No. 17-1548

IN THE

Supreme Court of the United States

PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY, DBA FEDLOAN SERVICING,
Petitioner,

v.

NEIL SILVER, on behalf of himself and all others similarly situated,
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

ADINA H. ROSENBAUM
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

JOSHUA SWIGART
HYDE & SWIGART
2221 Camino Del Rio S.
Suite 101
San Diego, CA 92108
(619) 233-7770

ABBAS KAZEROUNIAN
Counsel of Record
MATTHEW M. LOKER
KAZEROUNI LAW GROUP, APC
245 Fischer Avenue
Suite D1
Costa Mesa, CA 92626
(800) 400-6808
ak@kazlg.com

Counsel for Respondent

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QUESTION PRESENTED

Would applying an amendment to the Telephone Consumer Protection Act to conduct predating the amendment's enactment have an impermissible retroactive effect if doing so would eliminate a claim for damages that had already accrued?

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INTRODUCTION

The "presumption against retroactive legislation is deeply rooted in [this Court's] jurisprudence." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994). "[T]his time-honored presumption" applies "unless Congress has clearly manifested its intent to the contrary." *Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939, 946 (1997).

In *Landgraf*, this Court set forth a sequence of analysis for determining whether a statute applies to conduct that occurred before the statute was enacted. 511 U.S. at 280. Under that analysis, if Congress has not prescribed the statute's reach, the Court asks whether applying the statute would have a retroactive effect "in the disfavored sense of 'affecting substantive rights, liabilities, or duties [on the basis of] conduct arising before [its] enactment.'" *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 37 (2006) (quoting *Landgraf*, 511 U.S. at 278). If so, the Court applies a presumption against retroactivity and "construe[s] the statute as inapplicable to the event or act in question." *Id.* at 37–38.

The court below faithfully applied the *Landgraf* test, determining at the second step of the analysis that applying a Telephone Consumer Protection Act (TCPA) amendment to claims based on conduct predating its enactment would have an impermissible retroactive effect. "[R]etroactively extinguishing a personal claim that has already accrued," the court explained, "implicates the strong presumption against retroactivity under *Landgraf*." Pet. App. 12a.

Petitioner seeks review of that unpublished decision, arguing that the courts are in "disarray" over

whether a "statutory amendment that eliminates liability" is impermissibly retroactive when applied to conduct that predates its enactment. Pet. 11. Petitioner, however, does not cite a single case holding that a statute that changes substantive law may permissibly be applied retroactively where doing so would eliminate a damages claim that had already accrued.

There is no disagreement among the circuits, and the court of appeals' determination that the TCPA amendment would have an impermissible retroactive effect if applied to conduct predating its enactment is unremarkable and correct. Moreover, review is further unwarranted because, even apart from the presumption against retroactivity, the TCPA amendment is best read to apply only prospectively.

STATEMENT OF THE CASE

The TCPA prohibits making calls to a cellular telephone using an automatic telephone dialing system (ATDS) or an artificial or prerecorded voice, without the prior express consent of the called party. 47 U.S.C. § 227(b)(1)(A). This prohibition reflects Congress's recognition that people find "automated or prerecorded telephone calls, regardless of the content or the initiator of the message, to be a nuisance and an invasion of privacy." TCPA, Pub. L. No. 102-243, § 2(10), 105 Stat. 2394, 2394 (1991).

In January 2014, petitioner Pennsylvania Higher Education Assistance Agency (PHEAA) called respondent Neil Silver's cell phone using an ATDS or pre-recorded voice. In February 2014, Mr. Silver filed this case on behalf of himself and a class of similarly situated people, alleging that PHEAA's calls violated the TCPA.

In November 2015, while this case was pending, Congress amended the TCPA to, among other things, exempt calls "made solely to collect a debt owed to or guaranteed by the United States" from the scope of the TCPA's prohibition on calls to cell phones. *See* Bipartisan Budget Act, Pub. L. No. 114-74, § 301, 129 Stat. 584, 588 (2015). The amendment instructed the Federal Communications Commission (FCC) to issue implementing regulations within nine months, and it provided that the regulations could "restrict or limit the number and duration of calls made to a telephone number assigned to a cellular telephone service to collect a debt owed to or guaranteed by the United States." *Id.*

After the TCPA was amended, PHEAA moved for summary judgment, arguing, among other things, that the amendment barred Mr. Silver's claims because PHEAA's calls related to federally funded student loans. Pet. App. 5a. The district court granted PHEAA's motion for summary judgment, holding that the TCPA amendment "exempt[s] the calls allegedly placed by defendant." *Id.* at 9a. Although applying the TCPA amendment would extinguish Mr. Silver's pending damages claim, the court found that application of the amendment would not have an impermissible retroactive effect under the test set forth in *Landgraf*, 511 U.S. at 280.

The Ninth Circuit reversed. The court explained that "[t]his case involves a statutory personal injury claim that had accrued prior to the date Congress enacted the TCPA amendment at issue." *Id.* at 12a. "[R]etroactively extinguishing a personal claim that has already accrued," it continued, "implicates the

strong presumption against retroactivity under *Landgraf*." *Id.* The court found "no clear indication that Congress intended to override this strong presumption against retroactivity." *Id.* "The fact that the amendments were in the national interest of collecting debts owed to or secured by the government establishes the purpose for enacting the law," it explained, but does not "show that Congress 'affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits.'" *Id.* (quoting *Beaver v. Tarsadia Hotels*, 816 F.3d 1170, 1188 (9th Cir. 2016) (quoting *Landgraf*, 511 U.S. at 272–73)).

PHEAA filed a petition for rehearing and rehearing en banc, which was denied without any judge requesting a vote. *Id.* at 13a.

REASONS FOR DENYING THE WRIT

In *Landgraf*, this Court reconciled the "apparent tension" between "seemingly contradictory statements" in its decisions concerning the effect of statutes enacted between the date of the conduct challenged in a lawsuit and the court's decision in that lawsuit, 511 U.S. at 263–64, by establishing a "sequence of analysis" for determining whether a statute applies to conduct that occurred before it was enacted, *Fernandez-Vargas*, 548 U.S. at 37.

At the first step of the analysis, the Court looks to whether Congress has "expressly prescribed the statute's proper reach." *Landgraf*, 511 U.S. at 280. If it has, Congress's command prevails. If not, the Court moves to the second step of the analysis and "determine[s] whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability

for past conduct, or impose new duties with respect to transactions already completed." *Id.* If it would, the Court "appl[ies] the presumption against retroactivity by construing the statute as inapplicable to the event or act in question." *Fernandez-Vargas*, 548 U.S. at 37.

This Court has explained that the "inquiry into whether a statute operates retroactively" at the second stage of the *Landgraf* analysis "demands a commonsense, functional judgment about 'whether the new provision attaches new legal consequences to events completed before its enactment.'" *Martin v. Hadix*, 527 U.S. 343, 357–58 (1999) (quoting *Landgraf*, 511 U.S. at 270). *Landgraf* also explained that, "[w]hen the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive," 511 U.S. at 273, and that "changes in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity." *Id.* at 275.

Below, the court of appeals determined that applying the TCPA amendment, which effected a change in substantive law, to conduct that predated its enactment would have an impermissible retroactive effect. Pet. App. 12a. That decision does not implicate any circuit splits and is correct.

I. There Is No Circuit Split.

PHEAA contends that the circuits are divided over "whether a statutory amendment that eliminates liability" has an impermissible retroactive effect when applied to conduct that predates the statute's enactment. Pet. 11. On one side of the purported split, PHEAA places the Third Circuit, Seventh Circuit, and Ninth Circuit (including the decision below), all of

which have held that applying statutes to events predating their enactment would have an impermissible retroactive effect if doing so would eliminate an accrued damages claim. *See* Pet. App. 12a; *Killingsworth v. HSBC Bank Nevada, N.A.*, 507 F.3d 614, 623 (7th Cir. 2007); *Mathews v. Kidder, Peabody & Co.*, 161 F.3d 156, 165 (3d Cir. 1998); *see also Mabary v. Hometown Bank, N.A.*, 771 F.3d 820, 826 (5th Cir. 2014) (opinion withdrawn upon parties' request, Jan. 8, 2015) (Fifth Circuit case holding that statutory amendment did not apply retroactively where it would eliminate a "private civil right to statutory damages [that] accrued prior to the amendment's effective date").

PHEAA places the Sixth Circuit and other Ninth Circuit decisions on the other side of the purported split, citing a few decisions in which those courts applied new laws to pending cases. In none of those cases, however, did the court apply a substantive law to events predating its enactment where doing so would eliminate an accrued damages claim.

A. PHEAA devotes most of its discussion to arguing that the decision below is inconsistent with other Ninth Circuit decisions. To begin with, this Court seldom grants review to resolve a purported intra-circuit disagreement. Such disagreements do not pose a risk that different rules will apply in different parts of the country. And courts of appeals have their own tools for managing and resolving intra-circuit conflicts, such as the en banc review process. Notably, here, PHEAA argued in its en banc petition that the decision below conflicted with other Ninth Circuit decisions, yet no Ninth Circuit judge even requested a vote on whether to rehear the case en banc. Pet. App. 13a.

In any event, the decision below is wholly consistent with the cases on which PHEAA relies. PHEAA relies on three Ninth Circuit decisions that applied statutes to cases pending when they were enacted. First, PHEAA accuses the court below of "ignor[ing]" *Southwest Center for Biological Diversity v. U.S. Department of Agriculture*, 314 F.3d 1060 (9th Cir. 2002), and *Center for Biological Diversity v. U.S. Department of Agriculture*, 626 F.3d 1113 (9th Cir. 2010), *see* Pet. 9, both of which held that statutes that affected whether information was subject to disclosure under the Freedom of Information Act (FOIA) could be applied in FOIA cases that were pending when the statutes were enacted. FOIA cases, however, involve "prospective relief [in the form] of an injunction directing the [agency] to provide [the plaintiff] with certain information," *Ctr. for Biological Diversity*, 626 F.3d at 1118, not claims for damages, 5 U.S.C. § 552(a)(4)(B). As noted above, *Landgraf* stated that, "[w]hen the intervening statute authorizes or affects the propriety of prospective relief," such as injunctive relief, application of the new statute is not impermissibly retroactive. 511 U.S. at 273 (citing *Am. Steel Foundries v. Tri-City Cent. Trades Council*, 257 U.S. 184, 201 (1921), which held that a statute enacted while the case was on appeal governed the propriety of injunctive relief against labor picketing because "relief by injunction operates *in futuro*").

Unlike the relief sought in FOIA cases, damages for past conduct are not prospective relief; rather, they are "quintessentially backward looking." *Landgraf*, 511 U.S. at 281 (holding that statutory provisions authorizing the recovery of punitive and compensatory damages for employment discrimination in addition to the back pay that was already recoverable could not

be applied to conduct predating the statute's enactment). Because statutes affecting prospective relief do not raise the same retroactivity concerns as statutes affecting damages, *Southwest Center* and *Center for Biological Diversity* are irrelevant to the question whether applying a statute to conduct predating its enactment would be impermissibly retroactive if it extinguished a claim for damages that has already accrued, and those cases do not conflict with the decision below.

Besides *Southwest Center* and *Center for Biological Diversity*, the only case in which the Ninth Circuit applied a statute retroactively that PHEAA cites in its attempt to show an intra-circuit conflict is *Fink v. Shedler*, 192 F.3d 911 (9th Cir. 1999). There, a former prisoner brought an action under 42 U.S.C. § 1983, alleging that he was deprived of adequate medical treatment while incarcerated. Between the events at issue and the date the plaintiff filed suit, California enacted a statute that limited tolling of limitations periods for prisoners who were incarcerated for less than life. Explaining that, under *Landgraf*, "[p]rocedural statutes generally may be applied retrospectively without giving rise to concerns about retroactivity," the court determined that the tolling statute could be applied retroactively unless doing so would result in "manifest injustice." 192 F.3d at 915 (quoting *TwoRivers v. Lewis*, 174 F.3d 987, 994 (9th Cir. 1999)); *see Landgraf*, 511 U.S. at 275 ("Changes in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity."). The court concluded that applying the statute would not be manifestly unjust, because the plaintiff had had "ample time" to bring his claim. *Fink*, 192

F.3d at 915. Because this case does not involve a procedural rule, *Fink* is not in tension with the decision in this case.

B. Aside from trying to fashion an intra-circuit conflict, PHEAA relies on two Sixth Circuit cases to argue that this case implicates a circuit split: *BellSouth Telecommunications, Inc. v. Southeast Telephone, Inc.*, 462 F.3d 650 (6th Cir. 2006), and *Combs v. Commissioner of Social Security*, 459 F.3d 640 (6th Cir. 2006) (en banc). Neither case involved a statute that would eliminate accrued damages claims if applied to events predating its enactment. Indeed, although these cases form the basis for PHEAA's argument that the decision below conflicts with decisions of other circuits over whether "a statutory amendment that eliminates liability constitutes impermissible retroactive effect," Pet. 11, neither Sixth Circuit case involves a statutory amendment that eliminates a defendant's liability for its conduct.

BellSouth involved the regulatory scheme governing local telephone markets. Under that scheme, incumbent local exchange carriers (ILECs) must share their networks with new entrants to the market, known as competing local exchange carriers (CLECs) and, when they enter an agreement with a CLEC, must allow other CLECs to opt in to that agreement. 462 F.3d at 652–53. The FCC first promulgated a regulation allowing CLECs to opt in to terms of the agreement without having to accept the entire agreement, subject to challenge by the ILEC before the state regulatory commission. *Id.* at 653. Later, the FCC promulgated a rule requiring CLECs to opt in to agreements on an all-or-nothing basis. *Id.* at 654. The question before the Sixth Circuit was whether applying the

new regulation to a notice of intent to adopt a provision (but not all) of an agreement that was pending before a state commission when the regulation was adopted—specifically, a provision concerning dispute resolution—would have an impermissible retroactive effect.

The Sixth Circuit held that it would not. The court explained that the regulatory scheme did not provide the CLECs with "an unconditional opt-in right or 'guarantee' that a CLEC's adoption request will be granted." *Id.* at 658–59. Rather, "the right to adopt the provision of an existing agreement is contingent upon a state commission's determination that such an adoption is proper under the statute and the governing regulation." *Id.* at 660. Because the CLEC did not have an unconditional right to adopt the dispute-resolution term until the state commission determined it could, applying a regulation that was enacted before the commission made its determination did not impair the CLEC's rights. *See id.* at 660–61 (explaining that "filing an application with an agency does not generally confer upon the applicant an inviolable right to have the agency rule on the application pursuant to the regulations in effect at the time of filing").

Moreover, the court explained, "[b]ecause the new dispute-resolution provision would take effect as of the date of the [commission's] order, that provision would govern only the future relations between the parties." *Id.* at 661. "Applying new statutes (or regulations) that 'authorize[ ] or affect [ ] the propriety of prospective relief,' the Supreme Court has said, does not raise retroactivity concerns." *Id.* (quoting *Landgraf*, 511 U.S. at 273). "The fact that applying the all-

or-nothing rule would deprive [the CLEC] of only a future contractual benefit, serves to distinguish the present case from the 'quintessentially backward looking' damages provisions held to be impermissibly retroactive in *Landgraf*." *Id.* (quoting *Landgraf*, 511 U.S. at 282).

Unlike *Bellsouth*, this case does not involve a change in law while an application was pending before a state agency, but rather a change in law after a damages claim had already accrued, based on behavior that was illegal when it was undertaken. Unlike *Bellsouth*, Mr. Silver's TCPA rights were not conditional when the TCPA amendment was enacted: He had a right not to receive calls on his cell phone made with an ATDS or prerecorded voice, and a right to statutory damages if he received such calls. And unlike *Bellsouth*, this case does not involve only forward-looking relief; application of the TCPA amendment would extinguish damages claims based on conduct that predated the statute's enactment.

Combs likewise poses no conflict. In *Combs*, the Sixth Circuit held that a Social Security Administration rule altering the proof needed to demonstrate disability based on obesity could be applied in administrative adjudications of disability benefit applications that were pending when the rule was changed. 459 F.3d at 642. A plurality of the en banc court explained that a "rule regulating the evaluation and presentation of proof does not normally operate retroactively if it is applied to pending cases." 459 F.3d at 649; *see also id.* at 647 (stating that "changes to procedural rules generally do not have retroactive effect" and concluding that the change in the rule was "more procedural than substantive in nature"). Here, in contrast,

the TCPA amendment did not affect the evaluation and presentation of proof. Rather, the amendment altered substantive TCPA law. *Combs* neither addresses this situation nor suggests that that the Sixth Circuit would reach a different result if it did.

Thus, neither of the decisions that PHEAA claims creates a conflict among the circuits in fact does so. No circuit split is implicated here, and PHEAA's petition should be denied.

II. The Court of Appeals Correctly Held That Applying the TCPA Amendment Would Have an Impermissible Retroactive Effect.

"The inquiry into whether a statute operates retroactively demands a commonsense, functional judgment about 'whether the new provision attaches new legal consequences to events completed before its enactment.'" *Martin*, 527 U.S. at 357–58 (quoting *Landgraf*, 511 U.S. at 270). A statute has "a retroactive consequence in the disfavored sense" if it "'affect[s] substantive rights, liabilities, or duties [on the basis of] conduct arising before [its] enactment.'" *Fernandez-Vargas*, 548 U.S. at 37 (quoting *Landgraf*, 511 U.S. at 278).

As the court of appeals correctly held, applying the TCPA amendment to this case would "affect[] substantive rights" based on conduct that predated the amendment's enactment. *Id.* Before the TCPA amendment, Mr. Silver and the class had a statutory right *not* to receive autodialed or prerecorded calls on their cell phones, regardless of whether those calls were made to collect a debt owed to or guaranteed by the government, 47 U.S.C. § 227(b)(1)(A) (2014), and a right to receive damages if someone made such calls to their cell phones. *Id.* § 227(b)(3)(B). Applying the

TCPA amendment to calls predating its enactment would impair those rights.

PHEAA argues that the TCPA amendment should nonetheless apply retroactively because "merely impairing the ability to bring a lawsuit does not provide a sufficient basis, under *Landgraf*, to bar retroactive application" of a statute. Pet. 13–14 (quoting Pet. App. 7a). Application of the TCPA amendment here, however, would not "merely impair" Mr. Silver's "ability to bring a lawsuit." *Id.* The amendment regulates the "underlying primary conduct of the parties," not the "secondary conduct of litigation." *Hughes*, 520 U.S. at 951. Its retroactive application would alter substantive law and extinguish Mr. Silver's legal claim for damages, which accrued before the amendment's enactment. *See Landgraf,* 511 U.S. at 285–86 (noting that, in *U.S. Fidelity & Guar. Co. v. United States ex rel. Struthers Wells Co.*, 209 U.S. 306, 314–15 (1908), the Court "construed [a] statute *restricting* subcontractors' rights to recover damages from prime contractors as prospective in absence of 'clear, strong and imperative' language from Congress favoring retroactivity").

Contending that retroactive application of the TCPA amendment would "further Congress's intent to allow telephone calls to be placed in the furtherance of collecting debts owed to or guaranteed by the United States," Pet. 24, PHEAA also asks the Court to adopt a rule that, "at a minimum," statutory amendments should apply retroactively if they "further important federal government interests," *id.* at 22. In *Landgraf*, however, this Court specifically rejected the argument that a statute should be held to apply retroactively if doing so would "vindicate its

purpose more fully." 511 U.S. at 285. "That consideration," the Court explained, "is not sufficient to rebut the presumption against retroactivity. Statutes are seldom crafted to pursue a single goal …. A legislator who supported a prospective statute might reasonably oppose retroactive application of the same statute." *Id.* at 285–86. Moreover, here, the TCPA amendment includes a provision permitting the FCC to restrict or limit the calls made to cell phones to collect debts owed to or guaranteed by the United States. Pub. L. No. 114-74, § 301, 129 Stat. at 588. The statute itself thus demonstrates that Congress did not believe that the interest in permitting calls to collect such debts outweighs all other interests.

Because retroactive application of the TCPA amendment would affect substantive rights and alter the legal consequences of events predating its enactment, it would be impermissibly retroactive if applied to conduct predating its enactment. The court of appeals' determination that this case "implicates the strong presumption against retroactivity" follows directly from this Court's case law and is correct. Pet. App. 12a.

III. Regardless of the Presumption Against Retroactivity, the TCPA Amendment Should Apply Only Prospectively.

Review is also unwarranted because, even apart from the presumption against retroactivity, the TCPA amendment is best read to apply only prospectively. As this Court has explained, even statutes that do not have an impermissible retroactive effect if applied to conduct predating their enactment do not necessarily apply to cases pending at the time of their enactment.

Hamdan v. Rumsfeld, 548 U.S. 557, 577 (2006). Rather, the Court uses "normal rules of construction" to determine the statute's temporal reach. *Lindh v. Murphy*, 521 U.S. 320, 326 (1997); *see also Fernandez-Vargas*, 548 U.S. at 37.

Here, even aside from the presumption against retroactivity, the TCPA amendment should apply only prospectively. The amendment required the FCC to issue implementing regulations and provided that those regulations could "restrict or limit the number and duration of calls made to a telephone number assigned to a cellular telephone service to collect a debt owed to or guaranteed by the United States." Pub. L. No. 114-74, § 301, 129 Stat. at 588. Thus, the amendment made clear that the FCC implementing regulations would determine the scope of the amendment's exception for calls owed to or guaranteed by the United States. Congress could not logically have intended the amendment's exception to apply to conduct predating the amendment's enactment and make legal *all* previously illegal automated calls to cell phones made to collect a debt owed to or guaranteed by the United States, even as it invited the FCC to make some such calls illegal.

Moreover, the FCC's implementing regulations are themselves inconsistent with PHEAA's view that the statute applies retroactively. In those regulations, the FCC set a *future* effective date both for the rules allowing calls to be made to collect debts owed to or guaranteed by the United States and for the rules placing limits on those calls. *See* Report and Order, *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, FCC 16-99 (Aug. 11, 2016), at ¶ 60.

Explaining that the Paperwork Reduction Act required it to obtain Office of Management and Budget (OMB) approval before some of the rules could become effective, the FCC stated that none of the implementing rules, including those "permit[ing] a caller to make calls," would become effective until after the FCC published a notice that it had obtained the required OMB approval. *Id.* "We determine that the regulatory scheme we implement today must include both the ability for callers to make calls and the right of debtors to ask that calls stop," the FCC stated. *Id.* "[B]oth portions of the rules must become effective for the regulatory scheme to be effective." *Id.*

Because the FCC has not yet obtained OMB approval of the rules requiring such approval, the FCC regulations—including those permitting automated calls to cell phones to collect debts owed to or guaranteed by the United States—have not yet gone into effect. Accordingly, in addition to demonstrating that the statute's provisions permitting such calls were not meant to apply retroactively, these regulations raise a question about whether such calls are permitted under current law. This question is antecedent to the question presented, because, if such calls are not yet permitted, current law remains the same as the law predating the statute's enactment, obviating the need to consider retroactivity. Both this antecedent question, and the fact that, even apart from the presumption against retroactivity, the TCPA was designed to operate only prospectively, make this case a particularly bad vehicle for resolving any questions concerning the presumption against retroactivity.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ADINA H. ROSENBAUM
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

JOSHUA SWIGART
HYDE & SWIGART
2221 Camino Del Rio S.
Suite 101
San Diego, CA 92108

ABBAS KAZEROUNIAN
Counsel of Record
MATTHEW M. LOKER
KAZEROUNI LAW
GROUP, APC
245 Fischer Avenue
Suite D1
Costa Mesa, CA 92626
(800) 400-6808
ak@kazlg.com

Counsel for Respondent

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