No. 21-

IN THE

Supreme Court of the United States

KEVAS L. BALLANCE

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

MARK C. FLEMING
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109

H. RACHAEL MILLION-PEREZ
WILMER CUTLER PICKERING
HALE AND DORR LLP
1225 Seventeenth Street
Denver, CO 80202

MELODY BRANNON
Federal Public Defender
DANIEL T. HANSMEIER
Appellate Chief
Counsel of Record
KANSAS FEDERAL PUBLIC
DEFENDER
500 State Avenue, Ste. 201
Kansas City, KS 66101
(913) 551-6712
daniel_hansmeier@fd.org

Counsel for Petitioner

QUESTION PRESENTED

When reviewing a suppression ruling on appeal, should the appellate court review factual findings for clear error and the ultimate legal determination de novo, as six circuits do, or should it also view the evidence in the light most favorable to the district court's ruling, as the Tenth Circuit did here and as four other Circuits do?

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Petitioner Kevas Ballance respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this matter.

OPINIONS BELOW

The Tenth Circuit's unpublished order (App. 1a-19a) is available at 2022 WL 108330. The district court's unpublished order denying Mr. Ballance's motion to suppress (App. 21a-32a) is available at 2020 WL 248967.

JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231. The Tenth Circuit had jurisdiction under 28 U.S.C. § 1291. The Tenth Circuit's judgment was entered on January 12, 2022. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

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

INTRODUCTION

The courts of appeals are deeply divided over whether to view evidence in the light most favorable to a ruling on a motion to suppress evidence in a criminal case. Six (and potentially seven) circuits review factual findings for clear error and the ultimate determination of reasonableness de novo, which is consistent with this Court's precedent. But the Tenth Circuit in this case additionally viewed the evidence in a light most favorable to the district court's ruling, and five other circuits take similar approaches. This Court should grant this petition to resolve this conflict.

The resolution of this conflict is critically important. The manner in which suppression rulings are reviewed should not turn on the location of the

reviewing court. Moreover, the Tenth Circuit's rule, in practice, defers to the district court's legal conclusion and condones separate appellate findings of fact that most favor that conclusion. The Tenth Circuit's rule stands the review process on its head by making the appellate court the arbiter of facts and the district court the arbiter of law.

On the merits, the Tenth Circuit's rule is wrong. It is not supported by this Court's precedent or any rule of practice or procedure. And this case is an excellent vehicle to resolve the conflict. The issue was preserved, and the Tenth Circuit found reasonable suspicion only by viewing the evidence in a light most favorable to the district court's ruling. The Court should grant the petition, resolve the circuit split, and reverse the judgment of the Tenth Circuit.

STATEMENT OF THE CASE

A. District Court Proceedings

The facts, as stated by the district court, are as follows. App. 21a-24a. In May 2018, an unnamed employee at Hibbett Sports in Newton, Kansas called 911 to report that an individual who had just attempted to return an item to the store matched the description of an individual who had previously passed counterfeit bills. App. 21a-22a. The employee gave a description: "a black male wearing a white shirt and blue jeans" who had just left in a black Nissan Armada traveling north on Main Street. App. 22a. The employee provided the vehicle's license plate number. *Id.*

Two officers responded separately. The first officer, Shell, was in the vicinity and located the vehicle at a gas pump at a Kwik Shop. App. 22a. Officer Shell pulled in behind the vehicle. *Id.* The driver and

passenger exited the vehicle. *Id.* The passenger, Petitioner Kevas Ballance, who matched the description from the 911 call, went inside the store. App. 22a-23a. Officer Shell made contact with the driver, Joseph Richard. *Id.* Richard told Officer Shell that Mr. Ballance had just attempted to return some shoes to Hibbett Sports that had been purchased the day before. App. 23a. The shoes were in the vehicle, and Officer Shell could see them. *Id.*

The second officer, Winslow, then arrived on the scene. App. 23a. The district court found that, based on the information he received from dispatch, Officer Winslow understood that the Hibbett employee indicated that the individual was returning shoes that had recently been purchased with counterfeit money at a different Hibbett Sports store. App. 22a. As the officers questioned Richard about counterfeit currency, Mr. Ballance exited the store and walked toward the street, rather than the vehicle. App. 23a. The district court found that, when Richard told the officers to "call [him] down here to see if someone passed a fake bill," App. 4a, Richard was referring to Mr. Ballance, not the unnamed Hibbett employee. App. 24a. Officer Winslow followed and seized Mr. Ballance, ordered Mr. Ballance to speak with him, and frisked Mr. Ballance. App. 24a; *see also* App. 7a-8a (Tenth Circuit agreeing with the parties that a seizure occurred at this point). Mr. Ballance said that he was headed to a liquor store. App. 23a. Officer Winslow asserted that there was no liquor store in that direction; Mr. Ballance disagreed. *Id.*

Officer Winslow asked for identification, and Mr. Ballance gave him a Kansas Department of Corrections card. App. 23a. Mr. Ballance said that he was in Newton to return some shoes for his cousin but that the store would not allow him to return the shoes because

his identification did not have an address on it. App. 23a-24a. Officer Winslow asked to see the bills in Mr. Ballance's wallet—none was counterfeit—and also asked Mr. Ballance why the Hibbett Sports store would accuse him of passing counterfeit bills. App. 24a. Officer Winslow then obtained Mr. Ballance's consent to search his pockets, found counterfeit currency, and arrested him. *Id.* After his arrest, officers found more counterfeit bills in Mr. Ballance's shoes. *Id.*

A federal grand jury in Kansas indicted Mr. Ballance on numerous counterfeit currency charges. App. 5a. Mr. Ballance moved to suppress the counterfeit bills found in his pockets and shoes. *Id.* He argued that the officers did not have reasonable suspicion to seize him. App. 24a. Specifically, Mr. Ballance argued that, while the officers knew that he had just attempted to return shoes to the store, they did not have reasonable suspicion to believe that he had previously purchased the shoes with counterfeit currency. App. 27a.[1]

The district court denied the motion. App. 21a-32a. The district court found reasonable suspicion to seize based on four things: (1) the Hibbett employee's 911 call; (2) the officers' discussion with Mr. Richard; (3) Mr. Ballance's "[u]nprovoked flight" from the gas station; and (4) Mr. Ballance's statement to Officer Winslow that he

[1] Mr. Ballance also argued that his consent to search his pockets was involuntary. App. 24a. The district court and the Tenth Circuit rejected this claim. App. 16a-18a, 30a-32a. We do not pursue this argument in this petition. The unlawful seizure is a sufficient basis to suppress all fruits of that unlawful seizure, including the currency found on Mr. Ballance's person. The government never invoked attenuation or any other similar doctrine below to avoid application of the exclusionary rule on the basis of Mr. Ballance's consent.

was walking to a "non-existent liquor store." App. 29a-30a.

The district court found that the 911 call by the Hibbett employee provided two important categories of information: (1) firsthand knowledge regarding the identification of an individual who was in the store and attempting a return,[2] and (2) secondhand information of a suspected passing of counterfeit currency on an unknown date, at some other unknown store, likely transacted by some other unknown employee, of an unknown item. App. 26a-29a. The Hibbett employee making the call "did not explain how or why" Mr. Ballance matched the description of the individual who presumably purchased an item at another store, on a different date, from a different employee. App. 28a. Nevertheless, on these facts, the district court found the Hibbett employee's statements regarding that suspected criminal activity provided officers a reasonable suspicion to seize Mr. Ballance:

> Based on the [Hibbett] employee's representation that the shoes that [Mr. Ballance] was attempting to return were the shoes previously purchased by counterfeit currency, the [district] court [found] that it [wa]s reasonable for an officer to assume that the individual attempting to return the shoes is the same individual who purchased those shoes in the first instance.

App. 28a-29a.

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[2] The district court acknowledged that this information—the license plate of the vehicle and a description of a black male wearing blue jeans and a T-shirt—"does not go to specific information regarding criminal activity but rather information that would enable the officers to identify [Mr. Ballance.]" App. 26a.

The district court further found that the unnamed employee's information was sufficiently reliable, noting that the employee: (1) was not truly anonymous; (2) reported some contemporaneous, firsthand information (i.e., that Mr. Ballance just tried to return "shoes that were purchased with counterfeit currency"); and (3) provided specific information to identify Mr. Ballance and the vehicle. App. 25a-26a. The district court also found that Richard's statements, as well as the shoes in the vehicle, corroborated the information provided by the unnamed employee. App. 27a, 29a-30a.

Mr. Ballance entered a conditional guilty plea, reserving the right to appeal the denial of the motion to suppress. App. 6a.

B. Court Of Appeals Proceedings

The Tenth Circuit affirmed. App. 1a-19a. In doing so, and relying on its own precedent, the Tenth Circuit "view[ed] the evidence in the light most favorable to the district court's ruling." App. 6a (citing *United States* v. *Juszczyk*, 844 F.3d 1213, 1214 (10th Cir. 2017)). In a footnote, the Tenth Circuit acknowledged that Mr. Ballance disputed this standard of review, but refused to reconsider the standard under stare decisis principles. App. 6a n.4. That footnote referred to the standard as "viewing the evidence in the light most favorable to the government." App. 6a. The Tenth Circuit further stated that it would review factual findings for clear error and legal conclusions de novo. *Id.*

The Tenth Circuit's recitation of the underlying evidence was lengthier than the district court's ruling. App. 1a-6a. The Tenth Circuit plainly viewed those facts in the light most favorable to the district court's ruling, even where the district court did not expressly make findings. For example, the parties disputed the

content of Richard's conversation with the officers. When questioned about counterfeit currency, Richard told the officers to "call [him] down here to see if someone passed a fake bill." App. 4a. Mr. Ballance asserted that Richard was plainly referring to the unnamed Hibbett employee. Compelled by its "view [of] the evidence in the light most favorable to the district court's decision," the Tenth Circuit disagreed and "presume[d]" that Richard was referring to Mr. Balance. App. 4a n.3 ("Because we view the evidence in the light most favorable to the district court's decision in an appeal from the denial of a suppression motion, we presume that Richard was referring to Ballance."). The Tenth Circuit then used this fact in support of its reasonable-suspicion analysis. App. 14a-15a.

In conducting the reasonable suspicion analysis, the Tenth Circuit acknowledged that Mr. Ballance's "primary argument involve[d] the district court's factual finding about what information the 911 call contained." App. 8a. The district court found that Officer Winslow understood that the Hibbett employee indicated that the individual was returning shoes that had recently been purchased with counterfeit money at a different Hibbett Sports store. App. 22a. Mr. Ballance asserted that this factual finding was clearly erroneous and that the Hibbett employee did not provide specific information that Mr. Ballance had tried to return shoes previously bought with counterfeit currency at a different store, in a different city, from a different Hibbett employee. App. 8a-9a. As Mr. Ballance explained, Officer Winslow testified that he did not remember if he obtained this specific information from the dispatch call, and stated only that he was aware of this information when he seized Mr. Ballance. App. 9a-10a. Without specific details from the employee that Mr. Ballance

had passed counterfeit currency, Mr. Ballance argued, the 911 call "lack[ed] sufficient detail of criminal activity to support reasonable suspicion." App. 8a-9a.

In reviewing this factual finding, the Tenth Circuit again "[v]iew[ed] the evidence in the light most favorable to the district court's ruling." App. 10a. With that gloss on the evidence, the Tenth Circuit found no clear error: "the district court could reasonably accept [Officer Winslow's] initial statement and find that dispatch relayed the information." *Id.* The Tenth Circuit acknowledged that Mr. Ballance's position was a "reasonable reading" of the record and that the district court could have credited it. *Id.* But, viewing the evidence in the light most favorable to the district court's ruling, the Tenth Circuit found "a plausible way to avoid the conflict" in the testimony. App. 10a-11a.

In addressing the reliability of the 911 call under a most-favorable-light standard, the Tenth Circuit found its own facts. App. 10a-14a. Although the district court found that the unnamed employee did not relay "'firsthand knowledge of the suspected criminal activity'" (the purchase of shoes with counterfeit money on a prior occasion), the Tenth Circuit disagreed and found that Mr. Ballance's attempted return of the shoes was itself criminal activity (an "attempted fraudulent return"). App. 12a-13a & n.7. The Tenth Circuit admitted this finding "differ[ed]" from that of the district court, which found that the Hibbett employee who made the 911 call was "likely not relaying firsthand knowledge of the suspected criminal activity." *Id.* In finding this new fact, the Tenth Circuit did not cite any law—state or federal—that Mr. Ballance might have violated in merely returning the shoes. App. 12a-13a. The Tenth Circuit then used this newfound fact to reject Mr. Balance's argument that Richard's statement

merely showed that Mr. Balance had been in the store that day, not that he was engaged in suspected criminal activity. App. 13a n.8. Because the Tenth Circuit found that Mr. Balance's attempted return was itself criminal, it believed that Richard's statements "connected Balance" to criminal activity. *Id.*

The Tenth Circuit also engaged in fact finding under its most-favorable-light standard with respect to Mr. Balance's supposed "flight" from the gas station. App. 14a-15a. Rather than review for clear error the district court's factual finding that Mr. Balance engaged in "unprovoked flight" from the gas station, the Tenth Circuit found its own, new facts under its most-favorable-light standard: although Mr. Balance did not flee, the Tenth Circuit found he engaged in "evasive behavior." *Id.*

Ultimately, the Tenth Circuit held that "the district court did not err in determining that Officer Winslow had reasonable suspicion" based on: (1) the information provided in the 911 call; (2) Richard's statements to the officers; and (3) Mr. Balance's evasive behavior. App. 16a. For each of these facts, as just explained, the Tenth Circuit plainly viewed the evidence in the light most favorable to the district court's ruling. App. 10a-16a.[3]

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[3] Although the district court considered information obtained by Officer Winslow after the seizure (specifically, Mr. Ballance's statement that he was walking to a (supposedly non-existent) liquor store), App. 30a, the Tenth Circuit properly refused to consider this information, App. 7a n.5. The Tenth Circuit also properly refused to consider information known by Officer Shell that was not relayed to Officer Winslow. App. 15a-16a n.9. The Tenth Circuit's appropriate treatment of some information does not cure its improper treatment of other information and fact finding to support the district court's reasonable suspicion analysis.

REASONS FOR GRANTING THE PETITION

The federal courts of appeals are split six to five over whether to view evidence in the light most favorable to a district court's Fourth Amendment suppression ruling. The state courts of last resort are also conflicted on this question. This Court should use this case—where the Tenth Circuit affirmed the district court only by viewing the evidence in a light most favorable to the district court's ruling—to resolve the conflict on this important question. This Court should reaffirm that an appellate court's task is to review a district court's factual findings for clear error and its legal conclusions de novo, without construing all factual disputes in the light most favorable to the trial court's decision.

I. THE COURTS OF APPEALS ARE DEEPLY DIVIDED OVER WHETHER TO VIEW EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE DISTRICT COURT'S SUPPRESSION RULING.

When a district court rules on a Fourth Amendment issue, it is typically tasked with determining whether an officer had reasonable suspicion or probable cause to conduct the search or seizure at issue.

> The principal components of a determination of reasonable suspicion or probable cause will be the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or to probable cause. The first part of the analysis involves only a determination of historical facts, but the second is a mixed question of law and fact: "[T]he historical facts are admitted or

> established, the rule of law is undisputed, and the issue is whether the facts satisfy the [relevant] statutory [or constitutional] standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated."

Ornelas v. *United States*, 517 U.S. 690, 696-697, 699 (1996) (quoting *Pullman-Standard* v. *Swint,* 456 U.S. 273, 289 n.19 (1982)). In making this ultimate determination, the district court will draw its own inferences from the facts. *Id.* at 699. It may also find credible any reasonable inferences drawn by law enforcement officers. *Id.* at 699-700. Importantly, the district court must "state its essential findings on the record." Fed. R. Crim. P. 12(d). In other words, a district court cannot summarily deny (or grant) a suppression motion. *Id.*

If a suppression ruling is appealed, the appellate court employs a two-pronged standard of review. The appellate court reviews the district court's findings of historical fact for clear error. *Ornelas*, 517 U.S. at 694 n.3, 699. The appellate court then reviews the ultimate legal issue—i.e., whether reasonable suspicion or probable cause exists—de novo. *Id.* at 696-697, 699. In doing so, the appellate court gives "due weight" to inferences drawn from the historical facts by the district court. *Id.* at 699. The appellate court also gives "due weight" to a district court's "finding that an officer was credible" and any findings made that an officer's "inference was reasonable." *Id.* at 700.

A. Five Circuits View The Evidence In A Light Most Favorable To The District Court's Ruling

Despite this Court's clear guidance in *Ornelas*, five federal courts of appeals, including the Tenth Circuit in

this case, have engrafted an additional requirement onto this dual-pronged standard of review—one requiring the appellate court to view the evidence in a light most favorable to the district court's ruling. These courts of appeals have done so despite the absence of such a rule in this Court's precedent.

According to the **Tenth Circuit** in this case, when reviewing a suppression ruling, the court "view[s] the evidence in the light most favorable to the district court's ruling, accept[s] the district court's factual findings unless clearly erroneous, and review[s] de novo the ultimate question of reasonableness under the Fourth Amendment." App. 6a. In a footnote, the Tenth Circuit stated the standard differently: "viewing the evidence in the light most favorable to the government" (rather than to the district court's ruling). App. 6a n.4.

The **First Circuit** also views the evidence in the light most favorable to the district court's ruling. *See, e.g., United States* v. *Cruz-Rivera*, 14 F.4th 32, 42 (1st Cir. 2021) ("we review 'the record evidence in the light most favorable to the suppression ruling'"), *cert. denied*, No. 21-7287 (U.S. Apr. 4, 2022); *see also United States* v. *Camacho*, 661 F.3d 718, 723-724 (1st Cir. 2011) ("When reviewing a challenge to the district court's denial of a motion to suppress, '[w]e view the facts in the light most favorable to the district court's ruling' on the motion, and we review the district court's findings of fact and credibility determinations for clear error." (citation omitted)).[4]

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[4] In some cases, the First Circuit has stated the rule as viewing the facts in a most-favorable light "to the extent that they derive support from the record." *United States* v. *Sealey*, 30 F.3d 7, 8 (1st Cir. 1994). At other times, the First Circuit has stated that it will affirm the denial of a motion to suppress "[i]f any reasonable

The **Fourth**, **Fifth**, and **Eleventh** Circuits also view the evidence in the light most favorable to the district court's legal outcome.[5] *See, e.g.*, *United States* v. *Coleman*, 18 F.4th 131, 135 (4th Cir. 2021); *United States* v. *Flowers*, 6 F.4th 651, 655 (5th Cir. 2021), *pet. for cert. filed*, No. 21-835 (Nov. 30, 2021); *United States* v. *Johnson*, 921 F.3d 991, 997 (11th Cir. 2019) (en banc).[6]

B. Six Circuits Correctly Employ Clear Error Review Of Factual Findings, Without Viewing The Evidence In The Light Most Favorable To The District Court's Ruling

In contrast, six circuits—the **Second**, **Third**, **Seventh**, **Eighth**, **Ninth**, and **District of Columbia Circuits**—do not view evidence in a most-favorable light in

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view of the evidence supports the denial." *United States* v. *De La Cruz*, 835 F.3d 1, 5 (1st Cir. 2016); *see also United States* v. *Miles*, 18 F.4th 76, 78 (1st Cir. 2021) (similar), *cert. denied*, No. 21-7153 (U.S. Mar. 21, 2022).

[5] Some of these courts articulate the rule as viewing the evidence in the light most favorable to the prevailing party rather than the district court's ruling. That articulation has no impact on the issue presented. Under either articulation, the appellate court improperly transforms itself into a finder of fact, seeking out facts (new or old) that support the district court's legal conclusion.

[6] A handful of Fourth Amendment cases from the Fourth, Fifth, Tenth, and Eleventh Circuits do not include most-favorable-light language. *See, e.g.*, *United States* v. *White*, 836 F.3d 437, 440 (4th Cir. 2016) ("we review the district court's factual findings for clear error and its legal conclusions de novo"); *United States* v. *Vargas*, 643 F.2d 296, 297 (5th Cir. 1981) (same); *United States* v. *Gurule*, 935 F.3d 878, 882 (10th Cir. 2019) (same); *United States* v. *Hammond*, 890 F.3d 901, 905 (10th Cir. 2018) (same); *United States* v. *Green*, 981 F.3d 945, 956 (11th Cir. 2020), *cert. denied*, No. 20-7903 (U.S. May 24, 2021).

the Fourth Amendment context. Instead, consistent with this Court's decision in *Ornelas*, 517 U.S. at 699, these circuits simply review the district court's factual findings for clear error, without taking the evidence in the light most favorable to the district court's ruling. *See, e.g.*, *United States* v. *Pabon*, 871 F.3d 164, 173-174 (2d Cir. 2017); *United States* v. *Weaver*, 9 F.4th 129, 138 (2d Cir. 2021) (en banc); *United States* v. *Yusuf*, 993 F.3d 167, 182 n.11 (3d Cir. 2021); *United States* v. *Foster*, 891 F.3d 93, 103 n.9 (3d Cir. 2018); *United States* v. *Givan*, 320 F.3d 452, 458 (3d Cir. 2014); *United States* v. *Cole*, 21 F.4th 421, 425 (7th Cir. 2021) (en banc), *cert. denied*, No. 21-1165 (U.S. Mar. 28, 2022); *United States* v. *Stewart*, 902 F.3d 664, 672 (7th Cir. 2018); *United States* v. *Shumaker*, 21 F.4th 1007, 1015 (8th Cir. 2021); *United States* v. *Williams*, 955 F.3d 734, 737 (8th Cir. 2020); *United States* v. *Bontemps*, 977 F.3d 909, 913-914 (9th Cir. 2020) (citing *Ornelas*); *United States* v. *Gorman*, 859 F.3d 706, 714 (9th Cir. 2017); *United States* v. *Jones*, 1 F.4th 50, 52 (D.C. Cir. 2021); *United States* v. *Hutchinson*, 408 F.3d 796, 798 (D.C. Cir. 2005) (citing *Ornelas*).[7] The Tenth Circuit's review of the evidence

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[7] In *United States* v. *Garner*, 961 F.3d 264, 269 (3d Cir. 2020), the Third Circuit recently employed light-most-favorable review, citing *United States* v. *Myers*, 308 F.3d 251, 255 (3d Cir. 2002). *Myers* in turn relied on *United States* v. *Riddick*, 156 F.3d 505 (3d Cir. 1998). But when reviewing the suppression ruling in *Riddick*, the Third Circuit did not view the evidence in the light most favorable to the district court. *Id.* at 509. Instead, *Riddick* reviewed the "denial of the motion to suppress for 'clear error as to the underlying facts, but exercise[d] plenary review as to its legality in light of the court's properly found facts.'" *Id.*

The Third Circuit also recently viewed "the evidence presented in the light most favorable to the District Court's ruling" in *United States* v. *Clark*, 902 F.3d 404, 409 (3d Cir. 2018). But *Clark*

in the light most favorable to the district court's ruling cannot be harmonized with these decisions.

Notably, the D.C. Circuit, relying on this Court's precedent, expressly rejected a system whereby the court of appeals would view all factual issues in the light most favorable to the district court's determination. *United States* v. *Castle*, 825 F.3d 625, 632 (D.C. Cir. 2016) ("[W]hen, as here, the District Court has made factual findings, we may not search the record for any reasonable view of the evidence that will support the trial judge's conclusions.").

The Second Circuit has also addressed the issue expressly. The Second Circuit acknowledged that it had "sometimes posited that on a suppression motion we review facts both for clear error and in the light most favorable to the prevailing party." *United States* v. *Faux*, 828 F.3d 130, 134 (2d Cir. 2016). But "the better approach is to review the district court's findings of fact for clear error without viewing the evidence in favor of either party, and to review its conclusions of law and mixed questions of law and fact de novo." *United States* v. *Bershchansky*, 788 F.3d 102, 109 (2d Cir. 2015). The Second Circuit explained that evidence is viewed in a most-favorable light only when "the trial court has not made factual findings and the decision is based on one side's factual assertions or evidence," or when reviewing a jury's general guilty verdict. *Id.* at 110. "A requirement that the evidence be viewed in favor of one side or the other would be at odds with the notion that deference must be given to the factfinder's view of the evidence, and, for example, where there are two permissible views of the evidence, the less

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cited nothing other than a First Circuit decision for this proposition.

favorable of the two would not be clearly erroneous." *Id.* *Bershchansky* did not ultimately decide the issue, however, noting that the defendant would prevail under either standard of review. *Id.*

The Second Circuit revisited this issue in *Pabon*, 871 F.3d at 173-174. Citing *Bershchansky*, the Second Circuit held that, "in reviewing the district court's decision, we apply familiar standards governing clear error review, without viewing the evidence in either party's favor. In addition to carrying with it the advantage of invoking already-familiar standards of review, this approach is also the one most consistent with precedent." *Id.* at 173.[8]

The Sixth Circuit has decisions on both sides of the issue. Older decisions employed a most-favorable-light standard. *See, e.g., United States* v. *Snoddy*, 976 F.3d 630, 633 (6th Cir. 2020) (light most favorable to the prevailing party), *cert. denied*, No. 20-6774 (U.S. Feb. 22, 2021); *United States* v. *Lott*, 954 F.3d 919, 922 (6th Cir. 2020) (same); *United States* v. *Rodriguez-Suazo*, 346 F.3d 637, 643 (6th Cir. 2003) (same); *United States* v. *Garza*, 10 F.3d 1241, 1245 (6th Cir. 1993) (same); *United States* v. *Shamaeizadeh*, 80 F.3d 1131, 1135 (6th Cir. 1996) (viewing the evidence in a light most favorable to

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[8] Research disclosed two post-*Pabon* Second Circuit decisions that still invoked light-most-favorable review, without mentioning *Pabon*. *See United States* v. *O'Brien*, 926 F.3d 57, 73 (2d Cir. 2019); *United States* v. *Iverson*, 897 F.3d 450, 459 (2d Cir. 2018). These decisions cannot and do not overrule *Pabon*. *See Shipping Corp. of India* v. *Jaldhi Overseas Pte Ltd.*, 585 F.3d 58, 67 (2d Cir. 2009) (noting that a panel generally may not "reverse an existing Circuit precedent"). More recently, the Second Circuit issued an en banc Fourth Amendment decision that did not review the evidence in a most-favorable light. *United States* v. *Weaver*, 9 F.4th 129, 138 (2d Cir. 2021) (en banc).

the district court's decision); *see also United States* v. *Price*, 841 F.3d 703, 706 (6th Cir. 2016) ("we review its factual findings for clear error and consider the evidence in the light most favorable to affirmance").

Recently, however, the Sixth Circuit has issued six Fourth Amendment decisions that do not view the evidence in a most favorable light. *United States* v. *Cooper*, 24 F.4th 1086, 1090-1091 (6th Cir. 2022); *United States* v. *Hall*, 20 F.4th 1085, 1099 (6th Cir. 2022); *United States* v. *Elmore*, 18 F.4th 193, 198-199 (6th Cir. 2021), *cert. denied*, No. 21-7502 (U.S. Mar. 28, 2022); *United States* v. *Prigmore*, 15 F.4th 768, 777 (6th Cir. 2021); *United States* v. *Williams*, 998 F.3d 716, 738 (6th Cir. 2021), *cert. denied*, No. 21-6280 (U.S. Dec. 13, 2021); *United States* v. *Sheckles*, 996 F.3d 330, 337 (6th Cir. 2021), *cert. denied*, No. 21-5228 (U.S. Dec. 31, 2021).

Considering the depth of the conflict, there is no reason to think that the circuits can resolve the conflict on their own. It would take five or six circuits to switch sides to eliminate this conflict without this Court's review. Indeed, the Second and the D.C. Circuits have expressly rejected the light-most-favorable standard employed by the Tenth Circuit in this case. *Pabon*, 871 F.3d at 173-174; *Castle*, 825 F.3d at 632. Moreover, when asked to address this issue en banc, the Tenth Circuit declined to do so. App. 6a n.4. The conflict will persist until this Court resolves it.

C. State Courts Of Last Resort Are Also Divided

If the entrenched circuit conflict were not enough, the state courts of last resort are also divided over whether to view evidence in a most-favorable light when reviewing suppression rulings. Some state courts of last resort view the evidence in the light most favorable to the trial court's ruling. *See, e.g., State*

v. *Wagar*, 79 P.3d 644, 650 (Alaska 2003) ("A denial of a motion to suppress is reviewed in the light most favorable to upholding the trial court's ruling."); *Ferch* v. *State*, 459 P.3d 1105, 1108 (Wyo. 2020) ("[T]his [c]ourt views 'the evidence in the light most favorable to the district court's determination and defer[s] to the district court's factual findings unless they are clearly erroneous.'"); *State* v. *Bonacker*, 825 N.W.2d 916, 919 (S.D. 2013) (same); *White* v. *State*, 837 S.E.2d 838, 842 (Ga. 2020) ("[A]n appellate court must construe the evidentiary record in the light most favorable to the trial court's factual findings and judgment."); *Smith* v. *State*, 998 So. 2d 516, 524 (Fla. 2008) ("The evidence is considered in the light most favorable to the ruling, and mixed questions of fact and law are reviewed de novo."); *Pacheco* v. *State*, 214 A.3d 505, 509 (Md. 2019) ("We assess the record 'in the light most favorable to the party who prevails on the issue.'"); *Commonwealth* v. *Mathis*, 173 A.3d 699, 706 (Pa. 2017) (same); *State* v. *Koenig*, 148 A.3d 977, 981 (Vt. 2016) ("taking the evidence in the light most favorable to the prevailing party"); *State* v. *Farley*, 737 S.E.2d 90, 93 (W. Va. 2012) ("When we review the denial of a motion to suppress, we consider the evidence in the light most favorable to the prosecution."); *Smith* v. *State*, 419 P.3d 257, 259 (Okla. Ct. Crim. App. 2018) (same).

Other state courts of last resort ***do not*** view the evidence in the light most favorable to the trial court's ruling. *See, e.g.*, *State* v. *Wright*, 926 N.W.2d 157, 162 (Wis. 2019) ("[T]his court engages in a two-step inquiry. 'First, we review the circuit court's findings of historical fact under the clearly erroneous standard. Second, we independently apply constitutional principles to these historical facts.'"); *State* v. *Blythe*, 462 P.3d 1177, 1180 (Idaho 2020) (same); *Commonwealth* v. *McCarthy*,

142 N.E.3d 1090, 1097 (Mass. 2020) (same); *State* v. *Vegas*, 463 P.3d 455, 457 (Mont. 2020) (same); *State* v. *Krannawitter*, 939 N.W.2d 335, 340 (Neb. 2020) (same); *People* v. *Hammerlund*, 939 N.W.2d 129, 134 (Mich. 2019) (same); *State* v. *Leonard*, 943 N.W.2d 149, 155 (Minn. 2020) (same); *State* v. *Sample*, 414 P.3d 814, 816 (Nev. 2018) (same); *Welch* v. *Commonwealth*, 149 S.W.3d 407, 409 (Ky. 2004) (same); *State* v. *Iona*, 443 P.3d 104, 108 (Haw. 2019) (same); *State* v. *Schooler*, 419 P.3d 1164, 1173 (Kan. 2018) ("[A]n appellate court reviews the factual underpinnings of the decision under a substantial competent evidence standard. The ultimate legal conclusion drawn from those facts is reviewed de novo."); *State* v. *Parisi*, 831 S.E.2d 236, 243 (N.C. 2019) (same); *State* v. *Manning*, 222 A.3d 662, 679 (N.J. 2020) ("We defer to the trial court's factfindings, provided they are 'supported by sufficient credible evidence in the record.' In contrast, clearly mistaken factfindings are not entitled to deference. We review issues of law de novo and are not bound to follow the trial court's or Appellate Division's interpretive legal conclusions, unless persuaded that those conclusions are correct." (citations omitted)); *People* v. *Coates*, 266 P.3d 397, 400 (Colo. 2011) ("[W]hile the findings of historical fact upon which probable cause depend are entitled to deference by a reviewing court, the ultimate determination of probable cause is a mixed question of fact and law, to be resolved de novo by the reviewing court."); *State* v. *Haas*, 930 N.W.2d 699, 701-702 (Iowa 2019) (per curiam) ("When a defendant challenges a district court's denial of a motion to suppress based upon the deprivation of a state or federal constitutional right, our standard of review is de novo.").

II. The Question Presented Is Critically Important To The Procedures That Govern Appeals Of Suppression Rulings.

Standards of review are important to the administration of criminal justice. Not only do they frame the issues for appeal, and oftentimes determine the result of the appeal, but they also provide context for practitioners litigating issues in the lower courts and inform the lower courts how their rulings will be reviewed. Standards of review should not differ depending on the geographic location of the court of appeals. *See, e.g.*, *Concrete Pipe & Prods. Of Cal., Inc.* v. *Construction Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 625-626 (1993) (explaining that the case turned on the proper standard of review); *United States* v. *Gallegos*, 314 F.3d 456, 462 n.3 (10th Cir. 2002) (explaining that the standard of review can have a "substantial impact on the resolution of a particular case").

This Court has often granted certiorari to resolve circuit conflicts regarding standards of review. *See, e.g.*, *Guerrero-Lasprilla* v. *Barr*, 140 S. Ct. 1062, 1067 (2020) ("The question that these two consolidated cases present is whether the phrase 'questions of law' in the Provision includes the application of a legal standard to undisputed or established facts."); *Monasky* v. *Taglieri*, 140 S. Ct. 719, 723 (2020) ("Should the Court of Appeals have reviewed the District Court's habitual-residence determination independently rather than deferentially?"); *U.S. Bank* v. *Village at Lakeridge, LLC*, 138 S. Ct. 960, 963 (2018) ("[W]e address how an appellate court should review that kind of determination: de novo or for clear error?"); *McLane* v. *EEOC*, 137 S. Ct. 1159, 1164 (2017) (resolving "whether a court of appeals should review a district court's decision to enforce or quash an EEOC subpoena *de novo* or for abuse of

discretion"). Indeed, in *Ornelas*, this Court granted certiorari to resolve a very similar Fourth Amendment standard-of-review conflict. 517 U.S. at 695.

The same need for this Court's guidance exists here. Considering the prevalence and importance of Fourth Amendment issues, it is imperative that appellate courts apply the same standard when reviewing suppression rulings. Because they currently do not, the conflict presented in this petition is in need of prompt resolution. As it stands now, only this Court can resolve this entrenched conflict.

III. THE TENTH CIRCUIT ERRED WHEN IT VIEWED THE EVIDENCE IN A LIGHT MOST FAVORABLE TO THE DISTRICT COURT'S RULING.

The Tenth Circuit is on the wrong side of the circuit split for at least three reasons: (1) it contradicts this Court's precedent, (2) the suppression context differs significantly from the situations where a light-most-favorable approach is typically applied, and (3) the Tenth Circuit's ruling rests on circuit precedent predating the 1975 amendment to Federal Rule of Criminal Procedure 12(d), which now ensures that district courts will make factual findings in suppression rulings.

First, the Tenth Circuit's standard of viewing evidence in a light most favorable to the district court's ruling contradicts this Court's precedent. This Court ordinarily reviews factual findings for clear error and legal determinations de novo. *First Options of Chi., Inc.* v. *Kaplan*, 514 U.S. 938, 947-948 (1995). This Court held in *Ornelas* that the same standard applies in the Fourth Amendment context, where the legal "questions of reasonable suspicion [to stop] and probable cause to make a warrantless search should be reviewed

de novo." *Ornelas*, 517 U.S. at 691. At no time in *Ornelas*, however, did this Court gest that the evidence should be viewed in a light most favorable to the district court's ruling. *See id.*; *see also Pabon*, 871 F.3d at 174. That approach, followed by the Tenth Circuit in this case, effectively disregards the proper de novo and clear error standards in favor of what is essentially an abuse of discretion standard.

Contrary to this Court's precedent, the Tenth Circuit's standard gives improper deference to the lower court's ultimate legal determination. In essence, the Tenth Circuit's review defers to the district court's legal conclusions by finding facts to support that conclusion. The decision in this case proves the point. The Tenth Circuit affirmed the district court's ruling not by conducting an independent legal review and determining, for itself, whether Officer Winslow had reasonable suspicion to seize Mr. Balance, but instead by merely adopting the district court's reasoning. For example, rather than deciding whether the evidence supported a factual finding that the shoes Mr. Balance attempted to return had been purchased with counterfeit currency, or whether there was support for the assertion that Mr. Balance was the individual who passed counterfeit currency at a different store, on a different date, to a different employee, the Tenth Circuit attempted to find any reasonable basis for the district court's conclusion that the officers had reasonable suspicion. App. 10a, 12a-13a. Specifically, the Tenth Circuit found a new fact—that the act of returning the shoes was itself a criminal act—that it believed further supported the district court's ultimate legal conclusion. App. 12a. Absent the introduction of that new fact, the Tenth Circuit admitted it would have to "conclud[e] that the caller supplied only secondhand knowledge … [and] the

caller did not suggest he or she observed the prior incident at the other store and linked Ballance to the incident based solely on a description provided by someone else who did." *Id.* Rather than conduct de novo review, as this Court did in *Ornelas*, the Tenth Circuit effectively reviewed the suppression ruling for an abuse of discretion.

Relatedly, and also contrary to this Court's precedent, the Tenth Circuit's rule eviscerates the clear error standard for review of factual findings. If the evidence is viewed in a light most favorable to the district court's ruling, that ruling would only be set aside on factual grounds if no evidence whatsoever supported it. Conversely, the ruling would be affirmed as long as the appellate court could hypothesize a factual finding supporting it—even if the district court did not make such a finding. The rule thus not only insulates clear errors from review, but also effectively turns appellate courts into finders of fact.

Reviewing evidence in a light most favorable to the district court's ruling flies in the face of this Court's explicit holding in *Ornelas* that it "ha[s] never, when reviewing a probable-cause or reasonable-suspicion determination [itself], expressly deferred to the trial court's determination." 517 U.S. at 697. For that reason, this Court rejected "[a] policy of sweeping deference" to trial courts, noting that such deference would permit, in the absence of any significant factual differences, the Fourth Amendment's application to turn on different conclusions drawn by district judges. *Id.* "Such varied results would be inconsistent with the idea of a unitary system of law. This, if a matter-of-course, would be unacceptable." *Id.*

The Tenth Circuit's rule, under which appellate courts can make their own factual findings not previously made, further clashes with this Court's instruction "to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers." *Ornelas*, 517 U.S. at 699. As the Second Circuit recognized, "it is far from clear how one might go about appropriately layering the inferences required by [the most-favorable light] approach on top of the 'due weight' afforded by *Ornelas* to locally-drawn inferences." *Pabon*, 871 F.3d at 174.

Second, the Tenth Circuit's rule is anomalous in the suppression ruling context. There are only three contexts in which this Court views evidence in a light most favorable to a particular outcome: (1) a motion to dismiss, where the movant seeks to avoid sending a case to the factfinder, *see, e.g.*, *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007); (2) a motion for summary judgment, where the movant again seeks to avoid sending the case to the factfinder, *see, e.g.*, *San Francisco* v. *Sheehan*, 575 U.S. 600, 603 (2015); and (3) a motion for judgment of acquittal or judgment as a matter of law, where the movant asks the court to set aside a general jury verdict, *see, e.g.*, *Jackson* v. *Virginia*, 443 U.S. 307, 324 (1979); *cf. Tibbs* v. *Florida*, 457 U.S. 31, 38 n.11 (1982) (explaining that this rule does not apply when a party only asks for a new trial); *cf. Weisgram* v. *Marley Co.*, 528 U.S. 440, 440 (2000) (finding no abuse of discretion where circuit court directed entry of judgment rather than remanding, where the circuit court had viewed evidence in the light most favorable to non-movant under Federal Rule of Civil Procedure 50). In each instance, viewing the evidence in a most-favorable light is necessary to establish the universe of facts to be measured against the governing

legal standards. *See Bershchansky*, 788 F.3d at 110 ("In the first two scenarios, the trial court has not made factual findings and the decision is based on one side's factual assertions or evidence, and in the third scenario, the jury likewise has not made specific factual findings but has rendered only a general verdict.").

But here, Rule 12(d) requires the district court to find the facts on which its holding rests. Because the district court (unlike a jury, for instance) is required to make factual findings, and thus identify the universe of facts in play, there is no reason to view the entirety of the evidence in a certain light. *See Bershchansky*, 788 F.3d at 110. Instead, the proper role of an appellate court is first to review the lower court's factual findings to ensure that those findings are not clearly erroneous, and then to decide de novo whether the found facts (to the extent not clearly erroneous) provided reasonable suspicion. *Ornelas*, 517 U.S. at 696-698. There is no basis for shifting the inquiry away from the facts as the district court found them to alternative findings that the appellate court believes the district court *could* have made.

Third, and relatedly, the Tenth Circuit's approach rests on circuit precedent that in itself fails to account for Rule 12(d). The Tenth Circuit's most-favorable-light standard can be traced back to *United States* v. *Miles*, 449 F.2d 1272, 1274 (10th Cir. 1971). But that case's sole cited authority is a habeas case, *Sinclair* v. *Turner*, 447 F.2d 1158 (10th Cir. 1971). *Miles* did not include a pinpoint citation to *Sinclair*, but its only mention of viewing evidence in the light most favorable to the government was in reviewing a jury's general guilty verdict. *Sinclair*, 447 F.2d at 1160. Indeed, *Sinclair* did not even involve a Fourth Amendment claim.

Moreover, when the Tenth Circuit decided *Miles* in 1971, Federal Rule of Criminal Procedure 12 did not require district courts to make express factual findings when ruling on motions to suppress. Because summary denials of motions to suppress were possible at this time, the standard adopted in *Miles* was at least a plausible standard in certain cases where there were no findings to review. But in 1975, four years after *Miles*, Rule 12 was amended to require district courts to make express factual findings and conclusions of law when ruling on pretrial motions, such as motions to suppress. Fed. R. Crim. P. 12(e) (1975) ("Where factual issues are involved in determining a motion, the court shall state its essential findings on the record."). To the extent *Miles*'s earlier rule requiring appellate courts to view evidence in a "most favorable" light had any doctrinal basis or practical benefit, this amendment removed both. With express factual findings, there is no need to view evidence in a certain light. Either the factual findings are clearly erroneous or they are not, and if they are not clearly erroneous, then the appellate court accepts the findings and reviews the ultimate legal issue of reasonable suspicion de novo.

The other circuits on the Tenth Circuit's side have similarly problematic precedent. The Fourth Circuit's rule traces to *United States* v. *Vickers*, 387 F.2d 703, 706 (4th Cir. 1967), which held that, when a district court denies a motion to suppress without findings of fact, the evidence is considered in the light most favorable to the government. But unlike when *Vickers* was decided, Rule 12(d) now requires district courts to find facts when deciding a motion to suppress. Like the Tenth Circuit, the Fourth Circuit has failed to take Rule 12(d)'s enactment into account when applying

light-most-favorable review to post-Rule 12(d) suppression rulings.

The Fifth Circuit first began to employ a most-favorable-light standard in *United States* v. *Ehlebracht*, 693 F.2d 333, 337 n.6 (5th Cir. 1982), but, similar to the Tenth Circuit, it did so by citing a sufficiency-of-the-evidence case, not a case involving a suppression issue. As explained above, there are material differences between review of a general jury verdict and review of a detailed suppression order.

The First Circuit's rule traces to *United States* v. *Mosciatello*, 771 F.2d 589, 596 (1st Cir. 1985). *Mosciatello* relied on two cases—*United States* v. *Patterson*, 644 F.2d 890, 894 (1st Cir. 1981), and *United States* v. *Jobin*, 535 F.2d 154 (1st Cir. 1976) —neither of which included any language about viewing evidence in a most-favorable light.

Accordingly, because the Tenth Circuit's approach is rooted in inapposite circuit precedent and is contrary to this Court's more recent and well-reasoned approach, review is necessary.

IV. THIS CASE IS AN EXCELLENT VEHICLE.

This case is an ideal vehicle to resolve the conflict in lower court authority.

The question presented arises on direct review and was fully preserved. Mr. Ballance asked the Tenth Circuit not to view the evidence in a light most favorable to the district court's ruling, but the Tenth Circuit rejected the request under circuit precedent. App. 6a n.4. There are no procedural obstacles preventing this Court from deciding the merits of this critically important question.

The manifest injustice promulgated by application of a light most favorable standard in some circuits and some state courts but not others is enough for this Court to grant certiorari and resolve the conflict. Indeed, when faced with a failure to apply the correct standard of review, this Court has reversed and remanded on that issue alone. *See, e.g.*, *McLane*, 137 S. Ct. at 1170 (remanding to court of appeals to apply the correct standard of review and not engaging in any "first view" issues when the "the Court of Appeals has not had the chance to review the District Court's decision under the appropriate standard."); *Consolidated Rail Corp.* v. *Gottshall*, 512 U.S. 532, 557-558 (1994) (reversing and remanding for the lower court to apply the correct legal standard in the first instance).

Moreover, under the correct standard of review, Mr. Ballance would be entitled to relief. The Tenth Circuit affirmed the denial of Mr. Ballance's suppression motion only because it viewed the evidence in a light most favorable to the district court's ruling. App. 2a-16a. Specifically, the Tenth Circuit relied on its own distinct factual findings that (1) the shoes Mr. Ballance attempted to return had been purchased with counterfeit currency, (2) that the 911 call from the Hibbett employee reported contemporaneous, firsthand knowledge of criminal activity, and (3) that Mr. Ballance's walking away from the gas station amounted to "evasive behavior." App. 10a, 12a-13a.

Had the Tenth Circuit confined itself to reviewing the district court's factual findings for clear error, and determining whether any such findings amounted to reasonable suspicion, it could easily have found that the officers did not have an objectively reasonable suspicion to detain Mr. Ballance. Specifically, the Tenth Circuit would have found the district court clearly erred in

finding that Mr. Ballance attempted to return shoes that he had personally purchased with counterfeit currency. The record did not support a finding that the Hibbett employee who made the 911 call stated that the person in the store had attempted to return shoes that had been purchased with counterfeit currency. The caller provided no credible information about the individual who passed counterfeit currency at another store, on another date, from another employee, or about what item was purchased. And nothing in the record linked the shoes that Mr. Ballance was trying to return with the previous counterfeiting incident.

The Tenth Circuit also would have found that the district court erred in finding that Mr. Ballance's walking away constituted a "flight." Indeed, the record only supports that Mr. Ballance walked away from the gas station, without any attempt by the officers to make contact with him. As a result, under de novo review, and without viewing the evidence in a light most favorable to the district court's ruling, the Tenth Circuit would (and at least could) have held that the officers lacked reasonable suspicion to seize Mr. Ballance.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

MARK C. FLEMING
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109

H. RACHAEL MILLION-PEREZ
WILMER CUTLER PICKERING
HALE AND DORR LLP
1225 Seventeenth Street
Denver, CO 80202

MELODY BRANNON
Federal Public Defender
DANIEL T. HANSMEIER
Appellate Chief
Counsel of Record
KANSAS FEDERAL PUBLIC
DEFENDER
500 State Avenue, Ste. 201
Kansas City, KS 66101
(913) 551-6712
daniel_hansmeier@fd.org

Counsel for Petitioner

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