Nos. 22-506 and 22-535

In the Supreme Court of the United States

JOSEPH R. BIDEN, JR.,
PRESIDENT OF THE UNITED STATES, ET AL.,
Petitioners,
v.
STATE OF NEBRASKA, ET AL.,
Respondents.

UNITED STATES DEPARTMENT OF EDUCATION, ET AL.,
Petitioners,
v.
MYRA BROWN, ET AL.,
Respondents.

On Writs of Certiorari Before Judgment to the United States Court of Appeals for the Fifth Circuit and the United States Court of Appeals for the Eighth Circuit

BRIEF AMICUS CURIAE OF PROFESSOR LAWRENCE A. STEIN IN SUPPORT OF NONE OF THE PARTIES

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INTEREST OF THE AMICUS CURIAE

The amicus, Lawrence A. Stein, is an assistant clinical professor of law at Northern Illinois University, whose law school was established in 1974 and has a distinguished record of producing lawyers dedicated in one manner or another in public service in its various manifestations.[1] Professor Stein practiced law in various state and federal tribunals for nearly 30 years before joining the faculty of the university. He has scholarly interests in civil procedural generally, as well as appellate procedure, including procedure in this Court, all at least in part as a public service.

SUMMARY OF THE ARGUMENT

This court granted certiorari before the judgment of the courts of appeal in several monumental cases. It has been suggested that this Court has not articulated in any detail the standard or standards by which the Court decides to grant certiorari before judgment, beyond those stated in rule 11. And indeed, with certain exceptions, the court uses this procedure in the

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[1] No counsel for any party authored this brief in any manner whatsoever in whole or in part. No party, or counsel for any party, made any monetary contribution to the preparation or submission of this brief. All the expenses of the preparation and submission of the is brief were paid in full by the *amicus curiae*, though it is possible that in the future the university will reimburse him for some or all of those expenses. This brief is being filed without notice, leave of Court, and without the consent of the parties under the rules of this Court effective on January 1, 2023. New rule 37 no longer requires any of that and rule 48 indicates that the new rules "govern all proceedings after January 1, 2023" with exceptions not extant here.

most monumental cases it has heard. Without so stating, the argument is that the court has used a particular standard when granting certiorari before judgment. The court grants certiorari before judgment in monumental cases when the re is a need to avoid proceedings in the court or appeals, or when there is a need for a single authoritative decision on the merits subject to no further review.

ARGUMENT

In its opinion resolving these cases, the Court should articulate the standard it applied to take this case before judgment or the standard or standards it applies generally beyond the text of the Court's Rule 11. The people of the United States, including the other two branches of government and the bar of this Court, are entitled to the principled development of a doctrine, beyond rule 11, that this Court applies to requests for certiorari before judgment. The standard that the amicus deduced that this Court has been applying is that this Court will consider granting certiorari before judgment when: 1) there is a need to avoid activity in the court of appeals; or 2) there is a need for: a) a final authoritative decision b) on the merits c) without the possibility of further review, or both. The court may also wish to address whether there is any relationship between the standards for granting certiorari before judgment and after judgment.

I. THE COURT HAS THE LEGITIMATE POWER TO GRANT CERTIORARI BEFORE JUDGMENT.

The court has the legitimate power to grant certiorari before judgment.

The Court has the power to issue a writ of certiorari before judgment by statute: "The time for appeal or application for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment."[2] The statue is consistent with the Constitution, assuming the district court had Article III jurisdiction: "The Supreme Court shall have *appellate* jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the *Congress* shall make."[3]

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[2] 28 U.S.C § 2101(c). The statute refers to an "application" for certiorari before judgment, but Court practice is to file a "petition" for certiorari before judgment in the same form as a petition for certiorari after the court of appeals has filed its opinion. Also, the "judgment" of the court of appeals is different from any "opinion" it files. FRAP 36(a): "The clerk must prepare, sign, and enter the judgment . . . after receiving the court's opinion [or] if a judgment is rendered without an opinion, as the court instructs." The judgment is a separate document from the opinion, though the judgment refers to the opinion. The judgment is usually a document with the case's caption entitled "final judgment" with a single sentence that reads, in the case of affirmance "The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date." Of course the judgment may reverse, reverse and remand, dismiss the appeal, deal with costs differently, contain any instructions of the court, and any other relief granted or denied on appeal.

[3] U.S. Constitution, Art. III, § 2, ¶ 2 (emphasis added).

Since the Constitution only grants "appellate" jurisdiction, and not "original" jurisdiction, the Court is wholly without power to act as the district court or to grant certiorari in a case in the district court and not in a court of appeals.[4] When the Court grants certiorari before judgment, the Court is essentially acting as the court of appeals, though its decision cannot in any real sense be appealed. The Court's rule on certiorari before judgment provides in full (including the citation at the end) as follows:

> A petition for a writ of certiorari to review a case pending in a United States court of appeals, before judgment is entered in that court, will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to

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[4] This Court has said it has "supervisory authority" over all federal courts. (*McNabb v. United States*, 318 U.S. 332, 341 (1943).) But the Court appears to limit that power to enacting rules of procedure and evidence pursuant to Acts of Congress. (*Id.*) The Court does not appear to "general supervisory authority" over all other courts, in the sense of the general supervisory authority conferred on, and periodically used by, for example, the Supreme Court of Illinois. Illinois Constitution of 1970: "General administrative and supervisory authority over all courts is vested in the Supreme Court and shall be exercised by the Chief Justice in accordance with its rules. (*Id*. Art. VI; § 16.). Indeed, the Constitution has specified the "original" and "appellate" jurisdiction that this Court may exercise, and there is no constitutional text that would indicate anything like the "general supervisory authority" of the Supreme Court of Illinois. The question of whether Congress may confer such broad authority on the court is interesting but unanswered.

require immediate determination in this Court. See 28 U. S. C. § 2101(e).

Accordingly, according to the text, the stated standards are: 1) "that the case is of such imperative public importance as to justify deviation from normal appellate practice"; 2) "deviation from normal appellate practice" is justified; and 3) an "immediate determination in this Court" is required.

II. BEYOND THE TEXT OF RULE 11, THE COURT HAS NOT ARTICULATED THE STANDARDS BY WHICH IT DECIDES TO GRANT CERTIORARI BEFORE JUDGMENT AND THERE IS A DEARTH OF SCHO0LARSHIP ON THIS ISSUE.

Beyond the text of Rule 11, the court has not articulated the standards by which it decides whether to grant certiorari before judgment. and there is a dearth of scholarship on this issue.

This Court has articulated some standards which it uses to decide whether to grant certiorari before judgment by rule. The rule provides that the court will only consider granting judgment before judgment in "case[s] of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court."[5] But the Court has said little to noting beyond the text of

[5] Rule 11 of the rules of the Supreme Court of the United States (eff. Jan 1, 2023).

rule.[6] The court has granted certiorari before judgment without explanation.[7] Sometimes, the Court stated a reason for expeditious review but declined to even expressly state in its opinion that certiorari was granted before the judgment of the court of appeals.[8] Few commentators have noted this lacuna.[9]

Those lonely commentators have argued that the standards in the Rule "are of little help."[10] Writing that "presumably" this Court's rules "main purpose" is to "disclose the Court's standards to litigants, the commentators conclude that this Court's rule "does this

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[6] *See, e.g., United States v. Nixon*, 418 U.S. 683, 690 (1974) (stating that the Court granted certiorari before judgment with no explanation).

[7] *Ex Parte Quirin*, 317 U.S. 1, 18 (1942).

[8] *Compare Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981) ("Because the issues presented here *are of great significance and demand prompt resolution*, we granted the petition for the writ, adopted an expedited briefing schedule, and set the case for oral argument" expeditiously) *to Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 584 (1952) ("Deeming it best that the issues raised be promptly decided by this Court, we granted certiorari on May 3 and set the cause for argument" expeditiously."

[9] James Lundgren and William P. Marshall, "The Supreme Court's Extraordinary Power to Grant Certiorari Before Judgment in the Court of Appeals" in 8 *Supreme Court Review* 259. 259 (1987) (hereinafter "Lundgren and Marshall.")

[10] *Id*. at 265.

poorly."[11] Perhaps more broadly, the bar and the public would benefit from attention to this issue either in a published opinion, such as the opinion in this case, or, later, in an amendment to the Court's rules.

The standard treatise on practice before this Court only briefly lists the cases taken early and the laconic reasons given by the Court.[12] The main study of practice in federal courts goes little further in its analysis; addressing the advantages and disadvantages of early certiorari and positing whether it can be granted when a court of appeals is reviewing directly an administrative decision.[13]

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[11] *Id*. at 266. At the time of the commentators' remarks, this court's Rule 18 governed certiorari before judgment. The Rules have been renumbered, but the text applicable to certiorari before judgment has not changed.

[12] Eugene Gressman, *et al*, Supreme Court Practice 286-86 (9th ed. 2007).

[13] Charles Alan Wright, et al., 17 Federal Practice and Procedure § 4036 (2012).

III. IN REVIEWING THE IMPORTANT CASES DECIDED BY THIS COURT BEFORE JUDGMENT IN THE COURT OF APPEALS, IT CAN BE DEDUCED THAT THE COURT WILL CONSIDER GRANTING CERTIORARI BEFORE JUDGMENT WHEN THERE IS A NEED TO AVOID ACTION IN THE COURT OF APPEALS OR WHEN THERE IS A NEED FOR A FINAL AUTHORITATIVE DECISION ON THE MERITS NOT SUBJECT TO FURTHER REVIEW OR BOTH.

In reviewing the monumental cases decided by this Court before the judgment in the court of appeals, it can be deduced that the Court will consider granting certiorari before judgment when there is a need to avoid action in the court of appeals or when there is a need for a final authoritative decision on the merits not subject to further review or both.

A. The Court will consider granting certiorari before judgment when there is a need to avoid action in the court of appeals.

The Court will consider granting certiorari before judgment when there is a need to avoid action in the court of appeals.

One reason, it has been suggested, to avoid proceedings in, and an opinion from, the court of appeals is to spare a friendly foreign nation from

"lengthy court proceedings."[14] In *Wilson v. Girard*,[15] a member of the United States Army stationed in Japan, engaged "in a small unit exercise" while Japanese civilians were in the area.[16] During the exercise, Girard had a grenade launcher on his rifle, and under orders attempted to fire a "blank."[17] Shrapnel expelled from his grenade launcher hit and killed a Japanese civilian nearby.[18] The United States "immediately notified Japan that Girard would be delivered to the Japanese authorities for trial."[19]

> Thereafter, Japan indicted him for causing death by wounding. Girard sought a writ of *habeas corpus* in the United States District Court for the District of Columbia. The writ was denied, but Girard was granted declaratory relief and an injunction against his delivery to the Japanese authorities.[20]

Japan indicted him for causing death by wounding. Girard sought a writ of *habeas corpus* in a district

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[14] Lundgren and Marshall at 292-93.

[15] 354 U.S. 524 (1957).

[16] *Id*. at 526-27.

[17] *Id*. at 526.

[18] *Id*.

[19] *Id*.

[20] *Id*.

court.[21] The United States appealed to the court of appeals "without awaiting action by that court on the appeal, invoked the jurisdiction of this Court . . . ."[22] All this Court said about taking the case from the court of appeals was that it "granted" certiorari before judgment.[23]

According to two scholars, "A foreign nation may deserve a definitive ruling from our nation's highest legal authority," further suggesting that Japan "may not have understood a lengthy court proceeding."[24] While it may be true that some in Japan may not understand the procedures in our federal courts, the Japanese officials responsible for the matter would certainly be informed in detail of those procedures by the presumably American lawyers for Japan in the proceedings, and could inform others in Japan, including the civilian population, if it was desired, of the information obtained from the American lawyer's representing Japan's interest in the case. Speculation of the court's reasoning fill the lacuna left by the bald statement by the Court that it "granted" certiorari before judgment. A reasoned analysis in that case may have avoided scholarly speculation, and even tempered the foreign policy tensions created by the incident. In these cases, the court need not remain silent on the issue of why it took the case from the courts of appeal.

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[21] *Id*.

[22] *Id*.

[23] *Id*.

[24] Lundgren and Marshall at 292-93.

Another reason to avoid a decision by the court of appeals is to protect the dignity and authority of the court of appeals. In *United States v. Nixon*,[25] a subpoena was issued to President Nixon for some of his famous tape recordings. President Nixon asked a district court to quash the subpoena. The district court declined.[26] Nixon appealed to the court of appeals. This Court granted certiorari before judgment.[27] If this Court allowed the court of appeals to decide the case, and Nixon defied that ruling, the authority of the rulings of the court of appeals could be called into question in future cases.[28]

In the Nazi saboteurs case, *Ex Parte Quirin*,[29] the district court had denied the alleged saboteurs a writ of *habeas corpus*. The natural next step would be to appeal to the appropriate court of appeals. As will be seen, Roosevelt threatened to disobey any writ of *habeas corpus* issued by the court of appeals (though he may have been referring to a write from this Court.) Such disobedience would be quite problematic. The authority of the court of appeals would be called into question if the President disobeyed its judgment. So, this Court took the case away from the court of appeals, perhaps to avoid a trauma to the authority of

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[25] 418 U.S. 683 (1974)

[26] *Id* at 686.

[27] *Id*.

[28] Lundgren and Marshall at 287-88.

[29] *Ex Parte Quirin*, 317 U.S.1, 18 (1942).

the court of appeals if it were to reverse and the President who then refused to acknowledge the authority of the court of appeals.

In *Quirin*, President Roosevelt first ordered that the matter be adjudicated by a military commission. The accused saboteurs then unsuccessfully sought *habeas corpus* from a district court.[30] Next they sought the same relief in an original action in the Supreme Court.[31] The Court convened a special session in July 1942 to hear the original petition for writs of *habeas corpus* challenging the validity of Roosevelt's order.[32] It is said that at oral argument on that original petition for *habeas corpus*, the government "threatened to defy" the Court if the it were to decide the commissions illegal.[33] Intriguingly, after that oral argument on the issue of an original writ of *habeas corpus*, word is that counsel for the saboteurs "were made aware that they should instead ask for a writ of certiorari before

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[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] Lundgren and Marshall at 260 (citing newspaper accounts). An account of the proceedings by an author involved in the defense, the self-effacing author states that Roosevelt had said to the Attorney general before the "trial" began: "I won't hand [the saboteurs] over to any United States marshal armed with a writ of *habeas corpus* Understand [*sic*]." Boris I. Bittker, The World War II German Saboteurs' Case and Writs of Certiorari Before Judgment by the Court of Appeals: A Tale of Nunc Pro Tunc Jurisdiction, 14 Constitutional Commentary 431, 444 (Brackets in original (citing to "Danelski, 1 J. Of S. Ct. Hist. at 68 (cited in note 1.")

judgment in the court of appeals."[34] During the Court's special session, counsel for the alleged saboteurs filed serially: 1) a notice of appeal from the district court's decision denying habeas corpus; and a 2) petition for writ of certiorari before judgment in this court.[35] On the same day, the third day of the special session, this Court issued a *per curiam* opinion granting certiorari before judgment and upholding Roosevelt's military commissions.[36]

Thus, this court has granted certiorari before judgment when there was a need to avoid action in the court of appeals.

B. The Court will consider granting certiorari before judgment when there is a need for a final authoritative decision on the merits not subject to further review.

The Court will consider granting certiorari before judgment when there is a need for a final authoritative decision on the merits not subject to further review.

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[34] Lundgren and Marshall at 260. There is no citation to the source of this information. A first-party account of an attorney involved in the defense suggests this awareness arose from "back-channel discussions between counsel for both sides and several Justices." (Boris I. Bittker, The World War II German Saboteurs' Case and Writs of Certiorari Before Judgment by the Court of Appeals: A Tale of Nunc Pro Tunc Jurisdiction, 14 Constitutional Commentary 431, 440) (citing to "Danelski, 1 J. Of S. Ct. Hist. at 68 (cited in note 1.")

[35] Lundgren and Marshall at 261.

[36] *Quirin*, 317 U.S. at 18.

In *Quirin*, the Nazi Saboteurs case, the United States had been drawn into an Eurasian war against its will by a sneak attack at Pearl Harbor, where the enemy killed thousands of Americans and damaged a large portion of the of the Pacific Fleet of United States Navy. Worse, the attack required a full military response, including mass conscription and significant rationing of consumer goods so that war materiel could be produced *en mass* instead. Hundreds of thousands of volunteers and conscripts were transported overseas to fight in foreign lands and on foreign islands.

The lives of the entire nation were turned upside down in little more than moments. The lives of American soldiers were by necessity put in harms' way; Fathers, brothers, husbands and sons. Each of these soldiers had friends, family, and loved ones left in the United States to fret about their fate. Each and every American was impacted negatively and gravely.

Later, a few armed enemy forces breached our borders by stealth near areas of concentrated civilian populations carrying with them serious weapons of destruction.[37] Upon their capture, President Roosevelt ordered them to be tried by a military commission, which would have the power to impose and execute sentences of death, unlike civilian courts.

While these enemy soldiers were captured with the obvious intent on doing further harm to America and Americans within our borders, our soldiers were fighting, being critically wounded, and dying in battles

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[37] *Id*. at 20.

in foreign lands on foreign islands, and at sea. No judicial proceedings could or did intervene in those casualties. Enemy bullets, bombs, shells, and bayonets killed or wounded soldiers; wounds that no court could block. Our soldiers died or suffered their wounds immediately upon the effort of enemy forces to kill them.

Under these circumstances, the United States had to act swiftly. The guilt or innocence of the enemy saboteurs had to be established quickly, and, if guilty, swift and severe punishment had to be meted out promptly. The American public would not tolerate any delay or successive appeals. The people of the United States needed a final authoritative decision on the merits not subject to further review. The Court gave it to them.

The same can be said, though to a lesser degree, in *Youngstown Sheet & Tube Co. v. Sawyer*[38] and *Nixon v. United States*.[39]

The cases indicate that this Court will grant certiorari before judgment when there is a need for a final authoritative decision on the merits not subject to further review.

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[38] 343 U.S. 579 (1952) (national threat to shut down the steel mills during military conflict).

[39] 418 U.S. 683 (1974) (a crisis said to had nearly "ground " the government "to a halt") (citing Lundgren and Marshall at 292 n.170)

IV. THE COURT HAS NOT STATED ANY RELATIONSHIP BETWEEN THE STANDARDS APPLICABLE TO GRANTING CERTIORARI BEFORE JUDGMENT AND AFTER A DECISION IN THE COURT OF APPEALS.

Amicus notes in passing that rules 10 and 11, respectively regarding certiorari generally and certiorari before judgment omit to state any relationship between them. Notably, rule 10 refers to "compelling reasons" and the familiar list of the types of cases considered, noting that the list is "neither controlling nor fully measuring the Court's discretion." Amicus suggests that rule 11 also neither controls nor measures the Court's discretion, but omits to state that. But review by certiorari is review by certiorari, whether granted before or after the judgment of the court of appeals. Perhaps the two rules should be consolidated into one rule or rule 11 should indicate that the principles of rule 10 also apply to rule 11.

V. THE COURT SHOULD MAKE THE IMPLICIT STANDARDS APPLICABLE TO CERTIORARI BEFORE JUDGMENT EXPRESS WITH REASONS AND ANALYSIS IN THESE CASES.

The Court should make the implicit standards applicable to certiorari before judgment express with reasons and analysis in these cases.

From its inception, this court has followed the tradition from England to explain its decisions, with analysis, with opinions to make clear what the law is

and why. A decision to grant certiorari before judgment is an important decision that warrants discussion, and analysis, so America can know with some level of specificity when this Court will consider granted certiorari before judgment.

The Court has set forth detailed standards it considers when asked to grant certiorari as guidance for the bar.[40] This Court routinely explains, in its opinions on the merits, the reason it originally granted certiorari after a decision of a court of appeals. The Court almost always identifies one or more "questions presented" by the case, either accepting one or more of the questions required to be suggested by the petitioner, or setting for the issue differently. When the court identifies a split among the decisions of the courts of appeals, it identifies the divergence, usually with some analysis.[41]

Given the poverty of authority and scholarship on the issue of the standards applied to requests for early certiorari, the Court is well poised to address the issue in the opinions in these cases. These are monumental cases, yet the court has months to consider the issue of why it granted certiorari before judgment here and

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[40] Rule 10 of the Rules of the Supreme Court of the United States (eff, Jan. 1, 2023) (listing specific types of cases generally considered for certiorari without "controlling nor fully measuring the Court's discretion")

[41] See, e.g., *Wooden v. United States*, ___ U.S.. ___, ___ and nn. 1 and 2, 142 S. Ct. 1063, 1068 (2022); *Abuelhawa v. U.S.*, 556 U.S. 816, 819 and n. 2 (2009); *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 185-86 (1997);.

include its explanation in the opinion in this case. Addressing this issue in the opinions in these cases will be authoritative and precedential.[42]

VI. THE PROPOSED STANDARD APPLIES TO THIS CASE.

The proposed standard applies to this case.

Millions of people owe billions of dollars in student loan debt payable in monthly installments. No installment payments have been required for nearly three years. The handling of student loans impact both young graduates and their older parents. This impacts the housing market and even the population growth of the United States, which is especially relevant after a deadly pandemic that materially decreased the life expectancy of Americans. Young graduates who took out student loans and have become accustom to not making monthly payments. The Court's decision in this case will in many cases determine if these you

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[42] The actions of individual Justices lack authority when conducted outside the courtroom and not within the context of deciding a case, especially when those Justices amount to fewer than a majority of the Justices of the Court. Thus, statements of Justices lack precedential value when made in the legislative action in and around 1925 that reduced the mandatory caseload of the Court. *See* Lundgren and Marshall, at 271. Some Justices of the court participated in the drafting of that legislation and even testified before Congress in relation to it. Justice Van Devanter testified in support of the legislation by testifying that the Court would use "sound judicial discretion" and "recognized principles" in exercising the power Congress was to give the Court to select its own cases. *Id*. at 271-73 (1987) (citing Procedure in the Federal Courts: Hearing on S. 2060 and 2061 before a Subcommittee of the Senate Committee on the Judiciary, 68th Cong. 1st Sess. 46-47.).)

graduates can buy a house or start a family. As the months and years pass, the need to make these plans becomes more acute. For parents, retirement planning and employment choices are at stake.

We do not have the luxury of letting the various courts of appeal come to their own conclusions and set out their analyses, so this court can take them into account in deciding these cases on the merits. We have a national economy, and it would be intolerable to have one rule in the merits apply in California and another in New York.

VII. ARTICULATING THIS OR ANY OTHER STANDARD WILL NOT PREVENT THE COURT FROM ADJUSTING THE STANDARD, INCLUDE ADDITIONAL FACTORS, OR PROVIDING EXCEPTIONS.

Articulating this or any other standard will not prevent the court from adjusting the standard, include additional factors, or providing exceptions.

This Court can develop further the standard at any time by amending the rules or in future cases in which the court decides to grant certiorari before judgment (or when it declines a request for it).

VIII. AMICUS TAKES NO POSITION ON THE OTHER CASES WHEN THIS COURT GRANTS CERTIORARI BEFORE JUDGMENT, SUCH AS CASES INVOLVING THE SAME OR SIMILAR ISSUES TO CASES IN WHICH ALREADY HAS ALREADY BEEN GRANTED OR WHEN A CASE COMES BEFORE THE COURT ON CERTIORARI AFTER IT HAD PREVIOUSLY BEEN BEFORE THE COURT.

Amicus takes no position on the other cases when this court grants certiorari before judgment, such as cases involving the same or similar issues to cases in which already has already been granted or when a case comes before the court on certiorari after it had previously been before the court.

IX. AMICUS TAKES NO POSITION ON ANY OTHER ISSUE IN THIS CASE, SUCH AS THE MERITS OR THE ARGUMENTS OF THE PARTIES.

Amicus takes no position on any other issue in this case, such as the merits or the arguments of the parties.

CONCLUSION

Based on the foregoing, this Court should consider articulating in its opinion in these cases the standards, beyond the text of rule 11, that it applies when granting certiorari before judgment. Amicus suggests that this Court will consider granting certiorari before judgment when there is a need to avoid action in the court of appeals or when there is a need for a final

authoritative decision on the merits not subject to further review or both. Amicus suggests articulating this standard, or any other the Court wishes, in the opinion on the merits inn this case. The court can also amend rules 10 and 11, though it just promulgated new rules and may want to wait to incorporate any standard it articulates in this case into new rules at an appropriate time in the future. Finally, Amicus suggests that this Court should state explicitly in an authoritative manner at an appropriate time the relationship between rules 10 and 11.

Respectfully submitted,

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