No. _____

IN THE

Supreme Court of the United States

KATHRYN A. FLYNN,

Petitioner,

v.

UNITED STATES DEPARTMENT OF THE ARMY,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Where a federal employee's administrative complaint under the Whistleblower Protection Act identifies the Agency's adverse actions and seeks relief pursuant to the WPA, but identifies only some of the protected activities alleged to contribute to the adverse action, did the Ninth Circuit correctly hold, in conflict with the First, Fourth and Seventh Circuits, that the employee failed to properly exhaust administrative remedies as to the omitted protected activities?

II. Where the Whistleblower Protection Act, 5 U.S.C. § 2302(b)(8)(A)(i), prohibits retaliation because of "(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—(i) any violation of any law, rule, or regulation"; and at § 2302(b)(9)(A)(i) prohibits retaliation because of "the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation—(i) with regard to remedying a violation of paragraph (8)"; and where Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16, prohibits discrimination against federal employees on the bases of, *inter alia*, gender and reprisal, did the Ninth Circuit correctly hold that the WPA does not protect federal employees from reprisal for filing a sexual harassment and retaliation complaint?

III. If a prior adjudication held that certain protected activities were not properly exhausted, is the whistleblower's subsequent complaint raising those protected activities barred by *res judicata*?

DIRECTLY RELATED PROCEEDINGS

Pursuant to Rule 14.1(b)(iii), petitioner is not aware of any directly related proceedings in federal trial and appellate courts. She is a party to two consolidated administrative proceedings against the Respondent before the Equal Employment Opportunity Commission (EEOC), case Nos. 550-2019-00255X and 550-2019-00257X, and she has a separate complaint of discrimination pending before the Respondent's Equal Employment Opportunity Agency, No. ARPOM20AUG02807.

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The April 21, 2020, Memorandum opinion of the court of appeals is not reported but is set out in the Appendix at App. 1. The July 31, 2018, Initial Decision of the Merit Systems Protection Board (MSPB), which was not reported, is set out at App. 5. The August 20, 2020, Order Denying Rehearing in the court of appeals is not reported, but is set out at App. 33.

The March 21, 2016, Initial Decision of the MSPB in Dr. Flynn's first appeal is set out at App. 34. The MSPB's January 6, 2017, Final Decision and Ninth Circuit's January 8, 2019, affirmance are at App. 63 and 76, respectively.

JURISDICTION

The decision of the court of appeals was entered on April 21, 2020. A timely petition for rehearing and rehearing *en banc* was denied on August 20, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Whistleblower Protection Act, 5 U.S.C. § 2302(b)(1)(A), (8)(A) and (9)(A)

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—

(1) discriminate for or against any employee or applicant for employment—

(A) on the basis of race, color, religion, sex, or national origin, as prohibited under section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000E–16);

…

(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of—

(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—

(i) any violation of any law, rule, or regulation ….

if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs[.]

…

(9) take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of—

(A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation—

(i) with regard to remedying a violation of paragraph (8); or

(ii) other than with regard to remedying a violation of paragraph (8);

MSPB Jurisdiction, 5 U.S.C. § 1221(a)

(a) [A]n employee, former employee, or applicant for employment may, with respect to any personnel action taken, or proposed to be taken, against such employee, former employee, or applicant for employment, as a result of a prohibited personnel practice described in section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D), seek corrective action from the Merit Systems Protection Board.

All Circuits Review Act, 5 U.S.C. § 7703(b)(1)

(b)(1)(A) Except as provided in subparagraph (B) and paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review shall be filed within 60 days after the Board issues notice of the final order or decision of the Board.

(B) A petition to review a final order or final decision of the Board that raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C), or (D) shall be filed in the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. Notwithstanding any other provision of law, any petition for review

> shall be filed within 60 days after the Board issues notice of the final order or decision of the Board.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–16(a)

(a) Discriminatory practices prohibited; employees or applicants for employment subject to coverage

> All personnel actions affecting employees or applicants for employment … in military departments as defined in section 102 of title 5, in executive agencies as defined in section 105 of title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Regulatory Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Publishing Office, the Government Accountability Office, and the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

From 2007 to 2013, Dr. Kathryn Flynn served as an Associate Professor at the Army's Defense Language Institute and Foreign Language Center (DLIFLC) in Monterey, California. She had a time-limited "not-to-exceed" (NTE) appointment. In her May 2012 mid-year review, her supervisor, Dr. Gary Hughes, told her that her performance was outstanding, as it had been in four previous years.

In August, 2012, she disclosed to superior officials her concern that Army merit promotion regulations were violated in a promotion for which she was not selected. App. 15. One of those officials, Lt. Col. Laura Ryan, responded by threatening to discipline Dr. Flynn and instructing her not to contact her again.

Also, in August, 2012, Dr. Flynn complained about harassment by a different coworker. Dr. Hughes told her that she would lose her job if she filed an equal employment opportunity (EEO) or other formal complaint. Dr. Flynn responded by saying that if her job was on the line, she would have to file an EEO complaint. Dr. Hughes thereafter issued a Notice of Warning to Dr. Flynn, but not to the coworker who harassed her. Dr. Flynn commenced her EEO proceeding in September 2012 alleging sexual harassment and retaliation, App. 2, 10, 18, and Dr. Hughes promptly gave Dr. Flynn a performance rating of "fair" noting that she needed to improve her interpersonal relations. App. 10.

While her EEO complaint was pending, Dr. Flynn repeatedly complained to her first and second level supervisors that she was subjected to a hostile work environment. In October 2012, Dr. Hughes issued a reprimand to Dr. Flynn and instructed her to follow her chain of command. In January 2013, Dr. Sherilyn Kam informed Dr. Flynn that she was now her second-level supervisor. Dr. Kam's instructions to the faculty about a division-wide assignment were unclear, with the result that every faculty member had to ask for clarification. Only Dr. Flynn was disciplined for requesting clarification. App. 18.

In March 2013, Dr. Hughes proposed to suspend Dr. Flynn for failing to follow the chain of command.[1] App. 37. In addition, he reassigned Dr. Flynn to perform contract management duties for the "Working Memory" project (WMP) over her objection that she did not have the necessary experience or training in contract management. App. 37-38. Dr. Flynn requested training in contract management

1 Mr. Bilgen made the decision to impose that suspension in April 2013. App. 10-11.

and Dr. Hughes and Mr. Bilgen denied her request. Dr. Flynn later learned that the contract assigned to her was the subject of a criminal investigation. App. 42. Nevertheless, Dr. Flynn discovered numerous irregularities in the contract, which she reported to her chain of command in emails on April 24 and May 2, 7 and 15, 2013. App. 38-41.

On May 15, 2013, Dr. Hughes asked his HR office to fire Dr. Flynn because she was trying to "entrap" him and other staff into "wrongdoing." App. 40. In an email the next day, Assistant Director Jurgen Sottung concurred saying Dr. Flynn "challenges and questions everyone and everything in an endless stream of email[.]" *Id*. The Army approved Dr. Hughes' proposal to suspend Dr. Flynn, but by July it decided instead not to renew her contract of employment. App. 43.

On August 8, 2013, Dr. Hughes notified Dr. Flynn of his recommendation not to renew her contract of employment. App. 43. Dr. Hughes immediately removed Dr. Flynn from managing the WMP. On August 27, 2013, Mr. Bilgin notified Dr. Flynn of his final decision not to renew her contract.

Dr. Flynn filed a complaint against the non-renewal of her contract with the Office of Special Counsel (OSC) alleging that it was retaliation in violation of the Whistleblower Protection Act (WPA). App. 34-35, 44. She made a timely appeal of that complaint to the Merit Systems Protection Board (MSPB) where an Administrative Judge (AJ) conducted a hearing. That AJ, however, refused to consider whether any of Dr. Flynn's activities before May 23, 2013, had caused her adverse treatment and non-renewal of her employment. The AJ cited to one place in

the OSC complaint that identified May 23, 2013, as the date of the first protected activity, and concluded that claims arising from prior protected activities were not properly exhausted. App. 41. The Ninth Circuit affirmed the exclusion of the EEO complaint as a protected activity based on the finding that it had not been properly exhausted and the MSPB lacked jurisdiction. App. 77.

Dr. Flynn refiled her complaint with the OSC asserting that her earlier protected activities, including her EEO complaint, caused the Agency's adverse actions including non-renewal of her contract. The MSPB and the Ninth Circuit dismissed these claims holding that (1) her participating in the EEO process is not protected by the WPA, and (2) *res judicata* prevented readjudication of her claims relating to mismanagement and abuse of government contracts. App. 2-3.

Dr. Flynn timely petitions this Court for a *writ of certiorari*.

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit's first decision in this case conflicts with decisions of the First, Fourth and Seventh Circuits.

Retaliation claims arise from an employer's adverse actions, and not from the employee's protected activities. If a whistleblower reports a violation of law, rule or regulation and there is no adverse action, there is no claim of retaliation. Conversely, if an employee engages in no protected activity, but the employer terminates the employee on a mistaken belief about protected activity, then the employee does have a valid claim for retaliation. *Heffernan v. City of Paterson*, 578 U.S. ___, 136 S. Ct. 1412 (2016).

The MSPB and Ninth Circuit erred in Dr. Flynn's first appeal by refusing to consider her protected activities predating May 23, 2013, on grounds of lack of exhaustion.[2] Dr. Flynn properly exhausted her claims by seeking relief for the adverse actions. App. 77. The dates of her protected activities were items of evidence in support of her claim, but they were not jurisdictional elements of the claim. The First Circuit correctly determined the MSPB's jurisdiction to adjudicate WPA claims based on protected activities that were not separately exhausted. In *Mount v. Department of Homeland Security*, 937 F.3d 37, 45 (1st Cir. 2019), it held

2 This Court generally declines to accept cases for review until they are fully and finally adjudicated in the courts below. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967); *Virginia Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., concurring in denial of a writ of certiorari). Therefore, it is appropriate for Dr. Flynn to raise this error from the Ninth Circuit's first decision in her case with this petition. This is particularly true as her WPA claim in the last Ninth Circuit opinion seeks relief from the same adverse actions as her first appeal, and the second appeal was a natural result of the decision in the first appeal to exclude consideration of the earlier protected activities on grounds that they had not been administratively exhausted.

that the text of the WPA does not require a whistleblower to state the "precise ground" for the claim. "[T]he WPA does not dictate such a stringent exhaustion requirement." *Id*. The statute simply states that the employee "shall seek corrective action from the Special Counsel before seeking corrective action from the Board." 5 U.S.C. § 1214(a)(3). The First Circuit noted that its holding was in accord with the Seventh Circuit holding in *Delgado v. Merit Sys. Prot. Bd.*, 880 F.3d 913, 916 (7th Cir.), *as amended on denial of reh'g and reh'g en banc* (7th Cir. 2018). This holding is also consistent with other decisions of the Supreme Court, including *Johnson v. City of Shelby, Mississippi*, 574 U.S. 10 (2014), which held that plaintiffs did not have to raise legal theories in their complaints, but merely had to set out the facts necessary to support their claim.

The Fourth Circuit adopted a similar approach in *DeMasters v. Carilion Clinic*, 796 F.3d 409, 417 (4th Cir. 2015), stating that "[n]either the text nor the purpose of Title VII is served by…parsing a continuous course of oppositional conduct into individual acts and assessing those acts in isolation." As seen in this case, permitting the fragmentation of protected activities can result in fragmentation of the litigation.

II. The Ninth Circuit's decision fails to recognize that the Federal Circuit's decision in *Spruill* was legislatively overruled by the 2012 Whistleblower Protection Enhancement Act.

1. The Federal Circuit case on which the Ninth Circuit relies to decline jurisdiction over WPA claims arising from participating in EEO cases, *Spruill v. Merit Sys. Prot. Bd.*, 978 F.2d 679, 682 (Fed. Cir. 1992), is outdated in light of the 2012 WPEA. *Spruill* relied on the pre-amendment version of 5 U.S.C. § 1221, which made only claims under 5 U.S.C. § 2302(b)(8) appealable to MSPB, and not participation claims under 5 U.S.C. § 2302(b)(9). Relying on the older version of 5 U.S.C. § 1221(a), which did not permit appeals to the MSPB from claims arising under 5 U.S.C. § 2302(b)(9), the Federal Circuit in *Spruill* held that the MSPB could not hear claims in which participation in EEO proceedings was alleged to be the protected activity.

The WPEA amended 5 U.S.C. § 1221 to address this concern and make participation claims appealable to MSPB when they arise under 5 U.S.C. § 2302(b)(9)(A)(i) (protecting "the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation – (i) with regard to remedying a violation of paragraph (8)") or § 2302(b)(9)(B), (C) or (D). Whereas the *Spruill* court relied on the absence of any right to appeal a (b)(9) claim to the MSPB, the WPEA now explicitly grants such a right. The original logic of *Spruill* was questionable as any appeal, complaint or grievance would itself be protected under (b)(8)(A)(i) as "any disclosure" of a violation of law.

The WPA has long prohibited federal personnel decisions taken in reprisal for an employee's disclosure of a violation of law. 5 U.S.C. § 2302(b)(8). A discrimination complaint disclosing violations of Title VII, which prohibits discriminatory personnel actions, is just such a law. Congress clearly understood this when it passed the WPA as it included Title VII in 5 U.S.C. § 2302(b)(8)(A). The WPA also protects participation in proceedings. 5 U.S.C. § 2302(b)(9)(A)(i) (protecting "the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation – (i) with regard to remedying a violation of paragraph (8)").

2. Famously, Title VII does not explicitly provide a claim for federal sector retaliation. However, the holdings in *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 180 (2005), and *Gomez-Perez v. Potter*, 553 U.S. 474, 487-88 (2008), recognize that reprisal is implicitly a violation of anti-discrimination laws. Because Title VII is a "law," and the WPA prohibits retaliation for disclosing a violation of "law," Congress explicitly prohibited retaliation in the federal sector through 5 U.S.C. § 2302(b)(8)(A)(i). Congress made clear that this section of the WPA does apply to EEO claims, 5 U.S.C. § 2302(b)(1), and to retaliation claims, 5 U.S.C. § 2302(b)(8) and (9). It is particularly ironic that the decision below allows a federal sector victim of retaliation to file a civil action based on the implied cause of action, but does not permit her to appeal her explicit cause of action.

In 2012, Congress passed the Whistleblower Protection Enhancement Act (WPEA) because restrictive judicial interpretations had sapped the WPA of its effectiveness. S. Rep. No. 112-155 at 2, 2012 U.S.C.C.A.N. at 590 (WPEA was

"restoring the original congressional intent of the WPA to adequately protect whistleblowers . . .."). At 4-5, the Senate Report expresses the congressional frustration with the limits courts had put on the phrase "any disclosure" in 5 U.S.C. § 2302(b)(8). *Id.* at 592-93. "It is critical that employees know that the protection for disclosing wrongdoing is extremely broad and will not be narrowed retroactively by future MSPB or court opinions. Without that assurance, whistleblowers will hesitate to come forward." "The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it." *Handy–Clay v. City of Memphis, Tenn.*, 695 F.3d 531, 540 (6th Cir.2012), quoting *San Diego v. Roe*, 543 U.S. 77, 82 (2004).

3. The Ninth Circuit's reliance on *Daniels v. Merit Sys. Prot. Bd.*, 832 F.3d 1049, 1051 (9th Cir. 2016), is also unavailing. App. 2. The Ninth Circuit relied on *Daniels* for the tautology that the MSPB's jurisdiction under the WPA is limited to "whistleblowing." *Daniels* did not address whether Title VII was a "law" for which the WPA would protection the disclosure of violations or the proceedings to redress retaliation.

4. Courts have had no difficulty holding that whistleblower provisions must be given broad scope to accomplish their remedial purposes. *Lawson v. FMR LLC*, 571 U.S. 429, 432 (2014); *English v. General Elec. Co.*, 496 U.S. 72, 82 (1990) (to "encourage" employees to report safety violations and protect their reporting activity); *NLRB v. Scrivener*, 405 U.S. 117, 121-26 (1972); *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1512 (10th Cir. 1985)("Narrow" or "hypertechnical"

interpretations are to be avoided as undermining Congressional purposes.); *Passaic Valley Sewerage Comm. v. Department of Labor*, 992 F.2d 474, 479 (3d Cir. 1993). "Congress passed the whistleblower statute precisely because it did not trust agencies to regulate whistleblowers within their ranks." *Dep't of Homeland Sec. v. MacLean*, 135 S. Ct. 913, 920, 190 L. Ed. 2d 771 (2015).

5. On the related issue of a district court's jurisdiction over "mixed cases" under 5 U.S.C. § 7702 that combine discrimination and whistleblower claims, the Ninth Circuit held in *Kerr v. Jewell*, 836 F.3d 1048, 1056 (2016), *cert. denied* 137 S. Ct. 1365 (2017), that Kerr's exhaustion of her claims through the EEO process was insufficient to establish the district court's jurisdiction over her WPA claim. The Ninth Circuit recognized that its decision was in conflict with the Tenth's Circuit's interpretation in *Wells v. Shalala*, 228 F.3d 1137 (10th Cir. 2000). The Tenth Circuit held in *Wells* that the district court did have jurisdiction to hear whistleblower claims as part of a mixed case. In *Kerr*, however, the court rejected *Wells* because it was concerned with the "practical import" of the Tenth Circuit holding, but invocation of "practical import" reflects a desire to use the administrative process to shield the federal courts from having to decide more cases on the merits. This Court has reaffirmed that "a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2347 (2014) (internal quotation marks omitted); *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014) (same).

6. The Ninth Circuit's decision unnecessarily deprives federal courts of jurisdiction Congress conferred on them, and deprives public servants of remedies for violations of their civil rights. Federal courts have a responsibility to exercise the jurisdiction established by Congress. This responsibility is "virtually unflagging[.]" *Colo. River Water Conservation Dist v. U S*, 424 U.S. 800, 817 (1976); see also *Cohens v. Va.*, 19 U.S 264, 404 (1821) (Marshall, C.J.) ("It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction, if it should .... We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given."); see also, *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2347 (2014); *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014).

In the decision below, the Ninth Circuit has fallen short of its responsibility to adjudicate claims that federal officials violated the civil rights enacted by Congress. The plain language of Title VII prohibits sex discrimination in all of its forms, just as the WPA prohibits retaliation against whistleblowing..

Where, as here, the language of a statute is unambiguous, the Court need not try to divine the specific intent of the members of Congress that passed the law. See *Caminetti v. U.S.*, 242 U.S. 470, 490 (1917) (acknowledging as a "recognized rule" of statutory interpretation that "it is neither the duty nor the privilege of the courts to enter speculative fields in search of a different meaning" when the language of the statute is clear).

In *Sloan v. West*, 140 F.3d 1255 (9th Cir. 1998), the Ninth Circuit held that, "[i]f a complainant wishes to preserve both claims, he or she must not pursue an appeal of the EEO decision with the EEOC [or the district court]. Rather, he or she must file the appeal with the MSPB, or be deemed to have waived the non-discrimination claim." *Kerr* at 1057, quoting *Sloan* at 1260. Reaffirming *Sloan,* the Ninth Circuit in *Kerr* the MSPB furnishes the exclusive path for obtaining judicial review of a WPA claim. Here, Dr. Flynn did pursue her MSPB case to conclusion there and sought review in the Ninth Circuit pursuant to the All Circuits Review Act, 5 U.S.C. § 7703(b)(1)(B).

III. The Ninth Circuit's decision improperly applies *res judicata* to bar Dr. Flynn's second appeal as that second appeal raised claims explicitly excluded from her first appeal for failure to exhaust.

In the alternative to holding that the Ninth's Circuit's first decision erred in holding that some of Dr. Flynn's protected activities were not properly exhausted, this Court should hold that the MSPB and the Ninth Circuit unfairly applied *res judicata* to dismiss Dr. Flynn's second WPA appeal. Dr. Flynn was compelled to file her second appeal because of the MSPB's initial holding that Dr. Flynn's protected activities before May 23, 2013, had not been exhausted. App. 41. To the extent that *res judicata* does apply, it should apply for the principle that the protected activities were excluded from the first case and therefore had not been adjudicated. Just as the Marcel's subsequent claims involved "different claims" and "different times," so too did Dr. Flynn's claims in her second appeal. Quoting *Lucky Brand Dungarees, Inc. v. Marcel Fashion Group, Inc.*, 590 U.S. ___, 140 S. Ct. 1589, 1595 (2020).

More appropriately, consideration of the prior adjudication should be considered the law of the case which clearly had separated adjudications of Dr. Flynn's pre- and post-May 23, 2013, protected activities. "[L]aw of the case is an amorphous concept," which "posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618 (1983), decision supplemented, 466 U.S. 144 (1984).

While Dr. Flynn contends that this Court should grant *certiorari* and reverse the Ninth's Circuit's first opinion on failure to exhaust and remand for reconsideration based on all her protected activities, a sufficient result can be achieved by reversing its second decision and remanding this case for a new adjudication based on the protected activities excluded from the first appeal.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: January 18, 2021

Respectfully submitted,

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