No. 21-_____

In The Supreme Court of the United States

RAFI WALI MCCALL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the United States Constitution prohibit a judge from revoking supervised release pursuant to 18 U.S.C. § 3583 based on a judicial finding that the released individual committed a new "crime" that previously was tried to a jury and resulted in acquittal?

PARTIES TO THE PROCEEDINGS

Petitioner, Rafi Wali McCall, was the defendant in the United States District Court for the Western District of Texas and the appellant in the United States Court of Appeals for the Fifth Circuit.

Respondent, the United States, was the plaintiff in the district court and the appellee in the Fifth Circuit.

RELATED PROCEEDINGS

This case arises from the following proceedings:

- *United States v. McCall*, No. MO-07-CR-00096-DC (W.D. Tex.) (order revoking supervised release and resentencing of defendant issued Mar. 4, 2021) (Pet. App. 3a-4a);
- *United States v. McCall*, No. 21-50201 (5th Cir.) (opinion and judgment issued Oct. 21, 2021) (Pet. App. 1a-2a).

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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The Fifth Circuit's unpublished opinion (Pet. App. 1a) is available at 2021 WL 4933416. The Western District of Texas's opinion (Pet. App. 3a) is unreported.

JURISDICTION

The court of appeals entered its opinion and judgment on October 21, 2021. *See* Pet. App. 1a. On December 30, 2021, Justice Alito granted petitioner's application to extend the time to file the petition until March 20, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND GUIDELINES PROVISIONS INVOLVED

Article III, section 2, clause 3 of the United States Constitution provides:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

U.S. CONST. art. III, § 2, cl. 3.

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI.

Under 18 U.S.C. § 3583, entitled "Inclusion of a term of supervised release after imprisonment," a court "shall order, as an explicit condition of supervised release, that the defendant not commit another Federal, State, or local crime during the term of supervision." 18 U.S.C. § 3583(d). Under subsection (e), entitled "Modification of Conditions or Revocation," the court may

> revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on postrelease supervision, if the court, pursuant to the Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release, finds by a preponderance of the evidence that the defendant violated a condition of supervised release . . . .

Id. § 3583(e)(3). The entirety of 18 U.S.C. § 3583 is reproduced in the Petition Appendix at 5a-12a.

Under the United States Sentencing Guidelines for revocation of supervised release that pertain to petitioner, U.S.S.G. ch. 7 (2018), a "Grade A" violation of the conditions of supervised release includes certain "federal, state, or local offense[s] punishable by a term of imprisonment exceeding one year." U.S.S.G. § 7B1.1(a)(1). "Upon a finding of a Grade A or B violation, the court shall revoke probation or supervised release." *Id.* § 7B1.3(a)(1). The guidelines

include an advisory "range of imprisonment applicable upon revocation" that varies based on only two factors: the "Grade of Violation" and the released individual's "Criminal History Category" at the original sentencing. *Id.* § 7B1.4(a). The Petition Appendix includes, in full, U.S.S.G. §§ 7B1.1 (Pet. App. 13a-14a), 7B1.3 (Pet. App. 14a-16a), and 7B1.4 (Pet. App. 17a-18a).

STATEMENT

Petitioner had fully served his prison sentence for a past conviction and was out on supervised release pursuant to 18 U.S.C. § 3583 when he was indicted and prosecuted for a new crime. *See* R.21-50201.1160-61.[1] The government tried that crime to a jury, and the jury returned a verdict of not guilty. R.21-50201.1373.

The next day, the same judge who presided over the criminal trial also presided over a hearing on the government's motion to revoke petitioner's supervised release. The judge found that, notwithstanding the acquittal, petitioner had committed that crime in violation of the conditions of his supervised release. *See* Pet. App. 26a. The judge revoked petitioner's supervised release and imposed a new punishment of 57 months in prison in connection with the past conviction, which had occurred more than a decade before the new acquitted crime of which a jury

[1] Record cites in this petition correspond to the pagination of the record in the Fifth Circuit.

found petitioner not guilty. *See* Pet. App. 27a; R.21-50201.1373.

I. STATUTORY AND GUIDELINES PROVISIONS GOVERNING SUPERVISED RELEASE AND ITS REVOCATION

At a defendant's initial sentencing, the judge may impose a sentence of supervised release in addition to a sentence of imprisonment. 18 U.S.C. § 3583(a); *Johnson v. United States*, 529 U.S. 694, 696-97 (2000). For some offenses, like the one of which petitioner was convicted in 2007, the governing statute requires a period of supervised release following a prison sentence. *See, e.g.*, 21 U.S.C. § 841(b)(1)(B) (2006). The length and conditions of supervised release are subject to certain statutory requirements as well as optional conditions that are within the judge's discretion to impose. 18 U.S.C. § 3583(c)-(d). Every sentence that includes a term of supervised release must include "as an explicit condition" that "the defendant not commit another Federal, State, or local crime during the term of supervision." *Id.* § 3583(d).

Compliance with the terms of supervised release is overseen by a United States probation officer and overseen by the sentencing court. *Id.* § 3601; *Johnson*, 529 U.S. at 697. The court may terminate, modify, or, upon finding a violation of a condition of release, revoke a term of supervised release and require an additional term of imprisonment. 18 U.S.C. § 3583(e). If the government seeks to revoke supervised release,

a magistrate judge holds a preliminary hearing to determine whether probable cause exists to believe that a violation of a condition of release occurred. FED. R. CRIM. P. 32.1(b)(1). If so, the court will hold a revocation hearing at which the released individual is entitled to, *inter alia*: written notice of the alleged violation; disclosure of the evidence against the individual; and an opportunity to appear, question adverse witnesses, and offer mitigating information. FED. R. CRIM. P. 32.1(b)(2). After that hearing, the judge need only find by a preponderance of the evidence that a condition of supervised release was violated to "revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute" for the original conviction. 18 U.S.C. § 3583(e)(3).

If the judge revokes supervised release and imposes a prison sentence, there is no requirement that the judge credit the time already served on supervised release, and the judge has the option of imposing an additional term of supervised release following completion of the new prison term. *Id.* § 3583(e)(3), (h). This stands in contrast to federal parole, the system that preceded the creation of supervised release through the Sentencing Reform Act of 1984. Pub. L. No. 98-473, 98 Stat. 1987. Under the federal parole system, a defendant could be released before the end of a prison sentence. 18 U.S.C. § 4205 (repealed 1984). If parole were later revoked, the parolee would be exposed only to serving the remainder of that prison sentence. *Id.* § 4214

(repealed 1984). In contrast, the revocation of supervised release exposes the defendant to incarceration beyond the original sentence of imprisonment and possibly even beyond the original supervised-release sentence. *Id.* § 3583(a). The maximum additional prison time a judge may impose following revocation of supervised release is five years for a "class A felony," three years for a "class B felony," two years for a "class C or D felony," and one year for "any other case." *Id.* § 3583(e)(3).

The United States Sentencing Guidelines direct how the punishments imposed upon revocation of supervised release should be determined within the statutory framework. The guidelines identify three grades of violations: (1) Grade A violations, including "conduct constituting (A) a federal, state, or local offense punishable by a term of imprisonment exceeding one year that (i) is a crime of violence, (ii) is a controlled substance offense, or (iii) involves possession of a firearm or destructive device of a type described in 26 U.S.C. § 5845(a)" and "(B) any other federal, state, or local offense punishable by a term of imprisonment exceeding twenty years"; (2) Grade B violations, which include "conduct constituting any other federal, state, or local offense punishable by a term of imprisonment exceeding one year"; and (3) Grade C violations, which include other offenses and "a violation of any other condition of supervision." U.S.S.G. § 7B1.1(a). Under the guidelines, a court "shall revoke" supervised release upon a finding of a Grade A or B violation, and it "may" revoke or extend

supervised release for a Grade C violation. *Id.* § 7B1.3(a).

The recommended guidelines ranges for a new period of imprisonment are determined solely by two factors: the grade of the violation and the released individual's criminal-history category at the original sentencing. *Id.* § 7B1.4(a).[2] Although the guidelines are advisory, all sentencing determinations start with a calculation of the guidelines range, and an improper calculation of that range is procedural error. *Gall v. United States*, 552 U.S. 38, 46, 51 (2007).

II. Factual And Procedural Background

Petitioner began a period of supervised release on February 11, 2019, in connection with a 2007 conviction for possession with intent to distribute crack cocaine. *See* R.21-50201.446-47. His release coincided with a First Step Act reduction of his sentence to ten years, *see id.*, although petitioner already had spent nearly twelve years in prison by that time.

While out on supervised release, petitioner was indicted on August 26, 2020, for a new crime: one count of possession with intent to distribute cocaine. R.21-50201.1160-61. That count was tried to a jury on February 24 and 25, 2021. R.21-50201.1393, 1562.

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[2] Guidelines ranges also cannot exceed statutorily authorized maximums or fall short of statutorily required minimums. U.S.S.G. § 7B1.4(b).

At trial, an officer testified that he had been intermittently surveilling what he believed to be petitioner's residence on August 4 and 5, 2020, and that he suspected petitioner was engaged in drug activity. R.21-50201.1419-20. Just after midnight on the morning of August 6, petitioner exited the residence, got into a vehicle, and began to drive. R.21-50201.1419, 1421. The officer said he followed petitioner and eventually turned on his lights and siren, but petitioner did not immediately pull over and eventually started "evading." *See* R.21-50201.1426. The officer also claimed that, during the pursuit, he saw petitioner "throw out a baggie of cocaine" from the window of the vehicle petitioner was driving, R.21-50201.1427, and that the contents hit the ground and powder went "everywhere"—something the officer said he could observe from his patrol car while driving after petitioner. R.21-50201.1443. The government introduced multiple forms of video footage of the encounter—from a dashcam, several bodycams, and even heat-signature-sensitive plane-surveillance equipment, R.21-50201.1360, 1441—but none of these showed a baggie being thrown out of petitioner's car or powder visible "everywhere." *See, e.g.*, R.21-50201.1441, 1444. After petitioner was brought into custody, the officer went back to the spot where he claimed to have seen the baggie thrown from petitioner's car, and the officer claimed the baggie was there. R.21-50201.1452. The jury returned a verdict of not guilty. R.21-50201.1373.

The day after petitioner's acquittal of the crime of possession with intent to distribute cocaine, he appeared before the same judge who presided over that criminal trial—but this time for a hearing on the government's motion to revoke petitioner's supervised release in connection with the 2007 conviction for which petitioner had served nearly twelve years. *See* R.21-50201.983-99, 1374. The government had been pursuing revocation at the same time that it was prosecuting petitioner for the new crime of which he was acquitted. *See, e.g.*, R.21-50201.458. Indeed, the same day that petitioner was indicted on the new crime, a magistrate judge cited that indictment in finding probable cause that petitioner violated the condition of his supervised release requiring that he not commit another crime during the term of supervision. R.21-50201.458-59. The magistrate judge noted the government's initial allegation that petitioner violated an additional condition of supervised release requiring notice within ten days of a change in residence or employment, but the magistrate judge found that the government had "abandoned the violation" at the probable-cause hearing. R.21-50201.459.

After the jury trial on the new crime ended in a not-guilty verdict and judgment of acquittal, R.21-50201.1373-74, petitioner believed there was no remaining violation for the government to pursue and expected to go home after the revocation hearing the next day. *See* Pet. App. 24a. But the government moved forward with the allegation that he violated

the condition of supervised release requiring that he not commit another crime, and it also alleged that petitioner failed to provide notice within ten days of a change in residence or employment. R.21-50201.988-89; Pet. App. S.1a. On the new-crime ground, the government acknowledged that petitioner "was found not guilty" by the jury but maintained that there was evidence that he did commit the crime. R.21-50201.991. In terms of the notice violation, the government stated that petitioner "had been laid off for two weeks" when contacted by his probation officer. R.21-50201.990.

The judge found "both allegations to be true." Pet. App. 20a. In terms of the new-crime violation, the judge acknowledged that, at the jury trial, petitioner was "[f]ound acquitted. Yeah." Pet. App. 22a. But the judge agreed with the government that, "[r]egardless of what the jury did, even if they had found him guilty or not guilty, it doesn't matter." *Id.*

Petitioner's counsel at the hearing acknowledged "the evidentiary standard differences between the criminal case" and revocation, but he urged that "the findings of the Court by a jury of his peers is something that the Court should give significant weight." Pet. App. 23a. The judge noted that he presided over the criminal trial, heard the evidence, and believed the officer who claimed he "saw what he saw." *See* Pet. App. 26a. "And so I find by a preponderance of the evidence that the—from that evidence that I heard, not only preponderance of the evidence, I find beyond a reasonable doubt, me personally, that Mr. McCall committed that offense. That an offense was

committed, and that he committed that. The jury found otherwise." Pet. App. 26a.

The judge found that the crime-based violation of the conditions of petitioner's supervised release qualified as a Grade A violation under the sentencing guidelines and, with petitioner's criminal history, produced a guidelines range of 46 to 57 months. Pet. App. 22a. Stating his intent to "stay within the guidelines," the judge sentenced petitioner to serve a new prison term at the upper limit of the guidelines range, 57 months. Pet. App. 27a.

Petitioner timely appealed to the Fifth Circuit, challenging the constitutionality of using a crime of which he had been acquitted by a jury to impose 57 new months of punishment in connection with a 2007 conviction for which petitioner more than fully served his prison sentence. *See* Pet. App. 1a-2a. Although the Fifth Circuit acknowledged the absence of precedent foreclosing petitioner's argument, it nonetheless pointed to this Court's opinion in *United States v. Watts*, 519 U.S. 148 (1997) (per curiam), stating that, "[i]n light of *Watts* and the cases following it, and in the absence of precedent specifically rejecting the application of this line of cases in the context of a supervised release revocation," the district court's use of petitioner's "acquitted conduct in arriving at the revocation sentence" was not grounds for reversal. Pet. App. 2a.

SUMMARY OF ARGUMENT

This case presents an important question concerning the constitutional constraints on imposing new prison time following revocation of supervised release based on a judge's finding that the released individual committed a "crime" that already had been tried to a jury and resulted in acquittal. For years, the use of "acquitted conduct" to increase punishment for a conviction has concerned members of this Court and judges throughout the courts of appeals, not to mention state high courts, several of which prohibit the practice. Here, the judge's use of an acquitted crime to revoke petitioner's supervised release and impose additional prison time for a conviction that occurred fourteen years prior makes the constitutional concerns particularly acute.

Use of conduct underlying an acquitted crime has been justified as relevant to certain initial-sentencing considerations, such as the manner in which the defendant committed the crime of conviction. But that rationale—which many jurists deem constitutionally problematic—is wholly absent when a judge uses a new acquitted crime to revoke a term of supervised release for a *prior* conviction. The acquitted-crime-based revocation in this case therefore provides an excellent opportunity for this Court to revisit whether judicial use of acquitted conduct to increase punishment violates the Fifth Amendment's Due Process protections and the jury guarantees of the Sixth Amendment and Article III, section 2, clause 3.

The Constitution's protections against arbitrary government action rest on centuries of common-law traditions that this Court has acknowledged are "fundamental reservations" of power to the people. *Blakely v. Washington*, 542 U.S. 296, 305-06 (2004). The jury right works in tandem with the Fifth Amendment's Due Process Clause to secure the presumption of innocence and the requirement that every criminal charge be proven to a jury beyond a reasonable doubt. These "pillars of the Bill of Rights," *United States v. Haymond*, 139 S. Ct. 2369, 2376 (2019) (plurality), ensure that the jury serves as a "bulwark between the State and the accused." *S. Union Co. v. United States*, 567 U.S. 343, 350 (2012) (internal quotation marks omitted). But that vital constitutional role is thwarted when, as in this case, a judge disregards the jury's determination as to whether an accused individual committed a crime, finding instead that for "me personally, that Mr. McCall committed that offense. That an offense was committed, and that he committed that. The jury found otherwise." Pet. App. 26a.

Allowing a judge to displace a jury's not-guilty verdict and find that the very same "crime" occurred—and that it warrants revocation of supervised release and additional punishment *for a prior conviction*—is head-spinning. It eviscerates fundamental constitutional rights, defeats the Framers' intent, and displaces the jury's essential role under the Constitution. This Court should grant the petition to restore constitutional order and provide much-needed

guidance on the permissibility of using an acquitted crime to revoke supervised release and impose additional punishment under 18 U.S.C. § 3583(e)(3).

REASONS TO GRANT THE PETITION

I. THE PERMISSIBILITY OF USING AN ACQUITTED CRIME TO REVOKE SUPERVISED RELEASE PRESENTS AN IMPORTANT CONSTITUTIONAL QUESTION THAT ONLY THIS COURT CAN RESOLVE.

For decades, members of this Court and judges on the federal courts of appeals have raised constitutional concerns about imposing punishment based on a crime that was tried to a jury and resulted in a judgment of acquittal. As this Court noted in *United States v. Watts*, that practice has been explained as part of a judge's obligation at sentencing to consider "the manner in which [the defendant] committed the crime of conviction," 519 U.S. at 154 (citing *Witte v. United States*, 515 U.S. 389, 402-03 (1995)); and conduct underlying an acquitted crime may be relevant to that type of sentencing inquiry. *Id.* at 151-53 (discussing, *inter alia*, 18 U.S.C. § 3661 and U.S.S.G. § 1B1.3). But that rationale—which remains constitutionally problematic for many jurists—is wholly absent when a judge uses a new, acquitted

crime to revoke a term of supervised release for a *prior conviction*. *See* 18 U.S.C. § 3583(d), (e)(3).[3]

With revocation, a judge's ability to impose punishment based on an acquitted crime is not constrained by any requirement that conduct underlying the acquitted crime be relevant to, or shed light on, the offense of conviction that gave rise to the term of supervised release. *See id.* § 3583(e)(3); *cf. Watts*, 519 U.S. at 151-54. The crime-based trigger for revocation in petitioner's case—the same crime on which a jury returned a not-guilty verdict the previous day—presents a particularly compelling context in which to revisit the acquitted-crime issue. In light of the gravity of the consequences for released individuals like petitioner and persistent concerns from circuit judges troubled by this Court's and their own acquitted-crime precedent, this Court should grant the petition and determine whether a judge violates the Constitution by imposing punishment based on a finding that an individual committed a crime that was tried to a jury and that resulted in a judgment of acquittal.

Justices of this Court have long identified constitutional infirmities arising from punishment based on judge-found facts—particularly when a judge's finding relates to a crime on which a jury returned a not-guilty verdict. As Justice Scalia explained, joined by Justices Thomas and Ginsburg,

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[3] This Court "attribute[s] postrevocation penalties to the original conviction." *Johnson*, 529 U.S. at 701.

"[t]he Sixth Amendment, together with the Fifth Amendment's Due Process Clause," requires that facts that increase a defendant's punishment "be either admitted by the defendant, or 'proved to the jury beyond a reasonable doubt.'" *Jones v. United States*, 574 U.S. 948, 948 (2014) (Scalia, J., joined by Thomas & Ginsburg, JJ., dissenting from denial of certiorari) (quoting *Alleyne v. United States*, 570 U.S. 99, 104 (2013)). And concerns about judge-found crimes that increase punishment are particularly acute when "not only did no jury convict these defendants of the offense the sentencing judge thought them guilty of, but a jury *acquitted* them of that offense." *Id.* at 949.

Justices Kennedy and Stevens had similarly expressed concern about judges' use of acquitted crimes to impose punishment in their separate dissents from this Court's 1997, fractured, per curiam opinion in *Watts*—a decision that informs much of lower courts' jurisprudence to this day and that the Fifth Circuit expressly used to anchor its ruling below, Pet. App. 2a. *See* 519 U.S. at 159-71 (Stevens, J., and Kennedy, J., dissenting separately). As Justice Stevens wrote in his *Watts* dissent, "[t]he notion that a charge that cannot be sustained by proof beyond a reasonable doubt may give rise to the same punishment as if it had been so proved is repugnant to [constitutional] jurisprudence." *Id.* at 170 (Stevens, J., dissenting). And Justice Kennedy concluded that "to increase a sentence based on conduct underlying a charge for which the defendant was acquitted does raise concerns about undercutting the verdict of acquittal." *Id.*

(Kennedy, J., dissenting). Justice Kennedy highlighted the "distinction between uncharged conduct and conduct related to a charge for which the defendant was acquitted" and urged the Court to confront that distinction through a "reasoned course of argument, not by shrugging it off." *Id.*

This Court has yet to provide additional guidance on the permissibility of judges' using acquitted crimes to impose punishment. And the courts of appeals, like the Fifth Circuit below, are left unguided as to the reach of *Watts*, *see* Pet. App. 2a, which resolved only "a very narrow question regarding the interaction of the Guidelines with the Double Jeopardy Clause" in the initial-sentencing context and "did not even have the benefit of full briefing or oral argument." *United States v. Booker*, 543 U.S. 220, 240 n.4 (2005) (emphasizing the limited scope of *Watts*); *see also infra* Part II.B (explaining that *Watts* did not address, much less resolve, the constitutional question this petition presents).

In particular, judges on the courts of appeals, like Justices of this Court, have struggled to reconcile punishment based on acquitted crimes with constitutional guarantees under the Fifth and Sixth Amendments and this Court's jurisprudence stemming from its post-*Watts* decision in *Booker*. Justice Kavanaugh, while a judge on the D.C. Circuit, warned that using "*acquitted* conduct to increase sentences beyond what the defendant otherwise could have received" makes the law "appear to be back almost where we were pre-*Booker*." *United States v.*

Henry, 472 F.3d 910, 920 (D.C. Cir. 2007) (Kavanaugh, J., concurring). Expressing an "overarching concern about the use of acquitted conduct at sentencing," then-Judge Kavanaugh explained that "[a]llowing judges to rely on acquitted or uncharged conduct to impose higher sentences than they otherwise would impose seems a dubious infringement of the rights to due process and to a jury trial." *United States v. Bell*, 808 F.3d 926, 926-28 (D.C. Cir. 2015) (Kavanaugh, J., concurring in denial of rehearing en banc).

Justice Gorsuch, while a judge on the Tenth Circuit, voiced similar constitutional concerns. Citing Justice Scalia's dissent from the denial of certiorari in *Jones*, then-Judge Gorsuch recognized that "[i]t is far from certain whether the Constitution allows" a judge to impose punishment "based on facts the judge finds without the aid of a jury or the defendant's consent." *United States v. Sabillon-Umana*, 772 F.3d 1328, 1331 (10th Cir. 2014) (citing *Jones*, 547 U.S. at 948). That observation rings all the more true when judicial findings that increase punishment not only lack "the *aid* of a jury," *see id.* (emphasis added), but rest on a judge's finding that a defendant committed a crime that was in fact tried to a jury—and for which the jury refused to authorize punishment. *Cf. id.*

Additional concerns from circuit judges abound.[4] And judges have been vocal not only about their

[4] Similar to the concurring and dissenting opinions quoted above from judges on the Sixth, Seventh, Eighth, Tenth, and D.C. Circuits, judges in other circuits have raised constitutional concerns about the use of acquitted conduct to impose punishment. *See*,

constitutional misgivings regarding the use of acquitted conduct, but also about the need for this Court's intervention. Concurring in the denial of rehearing en banc in a D.C. Circuit case that presented the issue, Judge Millett stated that she was "deeply concerned about the use of acquitted conduct in this case" but had not voted in favor of rehearing en banc "because only the Supreme Court can resolve the contradictions in the current state of the law." *Bell*, 808 F.3d at 932 (Millett, J., concurring in the denial of rehearing en banc). And in exclaiming that "[w]e must end the pernicious practice of imprisoning a defendant for crimes that a jury found he did not commit," Judge Bright of the Eighth Circuit urged that "[i]t is now incumbent on the Supreme Court to correct this injustice." *United States v. Papakee*, 573 F.3d 569, 578 (8th Cir. 2008) (Bright, J., concurring).

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e.g., *United States v. Alejandro-Montañez*, 778 F.3d 352, 362-63 (1st Cir. 2015) (Torruella, J., concurring) ("I believe it is inappropriate and constitutionally suspect to enhance a defendant's sentence based on conduct that the defendant was . . . acquitted of."); *United States v. Mercado*, 474 F.3d 654, 663 (9th Cir. 2007) (Fletcher, J., dissenting) ("The jury's powers in criminal cases are confined to issuing verdicts. As such, any authorization or withholding of authorization must be communicated through the jury's verdict, and the jury's ability to insulate defendants from the government—as the Constitution requires—is entirely dependent upon the integrity of its verdict."); *United States v. Faust*, 456 F.3d 1342, 1349 (11th Cir. 2006) (Barkett, J., concurring) ("I strongly believe . . . that sentence enhancements based on acquitted conduct are unconstitutional under the Sixth Amendment, as well as the Due Process Clause of the Fifth Amendment.").

Just recently, the Seventh Circuit highlighted lower courts' inability to address persistent constitutional concerns, emphasizing that it will be up to this Court to "review an argument that has garnered increasing support among many circuit court judges and Supreme Court Justices, who in dissenting and concurring opinions, have questioned the fairness and constitutionality of allowing courts to factor acquitted conduct into sentencing calculations." *United States v. McClinton*, 23 F.4th 732, 735 (7th Cir. 2022). The Seventh Circuit viewed *Watts* as broadly authorizing judges to use acquitted conduct to impose punishment, bemoaning that, "despite the long list of dissents and concurrences on the matter, it is still the law in this circuit—as it must be given the Supreme Court's holding—that a sentencing court may consider conduct underlying the acquitted charge, so long as that conduct has been found by a preponderance of the evidence." *Id.* at 735 (citing *Watts*, 519 U.S. at 157).

State high courts also have struggled to reconcile federal constitutional guarantees with the practice of using judge-made findings on acquitted conduct to increase punishment. And in 2019, the Michigan Supreme Court took action. It surveyed the federal landscape, chronicled longstanding discontent with the practice among Justices on this Court and judges on the federal courts of appeals and, as a matter of federal constitutional law and the Due Process guarantees of the Fourteenth Amendment, proclaimed: "This ends here." *People v. Beck*, 939 N.W.2d 213, 226 (Mich. 2019) (en banc). That court collected and

dismissed assumptions by judges and academics that this Court's precedent—and *Watts* in particular—compelled begrudging tolerance of acquitted conduct's role in sentencing: "Unlike many of those judges and commentators, we do not believe existing United States Supreme Court jurisprudence prevents us from holding that reliance on acquitted conduct at sentencing is barred by the Fourteenth Amendment." *Id.*[5]

After *Beck*, the Fourteenth Amendment protects criminal defendants prosecuted in Michigan state courts from receiving increased punishment based on acquitted crimes, *see id.*, whereas criminal defendants prosecuted in Michigan *federal* courts do not have the same *federal constitutional protections* under Sixth Circuit precedent, which continues to control defendants' fates despite protests from that circuit's

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[5] The defendant in *Beck* did not challenge his sentence under the Michigan constitution, and the court made clear that its opinion did not address any state constitutional issues. *Beck*, 939 N.W.2d at 218 n.6. In terms of federal constitutional rights, the court's holding centered on Due Process under the Fourteenth Amendment, *id.* at 226; but three justices who concurred in full also would have held that the judge violated the Sixth Amendment by using acquitted conduct as a legally essential predicate for the sentence. *Id.* at 227, 231-42 (Viviano, J., joined by Bernstein & Cavanagh, JJ., concurring). Justice Viviano's extensive concurrence explores in detail the historical importance of the jury and explains, *inter alia*, why different burdens of proof do not make consideration of acquitted conduct at sentencing compatible with an acquittal. *See id.* at 227-42 (elaborating on further "serious concerns regarding whether acquitted conduct may ever be considered at sentencing without violating the Sixth Amendment").

judges. *See, e.g.*, *United States v. White*, 551 F.3d 381, 387 (6th Cir. 2008) (en banc) (Merritt, J., dissenting) (stating that, in authorizing the use of acquitted conduct at sentencing to increase punishment, the full court "relies upon but fails to understand and completely misapplies the Supreme Court's opinion in *United States v. Watts*" and "also misunderstands the Supreme Court's *Apprendi–Blakely–Booker* line of cases").[6]

Too much is at stake to permit these grave constitutional concerns to continue to fester. They have endured for decades, will continue to mount, and individuals like petitioner will be stripped of liberty unconstitutionally until this Court intervenes

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[6] Other states have prohibited the practice by invoking Due Process protections without specifying the source of that right. *See State v. Marley*, 364 S.E.2d 133, 139 (N.C. 1988) (holding that "due process and fundamental fairness preclude[]" a sentencing court from considering conduct underlying an acquitted charge); *State v. Cote*, 530 A.2d 775, 784-85 (N.H. 1987) (holding that a sentencing court violates a defendant's right to Due Process if it considers evidence of acquitted crimes). And criminal defendants in these states face the same contradiction: They are protected from receiving increased punishment based on acquitted conduct if sentenced in state court, but do not have the same protection if sentenced in federal court. *Compare Marley*, 364 S.E.2d at 139, *with United States v. Ashworth*, 139 F. App'x 525, 527 (4th Cir. 2005); *and Cote*, 530 A.2d at 784-85, *with United States v. Sandoval*, 6 F.4th 63, 119 (1st Cir. 2021). Additionally, at least one state has prohibited the practice under its own constitution. *See State v. Melvin*, 258 A.3d 1075, 1092 (N.J. 2021) ("In order to protect the integrity of our Constitution's right to a criminal trial by jury, we simply cannot allow a jury's verdict to be ignored through judicial fact-finding at sentencing. Such a practice defies the principles of due process and fundamental fairness.").

with further guidance. The revocation context of petitioner's case throws acquitted-conduct concerns into sharp relief—squarely exposing the tension between a judicial finding that a released individual committed a new crime and a jury's not-guilty verdict as to that same crime. This Court should grant the petition and resolve whether the Constitution prohibits a judge from imposing punishment following revocation of supervised release based on a finding that an individual committed a crime that previously was tried to a jury and resulted in a judgment of acquittal.

II. USING AN ACQUITTED CRIME TO REVOKE SUPERVISED RELEASE VIOLATES FUNDAMENTAL CONSTITUTIONAL PROTECTIONS.

The Fifth and Sixth Amendments stand as two "pillars of the Bill of Rights" protecting individuals accused of crimes from arbitrary government action. *Haymond*, 139 S. Ct. at 2376 (plurality). But allowing courts to impose punishment based on acquitted crimes erodes the robust role for the jury that the Founders intended. And this problem is worse when a court, as in petitioner's case, finds that an individual committed a new crime in violation of a condition of supervised release based on an alleged offense that was tried to a jury and resulted in an acquittal. In this context, the court does not merely consider conduct involved in an acquitted crime to calculate a sentence for an actual conviction; it reincarcerates an individual who already completed a prison sentence for a past

conviction, judicially finding a new "crime" that a jury determined the released individual did not in fact commit. Imposing punishment in this manner is inconsistent with the text, history, and spirit of the Fifth and Sixth Amendments, as well as with Article III, section 2, clause 3.

A. The Rights To A Jury And To Due Process Of Law Are Fundamental Pillars Of Liberty.

The Founders imbued the Constitution with "protections of surpassing importance," *Apprendi v. New Jersey*, 530 U.S. 466, 476-77 (2000), including the jury-trial right and presumption of innocence. U.S. CONST. art. III, § 2, cl. 3; *id.* amends. V, VI; *Apprendi*, 530 U.S. at 476-77; *Coffin v. United States*, 156 U.S. 432, 453 (1895). These "most vital protections against arbitrary government" and "pillars of the Bill of Rights," *Haymond*, 139 S. Ct. at 2373, 2376 (plurality), extend from the rich tradition of common law, *Apprendi*, 530 U.S. at 477, and they combine to "ensure that the government must prove to a jury every criminal charge beyond a reasonable doubt, an ancient rule that has 'extend[ed] down centuries.'" *Haymond*, 139 S. Ct. at 2376 (plurality) (quoting in part *Apprendi*, 530 U.S. at 466 (2000)). Even if a criminal prosecution is given another label, these rights still apply to protect individuals against government power. *See id.* at 2379 (rejecting an attempt to "dodge the demands of the Fifth and Sixth Amendments by the simple expedient of relabeling a criminal

prosecution a 'sentencing enhancement'"); *In re Winship*, 397 U.S. 358, 363-65 (1970) (holding that the same due-process requirement of proof beyond a reasonable doubt that applies to criminal prosecutions of adults applies to juvenile-delinquency hearings).

The Founders sought to "bar[] 'arbitrary' power over life, liberty, and property" through the Fifth Amendment's due-process guarantee. Randy E. Barnett & Evan D. Bernick, *No Arbitrary Power: An Originalist Theory of the Due Process of Law*, 60 WM. & MARY L. REV. 1599, 1643 (2019) (discussing the historical spirit of the concept of due process). The presumption of innocence is an "undoubted law, axiomatic and elementary," that "lies at the foundation" of criminal justice, *Coffin*, 156 U.S. at 453, and protects citizens against the machinery of government. *See Winship*, 397 U.S. at 363-64. The "reasonable doubt" standard, in turn, "reflect[s] a profound judgment about the way in which law should be enforced and justice administered." *Id.* at 361-62 (quoting *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968)). Subjecting an individual to punishment based only on determinations not subject to these requirements—such as a judge's determination that a person on supervised release committed a new crime, *see* 18 U.S.C. § 3583(e), and worse yet a crime on which a jury returned a not-guilty verdict—defeats the protections against arbitrary government power enshrined in the Constitution.

The Sixth Amendment right to trial by jury serves as a "bulwark between the State and the

accused." *S. Union Co.*, 567 U.S. at 350 (internal quotation marks omitted). It was created to be "an inestimable safeguard against" prosecutors and against "compliant, biased, or eccentric judge[s]." *Duncan*, 391 U.S. at 155-56; *cf.* Barnett & Bernick, *supra*, at 1618 (stating that founding-era "juries could judge both law and fact," which "ensur[ed] review of the *substance* of governmental enactments"). In fact, the jury right is one of the two "fundamental reservation[s]" of power to the people. *Blakely*, 542 U.S. at 305-06 ("Just as suffrage ensures the people's ultimate control in the legislature and executive branches, jury trial is meant to ensure their control in the judiciary."). "There is not one shred of doubt" about the Founders' intention to limit the State's power and create a "strict division of authority between judge and jury." *Id.* at 313. "Together with the right to vote, those who wrote our Constitution considered the right to trial by jury 'the heart and lungs, the mainspring and center wheel' of our liberties, without which 'the body must die; the watch must run down; the government must become arbitrary.'" *Haymond*, 139 S. Ct. at 2375 (plurality) (quoting Earl of Clarendon, *The Earl of Clarendon to W. Pym*, BOSTON GAZETTE, Jan. 27, 1766, *reprinted in* 1 PAPERS OF JOHN ADAMS 169 (R. Taylor ed. 1977)).

The Founders intended that the jury right not only protect individuals, but also act as a form of common "public good" meant to restrain government overreach and democratize the judiciary. *See* Stephen A. Siegel, *The Constitution on Trial: Article III's Jury Trial Provision, Originalism, and the Problem of Motivated*

Reasoning, 52 SANTA CLARA L. REV. 373, 396-97 (2012) (discussing how early America framed rights as "public goods" and juries "effectively impressed" their "mores and norms into the criminal law"). To this end, the right to a jury is enshrined not only in the Sixth Amendment, but also in Article III of the Constitution. *See* U.S. CONST. art. III, § 2, cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury[.]"); *Ramos v. Louisiana*, 140 S. Ct. 1390, 1395 (2020) (stating that "the promise of a jury trial surely meant *something*—otherwise, there would have been no reason to write it down" and noting the absurdity of imagining "a constitution that included the same hollow guarantee *twice*—not only in the Sixth Amendment, but also in Article III"); *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 16 (1955) (discussing "safeguards designed to protect defendants against oppressive governmental practices"—one of which, the jury right, "was considered so important to liberty of the individual that it appears in two parts of the Constitution"). This Court's precedent carries out the Framers' constitutional design "by ensuring that the judge's authority to sentence derives wholly from the jury's verdict. Without that restriction, the jury would not exercise the control that the Framers intended." *Blakely*, 542 U.S. at 306.

Allowing the use of an acquitted crime to increase punishment hollows the jury's role as a "circuitbreaker in the State's machinery of justice." *See Haymond*, 139 S. Ct. at 2380 (plurality) (quoting *Blakely*, 542 U.S. at 306). It turns on its head the requirement that a

judge's sentencing authority derives "wholly from the jury's verdict," *Blakely*, 542 U.S. at 306, eroding the jury's role as "a necessary check on governmental power." *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 860 (2017); *see Jones*, 526 U.S. at 248 (noting the Framers' recognition that "the jury right could be lost not only by gross denial, but by erosion").

B. Using An Acquitted Crime To Impose Punishment For A Crime-Based Violation Of The Conditions Of Supervised Release Is Especially Antithetical To The Founders' Constitutional Design.

When a judge uses an acquitted crime to find that an individual "commit[ted] another Federal, State, or local crime" in violation of the terms of supervised release, 18 U.S.C. § 3583(d), (e)(3), the increased punishment that results from revocation raises constitutional red flags beyond those already present when an acquitted crime influences an initial sentence for an actual conviction. It is not merely conduct that the judge considers in connection with the crime-based revocation ground. *See id.* The judge makes a finding as to whether the individual did, in fact, "commit" a "crime." *Id.*; *see also* Pet. App. 22a, 26a. That practice unconstitutionally usurps the jury's role when the "crime" found by the judge displaces a jury's

not-guilty verdict—a determination that the accused should not be punished for that crime.[7]

Moreover, displacing the jury's verdict in this direct manner not only "infringe[s] the rights of the accused," but "also divest[s] the 'people at large'—the men and women who make up a jury of a defendant's peers—of their constitutional authority to set the metes and bounds of judicially administered criminal punishments." *Haymond*, 139 S. Ct. at 2378-79 (plurality) (quoting in part *Blakely*, 542 U.S. at 306). As Judge Gertner has explained, "[w]hen a court considers acquitted conduct it is expressly considering facts that the jury verdict not only failed to authorize; it considers facts of which the jury expressly disapproved," and "to ignore the fruits of its efforts makes no sense—as a matter of law or logic." *United States v. Pimental*, 367 F. Supp. 2d 143, 152-53 (D. Mass. 2005).

Using an acquitted crime to impose punishment infringes on both jury-trial rights and the jury's role whether it happens at an initial sentencing in connection with a conviction or at a revocation hearing when an individual has been tried and acquitted of a

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[7] Even in the revocation context, "[t]he Constitution seeks to safeguard the people's control over the business of judicial punishments by ensuring that any accusation triggering a new and additional punishment is proven to the satisfaction of a jury beyond a reasonable doubt." *Haymond*, 139 S. Ct. at 2380 (plurality) (holding unconstitutional a revocation of supervised release and imposition of a mandatory prison term under 18 U.S.C. § 3583(k) without submission of that new punishment to a jury).

crime while out on supervised release. But in the "crime"-based revocation context, the conflict is more direct, and justifications for using acquitted conduct at sentencing, in addition to being constitutionally problematic, simply do not translate.

At an initial sentencing, this Court has indicated that a judge may consider an acquitted crime to determine criminal history or relevant conduct—"the former referring simply to a defendant's *past* criminal conduct . . . and the latter covering activity arising out of the same course of criminal conduct as the instant offense." *Witte*, 515 U.S. at 402 (citing U.S.S.G. §§ 4A1.1 and 1B1.3); *see also Watts*, 519 U.S. at 152-54. Petitioner, like Justices of this Court and judges of the courts of appeals, questions the constitutionality of this practice. *See supra* Part I. But in any event, those sentencing inquiries are distinct from a judge's use of an acquitted crime to revoke supervised release under 18 U.S.C. § 3583(d) and (e)(3). Conduct-related initial-sentencing inquiries ask for factual determinations that may or may not have been relevant to a jury's not-guilty verdict, whereas revocation of supervised release and imposition of new punishment based on an acquitted crime directly contravenes the jury's determination that the accused should not be punished for that crime.

Relevant-conduct rationales also disappear in the revocation context due to differences in timing. Even assuming a defendant's *past* acquitted conduct may be relevant when imposing an initial sentence for a conviction, *see*, *e.g.*, *Witte*, 515 U.S. at 403 (discussing

recidivism considerations in sentencing), that rationale does not exist when an acquitted crime occurs years *after* the sentence has been imposed and served—as almost always will be the case with a crime-based revocation of supervised release. Accordingly, when a judge imposes new prison time pursuant to a finding that the individual, while released, "committed" an acquitted crime, that additional punishment cannot be passed off as integral to the initial sentence rather than punishment for the acquitted crime—which is what it functionally becomes irrespective of how it is legally categorized.

The nature of supervised release, as opposed to its predecessor system, federal parole, highlights why reimprisonment following a "crime"-based revocation of supervised release is new punishment and not part of a previously imposed term in prison. Under the parole system, revocation would result only in a reinstatement of the original sentence. *See Haymond*, 139 S. Ct. at 2381-82 (plurality) (explaining that, with parole, not only could a defendant "serve as little as a third of his assigned prison term before becoming eligible for release on parole," but if a parolee violated a condition of his parole, "a judge generally could sentence the defendant to serve *only* the remaining prison term authorized by statute for his original crime of conviction"). But the revocation of supervised release results in additional prison time that was not part of the original sentence. *See* 18 U.S.C. § 3583(e)(3) (allowing courts to revoke a term of supervised release and impose prison time without credit for postrelease

supervision). And when revocation rests on a finding that a released individual committed a new crime—notwithstanding a jury verdict to the contrary—the judge at revocation is imposing punishment for that acquitted crime in direct conflict with the jury's verdict.

This Court's decision in *Watts* does not resolve the constitutional question presented in this case. As previously discussed, *Watts* resolved only "a very narrow question regarding the interaction of the Guidelines with the Double Jeopardy Clause." *Booker*, 543 U.S. at 240 n.4; *see Watts*, 519 U.S. at 154-55. This "very narrow question" was specific to sentencing and did not address the different concerns that arise with revocation of supervised release or the foundational Fifth and Sixth Amendment rights implicated in petitioner's case. While *Watts* considered a statute that allows a sentencing court to consider "information concerning the background, character, and conduct of a person convicted of an offense," *Watts*, 519 U.S. at 151 (quoting 18 U.S.C. § 3661), the court here found that petitioner committed a "crime" when it revoked his supervised release. Pet. App. 26a. That is a substantively different question on which the Constitution provides a clear answer: The not-guilty verdict of the jury—the "circuitbreaker in the State's machinery of justice," *Haymond*, 139 S. Ct. at 2380 (plurality) (quoting *Blakely*, 542 U.S. at 306)—prohibited the district court from imposing new punishment based on its own finding that petitioner

committed the crime of which a jury already had found him not guilty.[8]

III. This Case Provides An Excellent Vehicle To Answer An Important Question Concerning The Constitutionality Of Using An Acquitted Crime To Impose Punishment.

There can be no reasonable dispute that petitioner received increased punishment based on an acquitted crime. The district judge revoked petitioner's supervised release and imposed 57 months of new imprisonment by finding that petitioner "commit[ted] another Federal, State, or local crime," 18 U.S.C. § 3583(d), that qualified as a Grade A violation under the advisory guidelines. Pet. App. 22a, 26a-27a. In

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[8] For this reason, the crime-based revocation scenario raises a very different Double Jeopardy concern than the one at issue in *Watts*: Having failed to convince a jury that petitioner committed the crime, the government went back to the judge the next day, asked the judge to find that the same crime in fact occurred, and persuaded the judge to revoke petitioner's supervised release and impose a new prison sentence *because of that crime*. The government got the proverbial "second bite at the apple" that the Double Jeopardy Clause of the Fifth Amendment was intended to prevent. *See* U.S. CONST. amend. V; Jacob Schuman, *Criminal Violations*, 108 VA. L. REV. (forthcoming 2022) (manuscript at 37, 58), https://ssrn.com/abstract=4034991 (last revised Feb. 18, 2022) (discussing how the government "use[s] revocation after losing at trial in order to evade the prohibition on successive prosecutions under the Fifth Amendment's Double Jeopardy Clause," illustrating one of the ways acquitted-crime-based punishment "erodes constitutional rights").

doing so, the judge explicitly linked his new-crime finding to the jury trial over which he had just presided and that had concluded the previous day with the jury's not-guilty verdict: "I find by a preponderance of the evidence that the—from that evidence that I heard, not only preponderance of the evidence, I find beyond a reasonable doubt, me personally, that Mr. McCall committed that offense. That an offense was committed, and that he committed that. The jury found otherwise." Pet. App. 26a.

Without the judge's finding of a new crime despite the jury's verdict, petitioner would have received less prison time or none at all. The government's only other revocation allegation was a Grade C violation related to petitioner's purported failure to report a change in employment, R.21-50201.990; Pet. App. S.1a, and there was never a probable-cause finding on that ground prior to the revocation hearing. *See* R.21-50201.459. To the contrary, a magistrate judge found that the government "abandoned the violation" at the pre-revocation, probable-cause hearing. *Id.*

In any event, even assuming the alleged Grade C violation remained properly available to the district judge who revoked petitioner's supervised release, that ground would have yielded an advisory guidelines range of 7-13 months based on petitioner's criminal-history category. *See* U.S.S.G. § 7B1.4(a). Prison time of 7-13 months—or none at all—stands in stark contrast to the 57 months the judge imposed based on his use of the acquitted crime and his

adherence to the resulting guidelines range. *See* Pet. App. 27a.

The plain-error posture of this case poses no obstacle to this Court's consideration of the constitutionality of using the acquitted crime to increase petitioner's punishment. This Court has granted many cases presented under a plain-error standard. *See, e.g.*, *Greer v. United States*, 141 S. Ct. 2090, 2096 (2021) ("The question for this Court is whether Greer and Gary are entitled to plain-error relief for their unpreserved *Rehaif* claims."); *United States v. Olano*, 507 U.S. 725, 727 (1993) ("The question in this case is whether the presence of alternate jurors during jury deliberations was a 'plain error' . . . ."). And revocation of petitioner's supervised release based on an acquitted crime meets Rule 52's plain-error requirements: The error was not intentionally abandoned; it was clear; and it affected petitioner's substantial rights. *See Molina-Martinez v. United States*, 578 U.S. 189, 194 (2016). Moreover, increased imprisonment based on a crime for which a jury found petitioner not guilty "seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* (quoting *Olano*, 507 U.S. at 736). Thus, this case provides a clear opportunity for this Court to address the important constitutional issue presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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