NO. _____

IN THE

Supreme Court of the United States

JOHN KELSEY GAMMELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

ROBERT D. RICHMAN
P.O. BOX 16643
ST. LOUIS PARK, MN 55416
651.278.4987
robert.richman@gmail.com

RACHEL K. PAULOSE
UNIVERSITY OF ST. THOMAS
SCHOOL OF LAW
1000 LASALLE AVENUE
MINNEAPOLIS, MN 55403
651.962.4823
rachel.paulose@stthomas.edu

Counsel for Petitioner

QUESTION PRESENTED

In *Taylor v. United States*, 495 U.S. 575, 588-89 (1990), this Court held that in determining whether a particular state crime constitutes "burglary" for purposes of the Armed Career Criminal Act ("ACCA"), the courts are to apply a categorical approach that looks to the statutory elements of the offense, not the facts of the particular case, to determine if the offense comports with or is narrower than the generic definition formulated by the *Taylor* Court.

1. In determining whether a burglary conviction based on an aiding and abetting theory qualifies as an enumerated burglary under the ACCA, does the categorical approach apply to both the burglary statute and the aiding and abetting doctrine, such that a burglary conviction based on an overbroad aiding and abetting statute does not constitute generic burglary?

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John Kelsey Gammell respectfully 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 opinion of the court of appeals (App., *infra*, 1a-14a) is reported at 932 F.3d 1175 (8th Cir. 2019). The denial of Mr. Gammell's petition for rehearing *en banc* is unreported (App., *infra*, 15a). The district

court's order denying Mr. Gammell's motion is unreported (App., *infra*, 16a-22a).

JURISDICTION

A divided panel of the United States Court of Appeals for the Eighth Circuit entered judgment on August 8, 2019, with a concurring opinion by Judge Kobes. The court of appeals denied a petition for rehearing *en banc* on October 15, 2019. Two judges of the court of appeals voted to grant the petition for rehearing *en banc*. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924(e)(1) provides in relevant part:

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years.

18 U.S.C. § 924(e)(2)(B) states, in relevant part, as follows:

> The term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device

that would be punishable by imprisonment for such term if committed by an adult, that—

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, [or] involves use of explosives.

Minn. Stat. § 609.05 (1982) states in relevant part:

> **Liability for Crimes of Another.**
>
> Subd. 1. **Aiding, abetting; liability.** A person is criminally liable for a crime committed by another if he intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime.
>
> Subd. 2. **Expansive liability.** A person liable under subdivision 1 is also liable for any other crime committed in pursuance of the intended crime if reasonably foreseeable by him as a probable consequence of committing or attempting to commit the crime intended.
>
> . . . .
>
> Subd. 4. **Circumstances of conviction.** A person liable under this section may be charged with and convicted of the crime although the person who directly committed it has not been convicted or has

been convicted of some other degree of the crime or of some other crime based on the same act.

STATEMENT OF THE CASE

On January 17, 2018, John Kelsey Gammell pleaded guilty to a three-count Amended Information. Counts II and III charged Felon in Possession of a Firearm in the Districts of Colorado and New Mexico in violation of 18 U.S.C. § 922(g)(1) (2012). *See* DCD No. 77.

The Honorable Judge Wilhelmina M. Wright presided over sentencing proceedings on May 17, 2018. Over Mr. Gammell's objection, Judge Wright determined Mr. Gammell was subject to the enhanced penalties of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), on the basis of the following three state felony convictions, committed decades ago when Mr. Gammell was still a teenager:

- April 30, 1981 Hennepin County District Court conviction for aggravated robbery, PSR ¶ 58;
- July 6, 1981 Hennepin County District Court conviction for aggravated robbery, PSR ¶ 59; and
- January 25, 1984 Hennepin County District Court conviction for aiding and abetting second degree burglary, PSR ¶ 60.

This had the effect of enhancing Mr. Gammell's sentence from a maximum of ten years to a mandatory minimum of fifteen years and a maximum of life on each count. The district court sentenced Mr. Gammell to the fifteen year mandatory minimum as to Counts II and III, to be served concurrently. DCD No. 109.

Mr. Gammell filed a timely notice of appeal on June 1, 2018 challenging his classification under the ACCA. DCD No. 122. He argued on appeal, as he had in the district court, that his 1984 conviction for aiding and abetting second degree burglary was categorically overbroad because Minnesota's aiding and abetting statute was broader than generic aiding and abetting. As a result, a defendant could be convicted of aiding and abetting burglary in Minnesota even though his offense conduct would not satisfy the generic definition of burglary.

The issue divided the panel. The majority opinion of the panel held that the categorical approach adopted by this Court in *Taylor v. United* States, 495 U.S. 575 (1990) did not apply to the aiding and abetting statute, but only to the substantive offense. *United States v. Gammell*, 932 F.3d 1175 (8th Cir. 2019). Because aiding and abetting is not an independent criminal offense but only a theory of criminal liability, the majority reasoned,"[i]t matters not whether Gammell was convicted as a principal or aider or abettor; it matters only whether the substantive offense qualifies as a violent felony." *Id.* at 1180.

Judge Kobes, concurring, disagreed. He observed that *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), and *United States v. Boleyn*, 929 F.3d 932 (8th Cir. 2019) required the Court to determine whether "there is 'something special' about Minnesota aiding and abetting that makes it broader than generic aiding and abetting." *Gammell*, 932 F.3d at 1182 (Kobes, J., concurring).

The Court of Appeals subsequently denied Mr. Gammell's motion for rehearing *en banc*, with two judges voting to grant the motion. *See* App., *infra*, 15a.

REASONS FOR GRANTING THE PETITION

The circuits are divided on whether, in determining whether a conviction based on an aiding and abetting theory qualifies as an enumerated offense under the ACCA, the *Taylor* categorical approach, adopted to determine whether the conviction satisfies the generic definition of burglary, applies to both the burglary statute and the aiding and abetting doctrine.

Two circuits, the Ninth and Eleventh, following the reasoning of this Court in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007) in the immigration context, apply the categorical approach to both the underlying offense and the aiding and abetting theory of liability. *See Bourtzakis v. United States Attorney General*, 940 F.3d 616, 622 (11th Cir. 2019); and *United States v. Valdivia-Flores*, 876 F.3d 1201 (9th Cir. 2017).

The Eighth Circuit disagrees, rejecting the views of its sister circuits as well as an earlier decision of its own court. *Compare Gammell*, 932 F.3d 1175, *with United States v. Boleyn*, 929 F.3d 932 (8th Cir. 2019).

The split among the circuits, between panels of the Eighth Circuit, and among the judges of the *Gammell* panel reflect the confusion that exists in the lower courts on how to analyze convictions based on an aiding and abetting theory of criminal liability. The resolution of that confusion may make the difference between whether a defendant faces a maximum

sentence of ten years or a mandatory minimum term of fifteen years and a maximum of life.

Properly analyzed, John Kelsey Gammell is not an armed career criminal under the terms of the statute, as interpreted by this Court. Mr. Gammell's state court conviction for aiding and abetting second degree burglary is not a predicate crime of violence under the ACCA because the Minnesota aiding and abetting statute, phrased substantially more broadly than generic aiding and abetting, when coupled with generic burglary, sweeps within its ambit conduct which is not a violent felony.

This Court should grant this petition to resolve the split in the circuits and provide badly needed guidance to the lower courts on this issue.

I. The ACCA Legal Framework Requires the Categorical Analysis.

The ACCA, 18 U.S.C. § 924(e)(2), includes "burglary" as one of the offenses that may serve as a predicate "violent felony" for enhanced punishment under that statute. In determining whether a particular state crime constitutes "burglary" under the statute, the courts apply a categorical approach that looks to the statutory elements of the offense, not the facts of the particular case, to determine if the offense comports with or is narrower than the generic definition formulated by the Supreme Court. *See Taylor,* 495 U.S. at 588-89. The *Taylor* Court recognized that when it enacted the ACCA, Congress "had in mind a modern 'generic' view of burglary, roughly corresponding to the definitions of burglary in a majority of the States' criminal codes." *Id.* at 589. "[I]f the crime of conviction

covers *any more* conduct than the generic offense, then it is not an ACCA 'burglary.'" *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016) (emphasis added).

This is so "even if the defendant's actual conduct (*i.e.*, the facts of the crime) fits within the generic offense's boundaries." *Id.*

> Because we examine what the state conviction necessarily involved, not the facts underlying the case, we must presume that the conviction 'rested upon nothing more than the least of the acts' criminalized, and then determine whether even those acts are encompassed by the generic federal offense.

Moncrieffe v. Holder, 569 U.S. 184, 190-91 (2013) (*quoting Johnson v. United States*, 559 U.S. 133, 137 (2010)).

Just as a state burglary statute could be too broad in the classic *Taylor* model by sweeping in conduct that goes beyond the generic definition of burglary, so too could an otherwise conforming burglary statute flunk the *Taylor* analysis by virtue of an overbroad aiding and abetting theory of liability.

Imagine, for example, that a state extended aider and abettor liability to anyone who aids, abets, counsels, *or lives with* the person who commits a crime. If a defendant were then convicted of being an aider and abettor to a burglary on the basis of living with the burglar, that statutory scheme would fail the *Taylor* test. Specifically, our hypothetical statute would sweep within its ambit conduct that would exceed the generic

definition of burglary, regardless of whether the expansive accessory liability is included as an element of the burglary statute or in a separate aiding and abetting statute. Either way, a statutory scheme that criminalizes as "burglary" living with a burglar is broader than generic burglary.

This Court applied a *Taylor* analysis to aiding and abetting in *Duenas-Alvarez*, 549 U.S. at 190-92. Although that case arose in the immigration context, the Court explicitly applied the same categorical analysis under *Taylor* applicable here.

The issue in *Duenas-Alvarez* was whether California's vehicle theft statute satisfied the generic definition of theft for purposes of the removal statute, which makes generic theft a basis for deportation. *Id.* at 188. The Ninth Circuit had held that the accomplice liability included in the statute *necessarily* made the statute broader than generic theft because one could aid or abet theft without actually taking the property of another.

The Supreme Court rejected this argument. Noting that every jurisdiction has abrogated the common law distinction between principals and aiders and abettors, the Court held that "'the generic sense in which' the term 'theft' 'is now used in the criminal codes of most States,' . . . covers such 'aiders and abettors' as well as principals." *Id.* at 190. (*quoting Taylor*, 495 U.S. at 598).

Nonetheless, the Court agreed that if there were "something special" about the state's application of the aiding and abetting doctrine, such that it criminalized conduct beyond the generic understanding of

accomplice liability, the defendant would "succeed" in establishing that the underlying conviction does not satisfy the generic definition. *Id.* at 191. Thus, the Court undertook a *Taylor* analysis of the challenged aiding and abetting statute to determine whether it criminalized conduct beyond the generic definition. *Id.* Although Mr. Duenas-Alvarez fell short of the mark, the Court acknowledged a future case might recognize something "special" about a state aiding and abetting statute which would place it outside the mainstream generic definition.

II. The Circuit Are Split on Whether the Categorical Approach Applies to Aiding and Abetting Statutes.

In the years since this Court handed down *Duenas-Alvarez*, circuit courts have applied it unevenly. Presently, a 2-1 circuit split exists as to what *Duenas-Alvarez* means. On one side of the divide are the Ninth and Eleventh Circuits. The Eighth Circuit finds itself in the chaotic position of an intra-circuit split, with one panel following the Ninth and Eleventh Circuits, while Mr. Gammell's panel rejected the reasoning of its sister circuits.

A. The Ninth Circuit Subjects Aiding and Aiding Statutes to Categorical Analysis.

The Ninth Circuit applies the categorical analysis to both the underlying offense as well as the theory of liability in ACCA cases. The Ninth Circuit found the "special" aiding and abetting exception predicted by the *Duenas-Alvarez* Court in *Valdivia-Flores*, 876 F.3d at 1210.

In *Valdivia-Flores*, the defendant was subject to deportation as a result of a Washington state drug trafficking conviction. He argued that the Washington conviction was broader than the generic definition of drug trafficking, not because of the terms of the drug statute, but rather because of the scope of accomplice liability in Washington. "Critically, he says, Washington defines aiding and abetting more broadly than does federal law so that Washington forbids more conduct." *Id.* at 1207. The Ninth Circuit agreed. Specifically, the court determined that to establish accomplice liability, Washington requires mere knowledge that one's act will further the crime, whereas federal law insists upon specific intent. *Id.* Reviewing the plain language of the statute as well as the state court's case law interpreting it, the Ninth Circuit determined the Washington aiding and abetting statute was broader than its federal analogue, and therefore the drug offense could not be classified as an aggravated felony:

> Where, as here, a state statue explicitly defines a crime more broadly than the generic definition, no 'legal imagination' is required to hold that a realistic probability exists that the state will apply its statue to conduct that falls outside the generic definition of the crime.

Id. at 1208.

B. The Eleventh Circuit Subjects State Aiding and Abetting Doctrines to Categorical Analysis

The Eleventh Circuit also has embraced the task of engaging the categorical analysis to both the government's theory of liability as well as the substantive offense in the complex business of categorizing prior offenses. *See Bourtzakis*, 940 F.3d at 622 (11th Cir. 2019). Writing for the *Bourtzakis* court, Judge Pryor applied the categorical analysis to a state accomplice liability statute as well as a state drug delivery statute in an immigration case. Critically, the court found it was duty bound by this Court's analysis in *Duenas-Alvarez* to determine if there was a "realistic probability" that the state statutes, specifically including the theory of accomplice liability, swept more broadly than the federal understanding. *Id.* The Eleventh Circuit undertook a comprehensive comparison of the state definition of aiding and abetting to the federal *Rosemond* generic definition requiring intent as the level of scienter in an analysis that composed the bulk of the court's decision. *Id. See Rosemond v. United States*, 572 U.S. 65, 71 (2014).

Although the court ultimately found the state definition no broader than the federal definition because the *mens rea* components did not differ substantively, the Eleventh Circuit explicitly acknowledged it was following the *Duenas-Alvarez* model in separately reviewing the accomplice theory of liability as well as the elements of the underlying offense. *Bourtzakis*, 940 F.3d at 622.

C. The Eighth Circuit Has a Conflict Between Separate Panels.

In *Boleyn*, 929 F.3d at 937 n.3, the Eighth Circuit applied the *Duenas-Alvarez* analysis in the ACCA context and considered whether the Iowa aiding and abetting doctrine "is broader than the generic definition of aiding and abetting." Although the court ultimately determined that Iowa aiding and abetting is not overbroad, *id.*, it rejected the government's contention that the *Taylor* categorical approach applied only to the offense of conviction, not the aiding and abetting theory of liability. *Id.* Citing *Duenas-Alvarez,* Judge Loken explained that "it is consistent with the [*Taylor*] categorical approach to look to Iowa's aiding and abetting statute in determining whether the prior offense of conviction is overbroad." *Id.*

By contrast in this case, the panel majority refused to apply the *Duenas-Alvarez* analysis to Minnesota's aiding and abetting statute. Instead, the majority relied on this Court's acknowledgement in *Duenas-Alvarez* that every jurisdiction has abrogated the common law distinction between aiders and abettors and principals. *Duenas-Alvarez*, 549 U.S. at 189. As a result, this Court noted, the generic sense in which substantive offenses are defined by the states, include aiding and abetting liability. *Id.* Because aiders and abettors are indistinguishable from principals for purposes of criminal liability, the *Gammell* majority reasoned, "it matters not whether Gammell was convicted as a principal or aider or abettor," as long as the substantive offense is a violent felony. *Gammell*, 932 F.3d at 1180.

Mr. Gammell does not dispute that the Minnesota burglary statute under which he was convicted satisfies the generic definition of burglary under the ACCA. Nor does he dispute that conviction as an aider and abettor does not, by virtue of that fact alone, disqualify the conviction as an ACCA predicate. *See United States v. Salean*, 583 F.3d 1059, 1060 n.2 (8th Cir. 2009). The question here is whether Minnesota's aiding and abetting statute is so broad that when coupled with burglary, it sweeps within its ambit conduct that would not be considered generic burglary.

III. This Court Should Grant the Petition to Clarify the Meaning of *Duenas-Alvarez*.

The split in the circuits and between panels within the Eighth Circuit reflects the confusion in the lower courts about how to address the various aiding and abetting statutes of the fifty states. The fates of hundreds of criminal defendants whose putative violent felony convictions rely on an aiding and abetting theory of liability hang in the balance. If their convictions are overbroad, they should not be subject to the enhanced penalties of the ACCA, regardless of whether the source of the overbreadth is the substantive offense or the aiding and abetting statute.

Ironically, both sides in this debate take their support from *Duenas-Alvarez.* The *Gammell* majority pointed to the abrogation of the distinction between principals and aiders or abettors, *Duenas-Alvarez*, 549 U.S. at 189, from which it drew the faulty conclusion that the scope of the aiding and abetting statute was irrelevant. The concurring opinion, as well as the Ninth and Eleventh Circuits, relied instead on this Court's examination of whether there was "something special" about the aiding and abetting statute at issue there that would result in the state "criminaliz[ing] conduct that most other states would not consider 'theft.'" *Id.* at 191.

The *Gammell* panel's majority opinion cannot be reconciled with *Duenas-Alvarez*, *Boleyn*, *Valdivia-Flores,* and *Bourtzakis*. The panel's holding that the categorical analysis applies only to the underlying offense, not the aiding abetting statute, was expressly rejected by *Boleyn*, *Valdivia-Flores*, and *Bourtzakis*. More importantly, the panel's holding is inconsistent with *Duenas-Alvarez.* As all those courts made clear, if there is "something special" about an aiding and abetting doctrine, such that it allows conviction for burglary based on conduct that would not be considered burglary by most states, the resulting conviction would not be an ACCA predicate offense. *Duenas-Alvarez*, 549 U.S. at 191; *see Boleyn*, at 937 n.3. Judge Kobes, in his concurring opinion, correctly recognized that *Duenas-Alvarez* "requires us to analyze whether there is 'something special' about Minnesota aiding and abetting that makes it broader than generic aiding and abetting." *Gammell,* 932 F.3d at 1182 (Kobes, J., concurring).

This Court has not considered aiding and abetting in the context of the ACCA. The lower courts disagree about the meaning of *Duenas-Alvarez.* This Court's guidance is needed to address the conflict.

IV. This Case is an Ideal Vehicle to Resolve the Conflict.

A. Mr. Gammell's Sentence Will Fall From a Mandatory Fifteen Years to No More Than a Maximum Ten Years Should He Prevail.

The ACCA is strong medicine, converting the otherwise applicable statutory maximum of ten years into a mandatory minimum term of fifteen years and a maximum of life. Mr. Gammell received a sentence of fifteen years. If the ACCA does not apply, he will face a ceiling of ten years.

Mr. Gammell's aiding and abetting burglary conviction is one of three predicate convictions for his ACCA classification. Without the aiding and abetting burglary conviction, Mr. Gammell would not be subject to enhanced punishment. The issue in this case is not academic; it has real world consequences for a man whose youthful transgressions have come back to haunt him unfairly.

The issue was preserved in the district court and on appeal.

B. The Minnesota Aiding and Abetting Doctrine is Overbroad.

Moreover, Minnesota's aiding and abetting statute does not fit the mold of most other states. It has the "something special" required by *Duenas-Alvarez,* which makes the Minnesota statute stand apart as overbroad.

A defendant commits generic aiding and abetting when he (i) acts affirmatively in furtherance of the offense; and (ii) acts with the intent to facilitate the offense. *See Rosemond v. United States*, 572 U.S. at 71. By contrast, Minnesota courts do not require an affirmative act to establish aiding and abetting liability. "Active participation in the overt act which constitutes the substantive offense is not required." *State v. Ostrem*, 535 N.W.2d 916, 924 (Minn. 1995). Although mere presence at the scene of a crime is alone not sufficient, when the defendant "takes no steps to thwart its completion," it is. *Id. See State v. Parker*, 164 N.W.2d 633, 641 (Minn. 1969) ("If the proof shows that a person is present at the commission of a crime without disapproving or opposing it," evidence is sufficient to establish aiding and abetting); *State v. Merrill*, 428 N.W.2d 361, 367 (Minn. 1988) ("some knowing role" plus failure to thwart crime is sufficient). For that reason, "inaction is often the distinguishing characteristics of the aider and abettor." *Parker*, 164 N.W.2d at 641.

In *Ostrem*, the Minnesota Supreme Court upheld a conviction for aiding and abetting second degree burglary where the evidence showed the defendant was merely present at the scene of the crime. Although the

defendant protested that his mere presence and inactivity during the crime was insufficient to impose liability, the court rebuffed this argument, explaining that "[c]ertainly mere presence on the part of each would be enough if it is intended to and does aid the primary actors." *Ostrem*, 535 N.W.2d at 925. The court could not identify a single fact in the record pointing to any actions by which the defendant helped further the crime. Instead, the court repeated oft-cited Minnesota state precedent asserting that "a person's presence, companionship, and conduct before and after an offense are relevant circumstances from which a person's criminal intent may be inferred." *Id.* at 924. The court then inferred intent from the defendant's "long term association" with his co-defendants, asserting this relationship indicated defendant "must have known" of the crime. *Id.* at 925. Piling inference upon inference, the court sustained the defendant's conviction. *Id.* at 926.

The Minnesota aiding and abetting statute is also overbroad because, like only three other states, it extends aiding and abetting liability to conspiracy. In other words, the Minnesota statute criminalizes as an aider and abettor one who merely conspires to commit the underlying offense. *See* Minn. Stat. § 609.05. Notably, conspiracy, unlike generic aiding and abetting, requires no overt action by a particular defendant in furtherance of the offense; it is sufficient that only one co-defendant commit an affirmative act. *Pinkerton v. United States*, 328 U.S. 640, 646-47 (1946). By contrast, as discussed *supra*, generic aiding and abetting requires that the defendant personally take action with unlawful intent. *Rosemond*, 572 U.S. at

71. Minnesota's failure to require an aider and abettor to commit an act in furtherance of the crime places it outside the generic definition of aiding and abetting.

Judge Kobes, the only member of the panel to evaluate the Minnesota courts' aiding and abetting jurisprudence, agreed that the case law "arguably supports [Mr. Gammell's] position" that Minnesota aiding and abetting is overbroad. Moreover, he noted that if Minnesota courts used a conspiracy theory to convict a defendant as an aider and abettor, as § 609.05 explicitly permits, "its aiding and abetting doctrine would likely be broader than the generic version." *Gammell,* 932 F.3d at 1184 (Kobes, J., concurring). Nonetheless, asserting that Mr. Gammell had failed to cite any case in which aiding and abetting liability was applied in this way, Judge Kobes concluded that the case law is "in line with the federal definition of aiding and abetting." *Gammell,* 932 F.3d at 1183 (Kobes, J., concurring).

Because of the conflict noted above, the rest of the panel did not address the scope of the Minnesota aiding and abetting statute.

Before Mr. Gammell is subjected to the enhanced punishment of the ACCA, his Minnesota conviction for aiding and abetting second degree burglary should be reviewed under the full categorical analysis adopted by this Court in *Duenas-Alvarez* and required by the Ninth, Eleventh, and one panel of the Eighth Circuit.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT D. RICHMAN
P.O. BOX 16643
ST. LOUIS PARK, MN 55416
651.278.4987
robert.richman@gmail.com

RACHEL K. PAULOSE
UNIVERSITY OF ST. THOMAS
SCHOOL OF LAW
1000 LASALLE AVENUE
MINNEAPOLIS, MN 55403
651.962.4823
rachel.paulose@stthomas.edu

Counsel for Petitioner

January 6, 2020