No. 20-695

In the Supreme Court of the United States

DEREK PIERSING, on Behalf of Himself and All Others Similarly Situated,
Petitioner,
v.
DOMINO'S PIZZA FRANCHISING LLC; DOMINO'S PIZZA MASTER ISSUER LLC; DOMINO'S PIZZA LLC; and DOMINO'S PIZZA, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the incorporation in an arbitration agreement of arbitration rules that permit the arbitrator to decide questions of arbitrability constitutes a clear and unmistakable delegation of those questions to the arbitrator.

RULE 29.6 DISCLOSURE STATEMENT

Domino's Pizza Franchising LLC, Domino's Pizza Master Issuer LLC, Domino's Pizza LLC, and Domino's Pizza, Inc. state that Domino's Pizza, Inc. is publicly traded. Domino's Pizza Franchising LLC, Domino's Pizza Master Issuer LLC, and Domino's Pizza LLC are all indirect subsidiaries of Domino's Pizza, Inc. Domino's Pizza, Inc. has no parent corporation, and no publicly held company owns 10% or more of its stock. There is no publicly held corporation not a party to this proceeding which has a financial interest in the outcome of the proceeding.

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The opinion of the court of appeals (Pet. App. 1-23) affirming the district court's order is reported at 962 F.3d 842. The opinion of the district court (Pet. App. 24-39) is unreported, but it is available at 2019 WL 5543027.

JURISDICTION

The judgment the court of appeals was entered on June 17, 2020. The petition for a writ of certiorari was filed on November 16, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

A. Summary of the Argument

The petition here does not warrant this Court's review and should be denied. This Court has declined to review the question raised here on four prior occasions for good reason. The twelve federal courts of appeal to consider the question presented have held that an agreement incorporating privately promulgated arbitral rules that themselves assign questions of arbitrability to the arbitrator—such as the American Arbitration Association National Rules for the Resolution of Employment Disputes ("AAA Rules")—clearly and unmistakably evidence the parties' agreement that an arbitrator, not the court, will resolve these questions. The AAA Rules that were incorporated into Petitioner's arbitration agreement authorized the arbitrator to determine his or her own jurisdiction. Pet. App. 5-6 (quoting AAA R. 61-6, Pg. ID

989).[1] The incorporation of the AAA Rules satisfies the "clear and unmistakable evidence" standard under this Court's precedent for delegating gateway questions of arbitrability to the arbitrator. *See First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68-70 (2010). The state courts of last resort that have addressed the question are generally in agreement with the consensus rule.

Congress enacted the Federal Arbitration Act ("FAA") "[t]o overcome judicial resistance to arbitration," *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006), and "declare a national policy favoring arbitration of claims that parties contract to settle in that manner." *Preston v. Ferrer*, 552 U.S. 346, 353 (2008) (cleaned up). Section 2 of the FAA, is the Act's "primary substantive provision." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). It provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole

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[1] Currently Rule 7(a) of the AAA Commercial Arbitration Rules and Mediation Procedures. *See* <adr.org/commercial>. For the remainder of this brief, Respondents will only refer to the AAA Rules to discuss the incorporation of privately promulgated rules that themselves authorize the arbitrator to rule on his or her own jurisdiction. However, other such rules exist and are equally relevant to the general rule followed by all federal circuit courts that have addressed this issue.

> or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

Section 2 of the FAA "places arbitration agreements on an equal footing with other contracts and requires courts to enforce them according to their terms." *Rent-A-Ctr.*, 561 U.S. at 67 (cleaned up). "[A]rbitration is simply a matter of contract between the parties." *First Options*, 514 U.S. at 943. Thus, the FAA "allows parties to agree by contract that an arbitrator, rather than a court, will resolve threshold arbitrability questions as well as underlying merits disputes." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 527 (2019). Where, as here, parties "clear[ly] and unmistakab[ly]" evidence an intent to "arbitrate arbitrability," courts must cede the floor to an arbitrator and enforce that term of the agreement just as they would any other term. *First Options,* 514 U.S. at 943-44.

Parties may objectively evidence an intent to arbitrate arbitrability by including in the agreement what has been referred to as a "delegation provision" since this Court's decision in *Rent-A-Center*. 561 U.S. at 68. A "delegation provision is an agreement to arbitrate threshold issues concerning the arbitration agreement." *Ibid.* "[T]he FAA operates on this additional arbitration agreement just as it does on any

other." *Id*. at 70. Twelve courts of appeal have held that an agreement's incorporation of privately promulgated arbitration rules, such as the AAA Rules, which delegate threshold arbitrability issues and questions of jurisdiction to the arbitrator, constitutes such an antecedent agreement and clearly and unmistakably manifests the parties' agreement for an arbitrator to resolve those questions. *See, e,g., Belnap v. Iasis Healthcare*, 844 F.3d 1272, 1283-84 (10th Cir. 2017). No federal court of appeals has held otherwise.

This consensus rule is correct and consistent with this Court's precedent. The rule utilizes an objective means of ascertaining whether the parties to an agreement agreed to arbitrate issues arising from the contract, including threshold issues such as arbitrability itself. *Rent-A-Ctr.*, 561 U.S. at 69 n.1 (the "clear and unmistakable requirement pertains to the parties' manifestation of intent") (cleaned up). Moreover, this Court's precedent permits reliance on incorporated arbitral rules to govern the scope of an arbitrator's jurisdiction. *Preston*, 552 U.S. at 361, 363. The district court's grant of Respondents' motion to compel arbitration and the Sixth Circuit's affirmance properly applied this Court's precedent since *First Options*. And the Sixth Circuit expressly joined the eleven other courts of appeal to have held that the incorporation of arbitration rules that permit the arbitrator to resolve questions of arbitrability is sufficient to delegate those questions to the arbitrator. Thus, it is not surprising that this Court has repeatedly declined to grant review on the incorporation question raised here. This case does not warrant a different result.

B. Statement of Facts and Procedural History Relevant to the Question Presented

There are thousands of Domino's stores in the United States, the vast majority of which are franchised to and owned and operated by independent business owners. Pet. App. 3. One of those franchisees hired Petitioner to perform services at a franchise store located in Washington state. *Id.* As part of his new hire paperwork, Petitioner signed an arbitration agreement that required certain employment related issues be resolved through arbitration in accordance with the AAA Rules. *Id.* Under the heading "Binding Arbitration of Disagreements and Claims," the arbitration agreement states, in relevant part, that the parties:

> . . . mutually promise, agree, and consent to resolve any claim covered by this Agreement through binding arbitration, rather than through court litigation. Employee and Company further agree that such binding arbitration pursuant to this Agreement shall be the sole and exclusive remedy for resolving any claims or disputes covered by this Agreement.
>
> ***
>
> 4. Arbitration Rules and Procedures
>
> - AAA rules
>
> The American Arbitration Association ('AAA') will administer the arbitration

> and the arbitration will be conducted in accordance with then-current AAA National Rules for the Resolution of Employment Disputes ('AAA Rule'). The AAA Rules are available on the AAA's website (www.adr.org).

Pet. App. 41, 43. The AAA Rules current during the relevant time period provide:

> [T]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.

Id. at 5-6 (quoting AAA R. 61-6, Pg. ID 989).

After separating from the company, Petitioner and another named plaintiff filed a class action federal antitrust suit. Pet. App 4. Respondents moved to compel arbitration. *Id*. Petitioner opposed the motion arguing that the franchisee, not Respondents, signed the agreement. *Id*.[2] The district court granted the motion, directing the parties to arbitration after finding Petitioner (and his co-plaintiff) agreed to arbi-

[2] Petitioner does not argue this issue before this Court. *See* Pet. 9-10, 12 n.6. Moreover, any challenge to the propriety of Respondents enforcing the arbitration agreement is one for the arbitrator. *See* Pet. App. 6; *see also First Options*, 514 U.S. at 944.

trate both the merits and gateway questions of arbitrability. *Id*. Petitioner appealed that decision to the Sixth Circuit.

The Sixth Circuit affirmed the district court, expressly bringing to twelve the total of federal courts of appeal to hold that incorporation of the AAA Rules constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability. Pet. App. 5-6, 23.

The Sixth Circuit first recognized that it is well-settled law nationally, and in Washington state specifically, that parties may incorporate outside documents into their agreement. Pet. App. 6. The Sixth Circuit found that the agreement incorporated the AAA Rules into the contract and included a link to the AAA's website. *Id*.

The Sixth Circuit then looked to this Court's precedent, noting that (1) the AAA Rules "provide that arbitrators have the power to resolve arbitrability questions," *see Henry Schein*, 139 S. Ct. at 528, and (2) this Court has relied on the incorporation of the AAA Rules, in particular, when determining the intent of the parties. *See Preston*, 552 U.S. at 361-63. The Sixth Circuit easily concluded that it would apply the general rule as expressly applied by the eleven other federal courts of appeal.

Accordingly, the Sixth Circuit affirmed the district court, holding that the incorporation of the AAA Rules constituted clear and unmistakable evidence that the parties agreed to delegate questions regarding the arbitrator's jurisdiction to the arbitrator.

REASONS FOR DENYING THE PETITION

A. There is no Split of Authority Warranting Review on the Question Presented.

As Petitioner concedes, *see, e.g.,* Pet. 12, the twelve federal courts of appeal that have addressed the question presented are unanimous in holding that the incorporation of arbitration rules that permit the arbitrator to resolve questions of arbitrability is sufficient to delegate those questions to the arbitrator. *See Awuah v. Coverall N. Am., Inc.*, 554 F.3d 7, 11 (1st Cir. 2009); *Contec Corp. v. Remote Sol., Co.*, 398 F.3d 205, 208-09 (2d Cir. 2005); *Richardson v. Coverall N. Am., Inc.*, 811 F. App'x 100, 103-04 (3d Cir. 2020) (not precedential); *Simply Wireless, Inc. v. T-Mobile U.S., Inc.*, 877 F.3d 522, 527-28 (4th Cir. 2017), *cert denied*, 139 S. Ct. 915 (2019); *Petrofac, Inc. v. DynMcDermott Petrol. Operations Co.*, 687 F.3d 671, 675 (5th Cir. 2012); *McGee v. Armstrong*, 941 F.3d 859, 865-67 (6th Cir. 2019); *Fallo v. High-Tech Inst.*, 559 F.3d 874, 878 (8th Cir. 2009); *Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015); *Dish Network L.L.C. v. Ray*, 900 F.3d 1240, 1246 (10th Cir. 2018); *Terminix Int'l Co., LP v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327, 1332 (11th Cir. 2005); *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1372-73 (Fed Cir. 2006); *Chevron Corp. v. Ecuador*, 795 F.3d 200, 207-08 (D.C. Cir. 2015). Petitioner does not contest the unanimity of federal case law on this issue. *See* Pet. 14.

The highest courts of Alabama, Arkansas, Delaware, Kentucky, New York, and West Virginia have adopted the same rule. *See Eickhoff Corp. v. Warrior Met Coal, LLC*, 265 So. 3d 216, 222 (Ala. 2018); *HPD, LLC v. TETRA Techs., Inc.*, 424 S.W.3d 304, 310-11

(Ark. 2012); *James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76, 80 (Del. 2006); *Ally Align Health, Inc. v. Signature Advantage, LLC*, 574 S.W.3d 753, 756 (Ky. 2019); *Garthon Bus. Inc. v. Stein*, 86 N.E.3d 514, 514 (N.Y. 2017); *W. Va. CVS Pharmacy, LLC v. McDowell Pharmacy, Inc.*, 796 S.E.2d 574, 588 (W. Va. 2017). Given the general consensus on this issue, it is not surprising that this Court has repeatedly declined to grant review on the incorporation question raised here. *See Archer & White Sales, Inc. v. Henry Schein*, No. 19-1080, 2020 WL 3146709 (U.S. June 15, 2020); *Simply Wireless, Inc. v. T-Mobile U.S., Inc.*, 139 S. Ct. 915 (2019); *Limited Liab. Co. v. Doe*, 569 U.S. 1029 (2013); *Dunn v. Nitro Distrib., Inc.*, 549 U.S. 1077 (2006).

Petitioner is wrong to suggest that the courts of last resort in Montana, New Jersey, and South Dakota are all in conflict with the consensus identified above. The Montana and New Jersey decisions do not stand for the proposition that "referencing the AAA rules is insufficient to find the parties agreed to delegate arbitrability to the arbitrator." *See* Pet. 18-19. In *Global Client Solutions, LLC v. Ossello*, the Montana Supreme Court rejected the argument that the incorporation of the AAA Rules into the agreement to arbitrate constituted an agreement to arbitrate arbitrability because the AAA Rules were not a part of the record and neither party specified in their briefing which set of rules was supposedly incorporated. 367 P.3d 361, 369 (Mont. 2016).

In *Morgan v. Sanford Brown Institute*, 137 A.3d 1168 (N.J. 2016), the New Jersey Supreme Court re-

fused to enforce a purported delegation provision because the defendants did not clearly state that they were relying on a delegation clause in seeking to compel arbitration, *see id*. at 1172, the arbitration provision "did not have a clearly identifiable delegation clause," *see ibid*., and the provision did not state in broad enough language that "arbitration [was] a substitute for the right to seek relief in [state court]." *Id*. at 1179. (This Court's decision in *Kindred Nursing Centers Limited Partnership v. Clark*, 137 S. Ct. 1421 (2017), makes the validity of this reasoning questionable.)

Lastly, in a footnote in a 2005 decision, the South Dakota Supreme Court addressed the incorporation question in the only arguably conflicting opinion identified by Petitioner. *Flandreau Pub. Sch. Dist. No. 50-3 v. G.A. Johnson Constr., Inc*., 701 N.W.2d 430 (S.D. 2005). The court's reasoning was largely comprised of a comparison to a federal district court case that enforced a delegation provision which incorporated rules regarding arbitrability ***and*** expressly stated that "the arbitrability of any issue" would be settled by arbitration. *Id*. at 436 (emphasis omitted). The South Dakota Supreme Court did not fully analyze whether the incorporation of the AAA Rules, in and of itself, warranted delegation. Instead, the court simply declined to make a *per se* rule at that time in a footnote. *Id*. at 437 n.6. No case since has relied upon this outlier to reach the same conclusion.

B. The Consensus View on the Question Presented is Correct and Does Not Conflict with *First Options*.

Incorporation of the AAA Rules, which themselves provide that the arbitrator will decide questions of arbitrability, is clear and unmistakable evidence that the parties intended to delegate threshold questions of arbitrability to the arbitrator. "[A]rbitration is simply a matter of contract between the parties." *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995). "The Act allows parties to agree by contract that an arbitrator, rather than a court, will resolve threshold arbitrability questions as well as underlying merits disputes." *Henry Schein, Inc. v. Archer & White, Sales, Inc.*, 139 S. Ct. 524, 527 (2019). By incorporating into their arbitration agreement rules (like the AAA Rules) that grant an arbitrator the power to address the validity, enforceability and scope of an arbitration agreement, parties clearly and unmistakably evidence their agreement to have the arbitrator resolve questions of arbitrability—including whether the arbitrator or the court has jurisdiction over those questions. *See, e.g., Belnap v. Iasis Healthcare*, 844 F.3d 1272, 1283-84 (10th Cir. 2017).

When parties incorporate arbitral rules into an agreement, "the two form a single instrument" that should be interpreted—and enforced—as such. 11 *Williston on Contracts* § 30:25, at 304-06 (4th ed. 2020). Where, as here, the incorporated arbitral rules clearly and unmistakably state that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement," *see* Pet. App. 5-6, this Court's standard as set

forth in *First Options* and affirmed in *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63 (2010), is satisfied. *See Henry Schein*, 139 S. Ct. at 529.

By signing the contract at issue, Petitioner expressly agreed that: (1) claims covered by the Agreement would be resolved "through binding arbitration, rather than through court litigation," (2) the AAA "will administer the arbitration," and (3) "the arbitration will be conducted in accordance with then-current AAA National Rules." Pet. App. 41, 43. The then-current AAA Rules provided that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement." *Id.* at 6. Consequently, the single contract executed by Petitioner stated both that all claims arising from the contract would be subject to arbitration and that the incorporated AAA Rules would govern arbitral issues, including jurisdictional challenges to the arbitrator's authority. Thus, the incorporated AAA Rules applicable to this dispute clearly and unmistakably provide that the arbitrator should determine in the first instance whether he or she has jurisdiction over Petitioner's underlying claims against Respondents.

This Court's decision in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, supports the propriety of an arbitrator ruling on his or her own jurisdiction in the first instance. 514 U.S. 52 (1995). In *Mastrobuono*, this Court considered whether a New York choice-of-law provision permitted New York's rules regarding arbitrator authority to take priority over the privately promulgated arbitrator rules that were incorporated

into the agreement. *Id*. at 54-55. The Court held that the best way to "harmonize" the two provisions was to read the choice-of-law clause as encompassing substantive, contract law principles that New York law would apply, "but not to include [New York's] special rules limiting the authority of arbitrators." *Id*. at 63-64. Later, in *Preston v. Ferrer*, this Court affirmed that decision, again interpreting the incorporation of the AAA Rules as evidence that those rules governed the arbitrator's authority. 552 U.S. 346, 361-63 (2008). Petitioner argues that the Sixth Circuit inappropriately relied on this precedent because it does not expressly address delegation. Pet. 17. That is not the point. This precedent supports the reliance by every federal court of appeal to address this issue on (1) incorporated privately promulgated arbitral rules, that (2) establish an arbitrator's authority where they themselves address that issue.

Petitioner's argument that the consensus view conflicts with this Court's decision in *First Options* is wrong. In fact, the reasoning in the opinions of each court of appeal to adopt the general incorporation rule demonstrates that those courts followed this Court's holding in *First Options*. Petitioner's argument that the courts of appeal followed the First Circuit's decision in *Apollo Computer, Inc. v. Berg*, 886 F.2d 469 (1st Cir. 1989), rather than *First Options* is likewise wrong. As evidenced by the Second Circuit's analysis in *Contec Corp v. Remote Solution,* as an example, courts of appeal have cited *Apollo* for its factual similarity and reasoning, but relied on *First Options* for the standard by which to measure whether the agreement before them presented clear and unmistakable

evidence that the presumption in favor of courts resolving questions of arbitrability should be reversed. 398 F.3d 205, 208-10 (2d Cir. 2005). Likewise, the Sixth Circuit below cited to *Apollo* when explaining that other courts of appeal had reached the same decision, though it followed and relied upon *First Options* and *Rent-A-Center* to reach its holding. *See* Pet. App. 10, 14, 17, 20-21.

Petitioner's remaining related arguments are equally meritless. For example, Petitioner argues that the arbitration agreement only incorporates the AAA Rules as to claims that fall under the agreement. The Sixth Circuit correctly rejected this argument. As discussed above, nothing in the plain language of the agreement so limits the incorporation of the AAA Rules. Per the agreement and the incorporated AAA Rules, the scope of any such limitation is to be determined by the arbitrator, who has the authority to determine the scope and validity of the arbitration agreement. "Parties are generally free to structure their arbitration agreements as they see fit. . . . [S]o too may they specify by contract the rules under which the arbitration will be conducted." *Mastrobuono*, 514 U.S. at 57. If, as Petitioner argues, the AAA Rules were only effectively meant to govern court-ordered arbitrations, *see* Pet. 13, the agreement should have stated as much. It does not. And Petitioner's argument that the absence of that language should hold more weight than the incorporated AAA Rules as interpreted by twelve federal courts of appeal bears no semblance to reason.

Petitioner also contends that the applicable AAA Rule does not exclusively delegate arbitrability disputes to arbitrators. As the Sixth Circuit correctly

reasoned, even though the AAA Rules do not use the word "exclusive," it is understood "in law the expression of one thing often implies the exclusion of other things." Pet. App. 15 (quoting *Brueswitz v. Wyeth LLC*, 562 U.S. 223, 232-33 (2011)). Here, the specific identification of the arbitrator's authority necessarily excluded any sharing of that authority with the courts. Moreover, Petitioner's argument contravenes this Court's precedent that courts may not rule on questions "assigned by contract to an arbitrator." *Rent-A-Ctr.*, 561 U.S. at 67. To permit courts to resolve arbitrability questions where the contract provides that claims governed by the agreement are subject to arbitration and the AAA Rules would violate that principle. It would also necessarily create more litigation (and confusion) as to who has authority over a given "arbitrability" dispute, and "whether" a dispute exists in the first instance. The FAA was meant to provide clarity on a "national policy favoring arbitration." *Preston*, 552 U.S. at 353. Petitioner's proffered rule would do the exact opposite.

Accordingly, the Sixth Circuit correctly held the incorporation of the AAA Rules provided clear and unmistakable evidence of the parties' agreement to delegate gateway questions of arbitrability to the arbitrator.

C. The Petitioner's Sophistication Level is not Properly Before this Court and, in Any Event, this Court's "Clear and Unmistakable" Standard is Objective.

Petitioner's last argument—that the Court should grant certiorari to impose an exception to the incorporation consensus rule where, as here, a party is purportedly unsophisticated—also fails to warrant

review. *See* Pet. 33-35. Petitioner asks this Court to assume that employees like him and, more generally, all consumers are unsophisticated and thus cannot grasp the import of the agreements they sign. Petitioner, however, failed to present any evidence of his lack of "sophistication" below, and this matter does not involve a consumer agreement. Thus, this case is not an appropriate vehicle to resolve any question regarding sophistication of contracting parties. *Nevada Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 128-29 (2011).

In any event, as the Sixth Circuit correctly noted, nothing in the FAA distinguishes between "sophisticated" and "unsophisticated" parties. Pet. App. 21. Consequently, courts of appeal that have considered whether to apply the general incorporation rule for agreements between "sophisticated" and "unsophisticated" parties have done so without relying on the subjective understanding of the parties. *See, e.g., Richardson*, 811 F. App'x at 103-04; *McGee*, 941 F.3d at 863, 865-66; *Arnold v. Homeaway, Inc.*, 890 F.3d 546, 548-49, 551-52 (5th Cir. 2018); *Green v. SuperShuttle Int'l, Inc.*, 653 F.3d 766, 767-69 (8th Cir. 2011); *Brennan*, 796 F.3d at 1130-31. As explained in *Rent-A-Center*, courts must look to "the parties' *manifestation of intent*" when considering whether the "clear and unmistakable" standard has been met. 561 U.S. at 69 n.1. That clear and unmistakable standard was met here.

Accordingly, this policy argument also fails to raise a question worthy of this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 21, 2020

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