No. 20-_____

In The
Supreme Court of the United States

JAMES M. PERNA,

Petitioner,

v.

HEALTH ONE CREDIT UNION;
NATIONAL CREDIT UNION ADMINISTRATION;
NATIONAL CREDIT UNION ADMINISTRATION BOARD,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a grant of a writ of certiorari is warranted where, if left without review, the decision of the United States Court of Appeals for the Sixth Circuit would deny litigants their ability to contractually choose the forum to resolve disputes, and further deny litigants access to the courts, in violation of the First Amendment right to petition the Government for redress of grievances?

Whether a grant of a writ of certiorari is warranted where, if left without review, the decision of the United States Court of Appeals for the Sixth Circuit will allow federal courts that determine they lack jurisdiction to hear a case removed from a State court to dismiss the case without an order remanding the matter to the State court?

Whether federal law controls where the subject credit union was created and regulated under state law, and the underlying contractual arbitration was a matter of state contract law?

PARTIES TO THE PROCEEDINGS

Petitioner James M. Perna was the plaintiff/appellant below.

Respondents Health One Credit Union, National Credit Union Administration and National Credit Union Administration Board were the defendants/appellees below.

STATEMENT OF RELEVANT CASES

James M. Perna v. Health One Credit Union and National Credit Union Administration (NCUA), Case No. 01-18-001-5581, American Arbitration Association, Employment Arbitration Tribunal. Award entered on October 22, 2018.

James M. Perna v. Health One Credit Union and National Credit Union Administration, Case No. 2018-004330-CZ, Macomb County (Michigan) Circuit Court. Removed to federal court on January 2, 2019.

James M. Perna v. Health One Credit Union, National Credit Union Administration and National Credit Union Administration Board, Case No. 19-cv-10001, U.S. District Court for the Eastern District of Michigan. Judgment entered on July 15, 2019.

James M. Perna v. Health One Credit Union; National Credit Union Administration; National Credit Union Administration Board, Case No. 19-1965, United States Court of Appeals for the Sixth Circuit. Judgment entered on December 21, 2020. Order Denying Rehearing entered on January 26, 2021.

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STATEMENT OF JURISDICTION

The order of the United States Court of Appeals for the Sixth Circuit affirming the District Court's decision, but modifying its judgment was filed on

December 21, 2020. The order of the United States Court of Appeals for the Sixth Circuit denying appellant's petition for rehearing en banc was filed on January 26, 2021. This Court has jurisdiction to review this decision under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Section 1 of Article III of the United States Constitution provides as follows, in pertinent part, that the judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

The First Amendment of the United States Constitution provides, in pertinent part, that Congress shall make no law which prohibits or abridges the right of the people to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

This petition seeks review of the decision of the United States Court of Appeals for the Sixth Circuit affirming the decision of the United States District Court for the Eastern District of Michigan, but modifying its judgment, regarding an arbitration award, which was mandatory under a contract between petitioner and one of the respondents, a now-defunct credit union. Respondents refused to participate in the arbitration proceeding, despite having notice of the

arbitration proceedings. After the arbitrator issued an award in favor of petitioner, petitioner initiated a lawsuit in state court to reduce the arbitration award to a judgment, pursuant to the state court rules. Respondents then removed the case to federal district court, which then determined that it did not have jurisdiction to consider the case. However, instead of entering an order of dismissal and remanding the case to the state court, the district court granted summary judgment to respondents. The federal appellate court affirmed the district court's decision that it lacked jurisdiction, but modified the judgment to a dismissal, and did not remand the matter to the state court.

Judicial review of an arbitration award under both Michigan and federal law is limited to whether the arbitrator's award was made within the scope of the arbitrator's authority under the contract. The decisions of the lower courts in this case attacked the validity of the arbitration itself, and is contrary to established law regarding judicial review of arbitration awards. The lower courts made factual findings and legal conclusions regarding the merits of the arbitration even though they lacked subject matter jurisdiction. Further, the appellate court held that the state court also lacked jurisdiction, and refused to remand the case to the state court. This decision, if left standing, would deprive litigants of a forum despite a contractual right to arbitration which was to be confirmed in a state court, and would deprive litigants access to the courts, in violation of the First Amendment guarantee to petition the Government for redress of grievances. It would

also greatly expand a court's ability to review arbitration awards, contrary to long established precedents from this Supreme Court.

A. Facts Of The Case

James M. Perna was employed as General Manager of Health One Credit Union ("HOCU"). Perna's terms of employment were determined by his Employment Agreement. Paragraph 6 of the Employment Agreement provides for a severance payment if Perna's employment is terminated without cause. The Employment Agreement very specifically defines that which constitutes "cause" for termination of employment under this Agreement: "(a) a conviction, guilty plea or no contest plea, in a court of competent jurisdiction of the General Manager to a crime involving fraud or dishonesty, or (b) failure to perform the essential duties of his job in a competent manner."

Paragraph 8 of the Employment Agreement provides:

> It is further agreed that any controversy or claim arising out of or relating to this Agreement, or any breach thereof, shall be settled by arbitration by a labor arbitrator selected from a panel of the American Arbitration Association, and under the rules then prevailing for labor arbitration with the American Arbitration Association, and the judgment or award rendered by the arbitrator may be entered in any court having jurisdiction and enforced with the terms thereof.

The Employment Agreement was extended through December 31, 2016 by the HOCU Board on June 19, 2013.

On May 16, 2014, the Director of the Michigan Department of Insurance and Financial Services entered an Order appointed the National Credit Union Administration Board ("NCUA Board") as conservator of HOCU. HOCU was a state chartered credit union, and therefore the Order of appointment cited the Michigan Credit Union Act, M.C.L. 490.101, *et seq*., specifically M.C.L. 490.241(1), as the authority for the NCUA Board's appointment.

That same day, Perna was terminated from his position as General Manager of HOCU by the National Credit Union Administration ("NCUA"), not for cause as provided for under his Employment Agreement, but because the NCUA determined that the Employment Agreement would be burdensome. On October 6, 2014, Perna filed a claim for unpaid wages and fringe benefits with the Michigan Department of Licensing and Regulatory Affairs, Michigan Occupational Safety and Health Administration Wage and Hour Program ("Wage and Hour Program").

In response to Perna's claim, counsel for respondents argued that Perna's claim could not be decided by the Wage and Hour Program because it was preempted by the agreement to arbitrate with the American Arbitration Association ("AAA"), as stated in Perna's Employment Agreement. Respondents did not assert that Perna had to submit a claim to the NCUA.

On June 23, 2015, the Wage and Hour Program sent correspondence to Perna, which stated that "[r]esolution of the claim has been preempted by the contractual assent to arbitration by the American Arbitration Association for the issues being claimed." On July 1, 2015, the Wage and Hour Program also found that resolution of the claim was preempted by the agreement to arbitrate through the AAA.

On December 12, 2014, the NCUA was appointed as Receiver for HOCU. Also on December 12, 2014, it was announced by the Michigan Department of Insurance and Financial Services that New England Federal Credit Union had acquired HOCU. Despite having actual knowledge of Perna's claim with the Wage and Hour Program, neither the NCUA nor the NCUA Board sent any notice to Perna that his claim had to be submitted to the NCUA for processing.

On April 18, 2018, Perna filed a claim with the AAA, naming HOCU and NCUA as respondents. Even though HOCU and NCUA had notice of the pending arbitration, their counsel, Robert Robine, refused to participate in the arbitration proceedings, asserting that Perna's Employment Agreement had been repudiated by the NCUA, and therefore the arbitration clause was no longer effective. The arbitrator ruled that the arbitration clause remained in effect despite the repudiation, and allowed the arbitration hearing to proceed. Respondents did not make any other objections to the arbitration, and refused to appear for the hearing before the AAA arbitrator on August 27, 2018.

On October 22, 2018, Samuel E. McCargo, the arbitrator for the AAA, issued his opinion and award in the arbitration matter.

B. Proceedings Below

Pursuant to the Michigan court rules, specifically M.C.R. 3.602(I), Perna filed an action in the Macomb County (Michigan) Circuit Court on November 7, 2018, for the limited purpose of confirming the arbitration award and have it reduced to a judgment. On January 2, 2019, respondents removed the matter to the United States District Court for the Eastern District of Michigan, relying on 28 U.S.C. §1446(d) as the authority for the removal. Perna filed a motion for summary judgment on May 3, 2019, and respondents filed a motion for summary judgment on May 17, 2019.

On July 15, 2019, the district court denied Perna's motion for summary judgment, and granted respondents' motion for summary judgment. The district court denied Perna's motion for reconsideration on August 5, 2019.

Perna filed a notice of appeal to the United States Court of Appeals for the Sixth Circuit on August 26, 2019. The Sixth Circuit issued its Opinion and Order affirming the district court's decision, but modifying the grant of summary judgment to a dismissal, on December 21, 2020. Perna filed a petition for a rehearing en banc, which was denied on January 26, 2021.

REASONS FOR GRANTING THE WRIT

This Court should grant review of this petition because the rulings of the Sixth Circuit are contrary to decisions by this Supreme Court, which have held that parties have the right to contractually agree to arbitrate disputes and select the forums to which matters can be adjudicated. The decision of the Sixth Circuit further deprives litigants access to the courts, in violation of the First Amendment guarantee to petition the Government for redress of grievances. The decision of the Sixth Circuit further contradicts decisions by this Supreme Court, which have held that judicial review of arbitration awards are severely limited, and as long as the arbitrator does not exceed the scope of his authority under the contract, then the award must be upheld. The Sixth Circuit did not uphold the arbitration award, even though it did not find that the arbitration was improper, but ruled that no court, not even the state court, had jurisdiction to confirm the award.

THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE DECISION BELOW DEPRIVES LITIGANTS OF A FORUM, VIOLATES THE FIRST AMENDMENT, AND GREATLY EXPANDS A COURT'S ABILITY TO REVIEW ARBITRATION AWARDS, CONTRARY TO PRIOR DECISIONS OF THIS SUPREME COURT

As noted in the Facts of the Case, petitioner Perna had an employment agreement with respondent HOCU, which contained an arbitration clause to resolve any dispute that arose from the contract. Perna's

contract was repudiated by respondent NCUA after it was appointed Conservator of HOCU. After Perna initiated an arbitration proceeding with the AAA, respondents refused to participate in the arbitration, asserting only that the employment agreement was repudiated. Under Michigan law, repudiation of a contract does not make a contract void *ab initio*. *See Semmens v. Floyd Rice Ford, Inc.*, 1 Mich. App. 395, 398, 136 N.W.2d 704, 706 (1965). This Supreme Court has likewise held that the parties' obligations under their arbitration clause survived contract termination when the dispute was over an obligation arguably created by the expired agreement. *Nolde Bros. v. Bakery & Confectionery Workers Union*, 430 U.S. 243, 252 (1977). The arbitrator agreed that the arbitration clause remained effective, and continued with the arbitration proceeding without the participation of respondents.

Following the arbitrator's decision and award in favor of Perna, Perna initiated a state court action, which is required under Michigan law to confirm the award and reduce the award into a judgment. Respondents then removed the case to the federal district court, and attacked the arbitration's validity.

Under Michigan law, "[j]udicial review of arbitration awards is limited." *Konal v. Forlini*, 235 Mich. App. 69, 74, 596 N.W.2d 630 (1990). "A court may not review an arbitrator's factual findings or decision on the merits[,]" may not second guess the arbitrator's interpretation of the parties' contract, and may not "substitute its judgment for that of the arbitrator." *City of Ann*

Arbor v. American Federation of State, Co. & Muni. Employees (AFSCME) Local 369, 284 Mich. App. 126, 144, 771 N.W.2d 843 (2009). Instead, the reviewing court's inquiry is limited to "whether the award was beyond the contractual authority of the arbitrator." *Id.* "[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, a court may not overturn the decision even if convinced that the arbitrator committed serious error." *Id* (quotation marks and citation omitted).

Federal law likewise provides for only limited judicial review of arbitration awards. Under the United States Arbitration Act, 9 U.S.C. §1, *et seq*., if a party has notification of an arbitration pursuant to an agreement to arbitrate, and that party does not believe the agreement to arbitrate is valid, then Section 4 of the Act provides the procedure for determining whether there was an agreement to arbitrate. 9 U.S.C. §4. "But after an award has been entered, section 4 is no longer in play; sections 9 and 10 are, and section 10 does not permit the person resisting enforcement of the award to go back and litigate the question whether there was an agreement to arbitrate." *Comprehensive Accounting Corp. v. Rudell*, 760 F.2d 138, 140 (7th Cir. 1985).

This Supreme Court ruled that the text of 9 U.S.C. §10, which provides for the grounds for vacating an arbitration award, is exclusive, and cannot be expanded. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586 (2008). The grounds for vacating an arbitration award under §10 are:

> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Following respondents' removal to the federal district court, respondents began attacking the validity of the arbitration, which must be done before an award is entered. 9 U.S.C. §4. Yet respondents sought to vacate the award, not on the grounds specified under §10, but by asserting that Perna's claim had to be submitted to the NCUA pursuant to the Federal Credit Union Act, 12 U.S.C. §1751, *et seq*. Only if "the arbitrator act[s] outside the scope of his contractually delegated authority"—issuing an award that "simply reflect[s] [his] own notions of [economic] justice" rather than "draw[ing] its essence from the contract"—may a court overturn his determination. *Eastern Associated Coal Corp. v. Mine Worker*, 531 U.S. 57, 62 (2000) (quoting *Paperworkers v. Misco*, 484 U.S., 29, 38 (1987)) (internal

quotation marks omitted). Thus, respondents' challenges to the arbitration constituted an impermissible collateral attack on the validity of the arbitration.

The lower courts allowed the collateral attack on the arbitration award, but instead of vacating the award, they rendered the award meaningless. The District Court granted summary judgment to respondents by declaring that the Federal Credit Union Act trumped the Federal Arbitration Act. It held that it lacked jurisdiction to confirm the award or enforce the award, relying on 12 U.S.C. §1787(b)(13)(C).

On appeal, the Sixth Circuit concluded that it likewise did not have subject matter jurisdiction to hear this case. "When a federal court concludes that it lacks subject-matter jurisdiction, the court must dismiss the complaint in its entirety." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006). While the Sixth Circuit did modify the District Court's grant of summary judgment, changing it to a dismissal, it did not remand the matter back to the Macomb County Circuit Court where the case originated. The reason the Sixth Circuit made this ruling is because it held that all creditor claims against HOCU had to be submitted to the NCUA pursuant to 12 U.S.C. §1787(b), and that no court has jurisdiction over any claim against a credit union pursuant to 12 U.S.C. §1787(b)(13)(D).

However, Perna was not a creditor. Respondents did not believe Perna was a creditor either, as they never sent notice to Perna, which is a requirement

under 12 U.S.C. §1787(b)(3)(B) and (C). Those statutory provisions state:

> (B) Notice requirements. The liquidating agent, in any case involving the liquidation or winding up of the affairs of a closed credit union, shall—
>
> (i) promptly publish a notice to the credit union's creditors to present their claims, together with proof, to the liquidating agent by a date specified in the notice which shall be not less than 90 days after the publication of such notice; and
>
> (ii) republish such notice approximately 1 month and 2 months, respectively, after the publication under clause (i).
>
> (C) Mailing required. The liquidating agent shall mail a notice similar to the notice published under subparagraph (B)(i) at the time of such publication to any creditor shown on the credit union's books—
>
> (i) at the creditor's last address appearing in such books; or
>
> (ii) upon discovery of the name and address of a claimant not appearing on the credit union's books within 30 days after the discovery of such name and address.

There was no dispute that respondents knew Perna's address, or that he was asserting that he was owed severance pay and other monetary relief due to the NCUA's repudiation of Perna's employment agreement. The only logical conclusion that can be drawn

from these facts is that respondents did not consider Perna to be a creditor. Yet the lower courts faulted Perna for not timely filing a claim even though he was not yet a creditor, and even though respondents did not comply with the mandatory notice requirements cited above, which was respondents' duty to enforce.

The lower courts demanded strict compliance from Perna, but gave a free pass to respondents who are charged with execution of the statutes. In order to make these determinations, the lower courts had to make findings of fact and conclusions of law, which means their decisions were on the merits of the arbitration itself. The lower courts determined that the arbitration itself was invalid, even though it was contractually mandated. Ordinarily, a court cannot issue a ruling on the merits "when it has no jurisdiction" because "to do so is, by very definition, for a court to act ultra vires." *Brownback v. King*, ___ U.S. ___. 141 S. Ct. 740, 749 (2021) (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101-102 (1998)).

The lawsuit Perna filed in state court was for the limited purpose of confirming the arbitration award and reducing it to a judgment for collection, as provided under the Michigan statutes and court rules. *See* M.C.L. 691.1685; M.C.L. 691.1702; M.C.L. 691.1705; M.C.R. 3.602(I). Perna's employment agreement required any dispute arising out of the employment agreement to be arbitrated by the AAA. Thus, the parties contractually bound themselves to a particular forum for resolving disputes arising out of the employment agreement. Several circuits have held that when

an action arises from a contract or contractual relationship between two parties, the choice of forum clause in that contract governs. *Advent Elec., Inc. v. Samsung Semiconductor*, 709 F. Supp. 843, 846 (N.D. Ill. 1989) (citing *Coastal Steel Corp. v. Tilghman Wheelabrator, Ltd.*, 709 F.2d 190, 203 (3d Cir.), cert. denied, 464 U.S. 938 (1983)); *Manetti-Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d 509, 514 (9th Cir. 1988); *Rini Wine Co. v. Guild Wineries & Distilleries*, 604 F. Supp. 1055 (N.D. Ohio 1985*); see also Interamerican Trade Corp. v. Companhia Fabracora de Pecas*, 973 F.2d 487, 490 (6th Cir. 1992).

The district court in *Advent Elect*. found that the choice of forum clause survived the termination of the agreement based on the broad language of the clause. 709 F. Supp. at 846. That court noted that the termination of a contract does not void a choice of forum clause unless the language of the contract expressly or implicitly indicates such a result. *Id*.; *see Nolde Bros.*, 430 U.S. at 252 (holding that an obligation to act pursuant to an arbitration clause does not automatically end upon the termination of the agreement). Respondents' attack on the arbitration in the federal court was that the proper forum was with the NCUA Board. However, as the Eleventh Circuit explained in *In re Ricoh*, 870 F.2d 570 (11th Cir. 1989):

> The federal courts traditionally have accorded a plaintiff's choice of forum considerable deference. Thus, in the usual motion for transfer under section 1404(a), the burden is on the movant to establish that the suggested forum

> is more convenient. When, however, the parties have entered into a contract containing a valid, reasonable choice of forum provision, the burden of persuasion is altered.
>
> In attempting to enforce the contractual venue, the movant is no longer attempting to limit the plaintiff's right to choose its forum; rather, the movant is trying to enforce the forum that the plaintiff had already chosen: the contractual venue. In such cases, we see no reason why a court should accord deference to the forum in which the plaintiff filed its action. Such deference to the filing forum would only encourage parties to violate their contractual obligations, the integrity of which are vital to our judicial system . . . We [therefore] conclude that when a motion under section 1404(a) seeks to enforce a valid, reasonable choice of forum clause, the opponent bears the burden of persuading the court that the contractual forum is sufficiently inconvenient to justify retention of the dispute.

Id. at 573 (citations omitted). After Perna filed in the state court, respondents removed the matter to federal court, which was not proper according to the Sixth Circuit's Opinion. The Sixth Circuit noted that Perna was not a "creditor," which would preclude removal under 12 U.S.C. §1789(a)(2). Perna's lawsuit was based on Michigan arbitration law, so the federal question statute, 28 U.S.C. §1331 did not apply. The Sixth Circuit also rejected respondents' federal officer removal statute argument, which was based on 28 U.S.C. §1442(a)(1).

There was no basis for respondents to challenge the forum selection clause in the employment agreement. Respondents merely asserted that the employment agreement had been repudiated, thus insinuating that the entire employment agreement had been voided *ab initio*. Only when the matter was before the federal District Court did respondents assert that the dispute was litigated in an incorrect forum.

The court's decision leaves Perna no forum where he can litigate his contractual claim, completely depriving him of access to the judicial system. Thus, to the extent that the Sixth Circuit's ruling holds that Perna's case cannot be considered by any court, state or federal, pursuant to 12 U.S.C. §1787(b)(13)(D), Perna submits that this statutory provision is unconstitutional under the First Amendment. The First Amendment guarantees "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The right to petition for a redress of grievances includes the right of access to courts. In *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983), this Supreme Court "recognized that the right of access to the court is an aspect of the First Amendment right to petition the Government for redress of grievances." *Id.* at 741 (citing *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972)). Thus, any federal statute that purports to deprive a person access to the court system violates the First Amendment right to petition the Government for

redress of grievances, and should be stricken as unconstitutional.

There is no case that Perna could find where this Supreme Court ruled on whether an unauthorized removal to federal court from a state court must be remanded back to the state court. In *Baggs v. Martin*, 179 U.S. 206 (1900), this Supreme Court allowed the federal court to consider a case which had been questionably removed from state court because the federal court still had subject matter jurisdiction over the matter. Years later, this Supreme Court cited *Baggs* in holding that the absence of a "right to removal" does not pose a jurisdictional problem so long as the district court "would have had original jurisdiction" over the removed action. *Am. Fire & Cas. Co. v. Finn*, 341 U.S. 6, 16 (1951). Thus, it would appear that this Supreme Court would find that remand is necessary when a federal court does not have original jurisdiction over a removed case. Accordingly this is a case of first impression as to this issue, which Perna submits should be considered by this Supreme Court.

In this case, the lower courts found that they lacked subject matter jurisdiction, but the Sixth Circuit went further and asserted that even the state court lacked jurisdiction, even though the Sixth Circuit noted that the state court matter was an arbitration case based on state law. While there are no decisions from this Supreme Court that are directly on point, this Supreme Court has held that "[w]henever it appears . . . that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." *Steel Co.*,

523 U.S. at 94-95 (quoting Fed. R. Civ. P. 12(h)(3)), and "[i]f at any time before final judgment [in a removed case] it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." *Ruhrgas Ag v. Marathon Oil Co.*, 526 U.S. 574, 583-84 (1999) (quoting 28 U.S.C. §1447(c) (1994 ed., Supp. III)).

The Sixth Circuit's Opinion was recommended for publication. Thus, if allowed to stand, the Sixth Circuit's ruling would set forth binding precedence that would greatly expand a court's review of arbitration awards, contrary to 9 U.S.C. §§9-11, violate Perna's First Amendment right to seek redress of grievances through the judicial system, and further allow a federal court without subject matter jurisdiction over a removed case to dismiss the case without remanding it to the originating state court. These rulings are either a case of first impression, or are in direct conflict with prior rulings by this Supreme Court. Accordingly, Perna respectfully requests that this Supreme Court grant his petition for writ of certiorari.

CONCLUSION

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

Respectfully submitted,

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