No. _____

In the

Supreme Court of the United States

ERNEST VERDUGO, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Petition for Writ of Certiorari to the

United States Court of Appeals

for the Ninth Circuit

Petition for Writ of Certiorari

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Question Presented

Whether police officers establish probable cause that a motel room is a suspect's "residence" when they learn that he has abandoned his reported address and find him in the motel room with another individual, but they do not investigate whether he or the other individual rented the room or whether he has any independent access to it.

Statement of Related Proceedings

- *United States v. Ernest Verdugo*,
  Case No. 2:18-cr-0713-JFW-1 (C.D. Cal.)

- *United States v. Ernest Verdugo*,
  Case No. 19-50255 (9th Cir.)

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ERNEST VERDUGO, Petitioner

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Petition for Writ of Certiorari

Ernest Verdugo petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in his case.

Opinions Below

The opinion of the Court of Appeals is unreported and is included in the Appendix at App. 1-3. A transcript of the District Court's ruling is included in the Appendix at App. 4-23.

Jurisdiction

The judgment of the Ninth Circuit Court of Appeals was entered on May 7, 2021. App. 1. This Court's miscellaneous orders dated March 19, 2020, and July 19, 2021, extended the deadline for this petition for a writ of certiorari to 150 days from the Court of Appeals' judgment. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional Provision Involved

U.S. Const., Amend. IV 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

Police officers justified the warrantless search of a motel room based on the fact that one of the two people they found in the room was Ernest Verdugo, who was subject to the warrantless search of his "residence" under the terms of California's Postrelease Community Supervision. But before the officers could search the motel room on the basis of Mr. Verdugo's search condition, they were required to establish probable cause that he actually lived there—that the room was his "residence" and so subject to the search condition.

And yet, the officers here found no evidence indicating that Mr. Verdugo was living in the motel room before they searched it. All the officers knew when they searched the room was that Mr. Verdugo was staying at the motel that day with another individual. There was no indication he was there for more than one day. The officers also did not investigate whether Mr. Verdugo or the other person had rented the room,

which of them had paid for it, whether any of Mr. Verdugo's possessions were in the room, or if Mr. Verdugo even had a key to the room. The officers thus failed to establish probable cause that the room was under Mr. Verdugo's control, let alone that it was his residence. The search was therefore unconstitutional and the evidence found in the room should have been suppressed.

In affirming the District Court's denial of Mr. Verdugo's suppression motion, the Ninth Circuit Court of Appeals concluded that the officers had established probable cause that Mr. Verdugo lived in the motel room based on the fact that he had abandoned his reported address and was present in the motel room. But the issue was whether there was probable cause that Mr. Verdugo was living at the motel, not that he was no longer living at his reported address. This probable-cause-as-residence requirement is an important safeguard to prevent the warrantless search of every residence where a probationer may simply be visiting. The Ninth Circuit's decision eroded this important principle, and the probable cause standard more generally. This Court should reaffirm that the probable cause standard—written into our Constitution— requires more than bare suspicion to sustain a warrantless search.

Statement of the Case

In May 2017, Mr. Verdugo was placed on Postrelease Community Supervision ("PRCS") under the terms dictated by California law. App. 12-13; ER 79-80.[1] A warrant was later issued for Mr. Verdugo's arrest because he failed to report for PRCS. *See* App. 12. Mr. Verdugo had previously reported that he would live in his family's home, located on Springwood Street in South El Monte, California. App. 13. On July 11, 2017, officers with the Los Angeles County Sherriff's Department visited the Springwood Street home, searching for Mr. Verdugo. App. 13. Mr. Verdugo was not present at the residence, and his sister informed the officers that Mr. Verdugo was "staying" at a Motel 6 in Hacienda Heights, California. App. 13.

That same day, officers went to the Motel 6 in Hacienda Heights and spoke to the motel manager. App. 13. The manager stated that Mr. Verdugo and his girlfriend, Vanessa Cruz-Clendenning, had checked out of the motel on the previous day, July 10. App. 13; ER 64, 67. That is, the officers confirmed that Mr. Verdugo was *not* staying at the Motel 6 on July 11.

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[1] Citations to "ER" refer to the Excerpts of Record filed in Mr. Verdugo's appeal to the Ninth Circuit, case number 19-50255.

On July 19, the officers returned to the family home on Springwood Street, where they spoke to Mr. Verdugo's mother. App. 13. Mr. Verdugo's mother told the officers that Mr. Verdugo no longer lived at the location. App. 13.

On August 23, 2017, the officers obtained a warrant to track Mr. Verdugo's cellular telephone. App. 14. On August 30—more than six weeks after Mr. Verdugo had previously checked out of the motel—the tracking system showed that Mr. Verdugo's cellular telephone was located at the Motel 6 in Hacienda Heights. App. 14.

The officers then drove to the Motel 6 and showed a photograph of Mr. Verdugo to the motel's manager. App. 14. The manager stated that the person in the photograph was "staying" in room 278. App. 14. The officers then walked to room 278 and, before reaching the room, they saw Mr. Verdugo looking out of the window. App. 14. They then knocked on the door to room 278 an stated "Sherriff's department, open the door, parole search." App. 14. Mr. Verdugo answered the door, and the officers ordered him "to the ground," arrested him, and escorted him to one of their police cars. App. 14; ER 46, 65.

The officers saw that another person was also in the motel room, and she later turned out to be Nourjahawn Esparza (a different person than the

one Mr. Verdugo had stayed with at the motel in July). App. 14-15. The officers handcuffed Ms. Esparza and escorted her out of the room, at which point she was found to be in possession of cocaine and arrested. App. 14; ER 46.

Although they had a warrant for Mr. Verdugo's arrest, the officers did not have a warrant to search the motel room. They nonetheless searched the room. App. 15. In a declaration submitted to the District Court, one of the officers characterized the warrantless search as a "parole search." ER 66. Pursuant to his PRCS status, Mr. Verdugo was indeed subject to a warrantless search of his person, residence, and possessions. App. 12. Specifically, California law dictates that "[e]very person placed on postrelease community supervision, and his or her residence and possessions, shall be subject to search or seizure at any time of the day or night, with or without a warrant . . . ." Cal. Penal Code § 3465; *see also* ER 80 (notice of PRCS signed by Mr. Verdugo).

Before searching the room, the officers did not learn whether Mr. Verdugo (as opposed to Ms. Esparza) had rented the room. Indeed, the record reflects that the officers never investigated basic information about the room, such as who had rented it, whose name it was registered under, whether Mr. Verdugo possessed a key to the room, or whether Mr. Verdugo

had stayed in the room overnight, let alone for more than one night. *See* ER 38-39 (Mr. Verdugo's motion to suppress, pointing out these deficiencies in the investigation); ER 53-62 (Government's opposition to the motion, not contesting Mr. Verdugo's assertions about the deficiencies in the investigation).

Nevertheless, the officers conducted a warrantless search of the motel room, where they found a storage container, which they then opened and searched. App. 15. Inside the storage container the officers found access cards, an embosser machine, and a card reader, among other things. App. 15. Based on this evidence, a grand jury returned an indictment charging Mr. Verdugo and Ms. Esparza with possession of device-making equipment (count 1), possession of unauthorized access devices (count 2), and aggravated identity theft (count 3). ER 28-31.

Mr. Verdugo moved to suppress the evidence obtained through the warrantless search of the motel room, arguing that the officers lacked the required probable cause to believe he resided in the room. *See* App. 15. At a hearing, the District Court denied the motion, concluding that the officers had probable cause to believe that Mr. Verdugo resided in the motel room before they searched it based on the following facts: (1) the officers had "credible information that the defendant had abandoned his reported []

address"; (2) the officers tracked Mr. Verdugo's cell phone to the motel on the day of the search; (3) the motel manager said that Mr. Verdugo was "staying" in the motel room; (4) the officers saw Mr. Verdugo in the motel room immediately before the search; (5) Mr. Verdugo opened the motel room door for the officers; and (6) Mr. Verdugo's sister told the officers on July 11 that Mr. Verdugo was staying at the motel (even though the officers confirmed that same day that Mr. Verdugo was no longer at the motel). App. 20-21. The District Court concluded that these facts established the requisite probable case that Mr. Verdugo resided in the room on the day of the search. App. 20-22.

Mr. Verdugo entered a conditional guilty plea to all three charged counts, which preserved his right to appeal the denial of his motion to suppress. ER 82-83 ¶ 3.

Mr. Verdugo appealed his conviction, arguing that the officers lacked probable cause that he lived in the motel room, especially considering that there was a third party in the room at the time of the search and the officers did not know which of the two occupants had rented the room. A panel of the Ninth Circuit issued an unpublished decision affirming the conviction. App. 1-3. The Ninth Circuit concluded that the officers had the requisite probable cause that Mr. Verdugo was living in the motel room based "on both

Verdugo's abandonment of his reported residence and his sister's statement that he was staying at the Motel 6 weeks prior to the search." App. 2. The Court concluded that these facts, coupled with Mr. Verdugo's presence in the motel room on the day of the search, were sufficient to establish probable cause, notwithstanding the fact that the officers confirmed several weeks earlier, on the day the sister told them about the motel, that Mr. Verdugo was not staying there. App. 3.

Reasons for Granting the Writ

A. The Ninth Circuit's Decision Misapplied the Probable Cause Standard

1. Police officers searched the motel room without a warrant. "Because warrantless searches and seizures are *per se* unreasonable, the government bears the burden of showing that a warrantless search or seizure falls within an exception to the Fourth Amendment's warrant requirement." *United States v. Cervantes*, 703 F.3d 1135, 1141 (9th Cir. 2012); *see also United States v. Job*, 871 F.3d 852, 860 (9th Cir. 2017). The only exception to the warrant requirement that the Government asserted is that as a condition of PRCS, Mr. Verdugo's "residence" could be searched without a warrant. *See* App. 1-3; Cal. Penal Code § 3465 (authorizing warrantless search of "residence" of defendant on PRCS).

Before the officers could search a location based on the search condition covering Mr. Verdugo's "residence," the officers were required to establish probable cause that he actually resided in the location to be searched. *United States v. Grandberry*, 730 F.3d 968, 975 (9th Cir. 2013) ("We [] must apply our long-established probable-cause-as-to-residence requirement."); *see also United States v. Cervantes*, 859 F.3d 1175, 1183 (9th Cir. 2017) (applying the probable-cause-as-to-residence requirement to a hotel-room search based on a California post-release supervision search condition); *United States v. Howard*, 447 F.3d 1257, 1262 (9th Cir. 2006); *Motley v. Parks*, 432 F.3d 1072, 1079 (2005) (en banc), *overruled on other grounds by United States v. King*, 687 F.3d 1189 (9th Cir. 2012) (en banc).

This probable-cause-as-to-residence rule protects core Fourth Amendment principles. First and foremost, the rule protects the Fourth Amendment privacy interests of third parties; the rule recognizes that someone's private space may not be subjected to a warrantless search just because a suspect with a search condition is visiting. *See Motley*, 432 F.3d at 1079 ("Nothing in the law justifies the entry into and search of a third person's house to search for the parolee."). Additionally, because the Fourth Amendment generally requires a warrant, a search condition can authorize a warrantless search only if the search condition is "clear and unambiguous" in

its authorization. *Cervantes*, 859 F.3d at 1182; *see also United States v. Knights*, 534 U.S. 112, 119-20 (2001); *United States v. King*, 736 F.3d 805, 808-09 (9th Cir. 2013). Thus, a search condition covering a "residence" can authorize a warrantless search only at the location where the suspect actually lives—not "a place where he is merely a temporary overnight guest"—and the officers must have probable cause to believe the location is the suspect's residence before they search it. *Cervantes*, 859 F.3d at 1182 (holding that a hotel-room search was not authorized based on the search term for the defendant's "residence").

The probable-cause-as-to-residence requirement applies the familiar probable cause standard written into the Constitution. That is, to search a location based on a residential search condition, "the facts known to the officers at the time of the search must have been sufficient to support a belief, in 'a man of reasonable caution,'" that the defendant lived at the location to be searched. *Howard*, 447 F.3d at 1262 (quoting *Texas v. Brown*, 460 U.S. 730, 742 (1983)). Probable cause "requires more than a mere well-founded suspicion"; instead, "[t]here must be strong evidence that the [suspect] resides at the address." *Grandberry*, 730 F.3d at 975 (internal quotation marks and citations omitted).

Moreover, the probable-cause-as-to-residence requirement applies equally to the warrantless search of a motel room. *See United States v. Franklin*, 603 F.3d 652, 655-57 (9th Cir. 2010); *Cervantes*, 859 F.3d at 1182. When a motel room is to be searched based on a residential search condition, "[i]t is insufficient to show that the parolee may have spent the night there occasionally." *Franklin*, 603 F.3d at 656–57 (citation omitted); *see also Cervantes*, 859 F.3d at 1179 (holding that the term "residence" in a search condition did not apply to the defendant's hotel room since it did not "encompass a place where he is merely a temporary overnight guest"). Instead, like any search based on a residential search condition, the search condition can authorize a motel-room search only if the officers have "strong evidence" that the suspect is using the room as his "home base" for however long he stays there. *Grandberry*, 730 F.3d at 975; *see also Franklin*, 603 F.3d at 656–57 (holding that a motel room may constitute the suspect's "residence" for the duration of his stay where the suspect rented the room himself, stayed there alone, and used the room as his only residence).

2. As the Ninth Circuit stated in *Howard*, "[a]n examination of our case law demonstrates just how stringent this standard is." *Howard*, 447 F.3d at 1262. In *Howard*, the Court reversed the denial of the defendant's motion to suppress, concluding that the officers did not have probable cause

to believe the defendant lived in the searched apartment, despite the fact that the officers found him in the apartment with his girlfriend in the early morning, knew that he had previously stayed there several times, and knew that he kept some personal belongings in the apartment. *See id.* at 1259-62 & 1268. The Court emphasized that these facts showed only that the defendant was an occasional overnight guest in his girlfriend's apartment, and not that it was his residence. *See id.* at 1267-68. The Court further concluded that the fact that the defendant did not have a key to the apartment, and that both he and his girlfriend denied that he lived there, undermined probable cause that the apartment was his residence. *See id.*

Grandberry is an even more revealing decision. In *Grandberry*, the Ninth Circuit Court concluded that the officers lacked probable cause as to residence despite the fact that they had observed the parolee-defendant at the searched location six to ten times over a two-week period and observed him using a key to enter it. *Grandberry*, 730 F.3d at 975-77. The Court reasoned that in the officers' "nearly two weeks of surveillance, the only thing that they saw him carry in or out of the apartment was a substantial sum of cash—a fact which, as the district court concluded, might be indicative of his use of the [searched] apartment as a base from which 'to conduct drug business,' but did not suggest that the apartment was his residence."

Id. at 979. The Court further reasoned that the officers did not observe any indications that the searched address was the defendant's "home base"—"such as taking out the garbage, and bringing in and carrying out laundry and dry cleaning"—and the officers performed only "perfunctory" investigations to determine whether the defendant had abandoned his reported address. *Id.* at 979 (internal quotation marks and citations omitted). Consequently, the Court concluded that the officers lacked probable-cause-as-to-residence and affirmed the suppression of the evidence found inside. *Id.* at 980.

It is also telling to consider a case where there was "just barely" enough evidence to establish probable cause as to residence. *United States v. Harper*, 928 F.2d 894, 896 (9th Cir. 1991), *overruled on other grounds by United States v. King*, 687 F.3d 1189 (9th Cir. 2012) (en banc). In *Harper*, the police searched a residence after: (1) they knew that the home was leased by the defendant-parolee's family and that two of his brothers lived there; (2) the police had seen the defendant enter the residence with "his own key once or twice during a three day period"; (3) the police "saw cars belonging to known associates" of the defendant parked outside the family home; and (4) the police knew the defendant "had lived with his family at another address immediately before he was incarcerated, suggesting that he had no

independent residence and would resume living with them upon his release." *Id.* The Court concluded that "[t]his information was sufficient to give the police probable cause to believe that [the parolee] resided there—but just barely. It would have been far more prudent for the police to have obtained a search warrant." *Id.* at 896-97; *see also Howard*, 447 F.3d at 1263 (discussing *Harper*). That is, even though the defendant had been seen using his own key to enter the home multiple times, and was known to have previously lived with his family, this evidence was "just barely" enough to satisfy probable cause as to residence. *Id.*

These cases demonstrates that, as in all contexts, the probable cause standard "requires more than a mere well-founded suspicion," and instead authorizes a search only where the officers have actual evidence supporting their suspicion. *Grandberry*, 730 F.3d at 975 (internal quotation marks and citations omitted).

3. The officers here lacked probable cause to believe that the motel room was Mr. Verdugo's residence before they searched it. Before the search, the officers knew only that Mr. Verdugo was in the motel room with another person—Ms. Esparza—and that the motel manager stated that he was staying there. But they had no information as to whether Mr. Verdugo, as opposed to Ms. Esparza, had rented the room, which of them had paid for

it, or whether Mr. Verdugo even had a key or any independent control over the room. The officers also had no information indicating that he was living in the motel room, as opposed to visiting it as a temporary guest. But to establish probable-cause-as-to-residence in a motel room, "[i]t is insufficient to show that the [defendant] may have spent the night there occasionally." *Franklin*, 603 F.3d at 656–57 (quoting *Howard*, 447 F.3d at 1262)). Instead, probable cause required some indicia that Mr. Verdugo was using the motel room as his "home base," which were entirely lacking here. *Grandberry*, 730 F.3d at 975. The warrantless search of the motel room was therefore unconstitutional and the fruits of the search must be suppressed.

The Ninth Circuit concluded that the officers had established probable cause that Mr. Verdugo was living in the motel room on August 30 based on "Verdugo's abandonment of his reported residence and his sister's statement that he was staying at the Motel 6 weeks prior to the search." App. 2. The Court concluded that these two facts combined with Mr. Verdugo's presence in the motel room on the day of the search were sufficient to establish probable cause that he was living there. App. 3.

These facts fall far short of establishing probable cause as to residence: First, the fact that Mr. Verdugo's mother said that he no longer lived at his family's home "does not establish probable cause as to where he was living."

United States v. Sohappy, 392 F. App'x 557, 558 (9th Cir. 2010) (unpublished). As a panel of the Ninth Circuit stated in *United States v. Vasquez*, "what had to be shown here was probable cause as to where Vasquez *did* live, not as to where he did not live. The scant evidence regarding his reported residence was for that reason as well tangential to establishing that Vasquez did live in the apartment searched." *United States v. Vasquez*, 743 F. App'x 778, 779 (9th Cir. 2018) (unpublished). Evidence that he no longer lived with his family could not establish probable cause that Mr. Verdugo *did* live in the motel room.

Second, the fact that Mr. Verdugo's sister told the officers on July 11 that Mr. Verdugo was staying at the motel cannot establish that he was residing there on August 30. That is especially so since the officers confirmed on July 11 that Mr. Verdugo and Vanessa Cruz-Clendenning (not Ms. Esparza) had checked out of the motel together on July 10. App. 13. Thus, the statement from the sister only served to confirm that as of July 11, Mr. Verdugo was *not* living in the motel; it could not prove that he was living there six weeks later, on August 30. *See Howard,* 447 F.3d at 1267 ("[T]he mere fact that [an officer] had visited [the defendant] there in early February was not sufficient to create probable cause that [the defendant] *lived* there at the end of March."); *cf. Cuevas v. De Roco,* 531 F.3d 726, 734 (9th Cir.2008)

(holding that out-of-date residency information did not support a probable cause determination when more recent records indicated the defendant lived at a different residence).

Finally, Mr. Verdugo's mere presence in the motel room does not establish probable cause that he was living there. *See Howard*, 447 F.3d at 1259-62 & 1268 (holding that officers lacked probable cause as to residence even though they found the defendant at the searched apartment in the early morning, knew that he had previously stayed there several times, and knew that he kept some personal belongings in the apartment); *Grandberry*, 730 F.3d at 975-77 (holding that the officers lacked probable cause as to residence even though they had observed the defendant at the searched location six to ten times in a two-week period); *Sohappy*, 392 F. App'x at 558–59 ("Evidence of mere presence at a residence, standing alone, is insufficient to establish probable cause that an individual under community supervision is living at the residence." (citing citation omitted)).

While the officers knew that Mr. Verdugo was staying in the room on the day of the search, they had no information indicating that he was living in it. The officers did not even know whether the room was under his control, as opposed to Ms. Esparza's, let alone that it was his residence. This is especially so since there was no indication that he had stayed there for

more than one day. Courts have repeatedly emphasized that the term "residence" in a search condition does not "encompass a place where [a defendant] is merely a temporary overnight guest." *Cervantes*, 859 F.3d at 1182 (holding that the term "residence" in a search condition did not apply to the defendant's hotel room); *see also Franklin*, 603 F.3d at 656–57 (to establish probable-cause-as-to-residence in a motel room, "[i]t is insufficient to show that the parolee may have spent the night there occasionally"); *Grandberry*, 730 F.3d at 978 ("We have emphasized several times, however, that a parolee's presence at a residence, even if frequent, does not, standing alone, establish probable cause that the parolee lives there.").

The facts known to the officers fell far short of establishing probable cause as to residence. Before the search, the officers knew only that Mr. Verdugo was in the motel room with another person and had stayed there that day; they had no information about which of the two people in the room had rented it, whether Mr. Verdugo had a key or any independent control over the room, or whether Mr. Verdugo had stayed there for more than one night. That is, they had no information indicating that the motel room was Mr. Verdugo's "home base." *See Grandberry*, 730 F.3d at 975. The officers lacked the required probable cause that the motel room was Mr. Verdugo's residence, and the search therefore violated the Fourth Amendment.

B. Clarifying the Probable Cause Standard is of Exceptional Importance

The requirement that law enforcement officers obtain probable cause before searching private property is a core Constitutional right that "affect[s] the very essence of constitutional liberty and security," and "reach[es] farther than the concrete form of the case[,] apply[ing] to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life." *Berger v. State of N.Y.*, 388 U.S. 41, 49 (1967) (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)). The Ninth Circuit's decision erodes this core constitutional value by finding probable cause based on broad suspicion, as opposed to the required evidence that would cause "a man of reasonable caution" to believe that Mr. Verdugo lived in the searched location. *Texas v. Brown*, 460 U.S. 730, 742 (1983).

Moreover, this Court has recognized that specifying the contours of the probable cause standard as it applies in various context is an issue of exceptional importance. Given the probable cause standard's "imprecise nature," this Court has stressed that clarifying "how the general standard of probable cause applies in the precise situation encountered" is "especially important." *D.C. v. Wesby*, 138 S. Ct. 577, 590 (2018) (quotation marks and citation omitted). This case presents an opportunity to clarify the standard's

application to the question of how much evidence is necessary to form probable cause that a suspect lives in a particular location.

Finally, the question presented is of exceptional importance because of its far-reaching real-world consequences. There are hundreds of thousands of people in California subject to suspicionless searches as a condition of probation, parole, and PRCS.[2] The officers here assumed they could search any room where a suspect with a search condition was visiting for one night, and the Ninth Circuit affirmed that assumption. Countenancing this reasoning could subject any person to a suspicionless search of their home if they host one of the hundreds of thousands of Californians subject to a suspicionless search condition. Clarifying the probable cause standard in this particular context is therefore of exceptional importance.

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[2] At the end of 2015, there were more than 296,000 people on probation in California. *See* Ryken Grattet and Brandon Martin, *Just the Facts: Probation In California*, Public Policy Institute of California (December 2015), https://www.ppic.org/publication/probation-in-california/.

Conclusion

For the foregoing reasons, Mr. Verdugo respectfully requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

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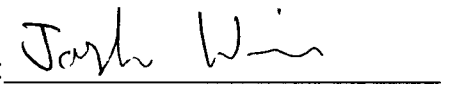
DATED: October 1, 2021

By: 

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