No. 25-772

IN THE
Supreme Court of the United States

LEV ASLAN DERMEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether a federal court of appeals is categorically barred from finding plain error if circuits are split on the issue under review.

2. Whether 18 U.S.C. § 981(a)(1)(C) precludes the imposition of joint-and-several liability in forfeiture awards, consistent with this Court's decision in *Honeycutt v. United States*, 581 U.S. 443 (2017).

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. The Cato Institute's Project on Criminal Justice was founded in 1999, and focuses on the proper role of the criminal sanction in a free society, the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement officers.

The Cato Institute is concerned that joint and several criminal forfeiture imposes unjust punishment on defendants disproportionate to their culpability. Joint and several forfeiture creates perverse incentives for law enforcement without regard for the devastating consequences that affect countless individuals, families, and communities. And it violates fundamental constitutional principles of judicial review and individualized punishment.

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[1] Pursuant to Supreme Court Rule 37, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no person, other than *amicus curiae* or its counsel, made a monetary contribution intended to fund its preparation or submission. All parties were timely notified of the filing of this brief.

STATEMENT AND SUMMARY OF ARGUMENT

Federal criminal forfeiture is a new phenomenon in the United States, and the imposition of joint and several forfeiture liability has no longstanding roots in American law. But since 1970, the use of criminal forfeiture has exploded and is now a nationwide problem. Prosecutors are abusing criminal forfeiture laws to rake in billions of dollars without regard for the disproportionality of these punishments or the devastating consequences for those affected. A particularly unfair type of forfeiture is joint and several liability. When such liability is imposed, one member of a criminal conspiracy—no matter how insignificant his or her role—can be on the hook for the profits of the entire enterprise.

This Court rejected joint and several liability as incompatible with the applicable statutory text in *Honeycutt v. United States*, 581 U.S. 443 (2017). Unfortunately, however, decisions like the Tenth Circuit's below have effectively allowed joint and several liability to continue being imposed, in cases where a defendant passed on money to a co-conspirator. This Court's intervention is necessary to reaffirm the principle of *Honeycutt* and to prevent further abuse of the federal criminal-forfeiture laws.

Before 1970, criminal forfeiture was essentially unknown in the United States. The First Congress statutorily "abolished forfeiture of estate as a punishment for felons." *Austin v. United States,* 509 U.S. 602, 613 (1993) (citing Act of Apr. 30, 1790, ch. 9, § 24, 1 Stat. 117). And for 200 years, forfeiture proceedings were brought as civil actions against the property involved in crime, relying on the fiction that "the property itself

is 'guilty' of the offense." *Id.* at 613–17; *see United States v. Bajakajian,* 524 U.S. 321, 332 (1998). Those *in rem* actions resulted in the forfeiture of specific "guilty property"—for example, a vessel used to smuggle goods or an illicit distillery—but did not impose any criminal sanction on the individual who committed the offense, much less one that authorized the criminal forfeiture of lawfully obtained legitimate assets. *See Austin*, 509 U.S. at 613–17.

In 1970, Congress for the first time authorized criminal forfeiture by making forfeiture a penalty for certain violations of the drug laws and the Racketeer Influenced and Corrupt Organization Act (RICO), Pub. L. No. 91-452, 84 Stat. 922 (codified at 18 U.S.C. §§ 1961–1968). *See Bajakajian,* 524 U.S. at 332 n.7. Unlike a civil forfeiture, those criminal forfeitures were "an aspect of punishment imposed following conviction of a substantive criminal offense." *Libretti v. United States,* 516 U.S. 29, 39 (1995). Whereas civil forfeitures are *in rem* proceedings directed at specific property, criminal forfeitures are *in personam* and impose personal liability on the convicted defendant. *Bajakajian,* 524 U.S. at 332.

In 1986, Congress expanded existing criminal forfeiture statutes in the Department of Justice Assets Forfeiture Fund Amendments Act of 1986, Pub. L. No. 99-570, Tit. I, § 1366(a), 100 Stat. 3207–35. That provision, codified at 18 U.S.C. § 981, provides that any person convicted of certain crimes shall forfeit to the United States, among other things, "[a]ny property, real or personal, which constitutes or is derived from proceeds traceable to a violation" of any one of numerous federal criminal statutes. The forfeiture of proceeds reflects another departure from traditional for-

feiture law, which had until the late 1970s been limited to "contraband and the instrumentalities of crime." STEFAN D. CASSELLA, ASSET FORFEITURE LAW IN THE UNITED STATES § 25–4(a) 900 (2d ed. 2013). In the decades since it enacted RICO's forfeiture provision, Congress has authorized the forfeiture of proceeds as a penalty for hundreds of other crimes. *See, e.g.*, 18 U.S.C. § 982(a); *see also* 28 U.S.C. § 2461(c) (authorizing criminal forfeiture for any offense for which civil forfeiture is authorized).

The importance of this Court's guidance in this arena is hard to overstate. This case involves the government's application of 18 U.S.C. § 981(a)(1)(C), which authorizes the forfeiture of an individual's property following a criminal conviction for many offenses. Federal law now includes several forfeiture statutes, many of which include language similar or identical to the language of the statute at issue here.

The Tenth Circuit below plainly misapplied the statute and this Court's precedents. By its own text and structure, § 981 does not permit joint and several liability. That is made only clearer by the Court's recent holding in *Honeycutt*, 581 U.S. 443, which rejected joint and several liability under a similar federal forfeiture provision. The Court should grant this case and reaffirm the presumption announced in *Honeycutt* that Congress does not intend forfeiture statutes to provide for joint and several liability unless it says so expressly.

Basic principles of criminal law reinforce *Honeycutt*'s application here. Joint and several liability is the atom bomb of tort remedies, making every defendant liable for the entire wrong. That may make sense in tort, but joint and several liability is an exceedingly

poor fit for criminal liability, defying basic principles of proportionality in criminal sentencing—principles Congress has repeatedly endorsed (through, for example, the Sentencing Commission) and reflected in the Excessive Fines and Due Process Clauses. Joint and several liability, moreover, undermines both the punitive and remedial purposes of criminal forfeiture by potentially exempting individuals who *actually* received the proceeds of a crime from forfeiting those proceeds while potentially collecting the entire forfeiture from individuals who received nothing from the crime.

Finally, the Court should clarify that plain error review is not barred merely due to a circuit split. A circuit split can take years to resolve, leaving judges without direction and litigants without resolution. Instead, courts must be able find plain error and "say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

The Court should take up these questions now. The Court is here presented with a case where the government has decided to seek joint and several liability—contrary to the statute's text and this Court's precedent. It should settle these questions once and for all.

ARGUMENT

I. THE CONTINUED PROSECUTORIAL EXPANSION AND ABUSE OF FORFEITURE STATUTES WARRANTS THIS COURT'S ATTENTION.

A. Forfeiture abuse is a rampant nationwide problem, even among federal prosecutors.

"[F]orfeiture has in recent decades become widespread and highly profitable," which "has led to egregious and well-chronicled abuses." *Leonard v. Texas*, 580 U.S. 1178, 1179–80 (2017) (Thomas, J., respecting denial of certiorari). These abuses are a predictable outcome whenever the government's coercive power is coupled with an incentive to use that power for monetary gain.

And the amount of money at stake is truly staggering. From 2009 to 2018, the Justice Department seized more than $20 billion of forfeited property. U.S. DEP'T OF JUSTICE, *10-yr Summary of Financial Report Data* 2 (2017).[2] Between 1986 and 2014, federal forfeiture skyrocketed 4,667 percent. Dick M. Carpenter II et al., *Policing for Profit: The Abuse of Civil Asset Forfeiture*, INST. FOR JUST. 5 (2d ed. 2015). In 2017 alone, of the $1.27 billion the Department of Justice received through asset forfeiture, $847 million, or 66 percent, came through criminal forfeiture. U.S. DEP'T OF JUSTICE, *United States Attorneys' Annual Statistical Report* 64 (2018).[3]

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[2] Available at http://bit.ly/2IE8RSF.

[3] Available at

https://www.justice.gov/usao/page/file/1081801/download.

Today, millions of people nationwide face debilitating financial burdens from civil and criminal fines, fees, and forfeitures. As of 2017, 10 million people owed more than $50 billion in criminal fines, fees, and forfeitures alone. Karin D. Martin et al., *Shackled to Debt: Criminal Justice Financial Obligations and the Barriers to Re-Entry They Create* 5 (2017).[4] Forfeitures and fines wreak havoc on Americans living in poverty, in particular by taking key assets from those who can least afford to lose them. *See id.* at 14.

B. Prosecutors and courts continue to levy disproportionately punitive fines without regard to their consequences.

Joint and several criminal forfeiture is often hugely disproportionate to the underlying offense because it has no connection to an individual's specific conduct. That results in cases where a low-level courier or a driver is on the hook for the proceeds of an entire criminal enterprise—without any regard to individual culpability. Just a small sampling of cases demonstrates how far some prosecutors are willing to take things in the absence of a rule restricting joint and several criminal forfeiture:

- *United States v. Wolford*, 656 F. App'x 59, 66–67 (6th Cir. 2016): Court held that young high-school dropout was jointly and severally liable for full $269,700 proceeds of drug conspiracy alongside conspiracy's principal, a convicted felon who was ten years her senior and the father of her child. *See* Def.'s Sentencing Mem. at 1–2, *United States v. Wolford*, No. 13-cr-22 (E.D. Ky. Jan. 28, 2015), ECF No. 267.

[4] Available at https://www.ncjrs.gov/pdffiles1/nij/249976.pdf.

- *United States v. Benevento*, 663 F. Supp. 1115, 1116–17 (S.D.N.Y. 1987), *aff'd*, 836 F.2d 129 (2d Cir. 1988): Defendant was subject to forfeiture of entire forfeitable amount of $1,238,000, where evidence showed that he had paid at least $738,000 to co-conspirators.

- *United States v. Cano-Flores*, 796 F.3d 83, 90 (D.C. Cir. 2015): District court held defendant jointly and severally liable for $15 billion forfeiture reflecting the gross take of an entire Mexican drug cartel employing "tens of thousands of people." Presaging *Honeycutt*, the court of appeals reversed on the basis that § 853 does not permit joint and several liability. *Id.* at 93–95.

- *United States v. Levesque*, 546 F.3d 78, 80–81 (1st Cir. 2008): An unemployed single mother who acted as a drug runner for a marijuana conspiracy, earning only $37,284, was subjected to a $3 million judgment for the full amount of the gross proceeds obtained by all the conspirators. The court of appeals vacated and remanded for the district court to consider whether the forfeiture "effectively would deprive the defendant of [her] livelihood" in violation of the Excessive Fines Clause. *Id.* at 84–85.

C. Forfeitures create perverse incentives that make it particularly important that courts carefully police their scope.

Incentives matter, and government officials are not immune from this basic economic principle. By letting those responsible for seizing property keep the assets and benefit from the proceeds, Congress injected a powerful new incentive for federal law enforcement to seize private property from Americans. *See United*

States v. James Daniel Good Real Prop., 510 U.S. 43, 56, 56 n.2 (1993). Once agencies are given the opportunity to benefit directly from the assets they seize, they acquire a strong incentive to view more of the property they encounter as "suspicious" or otherwise subject to forfeiture.

The enactment of criminal forfeiture laws, and the profit motive underlying them, also affects how laws are enforced. For example, researchers have found that enforcement of drug laws is far higher in communities where state law allows police to retain the assets they seize. *See* Brent D. Mast et al., *Entrepreneurial Police and Drug Enforcement Policy*, 104 PUB. CHOICE 285, 285 (2000). "Legislation permitting police to keep a portion of seized assets raises drug arrests as a portion of total arrests by about 20 percent and drug arrest rates by about 18 percent." *Id.* at 301, 303. That is true even when controlling for the level of drug use in a community. *Id.* at 285, 289.

In the plea-bargaining context, the threat of joint and several forfeiture can put extra pressure on criminal defendants to plead guilty. This is particularly problematic given the ubiquity of plea bargaining. As this Court has explained, plea bargaining "is not some adjunct to the criminal justice system, it is the criminal justice system." *Missouri v. Frye*, 566 U.S. 134, 144 (2012) (citation omitted). Approximately 95 percent of all criminal cases result in guilty pleas. *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010).

II. THE MASSIVE SWEEP OF § 981 MAKES IT ESSENTIAL THAT THE COURT INTERVENE TO CORRECT ITS APPLICATION.

Section 981(a)(1)(C) is "[t]he closest Congress has come to enacting one, all-powerful forfeiture statute,"

authorizing prosecutors to seek forfeitures for "over 200 different state and federal crimes." Stefan D. Cassella, *Overview of Asset Forfeiture Law in the United States*, 17 S. AFR. J. CRIM. JUST. 347, 350 (2004); *see* 18 U.S.C. § 981(a)(1) (listing property subject to forfeiture).

The list of crimes covered by § 981(a)(1)(C) includes some of the broadest and most frequently prosecuted federal crimes, including mail fraud, 18 U.S.C. § 1341, wire fraud, *id.* § 1343, and drug conspiracies, *id.* § 1956(c)(7)(C). As a result, § 981(a)(1)(C) applies to the vast majority of crimes the federal government charges each year, including, in one snapshot, the vast majority of the 8,269 fraud charges and 22,872 drug trafficking charges it brought in 2014. *See* Bureau of Justice Statistics (BJS), AOUSC Criminal Master Data File (on file with BJS). For example, that year, the government prosecuted 789 people for mail and wire fraud, both of which are subject to criminal forfeiture under § 981. *Id.*

And joint and several criminal forfeiture is not limited to § 981. Federal law now includes numerous forfeiture statutes, *see* Charles Doyle, *Crime and Forfeiture*, CONG. RSCH. SERV. 82–94 (2023) (listing scores of statutory sections), many of which include key language similar or identical to the "property traceable to proceeds" language at issue here and in *Honeycutt*, 581 U.S. 443. *See, e.g.*, 7 U.S.C. § 2024(f)(2); 18 U.S.C. § 1594(e)(1)(B); 18 U.S.C. § 2428(b)(1)(B).

This case thus offers a crucial opportunity to clarify not just the application of § 981(a)(1)(C) but also several other forfeiture statutes in the U.S. Code. Lower courts' continued confusion about the scope of *Hon-*

eycutt shows that this intervention is necessary to prevent courts and prosecutors from continuing to presume that generic forfeiture statutes authorize joint and several liability.

III. THE DECISION BELOW IS WRONG.

A. The language and structure of § 981 precludes the imposition of joint and several liability.

Section 981(a)(1)(C) provides for the forfeiture of property that "constitutes or is derived from" certain offenses. The most natural reading of these words is that each individual is liable only for a forfeiture of the amount *that* individual "derived from" the crime.

The structure of the statute shows this to be true. Section 981 in its entirety works just like § 853(a)(1)—the provision at issue in *Honeycutt*, 581 U.S. at 448—and even directly incorporates (or uses identical language to) the provisions that the Court found dispositive in that case. In particular, § 981 incorporates the sentiments expressed in § 853(e)(1) and (p). *United States v. Thompson*, 990 F.3d 680, 689 (9th Cir. 2021) (applying § 853(p) to § 981 and holding the "textual differences between [§ 981] and 21 U.S.C. § 853 appear to us to be immaterial"). Section 853(e)(1) authorizes pretrial freezes on forfeitable property only if the government proves that the property "has the requisite connection to that crime." *Honeycutt*, 581 U.S. at 451. And § 853(p) permits the government to "confiscate property untainted by the crime" as a substitute for tainted assets—but only in certain specified circumstances. *Id.* at 451–52. This Court concluded that the "carefully constructed statutory scheme" for substitution of untainted property in § 853(p) "lays to rest any doubt that

the statute permits joint and several liability." *Id.* So too here.

B. Joint and several liability is a tort-law concept that makes no sense in the context of criminal forfeiture.

1. Joint and several liability is a tort law concept that exists to relieve a plaintiff of the burden of litigating to determine who among multiple jointly liable tortfeasors bears ultimate responsibility for a tort. Its purposes are (1) to ensure full compensation to the victim, and (2) to relieve the victim of the need to go through the costly effort of tracing and apportioning responsibility. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT LIAB. § A18, at 347 (2000) (hereinafter "RESTATEMENT 3d") ("Where two or more causes combine to produce such a single result, incapable of any reasonable division, each may be a substantial factor in bringing about the loss, and if so, each is charged with all of it.").

Tort aims "to give compensation, indemnity or restitution for harms." RESTATEMENT (SECOND) OF TORTS § 901 (1979). One barrier to such relief is that some defendants may be insolvent or unreachable. Joint and several liability reflects the judgment that this risk "should fall on a partially guilty defendant [rather] than on a completely innocent victim." *Cano-Flores*, 796 F.3d at 95; *see* RESTATEMENT 3d, *supra*, § 10, cmt. a ("[A]s between innocent plaintiffs and culpable defendants the latter should bear th[e] risk" of "insolvency.").

Joint and several liability is sensible in tort, where the victim's goal is to achieve full compensation, and where the law prioritizes compensating victims even at the cost of some unfairness to tortfeasors. But

forfeiture law is *not* indifferent to the source of payment. Its remedial goals require forfeiting the tainted property *itself*—because only that can assure that the property does not again become a tool of crime, and that the person who received it does not "profit from . . . illegal acts." *United States v. Ursery*, 518 U.S. 267, 290–91 (1996). And forfeiture's punitive goals require punishing the person who actually received tainted property, rather than a different person who did not. Moreover, jointly and severally liable tortfeasors routinely bring actions against one another for contribution to ensure that ultimate responsibility is apportioned fairly among them. But in the criminal context, there is no analogous path for jointly and severally liable criminal defendants to bring actions for contribution.

Further, forfeiture has always been "understood, at least in part, as imposing punishment." *Austin*, 509 U.S. at 611. But perversely, by making forfeiture joint and several, the punishment the government levies against one defendant reduces the punishment of another. *See, e.g.*, *United States v. Solomon*, No. 13-cr-40, 2016 WL 6435138, at *13 (E.D. Ky. Oct. 31, 2016) ("[J]oint-and-several liability will create accidental martyrs: By serving his punishment, one defendant serves—or at least reduces—the punishment of the rest."); *United States v. Black*, 526 F. Supp. 2d 870, 890 (N.D. Ill. 2007); *see also* RESTATEMENT 3d § 25(b). That is inconsistent with how criminal punishment works in every other context.

C. Joint and several liability for criminal forfeitures raises serious constitutional concerns.

Joint and several liability violates a core tenet at the heart of the Eighth Amendment and Due Process

Clauses: Punishment must be individual and individualized. *See, e.g.*, *Gall v. United States*, 552 U.S. 38, 50 (2007) (sentencing courts "make an individualized assessment based on the facts presented"); *see also Tison v. Arizona*, 481 U.S. 137, 149 (1987) ("The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender."). It would be deeply wrong, and plainly unconstitutional, for a court to impose a joint and several *prison sentence*—allowing any conspirator to serve prison time, so long as one did. Joint and several forfeiture liability is indistinguishable.

In view of these constitutional principles, Congress has made clear that one of the paramount goals of criminal sentencing is proportionality, that is, the imposition of "appropriately different sentences for criminal conduct of different severity." *Molina-Martinez v. United States*, 578 U.S. 189, 192 (2016) (cleaned up). *In personam* forfeiture judgments are part of a criminal defendant's sentence, *Libretti*, 516 U.S. at 38–39, and therefore should be imposed in a manner that "achieve[s] the 'proportionality' goal of treating . . . major drug traffickers and low-level dealers . . . differently[.]" *Dorsey* v. *United States*, 567 U.S. 260, 268 (2012).

By expanding the scope of forfeiture to require disgorgement of property *ultimately obtained by someone else*, joint and several liability presents new and challenging questions about Eighth Amendment proportionality. On its face, a court order to disgorge property obtained by another looks like a quintessential violation of the Eighth Amendment and Due Process Clauses, because it effectively punishes an individual for the crime of another. At minimum, it is

likely to be frequently "grossly disproportionate." *Bajakajian*, 524 U.S. at 326; *see also Levesque*, 546 F.3d at 84.

Joint and several liability also leaves the discretion of whom to punish, and how much to punish them, entirely in the hands of the State following conviction. That sort of extrajudicial sentencing discretion is also inconsistent with longstanding criminal law precepts.

IV. PLAIN ERROR REVIEW IS NECESSARY TO PROTECT DEFENDANTS' CONSTITUTIONAL RIGHTS.

Plain error review permits "a court to accept an untimely argument only where it reflects (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) that seriously affects the fairness, integrity, or public reputation of judicial proceedings." Charles Eric Hintz, *The Plain Error of Cause and Prejudice*, 53 SETON HALL L. REV. 439, 440 (2022). Typically, an error is plain when "it contradicts circuit or Supreme Court precedent" or violates a legal norm. *In re Sealed Case*, 573 F.3d 844, 851 (D.C. Cir. 2009) (Tatel, J.). However, there is a circuit split on the question whether an error can be plain if circuits are split on the issue under review. *Compare id.* ("In the government's view, the circuit split on this issue necessarily means that the error could not have been plain. We disagree."), *with United States v. Bennett*, 469 F.3d 46, 50 (1st Cir. 2006) ("In light of conflicting case law, any error that might have been committed by the district court was not 'obvious,' and therefore not plain error." (quoting *United States v. Olano*, 507 U.S. 725, 734 (1993))). When there is a circuit split, the majority of courts of appeals have foreclosed a finding of plain error. *E.g.*, *United States v. Carthorne*, 726 F.3d 503, 516 (4th Cir.

2013). But these circuits overlook important aspects of plain error review.

First, criminal defendants are deprived of due process when they cannot access plain error review. *James Daniel*, 510 U.S. at 46, 48 ("[I]ndividuals must receive notice and an opportunity to be heard before the Government deprives them of property."); *People v. Moon*, 215 N.E.3d 58, 69 (Ill. 2022) ("The plain error rule is not a constitutional doctrine, but it 'has roots in the same soil as due process'" (quoting *People v. Herron*, 830 N.E.2d 467, 474 (Ill. 2005))). Because plain error review is "commonly invoked in a wide range of contexts" to save untimely arguments, Hintz, *supra*, at 440, it affords defendants an avenue to address trial court mistakes; without plain error review these mistakes go unchecked, and defendants suffer due to a lack of lucidity in the law.

Further, if plain error review is barred due to a circuit split, circuit courts will be forced to sidestep decision-making. A circuit split can take years to resolve, leaving judges without direction and litigants without resolution. Instead, courts must be able find plain error and "say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

V. THE COURT SHOULD DECIDE THESE QUESTIONS NOW.

Honeycutt should have put to rest the question whether the government could seek and obtain joint and several forfeitures, but these cases continue to appear throughout the federal courts. The Court should make clear that *Honeycutt* meant what it said.

The government continues to seek joint and several forfeitures under the statute at issue in *Honeycutt*. Ac-

cording to the Justice Department, this Court in *Honeycutt* apparently left open an exception that permits joint and several liability where money passed through one defendant and came to rest with another. Given the incentives that forfeiture statutes create for prosecutors, they may well dream up more *Honeycutt* exceptions. This Court's intervention is urgently warranted to remove any doubt that joint and several liability is completely foreclosed by *Honeycutt*. The Court should grant certiorari now to conclusively reject joint and several forfeitures under § 981.

CONCLUSION

The Court should grant certiorari.

Respectfully submitted,

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