

No. 17-521

IN THE
Supreme Court of the United States

CAROLYN LAZAR,

Petitioner,

v.

MARK G. KRONCKE, IN HIS CAPACITY AS
ADMINISTRATOR OF THE ESTATE OF
GEORGE THOMAS KRONCKE,

Respondent.

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

**BRIEF OF THE WOMEN'S LAW PROJECT,
AMERICAN ASSOCIATION OF UNIVERSITY
WOMEN, WOMEN'S INSTITUTE FOR A SECURE
RETIREMENT, NATIONAL PARTNERSHIP FOR
WOMEN & FAMILIES, CALIFORNIA WOMEN'S
LAW CENTER, LEGAL VOICE, AND SOUTHWEST
WOMEN'S LAW CENTER AS *AMICI CURIAE*
IN SUPPORT OF PETITIONER**

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INTEREST OF AMICI CURIAE¹

The Women's Law Project (WLP), founded in 1974, is a nonprofit legal advocacy organization dedicated to creating a more just and equitable society by advancing the rights and status of women throughout their lives. To advance these goals, WLP engages in high impact litigation, policy advocacy, public education, and individual counseling. Economic justice and equality for women are high priorities for WLP, including efforts to eliminate workplace inequality which contributes to the economic hardship and poverty disparately impacting women later in life, particularly women of color. WLP has represented clients challenging sex discrimination in the workplace and advocated for legal reform to achieve equity in the workplace and in retirement.

In 1881, the American Association of University Women (AAUW) was founded by like-minded women who had defied society's conventions by earning 27 college degrees. Since then it has worked to increase women's access to higher education through research, advocacy, and philanthropy. Today, AAUW has more than 170,000 members and supporters, 1,000

¹ Pursuant to Rule 37.6, amici certify that no counsel for a party authored this brief in whole or in part, and no persons other than amici curiae or their counsel made a monetary contribution to its preparation or submission. Pursuant to Rule 37.3(a), counsel for Petitioner and Respondent have consented to the filing of this brief and written consent has been filed with the Clerk of the Court. The parties have each received at least ten days notice of the intent to file this brief.

branches, and 800 college and university partners nationwide. AAUW plays a major role in mobilizing advocates nationwide on AAUW's priority issues, chief among them financial gender equality. In adherence with its member-adopted Public Policy Program, AAUW is a staunch advocate for pay equity and offers programming designed to increase financial security for women. AAUW promotes research and advocacy initiatives that highlight the burdensome impact that financial insecurity, due to debt, the wage gap and other societal factors, can have over women's lifetimes.

The Women's Institute for a Secure Retirement (WISER) is dedicated to education and advocacy that will improve the long-term financial quality of life for women. As the only nonprofit organization to focus exclusively on the unique financial challenges that women face in retirement, WISER seeks to improve women's opportunities to secure fair pensions and adequate retirement income through research, workshops, partnerships, education materials, and outreach with lawmakers and the media. WISER operates the National Resource Center on Women and Retirement Planning, a comprehensive compendium of educational and informational materials that are used by a variety of audiences to help educate women about the need to prepare for, save for, and overcome barriers to secure income in retirement.

The National Partnership for Women & Families (formerly Women's Legal Defense Fund) is a national

advocacy organization that promotes fairness in the workplace, reproductive health and rights, quality health care for all, and policies that help women and men meet the dual demands of work and family. Since its founding in 1971, National Partnership has fought to combat sex discrimination and has worked to advance women's equal employment opportunities and health through several means, including by challenging discriminatory employment practices in the courts.

The California Women's Law Center (CWLC) is a statewide, nonprofit law and policy center dedicated to advancing the civil rights of women and girls. Since its inception in 1989, CWLC has placed a particular emphasis on addressing the economic security of women with a specific focus on aging women.

Legal Voice is a regional nonprofit public interest organization that works to advance the legal rights of all women through litigation, legislation, and education. Since its founding in 1978, Legal Voice (formerly known as Northwest Women's Law Center) has been a regional leader in ensuring economic justice and workplace equity for women. Legal Voice has participated as counsel and as *amicus curiae* in cases throughout the Northwest and the country and is currently involved in numerous legislative and litigation efforts. Legal Voice has a strong interest in this case because it raises imperative questions about the economic and financial security of women in society.

The Southwest Women’s Law Center is a nonprofit policy and advocacy law center that was organized in 2005 to advance opportunities for women and girls in New Mexico. It collaborates with community members, organizations, attorneys, and public officials to address economic outcomes for women and their families. It advocates for equal rights for women who are the heads of households, and helps ensure that all individuals are treated with respect regardless of sex or gender.

SUMMARY OF ARGUMENT

In 1990, the drafters of the Uniform Probate Code added a new provision—Section 2-804—which provides that the divorce or annulment of a marriage automatically revokes a decedent’s designation of a former spouse as a beneficiary in nonprobate assets.² These assets often include individual retirement account (IRAs) and life insurance policies.³ Twenty-nine states have adopted such “revocation-on-divorce” statutes.⁴

These statutes have vast economic and social significance because they potentially impact the

² See Unif. Probate Code, art. II prefatory note, at 24-25 (2010); *id.* § 2-804.

³ See, e.g., *Metro. Life Ins. Co. v. Melin*, 853 F.3d 410 (8th Cir. 2017); *Whirlpool Corp. v. Ritter*, 929 F.2d 1318 (8th Cir. 1991).

⁴ See Pet. 21, n.2-3 (collecting statutes).

disposition of trillions of dollars in assets. They are particularly problematic for millions of divorced American women who may automatically lose their status as beneficiaries of their husbands' retirement accounts and life insurance policies.⁵ The economic stakes are enormous: "Most wealth transfer on death today occurs through the nonprobate system," while most wealth held in nonprobate assets like IRAs and life insurance policies belongs to men.⁶

The importance of the question presented in this case—whether the retroactive application of revocation-on-divorce statutes unconstitutionally "impair[s] the Obligation of Contracts," U.S. Const. art. I, § 10, cl. 1—is even greater because, as shown below, these statutes have a substantial disparate impact, especially when retroactively applied, on the ability of divorced women to achieve economic security.

⁵ Of course, civil marriage is no longer exclusively heterosexual. See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). The retroactive application of revocation-on-divorce statutes, however, disproportionately impacts former wives, due to a variety of circumstances unique to divorced women that are addressed in this brief.

⁶ John H. Langbein, *Major Reforms of the Property Restatement and the Uniform Probate Code: Reformation, Harmless Error, and Nonprobate Transfers*, 38 ACTEC L.J. 1, 12 (2012).

ARGUMENT

WOMEN ARE DISPARATELY AFFECTED BY REVOCATION-ON-DIVORCE STATUTES

A. Divorced women face greater economic insecurity in retirement and child-rearing than divorced men

Automatic revocation-on-divorce statutes, like the Arizona statute at issue here,⁷ are legislative decisions to revoke the beneficiary status of one group—ex-spouses—in order to benefit others. That statutorily mandated disadvantage is particularly problematic for women, who face significantly higher rates of poverty after divorce and in retirement than their former husbands.

In 2011, according to one study, 73% more women than men over 65 lived in poverty (10.7% of women compared to 6.2% of men).⁸ Another study found that women are “80 percent more likely than men to be impoverished at age 65 and older, while women between the ages of 75 to 79 are three times more

⁷ Ariz. Rev. Stat. § 14-2804.

⁸ See Mikki D. Waid, AARP Pub. Pol’y Inst., *An Uphill Climb: Women Face Greater Obstacles to Retirement Security*, at 2 (2013), <https://goo.gl/tdU79o>.

likely than men to be living in poverty.”⁹ “It is a truth universally acknowledged (or it should be) that women are more economically vulnerable than men in retirement.”¹⁰

The problem is even greater for divorced women—more than 20% of divorced women over the age of 65 live in poverty,¹¹ with some estimates as high as 37%.¹² As the Government Accountability Office has found, divorce is economically “devastating” for women and is “detrimental” for the “income security” of women nearing retirement.¹³

⁹ Jennifer Erin Brown et al., Nat’l Inst. on Ret. Sec., *Shortchanged in Retirement: Continuing Challenges to Women’s Financial Future*, at 1 (2016), <https://goo.gl/gr5o6t>.

¹⁰ Joan Entmacher & Amy Matsui, *Addressing The Challenges Women Face In Retirement: Improving Social Security, Pensions, and SSI*, 46 J. Marshall L. Rev. 749, 749 (2013).

¹¹ See Barbara A. Butrica and Karen E. Smith, *The Retirement Prospects of Divorced Women*, 72 Soc. Sec. Bull. 11, 11 (2012) <https://goo.gl/toxRtV>; Soc. Sec. Admin., *Income of the Population 55 or Older, 2014*, at 312 tbl.11.1 (2016), <https://goo.gl/8AgLr8> (in 2014, about 12.8% of divorced men over age 65 lived below the poverty line).

¹² Sandra Yin, *Older Women, Divorce, and Poverty*, Population Reference Bureau (Mar. 2008), <https://goo.gl/eb00jC>.

¹³ U.S. Gov’t Accountability Office, GAO-12-699, *Retirement Security: Women Still Face Challenges*, at Introduction, 46 (2012), <https://goo.gl/9mwGp4> (“[W]omen’s household income, on average, fell by 41 percent with divorce, almost twice the size of the decline that men experienced.”); see Conor Dougherty, *Children of Divorce More Likely to be Poor*, Wall St. J., Aug. 25,

The inequality of women’s financial status during retirement stems from the income inequality they experience during their working lives, as well as from the fact that women generally spend more time out of the workforce in caregiving roles for children and other family members.¹⁴ In 2016, husbands earned more than their wives in about 71% of marriages.¹⁵ As the Congressional Joint Economic Committee has recognized, the fact “women working full-time earned 77 cents for every dollar earned by their male

2011, <https://goo.gl/eeDFzw> (“27% of recently divorced women had less than \$25,000 in annual household income compared with 17% of recently divorced men.”); Diana B. Elliott & Tavia Simmons, U.S. Census Bureau, *Marital Events of Americans: 2009*, at 9 tbl.2 (2011), <https://goo.gl/dtwmmc> (in 2009, 21.5% of women divorced in the past 12 months were in poverty, compared to 10.5% of men).

¹⁴ See Waid, *supra* note 8, at 1 (discussing gender wage gap and that women generally take 12 years out of the work force as a result of caregiving); Peggie R. Smith, *Elder Care, Gender, and Work: The Work-Family Issue of the 21st Century*, 25 Berkeley J. Emp. & Lab. L. 351, 360, 370-71 (2004) (women provide approximately 70% of all unpaid elder care, and 16% of employed caregivers quit their jobs, 38% take time off, and 21% work fewer hours, which has “particularly harmful implications for women”).

¹⁵ U.S. Census Bureau, Table F-22, *Married-Couple Families with Wives’ Earnings Greater Than Husbands’ Earnings: 1981 to 2016*, Historical Income Tables – Families, <https://goo.gl/9Ls2Yh>.

counterparts . . . jeopardize[s] women’s retirement security.”¹⁶

With respect to economic security in retirement, women face similar disparities. As to IRAs (the nonprobate asset at issue in this case), multiple studies show disparities of 40% to 80% in women’s account holdings compared to men’s.¹⁷ As one example, the median IRA account balance for men age 70 and up was \$102,097 in 2012, compared with \$56,371 for women, meaning that the mens’ median balance was 81% greater than women’s.¹⁸ Such differences may have huge ramifications in light of the fact that IRA assets are Americans’ single largest type

¹⁶ U.S. Cong. Joint Econ. Comm. Chairman’s Staff, 112th Cong., *The Gender Wage Gap Jeopardizes Women’s Retirement Security* 1 (2011), <https://goo.gl/KnQpt9>; see *The Pay Gap’s Connected to the Retirement Gap*, Women’s Inst. for a Secure Ret. (2017), <https://goo.gl/gRTfpx>.

¹⁷ See Craig Copeland, *Individual Retirement Account Balances, Contributions, and Rollovers, 2012; With Longitudinal Results 2010–2012: The EBRI IRA Database*, EBRI Issue Brief No. 399 at 7 (May 2014), <https://goo.gl/dH8221> (“Males had higher individual average and median balances than females: \$139,467 and \$36,949 for males, respectively, vs. \$81,700 and \$25,969 for females . . . Across all ages, males had both higher individual average and median balances than females . . .”); Brown, *supra* note 9, at 9-10 (on average, women saved less than men in their IRAs, with an average account balance for men of \$56,429, which is 115% larger than the average of \$26,307 for women).

¹⁸ See Copeland, *supra* note 17.

of retirement holding,¹⁹ with over \$7.5 trillion held in IRAs alone.²⁰ Automatically removing a former wife as the beneficiary of a spouse's retirement account further exacerbates these disparities. For example, in this case Petitioner is a schoolteacher while her former husband's IRA is worth over \$1 million.²¹

A significant gender gap also exists for life insurance coverage, which is another nonprobate asset targeted by revocation-on-divorce statutes.²² As of 2016, 56% of women had life insurance coverage compared to 62% of men, and women carried only about 78% the amount of coverage as men.²³ Even women with high incomes are less likely to have life

¹⁹ See *id.* at 27 fig.A (IRAs comprise 24% of total U.S. retirement plan assets).

²⁰ Inv. Co. Inst., *The Role of IRAs in U.S. Households' Savings for Retirement, 2016*, at 2 (2017), <https://goo.gl/5h7kR1>.

²¹ See Pet. 4; Pet. App. 55a.

²² See, e.g., *Metro. Life Ins. Co.*, 853 F.3d at 411; *Whirlpool Corp.*, 929 F.2d at 1319.

²³ See *Women Still Lag Men in Life Insurance Ownership*, insurancenewsnet.com (Nov. 16, 2016) (citing LIMRA, *Life Insurance Ownership in Focus: U.S. Person-Level Trends* (2016)), <https://goo.gl/AZ4LTx>; Steven Jordan, *Gender Gap: Fewer Women than Men Have Life Insurance, Leaving Families Vulnerable*, Omaha World Herald, Aug. 27, 2015, <https://goo.gl/T6QTii>.

insurance than similarly situated men.²⁴ And while life insurance is often purchased by “family breadwinners who want to make sure that in the event they die, the future financial needs of dependents” are met, it is also used by many to “build up cash reserves” for retirement.²⁵ Again, gender disparities result in significant economic consequences for women, since the face value of Americans’ individual life insurance policies totaled \$12.3 trillion in 2015.²⁶

These disparities are further compounded because women live longer than men on average and are more likely to live alone in old age, thus having greater lifetime financial needs.²⁷ Indeed, women make up 70% of the nursing home population, and generally

²⁴ *Facts About Life 2011*, LIMRA (Sept. 2011), <https://goo.gl/CVmp6o>.

²⁵ *Who Buys Life Insurance?*, Alabama Department of Insurance, <https://goo.gl/5UjNc5>.

²⁶ Am. Council of Life Insurers, *Life Insurers Fact Book 2016*, at 66 tbl.7.1 (2016), <https://goo.gl/kmLf7V>.

²⁷ See Waid, *supra* note 8, at 1; Leslie Bennetts, *Census Data Reveals Elder Women’s Poverty Crisis*, *The Daily Beast* (Mar. 28, 2012), <https://goo.gl/8uqum3> (“Over the age of 85, 60 percent of men live with a spouse, but only 17 percent of women live with a spouse.”); Ctrs. for Disease Control & Prevention, U.S. Dep’t Health & Human Servs., *Nat’l Vital Statistics Rep. No. 65-04, Deaths: Final Data for 2014*, at 7 (2016), <https://goo.gl/ajNgH4> (“In 2014, the difference in life expectancy between the sexes was 4.8 years.”).

incur higher medical costs.²⁸ According to one recent analysis, due to the longevity difference and the rising cost of health care, the average 45-year-old woman today can expect to incur \$966,952 in medical expenses during her retirement, which is \$208,559 (27.5%) more than the average 45-year-old man (\$758,393).²⁹

Moreover, revocation-on-divorce statutes have a substantial disparate impact in the decades before retirement. Following a divorce, women are more likely to maintain primary or sole custody of the former couple's children, thereby facing potentially greater financial needs.³⁰ As courts, state legislatures, and the U.S. Solicitor General have understood, it is reasonable that a former husband would intend to use his nonprobate assets, such as an

²⁸ See Waid, *supra* note 8, at 1.

²⁹ HealthView Services, *The High Cost of Living Longer: Women and Retirement Health Care*, at 9 tbl.4 (2016), <https://goo.gl/2AKwws>.

³⁰ See Elliott & Simmons, *supra* note 13, at 11 tbl.3 (in 2009, 72.9% of children living with a parent who divorced in the past year were in single-mother households); Maria Cancian et al., *Who Gets Custody? Dramatic Changes in Children's Living Arrangments After Divorce*, 51 *Demography* 1381, 1387 (2014), <https://goo.gl/v467nR> (in 2008, divorced mothers had sole custody in 42% of cases and equal or primary custody in 41.4% of cases, while fathers had sole custody in 9% of cases).

IRA or life insurance, to ensure that his former spouse will be able to care for their children after his death.³¹

B. Retroactive application of revocation-on-divorce statutes compounds their disproportionate effect on women

Retroactive application of revocation-on-divorce statutes further increases the statutes' disparate impact by interfering with the settled expectations of divorcing spouses. As in contract law generally, the best evidence of the parties' intent is found in the written documents that they executed.³² In the

³¹ See *Whirlpool Corp.*, 929 F.2d at 1323 (“It is plausible that [an ex-husband would be] primarily concerned about the well-being of his ex-wife because she had custody of his four minor children and he wanted to insure her ability to provide for their welfare.”); H.B. 644, 91st Gen. Assemb., Reg. Sess. (Mo. 2001) (exempting life insurance benefits from coverage under revocation-on-divorce statute); Nonprobate Transfers: Hearing on H.B. 644 Before the H. Comm. on Ins., 91st Gen. Assemb., Reg. Sess. (Mo. 2001) (summary of Richard Smreker, Sr. Leg. Analyst), <https://goo.gl/LF1pdo> (proponents of bill argued that “[i]n reality, many people get divorced and still want their insurance policy beneficiary to remain unchanged”); Brief for United States as Amicus Curiae, *Hillman v. Maretta*, 133 S. Ct. 1943 (2013) (No. 11-1221), 2013 WL 1326956, at 28 (“A divorced federal employee might want his ex-spouse to receive insurance proceeds for a number of reasons – out of a sense of obligation, remorse, or continuing affection, or to help care for children of the marriage that remain in the ex-spouse’s custody.”).

³² See, e.g., *M & G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926, 933 (2015) (quoting 11 R. Lord, *Williston on Contracts* § 30:6 (4th ed. 2012)) (“Where the words of a contract in writing are clear and unambiguous, its meaning is to be ascertained in accordance with its plainly expressed intent.”).

circumstances here, those documents include the beneficiary designations in IRAs and insurance policies. As the Eighth Circuit aptly put it, “[h]aving determined that some individuals are inattentive regarding their insurance policies, the . . . legislature can hardly expect these same individuals to be cognizant of changes in the law respecting those policies.”³³

Protecting the parties’ reasonable expectations from automatic retroactive change by state legislatures is a core value at the heart of the Contracts Clause.³⁴ Retroactive application of

³³ *Whirlpool*, 929 F.2d at 1323; see *Paronese v. Midland Nat. Ins. Co.*, 706 A.2d 814, 818 (Pa. 1998) (“Divorce does not in all cases and automatically spell the end of interest in or even concern for one former spouse by the other”; accordingly, “to hold that forthwith upon divorce the husband must be presumed to intend to terminate a contractual arrangement which benefits the other is to engage in speculation” that may be unwarranted by the facts).

³⁴ See *Landgraf v. USI Film Prod.*, 511 U.S. 244, 265-66 (1994) (“[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence,” including in the Contracts Clause, because “[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.”); *Whirlpool*, 929 F.2d at 1322 (retroactive application of Oklahoma’s revocation-on-divorce statute violated the Contracts Clause because the decedent “was entitled to expect that his wishes . . . as ascertained pursuant to this then-existing law, would be effectuated. By reaching back in time and disrupting this expectation, the Oklahoma legislature impaired [the decedent’s] contract.”); *Aetna Life Ins. Co. v. Schilling*, 616 N.E.2d 893, 896 (Ohio 1993) (invalidating

revocation-on divorce statutes has been criticized as well because it “only confuses an already dizzying area of law.”³⁵ At the very least, the Constitution requires a case-by-case analysis of the divorcing spouses’ intent before a formal beneficiary designation can be retroactively overridden by the state.³⁶ This analysis

retroactive application of revocation-on-divorce statute as “obnoxious to” Ohio Constitution’s Contracts Clause).

³⁵ Kristen P. Raymond, Note, *Double Trouble - an Ex-Spouse's Life Insurance Beneficiary Status & State Automatic Revocation Upon Divorce Statutes: Who Gets What?*, 19 Conn. Ins. L.J. 399, 425 (2013) (“[S]tates that choose to adopt the modern minority rule should avoid making them retroactively applicable . . . creating more unsettlement in an already murky area of law.”); see Suzanne Soliman, *A Fair Presumption: Why Florida Needs a Divorce Revocation Statute for Beneficiary-Designated Nonprobate Assets*, 36 Stetson L. Rev. 397, 424 (2007) (“[T]he . . . Legislature should not retroactively apply the nonprobate revocation statute to accounts created prior to the enactment of the law.”).

³⁶ See, e.g., *Nat’l Auto. Dealers & Assocs. Ret. Tr. v. Arbeitman*, 89 F.3d 496, 498, 501 (8th Cir. 1996) (couple “maintained an amicable relationship,” husband “provided more support to [his former wife] and the children than he was legally obligated” to provide and “did not change the beneficiary designation” on his pension plan); *Am. Gen. Life Ins. Co. v. Jenson*, No. 11-5057-JLV, 2012 WL 848158, at *2 (D.S.D. Mar. 12, 2012) (couple “continued to live together and function as a couple” after divorce); *Hughes v. Scholl*, 900 S.W.2d 606, 607 (Ky. 1995) (“[T]here are often valid reasons why an insured would want a former spouse to receive his insurance policy proceeds” and decedent’s “inaction might well indicate his intent not to effect a change.”); *In re Estate of Rock*, 612 N.W.2d 891, 894-95 (Minn. Ct. App. 2000) (decedent intended former wife to remain as IRA beneficiary; the divorced couple “maintained an amicable relationship, and mutually agreed to retain each other as primary beneficiaries on their IRA

is particularly important when a statute has a disparate impact on women, as there is “no doubt that every level of Government may claim an interest in promoting . . . gender equality at least as a general matter.”³⁷ For that reason, policy proposals addressing women’s retirement inequality have focused on increasing divorced women’s access to their former spouses’ benefits.³⁸ A one-size-fits-all assumption regarding a decedent’s intended beneficiaries not only violates the Contracts Clause when applied retroactively, but is of particular

accounts, retirement plans or equivalent cash accounts” and “cooperated well in raising their children”); *Daughtry v. McLamb*, 512 S.E.2d 91, 92 (N.C. Ct. App. 1999) (“[T]he decedent and [former wife] remained friends after their divorce and continued to maintain a joint checking account;” “no attempt [was] made during the decedent’s lifetime to change the beneficiary . . .”).

³⁷ *Legatus v. Sebelius*, 988 F. Supp. 2d 794, 810 (E.D. Mich. 2013); see *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1143 (10th Cir. 2013), *aff’d sub nom.*, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (“recognize[ing] the importance” of the governmental interest in promoting gender equality, while holding, in that particular context, it did not satisfy the “compelling interest” standard).

³⁸ See U.S. Gov’t Accountability Office, *supra* note 13, at 45 (“increasing the benefit rate for divorced spouses to 75 percent would lower the poverty rate among divorced spouses from 30 percent to 11 percent” and discussing “mak[ing] divorced spouses who are disabled eligible for benefits on the same basis as disabled surviving spouses”); Entmacher, *supra* note 10, at 789 (discussing methods of protecting spouses’ interests in retirement assets at divorce as a solution to women’s retirement inequality).

concern here due to its disparate impact on divorced women.

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

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