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IN THE

Supreme Court of the United States

PATRICK WAYNE MCHENRY,

Applicant,

v.

UNITED STATES OF AMERICA,

Respondent.

Application for Extension of Time Within Which to File a Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

APPLICATION TO THE HONORABLE JUSTICE NEIL M. GORSUCH, AS CIRCUIT JUSTICE

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May 26, 2026

APPLICATION FOR EXTENSION OF TIME

Under this Court's Rule 13.5, Applicant Patrick Wayne McHenry respectfully requests a 30-day extension of time within which to file a petition for a writ of certiorari, to and including July 31, 2026.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

The judgment for which review is sought is *United States* v. *McHenry*, 161 F.4th 1194 (10th Cir. 2025) (attached as Exhibit 1).

JURISDICTION

This Court will have jurisdiction over any timely petition under 28 U.S.C. § 1254(1). The Tenth Circuit entered judgment on December 12, 2025 and denied a timely petition for rehearing on April 2, 2026 (Exhibit 2). In accordance with Rule 13.5, this application is being filed more than 10 days before the current due date of July 1, 2026.

REASONS JUSTIFYING AN EXTENSION OF TIME

1. Patrick McHenry was charged with carrying a firearm during crimes of violence, namely a federal carjacking and a federal enclave robbery in Indian country, in violation of 18 U.S.C. § 924(c). Ex. 1 at 4. Mr. McHenry robbed and carjacked Charles Jarman at a Motel 6 while Mr. McHenry's shotgun remained inside a parked Honda some distance away. After the taking, Mr. McHenry left the scene in Jarman's Subaru; his girlfriend and co-defendant, Ashton Clark, followed behind in the Honda, which still held the shotgun. *Id.* Mr. McHenry was convicted at trial.

On appeal, Mr. McHenry argued that the § 924(c) conviction was invalid because the evidence did not show that he used or carried the shotgun "*during* and in relation to" the robbery, as required by § 924(c). *Id.* at 6 (emphasis added). The Tenth Circuit nonetheless affirmed on the theory that Mr. McHenry "carr[ied]" the gun indirectly by ordering his codefendant to drive the car "during" their flight from the Motel 6—after the taking (and thus the predicate offense) was complete. *Id.* at 10, 16.

The Tenth Circuit's theory conflicts with other circuits' precedent. For example, in *United States* v. *Long Pumpkin*, the Eighth Circuit held that a federal carjacking offense "necessarily end[s]" when the taking is complete. 56 F.4th 604, 613–14 (8th Cir. 2022). The court reversed the defendant's § 924(c)(1) conviction for discharging a firearm "during and in relation to" the carjacking because the discharge occurred *after* the defendant "secured initial control" over the vehicle in question. *Id.* at 614 (quoting *United States* v. *Petruk*, 781 F.3d 438, 443 (8th Cir. 2015)).

The Tenth Circuit's decision also rests on a separate error: The government did not assert, and the jury was never instructed on, the theory on which the appellate court affirmed the § 924(c) conviction. At trial, the government did not argue that Mr. McHenry carried the shotgun during his immediate flight from the scene. Ex. 1 at 5 (Frederico, J., concurring). Nor was the jury instructed on post-taking carriage. The Tenth Circuit nonetheless affirmed. The majority opinion justified its holding by pointing to examples where the government argued post-taking carriage based on conduct *after* the immediate flight. *Id.* at 20. Judge Frederico's concur-

rence, joined by Judge McHugh, attempted to clarify the majority's holding by explaining that, even absent an express argument or jury instructions, the court's general "instruct[ion] … on constructive possession," "[c]ombined with the testimony from Mr. McHenry's girlfriend that Mr. McHenry did in fact direct her to follow in a separate vehicle with the shotgun," gave "the jury … the puzzle pieces needed to convict on the theory" adopted by the majority. *Id.* at 5.

The majority and two-judge concurrence's holding and reasoning directly contravene Supreme Court precedent prohibiting "affirm[ing] a criminal conviction on the basis of a theory not presented to the jury." *Chiarella* v. *United States*, 445 U.S. 222, 236 (1980); *accord Ciminelli* v. *United States*, 598 U.S. 306, 317 (2023) (appellate court may not "cherry-pick facts" and apply them to a new theory). The court's decision also diverges from other circuits, which require that a theory be presented to the jury. *E.g.*, *United States* v. *Johnson*, 19 F.4th 248, 260 (3d Cir. 2021) (appellate court will not consider theory "never heard" by jury); *United States* v. *Duroseau*, 26 F.4th 674, 682 (4th Cir. 2022) (government cannot rely on "theory that was never presented to the jury").

2. An extension of 30 days, to and including July 31, 2026, is warranted to allow counsel time to coordinate and prepare a petition that will aid the Court's review of these issues. Applicant has asked the Carter G. Phillips/Sidley Austin LLP Supreme Court Clinic at Northwestern Pritzker School of Law to help prepare the petition. Because the academic year has ended, the Clinic has no enrolled students. Summer associates at Sidley Austin LLP will assist the Clinic, and an ex-

tension will help ensure that the summer associates have time to be onboarded and integrated into this matter.

An extension is also warranted because of the press of counsel's other client business. The Clinic is also responsible for a forthcoming cert-stage reply brief in *Pheasant* v. *United States*, No. 25-6911, and forthcoming petitions for writs of certiorari in *Watkins* v. *United States*, No. 23-6210 (10th Cir.), and *Singh* v. *Second Judicial District Court of the State of Nevada*, No. 90620 (Nev.). In addition, undersigned counsel is presenting oral argument on June 9 in *Union Pacific Railroad* v. *Surface Transportation Board*, No. 25-2919 (8th Cir.), and is responsible for opening appellate briefs in *Commuter Rail Division of the Regional Transportation Authority* v. *Union Pacific Railroad*, No. 1-26-0612 (Ill. App.), and *Brightline Trains Florida LLC* v. *National Mediation Board*, No. 26-11487 (11th Cir.), both currently due in early July.

CONCLUSION

For these reasons, Applicant respectfully requests a 30-day extension of time within which to file a petition for a writ of certiorari, to and including July 31, 2026.

Respectfully submitted,

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