No. 25-203

In the Supreme Court of the United States

JOHANNA MCGEE, as Personal Representative of the Estate of Jacqueline McGee, ET AL.,
Petitioners,
v.
ALGER COUNTY TREASURER, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MICHIGAN

AMICI CURIAE BRIEF OF THE BUCKEYE INSTITUTE, MANHATTAN INSTITUTE FOR POLICY RESEARCH, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, INC., AND OWNERS' COUNSEL OF AMERICA IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Does Michigan's claims process violate the Takings and Due Process Clauses?

2. To the extent it authorizes Michigan's confiscatory claim statute, should the Court overrule *Nelson v. City of New York*?

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INTEREST OF AMICI CURIAE[1]

The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market policy in the states. The Buckeye Institute accomplishes its mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute also files lawsuits and submits amicus briefs to fulfill its mission. The Buckeye Institute is a nonpartisan, nonprofit, tax-exempt organization, as defined by I.R.C. section 501(c)(3). The Buckeye Institute has been vocal in its opposition to practices in Ohio allowing government entities to seize real property to satisfy a tax debt without compensating the property owners for their accrued equity, whether that seizure comes directly, as it did in *Tyler* v. *Hennepin County*, or in through procedural hurdles designed to frustrate the vindication of the Fifth Amendment right recognized in that case.

The **Manhattan Institute for Policy Research** is a nonpartisan public policy research foundation whose mission is to develop and disseminate new ideas that foster greater economic choice and individual responsibility. To that end, it has

[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part and no entity or person, aside from amici curiae made any monetary contribution toward the preparation or submission of this brief. Counsel timely provided the notice required by Rule 37.2.

historically sponsored scholarship and filed briefs supporting economic freedom and property rights against government overreach.

The **National Federation of Independent Business Small Business Legal Center, Inc.** (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. It is an affiliate of the National Federation of Independent Business, Inc. (NFIB), which is the nation's leading small business association. NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents, in Washington, D.C., and all 50 state capitals, the interests of its members.

The **Owners' Counsel of America** (OCA) is a nonprofit organization, organized under IRC § 501(c)(6) and sustained solely by its members. OCA is an invitation only network of the most experienced eminent domain and property rights attorneys from across the country who seek to advance, preserve and defend the rights of private property owners, large and small, locally and nationally. Since its founding in 2000, OCA has sought to use its members' combined knowledge and experience as a resource in the defense of private property ownership, and to make that opportunity available and effective to property owners nationwide. OCA member attorneys have been and are involved in landmark property rights cases in nearly every jurisdiction nationwide.

This case interests amici because home equity theft—a clear violation of property rights—remains a nationwide problem.

SUMMARY OF THE ARGUMENT

The Fifth Amendment does not mince words. Its simple and unadorned language provides, "[n]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V. This Court has been equally clear that a state "may not extinguish" a dispossessed owner's right to the remaining equity in his or her home "to avoid paying just compensation when it is the one doing the taking." *Tyler* v. *Hennepin Cnty., Minnesota*, 598 U.S. 631, 645 (2023) (citing *Phillips* v. *Washington Legal Found.*, 524 U.S. 156, 167 (1998)). Yet rather than creating a process to ensure that dispossessed homeowners recover the surplus equity due to them, the Michigan legislature erected procedural barriers to frustrate those homeowners from vindicating their rights under *Tyler*.

Unlike some constitutional protections, the Fifth Amendment's just compensation requirement is categorical. When the government takes property, it must pay for it. Always. There is no balancing test or weighing of interests. Rather, the Fifth Amendment—and the historical antecedents on which the Framers relied in crafting it—conditions the government's power to take property on the payment of just compensation. The Court should grant the petition to clarify that local governments cannot excuse themselves from the categorical duty to pay by creating a byzantine claims process that aims to pad

the government treasury rather than allow citizens to exercise their rights.

Deviation from, and resistance to, new precedents by legislatures and lower courts is not unheard-of. At times, this is a result of honest efforts to address complex issues. However, in other cases, the legislative and judicial responses appear to be based on hostility to the right itself. This was the case in the civil rights era. More recently, the tendency of legislatures and lower courts to circumscribe or "underrule" recent precedent cases has been manifest in Second Amendment jurisprudence. Here, Michigan's enactment of its surplus equity claims process in *Tyler's* immediate wake, coupled with its unusually complex requirements and easy default rules, points to an illegitimate government interest of maximizing windfalls to local governments at the expense of citizens who are often unsophisticated and reeling from the loss of their home.

Madison wrote that "[j]ustice is the end of government. It is the end of civil society." The Federalist No. 51, at 297 (James Madison) (Fall River Press ed., 2021). Here, this Court and the corpus of Anglo-American law say that justice requires local governments to return surplus equity. Any government process that elevates administrative convenience or capturing funds for the local government over this constitutional imperative must fail.

To the extent that local governments require some mechanism to ensure that equity refunds are processed in a timely manner and reach their proper recipients, the statutes of other states are instructive.

Nearly every state—both before and after *Tyler*—boasts a more liberal equity recovery process than Michigan. Administration of surplus equity claims apparently does not require the complexity and tight deadlines that Michigan has imposed. States can, and do, balance the homeowner's constitutional right to a refund with reasonable administrative convenience. The Court should grant certiorari and look to these other state statutes to create a procedural floor for equity claims.

ARGUMENT

I. Compensation under the Fifth Amendment is categorically required.

A. *Tyler* established that the duty to pay surplus proceeds to a landowner is categorical.

In arguing in favor of legislation regulating or curtailing the exercise of a constitutional right, politicians often fall back on the cliché that "no constitutional right is absolute." This holds true in some contexts, but not others. For example, the First Amendment's Free Exercise clause does not prohibit a state from preventing cruelty to animals, so long as it does not target ritual animal sacrifice. See *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 539 (1993). The First Amendment's free speech guarantee does not permit protestors to trespass or block public right-of-ways. See *Adderley* v. *State of Fla.*, 385 U.S. 39, 43 (1966). The exercise of one's right to a trial by jury is subject to the court's local procedural rules. See *Colgrove* v. *Battin*, 413 U.S. 149 (1973).

But the Fifth Amendment's just compensation requirement is different, and this Court has repeatedly recognized that difference. Unlike other rights, "[w]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner." *Arkansas Game & Fish Comm'n* v. *United States*, 568 U.S. 23, 31 (2012) (quoting *Tahoe–Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*, 535 U.S. 302, 322 (2002)). The just-compensation requirement is "categorical" in the sense that a sovereign's proper authority to physically take private property exists only to the extent that the taking is necessary for a public use. Applying this principle to satisfy a debt requires that the government compensate the property owner for his or her accrued equity in that property. Indeed, a "property owner has suffered a violation of his Fifth Amendment rights when the government takes his property without *just* compensation . . . ." *Knick* v. *Twp. of Scott, Pennsylvania*, 588 U.S. 180, 185 (2019) (emphasis added). Thus, "[t]he just compensation clause may not be evaded or impaired by any form of legislation." *Baltimore & Ohio R.R. Co.* v. *United States*, 298 U.S. 349, 368 (1936). "It does not rest with the public, taking the property, through . . . the legislature, . . . to say . . . what shall be the rule of compensation." *Id.* at 365.

B. The categorical nature of the right to just compensation is rooted in history.

The categorical nature of the right arises from the Takings Clause's historical antecedents. The requirement that "just compensation" must accompany any taking of private property predates the U.S. Constitution and has a pedigree stretching back nearly a millennium. This Court has observed that the roots of the Just Compensation Clause extend "back at least 800 years to Magna Carta, which specifically protected agricultural crops from uncompensated takings." *Horne* v. *Dep't of Agric.*, 576 U.S. 350, 358 (2015). Specifically, Clause 28 of Magna Carta forbade any "constable or other bailiff" from taking "corn or other provisions from any one without *immediately tendering money therefor*, unless he can have postponement thereof by permission of the seller." *Id.* (emphasis added and citation omitted).

Not long after the Revolutionary War's conclusion, Madison voiced his concerns over the erosion of property rights that had attended the conflict, writing to Jefferson that "[t]he necessity of . . . guarding the rights of property was for obvious reasons unattended to in the commencement of the Revolution" and cited the need for positive steps to secure those rights in the new country. William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L.J. 694, 709 (1985) (quoting James Madison, *Observations on Jefferson's Draft of a Constitution of Virginia*, *reprinted in* 8 The Papers of Thomas Jefferson 308, 310 (J. Boyd ed. 1953)).

While the colonial right to compensation for a taking of property often relied on a patchwork of purveyance statutes and general reliance on the common law, the Congress of the Confederation of the United States provided what was to be the first national statement on the matter when it enacted the Northwest Ordinance of 1787. In essence, the Northwest Ordinance provided the first national "pre-constitutional codification of the eminent domain power." Joseph J. Lazzarotti, *Public Use or Public Abuse*, 68 UMKC L. Rev. 49, 54 (1999).[2] In language that prefigured the Fifth Amendment, the 1787 Northwest Ordinance provided that:

> No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land, and *should the public exigencies make it necessary, for the common preservation, to take any person's property*, or to demand his particular services, *full compensation shall be made for the same*.

Confederation Cong., An Ordinance for the Government of the Territory of the United States North-West of the River Ohio, art. 2 (1787) (emphasis added).

Significantly, the State of Michigan was carved out of the Northwest Territory. Limiting takings to those that are necessary and requiring full compensation for

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[2] While the Northwest Ordinance provided the first "national" statement of the Just Compensation requirement, the Vermont Constitution of 1777 and the Massachusetts Constitution of 1780 included similar categorical requirements. Treanor, *supra*, at 701.

them is thus part of the Michigan origin story. When they loaded their wagons and lit out for the West, the men and women who settled what would become the State of Michigan would have relied—at least in part—on this national policy protecting them from uncompensated government takings.

The Framers' writings following ratification of the Fifth Amendment strongly support robust protection of private property. Madison, in particular, saw broad protection for property—both real and intangible—as the proper end of government. James Madison, *Property, reprinted in* 14 The Papers of James Madison 266 (University Press of Va., 1977), https://tinyurl.com/34cz994u. Indeed, Madison considered protection of property as a government responsibility commensurate with protection of individuals. The Federalist No. 54, at 311 (James Madison) (Fall River Press ed. 2021) ("Government is instituted no less for protection of the property, than of the persons of individuals."). And after the experiences of the Revolutionary War, he believed it necessary "to erect strong safeguards for rights in general and for property rights in particular." Treanor, *supra*, at 694. The Just Compensation Clause—although intended to have relatively narrow legal consequences—was such a safeguard. And though Madison viewed the Fifth Amendment as a restatement of what was already unquestionably the law, he believed that the codification of these pre-existing guarantees into the Bill of Rights would serve the hortatory purpose of encouraging respect for private property. " 'Paper barriers,' he declared, have a tendency to impress some degree of respect for them, to establish the public opinion in their favor, and rouse

the attention of the whole community.'" *Id.* at 710 (quoting James Madison, *Speech Proposing the Bill of Rights*, *in* 12 The Papers of James Madison 204–05 (C. Hobson & R. Rutland eds. 1979)). Of course, the paper barriers that Madison spoke of were intended to preserve rights. By contrast, Michigan's "paperwork barriers" serve as means to stealthily divest citizens of their property rights.

Following ratification, Madison's broader vision took hold in American jurisprudence. Professor Treanor explains that "[i]n addition to limiting the national government's freedom of action, the just compensation clause served an educative role: It inculcated the belief that an uncompensated taking was a violation of a fundamental right. . . . [T]he Fifth Amendment was a national declaration of respect for property rights." Treanor, *supra*, at 714. "By the 1820s, the principle of just compensation had won general acceptance." *Id.*

In the landmark case of *Gardner* v. *Village of Newburgh*, 2 Johns. Ch. 162, 167 (N.Y. Ch. 1816), Chancellor Kent articulated the broad Madisonian view that had begun at Runnymede, crossed the ocean, survived a war, and firmly established its place as the fundamental law of the new nation:

> [T]his inviolability of private property, even as it respects the acts and the wants of the state, *unless a just indemnity be afforded,* has excited so much interest, and been deemed of such importance, that it has frequently been made the subject of an express and fundamental

> article of right in the [United States] constitution of government.

In its simplest terms, the Fifth Amendment places the requirement to compensate the landowner squarely on the government. The question is not *if* the local government must provide the surplus equity to the dispossessed homeowner, but *how and when* it must do so.

In other words, there is no precedent that prescribes a balancing test or weighing of interests in determining whether to pay just compensation. To the extent that the Michigan Court of Appeals relied on *Nelson* v. *City of New York*, 352 U.S. 103 (1956), Petitioners have ably distinguished it from the case here. To read *Nelson* to countenance any procedure, no matter how cumbersome, as constitutional, elevates form over substance. As Justice Marshall recognized, the cornerstone of any legislative scheme must be some legitimate governmental purpose. See *McCulloch* v. *Maryland*, 17 U.S. 316, 421 (1819) ("Let the end be legitimate."). The frustration of a constitutional right can never be a legitimate end of government.

And while there is a legitimate interest in preventing people from shouting "fire" in a crowded theater when there is no fire, there is no legitimate countervailing government interest in avoiding paying just compensation. And as shown below, to the extent that the government has an interest in having an orderly system for the payment of just compensation, it can do so in a manner that facilitates, rather than frustrates, citizens' property rights.

II. History is replete with examples of legislative and judicial foot-dragging.

The Michigan statute was enacted in the wake of this Court's decision in *Tyler*, ostensibly to establish a system to provide for owner equity distributions in tax foreclosures. History teaches, however, that when this Court recognizes a constitutional right, state legislatures—and even lower courts—are not always keen to go along. Such is the case here, where Michigan obstructed, rather than facilitated, post-foreclosure equity distributions. It remains for this Court to serve as the final authority and promote procedural uniformity—or at least establish a procedural ground floor below which state processes may not sink. The Court has done this for almost all other constitutional guarantees and should, therefore, grant the petition to clarify, and if necessary, amplify its holding in *Tyler* that the Fifth Amendment's just compensation requirement is categorical.

Some of the nation's jurisprudential and legislative history demonstrates how, lamentably, without this Court's enforcement of its decisions, obdurate legislatures can frustrate the exercise of constitutional rights that are unfashionable or inconvenient. Some of the grossest—and most shameful—examples of legislatures brushing off this Court's clear holdings occurred following this Court's in *Brown* v. *Board of Education*, 347 U.S. 483 (1954). .

Legislatures, particularly, not but exclusively, in the South, sought to frustrate the national policy of desegregation that flowed from *Brown*. In 1954, "Virginia Governor Thomas Bahnson Stanley created a commission to conspire to defy *Brown*." *The*

Southern Manifesto and "Massive Resistance" to Brown v. Board, Legal Defense Fund, https://www.naacpldf.org/brown-vs-board/southern-manifesto-massive-resistance-brown/ (last visited Oct. 1, 2025). The Gray commission "held that school attendance should not be compulsory; money should be allocated to parents as tuition grants if they opposed integration; and authorized local school boards would assign students to schools themselves." *Id.* Following this Court's decision in *Swann* v. *Charlotte-Mecklenburg*, 402 U.S. 1 (1971), North Carolina enacted an "Anti-Busing Law" that prohibited school authorities from considering busing as part of the desegregation plan ordered by the Court. This Court stepped in to confirm that it meant what it said in Swann and that the North Carolina statute's "flat prohibition against the assignment of students for the purpose of creating racial balance must inevitably conflict with the [court-ordered] duty of school authorities to disestablish dual school systems." *North Carolina State Bd. of Ed.* v. *Swann*, 402 U.S. 43, 46 (1971).

Decades later, this same legislative resistance arose in the context of the rights preserved under the Second Amendment. Those rights had long been denigrated by legislatures and courts. Finally, in *District of Columbia* v. *Heller*, 554 U.S. 570 (2008), the Court held that the Second Amendment protected individuals' rights to bear arms.

After the Court invalidated New York's prohibition on carrying firearms in *New York State Rifle & Pistol Ass'n, Inc.* v. *Bruen*, 597 U.S. 1 (2022), New York refused to comply. It simply enacted a very similar law,

the Concealed Carry Improvement Act, which banned firearms in numerous public places, despite the Court's noting that "there is no historical basis for New York to effectively declare the island of Manhattan a 'sensitive place,' " *Id.* at 31.

When New York Governor Hochul fielded questions about the law, one reporter commented that it seemed like the new law restricted concealed carry in all public places. Marcia Kramer & Dick Brennan, *Fresh off primary win, Gov. Kathy Hochul dives right into guns--who can get them and where they can take them*, CBS New York (June 29, 2022), https://tinyurl.com/a6jcfd3p. Hochul responded, "I can't shut off all places." *Id.* And when asked where people could carry concealed, she responded, "[p]robably some streets." *Id.*

Indeed, some state legislatures, encouraged by sympathetic courts, continue to push the envelope of firearms regulations. Some courts have even expressed Reinhardt-like defiance as they affirmed legislative opposition to *Bruen*. See *Wilson* v. *Hawaii*, 145 S. Ct. 18 (2024) (Thomas, J., respecting the denial of cert.) (noting that "the Hawaii Supreme Court ignored" this Court's holding in *Bruen*); see also *Wolford* v. *Lopez*, No. 24-1046, 2025 WL 2808808 (U.S. Oct. 3, 2025) (granting certiorari to review whether Hawaii may presumptively prohibit the carry of handguns by licensed concealed carry permit holders on private property open to the public). More recently, there have been attempted congressional responses to this Court's decision in *Loper Bright Enters.* v. *Raimondo*, 603 U.S. 369 (2024). Some legislators took that decision particularly hard, arguing that it

"undermines our government's ability to promote worker safety, ensure clean air and water, and protect consumers." *Warren Leads Senate Response to End of Chevron Doctrine*, Elizabeth Warren (July 23, 2024), https://tinyurl.com/59sjs5vb. In response, the proposed "Stop Corporate Capture Act" would "[c]odify *Chevron* deference . . ." in an attempt to annul the Court's opinion. *Id.*; see also Stop Corporate Capture Act, H.R. 1507, 118th Cong. § 12(1)(A) (2023).

As once commentator explained, the bill's constitutionality turns on how the Court reads *Loper Bright*. Katy Marquardt Hill, *Can Congress overturn Supreme Court rulings?*, CU Boulder Today (July 30, 2024), https://tinyurl.com/299h4cr7. Professor Scott Skinner-Thompson opined that "to the extent the [C]ourt's decision in *Loper* hinged on constitutional separation of power principles" the bill "goes too far by preventing courts from having the final say on the law." *Id.* On the other hand, the bill is "arguably perfectly permissible," if instead the Court views the bill as seeking "to revise a statute and correct a Supreme Court interpretation of that statute . . . . It's a fine line." *Id.* While only a speculative case, it is representative of a common theme—just because courts speak, that does not mean legislatures are listening.

To be clear, the societal impact of the Michigan equity claims statute is not on par with the resistance to this Court's civil rights decisions. Rather, the legislative hurdles Michigan imposed on foreclosed property owners are a good old-fashioned money grab. But the principle is the same. The first proper concern of a government "of the People, by the People, and for

the People" must be the protection of the rights secured by the People in their constitution. When legislatures address this Court's decisions by seeking to frustrate the rights recognized therein, quick correction is warranted.

Like North Carolina's attempt to avoid its obligation to desegregate by frustrating the means by which that desegregation might occur, Michigan's statute attempts to undo what this Court ordered in *Tyler*. The statute removes—indeed one might argue forcibly extracts—the teeth from *Tyler*. The pre-sale notice requirement and narrow claims window appear designed to trip up the unwary. And homeowners going through the emotional and financial trauma of foreclosure process are particularly vulnerable. They are often unrepresented, see, *e.g.*, *Tallage Lincoln, LLC* v. *Williams*, 485 Mass. 449, 450 (2020), and must contend with relocating, finding a place for their belongings. Further, foreclosures most often "affects the elderly, mentally disabled, or ill . . . ." Jenna Christine Foos, *State Theft in Real Property Tax Foreclosure Procedures*, 54 Real Prop. Tr. & Est. L.J. 93, 96 (2019). If a private commercial entity attempted to take advantage of procedural complexities to work a default in similar circumstances, it would be rightly decried as unconscionable. And as set forth above, the government's attempt to do so is doubly harmful because it has a constitutional obligation not to engage in such activities. If the Court grants cert, it can decisively correct Michigan's attempt to obstruct this Court's *Tyler* decision.

III. The vast majority of states provide reasonable procedures designed to protect a homeowner's Fifth Amendment rights.

Payments out of the public fisc, of course, require some processes and recordkeeping to ensure that the money reaches the correct recipient. Similarly, local governments are not banks or escrow agents. But almost every other state accomplishes that goal without the tight timelines and pre-sale notice of claim required by Michigan. In light of the statutes enacted in other states that require returning surplus equity, the Michigan statute appears unnecessarily punitive.

For example, California allows dispossessed homeowner up to a year of recording of the tax deed on a tax-defaulted property to claim excess proceeds. See Cal. Rev. & Tax. Code § 4675. In Florida, the Clerk of Courts is required to give notice and instructions to all lienholders regarding the filing requirements, and the state allows the owner of record 120 days after that notice to file the request. Fla. Stat. § 197.582. Georgia provides written notice of excess funds to homeowners and allows them up to five years to seek recovery. Ga. Code Ann. § 48-4-5 (West).

In Texas, excess proceeds are paid into court, and prior homeowners have a two-year window to make a claim. Tex. Tax Code Ann. §§ 34.02–34.04 (West). Washington holds excess funds for the record owner for three years. Wash. Rev. Code Ann. § 84.64.080 (West). In Ohio, the county treasurer holds excess proceeds for one year and local treasurers establish processes on a county-by-county basis for requesting the funds. Ohio Rev. Code Ann. § 5723.11 (West).

This is not to argue that any particular state's processes are constitutional, but rather to highlight that most states have policies ordered more towards protecting the owner's rights than facilitating windfalls to local governments. The variety of state processes also provide this Court with many examples of possible due process floors below which a statute cannot fall.

The Court has prescribed such constitutional bare minimum requirements in numerous other constitutional contexts. In fact, the Court has, in some cases, required warnings to prevent the unknowing waiver of constitutional rights. See, *e.g.*, *Miranda* v. *Arizona*, 384 U.S. 436 (1966); see also *Curtis Publ'g Co.* v. *Butts*, 388 U.S. 130, 145 (1967) (noting that "[w]here the ultimate effect of sustaining a claim of waiver might be an imposition on that valued freedom [of speech], we are unwilling to find waiver in circumstances which fall short of being clear and compelling"); *D.H. Overmyer Co.* v. *Frick Co.*, 405 U.S. 174, 185–86 (1972) (noting that the standard applicable to waiver in a criminal proceeding is that "it be voluntary, *knowing*, and intelligently made, *Brady* v. *United States*, 397 U.S. 742, 748 (1970)" or be " 'an intentional relinquishment or abandonment of a *known* right or privilege,' *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938)" (emphasis added and citations cleaned up)). This case offers the Court the opportunity to put its unanimous holding in *Tyler* into operation and articulate a national baseline for due process in excess equity claims.

CONCLUSION

For the above reasons, the Court should grant the petition for a writ of certiorari, and the decision of the court of appeals should be reversed.

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