No. 21-1230

In the Supreme Court of the United States

DAKOTA TERRITORY TOURS, ACC,
Petitioner,

v.

SEDONA-OAK CREEK AIRPORT AUTHORITY, INC.,
Respondent.

On Petition for Writ of Certiorari to the Arizona Court Of Appeals

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

The additional questions presented by the Petition include:

(a) whether the Court has jurisdiction over a constitutional claim first raised in a petition for review to the state's highest court, where the state's highest court did not affirmatively decide the federal question, and could not, therefore, have denied the petition on that ground;

(b) whether there remains any justiciable "case or controversy" where there is no effective relief this Court can grant;

(c) whether the Seventh Amendment was violated when the vast weight of this Court's jurisprudence mandates that the Seventh Amendment does not apply to the states, and Arizona has a constitutional guarantee to a jury trial; and

(d) whether the Seventh Amendment or the due process clause require a state court to hold a jury trial despite the defendant's admission to the facts that entitle the plaintiff to possession and judgment in a forcible detainer case.

CORPORATE DISCLOSURE STATEMENT

Respondent Sedona-Oak Creek Airport Authority, Inc. ("SOCAA") is a non-profit Arizona corporation operating a public airport and may be defined as a "public body" under A.R.S. § 39-121.01(A)(2). SOCAA has no parent corporation and none of its shares are held by publicly traded corporations.

RELATED CASES OMITTED

• *Dakota Territory Tours ACC v. Sedona-Oak Creek Airport Authority, Inc.*, No. V1300-CV2017-80201, Yavapai County Superior Court, State of Arizona. Order lifting preliminary injunction entered December 5, 2017. Case pending, no judgment entered.

• *Dakota Territory Tours ACC v. Sedona-Oak Creek Airport Authority, Inc.*, No. 1 CA-CV 17-0767 Arizona Court of Appeals. Judgment memorandum opinion affirming order lifting injunction entered April 4, 2019. No judgment entered.

• *Dakota Territory Tours ACC v. Sedona-Oak Creek Airport Authority, Inc.*, No. CV-19-0133-PR. Arizona Supreme Court. Order denying petition for review entered September 23, 2019. No judgment entered.

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INTRODUCTION

Petitioner Dakota Territory Tours, ACC ("Dakota") promised to file – and then filed – this Petition in a transparent attempt to evade eviction from leased premises on the Sedona Airport. This is a statutory forcible entry and detainer action that was appropriately and repeatedly decided by the Arizona courts as a matter of law. There was no jury trial below because there were no disputed facts for the jury to decide. The Arizona Constitution fully and adequately protects a party's right to a jury trial when there are material facts in dispute; and when they are not, summary judgment is appropriate and adequately safeguards due process under the law. It is particularly unnecessary for this Court to incorporate the Seventh Amendment into the Fourteenth Amendment and make it applicable to the states on these facts – where Dakota failed to raise any constitutional issue until it petitioned Arizona's highest court, where Dakota's claim for relief is long-since moot, and where the material facts about the right to possession were not in dispute.

STATEMENT OF FACTS AND OF THE CASE

The Petition omits necessary facts and procedural history. SOCAA operates the Sedona Airport under a lease with Yavapai County. Court of Appeals Memorandum Opinion, Pet. App. 2, ¶ 2. SOCAA entered into a commercial lease with Dakota that expired April 30, 2017. *Id.* Pet. App. 2, ¶ 2.

Dakota first sued SOCAA in 2014. *Id.* Pet. App. 3, ¶ 3. The parties settled that lawsuit by entering into a

Settlement Agreement dated April 27, 2017. *Id.* Pet. App. 8, ¶ 3; **Resp't App. 1**, Settlement Agreement. The Settlement Agreement set forth the terms upon which Dakota was granted a conditional right to remain at the Sedona Airport, pending issuance of a Request for Proposals ("RFP") for a lease on the space Dakota then occupied. *Id*. Pet. App. 2, ¶ 2. On May 1, 2019, SOCAA issued the RFP for a new two-year leasehold. *Id*. Pet. App. 3, ¶ 4. SOCAA did not select Dakota. The Settlement Agreement provided that Dakota "must vacate" the Sedona Airport within thirty days if Dakota was not the successful bidder and if SOCAA notified Dakota to vacate. *Id*. Pet. App. 3, ¶ 3; **Resp't App. 1**, Settlement Agreement. Dakota received the required notice to vacate multiple times: June 26, 2017, July 11, 2017, and again on November 29, 2017. *Id*. Pet. App. 4, ¶ 7.

Rather than vacate, on July 21, 2017, Dakota sued SOCAA again, this time for alleged breach of the Settlement Agreement and bad faith, among other claims, and sought injunctive relief and damages in Yavapai Superior Court case number V1300 CV2017 80201. *Id*. Pet. App. 4, ¶ 5. That action is still pending.[1] On September 7, 2017, the trial court granted a temporary restraining order and a conditional preliminary injunction based almost entirely upon Dakota's claim of irreparable harm. *Id.* Pet. App. 4, ¶¶ 5-6. After a preliminary injunction hearing, and

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[1] The pandemic and Dakota's Chapter 11 bankruptcy petition stayed the proceedings for a significant time period. A two day "culprit hearing" to assess discovery sanctions against Dakota and/or its former counsel is now set for September 22 and 23.

upon SOCAA's later application, the trial court lifted the injunction. *Id*. Pet. App. 4, ¶ 6. SOCAA sent a third Notice to Vacate on November 29, 2017. *Id*. Pet. App. 4, ¶ 7.

Dakota appealed the trial court's decision to lift the injunction and obtained a stay precluding SOCAA from evicting Dakota pending the Arizona Court of Appeals' resolution of its appeal. On April 4, 2019, in a memorandum decision, the court of appeals affirmed the order lifting the injunction. *Dakota Territory Tours AAC v. Sedona-Oak Creek Airport Auth. Inc.*, No. 1 CA-CV 17-0767, 2019 WL 1499853, at *1 (Az. Ct. App. Apr. 4, 2019); **Resp't App. 2**, Memorandum Decision. Dakota appealed that court's decision to the Arizona Supreme Court and on September 23, 2019, the supreme court denied review. **Resp't App. 3**, 9/23/2019 Order.

On April 12, 2019, following the court of appeals' decision, SOCAA issued its fourth notice to vacate to Dakota. *Id*. Pet. App. 5, ¶ 7. Dakota refused to go. On April 23, 2019, SOCAA filed this forcible detainer action. On December 6, 2019, SOCAA filed a motion for summary judgment because the issues relating to possession of the premises (the only question properly presented in an eviction action under Arizona law, *see* A.R.S. § 12-1177(a)) were undisputed. *Id*. Pet. App. 5, ¶ 9. In responding to SOCAA's statement of facts, Dakota admitted to each of the material facts relating to possession.[2] *Id*. Pet. App. 16, ¶ 31. Dakota did not

[2] As the Arizona Court of Appeals noted, Dakota's only factual disputes were "not pertinent to the FED proceedings, they are not

raise any federal constitutional issues in response to that motion or at any time before the trial court (or in the Arizona Court of Appeals). *Id.* Instead, Dakota argued that Article 2 § 3 of the Arizona Constitution guaranteed it right to a jury trial because there were material facts in dispute. *Id*. Pet. App. 10, ¶¶ 13-18. Dakota's only claim to possession arose from the Settlement Agreement. On January 31, 2020, the trial court granted SOCAA's motion for summary judgment because there was no dispute of material fact as to whether Dakota was entitled to possession of SOCAA's premises under the Settlement Agreement. *Id*. Pet. App. 11-13, ¶¶ 21-26. The trial court found that the disputed facts related to counterclaims which were not permitted in a forcible detainer action, and which were already pending in Dakota's separate breach of contract action. *Id*. Dakota appealed that order.

In its appeal, Dakota argued that it had an "absolute" or "inviolate right" to a jury trial under Arizona law. *Id.* Pet. App. 7-10, ¶¶ 13-18. Dakota admits it did not raise federal constitutional issues in that appeal. Pet. for Cert. 3. On January 12, 2021, the Arizona Court of Appeals affirmed the summary judgment because Arizona law did not guarantee Dakota a right to a jury trial when there were no material facts in dispute and nothing for a jury to decide. Pet. App. 10-16. The court of appeals agreed that Dakota's facts related to impermissible counterclaims not allowed in a forcible detainer action

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material issues of fact precluding summary judgment." *Id*. Pet. App. 14, ¶ 27.

which were pending its separate lawsuit.[3] *Id*. Pet. App. 14, ¶ 28. Dakota has not argued that Arizona's forcible detainer statute violates due process or the Seventh Amendment.

Dakota petitioned the Arizona Supreme Court for review of the court of appeals' memorandum decision. Pet. App. 27. In its Petition for Review, Dakota did not identify any disputed issues of fact that precluded summary judgment on the sole issue of possession. Pet. App. 35-53. Rather, Dakota argued for the first time that it was entitled to a jury trial as a matter of federal constitutional law, solely because it demanded one. *Id*. In its response to that Petition for Review, SOCAA argued that Dakota waived any federal constitutional issues by not raising them below. Pet. App. 58, n.1. The Arizona Supreme Court denied review on July 30, 2021. Pet. App. 27.

Dakota filed for bankruptcy on July 26, 2021. Pet. App. 30, Arizona Supreme Court Order. After the bankruptcy court lifted the stay (Pet. App. 31, Arizona Supreme Court Order), SOCAA sought a writ of restitution to evict Dakota. Dakota unsuccessfully moved to stay the eviction multiple times in every possible forum, primarily because it intended to file

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[3] For example, Dakota argued that the Settlement Agreement gave it a right to remain on the premises indefinitely. But, on October 31, 2019, in separate litigation over the Settlement Agreement, SOCAA obtained partial summary judgment on the issue of specific performance because the Settlement Agreement did not entitle Dakota to a new lease or to possession of the Airport premises. **Resp't App. 4**.

this Petition for Certiorari. The court of appeals denied Dakota's attempt to stall its eviction, noting that:

> To merit a stay, Appellant much show a strong likelihood of success and irreparable injury absent a stay. *Nken v. Holder*, 556 U.S. 418, 434 (2009); *Smith v. Ariz. Citizens Clean Elections Comm'n*, 212 Ariz. 407, 410, ¶ 10 (2006). Even if we assume that Appellant preserved its federal constitutional issues before the Arizona courts, *but see Illinois v. Gates*, 462 U.S. 213, 220-24 (1983) (declining to address federal questions "not pressed or passed upon " before the state court); *Englert v. Carondelet Health Network*, 199 Ariz. 21, ¶ 13 (App. 2000) ("[W]e generally do not consider issues, even constitutional issues, raised for the first time on appeal."), Appellant has not shown any likelihood of success, *see, e.g. Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 327 n.8 (2007) (noting summary judgment does not violate the Seventh Amendment); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 336 (1979) (same).

Arizona Court of Appeals Order re Motion to Recall mandate and Stay Issuance of Mandate, at 1-2 (February 3, 2022). **Resp't App. 5**.

The trial court issued the Writ of Restitution on February 14, 2022. **Resp't App. 6**, Writ of Restitution. Dakota was evicted from the Sedona Airport on February 23, 2022. **Resp't App. 7**, Notice of Service.

ARGUMENT

I. Jurisdiction Is Not Appropriate Before This Court; Dakota Failed to Raise Federal Questions Below.

As a threshold matter, Dakota's Petition fails to establish that this Court has jurisdiction over its federal constitutional claim, raised for the first time before the Arizona Supreme Court. Namely, 28 U.S.C. § 1257 provides for review of final judgment of a decision by the highest state court when the constitutionality of a state or federal statute is in question or where a constitutional right is at issue.

> **(a)** Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

There was no judgment or decree rendered by the Arizona Supreme Court wherein the "validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States." Indeed, the trial court and the Arizona Court of Appeals did not and could not

pass on any federal constitutional questions because none were raised. The Arizona Supreme Court summarily denied Dakota's request for review, either because the lower courts never had the opportunity to rule on the federal constitutional questions and/or because the claims lacked merit.

The suggestion of a violation of a federal right, first made in a petition for review in the highest state court is "too late to serve as the basis for the exercise of the appellate jurisdiction of the Supreme Court of the United States where it does not affirmatively appear that the State Court passed on the Federal question, and the denial of the petition may well have been on the ground that the question, not having been suggested in the court below, could not be made on appeal." *Chicago, Indianapolis & Louisville Railway Co. v. McGuire*, 196 U.S. 128, 25 S.Ct. 200, 49 L.Ed. 413 (1905); *Hiwassee River Power Co. v. Carolina-Tennessee Power Co.*, 252 U.S. 341, 40 S.Ct. 330, 64 L.Ed. 601 (1920) (the failure to raise the Fourteenth Amendment in the state court is not cured by filing a writ with the U.S. Supreme Court).

Even if the Arizona Supreme Court's failure to affirmatively consider or pass on the Seventh Amendment issue was not fatal to jurisdiction here, *Dombrey v. Phoenix Newspapers*, 150 Ariz. 476, 487 n. 5, cited at Pet. for Cert. 2-3, did not prevent Dakota from raising a federal constitutional issue at any stage below. There was and is no need to overturn its holding. *Dombrey* observed that this Court had not applied the Seventh Amendment to the states, but nevertheless remanded to order a new jury trial in a

defamation case under article 2 § 24 (now § 23) of the Arizona Constitution because "The analysis is the same."

> We note a contrary view taken in *Marcone v. Penthouse International Magazine for Men,* 754 F.2d 1072, 1088–90 (3rd Cir.1985), *cert. denied,* 474 U.S. 864, 106 S.Ct. 182, 88 L.Ed.2d 151 (1985). *Marcone* was decided before *Anderson v. Liberty Lobby, supra.* In any event, we disagree with its conclusion because it gives insufficient weight to the right to a jury trial. It is one thing to engage in a constitutionally mandated, independent review of the evidence to see if it supports a verdict which otherwise will stand; it is a different thing, having reversed the verdict for error of law, to determine whether the evidence is sufficient to permit the case to go to trial at all. While the difference may be subtle, the seventh amendment right to a jury trial in federal cases is implicated. That right is not applied to the states by the due process clause of the fourteenth amendment, *see* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 568 (1978), but is guaranteed by article 2, § 24 of the Arizona Constitution. The analysis is the same. Our function is not to act as a second set of jurors but to determine whether the evidence is sufficient for the jury to consider. We believe *Anderson v. Liberty Lobby, supra,* is, therefore, the proper framework. Adopting that standard gives due regard for the jury's ultimate determination on matters of credibility. *Id.,* 477 U.S. at ——, 106 S.Ct. at 2514.

Dakota failed to establish that this Court has jurisdiction over its newly-formulated Seventh Amendment argument, and for that reason alone, its Petition should be denied.

II. There Is No Justiciable Controversy for the Court to Decide.

Dakota's Petition fails to present a justiciable controversy. This case is moot because no meaningful relief is possible: (a) due to the passage of time and (b) because Dakota has been evicted. Dakota indisputably received far more time on the leased premises than it was ever entitled to receive under Arizona law, its lease, the Settlement Agreement, the RFP, or otherwise. The inability to grant relief prevents review. *Campbell Ewald Co. v. Gomez*, 577 U.S. 153, 160-161, 136 S.Ct. 663, 669, 193 L.Ed. 2d. 571 (2016):

> Article III of the Constitution limits federal-court jurisdiction to "cases" and "controversies." U.S. Const., Art. III, § 2. We have interpreted this requirement to demand that "an actual controversy ... be extant at all stages of review, not merely at the time the complaint is filed." *Arizonans for Official English v. Arizona,* 520 U.S. 43, 67, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997) (quoting *Preiser v. Newkirk,* 422 U.S. 395, 401, 95 S.Ct. 2330, 45 L.Ed.2d 272 (1975)). "If an intervening circumstance deprives the plaintiff of a 'personal stake in the outcome of the lawsuit,' at any point during litigation, the action can no longer proceed and must be dismissed as "moot." *Genesis Healthcare Corp.,*

> 569 U.S., at ——, 133 S.Ct., at 1528 (quoting *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477–478, 110 S.Ct. 1249, 108 L.Ed.2d 400 (1990)). A case becomes moot, however, "only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox v. Service Employees,* 567 U.S. ——, ——, 132 S.Ct. 2277, 2287, 183 L.Ed.2d 281 (2012) (internal quotation marks omitted). "As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot."*Chafin v. Chafin,* 568 U.S. ——, ——, 133 S.Ct. 1017, 1023, 185 L.Ed.2d 1 (2013) (internal quotation marks omitted).

See, also, *Uzuegbunam v. Preczewski*, __ U.S. __, 141 S.Ct. 792, 796, 209 L.Ed. 2d 94 (2021) (in all stages of the litigation, the plaintiff must maintain a personal interest in the dispute; if a court can no longer provide plaintiff with any effectual relief, the case is generally moot.)

Dakota's lease at the Sedona Airport expired on April 30, 2017. Under the Settlement Agreement, Dakota had no right to stay unless it won SOCAA's 2017 RFP. The RFP was for a maximum two-year lease term. That lease term would have expired in July 2019.

Through a variety of stays granted by Arizona courts, an intervening global pandemic, and a Chapter 11 bankruptcy filing, Dakota retained possession of the Sedona Airport premises until February 23, 2022, nearly five years after its lease expired, and more than three years after it would have been required to vacate the airport's premises if it had it been successful in

responding to SOCAA's RFP (which, of course, it was not). Even if this Court granted this Petition, and ordered a jury trial, no jury could grant Dakota meaningful relief because Dakota has already occupied the land longer than it could have if it prevailed below.

Second, having been evicted, Dakota has no right to re-enter. Each of its many, many attempts to stay eviction or return to the airport have been summarily and justifiably rejected by Arizona courts. No jury could award a new lease because there is no legal basis for it.

Granting Dakota's Petition would not result in any relief to Dakota or a change of process in Arizona courts. Arizona's process satisfies the Seventh Amendment and due process. Article 2 § 23 of the Arizona Constitution guarantees a right to a jury trial, so long as there are factual issues for a jury to decide. As discussed in **Section IV** below, there is no Seventh Amendment right to a jury trial when the material facts are not in dispute

Dakota was not deprived of due process or any other articulable federal constitutional right. To the contrary, Dakota refused to vacate the Sedona Airport for years after it had a legal right to remain. The counterclaims against SOCAA that Dakota sought to raise in the forcible detainer action for breach of contract, bad faith and damages are still pending against SOCAA in a separate action.

III. There Is No Constitutional Issue to Decide.

Dakota has not identified any portion of any of the decisions issued in this case, or any Arizona opinion, statute, or rule that offends the United States

Constitution. If anything, Arizona guarantees greater process than the U.S. Constitution because it already requires jury trials in all civil cases, including forcible detainer cases, where there are material issues of fact for a jury to decide.

As to all of the other states, Dakota offers no reason to overturn more than a hundred years of precedent to now apply the Seventh Amendment to them – except for the fact that the Seventh Amendment has not yet been incorporated. The Seventh Amendment, which guarantees the right to jury trials in suits at "common law," has not been applied to the state courts. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 626 U.S. 687, 719, 119 S.Ct. 1624, 1643, 143 L.Ed. 2d 882 (1999) ("It is well settled that the Seventh Amendment does not apply . . . [to civil] suits brought in state court."). The due process clause in the Fourteenth Amendment applies to the states, but it has long been the law that deprivation of a right to a trial by jury in a state court does not deny the parties due process under the federal constitution. *Wagner Electric Mfg. Co. v. Lyndon*, 262 U.S. 226, 232, 43 S.Ct. 589, 591, 67 L.Ed. 961 (1923). *See, also*, *Lentendre v. Fugate*, 701 F.2d 1093 (4th Cir. 1983) (since the Seventh Amendment's right to trial by jury in federal court has not been extended to the states through the Fourteenth Amendment, denial of a jury trial in a state unlawful detainer proceeding does not violate the due process or equal protection clauses); *R.J. Reynolds Tobacco Co. v. Shewry*, 423 F.3d 906, 924 (9th Cir. 2005) ("Seventh Amendment's guarantee of the right to a civil jury trial does not apply to the states and was not incorporated into the Fourteenth Amendments.")

Dakota's cited authority is inapposite. *Pernell v. Southall Realty*, 416 U.S. 363, 94 S.Ct. 1723, 40 L.Ed. 198 (1974) does not hold or suggest that the Seventh Amendment should be applied to the states or to eviction actions. The Seventh Amendment applied in *Pernell* because the eviction took place *in the District of Columbia*, and was tried in a Federal Court, to which the Seventh Amendment already applied. *Pernell* does not discuss incorporating the Seventh Amendment into the Fourteenth Amendment's due process clause and applying the right to jury trial to the states.

And although *McDonald v. Chicago*, 561 U.S. 742, 764 (2010) is an example in which this Court incorporated an amendment (the Second Amendment) in the Bill of Rights, and made it applicable to the states through the Fourteenth Amendment, the *McDonald* rationale is not applicable to jury trials. Indeed, the words "Seventh Amendment" do not appear in that voluminous opinion, other than to recognize that the Seventh Amendment *has not been incorporated*. The fact that something has not happened is not a compelling reason why it should.

IV. Summary Judgment Does Not Violate the Seventh Amendment or Due Process.

Although Dakota's Petition does not say so, Dakota's real complaint is that it did not "consent" to summary judgment. Granting summary judgment when the material facts are undisputed does not offend the Seventh Amendment or due process. Rule 56 has long been recognized as a vital part of the Federal Rules of Civil Procedure (and of most states). *See, e.g. Etalook v. Exxon Pipeline Co.*, 831 F.2d 1440, 1447 (9th

Cir. 1987) ("The very existence of a summary judgment provision demonstrates that no right to jury trial exists unless there is a genuine issue of material fact suitable for a jury to resolve."); *City of Chanute, Kan. v. Williams Natural Gas Co.*, 955 F.2d 641, 657 (10th Cir. 1992) (affirming summary judgment and holding the Seventh Amendment was not violated because "[t]he trial judge in this case applied the law to undisputed fact"), overruled on other grounds by *Systemcare Inc. v. Wang Laboratories*, 117 F.3d 1137 (10th Cir. 1997). In *Fidelity & Deposit Co. of Maryland v. United States*, 187 U.S. 315, 23 S. Ct. 120, 47 L. Ed 194 (1902) this court unanimously rejected Seventh Amendment concerns and upheld the constitutionality of a precursor to the modern summary judgment. In *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 336, 99 S. Ct. 645, 654, 58 L.Ed. 2d 552 (1979) this Court noted that "summary judgment does not violate the Seventh Amendment."

In addition to failing to attack the concept of summary judgment, Dakota has not and now cannot explain how summary judgment in this case offends either the Seventh Amendment or due process. Dakota admits that the "operative facts are brief and undisputed." Pet. for Cert. 3. The logic is simple. Dakota had no lease. The contract was clear. The Settlement Agreement did not give Dakota a right to stay in possession any longer. SOCAA was entitled to judgment and to a return of its premises as a matter of law. This Petition, and the last four plus years of litigation, are simply a delay tactic and a waste of SOCAA's and this Court's resources.

CONCLUSION

For all the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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