No. _____

In The Supreme Court of the United States

SHAWN FORD,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a third party's apparent authority to consent to a search of a criminal suspect's residence requires that the police reasonably believe that the third party resides in, occupies or inhabits the residence?

PARTIES TO THE PROCEEDINGS BELOW

Charles Rogers was a party to the proceedings in the district court below, and the United States Court of Appeals for the Sixth Circuit consolidated the instant case, *United States v. Shawn Ford*, Case No. 19-4176 with *United States v. Charles Rogers*, Sixth Circuit Court of Appeals Case No. 19-4175 for briefing and submission. Pursuant to Supreme Court Rule 12.6, it is Petitioner's belief that Charles Rogers does not have an interest in the outcome of this Petition.

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PETITION FOR CERTIORARI

Petitioner Shawn Ford respectfully petitions for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit entered on May 27, 2021.

OPINION AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit entered on May 27, 2021 was not recommended for publication and appears at Appendix A. *United States v. Rogers, et al.* 2021 FED App. 0258N, 2021 U.S. App. LEXIS 16160 (6th Cir. May 27, 2021). The Petitioner's timely petition for rehearing and rehearing *en banc* was denied by order dated January 3, 2018, which appears at Appendix B. *United States v. Shawn Ford*, 2021 U.S. App. LEXIS 22763 (6th Cir. July 30, 2021).

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on May 27, 2021, and Petitioner's timely petition for rehearing and rehearing *en banc* was denied on July 30, 2021. The jurisdiction of this Honorable Court is invoked under Title 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. IV:

> 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.

STATEMENT OF THE CASE

Cleveland Police Department ("CPD") officers were investigating a series of armed robberies and an attempted robbery by masked robbers at Metro PCS stores in Cleveland, Ohio between March 21, 2018 and March 27, 2018. Petitioner Shawn Ford ("Ford") was detained and arrested for suspected narcotics possession after he was stopped walking away from a vehicle matching the description of the vehicle involved in the robbery on March 27, 2018.

CPD Detective Lisette Gonzalez ("Gonzalez") learned that Ford's home was a two-family residence with an upstairs unit and a separate downstairs unit. Gonzalez checked postal records and determined that Ford received mail at the upstairs unit. (R.143, Tr. Gonzalez, Page ID# 3239-3241). On April 19, 2018, Gonzalez obtained a warrant to search the upstairs unit. However, she admittedly did not have enough information to establish probable cause for a warrant for the downstairs unit. (R.143, Tr. Gonzalez, Page ID# 3239-3241).

Gonzalez did not attempt to determine ownership of the home before executing the warrant. (R.143, Tr. Gonzalez, Page ID# 3302). When executing the warrant in the upstairs unit, Gonzalez spoke to an occupant, Broderick Steward ("Steward"), who advised her that Ford resided in the downstairs unit. Steward told Gonzalez that he and Ford's mother, Keona McDonald ("McDonald"), owned the entire house. (R. 143, Tr. Gonzalez, Page ID# 3248-3250). However, before searching the downstairs unit, Gonzalez learned that county records indicated that a person named Michael Reeder owned the home. (R.143, Tr. Gonzalez, Page ID# 3304-3305). Gonzalez asked who stayed in the attic bedroom, and Steward responded "that's our room" meaning the bedroom he shared with McDonald. (R.143, Tr. Gonzalez, Page ID# 3306-3308).

Steward also told Gonzalez that Ford's grandmother, Marcella Berry ("Berry"), had previously stayed in the downstairs unit but that she was living "on Corlett," caring for the children of her other daughter who was incarcerated. (R.143, Tr. Gonzalez, Page ID# 3316-3318). When asked by an officer about who lived in the house, Steward listed a number of individuals, but did not mention Berry, stating "that's it." (R. 143, Ex. D1, Bauhof Body Camera Recording, 05:44-05:52). Police initiated attempts were made to request Berry to bring the key to the downstairs unit. (R.143, Tr. Gonzalez, Page ID# 3315).

Berry arrived with a key to the downstairs unit and immediately told Gonzalez, "this is his place." (R.143, Tr. Gonzalez, Page ID# 3319-3320). When Gonzalez asked Berry if she lived there, she initially said "yes and no," but then clarified that she had not stayed there since September or October, 2017. (R. 143, Tr. Gonzalez, Page ID# 3320-3321). Gonzalez' April 19, 2018 body camera recording clearly reflects the following exchange almost immediately prior to the search and well after Gonzalez received knowingly false information from Steward about ownership of the home:

Gonzalez:	Ok, so here's the deal, you do live here, is that correct?
Berry:	Yes and no.
Gonzalez:	So you stay here sometimes?
Berry:	Well, I haven't been here since, I would say, September, October.
Gonzalez:	September of last year?
Berry:	Yes.
Gonzalez:	And you haven't lived here since then?
Berry:	Right.

(Hearing Ex. E, Gonzalez Body Camera recording at 17:45-20:40). Berry did not claim to reside in, occupy or inhabit the downstairs unit. Gonzalez asked Berry if she owned the home, and Berry responded "not yet." (R.143, Gonzalez, Page ID# 3320-3321). Gonzalez then said "there's a problem with your consent because you're telling me you haven't lived her since September of 2017. I probably can't get consent from you because of that fact." (R.143, Tr. Gonzalez, Page ID# 3322-3323). Gonzalez asked Berry if she had property in the unit, and Berry

responded "my plants," and indicated that she came to the unit "every now and again" to attend to them. (R.143, Tr. Gonzalez, Page ID# 3322-3323). Gonzalez then had Berry sign the consent form to search the downstairs unit as "lessee." During this colloquy, Gonzalez received a call from the prosecutor whose help she had requested in obtaining a search warrant for the downstairs unit. Gonzalez told the prosecutor a warrant would not be necessary because "we have a family member that has property in the downstairs unit inside, and she has keys to the downstairs unit, so she's going to give us consent. So it doesn't look like I'll need the warrant." (Gonzalez Body Camera Recording, R. 143, Ex. E., 21:50-22:16). Gonzalez did not suggest to the prosecutor that she believed Berry resided in the unit. *Id.* After Berry led Gonzalez into the unit, she unlocked two closets and told officers the closets contained her property. Berry then watered her plants in the dining room and told Gonzalez that she did not know which bedroom was Ford's.

The district court below exercised jurisdiction pursuant to Title 18 U.S.C. §3231. By Indictment filed on June 5, 2018, Ford was charged with one count of conspiracy to commit Hobbs Act Robbery, three counts of Hobbs Act Robbery, one count of attempted Hobbs Act Robbery, and three counts of using, carrying, brandishing and/or discharging a firearm during and in relation to a crime of violence. The district court denied Ford's motion to suppress evidence seized from his residence. As to downstairs unit, the district court found that, although Berry

had not lived there for some 6-7 months, she had apparent authority to consent to the search as she had a key to the unit, had property there, and had recently put locks on two closets where she kept some property. (R.69, Memorandum Opinion, Page ID# 920-922).

Several items seized from a bedroom in the downstairs unit were introduced at trial - a pair of size 12 white Nike tennis shoes with a black Nike emblem and a black hooded Polo sweatshirt with white draw strings similar to those worn by the robbers as depicted on video surveillance cameras, as well as live Winchester .9mm rounds similar to the Winchester .9mm shell casings found at the scene of the March 27, 2018 robbery and shooting. On July 1, 2019, the jury returned verdicts of guilty on each count. (R.90, Verdicts). On November 19, 2019, Ford was sentenced to a total term of 403 months and final judgment was entered by the district. (R.110, Judgment).

A split panel of the United States Court of Appeals for Sixth Circuit affirmed. The panel majority did not decide the question of Berry's actual authority to consent to the search and found that she had apparent authority. The panel majority erroneously concluded that "living at the residence cannot be a requirement" for apparent authority. (Appx. A, *United States v. Rogers*, Majority Opinion, Doc. 62.2 at p. 18). Contrary to this Court's decisions, the panel majority interpreted "common authority" over premises to mean something less than

reasonably believed co-inhabitants having mutual use of the property and generally having joint access or control for most purposes so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right.

REASONS FOR GRANTING THE WRIT

This case presents a question of exceptional Fourth Amendment importance because the panel majority's opinion erroneously extends the scope of apparent authority to third parties whom the police do not reasonably believe to reside in, occupy or inhabit a residence at the time of the search. The panel majority's interpretation of apparent authority is contrary to the settled principles articulated by this Court requiring the police to reasonably believe that the third party giving consent resides in, occupies or inhabits the premises to be searched. The majority opinion is inconsistent with this Court's decisions in *United States v. Matlock*, 415 U.S. 164 (1974), *Fernandez v. California*, 571 U.S. 292 (2014), *Illinois v. Rodriguez*, 497 U.S. 177 (1990), and *Georgia v. Randolph*, 547 U.S. 103 (2006). Under this Court's decisions, the warrantless search of Ford's downstairs unit of a two family residence was unlawful as Berry did not reside in, inhabit or occupy the unit and did not have actual or apparent authority to consent to the search.

The doctrine of actual authority of a third party to consent to a search of the defendant's resident was first articulated in *United States v. Matlock*, 415 U.S. 164,

94 S.Ct. 988 (1974). There, this Court held that the voluntary consent of any joint occupant of a residence to search the premises jointly held is valid against a co-occupant.

> Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements, see *Chapman v. United States*, 365 U.S. 610 (1961) (landlord could not validly consent to the search of a house he had rented to another), *Stoner v. California*, 376 U.S. 483 (1964) (night hotel clerk could not validly consent to search of customer's room) but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the ***co-inhabitants*** has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

Id. at 171, n. 7 (emphasis added). As noted in Judge Clay's dissenting opinion below, the majority's opinion relies upon only a portion of this language in *Matlock*.

> [T]he opinion relies on broad language from *Matlock* that a warrantless search is justified when "permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." But in *Matlock*, both the facts of the case - the question presented was whether the defendant's cohabitating romantic partner could consent to a search of their shared room - and the language of the decision itself make clear that co-occupancy is the critical factor in determining a third party's actual authority to consent to a search. The majority reaches the opposite result only by quoting portions of [] footnote [7] from the *Matlock* decision.

(Appx. A, *Rogers,* Dissenting Opinion, Doc. 62-2 at 25). And as Judge Clay further noted, "the Supreme Court did not contemplate in *Matlock* that non co-habitants

would have a relationship to a defendant's premises so as to be able [to] authorize their search." *Id.* at 26.

As Judge Clay explained in dissent, "[s]ubsequent decisions of the Supreme Court have confirmed the critical role of co-occupancy in the actual authority to consent inquiry." (Appx. A, *Rogers*, Dissenting Opinion, Doc. 62-2 at p. 26). In *Fernandez v. California*, this Court held that "police officers may search jointly occupied premises if one of the occupants consents." 571 U.S. 292, 294 (2014). Further, it interpreted "the terms 'occupant,' 'resident' and 'tenant' interchangeably to refer to persons having 'common authority' over premises within the meaning of *Matlock*." *Id.* at 294, n. 1.

In *Illinois v. Rodriguez*, 497 U.S. 177 (1990), this Court recognized the doctrine of apparent authority where the third party consenter does not have actual authority, but the police reasonably believe that she does. There, the defendant's girlfriend had moved out of the residence a month before the search, took her and her children's clothing with her, but had left some furniture and household effects behind. After moving out, she sometimes spent the night at Rodriguez' apartment, but never invited her friends there, and although she had a key, she never went there when Rodriguez was not home. Her name was not on the lease and she did not contribute to the rent. *Id.* at 181. On these facts, this Court held that the girlfriend did not have actual authority to consent to the search. *Id.* at 181-182.

Prior to the search in *Rodriguez*, the girlfriend told officers that she had been assaulted by Rodriguez earlier in the day at the apartment, which she referred to several times as "our" apartment, and said that she had clothes and furniture there. Id. at 179. However, it was "unclear whether she indicated that she currently lived at the apartment, or only that she used to live there." *Id.* This Court held in *Rodriguez* that the Fourth Amendment is not violated "when officers enter without a warrant because they reasonably (though erroneously) believe that the person who has consented to their entry *is a resident of the premises*." *Id.* at 186 (emphasis added).

Rodriguez made clear that apparent authority requires a reasonable belief on the part of law enforcement that the third party consenting to a search resides in, occupies or inhabits the residence when this Court admonished:

> [W]hat we hold today does not suggest that law enforcement may always accept a person's invitation to enter premises. Even when the invitation is accompanied by *an explicit assertion that the person lives there*, the surrounding circumstances could conceivably be such that a reasonable person would doubt its truth and not act upon it without further inquiry.

Id. at 188.

Sixteen years later, in *Georgia v. Randolph*, 547 U.S. 103 (2006), this Court explained that, to be valid, apparent authority of a third party is conditioned upon law enforcement's reasonable, but erroneous, belief that the third party is a co-occupant:

> To the Fourth Amendment rule ordinarily prohibiting the warrantless entry of a person's house as unreasonable *per se*, *Payton v. New York*, 445 U.S. 573, 586, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980); *Coolidge v. New Hampshire*, 403 U.S. 443, 454-455, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971), one "jealously and carefully drawn" exception, *Jones v. United States*, 357 U.S. 493, 499, 78 S. Ct. 1253, 2 L. Ed. 2d 1514, 1958-2 C.B. 1005 (1958), recognizes the validity of searches with the voluntary consent of an individual possessing authority, *Rodriguez*, 497 U.S., at 181, 110 S. Ct. 2793, 111 L. Ed. 2d 148. That person might be the householder against whom evidence is sought, *Schneckloth v. Bustamonte*, 412 U.S. 218, 222, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973), or ***a fellow occupant*** who shares common authority over property, when the suspect is absent, *Matlock*, *supra*, at 170, 94 S. Ct. 988, 39 L. Ed. 2d 242, and the exception for consent extends even to entries and searches with the permission of a ***co-occupant whom the police reasonably, but erroneously, believe to possess shared authority as an occupant***, *Rodriguez*, supra, at 186, 110 S. Ct. 2793, 111 L. Ed. 2d 148.

Id. at 109 (emphasis added).

Contrary to the majority opinion below, this Court has never suggested that an officer may rely upon the consent of a person who does not or is not reasonably believed to "reside, inhabit or occupy a residence." *Boyer v. Peterson*, 211 F.Supp. 3d 943 (W.D. Mich. 2016), *citing Georgia v. Randolph*, 547 U.S. 103 (2006).

> Not a single Supreme Court case has ever suggested that an officer may rely upon the consent of a person who does not reside, inhabit or occupy a residence, because under those circumstances, "no common authority c[an] sensibly be suspected." The Supreme Court has reaffirmed, time and time again, the idea that consent is confined to cases where a person resides, inhabits, or occupies a home (actual authority), or is reasonably believed to have been a resident, inhabitant or occupant (apparent authority).

Id. at 961, *quoting Randolph,* 547 U.S. at 112.

And as Judge Clay explained in dissent below, "the majority misapprehends the nature of the apparent authority inquiry. It treats apparent authority as a diluted version of actual authority, when, in fact, its purpose is to allow law enforcement to reasonably rely on the information at hand, which may turn out to be false, in determining whether an individual can consent to a search." (Appx. A, *Rogers*, Dissenting Opinion, Doc. 62-2 at p. 27).

In the instant case, Berry did not "reside in, occupy or inhabit" the downstairs unit and she did not have either actual or apparent authority to consent to the search. She was not occupying the unit when officers arrived. She arrived only after Detective Gonzalez indicated on the phone to Berry's daughter that they would break down the door if they did not get the key to the downstairs unit. (Hearing Ex. E, Gonzalez Body Camera Recording at 5:30-8:35). Once Berry arrived with the key, she told Gonzalez that "this is his place," referring to Ford. She explicitly told Gonzalez that she had not lived in the unit for approximately 6-7 months. (Hearing Ex. E, Gonzalez Body Camera Recording at 17:45-20:40). She told Gonzalez that she had plants in the unit, and came to Ford's residence "every now and again" to attend to the plants. She did not claim to reside in, occupy or inhabit the unit. Gonzalez' April 19, 2018 body camera recording clearly reflects the following exchange almost immediately prior to the search and well after receiving information Gonzalez knew to be false from Steward about ownership of the home:

Gonzalez: Ok, so here's the deal, you do live here, is that correct?
Berry: Yes and no.
Gonzalez: So you stay here sometimes?
Berry: Well, I haven't been here since, I would say, September, October.
Gonzalez: September of last year?
Berry: Yes.
Gonzalez: And you haven't lived here since then?
Berry: Right.

(Hearing Ex. E, Gonzalez Body Camera recording at 17:45-20:40).

The police did not reasonably, or even actually, believe that Berry lived in the downstairs unit prior to the search. After the foregoing exchange with Berry, Gonzalez stated "Here's the problem. You just said you haven't lived here since last year in September. So I mean, there might be an issue with you giving us consent." (Gonzalez Body Camera Recording, R.143, Hearing Ex. E at 19:24-19:34). After inquiring of Berry further, and learning that Berry had plants in the unit and came to the unit "every now and again," Gonzalez received a call from the prosecutor whose help she had requested in obtaining a search warrant for the downstairs unit. Gonzalez told the prosecutor a warrant would not be necessary because "we have a family member that has property in the downstairs unit inside, and she has keys to the downstairs unit, so she's going to give us consent. So it doesn't look like I'll need the warrant." (Gonzalez Body Camera Recording, R. 143, Ex. E., 21:50-22:16). Gonzalez did not suggest to the prosecutor that she believed Berry resided in the

unit. *Id.* After she led Gonzalez into the unit, Berry watered her plants in the dining room and told Gonzalez that she did not know which bedroom was Ford's.

The majority opinion's conclusion below that the facts "suggested Berry had more than 'limited access' to the residence and instead possessed the 'common authority' sufficient for an officer of reasonable caution to believe she could consent to the search" is clearly erroneous and in conflict with this Court's precedent.

The majority opinion is also inconsistent with prior decisions of the Sixth Circuit. In *United States v. Hudson*, 405 F.3d 425 (6th Cir. 2005) relying on *Rodriguez*, the Sixth Circuit recognized that "in crafting the rule of [apparent authority], the Supreme Court lent critical weight to whether the police could reasonably conclude that the party consenting to the search *lived* at the premises." *Id.* at 442. (6th Cir. 2005)(emphasis in original). There, the defendant's girlfriend told officers that she lived with the defendant and their small child at the residence. *Id.* at 405 F.3d at 430-431. The girlfriend offered to take officers to the residence and drove there with officers following in their cars. She consented to the search both verbally and in writing. The Sixth Circuit concluded that, based upon these facts and the fact that the girlfriend had a key to the residence, officers could reasonably conclude that she had apparent authority to consent. Unlike here, the girlfriend in *Hudson* "consistently maintained that she lived at the house." *Id.* at 442. As Judge Clay noted in dissent, the Sixth Circuit's prior published decision in *Hudson* held

that "in determining whether a person has apparent authority to consent to a search, the question to be answered is whether the police could have reasonably believed that person resided at the premises." (Appx. A, *Rogers*, Dissenting Opinion, Doc. 62-2 at p. 29).

The majority's opinion in this case is also inconsistent with the Sixth Circuit's decisions in *United States v. Penney*, 576 F.3d 297, 308 (6th Cir. 2009) and *United States v. Gillis*, 358 F.3d 386 (6th Cir. 2004). In both of those cases, the cohabiting girlfriends providing consent to search stated to officers that they *lived at the residence at the time of the search*. *Penney*, 576 F.3d at 301; *Gillis*, 358 F.3d at 388. Additionally, in *Penney*, after the girlfriend had hitchhiked barefoot to the police station, her car was observed at the residence when officers returned there with her to conduct the search. *Penney*, 576 F.3d at 308. The Court in *Penney* again recognized that apparent authority hinges on the officers' reasonable believe that the party providing consent is a co-inhabitant of the premises to be searched.

> The magistrate judge and the district court determined that, given what ...officers learned on the morning of August 19 and what they knew about Penney and [his girlfriend], it was reasonable for them to believe that [she] was Penney's girlfriend and co-occupant with common authority over the residence. The magistrate judge also noted that it was reasonable for the police not to investigate whether [her] name was on the lease "as it is a reality in today's world that consenting adults often co-habitat [sic] together without benefit of legal formalities -- including those formalities relating to the establishment of property interests."
>
> The factual findings relied on by the district court and the magistrate judge are well-supported by the record. We agree that the facts known

> to [the police] warranted men "of reasonable caution in the belief that the consenting party had authority over the premises," *Rodriguez*, 497 U.S. at 188 (internal quotation marks and citation omitted). We have confirmed a number of times that a live-in girlfriend has common authority over the premises wherein she cohabits with a boyfriend. *See, e.g., United States v. Grayer*, 232 F. App'x 446, 449 (6th Cir. 2007); *United States v. Hudson*, 405 F.3d 425, 442 (6th Cir. 2005); *United States v. Gillis*, 358 F.3d 386, 391 (6th Cir. 2004); *United States v. Moore*, 917 F.2d 215, 223 (6th Cir. 1990).

Id. at 308.

The panel majority opinion's reliance upon *United States v. Ayoub*, 498 F.3d 532 (6th Cir. 2007) is misplaced. There, the Sixth Circuit held that the daughter of the owners and residents of the home had actual authority to consent to the search of her parents' house while they were out of the country because she had been given custodial care of the home, she had a key, she lived one block away from the home, and both she and her brother, an informant, told police that she was the care taker of the home while their parents were gone. *Id.* at 539-541. The Court in *Ayoub* did not reach the issue of apparent authority, however it recognized that the "exception for consent" to warrantless searches "extends even to entries and searches with the permission of a co-occupant whom the police reasonably, but erroneously, believe to possess shared authority *as an occupant*." *Georgia v. Randolph*, 547 U.S. 103, 109, 126 S. Ct. 1515, 164 L. Ed. 2d 208 (2006) (citing *Rodriguez*, 497 U.S. at 186)." *Id.* at 537. (emphasis added). *Ayoub* cannot be interpreted to extend apparent authority to a

third party whom the police do not reasonably believe to possess shared authority as an occupant of the searched premises.

Berry did not have apparent authority, much less actual authority, to consent to the search of Ford's residence. Gonzalez knew that Berry did not reside in, inhabit or occupy the unit at the time of the search or in the 6-7 months prior to the search. The facts that Berry said that she was "in the process" of purchasing the house and had plants in the downstairs unit are irrelevant. Here, officers knew that Berry, a family member and *former* tenant of the downstairs unit, had not lived there for 6-7 months but still had a key which she used to access the unit to water her plants. The majority opinion below erroneously holds that a family member with a key and plants/property in the residence has apparent authority to consent to a search despite the fact that the police know that she does not reside in, inhabit or occupy the place to be searched.

CONCLUSION

Petitioner Shawn Ford respectfully petitions this Honorable Court for a writ of certiorari to the United States Court of Appeals for Sixth Circuit. This Court's review and decision is critical and important to correcting the Sixth Circuit's erroneous interpretation of this Court's decisions and to clarify the meaning of apparent authority of a third party to consent to search a residence, an important question of federal constitutional law.

Respectfully submitted,

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