No. ____

IN THE
SUPREME COURT OF THE UNITED STATES

JUSTIN LEVAR TAYLOR,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether 18 U.S.C. § 922(g)(1)—the statute that prohibits firearm possession by any person who was previously convicted of "a crime punishable by imprisonment for a term exceeding one year"—violates the Second Amendment.

(2) Whether application of 18 U.S.C. § 922(g)(1) to petitioner violated the Commerce Clause where the only proof of a nexus between his firearm possession and interstate commerce consisted of the fact that the firearm had crossed a state line at some point before coming into petitioner's possession.

RELATED PROCEEDINGS

The following proceedings are directly related to this case:

- United States District Court for the Southern District of Texas:
  United States v. Justin Levar Taylor, No. 4:22-cr-589 (Aug. 28, 2023)

- United States Court of Appeals for the Fifth Circuit:
  United States v. Justin Levar Taylor, No. 23-20411 (May 8, 2024)

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PETITION FOR WRIT OF CERTIORARI

Petitioner Justin Levar Taylor petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The Fifth Circuit's opinion (App. 1a-2a) is unreported but available at 2024 WL 2045727.

JURISDICTION

The Fifth Circuit entered judgment on May 8, 2024. App. 1a. This petition is filed within 90 days of that date. *See* Sup. Ct. R. 13.1 & 13.3. The Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITTUIONAL AND STATUTORY PROVISIONS

Article I § 8 of the United States Constitution provides that:

> Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . .

The Second Amendment provides:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

18 U.S.C. § 922(g)(1) provides:

> (g) It shall be unlawful for any person–
>
> > (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; . . .
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

STATEMENT OF THE CASE

1. In 2014, Justin Levar Taylor was sentenced to 135 months in federal custody as a result of his convictions for aiding and abetting a bank robbery, 18 U.S.C. § 2113(a), and brandishing a firearm in relation to that "crime of violence," *id.* § 924(c)(1)(A)(ii). In October of 2022, while serving the final months of that sentence in a Houston, Texas, residential-reentry facility (or "half-way house"), petitioner was discovered possessing a nine-millimeter pistol in his waistband. Officers later learned that the pistol had been reported stolen to the Houston Police Department, and that it had been manufactured in Florida. At the time he possessed the pistol, in addition to the federal robbery and 924(c) convictions, petitioner had previously sustained eight felony convictions for various state-level crimes, including for the Texas offenses of sexual assault and burglary.

These facts led to a new federal indictment charging petitioner with one count of possessing the pistol as a convicted felon, in violation of 18 U.S.C. § 922(g)(1), and one count of possessing contraband in prison, in violation of 18 U.S.C. § 1791(a)(2), (b)(2). Petitioner pleaded guilty to the Section 922(g)(1) count in exchange for the government's promises to move for dismissal of the contraband count, and to recommend an offense-level reduction for acceptance of responsibility, at sentencing. The district court later sentenced petitioner to a term of 57 months' imprisonment, to be followed by three years of supervised release.

2. Petitioner appealed. On appeal, for the first time, petitioner challenged the constitutional basis for his conviction on two independent grounds. First, petitioner argued that

his guilty plea and conviction should be set aside because Section 922(g)(1)'s categorical ban on firearm possession solely on account of a person's status as a felon is inconsistent with the Nation's historical tradition of firearm regulations, and thus violates the Second Amendment under the rule of *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022). App. 1a. Petitioner alternatively claimed that Section 922(g)(1)'s application to him exceeded Congress's power under the Commerce Clause because the only proof that his conduct affected interstate commerce consisted of the fact that the firearm had crossed state lines at some point before coming into petitioner's possession. App. 1a.

The court of appeals affirmed. App. 1a-2a. Consistent with its practice of rejecting unpreserved *Bruen*-based claims to Section 922(g)(1) on the ground that any constitutional defect is not yet plain in the absence of precedent resolving the issue, the court of appeals rejected the Second Amendment challenge. App. 2a (citing *United States v. Jones*, 88 F.4th 571, 573-74 (5th Cir. 2023)). It likewise rejected the Commerce Clause claim as foreclosed by existing Fifth Circuit precedent. App. 2a.

REASONS FOR GRANTING THE PETITION

The question whether Section 922(g)(1) is compatible with the Second Amendment, as interpreted by this Court in *Bruen*, has split the circuits and produced widespread confusion and disagreement in the district courts. That question is implicated in thousands of cases each year, concerns a fundamental constitutional right, and remains unresolved after this Court's recent decision in *United States v. Rahimi*, 144 S. Ct. 1889 (2024). Nevertheless, the Court has deemed it prudent to return petitions raising *Bruen*-based challenges to Section 922(g)(1) to the lower courts for reconsideration with the benefit of *Rahimi*. The Court should take the same course here and grant the petition, vacate the Fifth Circuit's judgment, and remand for reconsideration in light of *Rahimi*. Alternatively, the Court should grant the petition and review the merits of this important constitutional question.

The question whether Section 922(g)(1)'s application to petitioner separately violated the Commerce Clause—because the statute permitted petitioner's conviction based solely upon proof that his firearm at some point moved across state lines—independently warrants review. However, because the Fifth Circuit is actively reconsidering its precedent regarding Section 922(g)(1)'s compatibility with the Second Amendment post-*Rahimi*, and because a favorable decision on that question would invalidate petitioner's conviction without the need to consider the Commerce Clause issue, the most prudent course is to GVR in light of *Rahimi*. If the Court is disinclined to GVR for reconsideration of the Second Amendment claim, it should alternatively grant the petition and resolve the long-standing

tension between this Court's modern Commerce Clause jurisprudence and the comparatively minimal interstate-commerce nexus needed to establish Section 922(g)(1)'s jurisdictional element under *Scarborough v. United States*, 431 U.S. 563 (1977).

I. The question whether Section 922(g)(1) comports with the Second Amendment has divided the courts of appeals and its resolution is of surpassing importance.

As this Court recognized in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and reiterated in *NYSRPA v. Bruen*, 597 U.S. 1 (2022), the Second Amendment guarantees to "all members of the political community," *Heller*, 554 U.S. at 581, the individual right to possess and carry firearms in common use for self protection. *Bruen* adopted a "test rooted in the Second Amendment's text, as informed by history," for determining whether a modern-day regulation impermissibly infringes that right. *Bruen*, 597 U.S. at 19. "When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Id.* at 24. At that point, it is government's burden to justify the law "by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Ibid*.

To do so, the government must show that the challenged law is "'relevantly similar' to laws that our tradition is understood to permit." *United States v. Rahimi*, 144 S. Ct. 1889, 1898 (2024). "Why and how the regulation burdens" the Second Amendment right "are central to this inquiry." *Ibid.* A contemporary law will likely pass the "relevantly similar" test where there is substantial evidence of founding-era laws that "impos[ed] similar restrictions" on firearm use "for similar reasons." *Ibid.*

In *Rahimi*, for example, the government presented "ample" historical evidence that the founding generation approved of the temporary disarmament of individuals found to pose "a clear threat of physical violence to another" upon a "judicial determination[]" that they "likely would threaten or had threatened another with a weapon." *Id.* at 1901-02; *see id.* at 1898-1901. The contemporary law at issue, 18 U.S.C. § 922(g)(8)(C)(i), imposes a similar burden on the Second Amendment right by disarming a person only while he is subject to a domestic-violence restraining order backed by a judicial finding that he "'represents a credible threat to the physical safety' of another"; and that temporary "restrict[ion] on gun use" is similarly designed "to mitigate demonstrated threats of physical violence." *Id.* at 1901-02 (quoting 18 U.S.C. § 922(g)(8)(C)(i)). Because the modern provision aligned with both the "how" and the "why" of the historical tradition of "allow[ing] the Government to disarm individuals who present a credible threat to the physical safety of others," its application to the defendant posed no Second Amendment problem under *Bruen*. *Id.* at 1902.

1. Prior to *Rahimi*, the question whether Section 922(g)(1)'s permanent, status-based ban on firearm possession comports with a sufficiently similar American regulatory tradition was the subject of an entrenched split among the circuits. *Rahimi* did not resolve that question. And there is good reason to anticipate that the dispute will not only persist, but deepen, upon the lower courts' reconsideration.

a. Before *Rahimi*, three circuits—the Eighth, Tenth, and Eleventh—engaged *Bruen*-based challenges to Section 922(g)(1) and upheld the statute's status-based ban on firearm

possession as permissible in all applications, including as to all felony offenses (even non-violent ones), and as to all arms (even those that are commonly used for self defense, like petitioner's handgun). *See United States v. Jackson*, 69 F.4th 495, 501-06 (8th Cir. 2023), *cert. granted, judgment vacated and remanded*, — S. Ct. —, 2024 WL 3259675, at *1 (July 2, 2024); *Vincent v. Garland*, 80 F.4th 1197, 1197-1202 (10th Cir. 2023), *cert. granted, judgment vacated and remanded*, — S. Ct. —, 2024 WL 3259668, at *1 (July 2, 2024); *United States v. Dubois*, 94 F.4th 1284, 1291-93 (11th Cir. 2024).

In *Jackson*, the Eighth Circuit held that Section 922(g)(1) complies with the Second Amendment both "as applied to" the particular defendant and as to all "other convicted felons." 69 F.4th at 502. In reaching this decision, the court found three factors particularly salient: (1) *Heller*'s assurance that the Court's opinion should not be read "to cast doubt on longstanding prohibitions on the possession of firearms by felons," *id.* at 501 (quoting *Heller*, 554 U.S. at 626), (2) evidence of founding-era laws disarming disfavored political and racial groups such as "Native Americans," "Catholics," and "people who refused to declare an oath of loyalty," *id.* at 502-03, and (3) *Bruen*'s "repeated statements" that the Second Amendment "protects the right of a 'law-abiding citizen.'" *Id.* at 503 (citing *Bruen*, 597 U.S at 9, 15, 26, 29-31, 38, 60, 70-71). These factors, the court reasoned, justified the conclusion that "history supports the authority of Congress to prohibit possession of firearms by persons who have demonstrated disrespect for legal norms of society," as well as by "categories of persons based on [the legislature's] conclusion that the category as a whole present[s] an unacceptable risk of danger if armed." *Id.* at 504. Understanding Section

922(g)(1) to reflect that Congress had so concluded as to felons, the court deemed the statute "consistent with the Nation's historical tradition of firearm regulation." *Id.* at 502.

The Tenth Circuit, in *Vincent*, concluded that *Bruen* had not clearly abrogated its prior decisions upholding Section 922(g)(1) against Second Amendment challenge. *See* 80 F.4th at 1200-02. The court thus reaffirmed its view that Section 922(g)(1) is constitutional as to "*any* convicted felon's possession of a firearm," *id.* at 1202 (original emphasis), without requiring the government to demonstrate the statute's "consisten[cy] with the Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 24. In *Dubois*, the Eleventh Circuit likewise concluded that *Bruen* had not abrogated its earlier precedent upholding Section 922(g)(1) as constitutional in all applications. *See* 94 F.4th at 1291-92.

b. The Third and Ninth circuits, in contrast, issued decisions striking down Section 922(g)(1)'s application as unconstitutional under *Bruen*. *See Range v. Att'y Gen.*, 69 F.4th 96 (3d. Cir. 2023) (en banc), *cert. granted, judgment vacated and remanded*, — S.Ct. —, 2024 WL 3259661, at *1 (July 2, 2024); *United States v. Duarte*, 101 F.4th 657, 664-91 (9th Cir.), *reh'g en banc granted, opinion vacated*, No. 22-50048, 2024 WL 3443151 (9th Cir. July 17, 2024).

In *Range*, the en banc Third Circuit applied *Bruen*'s text-and-history test and found Section 922(g)(1) unconstitutional as applied to a person whose prior conviction for making false statements in relation to food stamps had exposed him to more than a year in prison. *Range*, 69 F.4th at 98. First, the court rejected the government's contention that a person's past conviction for an offense punishable by over one year operates to remove

him from "the people" to whom the right to keep and bear arms is vested. *Id.* at 101-03. Then, upon examination of the relevant historical evidence, the court held that the government had failed in its attempt to demonstrate a broad tradition of American laws imposing anything near a permanent ban on firearm possession on account of past misdeeds. *Id.* at 103-06. In reaching these conclusions, the Third Circuit rejected each of the factors the Eighth Circuit relied upon in *Jackson* to conclude the opposite. *See id.* at 101-06. As a dissenting judge observed, "the ruling is not cabined in any way and, in fact, rejects all historical support for disarming any felon." *See Range*, 69 F.4th at 116 (Shwartz, J.).

Duarte similarly perceived no historical tradition of permanent disarmament based on prior felony convictions for offenses that either did not exist, or were punished as misdemeanors, at the founding. The Ninth Circuit accordingly invalidated Section 922(g)(1)'s application to a defendant with prior convictions for modern-day felonies such as possessing drugs for sale, vandalism, and evading arrest. *See Duarte*, 101 F.4th at 688-91.

c. As the Solicitor General has acknowledged, *see* Supplemental Brief for the Federal Parties at 2, *Garland v. Range*, No. 23-374 (June 24, 2024), the Court's recent decision in *Rahimi* clarified *Bruen*'s methodology to some extent, but did not resolve the deep and varied analytical disagreements that have driven the lower courts' conflicting applications of that methodology to Section 922(g)(1). The conflict over that question was already entrenched before *Rahimi*: the Third Circuit ruled en banc in *Range*, *supra*, while the Eighth Circuit twice declined requests to put the question to that full court. *See United States v.*

Jackson, 85 F.th 468, 468-79 (8th Cir. 2023) (Stras, J., joined by Erickson, Grasz, and Kobes, J.J., dissenting from the denial of rehearing en banc); *United States v. Cunningham*, No. 22-1080, 2023 WL 5606171, at *1 (Aug. 30, 2023). And there is little doubt that the conflict will persist, and likely deepen, despite the Court's decisions to grant, vacate, and remand the petitions in *Jackson*, *Range*, *Vincent*, and others raising the same question for reconsideration in light of *Rahimi*. *See United States v. Duarte*, — F.4th —, No. 22-50048, 2024 WL 3443151, at *2 (9th Cir. July 17, 2024) (Van Dyke, J., dissenting from the grant of rehearing en banc) (collecting GVR'd cases, and opining that "[n]othing in [this] Court's recent *Rahimi* decision controls or even provides much new guidance for these cases").

2. Resolving the question presented is also important. Despite serious concerns as to Section 922(g)(1)'s constitutionality in a wide array (if not all) of its applications under *Bruen*, the statute continues to result in the imprisonment of thousands of American citizens each year. *See* Petition for Writ of Certiorari at 22-24, *Garland v. Range*, No. 23-374 (Oct. 5, 2023) (marshaling statistics demonstrating that Section 922(g)(1) is the most frequently applied provision of Section 922(g)). And, for fear of the same fate, countless more individuals—like Ms. Vincent, Mr. Range, and Mr. Duarte—are deterred from engaging in conduct that would otherwise come within the Second Amendment's core. Only this Court can settle this monumental question upon its inevitable return to the Court's docket.

II. The Court should grant the petition, vacate the Fifth Circuit's judgment, and remand for reconsideration in light of *Rahimi*; alternatively, the Court should grant the petition and review Section 922(g)(1)'s constitutionality under the Second Amendment.

Given this Court's decisions to return petitions raising the first question presented to the respective courts of appeals for reconsideration in light of *Rahimi*, the most prudent course is to follow the same path here. The Fifth Circuit has already received post-*Rahimi* supplemental briefing and heard oral argument in a pending case challenging Section 922(g)(1) as incompatible with *Bruen*'s methodology. *See United States v. Diaz*, No. 23-50452 (argued July 10, 2024). A GVR would allow petitioner to benefit from a favorable ruling in *Diaz*. *See Henderson v. United States*, 568 U.S. 266, 274 (2013) (holding that plain-error relief encompasses errors that become plain only while an appeal is pending). And, in the event of an unfavorable result, it would permit petitioner to decide whether to seek this Court's review again after the issue has sufficiently percolated post-*Rahimi*. As an alternative, the Court may wish to grant the petition and review the merits of this important question in petitioner's case.

III. The question whether Section 922(g)(1) exceeds Congress's power under the Commerce Clause is important and warrants review.

In the court below, petitioner preserved for this Court's potential review a separate and distinct question regarding Section 922(g)(1)'s constitutionality: whether the statute's application to petitioner contravenes this Court's modern Commerce Clause jurisprudence by permitting conviction where, as here, the only proof of a nexus to interstate commerce is the fact that the firearm at some point crossed state lines in the past. Numerous judges

have flagged the apparent tension between the Court's updated understanding of the scope of Congress's power to regulate commerce and the comparatively minimal effect on commerce that this Court deemed sufficient to satisfy Section 922(g)(1)'s jurisdictional element in *Scarborough v. United States*, 431 U.S. 563 (1977). That question is important and worthy of this Court's resolution.

In *Scarborough*, this Court held, as a matter of statutory interpretation, that the government could satisfy the interstate commerce element of Section 922(g)'s predecessor, 18 U.S.C. § 1201(a) (repealed 1986), by proving that the firearm had traveled across state lines at any prior point, even if the defendant's possession occurred all in one state. *See* 431 U.S. at 577. Eighteen years later, in *United States v. Lopez*, 514 U.S. 549 (1995), the Court struck down a statute that made it a federal crime "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone," 18 U.S.C. § 922(q)(1)(A), reasoning that the law violated the Commerce Clause because it "neither regulate[d] a commercial activity nor contain[ed] a requirement that the possession be connected in any way to interstate commerce." 514 U.S. at 551. *Lopez* clarified that, for a law that regulates neither the channels nor the instrumentalities of commerce to nevertheless comport with the Commerce Clause, the regulated activity must "substantially affect" interstate commerce. *Id.* at 559. Section 922(q) failed that test because there was no evidence that the *instra*state, non-commercial act of possessing a gun in close proximity to a school had the requisite "substantial" impact on interstate economic activity, and the statute "contain[ed] no jurisdictional element which would ensure, through

case-by-case inquiry, that the firearm possession in question affect[ed] interstate commerce." *Id.* at 561.

In the following years, numerous jurists have identified and called upon this Court to resolve the apparent tension between *Lopez* and *Scarborough*. Justice Thomas, for instance, has observed that "*Scarborough*, as the lower courts have read it, cannot be reconciled with *Lopez* because it reduces the constitutional analysis to the mere identification of a jurisdictional hook" that, like Section 922(g)'s jurisdictional element, "seems to permit Congress to regulate or ban possession of any item that has ever been offered for sale or crossed state lines." *Alderman v. United States*, 131 S. Ct. 700, 702, 703 (2011) (Thomas, J., joined by Scalia, J., dissenting from the denial of certiorari). That result, Justice Thomas explained, is not only inconsistent with the *Lopez* framework but "could very well remove any limit on the commerce power" if taken to its logical extension. *Id.* at 703.

Despite similarly perceiving *Scarborough* as "in fundamental and irreconcilable conflict with the rationale" of *Lopez*, *United States v. Kuban*, 94 F.3d 971, 977 (5th Cir. 1996) (DeMoss, J., dissenting), the prevailing view of the courts of appeals is that *Scarborough* "implicitly assumed the constitutionality of" Section 922(g)'s predecessor statute, *United States v. Alderman*, 565 F.3d 641, 645 (9th Cir. 2009), *cert. denied*, 131 S. Ct. 700 (2011), and that "[a]ny doctrinal inconsistency between *Scarborough* and [this] Court's more recent decisions is not for [the lower courts] to remedy." *United States v. Patton*, 451 F.3d 615, 636 (10th Cir. 2006), *cert. denied*, 549 U.S. 1213 (2007); *see United States v. Kirk*, 105 F.3d 997, 1015 n.25 (5th Cir. 1997) (en banc) (Jones, J., for half of the equally

divided court) ("not[ing] the tension between" *Scarborough* and *Lopez* but observing that the Fifth Circuit has felt constrained to nevertheless "continue to enforce § 922(g)(1)" because a court of appeals is "not at liberty to question the Supreme Court's approval of [Section 922(g)'s] predecessor statute"). The courts of appeals have therefore made clear their intention to follow *Scarborough* "until the Supreme Court tells [them] otherwise." *Patton*, 451 F.3d at 648. And nine of those courts have specifically upheld the constitutionality of Section 922(g)(1) based on *Scarborough*'s minimal-nexus test. *See United States v. Smith*, 101 F.3d 202, 215 (1st Cir. 1996); *United States v. Santiago*, 238 F.3d 213, 216-17 (2d Cir. 2001); *United States v. Gateward*, 84 F.3d 670, 671-72 (3d Cir. 1996); *United States v. Rawls*, 85 F.3d 240, 242-43 (5th Cir. 1996); *United States v. Lemons*, 302 F.3d 769, 771-72 (7th Cir. 2002); *United States v. Shelton*, 66 F.3d 991, 992 (8th Cir. 1995); *United States v. Hanna*, 55 F.3d 1456, 1461-62, 1462 n.2 (9th Cir. 1995); *United States v. Dorris*, 236 F.3d 582, 584-86 (10th Cir. 2000); *United States v. Wright*, 607 F.3d 708, 715-16 (11th Cir. 2010).

This question is important and independently warrants review. As already noted, Section 922(g)(1) is one of the most oft-applied federal criminal statutes. Yet, as Justice Thomas has observed, and as many lower-court judges have echoed, the degree of proof needed to convict under that statute is in serious tension with the Court's modern understanding of the limited nature and scope of the federal power to regulate noneconomic, intrastate activity. In recently urging the Fifth Circuit to reconsider this issue en banc, Judge

Ho emphasized that the "constitutional limits on governmental power do not enforce themselves." *United States v. Seekins*, 52 F.4th 988, 989 (5th Cir. 2022) (Ho, J., dissenting from the denial of rehearing). The interpretation of Section 922(g)(1)'s jurisdictional element that the circuits understand *Scarborough* to require effectively "allows the federal government to regulate any item so long as it was manufactured out-of-state—without any regard to when, why, or by whom the item was transported across state lines." *Id.* at 990. That broad conception of federal regulatory authority is at odds with the *Lopez* framework. Only this Court can "prevent [that framework] from being undermined by a 1977 precedent that d[id] not squarely address the constitutional issue." *Alderman*, 131 S. Ct. at 703 (Thomas, J., dissenting from the denial of certiorari).

IV. If the Court were to decline to GVR in light of *Rahimi*, it should grant the petition and review Section 922(g)(1)'s compliance with the Commerce Clause.

Although Section 922(g)(1)'s compliance with the Commerce Clause independently warrants review, the fact that the Court has GVR'd other cases raising the Second Amendment issue presented above counsels in favor of the Court taking that course in this case as well. As noted, a favorable ruling by the court of appeals upon post-*Rahimi* reconsideration of the Second Amendment issue would obviate the need for this Court's intervention in petitioner's case. And an unfavorable ruling would permit petitioner to seek this Court's review again at a later date, should petitioner deem that course appropriate. If, however, the Court is disinclined to return this case to the court of appeals for reconsideration in light

of *Rahimi*, the Court should, for the reasons stated, grant the petition and review Section 922(g)(1)'s viability under the Commerce Clause.

CONCLUSION

The Court should grant the petition, vacate the Fifth Circuit's judgment, and remand petitioner's case for reconsideration in light of *United States v. Rahimi*, 144 S. Ct. 1889 (2024). Alternatively, the petition should be granted.

Respectfully submitted,

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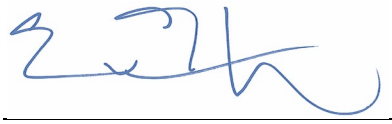

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