No. 24-1173

IN THE
Supreme Court of the United States

EVANS HOTELS, LLC, *et al.*,
Petitioners,
v.

UNITE HERE! LOCAL 30, *et al.*,
Respondents.

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

BRIEF OF COALITION FOR A DEMOCRATIC WORKPLACE & 3 OTHER ASSOCIATIONS REPRESENTING EMPLOYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

KEVIN S. ELLIKER
Counsel of Record
ELBERT LIN
KURT G. LARKIN
HUNTON ANDREWS KURTH LLP
951 East Byrd Street,
East Tower
Richmond, Virginia 23219
kelliker@hunton.com
(804) 788-8200

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Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*

Amici curiae have an interest in the proper and consistent implementation of federal labor relations law.[1]

The Coalition for a Democratic Workplace represents millions of businesses that employ tens of millions of workers across the country in nearly every industry. Its purpose is to combat regulatory overreach by the NLRB that threatens the wellbeing of employers, employees, and the national economy.

Associated Builders and Contractors (ABC) is a national construction industry trade association established in 1950 with 67 chapters and more than 23,000 members. Founded on the merit shop philosophy, ABC helps members develop people, win work, and deliver that work safely, ethically, and profitably for the betterment of the communities in which ABC and its members work. ABC's membership represents all specialties within the U.S. construction industry and consists primarily of firms that perform work in the industrial and commercial sectors.

The American Hotel and Lodging Association (AHLA), founded in 1910, is the sole national association representing all segments of the lodging industry, including hotel owners, REITs, chains, franchisees, management companies, independent properties, bed and breakfasts, state hotel associations, and industry suppliers. Supporting more than 9 million jobs and with over 33,000 properties in membership worldwide, the AHLA represents more than half of all the hotel rooms in the United States. The mission of the

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[1] No counsel for any party authored this brief in whole or in part, nor did any person or entity other than *amici* or their counsel make a monetary contribution to the preparation or submission of this brief. All counsel of record were given notice of *amici*'s intent to file.

AHLA is to be the voice of the lodging industry, its primary advocate, and an indispensable resource. AHLA serves the lodging industry by providing representation at the federal, state, and local level in government affairs, education, research, and communications. AHLA also represents the interests of its members in litigation that raises issues of widespread concern to the lodging industry.

Established in 1911, the National Retail Federation (NRF) is the world's largest retail trade association and the voice of retail worldwide. Retail is the largest private-sector employer in the United States. The NRF's membership includes retailers of all sizes, formats, and channels of distribution, spanning all industries that sell goods and services to consumers. The NRF provides courts with the perspective of the retail industry on important legal issues impacting its members. To ensure that the retail community's position is heard, the NRF files *amicus curiae* briefs expressing the views of the retail industry on a variety of topics.

Amici have a direct interest in preserving the integrity of labor law and preventing it from being weaponized against neutral employers. This case raises precisely that concern. Labor unions frequently resort to strongarm tactics, commonly called "corporate campaigns," to extort organizing concessions from targeted employers through the use of economic blackmail. Allowing unions to lob baseless environmental concerns while hiding behind the First Amendment threatens to convert regulatory process into a tool of extortion. Left unchecked, such tactics will undermine fair competition, chill investment in targeted firms, and destabilize industries vital to the national economy.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents a straightforward but important question: Can a union coerce a neutral business by threatening to weaponize environmental regulations against it unless it agrees to the union's demands—and then claim constitutional and statutory immunity for that conduct?

The answer should be obvious: no.

For nearly 80 years, Congress has drawn a bright line that permits unions to press their case with employers they wish to unionize, but prohibits them from enmeshing neutral third parties into their disputes through coercion. That is the essence of the secondary-boycott prohibition codified in § 8(b)(4) of the National Labor Relations Act. And from the beginning, this Court has made equally clear that the First Amendment provides no shelter for conduct that crosses that line.

This case calls for reaffirming that basic boundary. The Ninth Circuit's decision rewrites longstanding precedent, converts economic threats into constitutionally protected speech, and invites economic blackmail dressed up as environmental advocacy.

Amici represent industries where capital planning and permitting are essential, and where the emergence of "greenmail" campaigns—threatening environmental litigation to extract labor concessions—has become a serious and growing problem. These tactics are not aimed at environmental protection; they are designed to delay construction projects, increase costs, and compel businesses to sign neutrality agreements or project labor deals. Using the threat of economic harm via baseless environmental proceedings to extract union-organizing concessions is not free

speech. It is not legitimate petitioning. It is extortion, precisely of the kind that § 8(b)(4) was enacted to prevent. The Ninth Circuit's reliance on *DeBartolo* misreads that decision, which upheld only peaceful persuasion, not unlawful threats. And its cramped reading of the "sham" exception under *Noerr-Pennington* ignores this Court's settled precedent and gives legal cover to strategic abuse of process.[2]

The stakes here are not limited to one developer or one industry. This case is a classic example of a "corporate campaign," a sophisticated and favored technique used by unions to batter targeted employers into compliance with organizing goals. Respondents' threats to use baseless environmental claims as a roadblock to Petitioners' hotel development unless they promised to sign union agreements exemplify the corporate campaign.

If allowed to stand, the decision below would create a blueprint for allowing unions to leverage tactics like those on display here to pressure neutral businesses like Petitioners through contrived regulatory threats. The result will undermine labor law, distort environmental regulation, and chill investment in targeted businesses based on threats and extortion. Congress struck a balance in § 8(b)(4), preserving robust labor advocacy while protecting neutral parties from being dragged into disputes not their own. That balance cannot hold if courts mistake greenmail for constitutionally protected conduct.

The Court should grant certiorari and reaffirm that neither the First Amendment nor *Noerr-Pennington* shields conduct Congress deemed unlawful generations ago.

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[2] *E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965).

ARGUMENT

I. The First Amendment does not shield secondary boycotts.

A. Congress has long prohibited coercive union conduct that targets third parties.

Since 1947, the National Labor Relations Act (NLRA or Act), 29 U.S.C. § 151, *et seq.*, has prohibited unions from engaging in "secondary boycotts"—a tactic in which the union engages in an activity "whose sanctions bear, not upon the employer" with whom the union has a labor dispute, "but upon some third party who has no concern in it." *Loc. 761, Int'l Union of Elec., Radio & Mach. Workers v. NLRB*, 366 U.S. 667, 672 (1961).[3] This proscription reflects "the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." *NLRB v. Denver Bldg. & Const. Trades Council*, 341 U.S. 675, 692 (1951). As a result, Congress targeted union conduct that it viewed as impermissibly "coercive" in its intent to cause the secondary employer "to sever relations with the union's real antagonist." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 579 (1988).

The ban on secondary boycotts is the product of decades of experience that revealed how unchecked economic coercion, even when cloaked in the garb of union activity, can destabilize markets, injure neutral parties, and erode the rule of law.

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[3] All internal citations, quotation marks, and alterations are omitted unless otherwise noted.

In the early twentieth century, courts enjoined certain labor-related boycotts under the Sherman Act. *See Nat'l Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 620 & n.6 (1967). While aimed at restraining some of the most far-reaching forms of union misconduct, that trend swept too broadly as it threatened to impede legitimate worker protest. So Congress passed § 20 of the Clayton Act in 1914, which narrowed courts' ability to enjoin labor activity under the antitrust laws. *See id.* at 620-21.

But with protection came abuse. Unions soon exploited the Clayton Act's labor exemption, exemplified by the International Association of Machinists' "elaborate scheme to coerce and restrain neutral customers" of its bargaining opponent. *Id.* at 621. That overaggressive behavior did not seek the resolution of a workplace dispute but economic compulsion. That led this Court to hold that § 20 protected only boycotts "directed against an employer by his own employees." *Id.* (citing *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 461 (1921)). While those "direct" or "primary" boycotts "were excepted from the antitrust laws," "secondary pressure" was not. *Id.* at 622.

In 1932, Congress did away with the distinction between primary and secondary boycotts with the Norris-LaGuardia Act. *See* Act of March 23, 1932, ch. 90, § 13(c), 47 Stat. 73. Predictably, the pendulum swung too far again: what followed was a surge in union attempts to use threatening tactics under the cover of legal immunity for violations of the Sherman Act. *See Nat'l Woodwork Mfrs. Ass'n*, 386 U.S. at 622-23. So in 1947, Congress stepped in once again and enacted the Taft-Hartley Act, which for the first time in federal labor law imposed a categorical prohibition on secondary boycotts. *See* Labor Relations Management Act, 1947, ch. 120, § 8(b), 61 Stat. 141. The aim was unam-

biguous: to restore the balance between labor and commerce by "mak[ing] it unlawful to resort to a secondary boycott to injure the business of a third person who is wholly unconcerned in the disagreement between an employer and his employees." *Nat'l Woodwork Mfrs. Ass'n*, 386 U.S. at 624 (quoting Sen. Robert Taft).

Today, the secondary-boycott ban appears in § 8(b) of the Act, 29 U.S.C. § 158(b). As relevant here, it is "an unfair labor practice" under the NLRA "for a labor organization or its agents … to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where … an object thereof is … forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person." 29 U.S.C. § 158(b)(4)(ii)(B).

Although frequently characterized in terms of "picketing," the Act's ban on secondary boycotts is neither limited to, nor specifically directed at, picketing. Instead, § 8(b)(4) broadly proscribes "economic retaliation" with a secondary-boycotting purpose. *See, e.g.*, *Loc. Union No. 48 of Sheet Metal Workers Int'l Ass'n v. Hardy Corp.*, 332 F.2d 682, 685-86 (5th Cir. 1964). Congress was not concerned with the place where the unlawful conduct occurred, but with its object. *See Denver Bldg. & Const. Trades Council*, 341 U.S. at 688. "Recognizing that illegal boycotts take many forms, Congress intended its prohibition to reach broadly." *Int'l Longshoremen's Ass'n v. Allied Int'l, Inc.*, 456 U.S. 212, 225 (1982). At bottom, hammering neutral parties with baseless litigation to gain leverage in a labor dispute with another employer is prohibited by the NLRA.

B. The First Amendment is not a license to extort.

For more than 70 years, it has been understood that the First Amendment does not protect "speech or picketing in furtherance of unfair labor practices such as are defined in § 8(b)(4)." *Int'l Bhd. of Elec. Workers, Loc. 501 v. NLRB*, 341 U.S. 694, 704-05 (1951) (*IBEW*). This Court has "consistently rejected the claim" that an unlawful secondary boycott "is protected activity under the First Amendment." *Int'l Longshoremen's Ass'n*, 456 U.S. at 226.

In *IBEW*, the Court confronted a union's "peaceful picketing" meant to "induce[] employees of a subcontractor on a construction project to engage in a strike in the course of their employment, where an object of such inducement was to force the general contractor to terminate its contract with another subcontractor." *IBEW*, 341 U.S. at 696. Such conduct was precisely the "substantive evil condemned by Congress." *Id.* at 705. And although "[t]he words 'induce or encourage' are broad enough to include in them every form of influence and persuasion," *id.* at 702-703, the Court held that the Act's "prohibition of inducement or encouragement of secondary pressure … carries no unconstitutional abridgment of free speech," *id.* at 705.

In *NLRB v. Retail Store Employees Union, Local 1001*, 447 U.S. 607 (1980) (*Safeco*), the Court rejected a union's First Amendment defense to charges of "picketing [that] predictably encourage[d] consumers to boycott a neutral party's business." *Id.* at 609 (plurality opinion). The four-Justice plurality noted that "[s]uch picketing spreads labor discord by coercing a neutral party to join the fray," and it "perceive[d] no reason to depart from" the "well-established understanding" that "a prohibition on 'picketing in furtherance of [such] unlawful objectives'" does "not offend the First Amendment." *Id.* at 616 (quoting *IBEW*, 341 U.S. at

705). Justice Blackmun concurred in the result on the ground that Congress had struck an acceptable "balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife." *Id.* at 617-18 (Blackmun, J., concurring). And Justice Stevens, emphasizing that "picketing is a mixture of conduct and communication," concurred in the result on the ground that § 8(b)(4)(ii)(B)'s restrictions "are sufficiently justified by the purpose to avoid embroiling neutrals in a third party's labor dispute." *Id.* at 619 (Stevens, J., concurring). "In the labor context," he explained, "it is the conduct element rather than the particular idea being expressed that often provides the most persuasive deterrent to third persons about to enter a business establishment." *Id.*

Finally, in *DeBartolo*, the Court noted "serious constitutional questions" if § 8(b)(4)(ii)(B) were interpreted to cover peaceful expressive handbilling. 485 U.S. at 588. Employing the doctrine of constitutional avoidance, the Court endorsed Justice Stevens' focus on "the conduct element" of secondary boycotts and concluded that the statute did not extend to that kind of nonpicketing activity. *Id.* at 580 (citing *Safeco*, 447 U.S. at 619). The Court thus distinguished between union efforts to intimidate a neutral third party into taking its side in a labor dispute from achieving that goal as "the result of mere persuasion." *Id.* The statute proscribed the former, but not the latter.

C. Greenmail is unlawful secondary boycotting.

Section 8(b)(4)(ii)(B) remains a vital bulwark against anticompetitive organizing tactics that inflict collateral damage far beyond the bounds of a single labor dispute. Today's "greenmail" campaigns—where unions use regulatory threats to pressure neutral employers—are simply the latest attempt to circumvent those settled boundaries.

Union "greenmail" refers to the filing or threatened filing of an environmental lawsuit against a project unless the developer caves to the union's labor demands.[4] This "playbook" is carried out in two steps: first, the unions approach developers and "'encourage' them to use union labor" by threatening litigation if they do not; second, if the threats do not work, the unions "oppose the permit applications, thereby increasing the cost of using nonunion labor and making union labor relatively more cost-effective."[5] The mere filing of such a suit effectively operates as an injunction obtained without showing any probability of success or paying a bond, "because lenders will not provide funding where there is pending litigation."[6] As a result, "the union action seems more designed to inflict costs on

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[4] *See* Robert Selna, *How a few unions are hijacking California Environmental law*, S.F. Chron., July 3, 2022, http://bit.ly/4dSL0yq; Christian Britschgi, *How California Environmental Law Makes It Easy For Labor Unions To Shake Down Developers*, Reason, Aug. 21, 2019, https://bit.ly/45iplxC; Kevin Dayton, *Laboring Under 'Greenmail'*, L.A. Business J., Jan. 16, 2011, https://bit.ly/4jLdXxv.

[5] Daralyn J. Durie & Mark A. Lemley, *The Antitrust Liability of Labor Unions for Anticompetitive Litigation*, 80 Calif. L. Rev. 757, 759 (1992).

[6] Jennifer Hernandez, *California Environmental Quality Act Lawsuits and California's Housing Crisis*, 24 Hastings Envtl. L.J. 21, 44 (2018).

the users than to protect the environment."[7] Developers quite reasonably call this tactic "environmental extortion."[8]

The union greenmail playbook leads to transparent gamesmanship that has nothing to do with environmental protection. For example, when two competitors are building nearly identical projects, the union will seek to tie an unsupportive developer up in environmental red tape while urging "regulators to approve the project as quickly as possible" for the developer who "pledged to hire labor-friendly contractors."[9] In other instances, unions have reversed course and dropped objections once an employer caved to their demands. As one official observed in response to such an about-face, "It does strain credibility when you have an organization called [California Unions for Reliable Energy] that is concerned with the desert tortoise and turns around and disappears when a project labor agreement is signed."[10] Those are precisely the kinds of threats exacted on Petitioners here: agree to card check neutrality and promise to hire only closed-shop employers or risk contrived environmental complaints. *See* Pet. 7.

Union abuse of environmental laws for economic gain imposes costs on businesses, municipalities, and the public. No project developer or investor can plan responsibly when

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[7] Herbert R. Northrup & Augustus T. White, *Construction Union Use of Environmental Regulation to Win Jobs: Cases, Impact, and Legal Challenges*, 19 Harv. J.L. & Pub. Pol'y 55, 62 (1995).

[8] E. Thayer Nelson, *Strategic Use of Environmental Laws By Labor Unions: Legitimate Labor Tactic or Environmental Extortion?*, 13 Va. Envtl. L.J. 469, 470 (1994).

[9] *See* Todd Woody, A Move to Put the Union Label on Solar Power Plants, *N.Y. Times*, June 18, 2009, https://bit.ly/3TfXEhr.

[10] Marc Lifsher, *Labor coalition's tactics on renewable energy projects are criticized*, L.A. Times, Feb. 5, 2011, https://bit.ly/4kQAWIG.

a union can delay a project indefinitely until its labor demands are met. These tactics distort the permitting process, drive up costs, and chill job creation—particularly in industries like construction, hospitality, and energy, where environmental reviews are common and capital investment is substantial. Worse yet, studies of the practice in California suggest that greenmail "is worsening California's housing crisis, increasing air pollution, increasing the global emissions of greenhouse gas that the state has vowed to reduce, and perpetuating and protecting segregation patterns by class and race."[11]

Ultimately, labor's use of greenmail to pressure employers for organizing concessions is a textbook example of a corporate campaign—a union strategy that relies on "a wide and indefinite range of legal and potentially illegal tactics … to exert pressure on an employer," including "litigation, political appeals, requests that regulatory agencies investigate and pursue employer violations of state or federal law, and negative publicity campaigns aimed at reducing the employer's goodwill with employees, investors, or the general public." *Food Lion, Inc., v. United Food & Com. Workers Int'l Union*, 103 F.3d 1007, 1014 n.9 (D.C. Cir. 1997). The result is less development, fewer jobs, and higher prices for consumers and taxpayers—all in the service of unlawful labor leverage that Congress deemed a "substantive evil." *IBEW*, 341 U.S. at 705.

D. Respondents' greenmail attacks on Petitioners were not protected by the First Amendment.

Petitioners asserted two unlawful secondary boycotts conducted by Respondents. *First*, Respondents have at-

[11] Hernandez, supra note 6, at 25.

tempted to use greenmail to coerce Petitioners into working exclusively with contractors that employ the Respondents' workers. *Second*, the Unions threatened a different neutral party—Sea World—if it moved forward with Petitioners in a joint venture. In the first circumstance, Respondents demanded that Petitioners boycott certain contractors; in the second, Respondents demanded that Sea World boycott Petitioners. Both strategies are unlawful under § 8(b)(4)(ii)(B), and neither is protected by the First Amendment.

The Ninth Circuit correctly saw the Sea World threats for what they were—unlawful secondary boycotts—but misread *DeBartolo* to create a constitutional shield for the threats made to Petitioners. That case, however, involved peaceful handbilling, not extortionate threats. 485 U.S. at 588. The Court explicitly distinguished between that kind of expressive activity and conduct that "threatens, coerces, or restrains." *Id.* at 580. In this case, the union's threats bore none of the hallmarks of protected petitioning. To the contrary, as Judge Callahan explained in dissent, Petitioners "adequately allege[d] that the Unions made the threats pursuant to a policy of starting legal proceedings without regard to the merits and for purposes of injuring others." Pet. App. 10(a) (Callahan, J., dissenting).

The lesson from Congress's decades of calibration of the NLRA is clear: When a union pressures a business to sever ties with other businesses through threats and restraint, it crosses a line federal labor law was designed to hold fast. Labor's methods of boycotting may evolve, but the principle does not. The Court should grant certiorari to vindicate that principle once again.

II. The *Noerr-Pennington* doctrine does not protect serial greenmail campaigns.

The Ninth Circuit's misguided carveout for greenmail under the First Amendment is reason enough to grant the Petition. To compound that mistake, however, the Ninth Circuit made a grievous error in its application of the *Noerr-Pennington* doctrine to Respondents' tactics.

From its inception, *Noerr-Pennington* has never been a blanket shield for illegal or anticompetitive conduct. The doctrine was crafted to protect legitimate efforts to persuade the government, not to immunize abuses of legal or regulatory processes used as economic weapons against private parties. Thus, petitioning loses its constitutional protection when it is merely a "sham"—that is, the challenged activity is "objectively baseless" and deployed to conceal an improper subjective motive. *Pro. Real Est. Invs. v. Columbia Pictures*, 508 U.S. 49, 60-61 (1993) (*PREI*); *see Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 511 (1972) (observing that "there may be instances where the alleged conspiracy is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor").

Greenmail tactics easily satisfy that test. The environmental objections raised by unions are not made to advance any genuine environmental interest, nor to redress an environmental harm. Instead, they are used to threaten delay and regulatory costs unless third-party employers agree to blacklist nonunion actors or stay out of the union's way. Here, Petitioners' allegations made that point plain: the greenmail threats would disappear if they capitulated to labor demands. Pet. 8-10. That is not protected advocacy; it is extortion dressed up as process.

The Ninth Circuit's decision ignored this well-established framework by incorrectly limiting the "sham" exception to cases filed against Petitioners that denied it court access. *See* Pet. App. 4a. That conclusion reflects at least two errors of application.

First, there is no "access barring" requirement to allege "sham" petitioning. Both *PREI* and *California Motor Transport* make clear that bad-faith use of legal process—including mere *threats* of process—can constitute the kinds of shams that forfeit immunity. The Ninth Circuit's cramped, contrary view creates a dangerous safe harbor for coercive behavior. Indeed, the allegations raised by Petitioners of the greenmail "playbook" showed precisely the kind of serial sham petitioning that falls outside the protection of *Noerr-Pennington*. Yet under the Ninth Circuit's approach, any group with a grievance could use the threat of environmental complaints not to address an actual harm, but to extract business concessions under the guise of petitioning.

Second, this Court "has never required that a 'pattern' of baseless suits all be directed at the same party."[12] And for good reason. "One claim, which a court or agency may think baseless, may go unnoticed; but a pattern of baseless, repetitive claims may emerge which leads the factfinder to conclude that the administrative and judicial processes have been abused." *Cal. Motor Transp.*, 404 U.S. at 513. When that distinction is drawn, "the case is established that abuse of those *processes*"—plural—"produced an illegal result." *Id.* (emphasis added). So "the focus is not on any single case," but instead on "a holistic evaluation of whether 'the administrative and judicial processes have

[12] Durie & Lemley, supra note 5, at 799 n.244.

been abused.'" *Waugh Chapel S., LLC v. United Food & Com. Workers Union Loc. 27*, 728 F.3d 354, 364 (4th Cir. 2013) (quoting *Cal. Motor Transp.*, 404 U.S. at 513).

If anything, allegations of greenmail tactics deployed against a variety of developers over many years bolsters the case for sham petitioning. Under the Ninth Circuit's conception, however, every union gets one free pass to extort each employer without fear that the history will catch up with them. The serial-sham exception will then depend on the existence of a serial victim, not a serial offender.

The sham exception is essential to preserving the integrity of labor and environmental law. Regulatory requirements offer procedural hooks—scoping comments, review delays, litigation timelines—that can be exploited with minimal showing. That low threshold makes them especially vulnerable to strategic misuse. Campaigns to exploit those thresholds deserve no constitutional immunity.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

KEVIN S. ELLIKER
Counsel of Record
ELBERT LIN
KURT G. LARKIN
HUNTON ANDREWS KURTH LLP
951 East Byrd Street,
East Tower
Richmond, Virginia 23219

June 16, 2025

Counsel for Amici Curiae