No. 24-5221

IN THE

Supreme Court of the United States

ARTHUR LEE BURTON,

Petitioner,

v.

STATE OF TEXAS,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE TEXAS COURT OF CRIMINAL APPEALS

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

DORSEY & WHITNEY LLP
STEVEN J. WELLS*
KATHRYN A. JOHNSON
50 South 6th Street, Suite 1500
Minneapolis, MN 55402
(612) 340-2600
*Counsel of Record

Attorneys for Petitioner

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REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Texas continues to flout this Court's clear directives in *Hall*, *Moore I,* and *Moore II* in service of sending Mr. Burton to the execution chamber before any court conducts an actual review of his categorical ineligibility for the death penalty. Respondent concedes that the Texas Court of Criminal Appeals' summary denial of Mr. Burton's subsequent application for writ of habeas corpus was a merits decision. *See* Resp. Br. in Opp. at 8. Respondent's sole argument in opposition is therefore that Mr. Burton failed to plead a prima facie case that he is intellectually disabled. In so arguing, Respondent (1) relies on improper, extra-record evidence that is, in itself, a concession that Mr. Burton pled a prima facie case of intellectual disability; and (2) misstates, misconstrues, and misapplies the applicable legal and clinical diagnostic criteria, further demonstrating the need for this Court's intervention.

For these reasons, in addition to those in Mr. Burton's Petition for Writ of Certiorari, this Court's intervention is necessary to yet again compel Texas's compliance with *Hall*, *Moore I*, and *Moore II* and to stop the execution of an intellectually disabled man.

A. Respondent's Improper Reliance on Extra-Record Evidence is a Concession that Mr. Burton Met his Burden of Pleading a Prima Facie Case.

As Respondent purports to recognize, Mr. Burton was required only to make a prima facie showing that he is intellectually disabled and entitled to relief under the Eighth Amendment. Under TCCA precedent, this standard merely required him to plead "specific, particularized facts which, if proven true, would entitle him to habeas

relief." *Ex parte Staley*, 160 S.W.3d 56, 63 (Tex. Crim. App. 2005); *id.* at 64 ("[A] death-row inmate may file a subsequent writ application based upon the newly available legal claim of mental retardation under *Atkins v. Virginia*, but if his application states that his I.Q. has repeatedly been tested at 120-130, he has failed to state sufficient specific facts establishing a cognizable claim under Atkins[.]")). These facts must be "sufficient to enable a court to determine, from the face of the application itself, whether the application merits further inquiry." *Id.* at 63. Specifically, to obtain authorization to file a subsequent state habeas application under the Texas Code of Criminal Procedure on the basis that *Moore* was newly available law—as the TCCA has repeatedly recognized—Mr. Burton was required only to plead facts sufficient to "bring [his] constitutional claim under the umbrella" of *Moore*. 160 S.W.3d at 63.

Under either procedural gateway for subsequent state habeas applications in Texas, at the authorization stage, the TCCA's role is limited "to review[ing] the adequacy of [Mr. Burton's *Atkins*] pleading," and making a threshold determination only. *Ex parte Blue*, 230 S.W.3d 151, 162-63 (Tex. Crim. App. 2007) ("[The Code] does not authorize this Court to grant relief on a subsequent writ application, but only to review the adequacy of the pleading. The statutory scheme as a whole does not call upon us to make a determination of the merits of a subsequent writ application at this juncture. All we can do at this stage of the proceeding is to issue an order, either finding that the requirements under Subsection 5(a)(3) have been met, and the writ should issue and proceed in the ordinary course as an initial writ would, or that the requirements have not been met, and the writ should be dismissed."). Mr. Burton was

not required, at this stage, to "actually convince [the TCCA]" of the underlying merits of his claim. *Id.* at 163.

Despite this recognition, Respondent ignores the limited purpose of this prima facie threshold stage under binding state law, and instead asks this Court to consider whether Mr. Burton has proven his Eighth Amendment claim on the merits. For example, Respondent argues that Mr. Burton's expert and the lay witnesses who submitted declarations are not credible. Resp. Br. in Opp. at 14 n.8, 17. This type of credibility dispute is precisely what should be adjudicated at an evidentiary hearing, not the authorization stage, and is not relevant or proper in determining the sufficiency of Mr. Burton's prima facie showing at the authorization stage.

Respondent also attempts to introduce in this Court new facts, never considered by the TCCA, in an effort to rebut Mr. Burton's prima facie case. Respondent's Appendix consists solely of an August 1, 2024, ten-page letter from Dr. Thomas Guilmette. *See* Resp. App'x at 2-11. Respondent acknowledges that this letter was never submitted to the TCCA, in which proceedings the State chose not even to participate. This letter was not part of the record below, and cannot have been a basis for the TCCA's summary denial of Mr. Burton's subsequent application. If there *were* facts in the record before the TCCA that overcame Mr. Burton's prima facie case, Respondent would have invoked those facts, instead of improperly injecting extra-record information in this forum. *See* Br. in Opp. at 17.[1]

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[1] In addition to the extra-record expert report, Respondent injects information purportedly seized from Mr. Burton's cell, from his correspondence, and from his

Respondent's submission of, and reliance on, extra-record information is not only improper, it implicitly concedes that Mr. Burton pled a prima facie case of intellectual disability. If contrary evidence–including a competing expert opinion–was necessary to "refute[]" Mr. Burton's claim, *see* Opposition at 1 fn. 2,[2] then Mr. Burton necessarily has pled facts that, if true, establish a cognizable claim.[3] That is, the State's need to go outside of the record before the TCCA to attempt to defeat Mr. Burton's claim is a clear indication that the record before the lower court supported a facial claim of intellectual disability.

There can be no question that Mr. Burton alleged facts which, if proven true, would entitle him to relief. He presented factual allegations that two neuropsychologists concluded he meets the first criteria of intellectual disability and that one of those psychologists, who was the only expert to evaluate Mr. Burton's adaptive functioning, also concluded that he meets the second and third criteria of intellectual disability. The expert report and Mr. Burton's subsequent state habeas

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prison mental health records. None of that information is properly before the Court either, as it has never been introduced or submitted in any lower court.

[2] Pursuant to Supreme Court Rule 14(i)(vi), materials "essential to understand the petition" may be included in an appendix; there is no other applicable basis for its inclusion in an appendix.

[3] It should be noted that the opinions in the extra-record letter contravene the medical community's diagnostic framework and best practices for diagnosing ID, and thus, further demonstrate that the State's position rests on a disregard for current clinical standards. As just one of several examples, the letter—from an expert who has never met or evaluated Mr. Burton, nor interviewed anyone who knows him—relies heavily on Mr. Burton's functioning in prison, despite *Moore I*'s and the clinical standards' clear admonition that adaptive functioning is difficult to assess "in a controlled setting." *Moore I*, 581 U.S. at 16 (quoting DSM-5, at 38).

application clearly applied the current clinical diagnostic framework to the evidence of his intellectual and adaptive functioning. This was the only evidence regarding intellectual disability in the court below. There was no contrary evidence before the TCCA. Therefore, the only conclusion that can be drawn from the TCCA's dismissal of Mr. Burton's intellectual disability claim is that the TCCA blatantly failed to heed this Court's precedent.

B. Respondent's Incorrect Arguments Regarding the Clinical Diagnostic Standards Further Demonstrate the State of Texas's Disregard for this Court's Precedents

Respondent argues at length that Mr. Burton did not plead a prima facie case that he is intellectually disabled and therefore ineligible for the death penalty. Resp. Br. in Opp. at 11-21. Respondent's arguments are based on inapposite legal standards, unfounded attacks on Mr. Burton's expert witness, and incorrect clinical diagnostic standards. Each of its arguments should be rejected.

1. Respondent's arguments that Mr. Burton has not pled a prima facie case that he meets Criterion A (deficits in intellectual functioning) are factually and legally incorrect.

Respondent's arguments that Mr. Burton failed to make a prima facie showing of deficits in intellectual functioning ignore or misapply the current medical and clinical standards. In so doing, Respondent only highlights its disagreement with the controlling standards for diagnosing ID—a disagreement this Court already resolved in favor of current medical standards in *Moore I*.

At the outset, Respondent ignores the reality that neither the DSM-5-TR nor the AAIDD imposes a strict IQ cutoff. DSM-5-TR, at 37, 42 ("IQ test scores are

approximations of conceptual functioning but may be insufficient to assess reasoning in real life situations and mastery of practical tasks."). Indeed, the DSM-5-TR recognizes that individuals with IQ scores above 65-75 may qualify for an ID diagnosis, depending on their level of adaptive functioning. DSM-5-TR, at 42. *See also Hall v. Florida.*, 572 U.S. at 723 (quoting the DSM-5's recognition that persons with IQ scores above 70 may qualify for an ID diagnosis). Thus, "clinical judgment is important in interpreting the results of IQ tests, and using them as the sole criteria for the diagnosis for an intellectual developmental disorder is insufficient." *Id. See also Hall*, at 723 ("Intellectual disability is a condition, not a number."). In this case, the *only* expert who has exercised clinical judgment[4] in interpreting Mr. Burton's IQ scores is Dr. DeRight, who—after conducting an in-person examination of Mr. Burton and reviewing information from multiple sources—determined Mr. Burton has sufficient deficits in intellectual functioning to qualify for an ID diagnosis.

Respondent does not identify any authority—legal, clinical, or otherwise—that an IQ score above 75 precludes an ID diagnosis. The State's reliance on *Busby v. Davis*, 925 F.3d 699 (5th Cir. 2019), and *Green v. Lumpkin*, 860 F. App'x 930 (5th Cir. 2021), is unavailing. Those cases are inapplicable because they resolved only whether

[4] The AAIDD defines "clinical judgment" as "a special type of judgment built upon respect for the person. Clinical judgment emerges from the clinician's specialized training and experience, specific knowledge of the person and his/her environments, extensive data, and use of critical thinking skills." AAIDD, *Clinical Judgment* (2nd ed.2014), 7. Exercising critical judgment necessarily requires having information based on "interviews and conversations *with the person*," along with information from other sources. *Id.*, at 11 (emphasis added). Dr. DeRight is the *only* expert who conducted an in-person evaluation of Mr. Burton.

a state court's assessment of ID claims was contrary to or an unreasonable application of clearly established federal law within the meaning of 28 U.S.C. § 2254(d).

Respondent's arguments regarding the Flynn Effect fare no better. As an initial matter, Dr. DeRight opined that Mr. Burton meets the Criterion A standard even without considering the Flynn Effect.[5] Thus, even if there were some debate in the medical community about the Flynn Effect, that would not preclude Mr. Burton from demonstrating prima facie eligibility for relief under *Atkins*.

But Respondent's arguments about the Flynn Effect are also wrong. Respondent cannot deny that pursuant to current medical and clinical standards, best practices require consideration of the Flynn Effect. AAIDD-12, at 42 ("Current best practice guidelines recommend that in cases in which an IQ test with aged norms is used as part of a diagnosis of ID, a correction of the full-scale IQ score of 0.3 points per year since the test norms were collected is warranted."); AAIDD-11, at 37: ("best practices require recognition of a potential Flynn effect when older editions of an intelligence test (with corresponding older norms) are used in the assessment or interpretation of an IQ score"); AAIDD, *Clinical Judgment* (2nd ed.2014), at 30 ("Use the most recent norms of the assessment instruments selected, and consider Flynn effects."); DSM-5-TR at 38 (recognizing that the Flynn Effect may affect test scores).

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[5] Pet. Supp. App., DeRight Report at 22. Dr. DeRight's report was cited in, but not attached to, Mr. Burton's Petition for Writ of Certiorari. In light of Respondent's misrepresentations regarding the contents thereof, Mr. Burton attaches Dr. DeRight's report hereto.

Respondent appears to argue that the DSM-5-TR does not *mandate* adjusting scores downward for the Flynn Effect, and that the DSM is more controlling than the AAIDD manuals. Resp. Br. in Opp. at 11, 14. But this Court made clear in *Moore I* that both the AAIDD and the DSM "supply one constraint on States' leeway" in enforcing *Atkins*. *Moore I*, 581 U.S. at 20. And even to the extent that the DSM-5-TR does not *require* application of the Flynn Effect, it certainly does not forbid a psychologist, exercising his clinical judgment, from applying the Flynn Effect when evaluating a patient. That is precisely what Dr. DeRight did here; any disagreement that Respondent has with Dr. DeRight's clinical judgment is a question of fact for an evidentiary hearing, and does not invalidate Mr. Burton's prima facie case of intellectual disability.

The case law that Respondent relies upon to argue that the Flynn Effect should not be considered is outdated and inapplicable. For example, in *Brumfield v. Cain*, 808 F.3d 1041 (5th Cir. 2015), the Fifth Circuit did not address the Flynn Effect because the petitioner's scores satisfied the intellectual deficits requirement without a Flynn adjustment. Moreover, that case decided the *merits* of a claim in § 2254 proceedings, and thus has no bearing on whether Mr. Burton made a prima facie claim of intellectual disability in his state habeas application. Moreover, this Court's reference to the Flynn Effect in *Dunn v. Reeves*, 594 U.S. 731, 736–37 (2021) was dicta, made in the context of assessing whether Reeves' counsel was ineffective for failing to know about the Flynn Effect at the time of his 1998 trial, and describing the evidence at a state habeas evidentiary hearing in 2006. *See* Reeves v. State, 226

So. 3d 711, 722, 730-31 (Ala. Crim. App. 2016). Contrary to Respondent's suggestion that the Flynn Effect is some untested theory with a questionable scientific basis, multiple courts (in addition to controlling medical and clinical authorities) now rely on it as a valid, scientifically-established phenomenon that cannot be ignored. Indeed, even the TCCA has held that "factfinders may consider the Flynn Effect and its possible impact on IQ scores generally." *Ex parte Cathey*, 451 S.W.3d 1, 18 (Tex. Crim. App. 2014).[6]

Respondent misconstrues Dr. DeRight's report as suggesting the Flynn Effect should only be applied in death penalty cases. Resp. Br. in Opp. at 14, fn.8. In fact,

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[6] *See also Smith v. Ryan*, 813 F.3d 1175, 1185 (9th Cir. 2016) (applying the Flynn Effect to the petitioner's IQ score in light of the AAIDD's recognition of the phenomenon and "uncontroverted" expert testimony that it should be applied); *United States v. Wilson*, 170 F.Supp. 3d 347, 353 (E.D.N.Y. 2016) (applying the Flynn effect to a full-scale IQ score of 78, and finding that the Flynn-adjusted score of 76.68 satisfies the intellectual deficits requirement for an ID diagnosis); *Black v. Bell*, 664 F.3d 81, 96 (6th Cir. Tenn. 2011) ("allowing defendants to *present* evidence regarding the Flynn Effect and the SEM is not enough. Tennessee courts must also *consider* this evidence in assessing a defendant's ultimate functional I.Q."); *Winston v. Kelly*, 592 F.3d 535, 557 (4th Cir. 2010) (instructing district court to address evidence of the Flynn Effect on remand); *Walker v. True*, 399 F.3d 315, 322-23 (4th Cir. 2005) (directing the district court to consider the Flynn Effect on remand); *U.S. v. Hardy*, 762 F.Supp. 2d 849, 862-866 (E.D. La. 2010) (finding the Flynn effect "well established scientifically"); *United States v. Lewis*, No. 1:08 CR 404, 2010 WL 5418901, at *5 (N.D. Ohio Dec. 23, 2010) (recognizing the Flynn Effect as a "best practice"); *United States v. Shields*, No. 04-20254, 2009 WL 10714661, at *12 (W.D. Tenn. May 11, 2009) (the Flynn Effect "is a valid scientific phenomenon"); *U.S. v. Davis*, 611 F.Supp. 2d 472, 485-488 (D. Md. 2009) (considering the defendant's "Flynn-adjusted" IQ score); *Holladay v. Allen,* 555 F.3d 1346, 1358 (11th Cir.2009) (noting that "all of the scores were on WAIS tests, which may have reflected elevated scores because of the Flynn effect."); *Thomas v. Allen*, 614 F.Supp. 2d 1257, 1281 (N.D. Ala. 2009) (requiring consideration of the Flynn effect and the SEM).

Dr. DeRight noted that while scores are not typically adjusted *per se* (i.e., one does not simply plug the numbers into a formula and consider the results to be the true IQ score), the Flynn Effect should be considered as one of several factors that might affect the reliability of an IQ score, in the proper exercise of clinical judgment.[7] This is consistent with the medical and clinical authorities that require consideration of the Flynn Effect in *all* clinical settings—not just in death penalty cases. AAIDD-12, at 42; DSM-5-TR at 38; AAIDD, *Clinical Judgment*, at 30. The fact that clinicians may be more concerned about reliability of IQ scores in a death penalty case (or in other high-stakes decisions, such as decisions related to eligibility for Social Security Disability or special education services, as expressly noted by Dr. DeRight) is hardly surprising, and does not negate the scientific understanding that the Flynn Effect is real. *See Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (factfinding procedures in capital cases must "aspire to a heightened standard of reliability.").

Respondent's arguments—to the extent that they are not contrary to legal and clinical standards—at most establish that Respondent would present evidence contrary to Mr. Burton's at an evidentiary hearing on the merits. They do not establish that Mr. Burton did not plead a prima facie case.

2. Respondent's arguments that Mr. Burton has not pled a prima facie case that he meets Criterion B (deficits in adaptive functioning) are factually and legally incorrect.

Respondent claims that "Burton provides insufficient testing of his adaptive behavior to satisfy contemporary professional norms." Resp. Br. in Opp. at 16. As an

[7] Pet. Supp. App., DeRight Report at 22.

initial matter, Dr. DeRight is the only clinician who provided evidence to the court below about what the current diagnostic standards require and how they apply to the evidence of Mr. Burton's functioning. This Court should reject Respondent's lay interpretation of the clinical standards to attempt to overcome the prima facie case Mr. Burton presented to the TCCA. Moreover, in claiming that Mr. Burton's prima facie case of adaptive deficits did not satisfy current diagnostic criteria, Respondent misstates the relevant clinical standards recognized by this Court and makes material omissions about the evidence before the state court.

The clinical diagnostic criteria are set out in the most current version of both the DSM and the AAIDD Manual. *Moore v. Texas*, 581 U.S. 1, 13 (2017) (In *Hall* "[w]e relied on the most recent (and still current) versions of the leading diagnostic manuals—the DSM-5 and AAIDD-11."). Respondent appears to make up out of whole cloth its own criteria that a clinician must administer more than one adaptive behavior scale to return a diagnosis of intellectual disability. Resp. Br. in Opp. at 17 ("Dr. DeRight's clinical judgment to only administer one [Vineland Adaptive Behavior Scale-3] violates the requirements of the DSM-5-TR. . . ."). That requirement appears nowhere in the DSM-5-TR. The citation relied on by Respondent in the DSM-5-TR simply identifies, in general, sources of information on which diagnosis of intellectual disability is based. DSM-5-TR at 38. Indeed, the DSM-5-TR also states:

> Adaptive functioning is assessed using both clinical evaluation and individualized, culturally appropriate, psychometrically sound measures. Standardized measures are used with knowledgeable informants (e.g., parent or other family member; teacher; counselor; care provider) and the individual *to the extent possible*. Additional sources of

> information include educational, developmental, medical, and mental health evaluations.

DSM-5-TR at 42 (emphasis added). There is no mention of adaptive behavior scales specifically.

In *Hall*, this Court interpreted language in the DSM-5 which was very similar to that relied on by Respondent in the DSM-5-TR. *See* DSM-5 at 37 (diagnosis of intellectual disability "is based on both clinical assessment and standardized testing of intellectual and adaptive functions"). The *Hall* Court went on to note that assessment of adaptive behavior included evidence from "medical histories, behavioral records, school tests and reports, and testimony regarding past behavior and family circumstances." *Hall v. Florida*, 572 U.S. 701, 711 (2017). Neither *Hall* (nor *Moore*) identified adaptive behavior scales as a part of the diagnostic criteria.

Respondent also fails to make any mention of the AAIDD's guidelines for assessing adaptive behavior, which is the other source of diagnostic criteria as recognized by this Court. Under the AAIDD-12, making a retrospective diagnosis of intellectual disability involves "[u]sing a thorough social, medical, and educational history," [b]asing the diagnosis on multiple valid data points," and interpreting previously administered testing to the extent possible. AAIDD-12 at 41-42[8]; *see also* Brief of *Amici Curiae*, the American Association on Intellectual and Developmental Disabilities (AAIDD), and the ARC of the United States, In Support of Petitioner,

[8] *See also* Pet. Sup. App., DeRight Report at 23 (noting that the adaptive behavior assessment of Mr. Burton "is based on multiple data points including information from various individuals, school records, and standardized testing.")

Moore v. Texas, No. 15-797, at *15 n.17 (Aug. 4, 2016) ("Clinicians have developed sophisticated and detailed methods for objectively answering the question of what deficits or limitations an examined individual may have. These methods *include, but are not limited to,* psychometric instruments known as adaptive behavior scales.") (emphasis added). Nowhere does the AAIDD-12 require administration of multiple adaptive behavior scales to properly assess adaptive functioning. Indeed, it contemplates that a single in-range adaptive behavior score would satisfy the second diagnostic criterion. AAIDD-12 at 31 ("For a diagnosis of ID, the 'significant limitations in adaptive behavior' criterion is *an adaptive behavior score* that is approximately 2 standard deviations or more below the mean in at least one of the three adaptive behavior domains[.]").

Respondent also mischaracterizes the facts before the state court. First, Dr. DeRight did, in fact, administer several tests that measured Mr. Burton's adaptive functioning. One was the Vineland adaptive behavior scale administered to Mr. Burton's mother on which Mr. Burton scored a composite score of 54—a score worse than 99 percent of his peers.[9] But DeRight also administered standardized testing to Mr. Burton himself that measured both intellectual and adaptive functioning.[10] . Mr. Burton scored "exceptionally low" on several NAB Daily Living Modules, the Test of

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[9] Pet. Supp. App., DeRight Report at 19.

[10] Pet. Supp. App., DeRight Report at 16 ("As stated in the AAIDD manual (Tables 3.1 and 3.3), there is some overlap between measures of intellectual and adaptive functioning. For example, both domains might include problems with social problem solving/decision-making, problems with language comprehension, suggestibility, and a desire to please authority figures.")

Practical Judgment, and the Gujonsson Suggestibility Scale. His results on these tests reflected significant deficits in adaptive behaviors like the ability to read a map, write a check to pay a bill, follow simple instructions, and judge the safety of various scenarios.[11]

In addition to failing to address the totality of the testing administered by Dr. DeRight, Respondent omits mention of Mr. Burton's school records and the witness declarations explaining the significance of those records. Mr. Burton's school records demonstrate that he failed—and was required to repeat—two grades, that he was in special education throughout high school, and that his ability to graduate (and his ostensible class rank) was due to the school's policy of grading special ed students based on their *relative*—rather than scholastic—ability and graduating as many students as possible. These records evidence significant deficits in both intellectual functioning and the conceptual domain of adaptive behavior.

Mr. Burton presented a prima facie case that he had deficits in adaptive behavior as analyzed under current clinical criteria. Moreover, Mr. Burton's expert report was the only evidence before the TCCA evaluating his adaptive functioning. In dismissing his claim of intellectual disability, the TCCA necessarily flouted current clinical standards and this Court's precedent, and Respondent continues those errors in its opposition. This Court's intervention is necessary.

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[11] *Id.*

CONCLUSION

For the reasons set forth above and in Mr. Burton's Petition for Writ of Certiorari, the petition for writ of certiorari should be granted. At a minimum, this Court should grant the petition, vacate the judgment below, and remand for the TCCA to consider Mr. Burton's intellectual disability claim in compliance with *Hall*, *Moore I,* and *Moore II*.

Respectfully submitted,

Dated: August 7, 2024

By /s/ Steven J. Wells
Steven J. Wells
Counsel of Record
Member, Supreme Court Bar

DORSEY & WHITNEY LLP
Steven J. Wells
wells.steve@dorsey.com
Kathryn A. Johnson
johnson.kate@dorsey.com
50 South Sixth Street, Suite 1500
Minneapolis, MN 55402
Telephone: (612) 340-2600
Facsimile: *(612) 340-2868*
Attorneys for Petitioner