No. 08-77

In the Supreme Court of the United States

KEITH BYRON BARANSKI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in affirming the denial of petitioner's motion under 28 U.S.C. 2255 raising the claim that a search of his warehouse violated the Fourth Amendment because the warrant did not itself contain a description of the items to be seized but instead incorporated by reference an affidavit containing such a description, an affidavit that did not accompany the warrant at the time of the search.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 4a-11a) is reported at 515 F.3d 857.

JURISDICTION

The judgment of the court of appeals (Pet. App. 2a-3a) was entered on January 16, 2008. A petition for rehearing was denied on April 10, 2008 (Pet. App. 1a). The petition for a writ of certiorari was filed on July 9, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted of conspiring to import machine guns by submitting false entries on forms for the Bureau of Alco-

hol, Tobacco, and Firearms (ATF), in violation of 18 U.S.C. 371 and 26 U.S.C. 5861(*l*). He was sentenced to 60 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed, and this Court denied certiorari. *United States* v. *Baranski*, 75 Fed. Appx. 566 (8th Cir. 2003), cert. denied, 541 U.S. 1011 (2004) (*Baranski I*). Petitioner then filed a motion for collateral relief under 28 U.S.C. 2255. The district court denied the motion but granted a certificate of appealability. The court of appeals affirmed. Pet. App. 4a-11a.

1. Petitioner was a licensed firearms dealer who imported guns from Eastern European countries and stored them in a customs warehouse in Louisville, Kentucky, until he could sell them to eligible law-enforcement agencies. ATF agents discovered that petitioner was using forged letters from a law-enforcement official in order to sell the guns to other parties. After a six-month investigation, the ATF applied to a magistrate judge for a warrant to search petitioner's warehouse. In the location on the warrant form for describing the items to be seized, the warrant stated, "See Attached Affidavit." An attached affidavit listed the items to be seized: "about 425" guns owned by petitioner and stored at the warehouse. The magistrate judge issued the warrant, signing both the draft warrant and the affidavit, but ordered the affidavit to be sealed in order to protect ATF's confidential sources. Pet. App. 5a-6a; *Baranski* v. *Fifteen Unknown Agents of the Bureau of Alcohol, Tobacco & Firearms*, 452 F.3d 433, 436 (6th Cir. 2006) (en banc), cert. denied, 127 S. Ct. 1908 (2007) (*Baranski II*).

The next day, ATF agents executed the warrant. The warehouse's manager asked to see the warrant and

then asked to see the affidavit. The agents produced the warrant, informed the manager that the affidavit was under seal, and explained that they were looking for guns owned by petitioner and stored at the warehouse. The manager insisted that the warrant was defective because it did not describe the items to be seized, but he permitted the agents into the warehouse and directed them to the area in which petitioner's guns were stored. The agents seized 372 machine guns and 12 crates containing gun accessories. Upon leaving the warehouse, the agents gave the manager a copy of the search warrant and an inventory of the seized items. Pet. App. 6a n.16; *Baranski II*, 452 F.3d at 436-437.

Petitioner brought a civil action against the ATF agents in the Western District of Kentucky under *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). He alleged that the agents had violated his Fourth Amendment rights because the affidavit listing the items to be seized did not accompany the warrant at the time of the search. *Baranski II*, 452 F.3d at 437. The district court denied petitioner's motion to unseal the affidavit and stayed the action pending the completion of criminal proceedings against petitioner. *Ibid.*

2. A grand jury in the Eastern District of Missouri indicted petitioner on a charge of conspiracy to import machine guns illegally by making false entries on forms submitted to the ATF, in violation of 18 U.S.C. 371 and 26 U.S.C. 5861(*l*). After a jury trial, petitioner was convicted and sentenced to 60 months of imprisonment, to be followed by three years of supervised release. The Eighth Circuit affirmed. The court held that "[t]he warrant should not have been suppressed for lack of particularity" because "the warrant referred to a sealed affida-

vit that described the weapons." *Baranski I*, 75 Fed. Appx. at 568. The court further held that, in any event, any error in admitting the weapons at trial "was harmless in view of the other evidence admitted against [petitioner]." *Baranski II*, 452 F.3d at 437.

Petitioner filed a petition for a writ of certiorari, arguing that Eighth Circuit's decision conflicted with this Court's decision in *Groh* v. *Ramirez*, 540 U.S. 551 (2004), which was issued two months after the affirmance of his conviction on appeal. This Court denied the petition. 541 U.S. 1011 (2004).

3. After petitioner was convicted, the district court in the Western District of Kentucky unsealed the warrant affidavit and lifted the stay of his *Bivens* action. The defendants then moved to dismiss petitioner's Fourth Amendment claim on the basis of qualified immunity. The district court granted the motion to dismiss. A panel of the Sixth Circuit court of appeals reversed in relevant part, *Baranski* v. *Fifteen Unknown Agents of the Bureau of Alcohol, Tobacco & Firearms*, 401 F.3d 419 (2005), but, after granting rehearing en banc, the en banc court of appeals affirmed, *Baranski II*, 452 F.3d 433 (2006).

The en banc court held that the search of petitioner's warehouse did not violate the Fourth Amendment. The court reasoned that the warrant was valid, despite the fact that the warrant itself did not describe with particularity the things to be seized, because it expressly incorporated an affidavit that did describe them. *Baranski II*, 452 F.3d at 439-440. Petitioner relied on *Groh*, in which this Court held that a search of a home violated the Fourth Amendment because the warrant "failed altogether" to specify the evidence sought. 540 U.S. at 557. The Sixth Circuit explained that this case was different

from *Groh* because here, "[the] warrant explicitly incorporated the supporting affidavit; the magistrate signed the affidavit and warrant; and the affidavit described with particularity the items to be seized." *Baranski II*, 452 F.3d at 440. Accordingly, "this warrant made it clear that the magistrate understood and cabined the scope of the search he was authorizing." *Ibid.* The court of appeals held in the alternative that, even if the search did violate the Fourth Amendment, the ATF agents were entitled to qualified immunity because the search "did not violate clearly established law." *Id.* at 447.

Petitioner filed a petition for a writ of certiorari, arguing that the Sixth Circuit's decision conflicted with this Court's decision in *Groh*. This Court denied the petition. 127 S. Ct. 1908 (2007).

4. Petitioner then filed a motion for collateral relief under 28 U.S.C. 2255 in the United States District Court for the Eastern District of Missouri. Pet. App. 6a. Relying on *Stone* v. *Powell*, 428 U.S. 465 (1976), the district court dismissed the motion on the ground that petitioner's Fourth Amendment claim was not cognizable in a Section 2255 proceeding because it had been raised and decided on direct appeal. Supp. App. 4a-5a. The court granted a limited certificate of appealability to allow the court of appeals to review its decision in light of *Groh*. *Id*. at 8a.

5. The court of appeals affirmed. Pet. App. 4a-11a. The court disagreed with the district court and concluded that petitioner's Fourth Amendment claim was cognizable under Section 2255. *Id.* at 7a-8a. On the merits, however, the court rejected petitioner's claim. *Id*. at 8a-10a. The court noted that *Groh* had found the warrant in that case to be "plainly invalid" because it

"did not describe the items to be seized *at all*." 540 U.S. at 557-558. By contrast, the court observed, this warrant expressly incorporated the sealed document describing the items to be seized. Pet. App. 8a-9a. Thus, unlike the warrant in *Groh*, the warrant in this case "plainly showed that a neutral magistrate had approved the search with reference to the incorporated affidavit and had had the opportunity to limit the scope of the search authorized." *Id.* at 9a.

The court of appeals also agreed with the Sixth Circuit that *Groh* "had not established a 'bright-line rule' that an incorporated affidavit must accompany a warrant at the time of the search." *Id.* at 10a. The court went on to observe that, in the absence of any "intervening change in controlling authority," its earlier determinations on direct review "that the district court did not err in denying [petitioner's] motion to suppress since the agents had acted in good faith and that any error from admission of the evidence would have been harmless" required adherence as law of the case. *Id.* at 11a.

ARGUMENT

Petitioner contends (Pet. 7-22) that the decision of the court of appeals conflicts with this Court's decision in *Groh* v. *Ramirez*, 540 U.S. 551 (2004). Several procedural bars foreclose petitioner's attempt to litigate that claim on collateral review. In addition, the court below correctly found that the warrant in this case was valid under the reasoning of *Groh* because it incorporated by reference an affidavit that was reviewed and approved by the magistrate and that particularly described the items to be seized. Finally, there is no reason to disturb the court's holdings on direct appeal that, in any event, the search was saved by the good-faith exception to the

exclusionary rule, and that any error in admitting the evidence from the search was harmless. Further review is not warranted.

1. This is the third time that petitioner has asked this Court to consider his claim that the search of his warehouse was unconstitutional under *Groh*. On both previous occasions, this Court declined to review the case. See *Baranski I*, 541 U.S. 1011 (2004) (No. 03-1341); *Baranski II*, 127 S. Ct. 1908 (2007) (No. 06-612). Petitioner advances no reason why this Court should reach a different result here.

2. Notwithstanding the contrary conclusion of the court below, petitioner's Fourth Amendment challenge to his conviction is not cognizable in a proceeding under 28 U.S.C. 2255. In *Stone* v. *Powell*, 428 U.S. 465, 494 (1976), this Court held that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." The Court reasoned that federal habeas corpus relief based on the application of the exclusionary rule, when the State had already provided the opportunity for full and fair litigation of the issue, would make a minimal contribution to the effectuation of Fourth Amendment rights compared with the substantial costs associated with the exclusion of otherwise probative evidence. The Court concluded that the deterrent purpose of the exclusionary rule could be fully achieved by the risk of suppression of evidence at trial or the reversal of convictions on direct appeal. *Id.* at 489-495.

While the Court did not specify that its holding in *Stone* also applied to federal prisoners challenging their

convictions under 28 U.S.C. 2255, its rationale applies equally to Section 2255 motions. This Court has generally considered the grounds for relief under Sections 2254 and 2255 to be equivalent. See *Davis* v. *United States*, 417 U.S. 333, 343-344 (1974). And the Court has explained that that equivalence extends to the treatment of Fourth Amendment claims, so that, as a result of *Stone*, the "only cases" in which defendants may raise "Fourth Amendment challenges on collateral attack" are Section 2254 cases "in which the State has failed to provide a state prisoner with an opportunity for full and fair litigation of his claim," as well as "analogous federal cases under [Section] 2255, and collateral challenges by state prisoners to their state convictions under postconviction relief statutes that continue to recognize Fourth Amendment claims." *United States* v. *Johnson*, 457 U.S. 537, 562 n.20 (1982).[1]

With the exception of the court below, every court of appeals to consider the question has held that *Stone* applies to federal prisoners challenging their convictions

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[1] Even if *Groh* had affected the correctness of the court of appeals' decision rejecting petitioner's Fourth Amendment challenge on direct appeal (but see pp. 10-14, *infra*), that would not mean that he had lacked a full and fair opportunity to litigate it. The test for whether the rule of *Stone* applies is whether the movant had an earlier *opportunity* to litigate the claim, not whether the habeas court would reach a different result than the earlier court. See, *e.g.*, *Willett* v. *Lockhart*, 37 F.3d 1265, 1270 (8th Cir. 1994), cert. denied, 514 U.S. 1052 (1995); *Siripongs* v. *Calderon*, 35 F.3d 1308, 1321 (9th Cir. 1994), cert. denied, 513 U.S. 1183 (1995); *Deputy* v. *Taylor*, 19 F.3d 1485, 1491 (3d Cir.), cert. denied, 512 U.S. 1230 (1994); *Capellan* v. *Riley*, 975 F.2d 67, 71-72 (2d Cir. 1992); *Palmigiano* v. *Houle*, 618 F.2d 877, 882 (1st Cir.), cert. denied, 449 U.S. 901 (1980); *United States ex rel. Maxey* v. *Morris*, 591 F.2d 386, 389-390 (7th Cir.), cert. denied, 442 U.S. 912 (1979); *Swicegood* v. *Alabama*, 577 F.2d 1322, 1324-1325 (5th Cir. 1978).

under Section 2255. See *United States* v. *Ishmael*, 343 F.3d 741, 742-743 (5th Cir. 2003), cert. denied, 540 U.S. 1204 (2004); *United States* v. *Cook*, 997 F.2d 1312, 1317 (10th Cir. 1993); *United States* v. *Hearst*, 638 F.2d 1190, 1196 (9th Cir. 1980), cert. denied, 451 U.S. 938 (1981). See also *United States* v. *Byers*, 740 F.2d 1104, 1137 n.90 (D.C. Cir 1984) (Robinson, J., concurring); 5 Wayne R. LaFave, *Search and Seizure* § 11.7(g), at 458 (3d ed. 1996). By itself, *Stone* would provide an independent ground for affirming the judgment below.

3. In any event, even assuming that petitioner's claim is cognizable in a Section 2255 proceeding, the court below correctly held that *Groh* did not undercut its decision on direct appeal affirming the denial of petitioner's motion to suppress.

a. The Fourth Amendment requires that search warrants contain "a 'particular description' of the things to be seized." *Coolidge* v. *New Hampshire*, 403 U.S. 443, 467 (1971). The particularity requirement serves "to prevent general searches" that "take on the character of the wide-ranging exploratory searches the Framers intended to prohibit." *Maryland* v. *Garrison*, 480 U.S. 79, 84 (1987). The warrant in this case satisfied that requirement because it expressly incorporated an affidavit that particularly described the items to be seized. *Baranski II*, 452 F.3d at 436. In approving the warrant, the magistrate judge separately signed both the search warrant and the attached affidavit. *Ibid.* Thus, as the Sixth Circuit observed, the warrant in this case "made it clear that the magistrate found that there was probable cause to support the search" and further "made it clear that the magistrate understood and cabined the scope of the search he was authorizing." *Id.* at 440.

That the affidavit, which had been sealed, did not accompany the warrant *after* the warrant was issued did not retroactively make the issuance of the warrant invalid for purposes of the Warrant Clause. Nor did that fact make the search otherwise "unreasonable" under the Fourth Amendment, where the officers were evidently aware of the items that they had authority to search for and seize. The agents presented a copy of the warrant to the manager of the property and orally informed him of the items to be seized, thereby assuring him that a magistrate had passed on the existence of probable cause and enabling the manager to monitor the search. *Baranski II*, 452 F.3d at 436-437.

b. Contrary to petitioner's argument (Pet. 10-18), nothing in the decision below conflicts with *Groh*. In *Groh*, the warrant at issue erroneously listed the place to be searched as the items to be seized. 540 U.S. at 554. Although the warrant application did list with particularity the items to be seized, the warrant itself—unlike the warrant in this case—did not expressly incorporate that document. *Id.* at 554-555. The Court held that the warrant was "plainly invalid" because it "failed altogether" the Warrant Clause's requirement that it describe with particularity the things to be seized. *Id.* at 557. The Court explained that "[t]he fact that the *application* adequately described the 'things to be seized' does not save the *warrant* from its facial invalidity." *Ibid.*

As petitioner notes (Pet. 11-12), the Court in *Groh* did observe that "most Courts of Appeals have held that a court may construe a warrant with reference to a supporting application or affidavit if the warrant uses appropriate words of incorporation, *and* if the supporting document accompanies the warrant." 540 U.S. at 557-558 (emphasis added). Immediately after citing those

cases, however, the Court noted that "in this case the warrant did not incorporate other documents by reference, nor did either the affidavit or the application (which had been placed under seal) accompany the warrant." *Ibid.* For that reason, the Court concluded, "we need not further explore the matter of incorporation." *Ibid.*; see *id.* at 557 (noting that "[w]e do not say that the Fourth Amendment prohibits a warrant from cross-referencing other documents"). The Court therefore did not hold that the cited cases were correctly decided, and, more to the point, it did not decide the precise question presented by this case. As a result, the decision of the court of appeals in this case does not conflict with this Court's decision in *Groh*.[2]

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[2] Of the six courts of appeals whose decisions were cited in *Groh*, only two—the Ninth and Tenth Circuits—had unconditionally held that an affidavit may cure an otherwise deficient warrant only when the warrant specifically incorporates the affidavit and the affidavit accompanies the warrant during the search. See *United States* v. *McGrew*, 122 F.3d 847, 849-850 (9th Cir. 1997); *United States* v. *Williamson*, 1 F.3d 1134, 1136 n.1 (10th Cir. 1993). The remaining four courts of appeals had held, in decisions other than those cited in *Groh*, that an affidavit may cure an otherwise deficient warrant either if the warrant simply incorporates the affidavit and the executing officers were aware of the relevant contents of the affidavit, see *United States* v. *Dale*, 991 F.2d 819, 846-848 (D.C. Cir.), cert. denied, 510 U.S. 906, and 510 U.S. 1030 (1993); *United States* v. *Bonner*, 808 F.2d 864, 866-867 (1st Cir. 1986), cert. denied, 481 U.S. 1006 (1987), or if the warrant incorporates the affidavit and the affidavit is "present" at the scene when the search is conducted, even if it does not physically "accompany" the copy of the warrant possessed by the executing officers, see *United States* v. *Tagbering,* 985 F.2d 946, 950 (8th Cir. 1993); *United States* v. *Gahagan*, 865 F.2d 1490, 1497-1499 (6th Cir.), cert. denied, 492 U.S. 918 (1989).

While the record in this case established that the magistrate judge placed the original affidavit under seal at the time he issued the warrant, the question whether the agents had a copy of the affidavit with

Moreover, to the extent that *Groh* suggested that a warrant unaccompanied by an incorporated affidavit fails to "assure[] the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of power to search," 540 U.S. at 561, that line of reasoning has been substantially undercut by this Court's more recent decision in *United States* v. *Grubbs*, 547 U.S. 90 (2006). In *Grubbs*, the Court held that the Fourth Amendment does not require service of a warrant before conducting a search. As the Court noted, the Fourth Amendment particularity requirement "does not protect an interest in monitoring searches." *Id.* at 99. Rather, the Court explained, "[t]he Constitution protects property owners not by giving them license to engage the police in a debate over the basis for the warrant, but by interposing, *ex ante*, the 'deliberate, impartial judgment of a judicial officer . . . between the citizen and the police.'" *Ibid.* (quoting *Wong Sun* v. *United States*, 371 U.S. 471, 481-482 (1963)).

c. *Groh* is distinguishable from this case for the additional reason that it was decided in the context of a *Bivens* action seeking damages for an unconstitutional search. *Groh* thus does not address whether, even if the absence from the search scene of an incorporated affidavit violates the Fourth Amendment, the violation requires application of the exclusionary rule. As this Court recently explained in *Hudson* v. *Michigan*, 547 U.S. 586 (2006), suppression is not an automatic conse-

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them when they executed the warrant was not explored at the suppression hearing. The government represented to the lower courts during petitioner's *Bivens* action in the Sixth Circuit that a copy of the affidavit was in fact present at the scene (and thus available to agents) at the time of the search. See Br. in Opp. at 14 n.3, *Baranski II*, No. 06-612.

quence of a Fourth Amendment violation, but is appropriate only where it would "vindicate the interests protected by" the relevant constitutional requirement. *Id.* at 593. Here, the interests that petitioner asserts (Pet. 17-18) are protected by the presence of the incorporated affidavit—to provide the property owner notice of the precise items to be seized and to provide him with written assurance that the magistrate judge found probable cause to search for and seize every item listed in the affidavit—have nothing to do with the government's authority to seize the evidence. See *Grubbs*, 547 U.S. at 99. That authority is given by a valid warrant, explicitly incorporating an affidavit listing the items to be seized, which the magistrate judge issued in this case.[3]

In addition, the Court in *Hudson* noted that "the exclusionary rule has never been applied" except when its "substantial social costs" are outweighed by its deterrent benefits. 547 U.S. at 594. "[T]he value of deterrence depends upon the strength of the incentive to commit the forbidden act," *id.* at 596, and here, as in *Hudson*, the incentive to disregard a requirement that the incorporated affidavit accompany the warrant at the time of the search is very weak. See *United States* v. *Cazares-Olivas*, 515 F.3d 726, 729 (7th Cir. 2008) (voicing "doubt [in light of *Hudson*] that the Court [in *Groh*] would have invoked the exclusionary rule when a description of the things to be seized, though missing from the warrant, appeared in an affidavit that was filed with the court in support of the application and was respected

[3] Petitioner argues (Pet. 15-16) that the warrant as issued was not valid because, he asserts, it failed the particularity requirement. But, as noted above, p. 10, *supra*, any post-issuance separation of the sealed affidavit from the warrant did not undermine the validity of the warrant as issued.

when the search occurred"), cert. denied, No. 07-10647 (Oct. 6, 2008). Even if the search in this case violated the Fourth Amendment, suppression would not be an appropriate remedy.

d. Petitioner further contends (Pet. 19-22) that the decision below conflicts with the decisions of five other circuits that, in order for a warrant affidavit or application to save an otherwise insufficient warrant, it must be incorporated into and accompany the warrant at the time of the search. There is no conflict demanding review at this time. Two of the cases relied on by petitioner—*Rivera Rodriguez* v. *Beninato*, 469 F.3d 1 (1st Cir. 2006), cert. denied, 127 S. Ct. 3004 (2007), and *Doe* v. *Groody*, 361 F.3d 232 (3d Cir.), cert. denied, 543 U.S. 873 (2004)—like *Groh*, were decided in the context of civil actions seeking damages for alleged unconstitutional searches, and thus had no occasion to consider whether the absence of an incorporated affidavit at the search scene requires suppression of evidence in a criminal case. The three other cases on which petitioner relies—*United States* v. *Riccardi*, 405 F.3d 852 (10th Cir.), cert. denied, 546 U.S. 919 (2005); *United States* v. *McGrew*, 122 F.3d 847 (9th Cir. 1997); and *United States* v. *Maxwell*, 920 F.2d 1028 (D.C. Cir. 1990)—were decided before *Grubbs* and *Hudson*. As explained, those decisions indicate, first, that the Fourth Amendment does not require an officer to present a property owner with a copy of the search warrant before conducting a search, and, second, that not every deficiency in the execution of a warrant requires a remedy of suppression. It is unclear whether those courts of appeals will continue to apply a rule requiring accompaniment as well as incorporation in the wake of those decisions or that they would suppress evidence as a remedy for that violation.

See *United States* v. *Hector*, 474 F.3d 1150, 1154-1155 (9th Cir. 2007) (recognizing that its earlier line of cases requiring service of a warrant before conducting a search has been undermined by *Grubbs* and relying on *Hudson* in declining to suppress evidence for an alleged violation in failing to show a warrant to the occupant before searching), cert. denied, 128 S. Ct. 875 (2008).

Indeed, since *Grubbs* was decided, the only other court of appeals to have considered the precise issue presented here has held—like the Eighth Circuit in this case and the en banc Sixth Circuit in petitioner's *Bivens* action—that a warrant need only incorporate a supporting document and need not be accompanied by that document at the time of the search. See *United States* v. *Hurwitz*, 459 F.3d 463, 472 (4th Cir. 2006).

4. Finally, even if there were a Fourth Amendment violation in this case, the court of appeals correctly relied on its earlier rulings, on direct appeal, that the ATF agents acted in good-faith reliance on the warrant and that any error in admitting the evidence was harmless. Pet. App. 11a. This Court declined to consider petitioner's challenges to those rulings on direct review of his case, and they provide an independent basis for the judgment of the court of appeals. Petitioner argues (Pet. 22-24, 27-31) that the rulings of the court of appeals are erroneous, but those case-specific claims are not within the scope of the question presented (Pet. i), and in any event they do not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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