IBARGUEN v. NEW YORK

No. 21-1251

SUPREME COURT OF THE UNITED STATES

April 15, 2022

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ERIC IBARGUEN, Petitioner, v. NEW YORK, Respondent.

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Title

BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Text

INTERESTS OF *AMICUS* [1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit, voluntary professional bar [*4] association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crimes or misconduct. Founded in 1958, NACDL's members include private criminal defense lawyers, public

[1] Pursuant to Supreme Court Rule 37.2, Amicus certifies that counsel of record for all parties received timely notice of Amicus's intent to file this brief and provided written consent. Pursuant to Rule 37.6, Amicus also certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than Amicus or its counsel, has made a monetary contribution to the preparation or submission of this brief.

defenders, military defense counsel, law professors, and judges. NACDL is dedicated to advancing the proper, efficient, and fair administration of justice and frequently appears as *amicus curiae* in this Court and other federal and state courts, seeking to provide assistance in cases that raise issues of importance to criminal defendants, criminal defense attorneys, and the criminal justice system as a whole.

NACDL has a keen interest in Fourth Amendment jurisprudence, including cases involving residential searches and Fourth Amendment protections afforded to social guests invited to be present in another's home.

SUMMARY OF ARGUMENT

Both federal appellate courts and state courts of last resort have inconsistently decided whether the Fourth Amendment protects social guests from unreasonable searches when they visit a home but do not spend the night. In the decision below, the New York Court of Appeals widened this split by ruling that a social guest who [*5] visited for dinner, but did not stay the night, did not have standing to challenge the search of his host's home. *See People v. Ibarguen, 37 N.Y.3d 1107, 1107-08 (2021).*

At least thirteen federal circuit courts and state courts of last resort have ruled on this issue with conflicting results. [2] But that tally vastly underrepresents the full scope of the conflict and its detrimental impact on the legal system. That discrepancy arises because challenges to the legality of a search arise most frequently in pretrial proceedings which lead to plea agreements. Even where interpretation of the Fourth Amendment as it relates to social guests is clear within a particular jurisdiction, differences among jurisdictions inevitably result in disparate plea deals for comparable offenses and offenders in contravention of basic principles of parity and fairness in sentencing. Uncertainty regarding application of the Fourth Amendment in cases involving social guests also undermines the fairness and efficiency of the plea bargaining process because prosecutors and defendants lack clarity about the scope of admissible evidence.

The inconsistent application of the Fourth Amendment [*6] to social guests also degrades the efficacy of the exclusionary rule in providing clear standards for police conduct and concomitant deterrence of police misconduct by making it difficult to institutionalize uniform practices and compliance through widely-used training materials.

Finally, in eliminating Fourth Amendment protection for social guests who do not spend the night, the decision below will unacceptably chill social gatherings in private homes that are a crucial aspect of daily life in our nation, including gatherings for religious, political,

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[2] *See* Petition for Writ of Certiorari ("Pet.") at 8-10.

cultural, and community affiliation, weaving the fabric of social interaction among family, friends, and neighbors.

AR GUMENT

I. U NCERTAI NTY IN APPLICATI ON OF THE FOURTH AMENDMENT TO SOCIA L GUESTS UNDER MINES THE INTE GRIT Y OF PLEA NEGOTIATI ONS WHICH DETER MINE THE OUT COME OF THE VAST MAJORIT Y OF CRI MINAL CASES

A. While the Conflicting Interpretations of the Fourth Amendment Alone Justify Granting Certiorari, the Split Vastly Understates the Frequency with which this Issue Arises and Its Effect on the Criminal Justice System

This Court has yet to decide whether the Fourth Amendment protects social guests who are not staying [*7] overnight from unreasonable searches in their hosts' residence. *Minnesota v. Olson, 495 U.S. 91, 98 (1990)*, held that overnight guests have a legitimate expectation of privacy in their hosts' residence, and *Minnesota v. Carter, 525 U.S. 83, 91 (1998)*, held that guests visiting a residence purely to conduct a business transaction have no legitimate expectation of privacy. *Carter* drew a distinction between individuals "present for a business transaction" with no "previous relationship" to the host, and guests with a previous relationship "similar to the overnight guest relationship" and who have been "accept[ed] into the household." *See* *id. at 90* (noting how "[p]roperty used for commercial purposes is treated differently for Fourth Amendment purposes from residential property"). *Carter*, however, left unanswered the important federal question of whether the Fourth Amendment protects individuals who fall somewhere between the two: guests who visit their host's residence for noncommercial purposes but do not spend the night.

Federal courts and state courts of last resort have given starkly different answers to this question. [3] The decision below illustrates the point--while in some jurisdictions the evidence [*8] seized by the police in this case might well be excluded given the lack of exigent circumstances supporting the police officers' warrantless entry, in New York, the defendant did not even get a hearing on the search's reasonableness because he purportedly lacked a reasonable expectation of privacy in his host's home.

Yet, the conflicting appellate decisions are only the tip of the iceberg. The actual impact of the conflict is far greater. Some 95% of cases, at both federal and state levels, are resolved through guilty pleas, [4] meaning the vast majority of instances implicating the

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[3] *See* Pet. at 8-10.

Fourth Amendment and the exclusionary rule are resolved through plea negotiations--an "undocumented and largely unchallenged" process [5]--rather than by judicial [*9] decisions. Thus, the appellate courts that have issued conflicting decisions when faced with the question presented here have not seen the myriad fact patterns in which this issue arises, and the lack of clarity created by the contradictory rulings has a much greater impact on the integrity of the criminal justice process than about a dozen appellate cases might suggest. [6] That is because most defendants must make a decision whether to accept a plea deal before any court has considered the Fourth Amendment issue here. By granting certiorari, this Court would clarify the uncertainty in this "often visited area of the law." *Carter, 525 U.S. at 110* (Ginsburg, J., dissenting).

B. Granting Certiorari Would Ensure More Consistent Outcomes Across Jurisdictions and Protect the Integrity of Plea Negotiations

When "[p]roperly administered," plea bargaining can "benefit all concerned," including judges and prosecutors, who "conserve vital and scarce resources." *Blackledge v. Allison, 431 U.S. 63, 71 (1977)*; *see* *Corbitt v. New Jersey, 439 U.S. 212, 222 n.12 (1978)* ("The Court has several times recognized the benefits [*10] of plea bargaining to the defendant as well as to the State."). Indeed, the "criminal legal system could be brought to a halt by a mass refusal to plead guilty." [7] The exclusionary rule is a primary driver in the plea negotiation process because the strength of the evidence that is or is not admissible is "perhaps the most salient factor" parties consider when conducting plea negotiations. [8]

The conflicting decisions identified in the Petition--the majority of which ultimately involve an application of the exclusionary rule where evidence was seized--inevitably result in disparate sentencing outcomes for similar fact patterns and offenses because

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[4] *See, e.g., Lafler v. Cooper, 566 U.S. 156, 170 (2012)* ("Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas."); *Padilla v. Kentucky, 559 U.S. 356, 372 (2010)* ("Pleas account for nearly 95% of all criminal convictions.").

[5] Ram Subramanian, et. al., *In the Shadows: A Review of the Research on Plea Bargaining*, Vera Institute of Justice (Sept. 2020), *https://www.vera.org/downloads/publications/in-the-shadows-plea-bargaining.pdf* at iii.

[6] *See, e.g., Lafler, 566 U.S. at 170* ("[C]riminal justice today is for the most part a system of pleas, not a system of trials.").

[7] Subramanian, *supra* note 5 at iii; *see* Michelle Alexander, *Go to Trial: Crash the Justice System*, N.Y. Times (Mar. 10, 2012), *https://www.nytimes.com/2012/03/11/opinion/sunday/go-to-trial-crash-the-justice-system.html* ("If everyone charged with crimes suddenly exercised his constitutional rights, there would not be enough judges, lawyers or prison cells to deal with the ensuing tsunami of litigation.").

[8] Subramanian, et al., *supra* note 5 at 19. The strength of admissible evidence is a key driver of the plea negotiation process. *See, e.g.*, Bruce Frederick & Don Stemen, *The Anatomy of Discretion: An Analysis of Prosecutorial Decision Making -- Technical Report*, Vera Institute of Justice (2012), *https://www.ojp.gov/pdffiles1/nij/grants/240334.pdf* at 241 (analyzing survey of cases filed in one jurisdiction across multiple years and finding a "significant effect of strength of evidence on plea offers and the associated sentence recommendations"); Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 Yale L. J. 1179, 1224 (1975) ("The extent to which a defense attorney can learn the strength of the prosecutor's case against his client has an important influence on the plea-negotiation process.").

prosecutors and criminal defendants necessarily will weigh inculpatory but potentially inadmissible evidence differently depending on [*11] the jurisdiction.

Such unequal treatment of similarly-situated offenders contravenes the core principles of the American criminal justice system. For example, the Federal Sentencing Guidelines are intended to "create a comprehensive sentencing scheme in which those who commit crimes of similar severity under similar conditions receive similar sentences." *Hughes v. United States, 138 S. Ct. 1765, 1776 (2018)* . Indeed, circuit splits alone justify granting certiorari for this very reason. *See, e.g., Rita v. United States, 551 U.S. 338, 346 (2007)* (resolving circuit split relating to sentencing guidelines); *cf. Sewell v. United States, 113 S. Ct. 1367, 1367 (1993)* ("As a result of the conflict, those convicted of violating federal law are subject to widely disparate sentences, depending only on the federal circuit in which their cases are brought . . . . The Court should resolve this persistent conflict.") (White J., dissenting). Moreover, the overwhelming prevalence of plea bargaining means that the real-world impact of the decisional split here is many magnitudes larger on the ground than the number of controlling decisions might suggest.

The uncertainty concerning how a court might rule on the Fourth Amendment issue presented here means that both prosecutors [*12] and defendants are unable to adequately conduct the cost-benefit analyses that plea negotiations require. For plea deals to be "[p]roperly administered," *Blackledge, 431 U.S. at 71*, all parties require clear guidance as to what evidence would be admissible at trial. This problem is particularly acute in the over 50 jurisdictions where the federal circuit court or the state's highest court has not addressed the issue. In those jurisdictions, literally no one knows what the law is because they cannot predict how the top court might decide the issue, given the split of authority among the courts that have addressed it. In some jurisdictions, this will result in sentences that are too lenient because the prosecutor undervalues inculpatory evidence, while in other jurisdictions, the converse will occur, resulting in sentences that are too harsh. [9] Clarification of the applicable Fourth Amendment rule by this Court would solve this dilemma.

II . U NIFORM APPLICATI ON OF THE FOURTH AMENDMENT FACILITATES PROPER POLICE PRA CTI CES IN SEAR CHES

Over the past several decades, many of the practices of police agencies throughout the country and at all levels of government have developed in accordance with this Court's Fourth Amendment jurisprudence. As the Court has recognized: "Numerous sources are now available to teach officers and their supervisors what is required of them under this

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[9] *See, e.g. Missouri v. Frye, 566 U.S. 134, 144 (2012)* ("'To a large extent . . . horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it *is* the criminal justice system.'") (quoting Scott & Stuntz, *Plea Bargaining as Contract*, *101 [*13] Yale L. J. 1909, 1912 (1992)*).

Court's cases, how to respect constitutional guarantees in various situations, and how to craft an effective regime for internal discipline." *Hudson v. Michigan, 547 U.S. 586, 599 (2006)* . For example, the Federal Law Enforcement Training Centers (FLETC) has "grown into the Nation's largest provider of law enforcement training" and, in addition to federal law enforcement officers, "its training audience . . . includes state, local, and tribal departments throughout the U.S." [10] [*14]

Given these developments, the existence of clear, nationally-applicable interpretations of the Fourth Amendment by this Court is a key factor in achieving consistency and fairness in application of the law on a daily basis at the level of citizen interactions with the police. One of the most important ways the Court has served this goal is by applying the exclusionary rule to searches which violate the Fourth Amendment. *See, e.g., Herring v. United States, 555 U.S. 135, 144 (2009)* ("[T] he exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.").

The deterrent effect of the exclusionary rule in promoting compliance with fundamental Fourth Amendment protections depends on "alter[ing] the behavior of individual law enforcement officers or the policies of their departments." *United States v. Leon, 468 U.S. 897, 918 (1984)*. As Justice Stewart wrote: "[T] he exclusionary rule is intended to create an incentive for law enforcement officials to establish procedures by which police officers are trained to comply with the Fourth Amendment." Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary [*15] Rule in Search-and-Seizure Cases*, *83 COLUM. L. REV. 1365, 1400 (1983)*.

The exclusionary rule has in fact catalyzed changes in police training and behavior in America. Many of the most effective efforts in this regard have been made at the national level by formulating manuals and training procedures that are widely used by state and local police agencies. *See, e.g.*, Wayne R. LaFave, *Improving Police Performance Through the Exclusionary Rule--Part II: Defining the Norms and Training the Police*, 30 MO. L. REV. 566, 594 (1965) ("[S]ince Mapp the FBI has greatly intensified its efforts in training state and local officers on the requirements of the Fourth Amendment"). [11] As noted, the FLETC is the nation's largest provider of law enforcement training. [12]

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[10] Fed. L. Enf. Training Ctrs., *Learn About FLETC*, U.S. Dep't of Homeland Security (last visited Apr. 14, 2022), *https://www.fletc.gov/landing-page/learn-about-fletc*.

[11] *See, e.g.*, Bureau of Justice Assistance, *Considerations and Recommendations Regarding State and Local Officer-Involved Use-of-Force Investigations*, U.S. Dep't of Justice (Aug. 2017), *https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/Considerations_and_Recommendations_Regarding_State_and_Local_Officer_Involved_Use_of_Force_Investigations_Report_08170.pdf* at 1, 27, 29 (setting forth "recommendations and issues to consider for municipal, county, and state law enforcement officials" including with regard [*16] to the Fourth Amendment).

[12] *See supra* note 10.

With respect to the question presented in this case, the absence of clear, nationally-applicable standards concerning the Fourth Amendment's protection of social guests impedes training officers to follow the Fourth Amendment's requirements in a consistent and understandable way. For example, even the FLETC Legal Training Handbook (Fed. L. Enf. Training Ctrs., *Legal Training Handbook*, U.S. Dep't of Homeland Security (2019) (the "Handbook")) cannot provide coherent, authoritative guidelines on this issue. Because the Fourth Amendment rights of social guests are uncertain, the Handbook can state the law only in vague terms that provide no practical guidance to officers faced with a real-world decision of whether to enter a residence or obtain a warrant. The Handbook ambiguously states: "A social visitor *normally* does not have [a reasonable expectation of privacy] in the home visited; but [a reasonable expectation of privacy] *may* exist if the person is a frequent visitor with free access to the home and is authorized to control the premises at times." [*17] Handbook § 17.3.2. These guidelines are simply too vague and equivocal to realistically influence officers' conduct. *See* Leon, 468 U.S. at 975 (Stevens J., concurring in part) ("[T]he exclusionary rule cannot deter when the authorities have no reason to know that their conduct is unconstitutional.").

Conversely, where this Court sets unambiguous rules regarding the Fourth Amendment, the Handbook provides readily understandable guidelines that officers can easily apply. For example, in *United States v. Jones, 565 U.S. 400, 404 (2012)*, the Court ruled that attaching a GPS device to a vehicle to monitor its movement constitutes a search under the Fourth Amendment, and the Handbook now authoritatively instructs officers that "agents are required to obtain a Fourth Amendment warrant before installing an electronic tracking device onto a suspect's vehicle." Handbook § 15.3. In short, uniform rules increase law enforcement's compliance with constitutional protections because they create bright-line expectations and guidelines that can be reasonably implemented on the ground.

Moreover, police often coordinate across state lines and are thus required to comply with the applicable law of multiple jurisdictions. [*18] [13] The absence of a uniform, nationwide interpretation of the Fourth Amendment's application to social visitors means that standards may vary by geographic location, thereby impeding officers' ability to consistently remain within the Fourth Amendment's bounds. Officers are already expected to make split-second decisions that comply with constitutional doctrine. *See, e.g., Lange v. California, 141 S. Ct. 2011, 2021 (2021)* ("We have no doubt that in a great many cases flight creates a need for police to act swiftly."). Jurisdictional inconsistency of the sort present here unnecessarily complicates that difficult task.

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[13] Freder ic Lemieu x, *Police Cooperation Across Jurisdictions*, Oxford University Press (Nov. 2018), *https://www.researchgate.net/publication/328791694_Police_Cooperation_Across_Jurisdictions* at 1 (discussing "law enforcement and intelligence initiatives that transcend[] local and national jurisdictions" and concluding that "[i]n the 21st Century, a complex assemblage of public and private actors conducts police cooperation activities" and "[t]hese actors operate at several levels of geographical jurisdictions and cooperate through different organizational structures and legal frameworks").

III [*19] **. THE DECISI ON BELOW COMPROMISES THE FUNDAMENTA LRI GHT TO ENGAGE IN PRIVATE SOCIAL, RELIGIOUS, AND POLITICAL ACTIVITY IN ONE'S HOME**

Americans value privacy, [14] and privacy in the home is a core constitutional value long recognized by this Court. *See, e.g., Florida v. Jardines, 569 U.S. 1, 6 (2013)* ("But when it comes to the Fourth Amendment, the home is first among equals."); *Wilson v. Layne, 526 U.S. 603, 610 (1999)* ("The Fourth Amendment embodies this centuries-old principle of respect for the privacy of the home."); *Payton v. New York, 445 U.S. 573, 587 (1980)* ("Freedom from intrusion into the home or dwelling is the archetype of the privacy protection secured by the Fourth Amendment.") (internal quotation marks and citation omitted); *United States v. U.S. Dist. Ct., 407 U.S. 297, 313 (1972)* ("[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed."); *Silverman v. United States, 365 U.S. 505, 511 (1961)* ("The Fourth Amendment, and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental [*20] intrusion.").

An essential aspect of this privacy is "shared privacy." [15] As we have learned far too well over the past two years, being physically together is a "key ingredient for well-being" [16] and "a fundamental human need." [17] A common thread in our nation's social fabric is the "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984)* . This Court has well recognized the importance of individuals' freedom to associate. *See, e.g., Nat'l Ass'n for Advancement of Colored People v. State of Ala., 357 U.S. 449, 462 (1958)* ("This Court has recognized the vital relationship between freedom to associate and privacy in one's associations.").

Privacy is essential for many social activities fundamental to the fabric of our society. These activities--which occur in [*21] the home and do not involve overnight stays--may range, among many other examples, from family gatherings, playdates, card games, book clubs, holiday, anniversary, and birthday celebrations to religious worship and study

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[14] *See* Mary I. Coombs, *Shared Privacy and the Fourth Amendment, or the Rights of Relationships*, *75 CALIF. L. REV. 1593, 1593 (1987)*.

[15] Coombs, *supra* note 14 (discussing how "[m]uch of what is important in human life takes place in a situation of shared privacy" and that such events "are shared with a chosen group of others; they do not occur in isolation, nor are they open to the entire world").

[16] *See* Emily Long, et al., *COVID-19 Pandemic and its Impact on Social Relationships and Health*, 76 J. of Epidemiology & Cmty. Health 128 (2022), *https://jech.bmj.com/content/76/2/128#ref-22* at 130.

[17] Kevin Sikali, *The Dangers of Social Distancing: How COVID-19 Can Reshape Our Social Experience*, 48 J. of Cmty. Psych ology 2435 (2020), *https://doi.org/10.1002/jcop.22430* ("Social interactions are proposed to be a basic human need, analogous to other fundamental needs such as food consumption or sleep.").

groups, political and union organizing, and, as in Petitioner's case, the humble sharing of meals together. To facilitate these activities, Americans regularly open the doors of their homes to social guests who do not spend the night. [18] These social customs "serve functions recognized as valuable by society." *Olson, 495 U.S. at 98*. But all of these activities require privacy, and if the decision below is left to stand, it may chill New Yorkers' willingness to participate in, or at least to host, such activities for fear of police intrusion into their home.

In attempting to parse *Olson* and *Carter*, some courts have answered [*22] the constitutional question presented in this case by distinguishing between social guests who spend the night and those who do not. But Americans living their day-to-day lives do not make the same distinction. "Every day homeowners and leaseholders intend to share their expectations of privacy with individuals who stay not overnight, but only for a matter of hours." [19] The basic neutral principle is that Americans' expectation of privacy in their home includes the expectation that privacy will extend to individuals they invite into their homes, whether for a few hours or a few days.

The tension between the focus of some courts on overnight stays and the importance of "shared privacy" [20] demonstrates the importance of resolving the question presented by this case. As Justice Ginsburg said dissenting in *Carter*, "people are not genuinely 'secure in their . . . houses . . . against unreasonable searches and seizures' if their invitations to others increase the risk of unwarranted governmental peering and prying into their dwelling places." [*23] *525 U.S. at 108*.

Finally, a clear, consistent Fourth Amendment standard governing the rights of invited guests is of particular importance to marginalized communities. [21] Judge Wilson eloquently recognized this concern in his dissent in the court below. *See Ibarguen, 37 N.Y.3d at 1124* (Wilson, J., dissenting) ("[H]ome gatherings have always been a site of political debate and activism . . . [p]articularly for dissenting groups for whom the public sphere is hostile, [and for whom] the home offers a place of retreat and discretion.").

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[18] Bureau of Transp. Statistics, *National Household Travel Survey Daily Travel Quick Facts*, U.S. Dep't of Transp. (May 31, 2017), *https://www.bts.gov/statistical-products/surveys/national-household-travel-survey-daily-travel-quick-facts* (noting that in 2017, "27 percent of daily trips [were] social and recreational, such as visiting a friend").

[19] Edwin J. Butterfoss & Mary Sue B. Snyder, *Be My Guest: The Hidden Holding of Minnesota v. Carter*, *22 HAMLINE L. REV. 501, 525 (1999)*.

[20] *See* Coombs, *supra* note 14.

[21] *See* Jae M. Sevelius, et al., *Research with Marginalized Communities: Challenges to Continuity During the COVID-19 Pandemic*, Aids & Behavior (May 16, 2020), *https://doi.org/10.1007/s10461-020-02920-3* ("Marginalized communities are those excluded from mainstream social, economic, educational, and/or cultural life. Examples of marginalized populations include, but are not limited to, groups excluded due to race, gender identity, sexual orientation, age, physical ability, language, and/or immigration status. Marginalization occurs due to unequal power relationships between social groups.").

Collective action is most critical in marginalized communities [*24] whose viewpoints may not be widely or regularly represented in or accepted by governing bodies. *See, e.g., Jaycees, 468 U.S. at 622* ("[C] ollective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority.").

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

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