No. 15-10615

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JUAN CASTILLO-RIVERA,

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Texas
District Court No. 3:14-CR-432-M

BRIEF OF *AMICUS CURIAE* INSTITUTE FOR JUSTICE SUPPORTING NEITHER PARTY

Matthew R. Miller
INSTITUTE FOR JUSTICE
816 Congress Ave., Suite 960
Austin, Texas 78701
Tel.: 512-480-5936
Fax: 512-480-5937
E-mail: mmiller@ij.org

Counsel for Amicus Curiae

Dated: December 12, 2016

SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

Defendant-Appellant set forth the interested parties in this case at page i of his opening brief. In accordance with Fifth Circuit Rule 29.2—which requires "a supplemental statement of interested parties, if necessary to fully disclose all those with an interest in the amicus brief"—undersigned counsel of record certifies that, in addition to those persons listed in Defendant-Appellant's statement, the following persons have an interest in this *amicus curiae* brief. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1) Institute for Justice, *amicus curiae* in this case; and
2) Attorney for *amicus curiae*: Matthew R. Miller (Institute for Justice).

Undersigned counsel further certifies, pursuant to Federal Rule of Appellate Procedure 26.1(a), that *amicus curiae* Institute for Justice is not a publicly held corporation and does not have any parent corporation and that no publicly held corporation owns 10 percent or more of its stock.

Dated: December 12, 2016

/s/ Matthew R. Miller
Matthew R. Miller
Counsel of Record for *Amicus Curiae*

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INTEREST OF *AMICUS CURIAE*[1]

The Institute for Justice ("amicus") is a nonprofit, public-interest legal center dedicated to defending the essential foundations of a free society: property rights, economic liberty, educational choice, and freedom of speech. Throughout its litigation, *amicus* often confronts a question centrally presented in this case: To what extent are appellate panels bound by prior decisions in instances where the prior decision did not address or consider an argument that is now in front of the current panel?

The panel decision in this case got this vitally important question wrong. In doing so, the court broke with Supreme Court precedent. Amicus is deeply concerned that the rule adopted by the panel, if allowed to stand, will threaten constitutional rights throughout this Circuit.

[1] No party or party's counsel authored this brief in whole or in part, and no party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person—other than the *amicus curiae*—contributed money that was intended to fund preparing or submitting this brief. Pursuant to Federal Rule of Appellate Procedure 29(a), counsel for amicus states that counsel for the appellants and counsel for the appellee have consented to the filing of this brief.

SUMMARY OF ARGUMENT

This brief of amicus curiae addresses a central question of this appeal: Does this Court's rule of orderliness extend to unbriefed, unaddressed arguments in previous panel decisions? The panel in this case got this important question wrong, holding that current litigants can be bound by the decisions of past litigants to waive certain arguments.

If adopted by the *en banc* Court, this rule will lead to undesirable consequences for both litigants and judges. Parties should not be bound by the strategic decisions of past litigants to waive certain arguments. Judges should not be forced to choose between conducting enhanced, corrective *en banc* review versus grappling with unbriefed, unraised arguments in every opinion just to ensure than *en banc* correction will not be necessary. Perhaps this is why all nine circuit courts that have considered this question have decided on a rule under which prior decisions go as far as they actually go, and no further.

The importance of adopting the correct rule of orderliness is reflected by the Court's specific interest in it for *en banc* consideration. The constitutional rights of every American will be better protected if those rights are decided squarely on a case-by-case basis, rather than being implicitly ruled upon simply because they lurked in the background of a previous case. And future courts must be free to

reject a prior panel decision as binding in cases where the factual circumstances that led to a prior decision have fundamentally changed.

ARGUMENT

In its November 4, 2016, Latter of Advisement, this Court invited amici to submit briefs on "whether this court's rule of orderliness, properly understood, should extend to issues that were not considered by a prior panel[.]" Letter of Advisement, Nov. 4 2016. The parties to this appeal each propose very different answers to this question. Appellant Juan Castillo-Rivera proposes a rule that comports with Supreme Court precedent (the "Supreme Court rule"), under which a "published decision is precedent for all issues *actually decided* and *necessary to the outcome*, but it is not precedent as to issues that were merely assumed, never actually considered, and therefore never actually decided." Appellant's Supp. *En Banc* Br. at 11 (emphasis in original). Conversely, Appellee United States proposes a rule (the "sweeping precedent rule") under which "[a]rguments considered or not considered in the prior panel's resolution of [an] issue are irrelevant to a future panel because the issue has been decided." Appellee's Resp. to Pet. for Rehearing *En Banc* at 7.

The Supreme Court rule is correct. As shown below, the sweeping precedent rule denies process to future litigants by binding them to the conduct of previous unknown litigants who waived or neglected certain arguments; causes appellate

courts to function inefficiently; conflicts with the rule in all of the nine federal circuits that have passed on the question; needlessly restricts people's ability to raise constitutional arguments to protect their constitutional rights; and allows courts to account for fundamentally changed factual circumstances in future cases. Amicus therefore asks this Court to reject the sweeping precedent rule and affirm that the Supreme Court rule is the rule of this Court.

A. The sweeping precedent rule would deny due process to future litigants.

The essential problem with the sweeping precedent rule is that it would deny due process to future litigants by binding them to the litigation decisions of other litigants with whom they are not in privity. The right to appeal is fundamental to the functioning of the American justice system. *See, e.g.*, *Robinson v. Beto*, 426 F.2d 797, 798 (5th Cir. 1970) ("a defendant's right of appeal must be free and unfettered"). The idea that someone can waive an argument, and thereby bind all *subsequent* litigants, is a gross deprivation of that right.[2]

A fundamental tenet of American jurisprudence is that courts decide "cases and controversies *properly before them*." *Boumediene v. Bush*, 553 U.S. 723, 842 (2008) (Scalia, J., dissenting) (emphasis in original). And their "power 'to say what

[2] To be sure, litigants are bound by the *holdings* of courts in cases to which they were not parties. But that is a far cry from saying litigants can be bound by the *tactical choices* of individual parties with whom they are not in privity. A party can waive an argument for any number of reasons, from tactical considerations to ideological preferences to simple incompetence. To impose that decision on a party with a different view of tactics or ideology (or a different level of competence) deprives that party of important due-process rights.

the law is' is circumscribed by the limits of [their] statutorily and constitutionally conferred jurisdiction.*" Id.; citing Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-78 (1992). They do not issue advisory opinions. *United States v. Soriano*, 482 F.2d 469, 480 (5th Cir. 1973) (Coleman, J., concurring in part and dissenting in part) (reversed in part 497 F.2d 147 (5th Cir. 1974) (en banc)). Except in limited circumstances, like jurisdictional questions, courts limit their decisions to those facts and arguments raised by the parties. *See Cox Operating, L.L.C. v. St. Paul Surplus Lines Ins. Co.*, 795 F.3d 496, 506 n.2 (5th Cir. 2015). Each individual case is rooted in the time, place, specific circumstances, and specific legal theories of the parties involved.

In contrast, the sweeping precedent rule treats all decisions as both decisions on the issues raised and advisory opinions on issues that might have been litigated, but were not. That may be acceptable when applying the doctrine of *res judicata*, where the same party attempts to re-litigate the same set of facts, but it is fundamentally unfair where the parties and arguments are completely different.

In short, this country's adversarial process for resolving court cases premised on granularity and specificity. The sweeping precedent rule runs counter to this system by preventing courts from considering previously unraised, unbriefed, and unaddressed arguments—even arguments that were *deliberately*

waived by past litigants. The decision of one litigant to forego a particular path should not block that path for future litigants.

B. The sweeping precedent rule creates inefficient and unnecessary burdens for appellate panels.

Beyond its effect on litigants, the sweeping precedent rule would substantially burden appellate panels with reviewing unraised, unbriefed arguments in each case. If a party fails to raise an argument, the court is supposed to be able to wholly ignore that argument under the waiver doctrine. *See, e.g., Reddix v. Thigpen*, 805 F.2d 506, 509 (5th Cir. 1986); *Smith v. Maggio*, 664 F.2d 109, 111 n.2 (5th Cir. 1981). But if ignoring an unraised, unbriefed argument is going to have substantive effects in other cases, judges will have two choices: (1) issue decisions that have sweeping effects and require a lot of *en banc* cleanup solely because of inadequate briefing by the parties or (2) painstakingly vet every case for possible unraised constitutional or statutory arguments and either resolve them or drop footnotes expressly not resolving them, doing all of this without the benefit of briefing from the parties or even a decision from a lower court on the point.

Neither of these results is desirable. Under the first option, each panel decision would have broad effects beyond the arguments presented in a particular case. The only way to correct any unintentional effects would be increased *en banc* review of decisions in future cases that found themselves bound by unraised arguments in prior cases. Thus, rather than the sweeping precedent rule leading to

increased certainty and fewer issues for appellate panels to grapple with, it would simply push those arguments to the *en banc* court whenever they arose in the future.

Under the second option, appellate panels would be mindful of the dangers contained within the first option, and would instead vet each case for lurking arguments. Each unraised argument would then need to be either addressed fully by the panel opinion or be expressly *not* addressed through footnotes noting that a particular argument was not incorporated into the decision. While this option would not create the need for substantially increased *en banc* review, it would be needlessly inefficient for each panel to conduct this kind of review in every case. Both of these undesirable outcomes can be avoided by adopting the commonsense Supreme Court rule and limiting the precedential effect of past cases to arguments that were actually raised.

C. Nine other federal circuits have either expressly or implicitly adopted the Supreme Court Rule, and the Eleventh and D.C. Circuits have not yet ruled on the question.

The Supreme Court rule is uniformly consistent with the law of other federal appellate courts that have confronted this question. Based on amicus's survey of the caselaw, it appears that nine other federal circuit courts have adopted the Supreme Court Rule (the Eleventh and D.C. Circuits do not appear to have had the opportunity to decide the question). *See Cousins v. Sec'y of the U.S. Dep't of*

Transp., 880 F.2d 603, 608 (1st Cir. 1989) (*en banc*, Breyer, J.) (rejecting prior cases as binding because "[w]e have no reason to believe that any party in [those] cases briefed or argued the question" at issue in this case); *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 124 (2d Cir. 2010), *aff'd*, 133 S. Ct. 1659, 185 L. Ed. 2d 671 (2013) ("We have, in the past, decided ATS [Alien Tort Statute] cases involving corporations without addressing the issue of corporate liability. But that fact does not foreclose consideration of the issue here.") (internal citations removed); *Soyka v. Alldredge*, 481 F.2d 303, 306 (3d Cir. 1973) ("Questions neither brought to the attention of the Court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.") (internal quotations removed); *Fernandez v. Keisler*, 502 F.3d 337, 343 n.2 (4th Cir. 2007) ("The dissent's protestation that we are creating a conflict with our own precedent in applying *Chevron*—premised on the apparent belief that a previous decision binds the court even by what it did not do or say—is thus mistaken. We are bound by holdings, not unwritten assumptions."); *Rinard v. Luoma*, 440 F.3d 361, 363 (6th Cir. 2006) (reasoning that "although the total/partial exhaustion question lurked amid the record in *Hartsfield*, that case did not address nor decide the issue so as to be binding upon this court"); *Wellness Int'l Network, Ltd. v. Sharif*, 727 F.3d 751, 772 n.2 (7th Cir. 2013) ("'[T]he unexplained silences of our decisions lack precedential weight.'") (*quoting Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211,

232 n.6 (1995)); *Prince v. Kids Ark Learning Center*, 622 F.3d 992, 995 n.4 (8th Cir. 2010) ("'[U]nstated assumptions on non-litigated issues are not precedential holdings binding future decisions.'") (quoting *Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1288 (9th Cir. 1985)); *Galam v. Carmel (In re Larry's Apt., L.L.C.)*, 249 F.3d 832, 839 (9th Cir. 2001) (rejecting as binding prior cases where the current issue was not presented to the court); *United States v. Wolfname*, 835 F.3d 1214, 1219 (10th Cir. 2016) ("[I]t doesn't appear that the defendant in *Waweru* ever argued that assault was an element of his conviction under *Hathaway*. The same is true in *Dale*. Nor does it appear that we considered the question *sua sponte* in either case. Thus, these cases wouldn't be precedential even if they were published.").

D. The correct rule is important for protecting constitutional rights in many contexts.

In amicus's constitutional litigation as a public-interest legal center, it is often the case that prior caselaw must be distinguished on the basis that certain constitutional arguments were not raised in, nor addressed by, a prior decision. The prior caselaw might be a panel decision in the same circuit, a panel decision in another circuit, or a decision from another court. But the question—does one interpret a prior decision as a decision only on the issues litigated or on other issues that might have been raised but were not—is the same. Below, amicus provides some examples of cases brought by amicus, where amicus had to distinguish a

prior case where a key constitutional issue had not been raised or decided. Amicus also explains how the sweeping precedent rule could cause problems in yet another kind of constitutional inquiry, the question of whether a law that was once constitutional is no longer because circumstances have changed.

1. Consider *Loving v. IRS*, 742 F.3d 1013 (.D.C. Cir. 2014), in which amicus represented tax preparers who challenged the ability of the Internal Revenue Service to license tax preparers. There, amicus needed to distinguish *Wright v. Everson*, 543 F.3d 649, 656 (11th Cir. 2008), which involved a challenge by a tax preparer to regulations limiting his ability to *represent* taxpayers before the IRS.

Wright was cited repeatedly by the IRS in its motion for summary judgment in support of two claims: (1) that Congress had not directly spoken on the precise question of whether an unenrolled representative is entitled to represent taxpayers and, (2) that Congress expressly had granted to the Secretary the right to regulate who practices before the IRS in 31 U.S.C. § 330(a). Amicus distinguished *Wright* by pointing out that its clients did not seek to "represent" taxpayers and did not challenge the IRS's authority to regulate those who do actually appear before the IRS to represent people in tax appeals and other disputes; instead, amicus was challenging the IRS's authority to regulate those people who only prepare tax returns and do not represent taxpayers before the IRS in tax appeals. Had the

sweeping precedent rule been in effect, the amicus's tax preparer clients would have been unable to distinguish *Wright* from the case they brought, even though the parties in *Wright* never raised the arguments amicus was making.

2. In Washington State, amicus challenged a requirement that ferries on Lake Chelan, Washington, are subject to a "certificate of public convenience and necessity" requirement. *Courtney v. Goltz*, 736 F.3d 1152 (9th Cir. 2013). Amicus brought this challenge under the federal privileges or immunities clause, even though the law had been previously upheld by the Washington Supreme Court against a challenge under the state constitution in *Kitsap County Transportation Co. v. Manitou Beach-Agate Pass Ferry Ass'n*, 176 Wash. 486, 30 P.2d 233 (1934). That, obviously, required amicus to distinguish *Kitsap County*. It did so on the basis that the earlier case was decided under the state, not the federal, constitution. Under the sweeping precedent rule, the earlier case would have been interpreted to encompass the federal constitutional issues that might have been raised, but were not.

3. Similarly, the sweeping precedent rule would also impact litigants' ability to make arguments under a state constitution in cases where a law was previously declared constitutional under its federal analog. Consider the case of *McCaughtry v. City of Red Wing*, which involved a challenge to a city's rental inspection ordinance. 816 N.W.2d 636 (Minn. Ct. App. 2012). In that case, there

was a prior, published, Minnesota Court of Appeals decision holding that an administrative warrant for a rental inspection did not need individualized probable cause. However, the prior ruling only concerned the Fourth Amendment, relying on clear U.S. Supreme Court precedent. *In re Search Warrant of Columbia Heights v. Rozman*, 586 N.W.2d 273 (Minn. Ct. App. 1998). Appellant argued that *Rozman* did not apply because the instant case, *Red Wing*, concerned the Minnesota Constitution's Fourth Amendment analogue, Article I, Section 10, which the *Rozman* court was never asked to consider.

The court of appeals issued its decision and ruled on whether the Minnesota Constitution has a higher standard than the Fourth Amendment. *Red Wing*, 816 N.W.2d at 639-40. In doing so, the court did not concern itself with the *Rozman* case. The state constitutional issue could have been raised by the parties in *Rozman*, but it was not. Nevertheless, the city had argued that *Rozman* foreclosed the plaintiffs' state constitutional arguments. In deciding *Red Wing*, the court did not hold that *Rozman* prevented it from hearing the plaintiffs' challenge under the Minnesota constitution—effectively rejecting the government's argument that the previous decision should control. Had the *Red Wing* court adopted the rule the government argues for here, the state constitutional claim would have simply been foreclosed by the prior case.

4. The need to raise previously unraised arguments also occurs in cases where amicus challenges economic protectionism as a legitimate governmental interest. For instance, in *LMP Services, Inc., v. City of Chicago*, amicus represents Chicago food truck owners who are challenging the city's prohibition on food trucks operating within 200 feet of a brick-and-mortar restaurant. No. 12 CH 41235 (Cir. Ct. Cook Cnty. Ill. Ch. Div. Dec. 5, 2016). There, amicus needed to distinguish *Triple A Services, Inc. v. Rice*, 131 Ill. 2d 217, 230 (1989), by raising new arguments that were not addressed by the prior case.

The city, relying on *Triple A* as its principal case, claimed that the existence of the prior case prevented the food trucks from raising a previously unraised argument: Namely, that the city's 200-foot proximity restriction constituted unconstitutional protectionism. *LMP Services, Inc., at 7.* Amicus was able to distinguish *Triple A* on the grounds that it never addressed whether economic protectionism motivated the vending laws at issue, and thus did not address whether protectionism is a legitimate governmental interest for a law. *Id.* Had the sweeping precedent rule been in effect, the food trucks would have been bound by an argument that the parties in *Triple A* chose to waive, and perhaps never even considered.

E. The sweeping precedent rule would make it impossible to take account of changed circumstances.

Finally, consider the issue of changed circumstances. The Supreme Court has been clear that, where a statute's constitutionality hinges on particular circumstances, that statute may be challenged anew by showing that those circumstances no longer exist. *United States v. Carolene Products Co.*, 304 U.S. 144, 153 (1938) ("[T]he constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist."). Indeed, the very law at issue in *Carolene Products* met exactly that fate. *Milnot Co. v. Richardson*, 350 F. Supp. 221, 225 (N.D. Ill. 1972). And it is trivially easy to imagine applications of this idea in other contexts: For example, in an intermediate-scrutiny analysis under the First Amendment, a court must ask whether a law leaves ample alternative channels of communication. *See, e.g.*, *Prison Legal News v. Livingston*, 683 F.3d 201, 218 (5th Cir. 2012). It is entirely possible then, that a speech restriction in a particular park might be upheld at one point because a speaker had access to many other parks—but that the same restriction could be invalid a few years later if all those other parks have been closed.

But the sweeping precedent rule takes this straightforward inquiry and adds an additional procedural complication. Under the sweeping precedent rule, a court cannot simply ask whether it has evidence before it that was not presented to the

original panel and that undermines one of the panel's conclusions. Instead, it must ask whether that evidence was reasonably available to the original litigants in the case, such that they could be said to have waived the argument. (Perhaps, after all, it was clear at the time of the original case that the city was planning to close its other parks, and a more competent attorney would have adduced evidence of that the first time around.) Then the new party could not bring the evidence to the attention of the court. On the other hand, if the evidence was not available earlier, then the new party could make an argument that circumstances had changed.

There is neither sense nor justice in punishing a party because an unrelated party's lawyer failed to find relevant evidence. Similarly, there is no reason to charge a reviewing court with evaluating the historical competence or thoroughness of a lawyer not before it instead of performing the (already sufficiently difficult) task of weighing the evidence actually in the record in the case at bar. By adopting the sweeping precedent rule, this Court would lead itself into a thicket of difficult problems, some foreseeable and some not, as it tried to apply prior panel opinions. Is the new argument one that could have been raised before? Did undiscussed facts exist that would have supported or not supported the new argument some new parties want to raise? Did the new evidence exist at the time of the prior panel opinion? This Court should reject the sweeping precedent rule, as have the Supreme Court and every other circuit to address the question.

CONCLUSION

The answer to the Court's original question is no, the Court's rule of orderliness should not extend to issues that were not considered by a prior panel. Amicus respectfully requests that the *en banc* Court adopt this rule as its rule of orderliness going forward.

Respectfully submitted,

/s/ Matthew R. Miller
Matthew R. Miller
Texas Bar No: 24046444
INSTITUTE FOR JUSTICE
816 Congress Ave., Suite 960
Austin, Texas 78701
Tel.: 512-480-5936
Fax: 512-480-5937
E-mail: mmiller@ij.org

Dated: December 12, 2016

Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 29(a)(5) because it contains 3,689 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font for the primary text and 12-point Times New Roman font for the footnotes.

/s/ Matthew R. Miller
Matthew R. Miller
Counsel of Record for *Amicus Curiae*

CERTIFICATE OF SERVICE

I hereby certify that this Brief of *Amicus Curiae* Institute for Justice in Support of Neither Party has been filed with the Clerk of the Court and sent via the Court's ECF system to the following counsel of record:

Brian W. Portugal
Assistant United States Attorney
1100 Commerce Street, Third Floor
Dallas, Texas 75242

Counsel for Plaintiff-Appellee United States of America

J. Matthew Wright
Assistant Federal Public Defender
500 South Taylor Street, Suite 110
Amarillo, Texas 79101

Counsel for Defendant-Appellant Juan Castillo-Rivera

/s/ Matthew R. Miller
Matthew R. Miller
Counsel of Record for *Amicus Curiae*