No. 19-7794

IN THE

Supreme Court of the United States

JEREMY SHANE FOGLEMAN,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

On Petition for a Writ of Certiorari to the Mississippi Supreme Court

BRIEF OF THE DUE PROCESS INSTITUTE AND THE NATIONAL ASSOCIATION FOR PUBLIC DEFENSE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Shana-Tara O'Toole
DUE PROCESS INSTITUTE
700 Pennsylvania Avenue SE, Suite 560
Washington, DC 20003

Emily Hughes
NATIONAL ASSOCIATION FOR PUBLIC DEFENSE
130 Byington Rd.
Iowa City, IA 52242

Jonathan D. Hacker
Kendall Turner
Counsel of Record
O'MELVENY & MYERS LLP
1625 Eye Street NW
Washington, DC 20006
(202) 383-5204
kendallturner@omm.com

Jeffrey L. Fisher
O'MELVENY & MYERS LLP
2765 Sand Hill Road
Menlo Park, CA 94025

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Danielle Kaeble, U.S. Dep't of Justice, Bureau of Justice Statistics, *Probation and Parole in the United States, 2016* (Apr. 2018) 11

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INTERESTS OF *AMICI CURIAE*[1]

The Due Process Institute is a bipartisan, nonprofit, public-interest organization that works to honor, preserve, and restore principles of fairness in the criminal justice system. Formed in 2018, the Institute has already participated as an *amicus curiae* before this Court in cases presenting important criminal justice issues, including *Timbs v. Indiana*, 139 S. Ct. 682 (2019); *Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019); and another case concerning the Sixth Amendment right to a jury trial, *United States v. Haymond*, 139 S. Ct. 2369 (2019).

The National Association for Public Defense ("NAPD") is an association of more than 14,000 attorneys, investigators, social workers, administrators, and other professionals who fulfill constitutional mandates to deliver public defense representation throughout all U.S. states and territories. NAPD plays an important role in advocating for defense counsel and the clients they serve, and it is uniquely situated to speak to issues of fairness and justice in criminal legal systems. NAPD has filed numerous *amicus* briefs with this Court, including in *Byrd v. United States*, 138 S. Ct. 1518 (2018); and *United States v. Bryant*, 136 S. Ct. 1954 (2016).

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[1] Pursuant to Rule 37.2(a), counsel for *amici curiae* provided notice of *amici*'s intention to file this brief to counsel of record for all parties. Counsel of record for Petitioner and Respondent have both consented to the filing of this brief. Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution to this brief's preparation or submission.

This case presents an important, recurring criminal law issue on which the courts are divided: whether the Sixth Amendment requires a jury (rather than a judge) to make any factual finding that automatically postpones or eliminates a criminal defendant's eligibility for parole. Resolving this issue is essential to ensuring that courts do not dilute defendants' critically important, constitutional right to have a jury find all facts that increase their sentences beyond a reasonable doubt.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Sixth Amendment guarantees the right to a trial by jury in all serious criminal cases. *See, e.g.*, *Duncan v. Louisiana*, 391 U.S. 145 (1968). And the Due Process Clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970).

Applying these two constitutional guarantees together, this Court has held that "any 'facts that increase the prescribed range of penalties to which a criminal defendant is exposed' are elements of the crime" that must be found by a jury beyond a reasonable doubt. *Alleyne v. United States*, 570 U.S. 99, 111 (2013) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)). Specifically, in *Apprendi*, this Court held that facts that may increase the statutory *maximum* for a crime are elements that must be submitted to a jury and found beyond a reasonable doubt. 530 U.S. at 482–83. And in *Alleyne*, this Court held that a fact that mandates a higher *minimum* sentence also

"forms an essential ingredient of the offense" and accordingly must be submitted to a jury and found beyond a reasonable doubt. *Alleyne*, 570 U.S. at 112–13.

This brief does not reiterate petitioner's arguments why *Alleyne* applies to judicial fact-finding that increases the amount of time a defendant must serve before he is eligible for parole. Rather, it focuses on two reasons why certiorari should be granted, apart from the need to correct the errors of the decision below: *First*, the issue presented has national importance. At least fifteen states have laws that—like the Mississippi law at issue here—allow judicial fact-finding to raise the minimum amount of time a defendant must serve in prison before he is eligible for parole, or render him wholly ineligible for any form of early release. These state laws function just like the statute in *Alleyne*: They increase the minimum sentence a prisoner must serve. For example, where (as here) a state law bars release until the offender has served half of his sentence, *see* Miss. Code Ann. § 97-3-2(2); Pet. App. 2–3, half of the sentence is the minimum sentence. In other words, these parole-eligibility dates—like the seven-year term at issue in *Alleyne*—effectively establish sentencing floors in state indeterminate sentencing schemes. State laws that allow judicial fact-finding to elevate these floors are accordingly unconstitutional just like the federal law in *Alleyne*.

Second, judicial fact-finding that raises the minimum length of a defendant's sentence before parole eligibility also has sweeping practical consequences beyond the already significant (and unconstitutional)

consequence of extending the length of the defendant's sentence: In many states, the same judicial determination that renders a defendant ineligible for parole, or that delays a defendant's eligibility for parole, also renders the defendant ineligible for a host of state resources designed to help him rehabilitate and reenter society. For example, judicial fact-finding can render the crime ineligible for expungement. It can also preclude the offender from work-release, other alternative sentencing programs, and drug treatment programs. And it can lead to harsher sentences if the defendant reoffends.

A criminal defendant's rights under the Sixth and Fourteenth Amendments should not vary based on the happenstance of geography. This Court should guarantee that the sweeping consequences of requiring a defendant to serve more time before he is eligible for parole flow only from a jury determination, not from judge-found facts.

ARGUMENT

The requirement that a jury find "every fact necessary to constitute a crime" "beyond a reasonable doubt," *In re Winship*, 397 U.S. 358, 364 (1970), is an essential protection against "an erroneous judgment" and a recognition of the "magnitude" of "the interests of the defendant," *Addington v. Texas*, 441 U.S. 418, 423 (1979). The "right was designed to guard against a spirit of oppression and tyranny on the part of rulers, and was from very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and political liberties." *United States v. Gaudin*, 515 U.S. 506, 510–11 (1995) (internal quotation marks and citation omitted).

Citing this history, Justice Thomas's majority opinion in *Alleyne* explained that common law had long required juries to find "every fact that was a basis for imposing or increasing punishment." 570 U.S. at 109–10. That includes "[e]levating the low-end of a sentencing range," which "heightens the loss of liberty associated with the crime: the defendant's 'expected punishment has increased as a result of the narrowed range' and 'the prosecution is empowered, by invoking the mandatory minimum, to require the judge to impose a higher punishment than he might wish.'" *Id.* at 113 (quoting *Apprendi*, 530 U.S. at 552). In these circumstances, the Sixth Amendment requires a jury to find all the facts that "alter[] the legally prescribed punishment so as to aggravate it." *Id.* at 114–15.[2]

A restriction on a defendant's eligibility for parole does exactly that. First, it alters the minimum prison term a defendant must serve before being eligible for release. Indeed, many states link eligibility dates with minimum sentences. *See, e.g.*, Neb. Rev. Stat. § 83-1,110; N.C. Gen. Stat. § 15A-1371; *see also, e.g.*, *Commonwealth v. Brown*, 730 N.E.2d 297, 300 (Mass. 2000) ("The minimum sentence serves as a base for determining [the defendant's] parole eligibility . . . the

[2] Justice Breyer, providing the fifth vote in *Alleyne* in a separate concurrence, agreed that it would be "highly anomalous to read *Apprendi* as insisting that juries find sentencing facts that *permit* a judge to impose a higher sentence while not insisting that juries find sentencing facts that *require* a judge to impose a higher sentence." *Alleyne*, 570 U.S. at 123 (Breyer, J., concurring in part and concurring in the judgment). He wrote separately only to reiterate his view that *Apprendi* was wrongly decided. *See id.* at 122–23.

judge establishes both the maximum sentence the defendant will serve if he is never paroled and the minimum sentence the defendant will serve, after which the prisoner becomes eligible for parole." (internal quotation marks, citations, and footnote omitted)). And second, a judge's factual finding that delays the date of a defendant's eligibility for parole necessarily aggravates the penalty. *See Alleyne*, 570 U.S. at 113 ("[I]t is impossible to dispute that facts increasing the legally prescribed floor *aggravate* the punishment.").

Nevertheless, many state sentencing schemes allow more severe minimum sentences in the form of delayed or ineligibility for parole, based solely on the judge's factual findings at sentencing. All of those state laws are—as petitioner argues as to the Mississippi law applied in his case—unconstitutional under a proper understanding of *Alleyne*. Yet at present, all these laws are enforced every day not only to preclude criminal defendants from securing release earlier, but also to deprive them of a variety of other benefits, including access to alternative-sentencing programs and drug rehabilitation programs. This Court should grant *certiorari* to eliminate the unconstitutional practice of allowing judicial fact-finding to delay or eliminate defendants' eligibility for parole.

I. Numerous States Have Sentencing Schemes That, Like Mississippi's, Allow Judicial Fact-Finding To Delay Or Eliminate Defendants' Eligibility For Parole.

In *Alleyne*, the federal statute at issue prescribed a prison sentence of "not less than 5 years," or—if the judge found that the defendant brandished a weapon—"not less than 7 years." 570 U.S. at 103–04.

After the jury was discharged in Alleyne's case, the judge found that Alleyne had brandished a weapon. *Id.* at 104. The judge accordingly sentenced Alleyne to the mandatory minimum available under the law: 7 years in prison. *Id.* That sentence was fixed and not subject to subsequent reduction by paroling authorities.

Many states, however, impose sentences that allow a possibility of the defendant's release on parole before the maximum sentence imposed has been served. In these states, the period of the sentence that must be served before the defendant is eligible for parole is effectively the minimum sentence. *See, e.g.*, *State v. Iowa Dist. Ct. for Black Hawk Cty.*, 616 N.W.2d 575, 579 (Iowa 2000) (noting that "practical effect" of state laws requiring defendant to serve certain percentage of sentence before parole eligibility is to establish "a minimum sentence"). That is because the parole-eligibility date is like the minimum seven-year term in the determinate sentencing scheme in *Alleyne*: It is a floor of time that *must* be served. Accordingly, all state indeterminate sentencing schemes that allow a judicial fact-finding to impose a parole eligibility date later than the date that would apply in the absence of that finding are vulnerable to an *Alleyne* challenge.

1. Indeed, several states have already recognized the constitutional infirmity of their sentencing schemes following *Alleyne* and have amended them to address that problem. As the Mississippi Supreme Court acknowledged in this case, the New Jersey Supreme Court has "held that [New Jersey's sentencing] statute was unconstitutional under *Alleyne* because it

required the court to impose a period of parole ineligibility if the judge found that the defendant was involved in organized crime." Pet. App. 9 (citing *State v. Grate*, 106 A.3d 466, 475–76 (N.J. 2015) (alteration in original)). The Michigan Supreme Court has also held Michigan's sentencing guidelines "unconstitutional under *Alleyne* to the extent that they required the court to extend a defendant's parole eligibility date based on facts found by the judge but not the jury." *Id.* (citing *People v. Lockridge*, 870 N.W.2d 502, 516–17 (Mich. 2015)).

Similarly, prior Kansas law allowed a judge to deny parole eligibility to a defendant convicted of first-degree murder if the judge found certain aggravating factors. *See State v. Soto*, 322 P.3d 334, 347–48 (Kan. 2014). But following *Alleyne*, the Supreme Court of Kansas held that this sentencing procedure "violate[d] the Sixth Amendment . . . because it permits a judge to find by a preponderance of the evidence the existence of one or more aggravating circumstances necessary to impose an increased mandatory minimum sentence" without eligibility for parole, "rather than requiring a jury to find the existence of the aggravating circumstances beyond a reasonable doubt." *Id.* at 338.

2. At least fifteen states, however, have retained sentencing laws that should be invalidated under *Alleyne* because they allow judicial fact-finding to determine the floor for parole eligibility: Alaska, Arizona, Florida, Kentucky, Louisiana, Massachusetts, Minnesota, Mississippi, Montana, Nebraska, Nevada, Oklahoma, Pennsylvania, Rhode Island, and Virginia. *See, e.g.*, Alaska Stat. § 12.55.125(a); Ariz. Rev. Stat.

Ann. § 13-708; Fla. Stat. § 775.082(9);[3] Ky. Rev. Stat. Ann. § 439.3401; La. Stat. Ann. §§ 14:27(D)(1)(b), 14:34.2(3); Mass. Gen. Laws ch. 94C § 32(c); Minn. Stat. Ann. § 609.229; Miss. Code Ann. § 97-3-2(2); Nev. Stat. §§ 193.161, 200.750; Okla. Stat. tit. 21, § 13.1; 18 Pa. Cons. Stat. § 6121; 42 Pa. Stat. and Cons. Stat. Ann. § 9717;[4] R.I. Gen. Laws § 11-9-5.3(f); Va. Stat. § 53.1-151(C); *see State v. Rosling*, 180 P.3d 1102, 1116 (Mont. 2008) (rejecting *Apprendi* challenge to law allowing sentencing judge to deem defendant ineligible for parole upon finding "that the restriction is necessary for the protection of society").

These state schemes allow enhanced penalties based on a variety of judicial fact-finding. For example, some deny parole for those who have used firearms during the commission of their crimes, Ky. Rev. Stat. Ann. § 533.060; for those who have committed their offenses while on release from or awaiting trial for another crime, *see, e.g.*, Ariz. Rev. Stat. § 13-708;

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[3] An *Alleyne*-style challenge to this subsection is currently on appeal to the Eleventh Circuit. *See Cato v. Sec'y, Fla. Dep't of Corrs.*, 2019 WL 6877172 (M.D. Fla. Dec. 17, 2019), *appeal filed sub nom. Cato v. Florida*, No. 20-10059 (11th Cir.). Florida's Supreme Court recently invalidated a different subsection of this statute, Fla. Stat. § 775.082(10), as inconsistent with the Sixth Amendment because it required the court, not the jury, to find the fact of dangerousness to the public, and that finding increased the defendant's maximum sentence. *See Brown v. State*, 260 So. 3d 147, 150–51 (Fla. 2018).

[4] The Supreme Court of Pennsylvania relied on *Alleyne* to invalidate similar statutes that allow imposition of mandatory minimums based on judicial findings. *See, e.g.*, *Commonwealth v. Wolfe*, 140 A.3d 651, 660–63 (Pa. 2016). But the Pennsylvania statute cited above appears to remain in force.

Nev. Stat. § 176A.100(b)(1); or for those who have failed to complete an assigned program of treatment and rehabilitation, *see* Nev. Stat. § 176.100(b)(3). Other laws deny parole eligibility based on a judicial finding of a particular relationship between the victim and the defendant, *see, e.g.*, Fla. Stat. § 948.013, or of the age of the victim, *see, e.g.*, Minn. Stat. Ann. § 609.229(3)(a); Va. Stat. § 53.1-151(C).

State laws that require a minimum sentence without eligibility for parole based on judicial findings are vulnerable to an *Alleyne*-style challenge even if the judge has the *option* to impose that sentence without that fact-finding. *See, e.g.*, Alaska Stat. § 12.55.125(a). The mandatory nature of the ineligibility for parole when the judge makes such a finding is what renders it problematic under *Alleyne*. Indeed, in *Alleyne* itself, the judge had the discretion to impose seven years without finding the defendant brandished a gun; the seven-year sentence became mandatory only upon that finding. 570 U.S. at 103–04. This Court nevertheless invalidated that statute because it allowed judicial fact-finding to increase the *mandatory* minimum sentence for the crime. *Id.* at 103. The same result obtains when a state allows judicial fact-finding to increase the amount of time a defendant *must* serve before being eligible for parole.

In short, many states—not just Mississippi—have sentencing schemes that are vulnerable to the *Alleyne* challenge petitioner advances here.

3. Nor is the question presented by the petition of mere theoretical importance in those states. Parole is the "standard mode of release from prison." Joan Petersilia, When Prisoners Come Home: Parole and

Prisoner Reentry 62 (2009). In the 1970s, more than 70% of inmates who obtained release did so through parole. *Id.* More recently, the U.S. Department of Justice reported that nearly 80% of state prisoners are released to parole supervision.[5] At the end of 2016, 760,392 state prisoners were on parole.[6]

That so many prisoners are released on parole confirms that parole-eligibility dates operate as minimum sentences in most states where they are imposed. For all these prisoners, state laws that allow judicial fact-finding to determine parole eligibility are problematic in the same way that the federal statute at issue in *Alleyne* was problematic: Both allow judges to determine facts that increase the minimum amount of time defendants must serve.

4. Nor should the importance of a prisoner's parole eligibility date be minimized on the view that parole is merely a different way of serving a sentence. Parole is a *shorter* sentence. Indeed, the U.S. Department of Justice itself describes parole as "*release* in the community *following* a term in state or federal prison."[7] And for good reason: A parolee is free in the world,

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[5] U.S. Dep't of Justice, Bureau of Justice Statistics, *Reentry Trends in the U.S.* (last visited Apr. 14, 2020), https://www.bjs.gov/content/reentry/releases.cfm.

[6] Danielle Kaeble, U.S. Dep't of Justice, Bureau of Justice Statistics, *Probation and Parole in the United States, 2016*, Table 5 (Apr. 2018), https://www.bjs.gov/content/pub/pdf/ppus16.pdf.

[7] Danielle Kaeble, U.S. Dep't of Justice, Bureau of Justice Statistics, *Probation and Parole in the United States, 2016*, at 2 (Apr. 2018), https://www.bjs.gov/content/pub/pdf/ppus16.pdf (emphasis added).

merely subject to certain restrictions designed to guard against future misconduct. *See Morrissey v. Brewer*, 408 U.S. 471, 482 (1972) ("Though the State properly subjects [a parolee] to many restrictions not applicable to other citizens, his condition is very different from that of confinement in prison." (footnote omitted)). A parolee "can be gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life." *Id.* And as this Court has specifically observed, "the liberty of a parolee . . . includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee and often on others." *Id.*; *see also id.* (describing the "liberty" of a parolee as "valuable"); *Wolff v. McDonnell*, 418 U.S. 539, 560–61 (1974) (describing the parolee as "free" and revocation of parole as an "immediate disaster . . . for the parolee").

In short, the question presented has sweeping consequences for criminal defendants across the nation. This Court should grant review to ensure uniform application of *Alleyne*'s rule, rather than leaving criminal defendants vulnerable to infringement of their Sixth and Fourteenth Amendment rights based purely on where they happen to be prosecuted.

II. The Question Presented Has Adverse Consequences For Defendants Even Beyond Unconstitutional Criminal Sentences.

As explained above, state laws that allow judicial fact-finding to determine a defendant's eligibility for parole trigger the rule in *Alleyne* because they raise the penalty floor. Such judicial findings can—in addition to rendering the defendant ineligible for parole

or delaying his eligibility for that outcome—result in a number of negative collateral consequences, including ineligibility for a host of government resources designed to assist with his reentry into society and higher penalties if he reoffends.

1. As to the resources for which such judicial fact-finding can render a defendant ineligible, Mississippi itself is a good example. In petitioner's case, the jury convicted him of failing to stop a motor vehicle pursuant to the signal of a law enforcement officer while operating the vehicle in reckless disregard of the safety of persons or property. *See* Pet. App. 4; Miss. Code Ann. § 97-9-72(2) (2014). The judge then found that petitioner "used physical force, or made a credible attempt or threat of physical force against another person as part of a criminal act." Miss. Code Ann. § 97-3-2(2) (2014); *see* Pet. App. 4. Based on that finding, the judge classified his offense as a "crime of violence," which rendered petitioner ineligible for parole or any other type of early release until he served at least 50% of his sentence. Pet. App. 4–5; Miss. Code Ann. § 43-7-3(1)(g)(i) (2014).

The judge's "crime of violence" classification rendered petitioner ineligible for a variety of resources that could have otherwise eased his rehabilitation and reentry into society following his prison term. These include programs allowing intensive supervision as an alternative to incarceration, Miss. Code Ann. § 47-5-1003, pretrial intervention programs that, upon successful completion, allow dismissal of the charges and avoidance of prison time, *id.* § 99-15-107, and the possibility of expungement, *id.* § 99-19-71. Individuals found to have committed a "crime of

violence" are also ineligible for alcohol and drug intervention programs, *id.* § 9-23-15, mental health treatment, *id.* § 9-27-11, and state-county work programs, *id.* § 47-5-471.

Nor is Mississippi an outlier. Many other states allow the judicial fact-finding that governs parole eligibility to determine defendants' eligibility for a variety of state resources. For example, Massachusetts precludes defendants found to be ineligible for parole based on certain judicial fact-finding from participating in work-release programs. *See* Mass. Gen. Laws ch. 94C §§ 32(c), 32H 1/2. In Montana, judicial fact-finding rendering a defendant ineligible for parole also renders him ineligible for supervised-release programs, Mont. Code Ann. § 46-18-202, and some sexual offender treatment programs, *id.* § 46-18-207(6). Similarly, in Oklahoma—as in Mississippi—a defendants may be prohibited from ever expunging his record if a judge makes certain factual findings at the time of sentencing. *See* Okla. Stat. tit. 22, § 18(A)(13).

Many of the benefits from which defendants are excluded have lasting financial consequences. For example, in Virginia, being "sentenced to a term that makes [the prisoner] ineligible for release"—which can be done through judicial fact-finding alone—means a defendant is ineligible for the "personal trust account" that the state is otherwise required to establish in his name. Va. Stat. § 53.1-43.1. In Florida, judicial fact-finding that determines whether a conviction is a "violent felony" conviction can render a defendant ineligible for any compensation for wrongful incarceration. *See* Fla. Stat. §§ 775.084, 961.04. And in Oklahoma, a defendant is barred from obtaining a

real estate license for twenty years if the judge made certain factual findings during the sentencing hearing. *See* Okla. Stat. tit. 59, § 858-301.1.

2. Many states also impose stiffer penalties on individuals previously determined, based on facts found by the judge at sentencing, to be ineligible for parole. Again, Mississippi provides a good example: Where a judge determines—even if that determination stems from facts that he, rather than the jury, has found—that a defendant's crime is a "crime of violence," the defendant is subject to stiffer penalties if he reoffends. *See* Miss. Code Ann. § 99-19-83.

Other states similarly impose harsher penalties on defendants who reoffend if, in a prior proceeding, a judge made certain factual findings. For example, in Alaska, someone who has a prior conviction "of two or more serious felonies"—which prior offenses may be "serious felonies" only by virtue of judicial fact-finding—must be "sentenced to a definite term of imprisonment of 99 years." Alaska Stat. § 12.55.125(a), (*l*)And Kentucky law mandates that sentences be served consecutively rather than concurrently if a judge determines that a new felony was committed while the defendant was on parole following a felony conviction. *See* Ky. Rev. Stat. Ann. § 533.060(2).

3. These lists are illustrative, not exhaustive. But they show the serious collateral consequences of a judge's factual findings that govern a defendant's eligibility for parole. And these consequences confirm the practical importance of a jury's participation in the decision whether to enhance a defendant's sentence.

CONCLUSION

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

Respectfully submitted,

Shana-Tara O'Toole
DUE PROCESS INSTITUTE
700 Pennsylvania Avenue SE, Suite 560
Washington, DC 20003

Emily Hughes
NATIONAL ASSOCIATION FOR PUBLIC DEFENSE
130 Byington Rd.
Iowa City, IA 52242

Jonathan D. Hacker
Kendall Turner
Counsel of Record
O'MELVENY & MYERS LLP
1625 Eye Street NW
Washington, DC 20006
(202) 383-5204
kendallturner@omm.com

Jeffrey L. Fisher
O'MELVENY & MYERS LLP
2765 Sand Hill Road
Menlo Park, CA 94025

April 15, 2020