No. 23-329

In The
Supreme Court of the United States

CHONG YIM, et al.

Petitioners,

v.

CITY OF SEATTLE, WASHINGTON,

Respondent.

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

BRIEF *AMICUS CURIAE* OF NATIONAL APARTMENT ASSOCIATION, WASHINGTON MULTI-FAMILY HOUSING ASSOCIATION, AND APARTMENT OWNERS ASSOCIATION OF CALIFORNIA, INC. IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does Seattle's restriction on private owners' right to exclude potentially dangerous tenants from their property violate the Fourteenth Amendment's Due Process Clause?

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INTERESTS OF *AMICI CURIAE*[1]

National Apartment Association (NAA) is the leading voice and preeminent resource for the rental housing industry across the country. As a federation of 141 affiliated apartment associations, NAA encompasses over 95,000 members, representing more than 11.6 million apartment homes. NAA emphasizes integrity, accountability, collaboration, inclusivity, and innovation, and believes that rental housing is a valuable partner in every community. In addition to providing professional development, education, and credentialing, NAA and its network of affiliated apartment associations work to ensure that public policy does not impede but promotes the ability of apartment owners and operators to run their businesses and provide housing to more than 30 million American households.

The Apartment Owners Association of California, Inc. (AOA) is the largest individually organized group of apartment owners in California, serving landlords and property managers for over 40 years. AOA's mission is to provide education, advocacy, and resources to support to members in managing successful rental properties. It currently serves members through offices in San Diego, Orange

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

County, Long Beach, Los Angeles, Van Nuys, and Alameda.

The Washington Multi-Family Housing Association (WMFHA), established in 2003, is the Washington State chapter of the National Apartment Association (NAA). It represents residential property management companies, managers and owners of multi-family properties, apartment communities, and industry supplier companies that promote and advance the multi-family housing industry in Washington. WMFHA actively monitors and influences the legislative process to advocate equitably for the industry and the communities it services. WMFHA's educational and career development programs include national professional accreditation courses, continuing education, and opportunities. When its members' interests are at stake, WMFHA also participates in litigation to protect and promote those interests.

The member-landlords of NAA, AOA, and WMFHA face an increasingly hostile regulatory environment, as state and local governments in Washington, California, and other jurisdictions make it ever-more difficult to provide renters and their families with safe and affordable housing. The petition focuses on one particularly disturbing kind of regulation: a ban on landlords' right to perform and use criminal background checks to preclude dangerous individuals from renting their properties. Given that safety and habitability are of paramount concerns for all member-landlords, NAA, AOA, and WMFHA fully support the petition and urge the Court to grant review.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The petition raises issues that transcend the facts surrounding City of Seattle's ordinance. Just in the last ten years, many municipalities across the country have severely impaired the ability of private landowners to carry out criminal background checks. This has caused much consternation among landlords who want to—and are often charged by state law to—provide safe and secure housing for tenants. For many smaller landlords, these laws require them to rent to convicted arsonists, murderers, and other violent individuals who pose a threat, not just to other tenants, but themselves and their families when they reside on-site. Some state and federal laws similarly discourage landlords from barring dangerous tenants. Thus, the petition has far-reaching implications for the rental housing industry across the country.

Further, the petition rightly frames the question presented as whether the right to exclude is a fundamental right protected by the Due Process Clause. Judicial protection of fundamental rights historically has been achieved through the Due Process and Equal Protection Clauses of the Fourteenth Amendment. But, if it grants review, the Court could use the opportunity to determine whether an alternative vehicle for vindication of fundamental rights—like the right to exclude—is the Privileges or Immunities Clause of the Fourteenth Amendment. Long a dormant provision of the Amendment, the historical record demonstrates that the Privileges or Immunities Clause is a valid source for the protection of such rights.

For these reasons, and the reasons stated in the petition, the Court should grant review.

ARGUMENT

I. The Petition Highlights an Issue with Nationwide Implications, As Jurisdictions Across the County Have Joined Seattle in Banning Landlords' Use of Criminal Background Information To Screen Out Dangerous Tenants

With minor exceptions, Seattle's "Fair Chance Housing Ordinance" ("FCHO") makes it illegal for a private landlord to deny applicants a tenancy based on their criminal history. City of Seattle Municipal Code §§ 14.09.025(A), 14.09.010. There is an exception for sex-offender applicants. But to reject such applicants, the landlord must show a "legitimate business reason" that the applicant's exclusion is "necessary to achieve a substantial, legitimate, nondiscriminatory interest"; if the justification for excluding a convicted sex offender is not obvious on its face, it is difficult to see how the city's standard could be satisfied—at least without inviting government investigation and potentially prosecution. *Id.* § 14.09.025. Further, the FCHO prohibits the denial of an application even if inquiries reveal a conviction for murder or other serious crimes such as burglary and drug dealing. But Seattle is not the only jurisdiction to impair landlords' ability to ensure safe and secure conditions at their properties—for themselves, their employees, and other tenants.

Over the last decade, a "fair chance housing" revolution has spread across the country, resulting in

a number of municipalities enacting similar prohibitions. In 2022, it was reported that "fifteen local governments have adopted such ordinance"—all but one of them since 2014. Tom Stanley-Becker, *Breaking the Cycle of Homelessness and Incarceration: Prisoner Reentry, Racial Justice, and Fair Chance Housing Policy*, 7 U. Pa. J. L. & Pub. Aff. 257, 279-80 & n.115 (2022) (listing municipal ordinances across the country that ban the use of criminal information to deny applicants a tenancy).

For example, with extremely limited exceptions for a subset of owner-occupied rentals, the City of Berkeley, California, broadly bans private landlords from obtaining and acting on criminal background information about prospective tenants. City of Berkeley Municipal Code § 13.106.040.[2] There is no exception for applicants convicted of violent crimes like murder, battery, or assault, or property crimes like arson.

Other municipalities have similar bans, though not as severe as those of Seattle or Berkeley. Cook County (Illinois) and San Francisco require landlords to conduct an initial screening of potential tenants without consideration of their criminal history. If the tenant passes that initial screen, a tentative offer of tenancy must be made. Thereafter, landlords can conduct a second-level screening to assess a

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[2] Available at https://bit.ly/49rwWJw (last visited on November 6, 2023). The ordinance exempts owner-occupied duplexes or triplexes, but not owner-occupied fourplexes and other owner-occupied rental properties where the owner and his family are on the same premises as the criminal tenant. City of Berkeley Municipal Code § 13.106.030(K)(3).

prospective tenant's criminal background, but they can consider only certain offenses. While Cook County allows landlords to consider any convictions only within the last three years, San Francisco allows landlords to consider any convictions within the past seven years. Cook County, Ill., Code § 42-38; City & County of San Francisco, Admin. Code §§ 87.1-.11.

States and the District of Columbia also have passed laws severely limiting landlords' right to exclude—and thus their ability to ensure safe and secure housing conditions. For example, "[t]he State of New Jersey creates a sliding scale, allowing landlords to consider fourth degree offenses within the past year, second or third degree offenses within the last four years, first degree offenses within the last six years, and a short list of extremely serious offenses including murder and aggravated sexual assault no matter when they occurred." *Yim v. City of Seattle*, 63 F.4th 783, 797 (9th Cir. 2023) (citing N.J. Admin. Code §§ 13:5-1.1-2.7).

In D.C., the regulation of the use of criminal background checks is so stringent that it deters all but the most venturesome landlords to perform them. A criminal background check can be undertaken only *after* a conditional offer is made to the applying tenant. D.C. Code § 42-2541.02(d). Only then can a landlord consider "a pending criminal accusation or criminal conviction that has occurred within the past 7 years when the pending criminal accusation or criminal conviction is for one" of some *48 crimes*, including arson, burglary, all manner of assault, sexual abuse (including child sexual abuse), murder, and drug dealing. *Id.*

The common thread running through these ordinances is the substantial impairment of landlords' right to exclude tenants whom they reasonably deem could pose a threat to others on the premises. Recidivism—and the risks to life and property that criminal tenants represent—are real. From 2016 to 2020, the United States Sentencing Commission issued a number of reports on recidivism among federal offenders. *See, e.g.*, United States Sentencing Commission, *Recidivism Among Federal Offenders: A Comprehensive Overview* (2016) (hereinafter, "USSC, *Comprehensive Overview*")[3]; United States Sentencing Commission, *Criminal History and Recidivism of Federal Offenders* (2017)[4]; United States Sentencing Commission, *Recidivism Among Federal Violent Offenders* (2020) (hereinafter, "USSC, *Federal Violent Offenders*").[5] The Commission undertook a multiyear recidivism study, reporting rearrest, reconviction, and reincarceration rates of more than 25,000 federal offenders over an eight-year follow-up period. The Commission found that, over that period, about half of federal offenders were rearrested, almost one-third were reconvicted, and one-quarter were reincarcerated. *See* USSC, *Comprehensive Overview*, *supra*. Of those who reoffended, most did so within the first two years. *Id.* Worse, violent offenders reoffended at a higher rate than non-violent offenders. *See* USSC, *Federal Violent Offenders*, *supra*. Yet many of the laws discussed above, and others, would bar a private

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[3] Available at https://bit.ly/3FRxaMu (last visited on November 10, 2023).

[4] Available at https://bit.ly/3MHICyb (last visited on November 10, 2023).

[5] Available at https://bit.ly/3QBtpQe (last visited on November 10, 2023.

landlord from precluding such applicants from their premises—risking the safety of others who live or work on the premises, and the integrity of their rental properties.

To add insult to injury, in many jurisdictions where these bans are in place, private landlords are exposed to litigation and ultimately liability for criminal acts committed against their tenants. Consider California. In recent years, the landlord-tenant relationship, at least in the urban, residential context, has given rise to liability under circumstances where landlords have failed to take reasonable steps to protect tenants from criminal activity. *O'Hara v. Western Seven Trees Corp.*, 75 Cal. App. 3d 798, 802 (1977). The landlord's duty is to exercise reasonable care, with his liability turning on whether the third-party criminal conduct was foreseeable. *Pamela W. v. Millsom*, 5 Cal. App. 4th 950, 954 n. 1 (1994) (holding that to establish a landlord's duty for criminal activity, "breach of the implied warranty of habitability necessarily depends … upon a finding of foreseeability"). Of course, if the landlord learns of a violent criminal's background—but does not act on that information to deny a tenancy, because he is prohibited or deterred from doing so—criminal activity perpetrated against tenants becomes foreseeable, rendering the landlord liable to victimized tenants for potentially-crippling damages.

Even the federal agency responsible for enforcing the Fair Housing Act ("FHA")—the U.S. Department of Housing and Urban Development—has issued guidance that effectively chills the ability of private landlords to deny housing to applicants who

may pose a threat to others and to property given their criminal backgrounds. *See* U.S. Dep't of Hous. & Urb. Dev., *Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions* 1 (Apr. 4, 2016).[6] That guidance puts landlords on notice of the serious legal risks that they run if they use criminal-background information to deny housing to a prospective tenant in a way that is deemed an FHA violation:

> "While the Act does not prohibit housing providers from appropriately considering criminal history information when making housing decisions, arbitrary and overbroad criminal history-related bans are likely to lack a legally sufficient justification. Thus, a discriminatory effect resulting from a policy or practice that denies housing to anyone with a prior arrest or any kind of criminal conviction cannot be justified, and therefore such a practice would violate the Fair Housing Act. Policies that exclude persons based on criminal history must be tailored to serve the housing provider's substantial, legitimate, nondiscriminatory interest and take into consideration such factors as the type of the crime and the length of the time since conviction."

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[6] Available at: https://bit.ly/3FMsec4 (last visited on November 2, 2023).

Id. at 3.

As more recent HUD guidance on the issue explains, "[u]sing criminal history to screen, deny lease renewal, evict, or otherwise exclude individuals from housing may be illegal under the Fair Housing Act under three different theories of liability—discriminatory intent (also known as disparate treatment), discriminatory effects, and refusal to make reasonable accommodations." *See* U.S. Dep't of Hous. & Urb. Dev., *Implementation of the Office of General Counsel's Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions* 3 (June 10, 2022).[7] The guidance strongly urges that "[p]rivate housing providers should consider not using criminal history to screen tenants for housing." *Id.* at 8. Knowing that they can be investigated and prosecuted even under federal law for excluding dangerous applicants as tenants, few private landlords will screen for an applicant's criminal background. In effect, private landlords have been forced to relinquish their constitutional right to exclude, as reasonably exercised to preclude dangerous individuals from their properties. *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (per curiam) (holding that "preventing [landlords] from evicting tenants who breach their leases intrudes on one of the most *fundamental* elements of property ownership—the right to exclude" (emphasis added)).

[7] Available at https://bit.ly/3smvJmn (last visited on November 8, 2023).

Seattle may argue that its draconian law is just one piece of an already-burdensome regulatory regime that has long saddled the landlord-tenant relationship, so that when they entered the rental-housing business, they could reasonably expect more burdensome regulations. On this account, a person who chooses to rent his or her home or other property to third parties purportedly must accept most if not all government assaults on his property rights. Lower courts have gone along with this narrative. *See, e.g.*, *Gonzales v. Inslee*, 21 Wn. App. 2d 110, 140 (2022) (upholding an eviction moratorium partly on the grounds that "the moratorium did not completely interfere with landlords' reasonable expectations, since "[t]here is no question that the rental housing industry generally has been regulated heavily," and "[t]his pervasive regulation put landlords on notice that the government might intervene further in the landlord-tenant relationship"); *S. Cal. Rental Hous. Ass'n v. Cty. of San Diego*, 550 F. Supp. 3d 853, 866-67 (S.D. Cal. 2021) (upholding eviction moratorium because "the business of residential rental housing is highly regulated" and "landlords were on notice" it might come).

But *this* Court has rejected such a facile justification for violation of property rights. In *Horne v. Dep't of Agric*, 576 U.S. 351 (2015), the Federal Government contended that its raisin-reserve requirement imposed on growers was not a taking "because raisin growers voluntarily choose to participate in the raisin market." *Id.* at 365. "According to the Government," the Court observed, "if raisin growers don't like it, they can 'plant different crops,' or 'sell their raisin-variety grapes as table

grapes or for use in juice or wine.'" *Id.* (quoting Brief for Respondent 32). Relying on its decision in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), upholding a landlord's fundamental right to exclude against a New York law compelling it to allow a cable television company to install facilities on its premises, the Court rejected the Government's reasoning:

> "Let them sell wine" is probably not much more comforting to the raisin growers than similar retorts have been to others throughout history. In any event, the Government is wrong as a matter of law. In *Loretto*, we rejected the argument that the New York law was not a taking because a landlord could avoid the requirement by ceasing to be a landlord. We held instead that "a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation." . . . As the [*Loretto*] Court concluded, property rights "cannot be so easily manipulated."

Horne, 576 U.S. at 365 (quoting *Loretto*, 458 U.S. at 439 n.17.

In sum, the issue presented in the petition far transcends what landlords are facing in the City of Seattle. Governments across the county are rendering it all but impossible for private landlords to protect themselves, their employees, their tenants, and their rental properties from dangerous criminals.

Recognizing the fundamental right of landlords to exclude—including to deny dangerous criminals housing—would subject these nationwide bans to greater constitutional scrutiny under the Due Process Clause. And, it would equip landlords to better discharge their duty, recognized in many jurisdictions, to provide and maintain a safe and secure environment for their residents.

II. The Petition Presents an Opportunity To Consider Whether the Right To Exclude Is a Fundamental Property Right Protected by the Privileges or Immunities Clause of the Fourteenth Amendment

Section 1 of the Fourteenth Amendment contains three separate prohibitions against state action. It reads: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV. Thus, section 1 contains independent protections under the Privileges or Immunities Clause, the Due Process Clause, and the Equal Protection Clause.

Under the Court's present jurisprudence, the Fourteenth Amendment's Due Process Clause in particular has been the primary vehicle for substantively protecting fundamental rights against state and local infringement. But, as the petition notes, the lower courts are divided over the question of whether property rights generally, and the right to

exclude specifically, find sufficient (or any) protection under the Due Process Clause. *Compare Heights Apartments, LLC v. Walz*, 30 F.4th 720, 728 (8th Cir. 2022) ("The right to exclude is not a creature of statute and is instead fundamental and inherent in the ownership of real property."), *with Hillcrest Prop., LLP v. Pasco Cty.*, 915 F.3d 1292 (11th Cir. 2019) ("[L]and use rights, as property rights generally, are state-created rights" and therefore not "fundamental right[s]" protected by the Due Process Clause.) Given this confused state of affairs, the petition rightly calls for the Court to resolve that conflict, framing the question presented as whether Seattle's law stripping private landlords of their right to exclude violates the Fourteenth Amendment's Due Process Clause. However, the petition also presents an opportunity for the Court to consider whether the right to exclude—repeatedly characterized by the Court as a fundamental right—is alternatively (or also) protected under the Privileges or Immunities Clause.[8]

[8] In a 1999 dissent joined by then-Chief Justice Rehnquist, Justice Thomas asked whether the Court "should also consider whether the [Privileges or Immunities] Clause should displace, rather than augment, portions of [the Court's] equal protection and substantive due process jurisprudence." *Saenz v. Roe*, 526 U.S. 489, 527-28 (1999) (Thomas, J. dissenting) However, many scholars have argued that an originalist understanding and application of the Privileges or Immunities Clause arguably would not displace the work of the Due Process Clause, which—again, from an originalist perspective—*does* impose substantive limitations on the power of state and local governments to infringe on individual rights. *See* Randy E. Barnett & Evan D. Bernick, *No Arbitrary Power: An Originalist Theory of the Due Process of Law*, 60 Wm. & Mary L. Rev. 1599, 1605 (2019) ("We contend that the original letter and spirit of 'due process of law' in both the Fifth and Fourteenth

As noted above, the Privileges or Immunities Clause of the Fourteenth Amendment declares that "[n]o State . . . shall abridge the privileges or immunities of citizens of the United States." U.S. Const., amend. XIV. At the time the Fourteenth Amendment was ratified, the public meaning of the terms "privileges" and "immunities" encompassed "rights," "liberties," and "freedoms"—as those concepts were understood since the time of Blackstone. *McDonald v. City of Chicago*, 561 U.S. 742, 813 (2010) (Thomas, J., concurring in part & concurring in the judgment). With respect to Article IV, section 2, clause 1, of the United States Constitution, which declares that the "Citizens of each State shall be entitled to all Privileges and Immunities of Citizens of the several States," the term "privileges and immunities" was long interpreted to encompass "fundamental" rights. In *Corfield v. Coryell*, 6 F. Cas. 546 (C.C. E.D. Pa. 1825), Justice Bushrod Washington attempted a capacious description of the fundamental rights constituting a citizen's privileges and immunities as referenced in Article IV—a description that the framers of the

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Amendments require legislatures to exercise their powers over the life, liberty, and property of individuals in good faith by enacting legislation that is actually calculated to achieve constitutionally proper ends. Further, the original letter and spirit of 'due process of law' impose a duty upon both state and federal judges to make good-faith determinations of whether legislation is calculated to achieve constitutionally proper ends."); Timothy Sandefur, *Privileges, Immunities, and Substantive Due Process*, 5 N.Y.U. J.L. & Liberty 115, 116 (2010) (arguing that "both constitutional provisions are independent, constitutionally valid sources of protection against excessive state power").

Privileges or Immunities Clause relied upon when drafting it:

> What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen . . . to take, hold and dispose of property, either real or personal. . . . These, and many others which might be mentioned, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each state, in every other state, was manifestly calculated . . . the better to secure and perpetuate mutual friendship and intercourse among the people of the different states of the Union."

Id. at 551-52; *see also* Kimberly C. Shankman & Roger Pilon, *Reviving the Privileges or Immunities Clause To Redress the Balance Among States, Individuals, and the Federal Government*, Policy Analysis No. 326 (Nov. 23, 1998) ("Debates in Congress surrounding passage of the Fourteenth Amendment and in the states surrounding ratification make it clear that the Privileges or Immunities Clause was linked

unequivocally to both the Privileges and Immunities Clause of article IV of the Constitution and the construction of that clause by Justice Bushrod Washington in *Corfield v. Coryell* (1823), the leading case on the subject.")[9]

There can be little doubt that property rights—including the right to exclude—have long been considered among the fundamental rights protected as privileges and immunities of federal citizenship. As this Court has repeatedly observed, "[t]he right to exclude is one of the most treasured rights of property ownership." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021); *see also Loretto*, 458 U. S. at 435 ("The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights."). Recognition of the right to exclude as a fundamental right is rooted in English common law. "According to Blackstone, the very idea of property entails 'that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.'" *Cedar Point*, 141 S. Ct. at 2072 (quoting 2 W. Blackstone, *Commentaries on the Laws of England* 2 (1766)). If, as Justice Washington declared in *Coryell*, a citizen's privileges and immunities capture the fundamental rights to acquire, possess, and dispose of property—undoubtedly-important sticks in the bundle of rights characterized as "property"—then those concepts necessarily capture the right to exclude—"one of the most *essential* sticks" in that

[9] Available at https://bit.ly/3ubCMil (visited on November 10, 2023).

bundle of rights. *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) (emphasis added); *see also W. Va. State Bd. of Educ. v. Barnette,* 319 U.S. 624, 638 (1943) ("One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other *fundamental* rights may not be submitted to vote; they depend on the outcome of no elections." (emphasis added)).

The petition persuasively argues that the Ninth Circuit's decision below is at odds with a number of other state and federal cases on the question whether the right to exclude is a fundamental right protected by the Due Process Clause of the Fourteenth Amendment. Petition at 24-28 (demonstrating lower-court conflict on the issue). In resolving that deep conflict over an important federal constitutional question, the Court could reevaluate its Fourteenth Amendment jurisprudence and determine the appropriate font of protection for a fundamental right like the right to exclude. Because this case presents a question of law on undisputed facts, and there are no other procedural barriers that counsel against review, the petition presents "an opportunity to reexamine, and begin the process of restoring, the meaning of the Fourteenth Amendment agreed upon by those who ratified it"—and give the Privileges or Immunities Clause its due and equal place among the Amendment's provisions. *McDonald*, 561 U.S. at 813 (Thomas, J., dissenting).

CONCLUSION

For the reasons stated in the petition and in this brief, the Court should grant review.

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Respectfully submitted,

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