No. _____

In The
Supreme Court of the United States

RONALD CALZONE,

Petitioner,

v.

ERIC T. OLSON, in his official capacity as Superintendent of the Missouri State Highway Patrol,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Does the "closely regulated industry" exception to the Fourth Amendment apply to persons who have not chosen to involve themselves in any business connected with a closely regulated industry?

2) Does the Fourth Amendment allow executive or administrative officers in the field to exercise unlimited discretion as to whom the officers will subject to a warrantless search or seizure?

PARTIES TO THE PROCEEDINGS BELOW

The Petitioner is Ronald Calzone.

The Respondent is Eric T. Olson in his official capacity as the Superintendent of the Missouri State Highway Patrol.

RELATED CASES

- *State of Missouri v. Ronald J. Calzone*, Case No. 700761140, Phelps County Circuit Court. Nolle Prosequi entered April 4, 2014.

- *Ronald Calzone v. Chris Koster, et al.*, Case No. 4:15-cv-869 SNLJ, United States District Court for the Eastern District of Missouri, Southeastern Division. Judgment entered July 28, 2016.

- *Ronald Calzone v. Josh Hawley, et al.*, Case No. 16-3650, Eighth Circuit Court of Appeals. Judgment entered August 7, 2017.

- *Ronald Calzone v. Sandra Karsten*, Case No. 4:15-cv-869 SNLJ, United States District Court for the Eastern District of Missouri, Southeastern Division. Judgment entered March 9, 2018.

- *Ronald Calzone v. Eric T. Olson*, Case No. 18-1674, Eighth Circuit Court of Appeals. Judgment entered July 26, 2019.

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PETITION FOR A WRIT OF CERTIORARI

Ronald Calzone petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The United States District Court for the Eastern District of Missouri entered an unpublished opinion in *Calzone v. Koster*, which is included in the Appendix at pp. 35-49. The United States Court of Appeals for the Eighth Circuit entered an opinion affirming in part, reversing in part, and remanding, which is reported at *Calzone v. Hawley*, 866 F.3d 866. *See* App. 24-34. On remand, the United States District Court for the Eastern District of Missouri entered an opinion which is reported at *Calzone v. Karsten*, 316 F.Supp.3d 1085. *See* App. 10-23. The United States Court of Appeals for the Eighth Circuit then entered an opinion which is reported at *Calzone v. Olson*, 931 F.3d 722. *See* App. 1-9.

JURISDICTION

The Eighth Circuit entered its most recent judgment in this case on July 26, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the U.S. Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

In relevant part, Mo. Stat. § 304.230.1 states:

> "[L]aw enforcement officers that have been approved by the Missouri state highway patrol under section 304.232, members of the Missouri state highway patrol, commercial vehicle enforcement officers, and commercial vehicle inspectors . . . shall have the authority to conduct random roadside examinations or inspections to determine compliance with sections 304.170 to 304.230, and only such officers shall have the authority, with or without probable cause to believe that the size or weight is in excess of that permitted by sections 304.170 to 304.230, to require the driver, operator, owner, lessee, or bailee, to stop, drive, or otherwise move to a location to determine compliance with sections 304.170 to 304.230. Notwithstanding the provisions of this subsection, a law enforcement officer not certified under section 304.232 may stop a vehicle that

has a visible external safety defect relating to the enforcement of the provisions of sections 304.170 to 304.230 that could cause immediate harm to the traveling public. Nothing in this section shall be construed as preventing a law enforcement officer not certified under section 304.232 from stopping and detaining a commercial motor vehicle when such officer has probable cause to believe that the commercial motor vehicle is being used to conduct illegal or criminal activities unrelated to sections 304.170 to 304.230."

In relevant part, Mo. Stat. § 304.230.2 states:

"Any peace officer approved under section 304.232 or any highway patrol officer is hereby given the power to stop any such conveyance or vehicle as above described upon the public highway for the purpose of determining whether such vehicle is loaded in excess of the provisions of sections 304.170 to 304.230[.]"

In relevant part, Mo. Stat. § 304.230.7 states:

"The superintendent may also appoint members of the patrol who are certified under the commercial vehicle safety alliance with the power to conduct commercial motor vehicle and driver inspections and to require the operator of any commercial vehicle to stop and submit to said inspections to determine compliance with commercial vehicle laws, rules, and regulations, compliance with the provisions of sections 303.024 and 303.025, and to submit to a cargo inspection when reasonable grounds exist to cause belief that a vehicle is

transporting hazardous materials as defined by Title 49 of the Code of Federal Regulations."

STATEMENT

Ron Calzone is a farmer. He is not a professional commercial trucker.

Calzone and his wife own Eagle Wings Ranch near Dixon, Missouri, where they raise horses and cattle. He owns a 1992 International Harvester dump truck that he occasionally uses to carry materials related to the operation of his ranch. The truck is registered as a "local commercial vehicle" and as a "farm vehicle;" the license plate is marked with an "F" to reflect this registration. App. 2. Under Missouri law, these designations sharply limit Calzone's use of the vehicle—he may only use it within 50 miles of his farm and its use must be confined solely to the transportation of Calzone's own property, to or from his farm, and the property transported must be "for use in the operation of such farm." Mo. Stat. § 301.010(27).

As the July 26, 2019 Opinion issued by the Eighth Circuit recognized, due to the limited uses to which the farm truck may be put Calzone is not required to have a commercial driver's license to operate it. App. 7. He is not subject to the state regulations that govern operators who are "motor carriers" under Missouri law. App. 7. He is exempt from all driver qualification regulations. App. 7. He is excepted from regulations

governing hours for drivers. App. 7. He is also exempt from regulations requiring motor carriers to inspect, repair, and maintain commercial vehicles under their control. App. 7-8.

At about 10:00 on the morning of June 3, 2013, Calzone took his farm truck to an inspection station authorized by the Missouri State Highway Patrol for its regular Missouri Motor Vehicle Inspection. His truck passed the inspection and a couple of hours later he began driving the truck to a nearby quarry to purchase gravel for use in his daughter's chicken coop. The bed of the truck was empty and Calzone was being careful to obey all traffic laws. A Missouri State Highway Patrol vehicle fell in behind Calzone and signaled for him to pull over. When the officer approached his window Calzone asked why the officer had stopped him. The officer acknowledged that he had not observed any violation of the law, but stated that § 304.230 authorizes highway patrol officers to stop commercial vehicles and inspect them even if the officer has no reason to believe that any law has been violated.[1] Describing himself as a "hard-headed constitutionalist," Calzone insisted that the Fourth Amendment prohibits such suspicionless stops; he refused to consent to the search and the officer issued him a citation for failure to submit to a commercial vehicle inspection.

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[1] The officer that initiated the stop had unlimited discretion to decide which commercial vehicles he would seize and attempt to search.

The Phelps County Prosecuting Attorney initially pursued a misdemeanor charge against Calzone, but terminated the prosecution via nolle prosequi after Calzone filed a motion to dismiss. Calzone then filed this lawsuit in the United States District Court for the Eastern District of Missouri, asserting that three subsections of Mo. Stat. § 304.230 violated the Fourth Amendment both facially and as applied to Calzone. The Complaint named as defendants the Governor, the Attorney General, and the Superintendent of the Missouri State Highway Patrol. Calzone contended that § 304.230 was facially unconstitutional because it authorizes the roving seizure of almost any type of vehicle—not just commercial vehicles—"with or without probable cause" to believe that the vehicle is in violation of any law. In a separate count Calzone alleged that the June 3, 2013 stop violated the Fourth Amendment as applied to him, in part because the highway patrol officer was given unlimited discretion to choose which commercial vehicles he would subject to roving, suspicionless seizures and searches.

The government defendants filed a motion for summary judgment as to Count I (Calzone's facial challenge) and a motion for judgment on the pleadings as to Count II (Calzone's as-applied challenge). Calzone filed a motion for summary judgment as to both counts. The district court ruled for the government as to Calzone's facial challenge, holding that the statute could constitutionally be applied to the commercial trucking industry. App. 47. The district court also granted the government's motion for judgment on the

pleadings as to Calzone's as-applied challenge, holding that Calzone had failed to name a proper party as a defendant for Count II. App. 48. On appeal the Eighth Circuit affirmed the holding that § 304.230 could constitutionally be applied to "participants in the commercial trucking industry." App. 32. Regarding Calzone's as-applied challenge, however, the Eighth Circuit held that the Superintendent of the Missouri State Highway Patrol was a proper defendant and remanded the case to the district court for determination as to whether Calzone's use of his farm vehicle made him a participant in the commercial trucking industry. App. 33.

On remand the district court held that even though Calzone is not engaged in a business tied to the professional commercial trucking industry, he is nonetheless a participant in that industry because driving a commercial truck makes him subject to certain regulations. App. 14. The district court also held that because § 304.230 notified drivers that they would be subject to random, suspicionless stops the fact that there were no standards, guidelines, or policies in place to limit the discretion of the inspecting officers in deciding which vehicles to stop did not violate the Fourth Amendment App. 22. Calzone appealed again, but the Eighth Circuit affirmed the district court's judgment. App. 9. The Eighth Circuit acknowledged that Calzone was exempt from a wide swath of state and federal regulations that apply to those doing business as professional commercial truckers, but it justified its conclusion that Calzone and his farm truck were nonetheless

"closely regulated" because he is subject to the following smattering of statutes and regulations:

- General Federal rules applicable to commercial motor vehicles. 49 C.F.R. § 390. App. 8.
- Federal rules applicable to driving commercial motor vehicles. 49 C.F.R. § 392. App. 8.
- Federal rules establishing parts and accessories necessary for safe operation of commercial motor vehicles. 49 C.F.R. § 393. App. 8.
- A Missouri statute allowing cities to deny commercial vehicles the use of certain streets. Mo. Stat. § 300.550. App. 8.
- A Missouri statute requiring commercial vehicles to be registered with the state. Mo. Stat. § 301.030.3. App. 8.
- A Missouri statute requiring commercial vehicle owners to pay an annual registration fee. Mo. Stat. § 301.058.1. App. 8.
- Missouri statutes making all vehicles (not just commercial vehicles) subject to height, weight, and length restrictions. Mo. Stat. §§ 304.170-.230. App. 8.
- A Missouri statute requiring "[e]very commercial motor vehicle and trailer and all parts thereof [to] be maintained in a safe condition at all times[.]" Mo. Stat. § 307.400.1(1). App. 8.
- A Missouri statute requiring "[a]ccidents arising from or in connection with the operation of commercial motor vehicles and trailers [to] be reported to the department of public safety

> in such detail and in such manner as the director may require." Mo. Stat. § 307.400.1(2). App. 8.

Calzone has timely filed this petition seeking a writ of certiorari.

REASONS FOR GRANTING THE PETITION

The Court should grant this Petition for a Writ of Certiorari for two reasons:

First, the Eighth Circuit's decision blatantly disregards this Court's precedents regarding the purpose and intended limits of the "closely regulated industry" exception to the Fourth Amendment's protections.

Second, the Eighth Circuit's decision deepens a split among five federal circuit courts and at least four state appellate courts as to whether the Fourth Amendment permits executive and administrative officers to exercise unlimited discretion as to whom they will subject to warrantless searches and seizures.

Both of these issues are matters of great national importance, directly affecting the ability of a large portion of the American public to enjoy essential constitutional protections against improper exercises of governmental authority.

I. The Eighth Circuit's ruling disregards this Court's stated rationale for the "closely regulated industry" exception to the Fourth Amendment's protections and dramatically expands its scope.

It has been clear from the outset of this litigation that Calzone has not chosen to do business as a professional commercial trucker. In light of this undisputed fact, the critical question the lower courts had to address was whether this Court's precedents allowed Calzone to be treated as part of the "professional commercial trucking industry" based solely on his decision to purchase and use a piece of property—in this case a farm truck—that was subject to a limited set of regulations. Although nothing in this Court's precedents suggests that a citizen surrenders their Fourth Amendment rights merely by owning a piece of property, that is precisely the impact of the Eighth Circuit's decision. That conclusion ignores this Court's precedents, extends the "closely regulated industry" exception far beyond its proper, limited scope, and if other lower courts follow the Eighth Circuit's lead a large number of Americans could find themselves inadvertently stripped of their constitutional protections against warrantless searches and seizures.

This Court's cases discussing the "closely regulated industry" exception consistently state that the application of this exception is properly limited to those who have chosen to do business in industries that required special governmental permission before

one could lawfully do business in them. *See Colonnade Catering Corp. v. U.S.*, 397 U.S. 72 (1970) (business owner held state license to sell and serve alcoholic beverages); *U.S. v. Biswell*, 406 U.S. 311 (1972) (business owner held federal license to sell firearms and ammunition); *Donovan v. Dewey*, 452 U.S. 594 (1981) (mining company required to obtain state permit prior to excavations); *New York v. Burger*, 482 U.S. 691 (1987) (junkyard owner required to hold state license). Even in cases in which the Court held that the "closely regulated industry" exception did not apply, it emphasized that the exception depended on an individual's choice to pursue a certain kind of business opportunity. *See Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978) (exception applies where one has "voluntarily chosen to submit himself to a full arsenal of government regulation"); *Almeida-Sanchez v. U.S.*, 413 U.S. 266, 271 (1973) (exception inapplicable because subject "was not engaged in any regulated or licensed business").

The Eighth Circuit's opinion below represents a dramatic and dangerous expansion of the "closely regulated industry" doctrine. Absent any evidence that Calzone was engaged in business related to the professional commercial trucking industry, the court relied upon the fact that his farm truck is subject to a mishmash of state and federal regulations to conclude that Calzone had surrendered his Fourth Amendment protections. Even though the Eighth Circuit candidly acknowledged that Calzone was exempt from a vast swath of the regulations applicable to those who transport people and property for hire, the court placed

no importance on this fact and instead leaped to the conclusion that Calzone was subject to the "closely regulated industry" exception.

The Eighth Circuit's conclusion cannot be reconciled with this Court's reasoning in *City of Los Angeles v. Patel*, 135 S.Ct. 2443 (2015). The hotel owners in that case had made the choice to engage in a business that required compliance with a range of regulations, including requirements to maintain a business license, collect taxes, conspicuously post their rates, and ensure sanitary standards. But having reviewed this list of regulatory burdens this Court held that that it was "more akin to the widely applicable minimum wage and maximum hour rules that the Court rejected" in *Barlow's Inc. Id*. at 2455. "If such general regulations were sufficient to invoke the closely regulated industry exception, it would be difficult to imagine a type of business that would not qualify." *Id*. This Court concluded that even though these hotel owners had voluntarily consented to these regulations, there was no reason to infer that the owners had surrendered their Fourth Amendment protections.

The regulations applicable to the hotel owners in *Patel* were more extensive, more coherent, and more relevant to their business operations than the assortment of regulations the Eighth Circuit identified as being applicable to Calzone and his farm truck. Consequently, the Eighth Circuit's ruling in the instant case represents a dramatic and indefensible departure from this Court's guidance.

II. This Court should resolve the split among circuit courts as to whether the Fourth Amendment allows law enforcement officers to exercise unlimited discretion regarding whom they will subject to warrantless searches and seizures.

The Eighth Circuit's decision deepened a jurisdictional split as to whether the Fourth Amendment permits executive and administrative officers to exercise unlimited discretion when deciding whom they will subject to warrantless seizures and searches. The Sixth, Eighth, and Eleventh Circuits have concluded that the Fourth Amendment requires no restraint as to the process through which these officers select targets for warrantless inspections. The Ninth Circuit and at least four state appellate courts have reached the opposite conclusion, holding that the Fourth Amendment requires there to be some law or policy in place to limit the discretion of those officers empowered to conduct suspicionless searches. In an unusual development, the Fifth Circuit has shifted its stance on this question, recently clarifying its position that granting these officers unlimited discretion in choosing whom to subject to warrantless searches is inconsistent with the Fourth Amendment. This split in opinion is now well developed and this case presents a clean fact pattern in which to address the question.

In *New York v. Burger*, this Court articulated a three-part test to gauge whether a particular warrantless inspection in the context of a "closely regulated industry" could be considered "reasonable" or whether

the inspection would violate even the reduced limitations of the Fourth Amendment. The third prong of the *Burger* test asks whether the inspection program in question (1) adequately notifies the owner of the property to be searched that the search is being made pursuant to law and has a properly defined scope, and (2) limits the discretion of the inspecting officers. *Id*. at 703. Lower courts all over the country are divided over the extent to which the Fourth Amendment requires laws or policies that will limit an inspecting officer's discretion when determining which persons or properties the officer will inspect.

This is a constitutional question the importance of which this Court has repeatedly emphasized. Long before it issued its opinion in *Burger*, this Court explained that one of the purposes of the "warrant machinery contemplated by the Fourth Amendment" was to insulate property owners from overzealous government intrusion—requiring a disinterested third party to "warrant" the need for a search meant that property owners would not be "subject to the discretion of the officer in the field." *Camera v. Municipal Court of the City and County of San Francisco*, 387 U.S. 523, 532 (1967). Concurring with the majority opinion in *Almeida-Sanchez v. U.S.*, Justice Powell cautioned that the Fourth Amendment "does not contemplate the executive officers of Government as neutral and disinterested magistrates," insisting that "those charged with . . . investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks." *Id*. Years later

this Court again warned that "[t]he authority to make warrantless searches devolves almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to search and whom to search." *Barlow's, Inc.*, 436 U.S. at 323; *see also Delaware v. Prouse*, 440 U.S. 648, 661 (1979) (describing "standardless and unconstrained discretion . . . of the official in the field" to stop "apparently safe drivers" as an evil worthy of constraint).

The Ninth Circuit has ruled that the Fourth Amendment requires limits on inspecting officers' discretion, holding unconstitutional a roving vehicle stop by Fish and Wildlife officers of commercial fishermen for the purpose of inspecting their catch. *Tarabochia v. Adkins*, 766 F.3d 1115 (9th Cir. 2014). The panel confirmed that commercial fishing is a closely regulated industry, but noted that for a warrantless search to be valid the government still needed to show not only that a statute authorized such a search, but also that the statute appropriately limited officers' discretion to search. *Id.* at 1123-24. Although the administrative officials in *Tarabochia* claimed that a particular statute authorized their actions, the court pointed out that even if the cited statute conferred the authority the officials claimed, the search would still be improper because the statute "does not provide any standards to guide inspectors . . . in their selection of [automobiles] to be searched[.]" *Id*. at 1124 (citing *Donovan*, 452 U.S. at 601).

The Fifth Circuit recently came to a similar conclusion in *Zadeh v. Robinson*, 928 F.3d 457 (5th Cir.

July 2, 2019), when applying the *Burger* test to a statute that authorized the warrantless inspection of pain management clinics. The statute at issue limited the inspecting officers' discretion in several ways—the target of the inspection must be a pain management clinic, the regulatory board itself would perform the inspection, and the search had to focus on determining compliance with the rules applicable to pain management clinics. But the court nonetheless ruled that the inspection scheme was unconstitutional because it "did not limit how the clinics inspected are chosen." *Id*. at 468.

The Sixth and Eleventh Circuits have come to the opposite conclusion when it comes to the third prong of the *Burger* test. In *U.S. v. Branson*, 21 F.3d 113 (6th Cir. 1994), the Sixth Circuit reversed a district court's decision that an administrative inspection scheme did not adequately restrict the inspectors' discretion, holding instead that the officers' reasons for inspecting the subject property were not material. *Id*. at 117. In *U.S. v. Steed*, 548 F.3d 961 (11th Cir. 2008), the court observed that four state appellate courts[2] had struck down inspection statutes for failure to limit officers' discretion regarding which vehicles to inspect, but concluded that it was "difficult to reconcile" those cases with *Burger* because the record in *Burger* did not

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[2] *State v. McClure*, 74 S.W.3d 362, 373-76 (Tenn. Crim. App 2001); *State v. Landrum*, 739 N.E.2d 1159, 1165 (Ohio Ct. App. 2000); *State v. Hone*, 866 P.2d 881, 883 (Ariz. Ct. App. 1993); *Com. v. Bizarria*, 578 N.E.2d 424, 429 (Mass. Ct. App. 1991).

reveal why the officers had decided to inspect his business. *Id.* at 974.

Lower courts' confusion as to what, precisely, the third prong of the *Burger* test requires is perhaps best indicated by the fact that before the Fifth Circuit held in *Zadeh* that a warrantless inspection scheme must restrict the inspectors' discretion as to whom would be subjected to such a search, it seemed to indicate the opposite conclusion in *U.S. v. Fort*, 248 F.3d 475 (5th Cir. 2001). In *Fort* the Fifth Circuit was analyzing a statute similar to § 304.230, which authorized warrantless vehicle stops along Texas highways. The *Fort* court first noted that the statute provided vehicle owners adequate notice that inspectors could seize and search their vehicles, adding that the statute "limits the discretion of the inspecting officers." But the court then proceeded to say that the statutes "are subject to criticism for failing to provide specific limitations on the officer's discretion in making the decision to stop." *Id*. at 482. Whatever criticism the court might have thought appropriate, however, it upheld (based on "background testimony") the constitutionality of the warrantless stop at issue in that case. The *Zadeh* court faintly acknowledged that its conclusion on this point was inconsistent with the outcome in *Fort*, but appears not to have directly repudiated the earlier case. *Zadeh*, 928 F.3d at 470.

In the course of this litigation Calzone plainly and repeatedly insisted that the stop of his vehicle was unconstitutional in part because it was initiated by a highway patrol officer exercising unlimited

discretion as to which commercial vehicles he would seize and search. App. 22. The Eighth Circuit's July 26, 2019 opinion gave short shrift to this argument. App. 9. There is no question, however, that Calzone raised the issue in his Complaint and continued to press the argument throughout this litigation. Due to the growing division among this nation's lower courts as to whether the Fourth Amendment allows investigative officers in the field to have unlimited discretion when it comes to whom they will seize and search, this Court needs to squarely consider and resolve this issue.

III. This case is an ideal vehicle for clarifying these issues.

The record and the legal issues in this case are cleanly presented. There is no dispute over any of the material facts as the lower courts granted the government summary judgment as to Count I of Calzone's Complaint and judgment on the pleadings as to Count II of his Complaint.

The record confirms that Calzone does not do business as a professional commercial trucker, and the lower courts acknowledged that because of the limitations on how Calzone uses his truck, he and his truck are subject to only a relative handful of regulations. If, as Calzone has argued, this Court's precedent limits the "closely regulated industry" exception to circumstances in which a person has chosen to do business in the relevant industry, then Calzone enjoyed the full protections of the Fourth Amendment when he was

subjected to the suspicionless seizure of his farm vehicle on June 3, 2013.

The second question presented is similarly free from any factual dispute. When the highway patrol officer decided to initiate the roving, suspicionless stop of Calzone's truck he had not observed any violation of the law and he had unlimited discretion to stop any commercial vehicle he desired. This Petition has shown that the Fifth and Ninth Circuits have held that the Fourth Amendment forbids an executive or administrative officer to exercise this sort of unlimited discretion in initiating a warrantless, suspicionless search or seizure, while the Sixth, Eighth, and Eleventh Circuits have held that this level of discretion is constitutionally permissible. The Court should grant this Petition for the purpose of resolving this circuit split and ensuring the uniform application of this constitutional principle throughout the nation.

CONCLUSION

This Court has quite properly insisted that the "closely regulated industry" exception to the Fourth Amendment must not be allowed to swallow the general rule that persons have the right be free from unreasonable searches and seizures. This case demonstrates that the nation's lower courts are struggling to understand and enforce the proper boundaries of this exception, and it also offers the Court a prime opportunity to provide needed clarification. This case also

presents an opportunity for the Court to resolve a significant circuit split on the question of whether the Fourth Amendment permits executive or administrative officials in the field to exercise unlimited discretion as to which persons or property they will subject to a suspicionless search and seizure. This Court should grant certiorari in this matter for the purpose of addressing these important constitutional questions.

Respectfully submitted,

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