

No. ____

In the
Supreme Court of the United States

MICHELLE MANOR AND OREN MANOR,

PETITIONERS,

v.

ALEJANDRO N. MAYORKAS, ET AL.,

RESPONDENTS.

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

PETITION FOR A WRIT OF CERTIORARI

Robert L. Sirianni, Jr., Esq.
Counsel of Record
BROWNSTONE, P.A.
P.O. Box 2047
Winter Park, Florida 32790-2047
robertsirianni@brownstonelaw.com
(o) 407-388-1900
(f) 407-622-1511
Counsel for Petitioners

QUESTIONS PRESENTED FOR REVIEW

Whether the Ninth Circuit erred in finding that the Manors waived the issue that the trial court erred in relying upon unreliable statements made during a coercive interrogation and by giving too much weight to beliefs about what a marriage looks like to support its finding of marriage fraud?

Whether the Ninth Circuit correctly applied the *Matthews* factors in rendering its decision?

Whether the Ninth Circuit's opinion affirming the District Court's judgment is unconstitutionally vague violating the Petitioners' due process rights?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings before this Court are as follows:

Michelle and Oren Manor.

Alejandro N. Mayorkas, Secretary, Department of Homeland Security

Merrick B. Garland, Attorney General

Mendoza Jaddou, Director, U.S. Citizenship and Immigration Services

Anne Arries Corsana, District Director, U.S. Citizenship and Immigration Services

Anya Ronshaugen, Portland Field Office Director, U.S. Citizenship and Immigration Services,

LIST OF PROCEEDINGS

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

District Court Case No. 3:18-cv-00522-AC

MICHELLE MANOR and Oren Manor v. Kirstjen NIELSEN, Secretary, Department of Homeland Security, et al.

Judgment Dated 7/6/2020 DISMISSING Plaintiff's Motion for Summary Judgment and GRANTING Defendant's Cross-motion for Summary Judgment.

Manor v. Nielsen, No. 3:18-CV-00522-AC, 2020 WL 4457824 (D. Or. July 6, 2020).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
Case No. 3:18-cv-00522-AC
MICHELLE MANOR and OREN MANOR v. Jefferson
B. SESSIONS
Judgment Dated 7/31/2021 DISMISSING Plaintiff's
Motion for Summary Judgment and GRANTING
Defendant's Cross-motion for Summary Judgment
Manor v. Sessions, No. 3:18-CV-00522-AC, 2020 WL
4451043 (D. Or. July 31, 2020).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
Case No. 20-35720
MICHELLE MANOR and OREN MANOR v.
Alejandro N. MAYORKAS, et al.
Judgment Dated 10/13/2021 District Court's
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Manor v. Mayorkas, No. 20-35720, 2021 WL 4777000
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PETITION FOR A WRIT OF CERTIORARI

The Petitioners respectfully request that a Writ of Certiorari be issued to review the Court of Appeals for the Ninth Circuit's affirmance of the denial of their motion for summary judgment in the District Court.

OPINIONS BELOW

The July 6, 2020, verdict from the District Court of Oregon, Portland Division reproduced in the Appendix. ("Pet. App. 9a").

The July 31, 2020, decision from the District Court of Oregon is reproduced in the Appendix. ("Pet. App. 6a").

The October 13, 2021, decision from the Court of Appeals for the Ninth Circuit is reproduced in the Appendix. ("Pet. App. 1a").

BASIS FOR JURISDICTION IN THIS COURT

The Court of Appeals for the Ninth Circuit's judgment was rendered on August 24, 2021. Accordingly, this Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

U.S. Const. amend. v.

STATUTORY PROVISIONS INVOLVED

Title 5 U.S.C. § 706(2)(A) provides:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]

5 U.S.C. § 706(2)(A)

Title 8 U.S.C. § 1151(a)(1) provides:

Exclusive of aliens described in subsection (b), aliens born in a foreign state or dependent area who may be issued immigrant visas or who may otherwise acquire the status of an alien lawfully admitted to the United States for permanent residence are limited to . . . family-sponsored immigrants described in section 1153(a) of this title (or who are admitted under section 1181(a) of this title on the basis of a prior issuance of a visa to their accompanying parent under section 1153(a) of this title) in a number not to exceed in any fiscal year the number specified in subsection (c) for that year, and not to exceed in any of the first 3 quarters of any fiscal year 27 percent of the worldwide level under such subsection for all of such fiscal year.

8 U.S.C. § 1151(a)(1).

Title 8 U.S.C. § 1154(1)(A)(ii) provides:

An alien spouse described in the second sentence of section 1151(b)(2)(A)(i) of this title also may file a petition with the Attorney General under this subparagraph for classification of the alien (and the alien's children) under such section.

8 U.S.C. § 1154(1)(A)(ii).

Title 8 U.S.C. § 1151(b)(2)(A)(i) provides:

For purposes of this subsection, the term “immediate relatives” means the children, spouses, and parents of a citizen of the United States, except that, in the case of parents, such citizens shall be at least 21 years of age. In the case of an alien who was the spouse of a citizen of the United States and was not legally separated from the citizen at the time of the citizen’s death, the alien (and each child of the alien) shall be considered, for purposes of this subsection, to remain an immediate relative after the date of the citizen’s death but only if the spouse files a petition under section 1154(a)(1)(A)(ii) of this title within 2 years after such date and only until the date the spouse remarries. For purposes of this clause, an alien who has filed a petition under clause (iii) or (iv) of section 1154(a)(1)(A) of this title remains an immediate relative in the event that the United States citizen spouse or parent loses United States citizenship on account of the abuse.

8 U.S.C. § 1151(b)(2)(A)(i).

STATEMENT OF THE CASE

A. Concise Statement of Facts Pertinent to the Questions Presented.

Mrs. and Mr. Manor's Relationship

Plaintiff Michelle Manor is a United States citizen. She married Plaintiff Oren Manor, an Israeli citizen, on December 2, 2010. (“Pet. App. 10a”) Together, they have three young United States born children.

USCIS Petition

On January 9, 2011, Mrs. Manor filed a form I-130 petition for an alien relative with USCIS on behalf of Mr. Manor. (“Pet. App. 10a”). On September 8, 2016, the Agency denied Mrs. Manor’s petition because it determined Mr. Manor was ineligible under Section 204 of the INA on the ground that he had previously entered into a marriage to evade the immigration laws. (“Pet. App. 10a”). The Agency based its decision on Mr. Manor’s first marriage. (“Pet. App. 10a”). On October 11, 2006, he married Casey Brace. Approximately seven months later, Ms. Brace filed an I-130 petition on his behalf. USCIS approved that petition, but when Mr. Manor sought to adjust his status to a legal permanent resident based on the petition, USCIS denied that request. (“Pet. App. 10a-11a”).

During the pendency of his application to adjust status, he and Ms. Brace attended several interviews with USCIS and responded to several requests for evidence from the Agency. Much of this

time, they were acting *pro se*, without the assistance of an attorney. However, they briefly obtained help for their case from several attorneys. Yet, USCIS continued delaying the approval of the application for several years.

In or around late January and early February 2010, an individual named Chris Paschall¹ called a USCIS tip hotline and claimed Ms. Brace had been paid to marry Mr. Manor. (“Pet. App. 12a”). Exposing his bias, Mr. Paschall identified himself Ms. Brace’s current boyfriend and informed the USCIS that she was pregnant with his child. (“Pet. App. 12a”). Shortly after, Mr. Jeff Klingensmith, father of Ms. Brace’s first child and the man Ms. Brace separated from shortly before entering a relationship with Mr. Manor, also called the tip line to make a similar report without evidence or specifics that Ms. Brace’s marriage was fraudulent. (“Pet. App. 12a”).

Ms. Brace and Mr. Manor appeared for an interview with USCIS on March 4, 2010. (“Pet. App. 13a”). Counsel represented neither at that interview. Ms. Brace was separated from Mr. Manor and interrogated by USCIS Officer Elaine Martin. (“Pet. App. 13a”). During that interview, Officer Martin stated that the USCIS was “never gonna approve” the parties’ applications. She threatened Ms. Brace repeatedly with federal prosecution. She brazenly harassed Ms. Brace about the money she believed (presumably based on Mr. Paschall’s call to the tip line) that Ms. Brace received to marry Mr. Manor.

¹ Coincidentally, this individual was convicted of murder of Ms. Casey Brace and her Grandfather and was a convicted felon prior to his encounter with Ms. Brace.

Officer Martin threatened Ms. Brace with the potential loss of custody of her child, stating this could “affect your ability to be with your child” and asking “who’s going to take care of [Ms. Brace’s daughter]?” Throughout the interrogation, Ms. Brace repeatedly insisted that the marriage was not fraudulent, stating she “married [Mr. Manor] because [she] was actual in love with him” while acknowledging they had “grown apart.” Ms. Brace denied being paid any sum of money to enter the marriage. Ms. Brace acknowledged that she and Mr. Manor did not live together in a traditional sense due to fear of her daughter’s father, who she relied on for childcare, who was prejudiced against foreigners like Mr. Manor. This marriage eventually failed due to personal differences between Ms. Brace and Mr. Manor, exacerbated by Officer Martin’s baseless accusations.

Petition Adjudication

During the adjudication of Mrs. Manor’s petition for Mr. Manor, the USCIS notified both that the Agency intended to deny the petition because his previous marriage with Ms. Brace was fraudulent. To respond, the Manors submitted significant additional evidence to the Agency showing that Ms. Brace and Mr. Manor entered into their marriage in good faith, despite its ultimate failure. The Manors also demanded additional information from USCIS about any derogatory information it was relying on in threatening such a finding, including any statements by Ms. Brace during the March 4, 2010, interview. The Manors also demanded the opportunity to cross-examine Ms. Brace and any other adverse witnesses regarding the USCIS’s reliance on any inculpatory

statement. USCIS ignored their demands. Mr. Manor was interviewed that day by USCIS. Furthermore, Mr. Manor was not given a chance to present the fact that there was no evidence of fraud presented by Officer Martin to Ms. Brace or anyone else perpetuating her claims.

Moreover, in late October 2015, more than two years after the Notice of Intent to Deny, the Agency provided a copy of Ms. Brace's interview recording. The Manors objected to the abusive interview techniques used against Ms. Brace and renewed their request for an evidentiary hearing. Instead, on September 9, 2016, USCIS denied their petition, ultimately leading to this proceeding.

Mr. and Mrs. Manor appealed the USCIS decision denying their petition to the Board of Immigration Appeals, arguing the Agency lacked substantial and probative evidence of marriage fraud and that it had violated their due process rights by relying on Ms. Brace's statements without allowing them the opportunity to cross-examine her or other adverse witnesses. The Board rejected their appeal on July 27, 2017, affirming the decision of the District Director of USCIS.

B. Procedural History

Following the USCIS's affirmance, the Manors timely filed a complaint with the United States District Court for the District of Oregon challenging the decision because it violated the Administrative Procedure Act and their constitutional rights to due process. (Pet. App. 17a). Judge Acosta rejected those arguments and granted Defendants' motion for

summary judgment against Plaintiffs, dismissing their case with prejudice. (Pet. App. 49a). District Court Judge Mosman upheld that decision and entered judgment against the Appellants-Plaintiffs on July 31, 2020. (“Pet. App. 6a”). The Appellant-Plaintiff’s timely appealed the District Court’s decision to the Court of Appeals for the Ninth Circuit. (“Pet. App. 1a”). The Court of Appeals affirmed the District Court’s decision to dismiss the Manors’ case. This Petition for Writ of Certiorari followed.

REASONS TO GRANT THIS PETITION

I. As The Appellate Court Found That The Manor's Did Not Properly Raise The Issue That The Trial Court Relied On Improper Evidence, Trial Counsel's Performance Deprived The Manors Of A Meaningful Opportunity To Be Heard Violating Their Constitutional Right To Due Process.

The Due Process Clause of the Fifth Amendment provides that no person shall “be deprived of life, liberty, or property, without due process of law.” U.S. Const. amend. v. “When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.” *Santosky v. Kramer*, 455 U.S. 745, 753–54, (1982). “The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be ‘condemned to suffer grievous loss.’” *Id.* at 758; *Goldberg v. Kelly*, 397 U.S. 254, 262–263 (1970). The Ninth Circuit holds that due process protections apply to petitions for immediate relative status. *Ching v. Mayorkas*, 725 F.3d 1149, 1156 (9th Cir. 2013). In analyzing due process claims in the immigration context, the question of how much process is due is case-specific. *Id.* The reviewing court uses a *de novo* standard for evaluating due process violation claims. *Liu v. Holder*, 640 F.3d 918, 930 (9th Cir. 2011) (as amended). The reviewing court should apply the *Mathews* factors to make this determination. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). These factors are:

[f]irst, the private interest that will be affected by the official action; *second*, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and *finally*, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. (emphasis added).

In *Ching v. Mayorkas*, the Ninth Circuit reversed a grant of summary judgment upholding the BIA's marriage fraud decision because the petitioners were not allowed to cross-examine the beneficiary's first husband or the USCIS officer who interviewed him even though the BIA had relied on the statement by the former husband when making its finding of a fraudulent marriage. 725 F.3d at 1154–55. In evaluating the *Mathews* factors, the *Ching* court noted that the first factor favored the plaintiffs because “[t]he right to live with and not be separated from one's immediate family is 'a right that ranks high among the interests of the individual' and that cannot be taken away without procedural due process.” *Id.* at 1157 (quoting *Landon v. Plasencia*, 459 U.S. 21, 34–35 (1982)). As to the second *Mathews* factor, the Court explained that because of the risk of erroneous deprivation, “in almost every setting where important decisions turn on questions of fact, due process

requires an opportunity to confront and cross-examine adverse witnesses.” *Id.* at 1158 (citing *Goldberg*, 397 U.S. 269 (1970)). The *Ching* court also opined that in situations where it is necessary to evaluate the circumstances and motives of the statement by the former spouse, this risk is heightened. *See id.* Furthermore, in addressing the third factor, the *Ching* court noted that, although the Government has a substantial interest in preventing those who commit marriage fraud from erroneously receiving benefits, “there is a significant public interest in allowing those who are legitimately married to receive the benefits intended for them.” *Ching*, 725 F.3d at 1158–59; *see also Obergefell v. Hodges*, 135 S.Ct. 2585, 2601–2 (2015) (holding that “as the State itself makes marriage all the more precious by the significance it attaches to it, exclusion from that status” violates the Constitution). Finding that the trial court failed to implement appropriate procedural safeguards, *Ching* court remanded the case to the Agency so that it could hold an evidentiary hearing. *Ching*, 725 F.3d at 1158–59. The Ninth Circuit recently affirmed this reasoning holding, finding there is a protected interest in a benefit even if an individual had not yet proven eligibility for that benefit. *Zerezghi v. U.S. Citizenship & Immigration Servs.*, 955 F.3d 802, 813–16 (9th Cir. 2020).

By failing to raise the issue of the court’s reliance on improper evidence, Mr. Manor’s trial counsel deprived him of the opportunity to receive due process. The Manors’ case factually parallels Ms. Ching’s case from *Ching v. Mayorkas*, and should

similarly satisfy the *Mathews* factors. *Mathews*, 424 U.S. at 335; *Ching*, 725 F.3d at 1158–59; (Pet. App. 4a-5a).

Firstly, the Manors have the same interest that Ms. Ching had in *Ching v. Mayorkas*, the interest in living with his family, including his wife and small children, an interest that would be extinguished if the I-130 is not approved, leading to his removal from the United States. 725 F.3d at 1154–55; (Pet. App. 4a-5a). Trial counsel should have taken action to preserve this right. Consequentially, trial counsel’s failure prejudiced Mr. Manor’s ability to receive due process to protect this vital interest. Nevertheless, this private interest requires procedural due process, even if Mr. Manor had yet to establish eligibility for the benefits provided by I-130, regardless of his counsel’s actions. *See Zerezghi*, 955 F.3d at 813–16.

Secondly, Mr. Manor’s trial counsel deprived him of due process by failing to preserve the right to confront Ms. Brace, the adverse witness in his BIA hearing. *See Mathews*, 424 U.S. at 335. As stated by this Court and the Ninth Circuit, the question of Mr. Manor’s entitlement to marriage benefits is purely factual, meaning the Manors should have been given the opportunity to confront and cross-examine adverse witnesses at their request. *See Goldberg*, 397 U.S. at 262–263; *Ching*, 725 F.3d at 1154–55. Furthermore, here, this right is reinforced by the heightened circumstances present surrounding Ms. Brace’s testimony. *Ching*, 725 F.3d at 1153; (Pet. App. 4a-5a). The coercive and abusive interrogation Ms.

Brace was subject to, discussed above, severely increased the risk that her statements were made with fear, desperation, and other motivations which undermine their reliability unless the full context, is examined. *Ching*, 725 F.3d at 1154–55. The *Ching* Court acknowledges the effect having an officer “point out” the possibility of fines and imprisonment resulting from having filed a fraudulent I-130 petition could have on the accuracy of the statement made by a former spouse. *See id.*; (Pet. App. 4a-5a). Accordingly, as the interviewing officer similarly repeatedly threatened Ms. Brace with fines, imprisonment, and loss of custody of her daughter if she didn’t admit to fraud and withdraw the petition, so the risk of erroneous deprivation of Plaintiffs’ rights is similarly high. Therefore, additional procedure safeguards were needed to protect the Manors’ right to due process, safeguards not present because of their trial counsel’s performance. (Pet. App. 4a-5a).

Finally, the Government’s interest in protecting the rights of legitimately married individuals entitled the Manors’ to additional procedural safeguards in their case. *Zerezghi*, 955 F.3d at 810; *Ching*, 725 F.3d at 1158–59; *see also Obergefell*, 135 S.Ct. at 2601–2. Given the regularity with which evidentiary hearings are held in the immigration system, the additional procedures requested by the Manors’ before the BIA denied their I-130 application, like in *Ching*, would have come at “minimal cost to the government,” particularly if they had been granted when first requested. *Ching*, 725

F.3d at 1159; (Pet. App. 4a-5a). The Court found the burden on the Government in *Ching* was slight and did not outweigh the burden on the petitioners. *See id.* As the interest, in this case, is substantially similar to *Ching*, the Manors' satisfy the *Mathews* test and are entitled to additional procedural protections, protections that were deprived by their trial counsel's performance. (Pet. App. 4a-5a). Therefore, the Petitioners' Petition should be granted, the District Court's decision should be vacated, and the case should be remanded for further proceedings.

II. The Appellate Court Fundamentally Erred By Not Properly Reviewing The Trial Court' Weighing The *Matthews* Factors In Its Analysis

The Ninth Circuit's review of the Board's decision to deny the Plaintiffs' visa petition was governed by the Administrative Procedure Act ("APA"). *Zerezghi*, 955 F.3d at 807. Under the APA, an agency decision must be set aside if it is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." *Family Inc. v. U.S. Citizenship & Immigration Servs.*, 469 F.3d 1313, 1315 (9th Cir. 2006) (citing 5 U.S.C. § 706(2)(A)). An agency action is arbitrary and capricious "when the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Safari Aviation Inc. v. Garvey*, 300

F.3d 1144, 1150 (9th Cir. 2002) (internal citations and quotations omitted). The APA review should be “searching and careful.” *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989). Additionally, legal questions related to an agency’s actions are reviewed *de novo*. *Zerezghi*, 955 F.3d at 807 (explaining question of whether Agency acted “not in accordance with law” is reviewed *de novo*).

As due process claims in the immigration context involve the deprivation of private rights, the question of how much process is due is case-specific but must be reviewed *de novo*. See *Zerezghi*, 955 F.3d at 807; *Liu*, 640 F.3d at 930. Moreover, the *Mathews* factors must be evaluated on a case-by-case basis. See *Mathews*, 424 U.S. at 335. However, the appellate court must properly balance all test factors before deciding on the merits. See *id.*

The Ninth Circuit’s opinion fails to apply either *de novo* review or the *Mathews* factors as a matter of law. (Pet. App. 4a-5a). In analyzing applying its “*de novo*” review, the Ninth Circuit granted deference to the District Court’s finding that the claim of “marriage fraud” was supposedly supported by “substantial evidence.” (Pet. App. 2a-3a). This extremely vague 801-word opinion overlooks the application of Ninth Circuit precedence, *Mathews*, and the “searching and careful” analysis needed to determine if the BIA’s decision was arbitrary and capricious opinion. (Pet. App. 1a-5a).

As circumstances existed in the record to suggest that the testimony the District Court had

depended on was unreliable, an actual *de novo* review would have found that the District Court's opinion was not based on evidence strong enough to overcome the additional procedural protections that should have been applied according to the Ninth Circuit's opinion in *Ching. Mathews*, 424 U.S. at 335; *Ching*, 725 F.3d at 1159; (Pet. App. 4a-5a). The District Court, BIA, and eventually the Ninth Circuit erroneously dismissed the *Ching* case's applicability to this case, as they sought to require the Manors' to provide "compelling" evidence that their marriage was bona fide in order to establish a risk of erroneous deprivation. *Mathews*, 424 U.S. at 335; *Ching*, 725 F.3d at 1159; (Pet. App. 4a-5a). This requirement essentially turns the *Mathews* analysis on its head, requiring the Manors' to prove their eligibility for a visa *despite the inadequate procedural protections they were provided*. (Pet. App. 4a-5a). If the Ninth Circuit correctly applied its precedents, it would have rejected this kind of flawed analysis similar to its holdings in *Ching* and *Zerezghi*. *Ching*, 725 F.3d at 1159; *Zerezghi*, 955 F.3d at 808 (discussing *Ching* and reiterating that the Government must not confuse the issues of what protections are due with the question of whether parties are ultimately eligible). Accordingly, the Ninth Circuit inappropriately reviewed the District Court's opinion, granting a deferential review instead of properly reviewing the Manors' case *de novo*.

Moreover, a cursory glance at the Ninth Circuit's opinion reveals that the court failed to apply the full *Mathews* factors test needed to determine if

procedural protections were needed to protect the Manors' due process rights. (Pet. App. 1a-5a). The Ninth Circuit only discusses the second Mathews factor in its analysis, neglecting to address the other two. (Pet. App. 4a-5a). The Ninth Circuit fails to state why it believed further analysis of those factors was unnecessary. The *Mathews* factors permit a case-by-case analysis. *Mathews*, 424 U.S. at 335. Nevertheless, the Ninth Circuit was required to analyze these factors before determining the merits of the Manors' case. As that analysis was omitted from the Ninth Circuit's vague opinion, the appellate court fundamentally erred, and this Petition should be granted to protect the Manors' due process rights.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Robert L. Sirianni, Jr., Esq.
Counsel of Record
BROWNSTONE, P.A.
P.O. Box 2047
Winter Park, Florida 32790-2047
(o) 407-388-1900
(f) 407-622-1511
robertsirianni@brownstonelaw.com
Counsel for Petitioners

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