No. ____

IN THE
SUPREME COURT OF THE UNITED STATES

SPENCER WAYNE BACON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether 18 U.S.C. § 922(g)(1)—the statute that prohibits firearm possession by any person who was previously convicted of "a crime punishable by imprisonment for a term exceeding one year"—violates the Second Amendment.

(2) Whether application of 18 U.S.C. § 922(g)(1) to petitioner violated the Commerce Clause where the only proof of a nexus between his firearm possession and interstate commerce consisted of the fact that the firearm had crossed a state line at some point before coming into petitioner's possession.

RELATED PROCEEDINGS

The following proceedings are directly related to this case:

- United States District Court for the Southern District of Texas:
  United States v. Spencer Wayne Bacon, No. 2:23-cr-625-1
  (Sept. 23, 2024)

- United States Court of Appeals for the Fifth Circuit:
  United States v. Spencer Wayne Bacon, No. 24-40629 (May 27, 2025)

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MISCELLANEOUS

PETITION FOR WRIT OF CERTIORARI

Petitioner Spencer Wayne Bacon petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The Fifth Circuit's opinion (App. 1a-2a) is unreported but available at 2025 WL 1514105.

JURISDICTION

The Fifth Circuit entered judgment on May 27, 2025. App. 1a. This petition is filed within 90 days of that date. *See* Sup. Ct. R. 13.1 & 13.3. The Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITTUIONAL AND STATUTORY PROVISIONS

Article I § 8 of the United States Constitution provides that:

> Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . .

The Second Amendment provides:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

18 U.S.C. § 922(g)(1) provides:

> (g) It shall be unlawful for any person-
>
> > (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; . . .
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

STATEMENT OF THE CASE

1. On December 13, 2023, a federal grand jury in the Corpus Christi Division of the Southern District of Texas returned a single-count indictment charging petitioner with being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(8).

2. Petitioner moved to dismiss the indictment. His motion argued, in relevant part, that § 922(g)(1) is facially unconstitutional under the Second Amendment as interpreted by the Supreme Court in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022). On January 16, 2024, the district court entered a written order denying the motion.

3. On May 23, 2024, petitioner appeared before a magistrate judge and pleaded guilty to the indictment, without a plea agreement. In support of the guilty plea, the parties submitted a written "Stipulation of Fact" that stated in relevant part:

> On October 4, 2023, the Corpus Christi Independent School Police Department were called regarding an individual walking by the Cullen Place Elementary School, located at 850 Belmeade Dr., Corpus Christi, Texas, carrying what appeared to be a firearm. Officers were able to make contact with the individual, later identified as Spencer Wayne Bacon, about three-quarters of a mile from the school. During the investigation[,] the Defendant was found to have two bags and a firearm on his person.
>
> Prior to October 4, 2023, BACON had been convicted of several felony offenses including: Burglary-Residential on July 17, 2017, in the 8N Judicial District 1st Division Court of Hempstead County, Arkansas, under cause number CR-16-356; Theft by Receiving Value $1,000 =<$5,000 on July 17, 2017, in the 8N Judicial District 1st Division Court of Hempstead County, Arkansas, under cause number CR-17-154; Poss[ession] of Methamphetamine, a Sch II Con Sub, <2g on February 6, 2018, in the 8N Judicial District 1st Division Court of Hempstead County, Arkansas, under cause number CR-17-309, and Furnishing, Possessing or Using Prohibited Articles

> on February 6, 2018, in the 8N Judicial District 1st Division Court of Hempstead County, Arkansas, under cause number CR-17-367.
>
> A subsequent investigation confirmed the firearm was manufactured outside the State of Texas and after 1898. The New Haven by Mossberg, Model 600AT, 12-gauge shotgun bearing serial number H611968 was manufactured in the in the State of Connecticut and is a firearm as defined by 18 [U.S.C. §] 921(a)(3).

Petitioner confirmed, at the guilty-plea hearing, that these facts were all "true and correct."

4. The district court accepted petitioner's guilty plea and, on September 20, 2024, sentenced him to a 21-month term of imprisonment and a three-year term of supervised release.

5. Petitioner appealed. On appeal, he challenged the constitutional basis for his conviction. He argued that his guilty plea and conviction should be set aside because Section 922(g)(1)'s categorical ban on firearm possession solely on account of a person's status as a felon is inconsistent with the Nation's historical tradition of firearm regulations, and thus violates the Second Amendment under the rule of *Bruen*. He alternatively claimed, for the first time, that Section 922(g)(1)'s application to him exceeded Congress's power under the Commerce Clause by permitting a conviction based solely on evidence that the firearm he possessed was manufactured outside of and then imported into Texas and without regard to his involvement in the transportation or economic activity associated with the purchase or sale of the firearm.

6. The court of appeals affirmed the judgment of the district court in an opinion entered on May 27, 2025. App. 1a-2a. The opinion recognized that, as petitioner had conceded, the two issues raised on appeal were both foreclosed by existing Fifth Circuit precedent, including *United States v. Diaz*, 116 F.4th 458 (5th Cir. 2024), *petition for cert. filed* (U.S. Feb. 24, 2025) (No. 24-6625), and *United States v. Jones*, 88 F.4th 571 (5th Cir. 2023).

REASONS FOR GRANTING THE PETITION

I. The question of whether 18 U.S.C. § 922(g)(1) on its face violates the Second Amendment, in light of *New York Rifle and Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022), is important and warrants this Court's review, as that statute imposes a sweeping, historically unprecedented lifetime ban that prevents millions of Americans from possessing firearms for self-defense. Furthermore, the decision below is wrong.

II. The question of whether Section 922(g)(1)'s application to petitioner separately violated the Commerce Clause—because the statute permitted petitioner's conviction based solely upon proof that his firearm at some point moved across state lines—independently warrants review. This Court should take this opportunity to resolve the longstanding tension between this Court's modern Commerce Clause jurisprudence and the comparatively minimal interstate-commerce nexus needed to establish Section 922(g)(1)'s jurisdictional element under *Scarborough v. United States*, 431 U.S. 563 (1977).

I. The question of whether Section 922(g)(1) on its face violates the Second Amendment is important and warrants this Court's review.

In the court below, petitioner raised a question regarding Section 922(g)(1)'s constitutionality: whether the statute on its face violates the Second Amendment. That question is important and worthy of this Court's resolution.

1. As this Court recognized in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and reiterated in *Bruen*, the Second Amendment guarantees to "all members of the political community," *Heller*, 554 U.S. at 581, the individual right to possess and carry firearms in common use for self protection. *Bruen* adopted a "test rooted in the Second Amendment's text, as informed by history," for determining whether a modern-day regulation impermissibly infringes that right. *Bruen*, 597 U.S. at 19. "When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Id.* at 24. At that point, it is the government's burden to justify the law "by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id*.

To do so, the government must show that the challenged law is "'relevantly similar' to laws that our tradition is understood to permit." *United States v. Rahimi*, 602 U.S. 680, 692 (2024). "Why and how the regulation burdens" the Second Amendment right "are central to this inquiry." *Id.* A contemporary law will likely pass the "relevantly similar" test where there is substantial evidence of founding-era laws that "impos[ed] similar restrictions" on firearm use "for similar reasons." *Id.*

In *Rahimi*, for example, the government presented "ample" historical evidence that the founding generation approved of the temporary disarmament of individuals found to pose "a clear threat of physical violence to another" upon a "judicial determination[]" that they "likely would threaten or had threatened another with a weapon." *Id.* at 693, 698-99. The contemporary law at issue, 18 U.S.C. § 922(g)(8)(C)(i), imposed a similar burden on the Second Amendment right by disarming a person only while he is subject to a domestic-violence restraining order backed by a judicial finding that he "'represents a credible threat to the physical safety' of another"; and that temporary "restrict[ion] on gun use" was similarly designed "to mitigate demonstrated threats of physical violence." *Id.* at 698-99 (quoting 18 U.S.C. § 922(g)(8)(C)(i)). Because the modern provision aligned with both the "how" and the "why" of the historical tradition of "allow[ing] the Government to disarm individuals who present a credible threat to the physical safety of others," its application to the defendant posed no Second Amendment problem under *Bruen*. *Id.* at 700.

2. Whether 18 U.S.C. § 922(g)(1) passes the *Bruen* test is critically important, and thus warrants this Court's review, as that statute imposes a sweeping, historically unprecedented lifetime ban that prevents millions of Americans from possessing firearms for self-defense.

Out of about 64,000 cases reported to the Sentencing Commission in Fiscal Year 2023, more than 7,100 involved convictions under § 922(g)(1). *See* U.S. Sent'g Comm'n, Quick Facts: 18 U.S.C. § 922(g) Firearms Offenses, at 1 (June 2024). Those convictions accounted for over 10% of all federal criminal cases. *See id.* The government itself has

acknowledged "the special need for certainty about Section 922(g)(1) given the frequency with which the government brings criminal cases under it." Supp. Br. for the Federal Parties at 10 n.5, *Garland v. Range*, No. 23-374 (U.S. June 24, 2024).

3. Furthermore, the decision below is wrong. Section 922(g)(1) does not align with the "how" of our Nation's tradition of firearm regulation, as the government cannot point to a single historical gun law that imposed a *permanent* prohibition on the right to keep and bear arms even for self-defense. In other words, no historical regulation "impose[d] a comparable burden on the right of armed self-defense." *See Bruen*, 597 U.S. at 29.

That is hardly surprising. When Congress passed the modern felon-in-possession statute—four decades before *Heller* and more than a half-century before *Bruen*—it did not believe that the Second Amendment protected an individual right to keep and bear arms. At the time (in the 1960s), Congress shared a widely held—but incorrect—understanding of the Second Amendment. In committee testimony, the Attorney General assured Congress that "[w]ith respect to the [S]econd [A]mendment, the Supreme Court of the United States long ago made it clear that the amendment did not guarantee to any individuals the right to bear arms" and opined that "the right to bear arms protected by the [S]econd [A]mendment relates only to the maintenance of the militia." *Federal Firearms Act: Hearings Before the Subcomm. to Investigate Juvenile Delinq. of the Sen. Comm. on the Judiciary*, 89th Cong. 41 (1965). And Congress dismissed constitutional concerns about federal firearm regulations, explaining that the Second Amendment posed "no obstacle" because federal regulations did not "hamper the present-day militia." S. Rep. No. 90-1097 (1968),

reprinted in 1968 U.S.C.C.A.N. 2112, 2169. Congress relied on court decisions—including *United States v. Miller*, 307 U.S. 174 (1939)—which held that the Second Amendment "was not adopted with the individual rights in mind." *Id.*

Unconstrained by the Second Amendment, "Congress sought to rule broadly," employing an "expansive legislative approach" to pass a "sweeping prophylaxis … against misuse of firearms." *Scarborough v. United States*, 431 U.S. 563, 572 (1977) (first quote); *Lewis v. United States*, 445 U.S. 55, 61, 63 (1980) (second and third quotes). In particular, Congress was concerned with keeping firearms out of the hands of broad categories of "potentially irresponsible persons, including convicted felons." *Barrett v. United States*, 423 U.S. 212, 220 (1976). So it enacted two significant changes that brought about the modern felon-in-possession ban. *First*, Congress expanded the Federal Firearms Act to prohibit individuals convicted of *any crime* "punishable by imprisonment for a term exceeding one year"—not just violent crimes—from receiving a firearm. *See* An Act to Strengthen the Federal Firearms Act, Pub. L. No. 87-342, § 2, 75 Stat. 757, 757 (1961). *Second*, a few years later, Congress criminalized *possession* of a firearm—not just receipt—by anyone with a felony conviction. *See* Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 1202(a)(1), 82 Stat. 197, 236.

For these reasons, Congress did not try to pass a law that aligned with the "Nation's historical tradition of firearm regulation." *See Bruen*, 597 U.S. at 17. Instead—dismissing the Second Amendment as "no obstacle," *see supra* 9—it employed a sweeping, permanent prohibition on gun possession. *Lewis*, 445 U.S. at 61, 63. And that prohibition imposes a

burden far broader than any firearm regulation in our Nation's history.

4. The Fifth Circuit in *Diaz*—the case relied on by the panel in petitioner's case, *see* App. 1a-2a—recognized that § 922(g)(1)'s permanent disarmament requires a historical analogue that also permanently prevented individuals from possessing guns. *See Diaz*, 116 F.4th at 469-70. But the Fifth Circuit did not cite any historical firearm regulation imposing *permanent* disarmament. Instead, the court relied on capital punishment and forfeiture laws as historical analogues justifying § 922(g)(1). *Id.* at 468-69**.** That reliance conflicts with this Court's precedent for the following reasons.

This Court requires the government to show that a modern gun law aligns with our "historical tradition of firearm regulation." *Bruen*, 597 U.S. at 24 (emphasis added); *Rahimi*, 602 U.S. at 691 (same). In other words, the government's historical analogues must regulate firearms. In *Rahimi*, this Court relied only on historical laws that "specifically addressed firearms violence." 602 U.S. at 694-95. So too in *Bruen*. 597 U.S. at 38-66. Capital punishment and estate forfeiture, however, are not firearm regulations. So they cannot justify § 922(g)(1). The Fifth Circuit, in *Diaz*, reached a contrary conclusion by misreading *Rahimi*.

Diaz asserted that *Rahimi* "consider[ed] several laws that were not explicitly related to guns." *Diaz*, 116 F.4th at 468. But *Rahimi* said otherwise. In *Rahimi*, this Court relied on two historical legal regimes—surety laws and going armed laws—that both "specifically addressed firearms violence." 602 U.S. at 694-95. To be sure, surety laws were not "passed *solely* for the purpose of regulating firearm possession or use." *Diaz*, 116 F.4th at

468. But this Court emphasized that, "[i]mportantly for this case, the surety laws also targeted the misuse of firearms." *Rahimi*, 602 U.S. at 696 (emphasis added). In other words, historical laws that did not target the misuse of firearms—like capital punishment and estate forfeiture—are not proper analogues.

Diaz also noted that this Court accepted a greater-includes-the-lesser argument in *Rahimi*. *See Diaz*, 116 F.4th at 469. That is true. *Rahimi* held that "if imprisonment was permissible to respond to the use of guns to threaten the physical safety of others, then the lesser restriction of temporary disarmament . . . is also permissible." 602 U.S. at 699. But it does not follow, as the Fifth Circuit concluded, that "if capital punishment was permissible to respond to theft, then the lesser restriction of permanent disarmament that § 922(g)(1) imposes is also permissible." *Diaz*, 116 F.4th at 469. This Court explained that the purpose of imprisonment under the going armed laws was "to respond to the use of guns to threaten the physical safety of others." *Rahimi*, 602 U.S. at 699. So both the greater historical punishment (imprisonment under the going armed laws) and the lesser modern restriction (disarmament under 18 U.S.C. § 922(g)(8)) had the same purpose—curbing gun violence. Not so here. Again, capital punishment and forfeiture simply did not target gun violence.

This Court has also emphasized that the right to bear arms "is not a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." *Bruen*, 597 U.S. at 70 (cleaned up). But the Fifth Circuit's reasoning in *Diaz*—that because capital punishment is an "obviously permanent" deprivation of an individual's right to bear

arms, the lesser restriction of permanent disarmament is permissible for individuals who are not executed—conflicts with how the Constitution treats other fundamental rights.

"Felons, after all, don't lose other rights guaranteed in the Bill of Rights even though an offender who committed the same act in 1790 would have faced capital punishment." *United States v. Williams*, 113 F.4th 637, 658 (6th Cir. 2024). "No one suggests that such an individual has no right to a jury trial or be free from unreasonable searches and seizures." *Id.* And "we wouldn't say that the state can deprive felons of the right to free speech because felons lost that right via execution at the time of the founding." *Kanter v. Barr*, 919 F.3d 437, 461-62 (7th Cir. 2019) (Barrett, J., dissenting). "The obvious point that the dead enjoy no rights does not tell us what the founding-era generation would have understood about the rights of felons who lived, discharged their sentences, and returned to society." *Id.* at 462. Rather, "history confirms that the basis for the permanent and pervasive loss of all rights cannot be tied generally to one's status as a convicted felon or to the uniform severity of punishment that befell the class." *Id.* at 461.

A law is not compatible with the Second Amendment if it regulates the right to bear arms "to an extent beyond what was done at the founding." *Rahimi*, 602 U.S. at 692. Section 922(g)(1) does just that. It imposes a lifetime ban on firearm possession that would have been unimaginable to the Founders. Thus, § 922(g)(1) facially violates the Second Amendment because there are "no set of circumstances" under which it is valid. *See Rahimi*, 602 U.S. at 693 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)).

II. The question of whether Section 922(g)(1) exceeds Congress's power under the Commerce Clause is also important and independently warrants this Court's review.

In the court below, petitioner raised a separate and distinct question regarding Section 922(g)(1)'s constitutionality: whether the statute's application to petitioner contravenes this Court's modern Commerce Clause jurisprudence by permitting conviction where, as here, the only proof of a nexus to interstate commerce is the fact that the firearm at some point crossed state lines in the past. Numerous judges have flagged the apparent tension between the Court's updated understanding of the scope of Congress's power to regulate commerce and the comparatively minimal effect on commerce that this Court deemed sufficient to satisfy Section 922(g)(1)'s jurisdictional element in *Scarborough v. United States*, 431 U.S. 563 (1977). That question is important and worthy of this Court's resolution.

In *Scarborough*, this Court held, as a matter of statutory interpretation, that the government could satisfy the interstate commerce element of Section 922(g)'s predecessor, 18 U.S.C. § 1201(a) (repealed 1986), by proving that the firearm had traveled across state lines at any prior point, even if the defendant's possession occurred all in one state. *See* 431 U.S. at 577. Eighteen years later, in *United States v. Lopez*, 514 U.S. 549 (1995), the Court struck down a statute that made it a federal crime "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone," 18 U.S.C. § 922(q)(1)(A), reasoning that the law violated the Commerce Clause because it "neither regulate[d] a commercial activity nor contain[ed] a requirement that the

possession be connected in any way to interstate commerce." 514 U.S. at 551. *Lopez* clarified that, for a law that regulates neither the channels nor the instrumentalities of commerce to nevertheless comport with the Commerce Clause, the regulated activity must "substantially affect" interstate commerce. *Id.* at 559. Section 922(q) failed that test because there was no evidence that the *intra*state, non-commercial act of possessing a gun in close proximity to a school had the requisite "substantial" impact on interstate economic activity, and the statute "contain[ed] no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affect[ed] interstate commerce." *Id.* at 561.

In the following years, numerous jurists have identified and called upon this Court to resolve the apparent tension between *Lopez* and *Scarborough*. Justice Thomas, for instance, has observed that "*Scarborough*, as the lower courts have read it, cannot be reconciled with *Lopez* because it reduces the constitutional analysis to the mere identification of a jurisdictional hook" that, like Section 922(g)'s jurisdictional element, "seems to permit Congress to regulate or ban possession of any item that has ever been offered for sale or crossed state lines." *Alderman v. United States*, 131 S. Ct. 700, 702, 703 (2011) (Thomas, J., joined by Scalia, J., dissenting from the denial of certiorari). That result, Justice Thomas explained, is not only inconsistent with the *Lopez* framework but "could very well remove any limit on the commerce power" if taken to its logical extension. *Id.* at 703.

Despite similarly perceiving *Scarborough* as "in fundamental and irreconcilable conflict with the rationale" of *Lopez*, *United States v. Kuban*, 94 F.3d 971, 977 (5th Cir.

1996) (DeMoss, J., dissenting), the prevailing view of the courts of appeals is that *Scarborough* "implicitly assumed the constitutionality of" Section 922(g)'s predecessor statute, *United States v. Alderman*, 565 F.3d 641, 645 (9th Cir. 2009), *cert. denied*, 131 S. Ct. 700 (2011), and that "[a]ny doctrinal inconsistency between *Scarborough* and [this] Court's more recent decisions is not for [the lower courts] to remedy." *United States v. Patton*, 451 F.3d 615, 636 (10th Cir. 2006), *cert. denied*, 549 U.S. 1213 (2007); *see United States v. Kirk*, 105 F.3d 997, 1015 n.25 (5th Cir. 1997) (en banc) (Jones, J., for half of the equally divided court) ("not[ing] the tension between" *Scarborough* and *Lopez* but observing that the Fifth Circuit has felt constrained to nevertheless "continue to enforce § 922(g)(1)" because a court of appeals is "not at liberty to question the Supreme Court's approval of [Section 922(g)'s] predecessor statute"). The courts of appeals have therefore made clear their intention to follow *Scarborough* "until the Supreme Court tells [them] otherwise." *Patton*, 451 F.3d at 648. And nine of those courts have specifically upheld the constitutionality of Section 922(g)(1) based on *Scarborough*'s minimal-nexus test. *See United States v. Smith*, 101 F.3d 202, 215 (1st Cir. 1996); *United States v. Santiago*, 238 F.3d 213, 216-17 (2d Cir. 2001); *United States v. Gateward*, 84 F.3d 670, 671-72 (3d Cir. 1996); *United States v. Rawls*, 85 F.3d 240, 242-43 (5th Cir. 1996); *United States v. Lemons*, 302 F.3d 769, 771-72 (7th Cir. 2002); *United States v. Shelton*, 66 F.3d 991, 992 (8th Cir. 1995); *United States v. Hanna*, 55 F.3d 1456, 1461-62, 1462 n.2 (9th Cir. 1995); *United States v. Dorris*, 236 F.3d 582, 584-86 (10th Cir. 2000); *United States v. Wright*, 607 F.3d 708, 715-16 (11th Cir. 2010).

This question is important and independently warrants review. As already noted, Section 922(g)(1) is one of the most often-applied federal criminal statutes. Yet, as Justice Thomas has observed, and as many lower-court judges have echoed, the degree of proof needed to convict under that statute is in serious tension with the Court's modern understanding of the limited nature and scope of the federal power to regulate noneconomic, intrastate activity. In recently urging the Fifth Circuit to reconsider this issue en banc, Judge Ho emphasized that the "constitutional limits on governmental power do not enforce themselves." *United States v. Seekins*, 52 F.4th 988, 989 (5th Cir. 2022) (Ho, J., dissenting from the denial of rehearing en banc). The interpretation of Section 922(g)(1)'s jurisdictional element that the circuits understand *Scarborough* to require effectively "allows the federal government to regulate any item so long as it was manufactured out-of-state—without any regard to when, why, or by whom the item was transported across state lines." *Id.* at 990. That broad conception of federal regulatory authority is at odds with the *Lopez* framework. Only this Court can "prevent [that framework] from being undermined by a 1977 precedent that d[id] not squarely address the constitutional issue." *Alderman*, 131 S. Ct. at 703 (Thomas, J., dissenting from the denial of certiorari).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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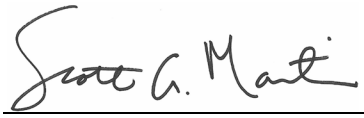

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