Case No. 02-626

In The

Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

Petitioner,

v.

MICCOSUKEE TRIBE OF INDIANS, *et al.,*

Respondents.

On a Writ of Certiorari
To The United States Court of Appeals For
The Eleventh Circuit

Brief of *Amicus Curiae* National Association of Home Builders In Support of the Petitioner

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INTEREST OF *AMICUS*

The National Association of Home Builders ("NAHB") has received the parties' written consent to file this brief as *amicus curiae* in support of the Petitioners. Letters of consent have been filed with the Clerk of the Court.[1]

NAHB represents over 211,000 builder and associate members throughout the United States. Its members include not only people and firms that construct and supply single family homes, but also apartment, condominium, multi-family, commercial, and industrial builders, land developers, and remodelers. It is the voice of the American shelter industry. Many of NAHB's members own and develop land. It is therefore concerned with any judicial decision that affects the regulation of land development, including the regulation of land development under the Clean Water Act ("CWA").[2] CWA permits are

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[1] Pursuant to Rule 37.6 of this Court, *amicus* states that its counsel authored this brief and amicus paid for it. This brief was not written in whole or part by counsel for a party, and no one other than amicus made a monetary contribution to its preparation.

[2] NAHB has been before the Court as an *amicus curiae* or as "of counsel" representing the interests of property owners in a number of cases. These include *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Babbitt v. Sweet Home*

some of the most common permits that NAHB's members must obtain in their projects to provide housing for the Nation's citizens.

INTRODUCTION

This case centers on whether the movement of water is inherently subject to regulation under the CWA.

The CWA regulates "discharges" of "pollutants" "into" navigable waters. It prohibits such discharges unless authorized and controlled by a permit. The Act defines "discharge" as an "addition," and it defines "pollutant" to mean certain enumerated biological and chemical waste materials, provided that they are "discharged into water." The Eleventh Circuit held that the South Florida Water Management District's movement of water between parts of its water management system is a "discharge" of a "pollutant" regulated by the Act. The holding outruns the law.

Water by its nature carries a variety of chemical and biological constituents, including sediment and plant and animal matter from within the water, and elements that naturally enter water after washing over land or passing through air. Fluid and nature being what they are, the types

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Chapter of Communities for a Greater Oregon, 515 U.S. 687 (1995); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 537 U.S. 99 (2002).

and amounts of constituents within water vary from virtually one molecule to the next, both laterally and horizontally.

If water is stirred by a spoon, pushed by an oar, or splashed by a hand, waterborne constituents could be said to be "added" to a new location in the water. But such movements of water could not be "additions" of pollutants, and thus "discharges" within the meaning of the Act, unless Congress intended to require a permit for virtually any activity that disturbs the surface of water. The Act demonstrates no such intent. Instead it evinces a clear intent to *regulate* only a limited albeit significant realm of activities: the disposal by a "source" of a "pollutant" through a "discharge" "into" navigable water. Other water pollution problems are addressed through other *nonregulatory* programs, such as the billions of dollars in authorized federal assistance for the construction of sewage treatment plants and the establishment of "state water pollution control revolving funds."

Congress's careful use of the terms "pollution" and "pollutant" reinforces the distinct regulatory versus non-regulatory realms of the Act. For instance, the Act establishes a national goal of eliminating the "discharge of pollutants," and prohibits the "discharge of any pollutant" unless authorized by a permit. 33 U.S.C. §§ 1311(a); 1251(a)(1). The term "pollutant" is inextricably tied to discharges: a substance meets the Act's definition of "pollutant" only if its is "discharged into water." *Id*. § 1362(6).

The statutory term "pollution," by contrast, is much broader, and is not tied to discharges. The term "'pollution' means the man-made or man-induced alteration of the

chemical, physical, biological or radiological integrity of water." *Id.* § 1362(19). Water that is polluted may be the result of "pollution" (man-induced change), but its constituents will not meet the definition of "pollutant" unless they have been "discharged" "into" the water "from" a "point source." *Id.* 1362(6), (12), (19).

The Act provides separately for water "pollution," including the goal of developing "programs for the control of nonpoint sources of pollution," recognizing the "rights of States to prevent, reduce and eliminate pollution," and providing grants to States and interstate agencies for the administration of "programs for the prevention, reduction, and elimination of pollution." *Id.* §§ 1251(a)(7); 1251(b); 1256(a). In fact, Congress specifically provided that the federal government "shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources." *Id.* § 1251(g).

The facts before the Court indicate that the District is not the source of the pollution in the water that it pumps from the canal. Nor does pumping water from one part of the District's water management system to another part add pollutants to water within the system any more than paddling a boat across a canal would add pollutants to one part of the canal and subtract them from another. Whether water is moved from one point in a canal to a different point in the canal, or to a different part of the water management system on the other side of a berm, is a distinction made nowhere in the Act. Of course, the Act nowhere prohibits the mere movement of water.

The Court of Appeals simply ignored the plain statutory language limiting the regulatory program to a

specific subset of polluting activities — i.e., the "discharge" of a "pollutant" from a "point source" "into" navigable waters — and establishing other nonregulatory mechanisms to address nondischarge forms of "pollution."[3] But Congress's specific choices as to what falls within the regulatory program must be honored. "[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987).

Requiring the District to obtain a permit for the movement of water between its structures not only exceeds the reach of the statute, but also requires the District to engage in an empty act. The District does not itself introduce the pollution into the water that moves through its system, nor does it determine the nature of that pollution. Rather, the type of pollution that is carried in the water is determined by the actual sources of the pollution. A permit establishing effluent limitations for water passing through the pump today would not necessarily treat the pollution that will pass through the pump tomorrow.

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[3] Perhaps betraying its confusion, the second sentence of the Court of Appeals's opinion states that the Water District is alleged to have discharged pollutants "without a national *pollution* discharge elimination system ("NPDES") permit." *Miccosukee Tribe of Indians v. South Florida Water Mgmt Dist.*, 280 F.3d at 1366 (emphasis added). The Act, of course, establishes the "national *pollutant* discharge elimination system" permit program. 33 U.S.C. § 1342.

The CWA regulatory program implements a basic concept: the nation's navigable waters are not to be used for the disposal of wastes unless the disposal is authorized and controlled by a permit. Far from disposing of a waste, the District's movement of water is central to its primary mission of managing water flows. Congress did not set out to regulate the millions of land owners, vessel operators, water suppliers, and others who simply move water in the course of their activities but discharge nothing "into" that water. Rather, it chose to regulate discharges of pollutants "into" the nation's waters by the actual "sources" of those pollutants.

The Eleventh Circuit's holding threatens to force a staggering range of activities that simply move or circulate water into the prohibitions and permit requirements of the Act. This result was neither specified nor envisioned by Congress. The holding must be reversed.

ARGUMENT

I. THE CLEAN WATER ACT REGULATES ONLY THE DISCHARGE OF POLLUTANTS "INTO" WATERS.

A. The Clean Water Act Water Pollution Control Framework.

Congress passed the Clean Water Act in 1972 in order to control discharges of untreated industrial and municipal wastes into the Nation's waterways. 33 U.S.C. §§ 1251-1387 (2000). The goals of the Clean Water Act are ambitious (to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters"), but Congress—as it usually does—selected with care the

means to pursue those goals. *Id*. § 1251(a). The Act uses a mix federal financial assistance, incentives, and regulation to pursue its pollution abatement goals while, at the same time, emphasizing "the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution [and] to plan the development and use . . . of land and water resources . . . ." *Id.* §§ 1251(a)–(b).[4]

The regulatory permitting program is one of the Act's primary water pollution control components. Section 301 prohibits the "discharge" of any pollutant unless specifically permitted under the Act. *Id.* § 1311(a). The Act defines the term "discharge" as an "addition" of a pollutant to navigable waters "from" any "point source." *Id*. § 1362(12). "Point source" is defined in terms of conveyance: "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." *Id*. § 1362(14). The Act does not define "source," but the dictionary defines it as "a place, person, or thing from which something originates." Oxford American

[4] It authorized billions of dollars in federal assistance for the construction of municipal sewage treatment plants to end a principal cause of water pollution—the discharge of raw sewage into our Nation's waterways. *Id.* § 1281. It established a massive program of "State Revolving Funds" for state pollution control programs, *Id.* § 1381, and a State-led program for areawide waste treatment management planning. *Id.* § 1288. The Act launched comprehensive programs to reduce water pollution in specific navigable waters of national significance. See *Id.* §§ 1258, 1268 (Great Lakes); *Id.* § 1266 (Hudson River); *Id.* § 1267 (Chesapeake Bay); *Id.* § 1269 (Long Island Sound); *Id.* § 1273 (Lake Pontchartrain). The Act also created pollutant-specific programs. *See*, *e.g.*, *Id.* § 1257 (mine water pollution); *Id.* § 1265 (toxic pollutants); *Id.* § 1321 (oil pollution); *Id.* § 1345 (sewage sludge).

Dictionary, 964 (1999). Finally, the definition of pollutant includes a variety of municipal, agricultural, chemical and biological spoils, wastes, and residues, garbage, rock, sand, and cellar dirt when "discharged *into* water." 33 U.S.C. § 1362(6) (emphasis added).

Section 402 provides one exception to the discharge prohibition. It authorizes EPA and delegated States to issue permits for discharges of pollutants such as industrial and municipal waste. 33 U.S.C. §§ 1342, 1362(6). Section 404 is another exception to the discharge prohibition. It authorizes the Corps of Engineers to issue permits for the "discharge of dredged or fill material *into* the navigable waters at specified *disposal* sites." *Id.* § 1344 (emphasis added).

B. Refuse Act Origins.

The 1899 Refuse Act makes it unlawful to

> throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind . . . into any navigable water of the United States.

33 U.S.C. § 407.[5] The focus of the prohibition is on the dumping ("throw, discharge or deposit") of waste ("refuse") "from" a ship or shore "into" navigable water.

[5] 33 U.S.C. § 407 is one section of the Rivers and Harbors Act of 1899, 33 U.S.C. § 401 *et seq.*

The CWA prohibition on the "discharge" of a pollutant "into" water can be traced to the 1899 Refuse Act. In the Report of the Senate Committee on Public Works, the committee explained that it had "extracted from the Refuse Act the basic formula . . . so that before any material can be added to the navigable waters authorization must first be granted by [EPA] under Section 402."[6] Indeed, the 1972 Conference Committee Report states, and the Act provides, that permits issued or applied for under the Refuse Act of 1899 are to be considered permits issued or applied for under section 402 of the CWA upon enactment.[7]

C. The Regulatory Design: Control the Dumping of Wastes Into Navigable Waters.

Like its Refuse Act predecessor, the CWA defines "pollutant" in terms plainly directed to wastes, byproducts and other unwanted materials dumped into water:

> The term "pollutant" means dredged *spoil*, solid *waste*, incinerator *residue*, *sewage*, *garbage*, sewage *sludge*, munitions, chemical *wastes*, biological materials, radioactive materials, *heat*, *wrecked* or *discarded* equipment, rock, sand, cellar dirt and industrial, municipal and agricultural *waste* discharged into water.

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[6] S. Rep. No. 92-414, at 76 (1971), *reprinted in* 2 Legis. Hist. at 1494.

[7] Conference Comm. Rep. No. 92-1236, at 139 (1972), *reprinted in* 1 Legis. Hist. of the Water Pollution Control Act Amendments of 1972, at 322 (1973); 33 U.S.C. § 1342(a)(4) and (5).

33 U.S.C. § 1362(6). The definition nowhere suggests that discharge includes the recirculation of waterborne constituents inherent in the movement of water.

Congress clearly targeted the industrial and municipal entities that were dumping chemicals, sewage and other pollutants into the nation's waterways when it passed the CWA in 1972.[8] The discharge prohibition and permitting program is specifically designed to control pollution by regulating and requiring the treatment of polluted effluent.[9] In fact, section 301 is titled "Effluent limitations" and, after setting out the Act's general discharge prohibition, requires the development of effluent limitations for the treatment of pollutants discharged from point sources. 33 U.S.C. § 1311(b).[10] Congress's intent to regulate the "disposal" of pollutants into water is reinforced by the terms of section 404, which direct that permits for

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[8] Waterways burned in the years leading up to the CWA's enactment. "In 1969, the Cuyahoga River in Cleveland, Ohio, coated with a slick of industrial waste, caught fire. Congress responded to that dramatic event, and to others like it, by enacting the [CWA]." *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174-75 (2001) (Stevens, J., dissenting);

[9] *See Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 489 (1987) ("One of the primary features of the [Clean Water Act is] a federal permit program designed to regulate the discharge of polluting effluents.").

[10] Effluent limitations are "any restriction . . . on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters." 33 U.S.C. § 1361(11).

discharges of dredged and fill material specify the "disposal" site.[11]

The plain language selected by Congress in framing the discharge prohibition, permit exceptions and definitions of key terms within those provisions clearly demonstrates its intent: to prohibit the discharge "into" navigable water of waste unless the source of the waste treats and is authorized to discharge the waste under a permit. It did not create a new scheme whereby a permit is required for the mere movement of water, even polluted water. Indeed, if Congress intended such a sweeping permitting requirement, one would expect explicit language to that effect in the statute and its legislative history. Prohibiting or requiring a permit for the mere movement of water and accompanying incidental changes in waterborne constituents goes far beyond the language or purpose of the Act.

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[11] Congress's use of the term "specified disposal sites" is consistent with the common dredging practice of excavating material *from* one place and dumping it *into* another area—*viz.*, the "specified disposal site." *See* Sen. Debate on S. 2770 (1971), *reprinted in* 2 1972 Legis. Hist. at 1386-90 (colloquy among Senators Ellender, Muskie, and Stennis) (disposal of dredged material in open water is "essential since the Secretary of the Army is responsible for maintaining and improving the navigable waters of the United States") and 1 1972 Leg. Hist. at 177 (Senate Consideration of Conference Report on S. 2770) (EPA "should have the veto over the selection of the site for dredged spoil disposal and over any specific spoil to be disposed of in any selected site.").

II. MOVING WATER WITHIN THE DISTRICT'S WATER MANAGEMENT SYSTEM DOES NOT DISCHARGE POLLUTANTS INTO THAT WATER.

The C-11 Canal (C-11) and Water Conservation Area-3A (WCA-3A) are components of the Central & Southern Florida Flood Control Project. *Miccosukee,* 280 F.3d at 1366. The District manages the Project through the operation of numerous levees, canals and water impoundment areas. *Id*. The C-11, WCA-3A and other Project components were "part of the historical Everglades . . . a single body of navigable water." *Id*. at 1369, n. 8. The C-11 was dug by the Army Corps of Engineers in the early 1900's and is now separated from the WCA-3A to its west by a levee. *Id*. at 1366. The C-11 collects water that seeps from the WCA-3A through the levee into the C-11, as well as runoff from the land surrounding the C-11. *Id*. The S-9 pump station then "backpumps" water from the canal through three pipes connecting the C-11 to the WCA-3A. 1999 WL 33494862, *1 (district court opinion); 280 F.3d at 1366. Thus, the C-11 and WCA-3A comprise part of the Project's system of keeping at bay the water that would otherwise flow eastward from the Everglades and flood populated areas of South Florida "within days." *Id*. at 1366.

The S-9 "adds no pollutants to the water which it conveys" to the WCA-3A. *Id*. at 1366. Water in the C-11, however, "contains higher levels of phosphorous than that naturally occurring in WCA-3A" as a result of runoff from surrounding land. *Id*.; *see* 1999 WL 33494862, *7. Finding that the pumping results in the "addition of low levels of phosphorus to WCA-3A," the court of appeals held that "the release of water caused by the S-9 pump station's operation constitutes an addition of pollutants

from a point source." *Id*. at 1368-71. But several critical elements of a regulated discharge are missing.

A. The District is Not the Source of the Pollutants.

The discharge prohibition applies to additions of pollutants from "point sources." 33 U.S.C. §§ 1311, 1362(12) and (14). The S-9 pump may be the point at which pollutants enter the WCA-3A, but as the Court of Appeals recognized, it is not the source of the pollutants. 280 F.3d at 1366. Thus, the court's holding reads the word "source" out of the statutory term "point source" contrary to the fundamental statutory construction principle that words in a statute are to be given effect rather than treated as surplusage[12] Because the CWA permitting requirement applies to the "point source" of a discharge and the District is not the source of the pollution, the District's pumping of water between its control structures is not a regulated discharge.

B. The District Does Not Add the Pollutants into the Water.

The court of appeals specifically recognized that the S-9 "adds no pollutants to the water which it conveys" to the WCA-3A. *Id*. at 1366. Rather, the facts demonstrate that the water in the C-11, including phosphorous and other

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[12] It is a "cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant." *Kungys v. United States*, 485 U.S. 759, 778 (1988) (plurality by Scalia); *see, e.g. Rake v. Wade*, 508 U.S. 464 (1993); *Colautti v. Franklin*, 439 U.S. 379, 392 (1979). Every word and phrase is presumed to add something to the statutory command. *See Exxon Corp. v. Hunt*, 475 U.S. 355, 369 n.14 (1986).

constituents, is the product of runoff from surrounding lands and seepage from the WCA-3A itself. Thus, the pollution in the C-11 is not "added" by the District, but instead results from a wide variety of activities that are not controlled by the District — e.g., a resident washing his car in his driveway or a farmer applying pesticides to her fields. Such activities, and the types of pollution they produce, could vary significantly from one day to the next.

Finally, the discharge prohibition is focused on the *disposal* of pollutants — "spoil . . . waste . . . residue, sewage, garbage, sewage sludge . . . wrecked or discarded equipment . . . industrial, municipal and agricultural waste" — through discharges into navigable waters. 33 U.S.C. § 1362(6). The District's management of water within its system components, including continuously backpumping to the west water that would otherwise flow to the east and flood populated areas of South Florida, is not the disposal of a pollutant. Indeed, if it were, any conveyance of water from one part of a water management system to another would require a permit — a result in no way suggested by the definition of pollutant and at odds with the statute's use of terms such as "discard[]," "dispose" and "waste." 33 U.S.C. §§ 1344, 1362(6).

C. The Act Does Not Regulate Water Movement.

The statute by its plain terms regulates the discharge of pollutants "into" navigable water. 33 U.S.C. §§ 1311, 1362(6). The statute nowhere regulates the movement of polluted water. For over twenty years the caselaw has held that when water is conveyed through a water control structure, such as where water is conveyed from a lake behind a dam to a river below or is circulated between a

lake and a water storage reservoir, no addition of pollutants occurs regardless of any water quality changes that result.

The D.C. Circuit held in *National Wildlife Federation v. Gorsuch* that no addition of a pollutant occurs where water behind a dam passes through the dam and continues with "dam induced water quality changes" in the stream below because no pollutant is introduced "into water from the outside world." 693 F.2d 156, 161-175 (D.C. Cir. 1982). Similarly, in *National Wildlife Federation v. Consumers Power*, water in Lake Michigan was passed through a storage reservoir and turbines on the shore for hydropower and back to Lake Michigan with pollutants not present before the diversion. The court held that no addition of pollutants occurred because the facility "merely changes the movement, flow or circulation" of the water, but it "never loses its status as a water of the United States" during the diversion. 862 F.2d 580, 588-89 (6th Cir. 1988).[13]

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[13] The Court of Appeals cast off *Gorsuch* and *Consumers Power* in a footnote with the *nonsequitur* observation that it "know[s] of no instance" extending the rule upheld in those cases to "facilities like the S-9 pump station." 280 F.3d at 1368, n.4. The court of appeals likened its holding to *Catskill Mountains Chapter of Trout Unltd. v. City of New York* and *Dubois v. U.S. Dep't of Agric.*, but those cases did not involve the movement of water within a single water management system constructed within "a single body of navigable water." *Id*. at 1369, n. 8; 273 F.3d 481 (2d Cir. 2001); 102 F.3d 1273 (1st Cir. 1996). Furthermore, *Catskill* and *Dubois* appear to stretch the Act beyond regulating the *disposal* "into" water of *wastes* "from" sources and into the regulation of the incidents of water movement, and therefore NAHB does not concede that their holdings are correct.

The required statutory element is a discharge *into* water. Mere movement of waterborne constituents within the District's water management system does not discharge pollutants *into* water.

D. Congress Specifically Provided for Water Management Systems.

There is an obvious reason that attempting to force the District's management of its water resources into the Act's permitting program causes statutory problems at every turn. Congress never intended it. In fact, Congress specifically provided the means for addressing the District's water management actions, and in doing so illustrated the inaptness of the permitting program.

After emphasizing "the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution [and] to plan the development and use . . . of land and water resources. . . .," the Act specifies that "Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce, and eliminate pollution in concert with programs for managing water resources." 33 U.S.C. § 1251(b), (g).

Thus, the Act mandates a cooperative approach to addressing pollution through water management programs, not the coercive control of the permitting program. That section 301 prohibits the discharge of "pollutants" while sections 101(b) and (g) address water "pollution" is particularly telling. 33 U.S.C. §§ 1251 (b) and (g), 1311(a). The Act generally defines "pollutants" as wastes discharged "into" navigable water, yet "pollution" is defined as "the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water."

Id. at § 1362(6) and (19). The Act's plain language supports the conclusion that the District's movement of water does not belong under the Act's permitting program.

CONCLUSION

For all of the foregoing reasons, the Eleventh Circuit's decision should be reversed.

DATED: September 10, 2003

Respectfully submitted,

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