In The

Supreme Court of the United States

JONATHAN CORBETT,

Petitioner,

v.

TRANSPORTATION SECURITY ADMINISTRATION,

Respondent.

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

BRIEF OF AMICUS CURIAE
FREEDOM TO TRAVEL USA IN SUPPORT OF
THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- 1. Whether a facial challenge under the Fourth Amendment to an agency order allowing warrantless searches of the public is a justiciable Article III "case or controversy" despite the absence of any factual record of how intrusive the searches actually are?
- 2. Whether a court may simultaneously dismiss a constitutional claim under a non-jurisdictional, procedural rule and then decide the claim, as the Eleventh Circuit has held, or whether the rule of constitutional avoidance precludes such an outcome, as this Court and every other circuit has held?

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INTEREST OF THE AMICUS CURIAE

Freedom to Travel USA ("Freedom to Travel" or "Amicus") respectfully submits this *amicus curiae* brief in support of Petitioner Jonathan Corbett ("Corbett" or "Petitioner").¹

Freedom to Travel is an unincorporated, non-partisan grassroots civic association with hundreds of members nationwide. It is concerned with the privacy and dignity of every American who travels by air. Freedom to Travel accordingly advocates for airline passenger screening procedures that have a proven track record, are of limited intrusiveness, and enable compassionate treatment of passengers with special needs. Freedom to Travel has advanced this mission through, among other things, the filing of amicus curiae briefs. Freedom to Travel participated as amicus curiae in oral argument in Redfern v. Napolitano, 727 F.3d 77 (1st Cir. 2013).

Freedom to Travel is interested in the instant Petition because it believes that the constitutionality of novel passenger screening procedures should not be

¹ Per Supreme Court Rule 37.6, Freedom to Travel certifies that: (1) counsel for the Parties did not author this brief in whole or in part; and (2) no person or entity other than Freedom to Travel and its counsel have made a monetary contribution to fund the preparation or submission of this brief. The parties were notified ten days prior to the due date of this brief of the intention to file. All parties to this case have consented to the filing of this brief.

decided absent a fully-developed factual record of how these procedures impact the privacy and dignity of air travelers nationwide — i.e., a record reflecting the *actual intrusiveness* of these procedures.

SUMMARY OF THE ARGUMENT

The instant Petition concerns original review by the U.S. Court of Appeals for the Eleventh Circuit of a Fourth Amendment facial challenge to a Transportation Security Administration ("TSA" or "agency") order authorizing warrantless bodily searches of air travelers. *Corbett v. TSA*, 767 F.3d 1171 (11th Cir. 2014). A divided panel held that these searches were facially constitutional based on just the text of the agency order and the administrative record tendered by the agency in support of its order. *Id.* at 1174-76, 1179-83. And the panel reached its constitutional determination "in the alternative" to its ruling that Petitioner's challenge was untimely under a controlling procedural rule. *Id.* at 1179.

This Court should grant Corbett's Petition for two reasons.

First, this Court should grant the Petition to vacate the Eleventh Circuit's decision of a broad constitutional issue that it lacked the power to decide. Article III of the Constitution permits federal courts to decide only ripe cases. See DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 352 (2006). But Fourth Amendment facial challenges risk the improper decision of

unripe cases. See Warshak v. United States, 532 F.3d 521, 526-29 (6th Cir. 2008) (en banc). Thus this Court has refused to decide the facial validity of a stop-and-frisk law because the "validity of a warrantless search is pre-eminently the sort of question which can only be decided in [a] concrete factual context." Sibron v. New York, 392 U.S. 40, 59 (1968). And no such context existed in this case, as the Eleventh Circuit never had the facts of any particular search by the TSA before it.

Yet the Eleventh Circuit decided the merits of Petitioner's unripe Fourth Amendment facial claim anyway. In doing so, the Eleventh Circuit ignored this Court's clear instruction that jurisdictional issues assume "a special importance when a constitutional question is presented." *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541-42 (1986). This Court should thus grant certiorari in order to summarily vacate the judgment below and order dismissal of this case for lack of proper jurisdiction. *See id.* at 549.

Second, this Court should grant Corbett's Petition to summarily reverse the Eleventh Circuit's "clear misapprehension" of the time-honored rule of constitutional avoidance. Tolan v. Cotton, 134 S. Ct. 1861, 1868 (2014) (per curiam). While finding Petitioner's constitutional claim to be time-barred under a relevant claim-processing rule, the Eleventh Circuit – over Judge Martin's dissent – held that it could still decide this claim because the time bar was non-jurisdictional and the merits of the case seemed "clear." Corbett, 767 F.3d at 1182-83.

The instant case thus entails a vital circuit split as to whether the rule of constitutional avoidance permits decision of a constitutional claim even if the claim is time-barred under a claim-processing rule. And this question assumes special urgency given this Court's growing review of putative claim-processing rules. See, e.g., United States v. Wong, 575 U.S. ____ (2015) (holding various time limits under the Federal Tort Claims Act to be claim-processing rules).

REASONS TO GRANT THE PETITION

I. Petitioner's Fourth Amendment facial challenge was non-justiciable.

In *Corbett v. TSA*, the Eleventh Circuit facially validated an agency order allowing novel warrantless body searches of every person who travels by air, finding this order *never* violates the Fourth Amendment so long as certain mitigating factors are assumed to be present (e.g., the use of same-gender screenings). 767 F.3d at 1180-82. The Eleventh Circuit therefore did exactly what this Court has told courts not to do: engage in "the abstract and unproductive exercise" of "pronounc[ing] on the facial constitutionality" of laws that authorize warrantless searches based on sheer assumptions rather than a "concrete factual context" establishing how these

warrantless searches actually work in real life.² Sibron, 392 U.S. at 59, 61.

In failing to recognize this reality, the Eleventh Circuit disregarded the important limits that Article III of the Constitution places on the jurisdiction of federal courts. As this Court has observed, "[i]f a dispute is not a proper case or controversy [under Article III], the courts have no business deciding it, or expounding the law in the course of doing so." DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 341 (2006). And for a dispute to be a justiciable case or controversy under Article III, the dispute must be ripe. Id. at 352. A dispute is not ripe when "factual development would significantly advance [the] ability [of the court] to deal with the legal issues presented." Nat'l Park Hosp. Ass'n v. Dep't of the Interior, 538 U.S. 803, 812 (2003) (quotation omitted).

On this score, this Court has found that facial challenges to warrantless search regimes under the Fourth Amendment are generally unripe for review and thus non-justiciable. In *Sibron v. New York*, this Court held that the "validity of a warrantless search

² Amicus informed the Eleventh Circuit of this issue through a timely-filed *amicus* brief. *See* Brief of *Amicus Curiae* Freedom to Travel USA in Support of Jonathan Corbett's Petition for Rehearing En Banc at 11-12, *Corbett v. TSA*, No. 12-15893 (11th Cir. filed Nov. 10, 2014). The Eleventh Circuit, however, denied Petitioner's request for rehearing and denied as moot Amicus's motion for leave to file. *See Corbett v. TSA*, No. 12-15893 (11th Cir. filed Dec. 5, 2014) (orders).

is pre-eminently the sort of question which can only be decided in the concrete factual context of the individual case." 392 U.S. 40, 59 (1968). This Court thus refused to decide the "facial constitutionality" of a stop-and-frisk statute because it recognized that any inquiry into the actual police searches at issue would not be served "by an attempt to pronounce judgment on the words of the statute." *Id.* at 62.

Following Sibron, the Sixth Circuit in Warshak v. United States concluded that it lacked the power to decide a broad Fourth Amendment facial challenge because the challenge was unripe for review. 532 F.3d 521, 534 (6th Cir. 2008) (en banc). At issue was a federal law allowing the government to obtain private e-mails through ex parte orders, which the plaintiff challenged after being searched twice under the law. See id. at 523. But the Sixth Circuit still held that the plaintiff's Fourth Amendment facial claim was not ripe because it did not furnish the court with the factual record necessary to address the "complex factual issues" posed by the claim – e.g., "the variety of internet-service agreements and the differing expectations of privacy that come with them." Id. at 527-28.

The Sixth Circuit further observed that Fourth Amendment claims are usually decided in as-applied, post-enforcement settings like "a motion to suppress in a criminal case" or "a damages claim under § 1983 or under *Bivens*." *Id.* at 528. These settings enable a court to "look[] at the [Fourth Amendment] claim in the context of an actual, not a hypothetical, search and in the context of a developed factual record of the

reasons for and the nature of the search." *Id*. By contrast, a "pre-enforcement challenge to future . . . searches . . . provides no such factual context." *Id*.

In the present case, Petitioner's only claim was a facial challenge under the Fourth Amendment to a September 2010 TSA order implementing electronic and physical full-body searches of all air travelers. *Corbett*, 767 F.3d at 1174-76. Despite Petitioner's allegations that he had been denied airport access three times because he refused to consent to the TSA's new body searches, Petitioner did not raise any kind of as-applied claim related to a specific airport search, nor did he seek any form of as-applied relief or monetary damages. *See id.* at 1175.

The facial nature of Petitioner's lone Fourth Amendment claim is further shown by his filings in this case. Petitioner asked the Eleventh Circuit "to review the TSA's order mandating . . . body scanners as primary screening for travelers" because "these devices constitute an unreasonable search under the

³ Petitioner's past search refusals also raise a ripeness issue, since "[a] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (internal punctuation omitted).

⁴ In a case wholly independent from this one, Petitioner did raise a number of as-applied and individual claims related to a specific airport search that he underwent in August 2011. *See Corbett v. TSA*, 568 F. App'x 690, 692-94 (11th Cir. 2014), *cert. denied*, No. 14-842 (U.S. Mar. 23, 2015).

Fourth Amendment." And he made the same claim about the TSA's full-body pat-down procedure.

The Eleventh Circuit, in turn, effectively obliged Petitioner's request for a Fourth Amendment facial judgment, holding that "the challenged procedure is a reasonable administrative search under the Fourth Amendment." *Corbett*, 767 F.3d at 1179. The court reasoned that the TSA's use of body scanners and full-body pat-downs was valid in all cases under the Fourth Amendment because (1) the body scanners "pose only a slight intrusion" given the software used and (2) the full-body pat-downs constitute a secondary search whose intrusiveness is mitigated by certain privacy measures adopted by the TSA. *Id.* at 1181-82. The court then stated that it was proper to reach these sweeping facial conclusions because "the issue will almost certainly recur." *Id.* at 1182.

But the Eleventh Circuit never considered the fact that the case before it was unripe for review and thus beyond its power to decide under Article III – a reality made clear by *Sibron* and *Warshak*. As a result, the Eleventh Circuit rendered essentially an advisory opinion on the TSA's new searches – one rife with assumptions about how these searches actually work. For example, in regard to full-body pat-downs, the Eleventh Circuit assumed – based apparently on

 $^{^{\}scriptscriptstyle 5}$ Petition for Review at 1, *Corbett v. TSA*, No. 12-15893 (11th Cir. filed Nov. 16, 2012).

⁶ *Id*. at 2.

policy statements in the Government's briefing and the administrative record⁷ – that the pat-downs are "not a primary screening method" and are rendered less intrusive by TSA policies that allow pat-downs in private and screenings by same-gender officers. *Corbett*, 767 F.3d at 1182. But when it comes to the actual experiences of Americans with these searches, many have reported that pat-downs are the primary screening method for them because of their age or use of a medical prosthetic. Many have also reported being denied a private pat-down after requesting one. And the TSA has revealed that it recently fired two of its agents who manipulated the body scanners

⁷ See Brief for Respondent at 18-19, 29-31, Corbett, No. 12-15893 (11th Cir. filed Jan. 28, 2014).

⁸ E.g., Jane Allen, Prosthetics Become Source of Shame at Airport Screenings, ABC News, Nov. 24, 2010, http://abcnews.go.com/Health/Depression/tsa-medical-humiliations-extra-pain-airports-people-prosthetic/story?id=12227882; TSA Admits Violations in Searches of Elderly Women, WABC 7 Eyewitness News, Jan. 18, 2012, http://7online.com/archive/8510128/; see also Daniel Harawa, The Post-TSA Airport: A Constitution Free Zone?, 41 Pepp. L. Rev. 1, 3 & nn.4-8 (2013) (collecting cases).

⁹ E.g., Joel Moreno, Dying Woman Humiliated by Revealing TSA Pat-Down, KBOI2, Oct. 9, 2012, http://kboi2.com/news/local/173291181.html; Angie Holdsworth, Phoenix Woman Says She Was 'Humiliated' by TSA at Sky Harbor Airport, ABC NEWS-ARIZ., May 24, 2012, http://www.abc15.com/dpp/news/region_phoenix_metro/central_phoenix/phoenix-woman-says-she-was-humiliated-by-tsa-security-at-sky-harbor-airport.

in order to enable a male TSA agent to pat down several male passengers he found attractive. 10

Unfortunately, such reports do not appear to have been part of the factual record reviewed by the Eleventh Circuit in deciding the facial validity of the TSA's new search procedures – and there lies the principal Article III ripeness problem raised by this case. In short, the Eleventh Circuit did not have a "developed factual record" before it on the unique intrusions that either body scanners or full-body patdowns entail when used to process over 700 million travelers every year. Warshak, 532 F.3d at 527-28 (noting how facial analysis of ex parte e-mail searches was necessarily complicated by "the variety of internet-service agreements and the differing expectations of privacy that come with them").

Rather, the only record before the Eleventh Circuit was an administrative record compiled by the TSA in support of the challenged searches – a record that is devoid of any adversarial fact-finding or discovery. See Corbett, 767 F.3d at 1176. While this record may have provided the court with ample information on why the TSA adopted the challenged searches, this record does not appear to have contained equally critical facts about the actual intrusiveness of

 $^{^{\}scriptscriptstyle 10}$ Brian Maass, TSA Screeners at DIA Manipulated System to Grope Men's Genitals, CBS-Denver, Apr. 13, 2015, http://denver.cbslocal.com/2015/04/13/cbs4-investigation-tsa-screeners-at-dia-manipulated-system-to-grope-mens-genitals/.

these searches. *See id*. Indeed, it is unlikely such facts were ever in this record given the TSA's admitted systematic failure in collecting passenger complaints arising from its new screening procedures.¹¹

These missing facts matter, in turn, because a "search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope." Terry v. Ohio, 392 U.S. 1, 18 (1968). Or as this Court recently stressed in *Grady* v. North Carolina, "[t]he reasonableness of a search depends on the totality of the circumstances, including the nature . . . of the search." 135 S. Ct. 1368, 1371 (2015) (emphasis added). This Court has thus implicitly rejected the idea that the reasonableness of a search may be judged simply by examining the language of the law authorizing the search. See id. Likewise, in addressing the Fourth Amendment validity of federal laws that authorized warrantless record inspections of adult filmmakers, the Third Circuit remanded for factual development on how these searches were actually conducted, explaining "[t]he nature and manner of [a] search are critical factors when determining ... the reasonableness of

¹¹ See U.S. Gov't Accountability Office, GAO-13-43, Air Passenger Screening: TSA Could Improve Complaint Processes 23, 31 (2012) (concluding that by the TSA's own account, the TSA does not help airports receive air passenger complaints or even require TSA staff to "collect . . . the screening complaints that air passengers submit in person").

the particular search." Free Speech Coal., Inc. v. U.S. Att'y Gen., 677 F.3d 519, 543-44 (3d Cir. 2012).

By contrast, the Eleventh Circuit held in *Corbett* that the text of a TSA order and the administrative record compiled by the TSA in support of this order afforded a "complete record" (767 F.3d at 1182) on the Fourth Amendment validity of searches affecting 700 million passengers every year - searches raising reports of sexual harassment, traumatized children, and even passenger endangerment.12 The Eleventh Circuit thus failed to appreciate how unripe the case before it was, and how "further factual development" would have "significantly advance[d] [its] ability to deal with the legal issues presented." Nat'l Park Hosp. Ass'n, 538 U.S. at 812 (quotation omitted). This failure, in turn, cannot be excused by the desire to expedite decision of an "issue [that] will almost certainly recur." Corbett, 767 F.3d at 1182. This is because federal courts "have no business deciding" a "dispute [that] is not a proper case or controversy." DaimlerChrysler Corp., 547 U.S. at 341.

¹² E.g., Female Passengers Say They're Targeted by TSA, CBS News, Feb. 3, 2012, http://dfw.cbslocal.com/2012/02/03/female-passengers-say-theyre-targeted-by-tsa/; Roxana Hegeman, TSA Defends Pat-Down of 4-Year-Old at Kan. Airport, Associated Press, Apr. 26, 2012; Omar Villafranca, TSA Agents Allegedly Strip-Search Woman, Fiddle with Feeding Tube, NBC News, July 19, 2012, http://www.nbcd fw.com/news/local/TSA-Agents-Allegedly-Strip-Search-Woman-Fiddle-With-Feeding-Tube-16298 5046.html.

This Court should therefore vacate the Eleventh Circuit's ruling in this case for lack of a justiciable dispute under Article III. See Bender, 475 U.S. at 546-47 (vacating judgment based on lack of Article III jurisdiction). Vacatur may also prove necessary as a matter of mootness should this Court hold in the pending case of City of Los Angeles v. Patel, No. 13-1175 (U.S. cert. granted Oct. 20, 2014) that the kind of Fourth Amendment facial challenge raised by Petitioner in this case is foreclosed under Sibron.

II. In conflict with the time-honored rule of constitutional avoidance followed by this Court and all other circuits, the Eleventh Circuit held that it may simultaneously dismiss and decide constitutional claims barred by claim-processing rules.

The Eleventh Circuit did not need to decide Petitioner's Fourth Amendment facial challenge. The court could have rested on its primary holding that this constitutional claim was time-barred under a claim-processing rule for seeking review of TSA orders. See Corbett, 767 F.3d at 1178-79. Instead, the court reasoned that it could simultaneously dismiss and decide this constitutional claim since its dismissal rested on a non-jurisdictional procedural rule and the court could not foresee "other outcomes [that] could be reached on the merits." Id. at 1182. And in the Eleventh Circuit, "alternative holdings... are as binding as solitary holdings." Bravo v. United States, 532 F.3d 1154, 1162 (11th Cir. 2008).

The Eleventh Circuit thus refused to respect the time-honored rule of constitutional avoidance – a refusal that stands in direct conflict with how this Court has defined the rule¹³ and how every other circuit has applied it when faced with a procedural ground that enabled the dismissal of a constitutional claim.¹⁴ This rule is both categorical and clear: a

¹³ See, e.g., Alma Motor Co. v. Timken-Detroit Axle Co., 329 U.S. 129, 136-37 (1946) ("If two questions are raised, one of nonconstitutional and the other of constitutional nature, and a decision of the non-constitutional question would make unnecessary a decision of the constitutional question, the former will be decided. This same rule should guide the lower courts as well as this one." (emphasis added)).

 $^{^{14}}$ See, e.g., Pustell v. Lynn Pub. Sch., 18 F.3d 50, 51, 53 (${f 1st}$ Cir. 1994) (avoiding constitutional issue based on procedural ground of abstention); Fine v. City of New York, 529 F.2d 70, 76 (2d Cir. 1975) (applying constitutional avoidance to remand constitutional claim for determination of claim's timeliness); United States v. Schiavo, 504 F.2d 1, 6 (3d Cir. 1974) (avoiding constitutional challenge to court order by finding order deficient on procedural grounds); In re Under Seal, 749 F.3d 276, 293 (4th Cir. 2014) (avoiding constitutional issue where procedural ground of waiver mandated dismissal of issue); Sixta v. Thaler, 615 F.3d 569, 571-73 (**5th Cir.** 2010) (avoiding constitutional issue via dismissal on procedural matter); Seals v. Quarterly Cnty. Court, 526 F.2d 216, 220 (6th Cir. 1975) (reversing case dismissal on constitutional grounds to enable resolution on pendant, non-constitutional grounds); Ruslan Shipping Corp. v. Coscol Petroleum Corp., 635 F.2d 648, 650-51 (**7th Cir.** 1980) (reversing grant of motion on constitutional ground to enable the motion to be resolved on a procedural ground); White v. Kautzky, 494 F.3d 677, 680-81 (8th Cir. 2007) (dismissing constitutional claim based on procedural deficiencies); United States v. Percy, 250 F.3d 720, 727 (9th Cir. 2001) (avoiding constitutional claim based on procedural ground of waiver); Rocky Mountain Christian (Continued on following page)

federal court "will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of." Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (emphasis added). And Judge Martin concluded as much in her dissent in Corbett, emphasizing that federal courts do not decide constitutional questions unless absolutely necessary. See Corbett, 767 F.3d at 1184 & n.1.

The Eleventh Circuit's deviation from this rule accordingly reflects a "clear misapprehension" of this Court's jurisprudence that merits summary reversal. Tolan v. Cotton, 134 S. Ct. 1861, 1868 (2014) (per curiam). This is especially true given the Eleventh Circuit's faulty reasoning for why it could both dismiss and decide Petitioner's constitutional claim. In particular, the Eleventh Circuit held that it could disregard the rule of constitutional avoidance in this case since: (1) "the procedural question of timeliness . . . is not jurisdictional," (2) "the parties have briefed . . . the merits, and we have a complete record," (3) "[t]he answer on the merits is clear," and (4) "the

Church v. Bd. of Cnty. Comm'rs, 613 F.3d 1229, 1239 (10th Cir. 2010) (avoiding constitutional claims based on procedural ground of inadequate briefing) Young v. Anderson, 160 F.2d 225, 226-28 & n.3 (D.C. Cir. 1947) (avoiding constitutional claim based on procedural ground of joinder); Transmatic, Inc. v. Gulton Indus., Inc., 53 F.3d 1268, 1279 (Fed. Cir. 1995) (avoiding constitutional claim where the claim was untimely raised and thus waived).

issue will almost certainly recur." 767 F.3d at 1182. But none of these rationales finds any support in the facts of the case or in the law of this Court.

First, the rule of constitutional avoidance "encourages the court to first resolve procedural issues." Slack v. McDaniel, 529 U.S. 473, 485 (2000). Second, the Eleventh Circuit did not have a "complete record" before it, as explained supra Part I. Third, the answer on the merits was only superficially "clear" given the one-sided barebones record in this case and one other circuit's merits-based review of the same record. See EPIC v. U.S. Dep't of Homeland Sec., 653 F.3d 1 (D.C. Cir. 2011). Fourth, the reality that a constitutional issue will recur reflects that the issue is a "matter[] of great national significance" – a point favoring constitutional avoidance. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11 (2004).

The Eleventh Circuit's refusal to apply the rule of constitutional avoidance further contravenes the logic of this Court's decision in *Pearson v. Callahan*, 555 U.S. 223 (2009), establishing that lower courts may grant qualified immunity without first deciding whether the government conduct at issue was indeed constitutional. *See id.* at 236-42. The Court thereby emphasized the judicial importance of constitutional avoidance in terms of averting premature decision-making and enabling effective appellate review. *See id.* These same values are directly undermined by the Eleventh Circuit's flagrant refusal to apply the rule of constitutional avoidance in this case.

In terms of premature decision-making, because the Eleventh Circuit failed to honor the rule of constitutional avoidance in this case, the court ended up unintentionally deciding two constitutional questions beyond the one it sought to decide (i.e., the validity of the challenged TSA searches): (1) whether Fourth Amendment facial challenges are ever proper and (2) whether such facial challenges may be decided based on a factual record compiled by the government alone. The court further decided these questions without recognizing that Petitioner's case was not ripe to address them, as noted above.

And then there is the reality that by refusing to honor the rule of constitutional avoidance in this case, the Eleventh Circuit has set a precedent that stands to hinder effective appellate review in future cases. Indeed, if left uncorrected by this Court, this precedent will only encourage lower courts to issue unnecessary, alternative rulings on procedurallybarred constitutional questions. The appellate courts that then "affirm[] on the procedural ground" will face "a dilemma as to the substantive ground." Karsten v. Kaiser Found. Health Plan, 36 F.3d 8, 10 (4th Cir. 1994) (per curiam). If the appellate court "address[es] the question on the merits," then it will be "ignor[ing] the procedural reason for the affirmance" - but if the appellate court "ignore[s] the question on the merits," then it will be "allow[ing] the lower court's treatment of that issue to stand, when the appellate court's affirmance makes that part of the lower court's holding dicta." Id.

It is for this reason that when "[c]ourts enforce the requirement of procedural regularity on others ... [they] must follow those requirements themselves." Hollingsworth v. Perry, 558 U.S. 183, 184 (2010). Here, the Eleventh Circuit enforced a procedural rule against Petitioner in finding that his constitutional claim was time-barred. The court then should have followed one of the most critical procedural rules binding on it – the rule of constitutional avoidance – and left Petitioner's Fourth Amendment facial claim undecided. Instead, the court decided this claim via an alternative ruling with binding effect. Summary reversal is thus warranted to correct the "danger[ous]" precedent set by this ruling. Karsten, 36 F.3d at 10; cf. Tolan, 134 S. Ct. at 1867-68.

CONCLUSION

This Court should grant Corbett's Petition for a Writ of Certiorari and vacate the Eleventh Circuit's judgment for lack of a justiciable Article III case. In the alternative, the Court should grant certiorari and summarily reverse the Eleventh Circuit's judgment because it reflects a clear misapprehension of the time-honored rule of constitutional avoidance.

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