No. 21-1181

In The
Supreme Court of the United States

LYNDSEY BALLINGER, et al.,
Petitioners,

v.

CITY OF OAKLAND, CALIFORNIA,
Respondent.

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

BRIEF *AMICUS CURIAE* OF APARTMENT ASSOCIATION OF LOS ANGELES COUNTY, INC.; APARTMENT OWNERS ASSOCIATION OF CALIFORNIA, INC.; CALIFORNIA ASSOCIATION OF REALTORS®; CALIFORNIA RENTAL HOUSING ASSOCIATION; AND THE SANTA BARBARA APARTMENT ASSOCIATION, INC. IN SUPPORT OF PETITIONERS

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Questions Presented

1. Whether the unconstitutional conditions tests in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), apply to an ordinance that requires rental owners to make a payment to a tenant before the owners may end the tenancy and reoccupy their home.

2. Whether "state action" sufficient to justify a Fourth Amendment "seizure" claim exists when a law directs the transfer of property from one private citizen to another.

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IDENTITY AND INTEREST OF AMICI CURIAE[1]

Amicus Curiae Apartment Association of Los Angeles County, Inc., doing business as "Apartment Association of Greater Los Angeles" ("AAGLA") was formed in 1917 as a California nonprofit corporation. AAGLA has more than 10,000 members who own or manage over 200,000 rental housing units throughout the counties of Los Angeles, Ventura, and San Bernardino. For over 105 years, AAGLA has served rental housing providers through education and management advice, and as an advocate for rental housing providers at the local, county, state, and federal levels of government.

Amicus Apartment Owners Association of California, Inc. ("AOA") is a membership-based organization established in 1982. AOA has a current membership of 21,754, comprised mostly of small housing providers (1-20 units) and property management companies located throughout the State. AOA has members with properties in the City of Oakland, the Respondent in this case. It currently serves members through offices in San Diego, Orange County, Long Beach, Los Angeles, Van Nuys and Alameda.

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[1] All counsel of record for the parties in this case received timely notice of, and provided written consent to, the filing of this brief. No party or counsel for any party authored this brief in whole or in part, and no party or counsel for any party made a monetary contribution towards the preparation or submission. No person other than *Amici*, their members or counsel made a monetary contribution towards the preparation and submission of this brief.

Amicus California Association of Realtors® ("C.A.R.") is a voluntary trade association whose membership consists of approximately 200,000 individuals licensed by the State of California as real estate brokers and salespersons, as well as the local associations of REALTORS® to which they belong. C.A.R. advocates for the real estate industry in court by bringing to a court's attention the perspective of the industry rather than the singular perspective of a litigant. C.A.R. also advocates in this same way on behalf of property owners. C.A.R. does so for at least two reasons. First, C.A.R.'s mission includes preservation of property rights as one of its goals. Second, because C.A.R.'s members' business interests depend upon owners of property, it also serves C.A.R.'s purpose, in appropriate cases, to stand up for owners' property rights.

This is one of those cases. C.A.R.'s members are witnessing the significant disruption and costs that burdensome relocation-payment mandates can generate, especially when selling a rented home to a prospective buyer who intends to reside in it. Repossession of the property from the tenant can, in those jurisdictions with relocation-payment mandates, cost many thousands of dollars. Much like a defective roof whose cost of repair often is reflected in a lower home valuation, the legal obligation to pay a tenant thousands of dollars in relocation expenses as the condition of repossessing property devalues the home and complicates real-estate transactions.

Amicus California Rental Housing Association ("CalRHA") represents over 20,000 members totaling more than 575,000 units, made up of small, medium,

and large rental housing owners throughout the State of California, including the City of Oakland. CalRHA's purpose is to advocate in the best interest of the rental housing industry and collectively address industry needs and challenges. CalRHA provides timely grassroots mobilization for the purposes of advocating at the State level and contributing to change in the multifamily housing industry.

Amicus Santa Barbara Apartment Association, Inc., dba Santa Barbara Rental Property Association ("SBRPA") is a nonprofit advocacy organization founded in 1929 to provide assistance to local rental housing owners in Santa Barbara, California. As described in greater detail below, SBRPA recently filed a lawsuit against the City of Santa Barbara in federal district court, challenging the constitutionality of a City law requiring owners to pay a substantial relocation fee (three times the monthly rent) before lawfully terminating a tenancy.

Amici's members face an increasingly hostile regulatory environment, as cities, counties, and state governments subject rental housing owners to ever-more burdensome laws favoring tenants at the expense of housing providers. The mandate that owners pay tenants' relocation expenses as the condition of exercising the fundamental right to repossess their properties is the latest in an onslaught of such laws over the last several years. Relocation-payment mandates not only implicate the constitutional rights of rental housing owners, but also lead to the devaluation of affected properties and needlessly complicate the purchase and sale of those properties.

Amici's members have a substantial interest in this Court's review of the Ninth Circuit's decision upholding the City of Oakland's relocation-payment mandate. Their objective in this brief is to demonstrate to the Court that crippling relocation-payment requirements—and the serious constitutional questions they raise—are not an isolated problem restricted to one city. *Amici* will bring to the Court's attention similar relocation-payment mandates in other California jurisdictions and across the country. Forcing rental housing owners—many of them, small "mom and pop" landlords—to foot the bill for a tenant's relocation costs is not a City of Oakland problem; it's a nationwide scourge that substantially burdens those owners and the real-estate industry that serves them.

SUMMARY OF THE ARGUMENT

The federal questions raised in the petition are of national importance, as they affect untold numbers of rental housing owners and their tenants across the country. The City of Oakland is not the only jurisdiction with a relocation-payment mandate. There are many other government entities in California and other jurisdictions with the same or similar requirement. Thus, by granting the petition, the Court can address the nationwide phenomenon of governments confiscating financial obligations—in the form of forced relocation payments to tenants—as the condition of owners' decision to exercise their right to use and repossess their property.

Further, by granting the petition, the Court can clarify the reach of *Nollan* and *Dolan*. For too long, courts (including the Ninth Circuit here) have found

ways to avoid applying *Nollan* and *Dolan* to blatant confiscations of property. In this case, the Ninth Circuit's *Nollan/Dolan* analysis rests largely on a mischaracterization of the relocation-payment mandate as a mere "regulation" of use or of the landlord-tenant relationship. That approach to property confiscations appears in the *dissents* from many of this Court's key takings case, wherein confiscations are recast as mere "regulations" that should be immune from the heightened scrutiny otherwise required by *Nollan* and *Dolan*. Further guidance from this Court on whether billing a confiscation of property as a "regulation" somehow allows the confiscation to dodge meaningful judicial review.

ARGUMENT

I. Government Entities Across California and the Country Are Imposing Relocation-Payment Mandates On Rental Housing Owners with Impunity

The City of Oakland's relocation-payment mandate may seem like an outlier. But it isn't. Government entities across California and the country have passed their own versions, emboldened by court decisions that re-package the mandates as "mere" landlord-tenant regulations immune from constitutional review under *Nollan* and *Dolan*.

A. California Governments Lead the Charge In Forcing Rental Housing Owners To Subsidize Tenants' Relocation Expenses

The petition ably describes the City of Oakland's relocation-payment mandate. But Oakland's law is not an aberration. Similar mandates prohibiting owners from repossessing their properties unless they subsidize their tenants' relocation costs have swept the State of California. By *Amicus* C.A.R.'s count, over 30 jurisdictions have some form of a relocation-payment mandate, and Santa Barbara's is among the most confiscatory.

The Santa Barbara City Council passed Ordinance No. 5979 in December 2020.[2] The Ordinance states that "[t]he owner of a rental unit who issues a termination notice based upon no-fault just cause shall make a relocation assistance payment to each qualified tenant in an amount established by resolution of the City Council, or one month's rent plus one dollar, whichever is greater." City of Santa Barbara Municipal Code ("SBMC") § 26.50.20(A). A "qualified tenant" is defined as "a tenant who has continuously and lawfully occupied a rental unit for 12 months." The relocation payment requirement applies to rental housing in the City with very limited exceptions. *Id.* § 26.50.

The same day it enacted the Ordinance, the Council passed a resolution making the relocation payment ***three times*** the monthly rent charged at the time the owner issues the notice to terminate the

[2] The entire Ordinance is available at https://bit.ly/3iGae7k (last visited on March 28, 2022).

tenancy. City of Santa Barbara Resolution No. 20-084.[3]

Like many relocation-payment laws, the Ordinance distinguishes between "at fault" just cause and "no fault" just cause. "No fault" just cause—which triggers the mandatory relocation payment—is defined as follows:

> "a. Intent to occupy the rental unit by the owner or their spouse, domestic partner, children, grandchildren, parents, or grandparents if a provision of the lease allows the owner to terminate the lease when the owner, or their spouse, domestic partners, children, grandchildren, parents, or grandparents, unilaterally decides to occupy the rental unit.
>
> b. Withdrawal of the rental unit from the rental market.
>
> c. The owner complying with any of the following:
>
> > i. An order issued by a governmental agency or court relating to habitability that necessitates vacating the rental unit.

[3] The Resolution is available at https://bit.ly/36sGfh3 (last visited on March 28, 2022).

> ii. An order issued by a government agency or court to vacate the rental unit.
>
> iii. A local ordinance that necessitates vacating the rental unit.
>
> d. Intent to totally demolish or to substantially remodel the rental unit."

SBMC § 26.50.070(B)(2).

Santa Barbara's setting of the relocation payment amount at three times the monthly rent imposes a significant monetary burden on rental housing owners. In May 2021, the City commissioned a study on rents in the South Coast region of California, including Santa Barbara. *See* City of Santa Barbara, *2021 Rent Survey for the South Coast—Final Report* (Robert D. Niehaus, Inc. May 18, 2021).[4] The median monthly rent for rental properties in the City of Santa Barbara are shown below:

	Apartment	**Condo**	**Duplex / Townhouse**	**Single-Family Homes**
Studio	$1695	N/A	N/A	N/A
1 BR	$2000	$2625	$2100	$2400
2 BR	$2688	$3075	$2713	$2850
3 BR	$3800	$3500	$3550	$4000
4 BR	$4150	None	None	$5975

[4] Available at https://bit.ly/3IIPaI1 (last visited on March 28, 2022).

Id. at 5-6.

Thus, based on the City's rent survey, an owner who rents out her Santa Barbara property can expect to pay a monetary exaction of (on average) between ***$5,085*** (for a studio) to ***$17,925*** (for a four-bedroom house)—so that she can exercise her right to repossess her property.[5]

Significantly, the Ordinance contains no "means testing" to ensure that only tenants in actual need of assistance with relocation expenses are entitled to the relocation payment. In other words, there is nothing in the Ordinance to prevent a small, mom-and-pop landlord of modest means from having to subsidize the relocation expenses of a comparatively wealthy tenant renting in Santa Barbara. Further, the law does not require that a relocation payment be used for relocation. The relocation payment can be used for any private purpose the tenant desires.

Amicus SBRPA recently filed a challenge to the Santa Barbara relocation-payment law, including on the grounds that the law violates the unconstitutional conditions doctrine as applied in *Nollan* and *Dolan*. The challenge is pending in the federal district court for the Central District of California. *See* The Santa Barbara Apartment Ass'n, Inc. v. City of Santa

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[5] The median minimum relocation payment is calculated by multiplying $1695 (the medium rent per month for a studio apartment) by three, and the median maximum relocation payment is calculated by multiplying $5975 by three.

Barbara, No. 2:22-cv-01315-SK (C.D. Cal. filed February 25, 2022).

As *Amicus* AAGLA's members know all too well, Los Angeles County has a similarly confiscatory relocation-payment mandate. Owners who repossess their rental properties must make a substantial relocation payment for so-called "no fault" evictions. Los Angeles County Code § 8.52.090(E)(3). A "no fault" eviction occurs when the owner seeks to repossess her property in order to move in herself or her family; when she simply wants to withdraw the property from the rental market; or when she must remove the tenant pursuant to government or court order. *Id.* § 8.52.090(E)(1).

In "no fault" cases, "standard" tenants are entitled to (1) three times the Countywide median rent based on the dwelling unit size, (2) estimated costs associated with disconnecting and reconnecting utilities, (3) estimated packing and moving costs, (4) estimated storage costs for three months, (5) packing supplies, (6) fees for applying for a new unit, and (7) taxes. Los Angeles County Code § 8.52.110(A)(1).[6] Non-"standard" tenants are entitled to even more. Displaced senior, minor, and disabled tenants, as well as lower-income households, are entitled to higher payments. *Id.* § 8.52.110(A)(2). Last year, the County established the following payment scheme, showing

[6] The County's "Rent Stabilization and Tenant Protections" law, of which the relocation-payment mandate is just one part, can be accessed at https://bit.ly/3uxfmR2 (last visited on March 28, 2022).

the extraordinary monetary exaction that must be paid as the condition of repossessing one's property:

Relocation Assistance Amounts 4/1/2020- 6/30/2021					
	Studio	1 Bedroom	2 Bedrooms	3 Bedrooms	4+ Bedrooms
Standard	$7,654	$8,662	$10,797	$13,115	$14,759
Seniors, Minors, Persons w/ Disabilities	$9,272	$10,675	$13,359	$16,043	$17,995
Lower-Income Household	$10,980	$12,688	$15,921	$18,971	$21,411

Los Angeles County, Consumer & Business Affairs, *Relocation Assistance FAQs* at 2 (February 2, 2021).[7]

The approximately-thirty local laws imposing some form of relocation-payment mandate exist against the backdrop of a California statute that imposes a "relocation payment" floor—applicable in those localities that choose not to exact a relocation payment from owners who lawfully repossess their properties. Under California law, a tenant subject to a "no fault" eviction is entitled to "one month of the tenant's rent" to subsidize his relocation expenses. Cal. Civ. Code § 1946.2(d)(2). "No fault" repossessions happen when the owner or her family wishes to occupy the property; the owner wishes to withdraw the property from the rental market; a government agency or court order requires the eviction; or the owner intends to demolish or substantially remodel the property. *Id.* § 1946.2(b)(2). The statute is explicit that the tenant's income is irrelevant; the wealthiest of tenants are entitled to the payment from the

[7] The document can be accessed at https://bit.ly/3uAHZN5 (last visited on March 28, 2022).

poorest of mom-and-pop landlords. *Id.* § 1946.2(d)(1) (mandating that "the owner shall, *regardless of the tenant's income*" make the relocation payment (emphasis added)).

B. Conditioning Owners' Fundamental Right to Repossession of Their Property on Payment of Tenants' Relocation Expenses Is a Nationwide Phenomenon

California's confiscatory mandates against rental housing owners can be found in other jurisdictions, as well. Consider Seattle, Washington. Seattle recently passed an ordinance that goes into effect in July and mandates relocation assistance to "low income" tenants who choose to vacate their unit after their rent has increased by a certain amount. The owner must pay the displaced tenant ***three times*** the amount of the tenant's monthly "housing costs," as determined by the City. City of Seattle Ordinance No. 126451.[8]

Portland, Oregon has a similar law. An owner is prohibited from terminating a tenancy after the first year of occupancy unless the landlord has one of four "Qualifying Landlord Reasons" which include: (1) the owner decides to convert the unit to nonresidential use, (2) the owner or her immediate family member intends to occupy the home as a primary residence, (3) the owner is remodeling the home, or (4) the owner is selling the home to someone who intends to use it as a primary residence. Or. Rev. Stat. § 90.427. If the

[8] The Ordinance can be accessed at https://bit.ly/3IGyIIo (last visited on March 28, 2022).

owner has a qualifying reason and owns more than four dwelling units, she must pay a fee equal to one month's rent for relocation expenses. *Id.* Portland's law was recently upheld against challenge in *Owen v. City of Portland*, 497 P.3d 1216 (Or. 2021).

The City of St. Louis Park, Minnesota, also makes owners of a subset of rental housing pay for their otherwise-lawful right to terminate tenancies there. Under a St. Louis Park ordinance, the purchaser of an "affordance housing building" who "terminates or refuses to renew any affordable housing unit tenant's rental agreement without cause" must "pay to the tenant, as relocation assistance . . . a payment in the amount as follows: $2,600 for a studio or single room occupancy dwelling unit, $3,000 for a one-bedroom dwelling unit, $3,600 for a two-bedroom dwelling unit, and $4,100 for a three-bedroom or larger dwelling unit." City of St. Louis Park Municipal Code § 8-334.[9]

Chicago, Illinois, has a law that mandates relocation payments in the context of so-called "single room occupancy" ("SRO") units. Tenants displaced as a result of demolition, conversion, or sale of an SRO unit are entitled to relocation payments of up to $8,600. City of Chicago, Ill. Municipal Code §§ 5-15-010—5-15-100.[10]

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[9] Chapter 8 of the St. Louis Park Municipal Code, which contains the relocation-payment mandate, can be accessed at https://bit.ly/3IGyIIo (last visited on March 28, 2022).

[10] The law is available at https://bit.ly/3Dj0vNM (last visited on March 28, 2022).

The District of Columbia also enforces a relocation-payment mandate. There, any rental housing owner who decides to "substantially rehabilitate, demolish, or discontinue any housing accommodation" must make a relocation payment to the displaced tenant(s). District of Columbia Code § 42–3507.02.[11] The Mayor is charged with setting the amount of the relocation payment, which "shall reflect the cost of moving, including transporting personal property, packing and unpacking, insurance of property while in transit, storage of personal property, the disconnection and re-connection of utilities, and any other reasonable factor, within the Washington-Baltimore Standard Metropolitan Statistical Area." *Id.* § 42–3507.03.

The constitutional problems associated with forced relocation payments, as described in the petition, are not confined to Oakland. They are widespread, as more and more jurisdictions adopt some form of the mandate as a means of "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Yet, if the Ninth Circuit's decision in this case survives as binding or persuasive authority in future challenges to such mandates, the mandates likely will escape judicial review.

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[11] The cited provisions from the District of Columbia Code are available at https://bit.ly/3Dy6ajv (last visited on March 28, 2022).

II. The Ninth Circuit's Characterization of Oakland's Ordinance As a Mere Regulation of Property Use and Landlord-Tenant Relations Conflicts with this Court's Precedents

The Ninth Circuit concluded that the Oakland ordinance is merely a "regulation of the landlord-tenant relationship." App. A-9. Quoting *Yee v. City of Escondido*, 503 U.S. 519 (1992), it held that "the relocation fee is not an unconstitutional physical taking," but only "regulate[s] [the Ballingers'] *use* of their land by regulating the relationship between landlord and tenant." App. A-9 (emphasis in original) (internal citation and quotation marks omitted). Largely on that basis, the court concluded that Oakland's relocation-payment mandate does not result in "a compensable taking" and therefore is not "an exaction" subject to heightened constitutional review under *Nollan* and *Dolan*. App. A-23.

The Ninth Circuit's characterization of Oakland's ordinance is reminiscent of *dissenting opinions* from seminal takings decisions over the last 35 years, all of which have confirmed—time and again—the broad applicability of *Nollan* and *Dolan* to government attempts to condition the fundamental right to use property on the relinquishment of land or money. *Sher v. Leiderman,* 181 Cal. App. 3d 867, 879 (1986) ("A landowner's right to use his property lawfully to meet his legitimate needs is a fundamental precept of a free society.").

In *Nollan*, dissenting Justice Stevens argued that, by subjecting conditions on property use to

heightened scrutiny, the Court was interfering with "government regulation of the use of privately owned real estate." *Nollan v. Cal. Coastal Comm.*, 483 U.S. 825, 866 (1987) (Stevens, J., dissenting). In his dissenting opinion, Justice Brennan characterized the use condition (dedication of a public-access easement) as merely an "exercise of the police power" (*id.* at 842 (Brennan, J., dissenting)) and solely a "regulation of development" (*id.* at 859). He declared that "[t]here can be no dispute that the police power of the States encompasses the authority to impose conditions on private development." *Id.* at 843. These dissents reflect the Ninth Circuit's view here that the Oakland ordinance is just a regulation of use, which the City has broad power to enforce free of heightened constitutional scrutiny.

The dissenting Justices in *Dolan* similarly characterized a required dedication of property (as the condition of its use) as nothing more than the exercise of the "police power." *Dolan v. City of Tigard*, 512 U.S. 374, 413 (1994) (Souter, J., dissenting). As the *Dolan* majority observed:

> "[The] dissent relies upon a law review article for the proposition that the city's conditional demands for part of petitioner's property are a species of business regulation that heretofore warranted a strong presumption of constitutional validity. But simply denominating a governmental measure as a 'business regulation' does not immunize it from constitutional

> challenge on the ground that it violates a provision of the Bill of Rights."

Id. at 392 (internal citations and quotation marks omitted). Again, the *Dolan* dissent mirrors the Ninth Circuit's view in this case that the Oakland ordinance is a mere regulation of the landlord-tenant relationship—a kind of "business regulation" immune from *Nollan* and *Dolan* review.

In *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013), the dissent argued that when "the government conditions a permit . . . on the payment or expenditure of money," it is merely engaging in "local land-use regulation[]" that implicates no "constitutional questions." *Id.* at 620, 636 (Kagan, J., dissenting). The dissent warned that the Court's decision "threaten[ed] to subject a vast array of land-use regulations, applied daily in States and localities throughout the country, to heightened constitutional scrutiny. *Id.* at 620 (Kagan, J., dissenting). The *Koontz* majority responded that the dissent really amounted to "an argument for overruling *Nollan* and *Dolan*." *Id.* at 618. Once again, the theme in the *Koontz* dissent is repeated in the Ninth Circuit's decision here: Petitioners are (allegedly) complaining about a simple regulation of use—a regulation of the landlord-tenant relationship—that triggers no heightened scrutiny by the courts.

More recently, this Court was explicit about misguided attempts to cabin *Nollan* and *Dolan*'s application by repackaging confiscations of property as mere regulations effectively immune from judicial

review. In *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021), the Court was clear: It doesn't matter whether the challenged government action "comes garbed as a regulation (or statute, or ordinance, or miscellaneous decree)." *Id.* at 2072. What matters is "whether the government has physically taken property for itself *or someone else*—by whatever means—or has instead restricted a property owner's ability to use his own property." *Id.* (emphasis added). As the Court observed, "the dissent advance[d] a distinctive view of property rights" that (like the Ninth Circuit here) interprets naked confiscations of property as mere regulations. *Id.* at 2077. The C*edar Point* dissent characterized a California law that appropriated an access easement on private property so that unions could organize there as "simply *regulat[ing]* the employers' property rights." *Id.* at 2081 (Breyer, J., dissenting) (emphasis added). In the dissent's eyes, the law just "regulate[d] the employers' right to exclude." *Id.* (Breyer, J., dissenting).

But as in *Nollan*, *Dolan*, and *Koontz*, the Court in *Cedar Point* rejected the dissent's "understanding of the role of property rights in our constitutional order." *Id.* at 2077. In the Court's mind, "the dissent's permissive approach to property rights hearkens back to views expressed (in dissent) for decades." *Id.* at 2078.

The same can be said of the Ninth Circuit's takings analysis in this case. It harkens back to the dissenting opinions from seminal takings decisions over the last thirty-five years, which paint otherwise-obvious confiscations of property (whether land or financial obligations) as mere regulations within the

government's broad police powers. The Court should take the opportunity in this case to put a decisive end to unnecessarily cramped readings of *Nollan* and *Dolan* by lower courts.

CONCLUSION

While rightly focused on an ordinance from one California city, the stakes in this case are much higher. The questions presented transcend a simple constitutional dispute between Oakland and the petitioners. Rather, the questions vex all rental housing owners in this country whose government requires them to pay a heavy price for exercising their property rights. Further, the Ninth Circuit's failure to apply *Nollan* and *Dolan* based on a long-discredited view of property confiscations as mere "regulations" broadly within the government's police power calls out for the Court's review.

This petition presents a clean record on purely legal questions, with little to no factual disputes. It is an ideal vehicle to resolve the questions presented. The Court should grant the petition.

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Respectfully submitted,

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