No. 13-1127

In the Supreme Court of the United States

J.B. VAN HOLLEN, ATTORNEY GENERAL OF WISCONSIN, *ET AL.*

Petitioners,

v.

PLANNED PARENTHOOD OF WISCONSIN, INC., *ET AL.*

Respondents.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Seventh Circuit

BRIEF *AMICUS CURIAE* OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND, INC., IN SUPPORT OF PETITIONERS IN SUPPORT OF REVERSAL

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QUESTIONS PRESENTED

1. 42 U.S.C. §1983 allows a person whose constitutional rights have been deprived to bring an action to redress the constitutional deprivation. Wisconsin Stat. §253.095 requires abortion providers to have admitting privileges at a local hospital. Four abortion providers assert a claim to permanently enjoin Wis. Stat. §253.095's local hospital admitting-privileges requirement based upon the alleged violation of the Fourteenth Amendment liberty and privacy rights of their patients. The patients are not parties to this action.

Does 42 U.S.C. §1983 provide statutory standing for abortion providers to assert a claim based solely upon the constitutional rights of their patients?

2. In *Singleton v. Wulff,* 428 U.S. 106, 118 (1976) (opinion of Blackmun, J.), four members of the Court opined that "it generally is appropriate to allow a physician to assert the rights of women patients as against governmental interference with the abortion decision." No majority of the Court has endorsed the *Singleton* plurality's view regarding third-party standing. Likewise, the Court has not expressly addressed the question whether abortion providers have standing to raise the constitutional rights of their patients when challenging abortion regulations designed to protect maternal health. In these situations, the abortion providers' interest in avoiding regulation is not necessarily aligned with their patients' interest in safe, regulated abortions.

Do abortion providers have standing to assert a claim based solely upon the constitutional rights of

their patients when challenging abortion regulations that are designed to protect maternal health?

3. In applying the "undue burden" analysis from *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833 (1992), the court of appeals created a circuit split by inventing a sliding scale test for determining "undue burden" under which "[t]he feebler the medical grounds, the likelier the burden, even if slight, to be 'undue' in the sense of disproportionate or gratuitous." *Planned Parenthood of Wisconsin, Inc. v. Van Hollen,* 738 F.3d 786, 798 (7th Cir. 2013).

Is the court of appeals' addition of a new legal standard consistent with the "undue burden" framework established by *Casey?*

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Eagle Forum Education & Legal Defense Fund ("Eagle Forum"),[1] a nonprofit Illinois corporation founded in 1981, has consistently defended federalism and supported state and local autonomy in areas – such as public health – of traditionally state and local concern. In addition, Eagle Forum has a longstanding interest in

[1] *Amicus* files this brief with consent by all parties, with 10 days' prior written notice; *amicus* has lodged the parties' written consent with the Clerk. Pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity – other than *amicus* and its counsel – contributed monetarily to preparing or submitting the brief.

protecting unborn life and in adherence to the Constitution as written. For these reasons, Eagle Forum has a direct and vital interest in the issues before this Court.

STATEMENT OF THE CASE

Amicus Eagle Forum adopts the facts as stated by Wisconsin. *See* Pet. at 3-6. In summary, Planned Parenthood of Wisconsin, another abortion provider, and two of their abortion doctors (collectively, "Plaintiffs") sued Wisconsin's Attorney General, the Secretary of its Department of Safety and Professional Services, the members of its Medical Examining Board, and the District Attorney for Dane County as a representative of the class of all Wisconsin district attorneys (collectively, "Wisconsin") to enjoin a new Wisconsin law that requires abortion doctors to have admitting privileges at a hospital within thirty miles of where an abortion is performed. 2013 Wis. Act 37, §1 (*enacting* §253.095(2)) (hereinafter, "Act 37").

About every sixteen days in Wisconsin, a woman seeking an abortion requires hospitalization as a result of the abortion or attempted abortion. Court of Appeals Joint Appendix ("CAJA") at 33, 76, 238. When abortion doctors do not have admitting privileges and a complication arises, the patient – and all responsibility for her care – are typically transferred to a hospital. *Id.* at 175-76. Because the treating abortion provider rarely communicates with the receiving hospital, the "hand off" necessarily cases delay in the patient's treatment, *id.* at 237, and delay as short as an hour can make the difference between life and death. *Id.* at 150. Similarly, delay in

managing acute bleeding can make hysterectomy more likely, thereby making future childbearing impossible. *Id.* at 238. For that reason, requiring abortion doctors to obtain local admitting privileges would create an effective relationship between abortion providers and the local emergency room, resulting in a continuity of care and better overall care to women suffering from abortion complications. *Id.* at 239. Although they dispute Wisconsin's view, Plaintiffs did not submit evidence sufficient to negate "the *theoretical* connection" between "the probable consequences of the [statute]" vis-à-vis the legislative purpose. *Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456, 463-64 (1981) (emphasis in original). It is plainly reasonable for a legislature to believe that better continuity of care would improve the results for patients who have complications from abortion.

The district court preliminarily enjoined Act 37, which the Seventh Circuit affirmed in Wisconsin's interlocutory appeal. In its petition to this Court for review, Wisconsin raises four reasons to grant the writ of *certiorari. See* Pet. at 7-8. In the body of this *amicus* brief, Eagle Forum addresses two of those reasons: (i) third-party standing, and (ii) the legal framework for evaluating state abortion regulations that protect maternal health. That focus does not undermine the importance of the other two reasons for this Court to grant review.[2]

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[2] Specifically, the split in authority over third-party rights under 42 U.S.C. §1983 is especially significant because it ties to the availability of attorneys' fees under 42 U.S.C. §1988(b), in addition to the important points that Wisconsin raises. Further, the interlocutory procedural posture should not pose a barrier

Constitutional Background

The federal Constitution preempts state law whenever the two conflict. U.S. CONST. art. VI, cl. 2. The merits questions presented here involve the contours of federal abortion rights created by this Court in *Roe v. Wade,* 410 U.S. 113 (1973), and its progeny. In particular, the merits turn on criteria promulgated in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), for balancing individual rights to an abortion and states' rights to regulate maternal health and safety as well as to protect the life of the infant:

> (a) To protect the central right recognized by *Roe v. Wade* while at the same time accommodating the State's profound interest in potential life, we will employ the undue burden analysis as explained in this opinion. An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.
>
> (b) We reject the rigid trimester framework of *Roe v. Wade.* To promote the State's profound interest in potential life, throughout pregnancy the State may take measures to ensure that the woman's choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to

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here because plaintiffs need standing to secure a preliminary injunction, *City of Los Angeles v. Lyons,* 461 U.S. 95, 103 (1983), which makes this Court's review even more important now.

> choose childbirth over abortion. These measures must not be an undue burden on the right.
>
> (c) As with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion. *Unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.*
>
> (d) Our adoption of the undue burden analysis does not disturb the central holding of *Roe v. Wade,* and we reaffirm that holding. Regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.
>
> (e) We also reaffirm *Roe*'s holding that "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."

Casey, 505 U.S. at 878 (citations omitted, emphasis added). Significantly, only the maternal-health prong in clause (c) asks whether the state regulation is "necessary."

As explained in Section II, *infra, amicus* Eagle Forum respectfully submits that only maternal-health abortion regulations include a "necessity"

inquiry because only such regulations protect the holders of the *Roe*-based right to an abortion, which justifies placing that inquiry *before* determining whether the regulation presents an undue burden.[3] Were it otherwise, states would be hard-processed to prohibit even "back-alley" abortions, which plainly is not the law. *Connecticut v. Menillo,* 423 U.S. 9, 10-11 (1975). As *Menillo* recognized contemporaneously with *Roe,* states may require that "abortion [be] performed by *medically competent personnel under conditions insuring maximum safety* for the woman." *Id.* (emphasis added); *accord Mazurek v. Armstrong*, 520 U.S. 968, 971 (1997). *Amicus* Eagle Forum respectfully submits that Wisconsin has done no more here.

Statutory Background

Act 37 provides two remedies for violation of the admitting-privilege requirement: (1) a penalty between $1,000 and $10,000 assessed against the abortion provider, but not "against the woman upon whom the abortion is performed or induced," and (2) a cause of action "for damages, including damages for personal injury and emotional and psychological distress" for the "woman on whom an abortion is performed or attempted" and certain of her family members. WIS. STAT. §253.095(3)-(4).

"Throughout our history the several States have exercised their police powers to protect the health and safety of their citizens," which "are 'primarily, and historically, ... matter[s] of local concern.'"

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[3] *Amicus* Eagle Forum emphatically does not support lesser protections for infants. *Amicus* Eagle Forum is merely describing this Court's holdings.

Medtronic, Inc. v. Lohr, 518 U.S. 470, 475 (1996) (*quoting Hillsborough County v. Automated Med. Labs., Inc.,* 471 U.S. 707, 719 (1985)) (second and third alterations in *Medtronic*). For their part, the federal Executive and Congress lack a corresponding police power to take up the slack: "we always have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power." *U.S. v. Morrison,* 529 U.S. 598, 618-19 (2000). As indicated, if Wisconsin cannot regulate the abortion industry's excesses, and the federal government cannot, that leaves only the judiciary and the abortion industry.

The judiciary, of course, is ill-suited in training to determine or second-guess what procedures are safe or necessary. *Cf. Parents Involved in Community Schools v. Seattle School Dist. No. 1,* 551 U.S. 701, 766 (2007) (federal courts "are not social engineers") (Thomas, J., concurring). Indeed, judges are even less qualified to practice medicine than they are to practice social engineering. Because the judiciary cannot be a credible regulator, accepting the Seventh Circuit's narrow view of the flexibility that *Casey* gives the states would make abortion providers essentially an unregulated industry.

Moreover, the abortion industry is incapable of regulating itself. Significantly, Wisconsin enacted Act 37 in the wake of the Gosnell prosecution and the accompanying revelations about the abortion industry not only for murdering live-born, viable infants but also for endangering and even killing women abortion patients. *See In re County Investigating Grand Jury XXIII,* Misc. No. 9901-2008

(Pa. C.P. Phila. filed Jan. 14, 2011) (hereinafter, "Gosnell Grand Jury Report"). For example – "[e]ven nail salons in Pennsylvania are monitored more closely for client safety" than abortion clinics. Gosnell Grand Jury Report, at 137. States have a right – and indeed a duty – to correct the under-regulation of abortion providers, and the admitting-privilege requirement serves that role.

Perhaps due to of the politicization of this issue in the United States – caused in great part by this Court's unprecedented *Roe* decision – abortion providers appear to regard themselves more as civil-rights warriors than as medical providers. As such, many abortion providers apparently believe that they simply cannot disclose anything negative about their abortion mission:

> Political considerations have impeded research and reporting about the complications of legal abortions. The highly significant discrepancies in complications reported in European and Oceanic [j]ournals compared with North American journals could signal underreporting bias in North America.

Jane M. Orient, M.D., *Sapira's Art and Science of Bedside Diagnosis,* ch. 3, p. 62 (Lippincott, Williams & Wilkins, 4th ed. 2009) (citations omitted).

In other words, claims that states have targeted the abortion industry for *unwarranted* scrutiny have it precisely backwards. Here, Wisconsin has regulated an industry that cuts corners and hides information by enacting a state law that requires that industry to integrate itself into the larger

medical community. Legislatures have wide authority to solve only part of a perceived problem, leaving the balance to future legislation, *Williamson v. Lee Optical of Oklahoma,* 348 U.S. 483, 487-89 (1955), and Wisconsin has acted appropriately in seeking to increase medical supervision and to minimize unnecessary death and injury – *i.e.,* to ensure "medically competent personnel under conditions insuring maximum safety for the woman," *Menillo,* 423 U.S. at 10-11 – in its regulations here.

Under such circumstances, "legislatures [have] wide discretion to pass legislation in areas where there is medical … uncertainty," and "medical uncertainty … provides a sufficient basis to conclude in [a] facial attack that the Act *does not* impose an undue burden." *Gonzales v. Carhart,* 550 U.S. 124, 164 (2007) (emphasis added). Significantly, the Constitution does "not give abortion doctors unfettered choice in the course of their medical practice, nor should it elevate their status above other physicians in the medical community." *Gonzales,* 550 U.S. at 163. That holding from *Gonzales* applies even more so here to bolster the states' authority to regulate this field of traditional state concern.

SUMMARY OF ARGUMENT

Abortion providers lack third-party standing to assert a future patient's *Roe-Casey* rights. Section I.A, *infra.* To the extent that Plaintiffs have standing at all, they must proceed under their own rights, which trigger a more deferential standard of review. Section I.B, *infra.* On the merits, assuming *arguendo* that *Casey* applies, state regulations to protect

maternal health are reviewed less stringently than regulations to protect the life of the child, which the Seventh Circuit did not recognize, and this Court should clarify. Section II, *infra.*

ARGUMENT

I. THIS COURT NEEDS TO CLARIFY ITS THIRD-PARTY STANDING DOCTRINE TO ENSURE THAT FEDERAL COURTS PLAY THEIR PROPER ROLE IN OUR FEDERAL SYSTEM

Plaintiffs cannot assert the *Roe-Casey* rights of their future patients because the interests of Plaintiffs and their patients are at least potentially in conflict with respect to enjoining state laws that protect those future patients from substandard care by Plaintiffs. Moreover, without third-party standing to assert *Roe-Casey* rights, Plaintiffs must proceed under the more deferential rational-basis test.

By way of background, standing has not only a constitutional component derived from the case-or-controversy requirement of Article III but also various judge-made prudential requirements "that are part of judicial self-government." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992). "In both dimensions it is founded in concern about the proper – and properly limited – role of the courts in a democratic society." *Warth v. Seldin,* 422 U.S. 490, 498 (1975). Under Article III, a plaintiff must establish cognizable injury, caused by the challenged conduct, and redressable in court, *Defenders of Wildlife,* 504 U.S. at 561-62. As relevant here, standing doctrine prudentially limits the ability of plaintiffs to assert the rights of an absent third party

unless they have their own Article III standing and a close relationship with the absent third party, whom a sufficient "hindrance" keeps from asserting his or her own rights. *Kowalski v. Tesmer,* 543 U.S. 125, 128-30 (2004). Plaintiffs cannot meet that test.

A. The Seventh Circuit's Flawed Analysis Demonstrates the Need for this Court to Clarify Third-Party Standing's Application Here

While *Amici* do not dispute that practicing physicians have close relationships with their regular patients, the same is simply not true for hypothetical relationships between Plaintiffs and their *future* patients who may seek abortions at Plaintiffs' clinics: an *"existing* attorney-client relationship is, of course, quite distinct from the *hypothetical* attorney-client relationship posited here.*"* *Kowalski,* 543 U.S. at 131 (emphasis in original). Women do not have regular, ongoing, physician-patient relationships with abortion doctors in abortion clinics.

Before *Kowalski* was decided in 2004, "the general state of third party standing law" was "not entirely clear," *Am. Immigration Lawyers Ass'n v. Reno,* 199 F.3d 1352, 1362 (D.C. Cir. 2000), and "in need of what may charitably be called clarification." *Miller v. Albright,* 523 U.S. 420, 455 n.1 (1998) (Scalia, J., concurring). Since *Kowalski* was decided in 2004, however, hypothetical future relationships can no longer support third-party standing. As such, Plaintiffs lack third-party standing to assert *Roe-Casey* rights. Plaintiffs' invocation of third-party standing also fails for two reasons beyond the limits

that *Kowalski* put on using hypothetical future relationships to prove third-party standing.

First, Plaintiffs' challenge to Act 37 seeks to undermine legislation that Wisconsin enacted to protect women from abortion-industry practices, a conflict of interest that strains the closeness of the relationship. Third-party standing is even less appropriate when – far from the required "identity of interests"[4] – the putative third-party plaintiff's interests are *adverse* or even *potentially adverse* to the third-party rights holder's interests. *Elk Grove Unified Sch. Dist. v. Newdow,* 542 U.S. 1, 15 (2004) (rejecting third-party standing where interests "are not parallel and, indeed, are potentially in conflict"). In such cases, courts should avoid "the adjudication of rights which [the rights holders] not before the Court may not wish to assert." *Newdow,* 542 U.S. at 15 n.7. Under *Newdow,* abortion providers cannot ground their standing on the third-party rights of their hypothetical future potential women patients, when the goal of Plaintiffs' lawsuit is to enjoin Wisconsin from protecting those very same women from abortion providers' substandard care.

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[4] *See, e.g., Lepelletier v. FDIC,* 164 F.3d 37, 44 (D.C. Cir. 1999) ("there must be an identity of interests between the parties such that the plaintiff will act as an effective advocate of the third party's interests"); *Pa. Psychiatric Soc'y v. Green Spring Health Servs.,* 280 F.3d 278, 288 (3d Cir. 2002) (asking whether "the third party … shares an identity of interests with the plaintiff"); *Region 8 Forest Serv. Timber Purchasers Council v. Alcock,* 993 F.2d 800, 810 (11th Cir. 1993) ("relationship between the party asserting the right and the third party has been characterized by a strong identity of interests").

Second, the instances where this Court has found standing for abortion doctors involve laws that apply equally to *all abortions* and to *all abortion doctors,* so that the required "identity of interests" was present between the women patients who would receive the abortions and the physicians who would perform the abortions. Here, by contrast, Wisconsin regulates in the interest of pregnant women who contemplate abortions and imposes no pertinent restrictions either on hospital-based abortions or on abortion doctors who already have (or are willing to obtain) admitting privileges. When a state relies on its interest in unborn life to insert itself into the doctor-patient relationship by regulating all abortions, doctors and patients potentially may have sufficiently aligned interests. Here, by contrast, all abortion doctors do not share the same interests as future abortion patients. Indeed, the Plaintiffs do not even share the same interests as all abortion doctors. Without an identity of interests between Plaintiffs and future abortion patients, the doctor-patient relationship is not close enough for third-party standing.

Citing only a recent Ninth Circuit decision on a law that prohibited an entire category of abortions and a law review article from 2000, Pet. App. at 16a-17a, the Seventh Circuit presents no basis for rejecting this Court's controlling *Kowalski* and *Newdow* decisions from 2004 on the close-relationship prong. Indeed, the law review article recognizes that its exceptions to third-party standing arise under the First Amendment's overbreadth doctrine and instances when *state-court appeals*

reach the U.S. Supreme Court. Richard H. Fallon, Jr., *"As-Applied and Facial Challenges and Third-Party Standing,"* 113 HARV. L. REV. 1321, 1359-60 & n.196 (2000); *City of Chicago v. Morales,* 527 U.S. 41, 55 n.22 (1999). Those circumstances are obviously not present in an abortion case initiated in federal court, and this Court should not (and the lower courts cannot) extend the flexible principles of First Amendment justiciability to other doctrinal contexts.

B. Without Third-Party Standing, a Reviewing Court Must Apply the Standard of Review Corresponding to Plaintiffs' Rights

When a party – like Plaintiffs here – does not possess an absentee's right to litigate under an elevated scrutiny such as the *Casey* undue-burden test, that party potentially may assert its own rights, albeit without the elevated scrutiny that applies to the absent third parties' rights:

> Clearly MHDC has met the constitutional requirements, and it therefore has standing to assert its own rights. Foremost among them is MHDC's right to be free of arbitrary or irrational zoning actions. But the heart of this litigation has never been the claim that the Village's decision fails the generous *Euclid* test, recently reaffirmed in *Belle Terre.* Instead it has been the claim that the Village's refusal to rezone discriminates against racial minorities in violation of the Fourteenth Amendment. As a corporation, MHDC has no racial identity and cannot be the direct target of the petitioners' alleged

> discrimination. In the ordinary case, a party is denied standing to assert the rights of third persons.

Village of Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252, 263 (1977) (citations omitted); *City of Akron v. Akron Ctr. for Reprod. Health,* 462 U.S. 416, 438 (1983) ("lines drawn … must be reasonable"). Like the Metropolitan Housing Development Corporation ("MHDC") in *Arlington Heights,* Plaintiffs would need to proceed under the rational-basis test if they were to proceed without the elevated scrutiny afforded to third-party rights holders. Thus, depending on the resolution of the third-party standing issue, a reviewing Court might not apply *Casey* at all.

II. THIS COURT MUST CLARIFY HOW *CASEY* APPLIES TO REGULATING ABORTION TO PROTECT MATERNAL HEALTH

This litigation presents issues of exceptional importance to the ongoing efforts of legislatures and courts to define the roles of state and federal law in elective abortions generally and in public-health issues surrounding abortion procedures specifically. Significantly, *Roe* concerned states' ability to *prohibit* abortions in the interest of the *infant* and the state's interest in that new life. By contrast, this litigation concerns the states' ability to *regulate* abortions in the interest of *pregnant women* who contemplate and receive abortions. Although *Casey* laid out a test for this category of maternal health regulations, the language in *Casey* has not been understood by lower

courts and requires further clarification, now that an actual case or controversy has reached this Court.

As *Casey* itself recognizes, "disagreement is inevitable," "[e]ven when jurists reason from shared premises," and "[w]e do not expect it to be otherwise with respect to the undue burden standard." *Casey,* 505 U.S. at 878. As *amicus* Eagle Forum understands *Casey* – and contrary to how the Seventh Circuit understood *Casey* – the undue-burden analysis does not enter the equation for "necessary" regulation of abortion procedures that protects women seeking an abortion. Specifically, under *Casey,* states "may enact regulations to further the health or safety of a woman seeking an abortion," "[a]s with any medical procedure." *Casey,* 505 U.S. at 878. The only prohibition in the maternal-health prong is that "*[u]nnecessary* health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right." *Id.* (emphasis added). To unpack this language to its constituent parts, an undue-burden violation for maternal-health regulations requires that plaintiffs establish each of two elements: (1) a maternal-health regulation is *unnecessary;* and (2) that regulation either has the purpose or effect of presenting a *substantial* obstacle. Here, Plaintiffs cannot meet either prong of the test.

No one can seriously question the legislative conclusion that the abortion industry's unsupervised handoffs of patients with potentially life-threatening abortion-related complications pose a risk to women's health. As recognized by the Eighth, Fourth, and

Fifth Circuits, requiring abortion doctors to have admitting privileges in a local hospital obviously serves the goal of protecting maternal health by ensuring better communications and handoffs. *See Greenville Women's Clinic v. Comm'r,* 317 F.3d 357, 363 (4th Cir. 2002); *Women's Health Ctr. of West Cnty., Inc. v. Webster,* 871 F.2d 1377, 1382 (8th Cir. 1989); *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott,* 2014 U.S. App. LEXIS 5696, 46-47 (5th Cir. Mar. 27, 2014). As Wisconsin explains, Pet. at 17-21, this Court should review the Seventh Circuit's anomalous contrary holding.

CONCLUSION

The Court should grant the petition for a writ of *certiorari.*

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