ORIGINAL

No. 24-262

IN THE

Supreme Court of the United States

STACY MAKHNEVICH,

Petitioner,

v.

GREGORY S BOUGOPOULOS
NOVICK EDELSTEIN POMERANTZ PC

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Both sections 1692e and 1692f of Fair Debt Collection Practices Act ("FDCPA") expressly prohibit specific conduct relating to debt collection. Section 1692e states that "[a] debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt." Section 1692f provides, without limitation, that "a debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt." The FDCPA "enable[s] *135 the courts, where appropriate, to proscribe other improper conduct which is not specifically addressed.[1] In 1986 Congress repealed the attorney exemption in response to the explosion of law firms conducting debt collections.[2]

Question presented is:

1. Whether a debt collector misrepresentations to consumers that an entity (such as an Unincorporated Association) on behalf of which the debt collection action was filed is authorized to proceed in its name in state courts (with such misrepresentations reflected in both original and amended debt collection complaints) whereas such entity can *not* sue or be sued in its name is violative of FDCPA?

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[1] Senate report

[2] Pub. L. No. 99-361, 100 Stat. 768 (1986).

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed in the caption.

Petitioner Stacy Makhnevich was the plaintiff in the United States District Court for the Eastern District of New York and the appellant in the United States Court of Appeals for the Second Circuit.

Respondents Novick Edelstein Lubell Reisman Wasserman & Leventhal PC (changed name to Novick Edelstein Pomerantz PC amidst litigation) and Gregory S Bougopoulos were defendants in the United States District Court for the Eastern District of New York and the appellees in the United States Court of Appeals for the Second Circuit.

Bryant Tovar was defendant in the United States District Court for the Eastern District of New York. The Board of Managers of 2900 Ocean Condominium was defendant in the United States District Court for the Eastern District of New York and the appellee in the United States Court of Appeals for the Second Circuit.

PROCEEDINGS

Makhnevich v. Bougopoulos, No. 1:18-cv-285 (KAM), U.S. District Court for the Eastern District of New York. Judgment entered March 30th, 2022.

Makhnevich v. Bougopoulos, No. 22-936, U.S. Court of Appeals for the Second Circuit. Judgment entered April 17th, 2024.

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APPENDIX CONTENTS

PETITION FOR A WRIT OF CERTIORARI

Stacy Makhnevich respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is unpublished, but available at Makhnevich v. Bougopoulos, No. 22-936 (2d Cir. April, 17, 2024); infra Pet. App. 49a-56a.[1] The order of the United States District Court for the Eastern District of New York is reported at Makhnevich v Bougopoulos, 650 F. Supp. 3d 8 (E.D.N.Y. 2023). infra Pet. App. 01a-46a.

JURISDICTION

The court of appeals entered judgment on April 17th, 2024, infra, App. 49a-56a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Congress enacted the Fair Debt Collection Practices Act in 1977 because it concluded that existing laws and procedures were inadequate to protect consumers from serious and widespread debt collection abuses. Section 1692e states that "[a] debt collector may not use any false, deceptive, or misleading representation or means in connection

[1] Petitioner's Appendix is cited throughout this brief as "App. __." or "Pet. App."

with the collection of any debt." Section 1692f provides, without limitation, that "a debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt." Neither provision limits itself to communications to debtors. Both sections expressly prohibit specific conduct relating to debt collection, but the FDCPA "enable[s] *135 the courts, where appropriate, to proscribe other improper conduct which is not specifically addressed." Senate Report at 4.

As originally enacted, the Act exempted debt-collecting attorneys from its coverage, Pub. L. No. 95-109, § 803(6)(F), 91 Stat. at 875, but in 1986 Congress repealed the attorney exemption in response to the explosion of law firms conducting debt collections. Pub. L. No. 99-361, 100 Stat. 768 (1986). The FDCPA also addresses the relationship between the Act and state laws. The Act contemplates that the FDCPA and state debt collection laws will work in concert to protect consumers. The FDCPA preempts state law to the extent it is "inconsistent" with the FDCPA, but where a state's debt collection law is more protective of consumers, both the State's law and the FDCPA apply. See 15 U.S.C. § 1692n.

After filing three debt collection lawsuits at Kings County Civil Court in New York against three consumers residing at 2900 Ocean Avenue in Brooklyn- inclusive of Petitioner, Stacy Makhnevich, ("Makhnevich "),[2] Respondent Novick Edelstein Pomerantz PC , a debt collector law firm and Gregory Bougopoulos, a debt collector

[2] index cv004977/16 ,cv070865/15 and cv070866/15

attorney, falsely stated in all three state court debt collection action that 2900 Ocean Condominium ("2900 Ocean") was *authorized to proceed*" in its name concealing the fact that 2900 Ocean is an Unincorporated Association which can *not* sue or be sued in its name (Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C1025:2 at 341) in attempt to deter disputes and avoid lawsuits /counterclaims. Novick and Bougopoulos acted unlawfully[3] in failing to meaningfully review the complaints in all these three debt collection actions. Their misstatement was a material misstatement because it prevents a consumer from asserting a valid defense and the consumer defendant's decision to pay or challenge the alleged debt will be affected by knowledge the case is subject to dismissal, even temporarily. Novick and Bougopoulos (collectively "Respondents") supported these debt collection actions with affidavits of fact and affirmations attesting to their "personal knowledge "of facts and circumstances which were false. Yet, the lower courts held that that Novick's misrepresentation of 2900 Ocean's status as an Unincorporated Association and Novick's misrepresentation that 2900 Ocean is "authorized to proceed" in its name when 2900 Ocean is not authorized to sue or be sued in its name, as all original and subsequent

[3] Petitioner, Bryant Tovar and 2900 Ocean settled. Ms. Makhnevich has no remaining claims against the Condominium, the Board, Bryant Tovar, Randy Sulzer, First Service, First Service Residential, or its current affiliates. This appeal proceeds strictly against Novick and Bougopoulos.

amended debt collection complaints omitted the fact that 2900 Ocean was Unincorporated Association, does not impede the least sophisticated consumer's ability to litigate on merits because Respondents'

> "error contributed to Plaintiff's efforts to defend against an adverse judgment in Civil Court..... reversing judgment when the error was not corrected)". *MAKHNEVICH v BOUGOPOULOS*, No. 18-CV-285 (KAM) (VMS) (E.D.N.Y. Mar. 29, 2022).

The Second Circuit affirmed following an oral argument during which Petitioner explained that "they knew that they were misrepresenting to the State Court, to myself, that they can proceed in a State action when in fact they cannot. They did not disclose that in the original complaint. They did not disclose that in the amended complaint, Your Honors. And I believe that's a material misrepresentation because I never had an opportunity to assert my defenses." [4]

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[4] Ms. Makhnevich's counterclaim was severed in a debt collection action in state court, then dismissed without prejudice in federal court and then dismissed again for lack of personal jurisdiction in state court because Ms. Makhnevich relied on Novick's misrepresentation and served the Condominium as a Corporation as Novick misrepresented and concealed it being an Unincorporated Association, which was equally concealed by Respondents in their debt collection action from the state court itself and from Ms. Makhnevich who was deprived from claiming a valid defense in her answer in a debt collection action.

Indeed, Respondents never corrected their misrepresentations, neither in the original nor in the amended complaint which they filed in October of 2017 in the debt collection action involving the Petitioner. Respondents never corrected the error in the other two debt collection complaints they filed for 2900 Ocean. The effect of the lower court's decision would mean that thousands of consumers - who face debt collection actions by entities that are not *"authorized to proceed* " in state court debt collection actions - would be deprived from asserting valid defenses in their debt collection actions. About 75.5 million Americans reside in a community that's governed by a homeowners association, representing more than 30% of the U.S. housing stock, according to the Foundation for Community Association Research. An estimated 3.6 million New York residents live in a community association. The law surrounding HOA's is now so complicated that homeowners who run HOA's cannot understand the law and run afoul of the law constantly, generating lawsuits. There is no way around the fact that the increasing complexity of HOA laws means that debt collection lawyers have their fingers in every pie especially so when debt collectors are engaged in profit splitting or commissions on generated profits. If the portions of lower courts order is now allowed to take effect, it would have damaging consequences on thousands of consumers who rely on accuracy of representations in debt collection complaints, who would be prevented from asserting valid defenses in their answers and the consumer defendant's decision to pay or challenge the alleged debt will be affected by

knowledge the case is subject to dismissal, even temporarily.

Thus, as it stands, this case represents the principle that debt collectors can continue their deceptive practices unreprimanded as Respondents should be held accountable for their acts that have been geared to injure Plaintiff.

That cannot be the law in the country where Congress enacted the Fair Debt Collection Practices Act to protect consumers. For these reasons, this case presents important and recurring issues that require this Court's resolution.

A. The Fair Debt Collection Practices Act

As originally enacted, the Fair Debt Collection Practices Act exempted debt-collecting attorneys from its coverage, Pub. L. No. 95-109, § 803(6)(F), 91 Stat. at 875 H.R. Rep. No. 99-405, at 6 (1985). That, however, "prove[d] not to be the case," and in 1986 Congress repealed the attorney exemption in response to "the explosion of law firms conducting debt collection businesses," Hemmingsen v. Messerli & Kramer, P.A., 674 F.3d 814, 817 (8th Cir. 2012); see also Pub. L. No. 99-361, 100 Stat. 768 (1986). The Act thus now applies to "lawyers engaged in litigation." Heintz v. Jenkins, 514 U.S. 291, 294 (1995). The FDCPA also addresses the relationship between the Act and state laws. The Act contemplates that the FDCPA and state debt collection laws will work in concert to protect consumers. The FDCPA preempts state law to the extent it is "inconsistent" with the FDCPA, but where a state's debt collection law is more protective of consumers, both the State's law and the FDCPA apply. See 15 U.S.C. § 1692n.

B. Proceedings Below:

This action was filed by Petitioner on January 16th 2018.

On October 31, 2018, Petitioner sought leave to file an amended complaint for Fair Debt Collection Practices Act ("FDCPA") violations by all defendants, including an additional defendant, Bryant Tovar ("Tovar"), breach of contract and fraud by the Board, and GBL § 349 violations by Bougopoulos, Novick and 2900 Ocean. 2900 Ocean, with its consent, was named as a direct defendant for the FDCPA claims in the operative, first amended complaint. The court granted plaintiff's motion on November 19, 2018. The court held a pre-motion conference on December 14, 2018 and set a briefing schedule for Plaintiff's motion for leave to file a second amended complaint.

While 2900 Ocean, with its consent, was named as a direct defendant for the FDCPA claims in the operative, first amended complaint. (ECF No. 58, Am. Compl. at 19; ECF No. 53, Def. Nov. 13, 2018 Ltr.), the court, nevertheless , sided with 2900 Ocean that the proposed second amendment would be futile and dismissed 2900 Ocean from this action with prejudice.

For the purposes of clarification for this appeal,[5] Plaintiff amended her complaint for the second time

[5] Plaintiff, 2900 Ocean Condominium and Bryant Tovar settled. Ms. Makhnevich has no remaining claims against the Bryant Tovar, Condominium, the Board, Randy Sulzer, First Service, First Service Residential or its affiliates. This petition proceeds strictly against Novick Edelstein Pomerantz PC and Gregory Bougopoulos.

to include that at the time of the events Def. Bryant Tovar had already been nominated as a Bronx Housing Court Judge (versus being officially appointed as previously stated) when Mr. Tovar appeared for the summary judgment hearing in Brooklyn Court resulting in Plaintiff's two week first time adjournment request being denied and Defendants' supplemental affirmation being accepted by the Brooklyn Housing Court with a subsequent entry of a summary judgment against Ms. Makhnevich. Collectors subsequently assessed against petitioner and attempted to collect a legal fee for an oral argument incurred through defendant Tovar's appearance on March 28, 2018 in the state court proceeding and then refused to remove that fee from her bill in violation of 15 U.S.C. § 1692d and § 1692e.[3]. Plaintiff explained that the charge was fraudulent and illegal because Plaintiff was not present in court for that proceeding. The Court Order for that day does not mention any legal arguments. There is no certified transcript to that effect either. Plaintiff equally complained about unconscionable legal fees assessed to her when no such fees were due or owed that Respondents demanded from her and attached an invoice dated May 1, 2018 that listed various unspecified legal fees in thousands and only one monthly maintenance charge of $352.08. [6]

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[6] "a debt collector's inclusion of estimated attorney's fees and costs in the collection letter could be a violation of the FDCPA, even if allowed under the contractual agreement between the parties[.]" Derosa v. Comput. Credit, Inc., 295 F Supp. 3d 290, 297 (E.D.N.Y. 2018) (describing the Second Circuit's analysis in Carlin, 852 F.3d at 216). This approach "places the risk of penalties on the debt collector that engages

On July 9th 2019, the District Court denied Plaintiff's motion for leave to file second amended complaint and dismissed her FDCPA claim with prejudice as against 2900 Ocean.

In the case at bar, it took two Motions to Compel for Respondents to produce their discovery responses to Plaintiff's first set of discovery demands which they produced on a third attempt.[7] No depositions were conducted because this case have been litigated during NYC lockdown.

The Court issued an Order granting Respondents their motion for summary judgment on March 29th 2022. Judgment in favor of Defendants was entered on March 30th 2022. The Court of Appeals affirmed on April 17th, 2024.

REASONS FOR GRANTING THE PETITION

As it stands, this case represents the principle that debt collectors can continue their deceptive

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in activities which are not entirely lawful, rather than exposing consumers to unlawful debt-collector behavior without a possibility for relief." Stratton v. Portfolio Recovery Assocs., LLC, 770 F.3d 443, 449 (6th Cir. 2014). "In other words, if a debt collector seeks fees to which it is not entitled, it has committed a prima facie violation of the Act, even if there was no clear prior judicial statement that it was not entitled to collect the fees." Wise, 780 F.3d at 713.

[7] A simple look at the Respondents' policies and protocols relating to FDCPA confirms that there are none. Respondents have no set policies, no protocols set in compliance with FDCPA and no mechanism in place for verifying that the collection data they receive is accurate.

practices unreprimanded as Respondents should be held accountable for their acts that have been maliciously geared to injure Plaintiff.

That cannot be the law in the country where Congress enacted the Fair Debt Collection Practices Act to protect consumers. For these reasons, this case presents important and recurring issues that require this Court's resolution.

I. The Decision Below is Incorrect:

Contrary to the district court decision (affirmed by Second Circuit) that " this mistake is not a fatal mistake" , it is merely a "correctable error", the misrepresentation by debt collectors with the "capacity to discourage debtors from fully availing themselves of their legal rights" violate 15 U.S.C. § 1692e. Debt collectors may not collect debts "in a manner that prevents consumers from exercising their legal rights"); Tourgeman v. Collins Fin. Servs., Inc., 755 F.3d 1109, 1122 n.9 (9th Cir. 2014) ("Debt collectors must not make representations that tend to lead consumers to forego the valuable rights granted to them by the Act."). Whether a misrepresentation has such a capacity must be judged against the objective standard of the hypothetical least sophisticated consumer. *Easterling v. Collecto, Inc.*, 692 F.3d 229 (2d Cir. 2012). This standard "ensures the protection of all consumers, even the naive and the trusting, against deceptive debt collection practices." Clomon v. Jackson, 988 F.3d 1314, 1320 (2d Cir. 1993).

Novick filed three debt collection lawsuits at Kings County Civil Court in New York against three consumers- Makhnevich, Kogan and Levinson

from 2900 Ocean Avenue in Brooklyn. All three of these original debt collection complaints omitted the fact that 2900 Ocean Condominium ("2900 Ocean") was an Unincorporated Association that can *not* sue or be sued in its name (Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C1025:2 at 341). Novick misrepresented to Makhnevich and the state court that 2900 Ocean was *authorized to proceed*" in its name concealing the fact that 2900 Ocean can *not* sue or be sued in its name. Under any circumstances, this could make a big difference to a consumer who might not be able to assert a valid defense. A valid defense includes lack of capacity to sue because 2900 Ocean is not authorized to proceed in its name and the consumer defendant's decision to pay or challenge the alleged debt will be affected by knowledge the case is subject to dismissal, even temporarily.

In Makhnevich's case, Novick misrepresented that 2900 Ocean is "authorized to proceed" in its name in both original and amended complaints (dated October 13, 2017). However, when Ms. Makhnevich filed her counterclaims, they were not reviewed but "severed" from the state court, dismissed without prejudice in federal court and then dismissed for lack of personal jurisdiction from state court because Novick fraudulently concealed The Condo's Corporate Status misrepresenting that it's a Corporation versus Unincorporated Association as they used 2900 Ocean (registered as LLC) and finally presented on record in an Affirmation from Bougopoulos for the first time in the state court action in July of 2020 that it is an Unincorporated Association so that they could claim

lack of personal jurisdiction and as Novick filed the Affidavit which shows that Novick knew that Ms. Makhnevich was due reimbursement as a "set-off' for the collapsed ceilings (Makhnevich v Bougopoulos et al, index 1:18-cv-00285 EDNY, Doc. 75,p 61)."

Capacity to discourage debtors from fully availing themselves of their legal rights renders its misrepresentation exactly the kind of 'abusive debt collection practice[]' that the FDCPA was designed to target." Id. (quoting 15 U.S.C.§ 1692(e)).

Furthermore, any hypothetical least sophisticated consumer would be impeded to challenge any questioned debts. Cf. Russell, 74 F.3d at 34 ("[T]he test is how the least sophisticated consumer—one not having the astuteness of a 'Philadelphia lawyer' or even the sophistication of the average, everyday, common consumer—understands the notice he or she receives."). Such a consumer may simply give up and forfeit his/her/their right to challenge any debt especially when unspecified legal charges are passed on to him/her/them in thousands during such challenge.

Many courts read a materiality requirement into § 1692e. In the case at bar, the lower courts erred because Bougopoulos 'alleged misrepresentations would be material to the least sophisticated consumer. Most directly, Bougopoulos ' misstatement would be important to the least sophisticated consumer in deciding how (and whether) to respond to debt collection complaint. See, e.g., Powell v. Palisades Acquisition XVI, LLC, 782 F.3d 119, 127 (4th Cir. 2014) ("[T]he [materiality] inquiry is not whether the least

sophisticated consumer would have acted differently upon receiving Palisades' Assignment of Judgment. Instead, it is whether the information would have been important to the consumer in deciding how to respond to efforts to collect the debt." (emphasis in original)); Lox v. CDA, Ltd., 689 F.3d 818, 827 (7th Cir. 2012) ("Whether or not this fact would have led Lox to alter his course of action, it would have undoubtedly been a factor in his decision-making process, and very well could have led to a decision to pay a debt that he would have preferred to contest. The false statement was therefore material."). The Second Circuit erred in affirming the district court's judgment. Congress wanted to ensure that consumers were protected from "other improper conduct, which is not specifically addressed." McMillan v. Collection Prof'ls, Inc., 455 F.3d 754, 760 n.8 (7th Cir. 2006) (quoting S. Rep. No. 95–382, at 4 (1977), reprinted in 1977 U.S.C.C.A.N. 1695, 1698).

2. Respondents misrepresentations were intentional made to harass Ms Makhnevich in an effort to stop her from challenging the alleged debt and alleged charges that occurred as a result of Respondents' misrepresentations and false statements and as they assessed thousands of dollars in unspecified legal fees passed through to her condominium claiming it was "authorized to proceed " in its name in order to deprive her of a valid defense and as her counterclaim was severed in state court, dismissed without prejudice in federal court and dismissed due to lack of personal jurisdiction in state court because Novick fraudulently concealed The Condo's Corporate Status misrepresenting that it's a Corporation

versus Unincorporated Association as they used 2900 Ocean (registered as LLC) and finally presented on record in an Affirmation from Bougopoulos for the first time in the state court action in July of 2020 that it is an Unincorporated Association so that they could claim lack of personal jurisdiction and as Novick filed the Affidavit which shows that Novick knew that Ms. Makhnevich was due reimbursement as a "set-off" for the collapsed ceilings (Makhnevich v Bougopoulos et al, index 1:18-cv-00285 EDNY, Doc. 75,p 61)."

Contrary to the district court decision (affirmed by Second Circuit) that " this mistake is not a fatal mistake" , it is merely a "correctable error", the lie was , in fact, fatal and the state court dismissed Ms. Makhnevich's refiled counterclaim based on lack of personal jurisdiction in July 2021 because Makhnevich relied on Bougopoulos's misrepresentation that 2900 Ocean was a Corporation as he misrepresented the same to the state court in debt collection action by falsely claiming that 2900 Ocean was authorized to proceed in state court and concealing the fact that an Unincorporated Association was not, in fact, authorized to proceed in its name.

Respondents "made false or misleading statements intentionally or with deliberate recklessness." See Gebhart v. S.E.C. , 595 F.3d 1034, 1044 (9th Cir. 2010) see also Howard v. Everex Systems , 228 F.3d at 1064-65 (finding recklessness shown where the defendant had "grounds to believe material facts existed that were misstated or omitted, but nonetheless failed to obtain and disclose such facts". A jury should have

decided whether Respondents had the requisite mental awareness when they made their misrepresentations. Furthermore, based on his own sworn testimony, Bougopoulos was hired by First Service Residential, a property management company. Novick was instructed to file the lien via email from Boris Meydid of First Service Residential prior to filing a debt collection action. Based on the record including certified transcripts, Novick never produced an original retainer agreement. Novick never obtained a written authorization from all the 2900 Ocean's Board members to neither file the lien nor pursue debt collection in accordance with the by-laws in 2015. Novick never produced or attempted to produce proper invoices/accounting for credits due /abatements for the initial incident of the collapsed ceiling as Novick claimed Wentworth Management was an "old" management company when Novick knew or should have known that it merged with First Service Residential initially utilizing the name of Cooper Square. In fact, Novick ensured that neither The Board of Mgrs of 2900 Ocean Ave nor a single member of the Board ever appeared for any hearing in the debt collection action. The mistrial that occurred on 06/21/2018 was conducted without The Board or any member of the Board present in the debt collection action. The jury trial conducted on December 3, 4 and 6th 2018 did not include the Board. The Board was simply not present. It was only Respondent Bougopoulos who spoke for the Board as the Board (or any of its members) were always absent. As for the attorney fees hearing which was conducted in two parts immediately after the jury trial on December 7th,

2018 , the court erroneously omitted that Ms. Makhnevich was present on December 7th, 2018 and denied Ms. Makhnevich request for an adjournment due to severe pregnancy complications based on Bougopoulos's inhumane objection.

II. The Decision below Warrants Review

The Circuit's decision warrants this Court's review because it would impose a profoundly disruptive result on thousands of consumers who would have to deal with misrepresentations.

Respondent did not engage in the FDCPA - mandated meaningful review while preparing the debt collection complaint, the original complaint and amended complaint in October 2017. What is clear is that state court complaint are boilerplate. This course of conduct -filing false and deceptive complaints without successfully verifying key details - at least gives rise to a fair interference that Respondents were not meaningfully reviewing the pleadings. As argued in district court in opposition to summary judgment and in support of her request to amend her complaint, Respondents acted unlawfully in failing to meaningfully review the complaint in that action. Respondents' misrepresentation that 2900 Ocean was authorized to proceed in its name in the debt collection action when, in fact, it was not, was material. Respondents' misrepresentation was intentional which was discussed at oral argument in Circuit Court but Second Circuit affirmed. If the Court should grant this petition because the question presented independently warrants this Court's review.

CONCLUSION

For the reasons discussed, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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