CAPITAL CASE

No. 22-7482

IN THE
Supreme Court of the United States

RALPH LEROY MENZIES, *Petitioner,*

vs.

ROBERT POWELL, WARDEN, *Respondent.*

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

BRIEF IN OPPOSITION

SEAN D. REYES
Utah Attorney General
MELISSA HOLYOAK*
Utah Solicitor General
ANDREW PETERSEN
Deputy Solicitor General
JOHN J. NIELSEN
Special Assistant
Solicitor General
Counsel for State of Utah
350 N. State Street, Suite 230
Salt Lake City, UT 84114-2320
Telephone: (801) 538-9600
Email: melissaholyoak@agutah.gov

**Counsel of Record*

QUESTIONS PRESENTED

This is federal habeas review of a state conviction. The Court's review is limited to deciding whether the lower courts acted reasonably in light of the record and this Court's prior decisions. This is not a forum to decide novel questions or extend the law.

This Court has held that criminal defendants are entitled to trial records complete enough to afford "adequate and effective appellate review." *Griffin v. Illinois*, 351 U.S. 12, 20 (1956). The Utah Supreme Court held that the record met that standard. Petitioner challenged the legal aspect of that holding for the first time in the Tenth Circuit. The Tenth Circuit held that claim unpreserved and alternatively held that the Utah Supreme Court reasonably interpreted this Court's precedent. Petitioner does not address the preservation holding in this Court.

Petitioner also raises factual claims involving record gaps during (1) voir dire and (2) a time when a juror fainted. The courts below held no prejudice. On the voir dire claims, most of the alleged errors did not matter because they occurred during jury death qualification, and Petitioner opted for judicial sentencing. Other voir dire gaps could be reasonably filled in context. And the existing record was clear on which jurors were challenged for cause and which ones sat on the jury. On the fainting-juror episode, the Utah Supreme Court let Petitioner raise any issue that could have "conceivably" been discussed during that gap as if it had been preserved. Petitioner

would have known how to conceive of the gaps because one of his trial attorneys represented Petitioner on direct appeal.

1. Under the Anti-terrorism and Effective Death Penalty Act, were these holdings reasonable?

Structural error dispenses with the usual requirement for a petitioner to prove prejudice from an error. It is reserved for a handful of errors that affect the judicial process itself, like having an actually biased trial judge. For many years, this Court has been reluctant to add to that class of errors and has never held that having some gaps in a trial record qualifies.

2. Should this Court grant review and hold—for the first time on federal habeas review—that gaps in a trial record amount to structural error?

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OPINIONS BELOW

The Tenth Circuit's opinion (under the name *Menzies v. Powell*) is reported at 52 F.4th 1178. The district court's opinion (Pet. App. 210a-284a, under the name *Menzies v. Crowther*) was not published in the Federal Supplement, but is available at 2019 WL 181359.

JURISDICTION

The Tenth Circuit entered its judgment on November 7, 2022, and denied Menzies's rehearing petition on January 3, 2023. Justice Gorsuch granted Menzies a 30-day extension of time to file his petition, which Menzies then timely filed on May 3, 2023. This Court has jurisdiction over the petition under 28 U.S.C. 1254(1).

PROVISIONS INVOLVED

U.S. Const. amend. V: "No person shall . . . be deprived of life, liberty, or property, without due process of law[.]"

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

U.S. Const. amend. XIV: ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall

any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

INTRODUCTION

Menzies robbed, kidnapped, and murdered Maureen Hunsaker in 1986. He was convicted of first-degree murder and sentenced to death in 1988. He then moved for a new trial, claiming that the trial transcripts were not complete enough to ensure adequate appellate review. Counsel for both parties worked with the court reporter for nearly three weeks and were able to piece together much of the missing record, though some gaps remained because the parties could not entirely agree on everything that happened. But most of the questionable part of the record concerned jury death qualification, which became irrelevant once Menzies opted for judicial sentencing.

On direct appeal, the Utah Supreme Court held that the reconstructed record enabled adequate appellate review and that any gaps were harmless. Menzies sought this Court's review, which it denied.

At the federal habeas stage, Menzies again raised the transcript issue, arguing that the state court had unreasonably determined the facts. The district court disagreed and rejected this claim.

In the Tenth Circuit, Menzies argued that the state court had both unreasonably determined the facts and unreasonably applied cases from this Court governing appellate review. The Tenth Circuit held that the unreasonable-

application claim was unpreserved and alternatively that it failed on the merits. It also held that the state court had reasonably determined the facts.

Menzies now seeks review in this Court, arguing both that the Utah court misapplied this Court's decisions on record adequacy for appeal and unreasonably determined the facts related to it. The Court should deny review for three reasons. First, Menzies's claims allege mere error, which are not compelling reasons for certiorari review. Relatedly, the procedural posture here narrows substantially the effect any decision would have—the answers to Menzies's questions presented would affect his case, and his case only. Second, reviewing his alleged legal errors would produce an advisory opinion because he does not challenge the Tenth Circuit's preservation holding. And third, there is no error to correct anyway.

The petition should be denied.

CASE STATEMENT

Menzies was convicted by a jury of first-degree murder for robbing, kidnapping, and killing Maureen Hunsaker. Pet. App. 17a-18a. He waived jury sentencing and a judge sentenced him to death. *Id.* He moved for a new trial, alleging that because the trial transcripts were inaccurate, proper appellate review was not possible. *Id.* at 18a. Trial counsel worked with the court reporter for almost three weeks to fill the transcript gaps as best they could. *Id.* at 46a. Following several hearings and after considering proposed changes, the trial court denied Menzies's new trial motion, ruling that the original transcript was accurate enough for fair review of Menzies's

appellate claims. *Id.* The appellate record contained both the original transcript and a copy of the reconstructed transcript. *Id.*

The Utah Supreme Court held an appellate proceeding devoted solely to deciding whether the record was "sufficient for appellate review." *Id.* at 67a. The Utah Supreme Court noted that, in death penalty appeals, it reviews the record and will reverse on plain or manifest error it notices on its own. *Id.* at 68a-69a. With that framework in mind, the court extensively reviewed the record, the transcripts (original and interlineated), and Menzies's transcript claims. *Id.* at 68a-80a.

Two of those transcript claims are relevant here. First, Menzies argued that gaps during voir dire prevented him from raising issues on appeal like whether particular jurors should have been stricken for cause. *Id.* at 71a. The Utah Supreme Court explained that it was "not necessary to examine the voir dire of every prospective juror," but only those who "either sat on the case or [were] challenged for cause and not dismissed." *Id.* at 72a.

The identities of these jurors were apparent from the existing record: a jury list and post-verdict polling showed those who sat. *Id.* And defense trial counsel had confirmed "that eight jurors were challenged for cause and not dismissed." *Id.* Any gaps were not prejudicial because context made sufficiently clear what had happened. *Id.* While there were "a few discrepancies between the original transcript and the court reporter's notes" on some juror responses, they were "minor in nature" and did not "bear on the substance" of the response. *Id.* at 72a-73a. Moreover, the "vast

majority" of errors dealt with questions and answers on capital punishment, which were not relevant because a judge sentenced Menzies. *Id.*

Second, the fainting juror. During the medical examiner's testimony, one juror fainted. *Id.* at 78a. After a recess, she explained to the court "that she had fainted due to the nature of the testimony and the fact that she had not eaten. She also stated that she had eaten lunch, remembered the medical examiner's tesimony, and was able to continue." *Id.* The medical examiner's testimony and the juror's statements to the judge were properly recorded, but there was some omitted discussion that happened outside the jury's presence. *Id.* The prosecutor later explained that no rulings were made at that time, and that any issues discussed "were reargued later." *Id.* Thus, the court held, "Menzies suffered no prejudice from this omission." *Id.* Further, any error was also curable by affording Menzies appellate review on "any claim that could have conceivably been raised at this point as though it had been properly preserved." *Id.* at 78a-79a.

After addressing these and other gaps, the Utah Supreme Court issued a published opinion holding that the record was adequate for appellate review and only then ordered briefing on the merits to proceed. *Id.* at 79a-80a.

In his merits brief on plenary appeal, Menzies again argued that the transcript was inadequate for appellate review. But he merely incorporated by reference his earlier briefs on the transcript issues, offering no new arguments. Menzies Br. p. 29, 9/14/92. The state court did not independently readdress the transcript issues, but

concluded its merits opinion with: "We find Menzies's other claims to be without merit." Pet. App. 104a.

Menzies sought review in this Court on several issues, including the transcript ones. Pet. Cert. 14-20, Case. No. 94-6471. The Court denied review. Pet. App. 109a.

Menzies filed a federal habeas petition, arguing that the state court had unreasonably determined the facts on his transcript claims. *Id.* at 350a-358a. The federal district court reviewed the transcripts, the state court's findings, and the arguments Menzies raised. *Id.* at 217a-220a. It ruled that Menzies had not shown that the findings of the state court were unreasonable in light of the evidence presented. *Id.* And it found that Menzies had "not established any basis for federal habeas relief" on this issue under the Sixth, Eighth, or Fourteenth Amendments. *Id.* at 218a.

Menzies appealed to the Tenth Circuit, arguing that the state court had unreasonably determined the facts, and then added for the first time that the state court had also unreasonably applied this Court's precedent. Supp. Br. Aplt., case 19-4042, at 1-6. On the unreasonable-application claim, the Tenth Circuit held that it failed for two independent reasons: (1) it was unpreserved; and (2) it was meritless. Pet. App. 46a-47a. On the unreasonable-determination-of-facts claims, the Tenth Circuit held the state court fact determinations reasonable and any gaps harmless. *Id.* at 47a-53a.

Menzies now seeks this Court's review, arguing that: (1) the state court's fact determinations were unreasonable; (2) the lower courts unreasonably applied this Court's precedent on record adequacy for review; and (3) the lower courts unreasonably interpreted this Court's precedent in placing the burden on him to show prejudice. Pet. Cert. 17-23.

ARGUMENT

I. Menzies has shown no compelling reason to grant review.

Menzies alleges that the courts below both "failed to reasonably apply [this Court's] clearly established precedents" and made an "unreasonable determination of the facts." Pet. Cert. 17. The alleged legal application errors concern (1) his right to a sufficient record supporting "adequate and effective appellate review" under *Griffin v. Illinois*, 351 U.S. 12, 20 (1956) and *Evitts v. Lucey*, 469 U.S. 387 (1985); and (2) structural error for inadequate record claims. Pet. Cert. 15-23. The alleged factual errors are addressed in detail below.

The Court should deny review because Menzies's case presents narrow issues that will affect no case beyond his own, and the lower courts were correct at any rate.

A. Menzies's alleged errors—unreasonable fact determinations and unreasonable application of precedent—are narrow and undeserving of review.

Menzies has alleged no conflict among lower courts on the meaning of the law, nor shown how the issues he asks this Court to address would affect cases beyond his own. This narrowness stems in part from his claimed errors, and in part from the

procedural posture. As detailed below, the only questions properly before this Court concern facts, and those facts are unique to this case.

Further, federal habeas review of state-court convictions is—by design—"highly circumscribed." *Shinn v. Ramirez*, 142 S. Ct. 1718, 1732 (2022). To show factual error, a petitioner bears the heavy burden of proving, by clear and convincing evidence, that a state court unreasonably determined facts in his case. *Burt v. Titlow*, 571 U.S. 12, 15 (2013); 28 U.S.C. §§ 2254(d)(2), (e)(1). To show legal error, the petitioner must show, "based solely on the state-court record," that "under this Court's precedents, no fairminded jurist could have reached the same judgment as the state court." *Shinn*, 142 S. Ct. at 1732 (cleaned up).

The questions before this Court do not turn on whether it agrees with the state court, but merely on whether the state court's interpretations were reasonable. *Burt*, 571 U.S. at 18-19. Habeas review is backward-looking; it is not proper to advance the substantive law when deciding whether a lower court reasonably interpreted existing precedent. So even if this Court were to grant review, it would not be setting new legal standards beyond what it has already laid out nor even settling the facts here. Review would only determine whether, based on existing law and the record here, the state court acted reasonably.

This Court has repeatedly passed on the chance to shape the rules more finely in this area even outside the limited-review posture here. Most relevant, it denied review in Menzies's direct appeal in 1995. Pet. App. 109a. It also denied review about

five years ago in another capital case, *Townes v. Alabama*, 139 S. Ct. 18 (2018). Menzies cites a dissent from that denial in his petition. Pet. Cert. 17. In *Townes*, the Alabama Court of Criminal Appeals had originally reversed Townes's conviction and sentence because a jury instruction had required the jury to presume intent to kill. *Townes v. State*, 253 So.3d 447, 458-59 (Ala. Crim. App. 2015). But after that opinion issued, the trial court corrected the record, which changed a "must" in the instruction to a "may." *Id.* at 459-60. That small change defeated Townes's claim. *Id.* Townes, like Menzies here, asked this Court to review the state court's record-correcting process and to resolve any record ambiguities in his favor—in essence, asking to absolve him from his prejudice burden. *See* Pet. Cert. in case 17-7894. This Court declined the invitation.

If Menzies's direct appeal and Townes's state appeal did not merit this Court's review, then Menzies's current appeal is even less deserving because it is not set up for this Court to shape the law on record adequacy further than it already has.

In this same vein, this case is also a poor vehicle for holding—for the first time—that an incomplete record amounts to structural error. Pet. Cert. 23 (urging the court to presume prejudice); *see generally Weaver v. Massachusetts*, 582 U.S. 286, 299 (2017) (explaining that "in the case of a structural error" that is preserved, "the defendant generally is entited to automatic reversal regardless of the error's actual effect on the outcome") (citation and quotation omitted). Because this Court has never held that, it cannot fault the lower courts on mere reasonableness review for not

holding that. This is particularly true where the Court has long been reluctant to add to the class of structural errors. *See Arizona v. Fulminante*, 499 U.S. 279, 306 (1991) ("Since this Court's landmark decision in *Chapman v. California* . . . the Court has applied harmless-error analysis to a wide range of errors and has recognized that most constitutional errors can be harmless."). And even where structural error has occurred, this Court has enforced procedural limits like preservation to require prejudice showings. *See, e.g., Weaver*, 582 U.S. at 300-01 ("[N]ot every public-trial violation will in fact lead to a fundamentally unfair trial," and "when a defendant raises a public-trial violation via an ineffective-assistance-of-counsel claim, *Strickland* prejudice is not shown automatically."). The procedural limits of habeas review make this a poor vehicle to decide a novel question.

For these reasons alone, certiorari review is unwarranted.

B. Menzies seeks an advisory opinion from the Court on any alleged legal errors because he has not challenged the Tenth Circuit's alternative basis—lack of preservation—for rejecting them.

To the extent that a decision in Menzies's case might affect litigants beyond himself, it would be on his unreasonable-application claims. But he has not addressed the Tenth Circuit's independent, alternative basis for rejecting those claims: that Menzies did not preserve them.

Menzies did not argue in the federal district court that the Utah Supreme Court unreasonably applied this Court's precedent on his transcript claim; he alleged

only unreasonable *fact* determinations. Pet. App. 350a-358a. For the first time in the Tenth Circuit, he argued that the Utah court had unreasonably interpreted clearly established federal law. Recognizing this, the Tenth Circuit held that those claims were unpreserved and thus forfeited or waived. *Id.* at 46a-47a. It alternatively rejected those claims on the merits. *Id.*

Menzies's petition challenges the merits holding but does not even mention—let alone challenge—the preservation holding. Because preservation was an independent basis for rejecting Menzies's claims, any holding on the merits would not benefit Menzies. Menzies thus asks the Court for something that it cannot give: an advisory opinion. *See, e.g., Coleman v. Thompson*, 501 U.S. 722, 729 (1991) (explaining, in context of adequate-and-independent-state-ground doctrine, that "resolution of any independent federal ground for the decision could not affect the judgment and therefore be advisory"); *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945) ("We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we correct[] its views of federal laws, our review could amount to nothing more than an advisory opinion.").

C. There is no error to correct at any rate.

Even if the Court were to grant review and overlook Menzies's procedural failings, it would simply affirm because the lower courts reasonably determined the law and the facts.

Menzies argues that the lower courts violated this Court's precedents by holding that the corrected transcript sufficed to review his claims that (1) the gaps during jury selection did not let him explore whether certain jurors should have been challenged for cause and (2) he was prejudiced when a juror fainted during the medical examiner's testimony and Menzies was forcibly removed from the courtroom while shackled. Pet. Cert. 17-19. He also argues (3) that this Court has clearly held that transcription errors are structural. Pet. Cert. 20-23. Menzies is mistaken.

Everyone here agrees that criminal defendants are entitled to a sufficient trial record to ensure an "adequate and effective" appeal. *Griffin v. Illinois*, 351 U.S. 12, 20 (1956); *see also Parker v. Dugger*, 498 U.S. 308, 321 (1991); *Evitts v. Lucey*, 469 U.S. 387, 393 (1985); *Draper v. Washington*, 372 U.S. 487, 495 (1963). And where a "full verbatim record" is "necessary to assure the indigent as effective an appeal as would be available to the defendant with resources to pay his own way," the defendant gets one. *Mayer v. Chicago*, 404 U.S. 189, 195 (1971). These concerns—as with many legal concerns—are heightened in the capital context. *See generally Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

But the question of what is "adequate and effective" and how much of a transcripton is "necessary" are case-specific. The lower courts reasonably applied this broad language to the facts here and held no prejudicial error.

On the voir dire gaps, Menzies argues that the lower courts unreasonably found that the prospective jurors' answers could be sussed out in context, and that the transcript included answers that were a "fabrication." Pet. Cert. 17-18.

The state court did not rely on an unreasonable fact determination. The state court found that "[c]lose examination of the pertinent prospective juror responses does not reveal any instances where the note reader 'made up' actual juror answers." Pet. App. 72a. There were a few discrepencies between the original transcript and the reporter's notes, but the state court found that those "discrepancies [were] minor" and did "not bear upon the substance of the prospective juror's response." *Id.* at 72a-73a. And the "vast majority of these discrepancies" were on "questions concerning capital punishment," which were not relevant to a judicial sentencing. *Id.* at 73a. "Given these facts, the discrepancies [were] not prejudicial." *Id.* On contextual clues and gaps, the court explained that most of the alleged errors were "obvious" and "reconcilable when viewed in the context of the relevant passage or by referring to documentary evidence, and none have bearing upon issues raised on appeal." *Id.* at 71a.

The Tenth Circuit held that a "reasonable jurist could find that the court reporter's errors in voir dire hadn't prevented a meaningful appellate challenge like an erroneous denial of a challenge for cause." *Id.* at 49a. One of the alleged fabrications here were instances—seized on by Menzies in his petition, Pet. Cert. 17-18—in which the court reporter's notes said "BLRB," which the Tenth Circuit took to

mean "blurb." Pet. App. 49a. But the Tenth Circuit explained that given Menzies's ability to figure out the unsuccessful for-cause challenges, none of these gaps—BLRBs included—prevented Menzies from arguing "that the trial court had erroneously rejected challenges for cause." *Id.* He thus had "a full and fair opportunity for appellate review of jury selection." *Id.*

The Utah Supreme Court's and Tenth Circuit's holdings were reasonable in light of this Court's general guidance that trial records have to be good enough to ensure an "adequate and effective" appeal on voir dire issues. Menzies received that.

Menzies also complains that when a juror fainted, he was "forcibly shackled and removed from the court room in view of the jurors." Pet. Cert 19. Menzies raised this issue for the first time in a cross-motion during state post-conviction proceedings and again on appeal in that case. Pet. App. 229a-230a. The Utah Supreme Court refused to address it because it was unpreserved. *Id.* at 206a (n.185). Menzies raised it again in federal district court, but that court held no prejudice based on Tenth Circuit precedent because there was "no indication in the record"—including from trial counsel's affidavit—"that this exposure was either aggravated or continuous." *Id.* at 230a. This was particularly true given that the jury's focus would have been not on Menzies, but on the fainting juror. *Id.* Menzies did not raise any issue on shackling in the Tenth Circuit. *see* Aplt. Br. and Supp. Aplt. Br. in case 19-4042, so that court did not address it. Because the Tenth Circuit did not address it, there is

nothing for this Court to review. *See McWilliams v. Dunn*, 582 U.S. 183, 200 (2017) ("[W]e are a court of review, not of first view.") (citation omitted).

Menzies also points out that a portion of the transcript from the fainting episode is missing and argues that the state court erroneously found that no ruling was made during the bench conference and that the issues discussed were reargued later. Pet. Cert. 19, 21-22. But Menzies did not challenge those findings in the Tenth Circuit. Pet. App. 47a-53a. So again, there is nothing for this Court to review. *McWilliams*, 582 U.S. at 200.

Next, Menzies argues that this Court has held that transcript errors are structural. For this, he cites *Mayer* and *Draper*. Pet. Cert. 20-21. But those cases held no such thing. *Mayer* says that "where the grounds of appeal . . . make out a colorable need for a complete transcript, the burden is on the State to show that only a portion of the transcript or an 'alternative' will suffice." 404 U.S. at 195; *see also Draper*, 372 U.S. at 498. But the issue here is *transcription error*; Menzies cites no authority from this Court establishing that he is not obliged to show that the errors prejudiced his right to appeal.

The lower courts reasonably resolved this issue. The Utah Supreme Court cited *Griffin* and *Draper* and recognized that Menzies had "a federal constitutional right" "to the use of a transcript" of "'sufficient completeness'" to address his claims. Pet. App. 79a, 89a (n.66-67). Because the transcript errors did not undermine that right, "the use of the transcript [did] not violate equal protection." *Id.* at 79a. And the issue

that *Mayer* addresses—indigence—has nothing to do with the transcription errors at issue here.

And as the Tenth Circuit noted, at least five federal circuits put the burden on petitioners "to show prejudice from errors in the trial transcript." *Id.* at 47a (citing cases from the Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits). The Utah Supreme Court reasonably joined this unanimous circuit approach. And the procedural posture here—federal habeas review of a state conviction—does not lend itself to creating a new class of structural error at any rate.

Finally, Menzies argues that if he were required to show prejudice, he did so for three reasons. First, the unknown unknowns of jury selection—"jurors who *should* have been challenged for cause but were not." Pet. Cert. 19. To the extent that any of these responses came from prospective jurors who did not sit on the jury, Menzies could not show prejudice. *See Ross v. Oklahoma*, 487 U.S. 81, 88 (1988) ("So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated."). And he does not connect the errors to any juror that did sit. Pet. Cert. 19.

Second, he asserts that because the Utah Supreme Court summarily rejected a claim regarding the fainting-juror episode, there is no way to tell whether the Court reviewed his claim as if it were preserved. *Id.* at 21-22. But the court found this and other claims "to be *without merit*." Pet. App. 104a (emphasis added). "Without merit" is a merits ruling, not a procedural one. Relatedly, he argues that without the missing

portion of the transcript, "appellate counsel was left to speculate" on what might have happened during the gap. Pet. Cert. 22. But as the Tenth Circuit explained, one of Menzies's trial attorneys who was at the bench conference "later represented Mr. Menzies on appeal," and was thus able to raise any claim from her own memory. Pet. App. 50a.

Third, Menzies says that the federal district court relied "on the original transcript rather than the corrected transcript," which caused it to misunderstand a prospective juror's response to the question of whether the juror could be impartial. *Id.* at 22-23. But he does not show that this prospective juror sat on his case, so that cannot be a basis for prejudice.

CONCLUSION

The Court should deny the petition.

Respectfully submitted,

/s/ Melissa Holyoak

SEAN D. REYES
Utah Attorney General
MELISSA HOLYOAK*
Utah Solicitor General
ANDREW PETERSON
Deputy Solicitor General
JOHN J. NIELSEN
Special Assistant
Solicitor General
Counsel for State of Utah
350 N. State Street, Suite 230
Salt Lake City, UT 84114-2320
Telephone: (801) 538-9600
Email: melissaholyoak@agutah.gov
**Counsel of Record*