NO. _____

In the

Supreme Court of the United States

RANDY PRICE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Dated: November 4, 2024

I. QUESTION PRESENTED FOR REVIEW

The narrow question presented is whether Second Amendment protected "conduct," for purposes of *Bruen*'s step one, consists of anything other than an individual's possession or carrying of a bearable firearm.

In *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022), this Court established the framework for analyzing whether a firearm regulation, such as 18 U.S.C. § 922(k)'s prohibition on possessing a firearm with an "obliterated" serial number, violates the Second Amendment. *Bruen*'s first step provides that "when the Second Amendment's plain text ***covers an individual's conduct***, the Constitution presumptively protects ***that conduct***." *Id.* at 17 (emphasis added).

The Fourth Circuit found rather than what an individual is doing with a gun that is regulated, Second Amendment protected "conduct" is further defined by the historical scope of (1) who can possess a gun, as well as (2) what type of gun can be possessed. *United States v. Price*, 111 F.4th 392, 399, 401 (4th Cir. 2024)(*en banc*). The Fourth Circuit further found that firearms with obliterated serial numbers are not in common use for any lawful purpose, such that their possession is not entitled Second Amendment protection at *Bruen*'s step one. *Id.* at 402 ("[b]ecause it is outcome determinative here, we focus our analysis on *Bruen*'s . . . step one inquiry"). Rather than straightforwardly apply *Heller* and *Bruen*, the Fourth Circuit created a reimagined *Bruen* step one - which at the very least requires correction and remand for Price's Second Amendment challenge to be resolved under *Bruen*'s step two.

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- *United States v. Price*, No. 22-4609, U.S. Court of Appeals for the Fourth Circuit. Judgment entered on August 6, 2024.

V. OPINIONS BELOW

The Fourth Circuit reversed the partial grant of Price's motion to dismiss the indictment filed against him in a published decision, *United States v. Price*, 111 F.4th 392 (4th Cir. 2024)(*en banc*), that is attached to this Petition as Appendix A. The district court's written memorandum opinion and order partially granting Price's motion to dismiss was also a published decision, *United States v. Price*, 635 F. Supp. 3d 455 (S.D. W. Va. 2022), and is attached to this Petition as Appendix B. Because the Government took an interlocutory appeal from that order no final judgment has yet been entered in this matter.

VI. JURISDICTION

This Petition seeks review of a judgment of the United States Court of Appeals for the Fourth Circuit entered on August 6, 2024. No petition for rehearing was filed. This Petition is filed within 90 days of the date the court's entry of its judgment. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254 and Rules 13.1 and 13.3 of this Court.

VII. STATUTES AND REGULATIONS INVOLVED

The issue in this Petition requires interpretation and application of the Second Amendment to the United States Constitution, which provides, in pertinent part:

> 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.

As well as 18 U.S.C. § 922, which provides, in pertinent part:

> **(k)** It shall be unlawful for any person knowingly to transport, ship, or receive, in interstate or foreign commerce, any firearm which has had the importer's or manufacturer's serial number removed, obliterated, or altered or to possess or receive any firearm which has had the importer's or manufacturer's serial number removed, obliterated, or altered and has, at any time, been shipped or transported in interstate or foreign commerce.

VIII. STATEMENT OF THE CASE

A. Federal Jurisdiction

On May 3, 2022, a federal grand jury sitting in the Southern District of West Virginia returned a two-count indictment charging Randy Price with possessing a firearm after sustaining a felony conviction (Count One), under 18 U.S.C. §§ 922(g)(1) and 924(a)(2), and possession of the same firearm that had an obliterated serial number, under 18 U.S.C. § 922(k) (Count Two). JA6-9.[1] Because those charges constitute offenses against the United States, the district court had original jurisdiction pursuant to 18 U.S.C. § 3231. The district court partially granted Price's motion to dismiss the indictment, concluding that § 922(k) violated the Second Amendment. *United States v. Price*, 635 F. Supp. 3d 455 (S.D. W. Va. 2022). The

[1] "JA" refers to the Joint Appendix that was filed with the Fourth Circuit in this appeal.

Government sought interlocutory review of that portion of the district court's order. The United States Court of Appeals for the Fourth Circuit had jurisdiction pursuant to 18 U.S.C. § 3731.

B. Facts Pertinent to the Issue Presented

This case arises from a traffic stop in which Price was found to be in possession of a firearm. Charged with two offenses, Price moved to dismiss the indictment against him on grounds that it violated the Second Amendment. The district court partially agreed and dismissed Count Two of the indictment, which charged Price with possessing a firearm with an obliterated serial number. The ultimate issue in this Petition is whether the district court was correct when it did so.

1. The district court partially grants Price's motion to dismiss, concluding that § 922(k) violates the Second Amendment.

Price was charged in a two-count indictment with unlawful possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1), and possession of a firearm with an obliterated serial number, in violation of 18 U.S.C. § 922(k). JA6-9. Price filed a motion to dismiss the indictment, arguing that both statutes violated the Second Amendment. JA10-39. Foundationally, Price argued that he was one of "the people" protected by the Second Amendment as defined by *District of Columbia v. Heller*, 554 U.S. 570 (2008), and that his possession of a semi-automatic .25 caliber handgun for purposes of self-defense – even if it had an obliterated serial number – is conduct protected by the Second Amendment. JA60-62. Under the text and history standard set forth in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1

(2022), Price argued both regulations trigger application of a presumption of unconstitutionality by burdening firearm possession – conduct within the plain text of the Second Amendment. JA60-62. Because the Government could not rebut *Bruen*'s step one presumption of unconstitutionality for both statutes, Price maintained that his indictment should be dismissed. Price's motion implicated both ***who*** could be prevented from possessing a firearm after *Bruen*, as well as ***what*** type of firearm could be regulated.

The district court denied Price's motion with respect to § 922(g)(1), based on *Heller*'s *dicta* regarding the presumptively lawful disarmament of convicted felons, but granted the motion and dismissed Price's § 922(k) charge, finding no distinctly similar analogue establishing a history of firearm regulation that would support the constitutionality of § 922(k). *Price*, 635 F. Supp. 3d at 459-465.

2. The Government seeks interlocutory relief from the Fourth Circuit regarding the dismissal of the § 922(k) charge. The Fourth Circuit, sitting *en banc*, reverses the district court.

The Government filed an interlocutory appeal of the district court's ruling, which the Fourth Circuit reversed in a published, *en banc* opinion. *United States v. Price*, 111 F.4th 392 (4th Cir. 2024)(*en banc*). The court did so in a split nine-judge majority opinion holding (a) *Bruen*'s step one is not limited to determining whether a regulation burdens conduct protected by the Second Amendment, and (b) non-functional characteristics of a firearm like obliterated serial numbers are not in

common use for lawful purposes, such that possessing one is outside the scope of Second Amendment protections at *Bruen*'s step one. *Id.* at 398-408.

As part of its ruling, the Fourth Circuit found that courts are required to make ***three*** different inquiries in order to make the single determination of what "conduct" is protected by the Second Amendment: (1) whether the burdened ***individual*** is part of "the people" whom the Second Amendment protects, (2) whether the ***weapon regulated*** by the challenged regulation is "in common use" for a lawful purpose, and (3) whether the Second Amendment protected the individual's ***proposed course of conduct***. *Price*, 111 F.4th at 399. Most importantly for this Petition, the Fourth Circuit expressly held "we can *only* properly apply step one of the *Bruen* framework by looking to the historical scope of the Second Amendment right." *Id.* at 401.

Confronted with *Heller* holding that handguns are in common use - after observing that this Court has not "elucidated a precise test" for determining whether a regulated firearm is in common use for a lawful purpose, *Price*, 111 F.4th at 403, the Fourth Circuit created one of its own.

Despite *Heller* tying its "in common use for lawful purposes" analysis to the "dangerous and usual" discussion of short-barreled shotguns in *United States v. Miller*, 307 U.S. 174 (1939), and *Heller*'s including possession of firearms for "self-defense" as one of those common uses enjoying Second Amendment protection,[2] the Fourth Circuit nevertheless decided that functional characteristics of a firearm[3] do

[2] *See Heller*, 554 U.S. at 624-625, 634.
[3] I.e., those things which did or did not make a given firearm "dangerous and unusual" under *Miller*.

not determine whether a gun is in common use for lawful purposes. Instead, the Fourth Circuit focused on the regulated *non-functional* firearm characteristics to determine common and lawful use. After further deciding (based on little more than questionable ATF statistics) that firearms with obliterated serial numbers are not common – and, after failing to find any lawful purpose for "preferring" firearms with an obliterated serial number – the Fourth Circuit used "common sense" to hold firearms with obliterated serial numbers did not enjoy Second Amendment protection. *Price*, 111 F.4th at 404-406. This was done solely within *Bruen*'s step one, without any burden shifting to the United States to ever historically justify its firearm regulation.

Three concurrences, and two separate dissenting opinions were also filed in *Price*. Notably, Judge Niemeyer's concurrence defines Second Amendment protected "conduct" and the scope of *Bruen*'s step one correctly, within the amendment's plain text (i.e., as simply keeping and bearing arms). *Price*, 111 F.4th at 409-411 (Niemeyer, J., concurring in the judgment). Dissents authored by Judge Gregory and Judge Richardson also consistently conclude that *Bruen's* step-one inquiry does not concern historical context or non-functional firearm characteristics like an obliterated serial number. Both further conclude that the "dangerous and unusual" and "in common use" inquiries are part of the broader historical examination under *Bruen*'s step two. *Price*, 111 F.4th at 423-425 (Gregory, J., dissenting), 426-429 (Richardson, J., dissenting).

IX. REASONS FOR GRANTING THE WRIT

The writ should be granted to determine, when analyzing a challenge to a firearm regulation like 18 U.S.C. § 922(k), what constitutes Second Amendment protected "conduct" under *Bruen*'s step one. Through a straightforward application of *Heller* and *Bruen*, this should require no more than possession or carrying of a bearable firearm.

This Petition should be granted to address the important question of constitutional law which has not yet been settled by this Court. *See* Rules of the Supreme Court 10(c). That is, whether, when analyzing a challenge to a firearm regulation under the Second Amendment, the protected "conduct" needed to meet *Bruen*'s step one requires any more than an individual's possession of a bearable firearm. Until that question is resolved, leaving the Fourth Circuit's ill-conceived *Bruen* step-one framework intact will have a national impact affecting both a large number of people and ongoing Second Amendment litigation across the country. The Fourth Circuit's construction of *Bruen*'s step one goes well beyond what this Court intended and is inconsistent with both the Second Amendment's plain text and this Court's Second Amendment jurisprudence. This Petition should be granted so this Court may address that compelling issue, correct a material error, and give further guidance to the courts below.

A. Directly applying *Heller* and *Bruen*'s step one easily determines what constitutes Second Amendment protected "conduct" – as opposed to filtering *Bruen*'s step one through the additional layers of analysis created by *Price*.

Just over two years ago, this Court held that means-end scrutiny had gone "one step too many" in the Second Amendment context. *New York State Rifle & Pistol*

Ass'n, Inc. v. Bruen, 597 U.S. 1, 2 (2022). Yet rather than simply apply *Bruen*'s streamlined text and history framework, the Fourth Circuit did just the opposite and inserted at least three additional layers of analysis into *Bruen*'s step one, only to answer the preliminary question of what conduct is protected by the Second Amendment. Nothing in the Second Amendment's plain text, or *Bruen*, contemplates anything like that.

Increased Second Amendment deference is an intended consequence of *Bruen*, which did not just materialize out of thin air in 2022. Prior to *Bruen*, for fourteen years Justice Thomas had consistently observed both the states and lower federal courts were resisting this Court's decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), by failing to protect Second Amendment rights to the same extent they protected other constitutional rights.[4] *Bruen* was the predictable reaction to this. The *Price* majority is now similarly misapplying *Bruen*'s step one, in a manner that imitates intermediate

[4] S*ee, e.g.*, *Rogers v. Grewal*, 140 S. Ct. 1865, 1866 (2020)(appeal of New Jersey may issue carry permit requirement and near-total prohibition on public carry: "many courts have resisted our decisions in *Heller* and *McDonald*."); *New York State Rifle & Pistol Ass'n, Inc. v. City of New York, NY*, 590 U.S. 336, 340-341 (2020)(appeal of New York firearm license ordinance, dismissed as moot when city amended ordinances during appeal; Justice Alito dissent joined by Justice Gorsuch and Justice Thomas); *Silvester v. Becerra*, 138 S. Ct. 945, 950-951 (2018)(appeal of California's 10-day waiting/cooling off period for firearm purchases); *Peruta v. California*, 137 S. Ct. 1995, 1999 (2017)(appeal of California's prohibition of public carry and carrying concealed firearms in public); *Voisine v. United States*, 136 S. Ct. 2272, 2291-92 (2016)(appeal of denying Second Amendment protections based on reckless misdemeanor conduct); *Friedman v. Highland Park*, 136 S. Ct. 447, 449 (2015)(appeal of Illinois' AR-style rifle and large capacity magazine bans); *Jackson v. City and County of San Francisco, California*, 135 S. Ct. 2799, 2800-02 (2015)(appeal of California ordinance requiring trigger locks for handguns stored in residences).

means-end scrutiny by continuing to avoid meaningful historical justification of regulations burdening Second Amendment protections.

The approach of lower courts in general, and now the Fourth Circuit's in this case, mirrors post-*Heller* Second Amendment litigation when the Courts of Appeals coalesced around intermediate means-end scrutiny. *See, e.g., United States v. Hosford*, 843 F.3d 161 (4th Cir. 2016); *United States v. Carter*, 750 F.3d 462 (4th Cir. 2014); *United States v. Pruess*, 703 F.3d 242 (4th Cir. 2012); *United States v. Mahin*, 668 F.3d 119 (4th Cir. 2012); *United States v. Chester*, 628 F.3d 673, 676 (4th Cir. 2010)(noting *Heller*'s explanation of how rational-basis scrutiny would be inappropriate for analyzing infringements on individual Second Amendment rights). Under means-end scrutiny, the lower courts created a new vocabulary for "core/non-core" categories of citizens, distinguishing between "law abiding" individuals who enjoyed "full" Second Amendment protections in their homes and everyone else afforded materially diminished Second Amendment protections. The Second Amendment's plain text never supported this two-tiered approach, nor did anything in *Heller*. The fact that *Chester*'s framework was adopted by all other Courts of Appeals did not make it analytically correct, as evidenced by *Bruen* itself, which ultimately dispensed with means-ends scrutiny analysis of Second Amendment protections altogether.

The Fourth Circuit held that the analysis under *Bruen*'s step one ***must*** include an evaluation of the historical scope of the Second Amendment right. *Price*, 111 F.4th at 401. If true, then *Bruen*'s step two historical analysis becomes not only redundant,

but completely meaningless. Historical analysis in *Bruen*'s step one, which places the burden on the regulation's challenger, will effectively ensure no historical analysis is ever conducted at *Bruen*'s step two (which was also the case with intermediate means-end scrutiny). However, that approach is inconsistent with *Bruen*, which squarely places the historical analysis in step two where the Government must demonstrate a well-established and representative historical tradition that justifies upholding the challenged regulation.

The Fourth Circuit's reimagining of *Bruen's* Second Amendment protected "conduct" inquiry is contrary to *Heller*, in which this Court already defined what that "conduct" is: simply keeping and bearing arms. *Heller*, 554 U.S. at 581-593. Inconsistent with that definition, however, the Fourth Circuit now requires more.

In analyzing *United States v. Miller*, 307 U.S. 174 (1939), and the "common use" element of *Bruen's* step one, the Fourth Circuit correctly perceived that *Heller*'s construction of *Miller* limited Second Amendment protections to "arms in common use at the time for lawful purposes ***like self-defense***." *Price*, 111 F.4th at 400 (emphasis added). The Fourth Circuit, however, surged past this understanding by applying the common use inquiry in *Bruen*'s step one, and then focusing only on the non-functional characteristics of guns with obliterated serial numbers. At which point the "common use for lawful purposes" element becomes completely a circular exercise, particularly when compared to the functional characteristics of short-barreled shotguns.

B. There are ancillary questions for this Court to resolve addressing the question presented, that will give much needed guidance for future Second Amendment cases.

This Court should reject the Fourth Circuit's revised *Bruen* step one framework and specifically articulate how courts are to define Second Amendment conduct. This is the core question being presented by this Petition. Reaching the ultimate answer, however, means this Court must also explain the analytical relationship between "dangerous and unusual" and "in common use for lawful purposes," as well as when "self-defense" is not such a common use. This Court similarly needs to articulate how historical considerations are to be applied between *Bruen*'s step one and two. Here, the Fourth Circuit says historical context applies to both *Bruen* steps, while several concurring and dissenting judges recognize that it only applies to *Bruen*'s step two. It cannot be both, and the Fourth Circuit's split application is simply inconsistent with *Bruen* and renders *Bruen*'s step two a practical nullity. These questions are all related, and are the benchmarks for getting to what constitutes Second Amendment protected "conduct" under *Bruen*'s step one.

C. The Fourth Circuit's non-functional "in common use" requirement is improperly detached from *Miller*'s "dangerous and unusual" standard, as well as the historical inquiry intended for *Bruen*'s step two. "In common use" is also just as problematic to apply in *Bruen*'s step one as the "responsible" standard *Rahimi* rejected.

The right to keep and bear arms is among the "fundamental rights necessary to our system of ordered liberty." *United States v. Rahimi*, 144 S. Ct. 1889, 1897 (2024). Yet, the problems created applying the Fourth Circuit's "in common use"

standard with *Bruen*'s step one differ little in practical application from the "law abiding, responsible" citizens standard expressly rejected by *Rahimi*. *Id.* at 1903, 1944-1945. This conclusion is easily borne out by the Fourth Circuit's decision itself, where, after detaching "in common use for lawful purposes" from *Miller*'s "dangerous and unusual" metric, the court had to turn to "common sense" to define the scope of Second Amendment protections. *Price*, 111 F.4th at 404-406. Despite the fact the pistol Price possessed was no different functionally than any serialized M25 semi-automatic pistol possessed for purposes of self-defense, the Fourth Circuit still concluded it was not in common use for a lawful purpose. *Ibid.* As the dissenting judges observe, under the majority analysis the serial number requirement turned the same firearm into a new type of firearm outside the scope of the Second Amendment, despite the fact it operated functionally the same. *See* 111 F.4th at 422-425 (Gregory, J., dissenting), 427-429 (Richardson, J., dissenting). Absolutely nothing in the Second Amendment's plain text, or this Court's jurisprudence in any way support the Fourth Circuit's construing "in common use" this way. *Ibid.*

Miller readily showed how Second Amendment protections necessarily relate to the functional characteristics of a firearm. If an object is not an "arm" capable of functionally aiding in self-defense, there is no Second Amendment interest to protect. While *Miller* dealt with the National Firearm Act, and the utility of short-barreled shotguns to militia service, it was still the firearm's functionality, its capacity to provide portable, deadly force for use in self-defense, that implicated the prospects of constitutional protection in the first place. The Fourth Circuit's reframing of *Bruen*'s

step one completely rejects this distinction, which is another reason it should be promptly reviewed and reversed.

D. Failing to review *Price* now will have an adverse national impact on substantially more people than the Fourth Circuit suggests.

In support of its holding that obliterated serial number guns are not in common use, the Fourth Circuit relied on a 2023 ATF Report claiming less than 3% of firearms submitted for tracing consist of such guns. *Price*, 111 F.4th at 407. Assuming the report is even accurate or interpreted correctly, this estimate grossly under represents the number of people and cases adversely impacted by *Price*'s reimagined *Bruen* step one. To put matters more in perspective, 64,124 sentenced defendants were reported to the Sentencing Commission for FY 2023, 8,832 or 13.8% of which were convicted of firearm offenses.[5] Separately, the regulation of National Firearm Act or "NFA" weapons is instructive, where the underlying regulatory basis is not so much who can possess a firearm, but the characteristics of what firearms may be lawfully possessed. The Fourth Circuit now holds that this is a *Bruen* step one issue.

According to the Bureau of Alcohol, Tobacco, Firearms, and Explosives' *National Firearm Commerce and Trafficking Assessment (NFCTA)*, Vol. I, Part VII: National Firearms Act, at 87-103 (May 5, 2022),[6] in order to legally make an NFA

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[5] U.S. Sent'g Comm'n, *Statistical Information Packet Fiscal Year 2023, Fourth Circuit* at 2 tbl.1 https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2023/4c23.pdf

[6] Available online at https://www.atf.gov/firearms/docs/report/national-firearms-commerce-and-trafficking-assessment-firearms-commerce-volume (last visited Nov. 1, 2024)

weapon a person must first file an ATF Form 1, *Application to Make and Register a Firearm* with the corresponding tax payment and receive approval from ATF. To transfer a registered NFA weapon to another person, the transferee must go through a federal firearm licensee ("FFL") to file an ATF Form 4, *Application for Tax Paid Transfer and Registration of Firearm (ATF Form 5320.4)*, and also receive approval from the ATF. Applications to make or transfer a firearm will not be approved if federal, state, or local law prohibits the making or possession of the firearm. *See* 26 U.S.C. §§ 5812 & 5822.

With that background, what is pertinent for this Court's purposes is that the total number of NFA applications received by the ATF between 2010 and 2020 increased from 95,674 to ***551,074***. *See NFCTA* at 89 fig.N-01. ATF Form 4 filings accounted for the largest share of NFA applications during the same period. ATF Form 4 applications represented 46% (251,936) of total NFA applications (551,074) received in 2020. In terms of percentage increases by type of NFA applications between 2010 and 2020, ATF Form 1 filings increased 754%, while ATF Form 4 filings increased 636%. *NFCTA* at 90 tbl.N-03a. The ATF maintains that on average 95% of "correctly submitted" electronic and paper applications received between 2016 and 2020, or ***1,9455,063 applications***, were approved. *NFCTA* at 93 tbl.N-06a. Between 2016 and 2020, ATF received 2,073,275 eligible applications involving the registration or transfer of ***10,074,950 NFA weapons***. *NFCTA* at 102.

As a consequence, were even ten percent of known NFA weapons involved in prospective future federal criminal cases, it would easily impact over 1,000,000

people. This is not an insignificant number that would plainly be directly affected by the Fourth Circuit's revision of *Bruen*'s step one. This is another reason why Price's Petition is so important, and should be granted.

X. CONCLUSION

Chris Williamson, host of the *Modern Wisdom* podcast, frequently says "contemplate the price you pay for inaction."[7] Given the substance of the Fourth Circuit's decision below, declining to grant *certiorari* now will exact a persistently heavy price on individual firearm owners, while further retarding developing post-*Bruen* Second Amendment jurisprudence. Which is why this Court must intervene now, and articulate the correct method for identifying protected Second Amendment conduct under *Bruen*'s step one. It is a compelling and extremely important issue which will impact every Second Amendment case going forward in both state and federal courts. For the reasons stated, therefore, this Court should grant Price's Petition.

Respectfully submitted,

RANDY PRICE

By Counsel

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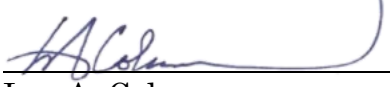

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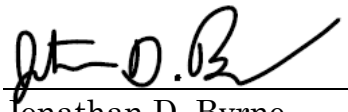
[7] Chris Williamson (@ChrisWillx), X (Nov. 15, 2022, 9:00 AM), https://x.com/ChrisWillx/status/1592517785925685248 (last visited Oct. 30, 2024).



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Dated: November 4, 2024