Seeking Effective Amicus Support

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APPENDICES "B", "C", and "D"

B. Texas Amicus Curiae Brief Sample – *Matbon, Inc. v. Hutton* (Interpretation of paid or incurred statute for personal injury claims.)

C. Fifth Circuit Amicus Curiae Brief Sample – *Sanders-Burns* v. *City of Plano* (Statute of limitations in suits against governmental officials.)

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APPENDIX "B"

Texas Amicus Curiae Brief Sample – *Matbon, Inc. v. Hutton*
(Interpretation of paid or incurred statute for personal injury claims.)

IN THE COURT OF APPEALS
FOR THE ELEVENTH DISTRICT
AT EASTLAND

No. 11-06-00258-CV

MATBON, INC. and WILLIAM EDGAR HUTTON,
Appellants,

v.

DENNIS and DEBRA GRIES
Appellees.

On Appeal from the 29th Judicial District Court
of Palo Pinto County, Texas
The Honorable Jerry D. Ray, Presiding
Trial Court Cause No. C40959

BRIEF OF TEXAS ASSOCIATION OF DEFENSE COUNSEL AS AMICUS CURIAE IN SUPPORT OF APPELLANTS ON ISSUES OF PAID OR INCURRED MEDICAL EXPENSES

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For the remaining parties and counsel, TADC adopts Appellants Matbon, Inc.'s and William Edgar Hutton's statement of the Identity of Parties and Counsel.

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STATEMENT OF THE CASE

TADC adopts the Statement of the Case of Appellants Matbon, Inc. and William Edgar Hutton.

ISSUES PRESENTED

TADC adopts the Issues Presented of Appellants Matbon, Inc. and William Edgar Hutton on the issues of paid or incurred medical expenses.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

This *amicus curiae* brief is tendered on behalf of the Texas Association of Defense Counsel ("TADC"). TADC respectfully requests that the Court receive its brief. *See* TEX. R. APP. P. 11.

TADC is an association of Texas attorneys whose practice is concentrated on the defense of civil tort lawsuits. In the defense of such cases, the defendants often have insurance, and TADC members have been retained to represent the insured. The TADC is devoted to the just and efficient administration of civil justice. To that end, it advocates a system of tort reparations in which: (1) plaintiffs are fairly compensated for genuine injuries; (2) non-responsible defendants are exonerated without unreasonable cost; and (3) responsible defendants are held liable for appropriate damages. No person or entity has paid for or will pay for the preparation of this brief.

TO THE HONORABLE EASTLAND COURT OF APPEALS:

The Texas Association of Defense Counsel (TADC) submits this *amicus curiae* brief on behalf of Appellants Matbon, Inc. and William Edgar Hutton on the issues of actually paid or incurred medical expenses. The brief addresses the interpretation of Section 41.0105 of the Texas Civil Practice and Remedies Code, which was enacted as part of the House Bill 4 tort reform legislation in 2003.

STATEMENT OF FACTS

TADC adopts the Statement of Facts of Appellants Matbon, Inc. and William Edgar Hutton on the issue of paid or incurred medical expenses.

SUMMARY OF THE ARGUMENT

Section 41.0105, enacted as part of House Bill 4 in 2003, has been consistently interpreted by appellate courts. Section 41.0105 is a limit on the damages that are recoverable. The statute means nothing more or less than what it says. Plaintiffs are entitled to recover medical costs that are actually paid or incurred by or on behalf of the claimant. But plaintiffs cannot recover "as charged" medical bills if those costs are never actually paid or incurred. Trial courts simply cannot disregard Section 41.0105 even if they disagree about whether the actual medical bills or only the amount of such bills actual paid or incurred should be introduced into evidence during the trial of the lawsuit. Like other courts, this Court should hold that the legislative pronouncement of Section 41.0105 means what it says.

The positions advanced by the Texas Trial Lawyers Association in their *amicus curiae* brief are easily dismissed. Section 41.0105 does not conflict with Sections 18.001

and 18.002 of the Texas Civil Practice and Remedies Code. Rather, it simply insures that the "costs" recovered by Plaintiffs are the actual costs paid or incurred. Moreover, Section 41.0105 does not conflict with the collateral source rule. Section 41.0105 specifically allows for recovery of medical costs paid by or "on behalf of" the injured party. TTLA asserts the separation of powers doctrine bars courts from interpreting Section 41.0105. This argument is meritless because it was the legislature who enacted the statute, and it has always been the court's job to interpret statutes.

ARGUMENT AND AUTHORITIES

Section 41.0105 of the Civil Practice and Remedies Code is a relatively new statute, which was enacted in 2003. It provides:

> § 41.0105. Evidence Relating to Amount of Economic Damages
>
> In addition to any other limitation under law, recovery of medical or health care expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant.

TEX. CIV. PRAC. & REM. CODE § 41.0105 (Lexis 2007). Although the statute is relatively new, it has been consistently interpreted.

I. APPELLATE COURTS HOLD THAT § 41.0105 MEANS JUST WHAT IT SAYS.

Courts interpreting Section 41.0105 have held that it means exactly what it says. *See Mills v. Fletcher*, 229 S.W.3d 765 (Tex. App.–San Antonio 2007, no pet.); *Goryews v. Murphy Exploration & Prod. Co.*, 2007 U.S. Dist. Lexis 57719 (S.D. Tex. Aug. 8, 2007). The San Antonio Court of Appeals held that a plaintiff's "award for past medical expenses should have been reduced because his medical providers accepted lesser amounts for their services from his health insurance company, thereby 'writing off' the

balance due from [the plaintiff]." *Mills*, 229 S.W.3d at 767. The court reversed the case and remanded it to the trial court for entry of a judgment which excluded payments for "written-off" medical charges. *See id*. at 767-768.

In *Goryews*, the district court also applied Section 41.0105 to hold that an award for past medical care should be reduced to the amount which was "actually paid" by the plaintiff's workers' compensation carrier. *Goryews v. Murphy Exploration & Prod. Co.*, 2007 U.S. Dist. Lexis 57719, at *8-*13 (S.D. Tex. Aug. 8, 2007). Following *Mills*, the court rejected the plaintiffs' argument that Section 41.0105 allowed recovery of the amount actually paid or the amount that was initially billed to the plaintiff, although a lower, negotiated rate was ultimately paid and accepted. *Id*. The court concluded: "it is appropriate to reduce the amount of damages the Plaintiff can recover for past medical expenses to the amount actually paid on behalf of the Plaintiff." *Id*. at *12. The court accomplished this reduction at the "post-verdict state of the proceedings." *Id*.

In *Bituminous Casualty Corp. v. Cleveland*, the trial court applied Section 41.0105 and reduced a jury verdict by the amount of medical expenses that were not paid. *Bituminous Cas. Corp. v. Cleveland*, 223 S.W.3d 485, 488-489 (Tex. App.–Amarillo 2006, no pet.). Like *Goryews*, the trial court reduced the damage award at the post-verdict stage of the litigation. *See id.*

The Amarillo Court of Appeals decision in *Gore v. Faye* should also be noted, although it is only a procedural case that addresses the timing of the application of Section 41.0105. 253 S.W.3d 785 (Tex. App.–Amarillo, no pet.) The trial court refused to allow admission of the reduced medical bills before the jury, but agreed to consider the

reductions post verdict. *Id*. at 787-789. The sole contention on appeal was whether the trial court abused its discretion in excluding the reduced charges from the jury's consideration, although admitted for the court's consideration, post-verdict. *Id*. at 788-789. The Amarillo Court of Appeals held that there was "no abuse of discretion in the trial court's decision to apply section 41.1015 post-verdict." *Id*. at 789. Although TADC believes it is proper to admit the evidence before the jury (see discussion of amended Pattern Jury Charge below), the *Gore v. Faye* case nevertheless supports the position that Section 41.0105 must be given effect, even where there is a disagreement about what point in the trial the provision should be applied. In fact, the Amarillo Court of Appeals said: "By its language the limitation on damages prescribed by section 41.0105 is mandatory." *Id*.

The Court holdings were echoed in a law review article that analyzed the provision and concluded: "Section 41.0105 limits the recovery of medical or health care expenses to the amount 'actually paid or incurred by or on behalf of the claimant.'" *House Bill 4 and Proposition 12: An Analysis with Legislative History*, 36 TEX. TECH. L. REV. 169, 252 (2005) (citing TEX. CIV. PRAC. & REM. CODE § 41.0105 (Vernon Supp. 2004-2005). The article explained the purpose of the statute, saying:

> This provision is designed to limit the recovery of past medical expenses to what a plaintiff would actually have to repay from any judgment awarded to the claimant. Thus, balance billing by health care providers a claimant will never have to pay is not recoverable. Moreover, if a medical lien can be settled for less than the amount of the lien, only the actual cost is recoverable.

Id. The article also specifically addressed medical bills paid by Medicare as follows:

> E. Limitation on Medical Expenses: Collateral Source

> Section 41.0105 of the Civil Practice and Remedies Code was added by H.B. 4 to limit the recovery of medical expenses.[938] In many cases, the medical expenses of a claimant or decedent are paid by Medicare or a third-party payor.[939] Medicare or the third-party payor typically would have contracted with the health care provider, reducing rates of reimbursement from those amounts actually billed or charged.[940] In the course of litigation, the plaintiff would obtain the original bills in admissible form, with the custodian of records having signed that the billing amounts were reasonable and the medical services necessary, even though those were not the amounts reimbursed or the amounts that would be subject to any subrogation interest.[941] Section 41.0105 makes clear that when medical and health care expenses are recovered, they are limited to the amount paid or incurred. Section 41.0105 states that "[i]n addition to any other limitation under law, recovery of medical or health care expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant."[942]
>
> [938] The Medical Malpractice & Tort Reform Act of 2003, 78th Leg., R.S., ch. 204, § 13.08, sec. 41.0105, 2003 Tex. Gen. Laws 847, 889.
> [939] *See, e.g., Texarkana Mem'l Hosp. v. Murdock*, 946 S.W.2d 836, 837-38 (Tex. 1987).
> [940] *See, e.g., id.*
> [941] *See, e.g., id.*
> [942] *See* TEX. CIV. PRAC. & REM. CODE Ann. § 41.0105 (Vernon Supp. 2004-2005).

Id. at 318. The provision is also applicable to future medical care expenses as noted in the article:

> Another issue arises as to the impact this statute will have on future recovery of damages. From the legislative history, the limitation on recovery apparently is designed to apply to both past and future damages. Senator Ratliff, the sponsor of H.B. 4 in the Senate, explained the following: "[W]hat this means is that economic damages are . . . limited to those . . . actually incurred. You can't recover more than you've actually paid or [have] been charged . . . for health care expenses in the past or what the evidence shows you will probably be charged in the future." [944]
>
> [944] Debate on Tex. H.B. 4 on the Floor of the Senate, 78th Leg., R.S. 6 (June 1, 2003) (adopting the Conference Committee Report) (transcript of tape 5 available from the Senate Staff Services Office and the authors of this article).

Id.

In the summer of 2007, House Bill No. 3281 was introduced and would have limited Section 41.0105 to medical malpractice claims. However, House Bill No. 3281 was vetoed. *See* Governor's Veto Message, 2007 Legis Bill Hist. TX H.B. 3281 (June 15, 2007). The veto message explained:

> The purpose of damages in a civil lawsuit is to make an injured individual whole by reimbursing the actual amount they have been deprived by the defendant's actions. It should not be used to artificially inflate the recovery amount by claiming economic damage that were never paid and never required to be paid.

Id.

The Texas Pattern Jury Charge has been modified to comply with the requirements of Section 41.0105. STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES – GENERAL NEGLIGENCE PJC 8.2, p. 114 (2006). The PJC gives a specific question when "there is a question whether medical expenses were actually paid or incurred by or on behalf of the plaintiff." *Id*. The PJC provides:

> **Medical care in actions filed on or after September 1, 2003.** For actions filed on or after September 1, 2003, recovery of medical or health-care expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant. TCPRC § 41.0105. If there is a question whether medical expenses were actually paid or incurred by or on behalf of the plaintiff, the following should be substituted for element *i*:
>
> i. Medical care expenses in the past actually paid or incurred by or on behalf of Robert J. Norris.
>
> Answer: _____

Id. These authorities make it clear that plaintiffs cannot recover medical or health care expenses that have not been actually incurred or paid. Moreover, “as charged” medical expenses are not relevant to the ultimate issue when a medical provider has waived or

written off fees or has entered a contractual agreement for a lower amount. The inclusion of a specific question in the PJC makes it clear that evidence of "actually paid or incurred" expenses should be admitted before the jury.

II. TTLA's POSITION IS EASLY DISMISSED.

The positions advocated by the Texas Trial Lawyers Association in their *amicus curiae* brief are easily dismissed. TTLA argues: "Existing law was not altered by § 41.0105, and this court is constrained from finding that it was." *See* TTLA Amicus Brief, p.5. TTLA's argument renders Section 41.0105 meaningless, which clearly was not the intent of the legislature; if the statute was intended to have no meaning, the legislature would not have enacted it.

TTLA also advances a curious separation of powers argument. *See* TTLA Amicus Brief, p.6-10. Needless to say, no court enacted Section 41.0105. Rather, the provision was enacted by the legislature as part of the House Bill 4 tort reform. *See* TEX. CIV. PRAC. & REM. CODE § 41.0105 (Lexis 2007) (Acts 2003, 78th Leg., ch. 204, effective Sept. 1, 2003).

TTLA's position is ultimately founded on its contention that Section 41.0105 purportedly conflicts with Sections 18.001 and 18.002 of the Texas Civil Practice and Remedies Code. *See* TTLA Amicus Brief, p.5-7. These sections provide for affidavits concerning "cost and necessity" of services. *See* TEX. CIV. PRAC. & REM. CODE §§ 18.001-18.002. As was recently stated by the Texas Supreme Court:

> Few patients today ever pay a hospital's full charges, due to the prevalence of Medicare, Medicaid, HMOs, and private insurers who pay discounted rates.

Daughters of Charity Health Servs. v. Linnstaedter, 226 S.W.3d 409, 410 (Tex. 2007). The Court went on to explain that recovery of medical charges initially billed by a hospital rather than those amounts paid (by a workers' compensation carrier) would be a "windfall" to the plaintiff. *Id*. at. 412. As the hospital had no legal claim for payment above that allowed by the worker's compensation statute, the plaintiffs could not claim a greater amount from a tortfeasor. *Id*. The Court concluded that Section 41.0105 was a codification of a the common law rule stated in *Allstate Indemnity Co. v. Forth*, which held that an insured who had no exposure for unreimbursed medical expenses had no standing to assert a claim against her insurer. *Id*. (citing *Allstate Indem. Co. v. Forth*, 204 S.W.3d 795, 796 (Tex. 2006)).

The statutory provisions of Section 18.001 and 18.002 concern "costs". Section 18.001(b) says: "Unless a controverting affidavit is filed as provided by this section, an affidavit that the amount a person charged for a service was reasonable at the time and place that the service was provided and that the service was necessary is sufficient evidence to support a finding of fact by judge or jury that the amount charged was reasonable or that the service was necessary." TEX. CIV. PRAC. & REM. CODE § 18.001(b) (Lexis 2007). Nothing in this provision conflicts with the further requirement, per Section 41.0105, that the amounts so charged were "actually paid or incurred" for medical services. Rather, Section 18.001(b) merely states that the evidence, if uncontested, is sufficient to support a finding that such charged amounts were reasonable and necessary. *See id.* In short, the costs recovered by injured parties must simply be real costs. Section 41.0105 recognizes the modern reality of managed costs in healthcare.

Even assuming, arguendo, that Section 41.0105 does conflict with Section 18.001(b), it simply makes the "amount charged" irrelevant in cases where the amount charged is in excess of the amount actually paid or incurred. Under Section 41.0105, the ultimate issue is the amount "actually paid or incurred."

Last, Section 41.0105 has no effect on the collateral source rule. Section 41.0105 expressly applies to amounts "actually paid or incurred by or on behalf of the claimant." TEX. CIV. PRAC. & REM. CODE § 41.0105 (Lexis 2007) (emphasis added). Thus, the statute does not "permanently abridge the collateral source rule," as TTLA contends. *See* TTLA Amicus Brief, p.7. TTLA's contentions disregard the legislative source of the rule and ignore the common sense principle that plaintiffs are entitled to recover only actual damages. As TTLA says in its Interest of *Amici Curiae*, the judicial system should produce "results that are fair to all parties, not only the plaintiffs." *See* TTLA Amicus Brief, p.1.

While Section 41.0105 requires the admission of actually paid or incurred medical expenses, the provision does not require that the sources of the actual payments or discounts be admitted or disclosed. The source of the payment or the explanation for the discount can simply be redacted from the medical records.

CONCLUSION

The plain language of the Section 41.0105, the case law interpreting this provision, the pattern jury charge, and the law review article stand together for the proposition that a plaintiff cannot recover medical damages that were not actually paid or incurred. The Texas Pattern Jury Charge also makes it clear that the question of actually

paid or incurred medical care expenses should be submitted to the jury. This can be accomplished by introducing evidence of only the amount of medical care expenses actually paid or incurred. It is not necessary to introduce evidence that the amounts actually paid or incurred were based on Medicare payment rates or discounted rates negotiated by private insurers. Thus, the objectives of Section 41.0105 can be accomplished without the disclosure of insurance or violation of the collateral source rule. Most importantly, admitting amounts of medical expenses that are neither paid nor incurred misleads the jurors. This is not what the legislature intended.

PRAYER

TADC believes that the trial court erred by allowing evidence only on preliminary medical care costs as initially billed with no regard for costs that were actually paid or incurred. The defendant in this cause – and the defendants in all personal injury claims throughout Texas – should be allowed to present evidence regarding the health care costs that were actually paid and incurred (including specifically amounts that were reduced pursuant to Medicare payment guidelines or insurance contracts) to the jury. In the event that an award for medical care exceeds the amount actually paid or incurred, the trial court should reduce the awarded amount in its judgment, which can be made at the post verdict stage of the litigation. Accordingly, the judgment in this matter for medical care costs should be reversed and remanded for further proceedings consistent with Section 41.0105.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify a true and correct copy of the BRIEF OF TEXAS ASSOCIATION OF DEFENSE COUNSEL AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS ON ISSUES OF PAID OR INCURRED MEDICAL EXPENSES was mailed by certified mail, return receipt requested to all attorneys of record, in compliance with Texas Rule of Appellate Procedure 9.5, on September 11, 2008, as follows:

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APPENDIX "C"

Fifth Circuit Amicus Curiae Brief Sample – *Sanders-Burns* v. *City of Plano*
(Statute of limitations in suits against governmental officials.)

CASE NO. 08-40459

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LINDA SANDERS-BURNS
Plaintiff – Appellant

VS.

CITY OF PLANO AND JOSEPH CABEZUELA,

Defendants - Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS – MARSHALL DIVISION
CAUSE NO. 2:06-CV-439

BRIEF OF AMICI CURIAE SUPPORTING APPELLEE JOSEPH CABEZUELA'S PETITION FOR EN BANC REHEARING (SEEKING REVERSAL OF THE PANEL DECISION)

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On behalf of Amici:
International Municipal Lawyers Association
Texas Municipal League
Texas City Attorneys Association
Texas Municipal League Intergovernmental Risk Pool
Texas Municipal Police Association
Combined Law Enforcement Associations of Texas
City of Arlington, Texas
City of Fort Worth, Texas
City of Grand Prairie, Texas

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TO THE HONORABLE FIFTH CIRCUIT COURT OF APPEALS:

NOW COME Amici Curiae the International Municipal Lawyers Association, Texas Municipal League, Texas City Attorneys Association, Texas Municipal League Intergovernmental Risk Pool, Texas Municipal Police Association, Combined Law Enforcement Associations of Texas, Cities of Arlington, Fort Worth, and Grand Prairie, Texas and, in support of the Petition for En Banc Rehearing filed herein by Officer Joseph Cabezuela show:

I. STATEMENT OF THE IDENTITY, INTEREST, AND AUTHORITY OF AMICI.

The International Municipal Lawyers Association ("IMLA") is a nonprofit, nonpartisan professional organization consisting of more than 3,000 members. IMLA's membership is comprised of local government entities, including cities, counties, state municipal leagues, and individual attorneys representing governmental interest. Since its establishment in 1935, IMLA has advocated for the rights and privileges of local governments.

The Texas Municipal League ("TML"), founded in 1913, exists to serve the needs and advocate the interests of municipal governments throughout Texas. TML serves as a resource and advocate on behalf of over 1,100 member cities, both small and large. TML also has over 400 Associate members comprised of private sector companies, organizations and individuals. The Legal Defense

Program, in coordination with the Texas City Attorneys Association, advocates the statewide interests, positions, and views of local governments on legal issues.

The Texas City Attorneys Association, an affiliate of the Texas Municipal League, is an organization of attorneys who represent Texas Cities and city officials in the performance of their duties.

The Texas Municipal League Intergovernmental Risk Pool ("TMLIRP") is a self-insurance risk pool created by over 2,300 participating governmental entities in the State of Texas under the provisions of the Texas Interlocal Cooperation Act. Over 1000 cities obtain liability coverage from the TMLIRP.

The Texas Municipal Police Association ("TMPA") is a statewide association of over 15,000 law enforcement officers and professionals. TMPA began as a lobbying group of municipal officers with the objective of promoting professionalism in Texas law enforcement, improving job conditions, and enhancing communication among Texas peace officers. Today, TMPA provides a wide range of services to law enforcement officers.

The Combined Law Enforcement Associations of Texas ("CLEAT") is a statewide labor organization with over 17,000 law enforcement professionals. CLEAT provides legal, legislative and organizing services to its members and affiliated local associations.

The Cities of Arlington, Fort Worth, and Grand Prairie are home rule municipalities located in North Texas. Each operates or participates in self-insurance funds, and upon occasion each provides a defense to their public officials. Arlington, Fort Worth, and Grand Prairie employ more than 600, 1,500, and 200 sworn police officers, respectively.

Each of the amici have authorized this brief to be filed on their behalf by Robert Fugate and Denise Wilkerson, Assistant City Attorneys employed by the City of Arlington, Texas.

II. SUMMARY OF THE ARGUMENT.

Amici Curiae urge the Court to grant Officer Cabezuela's Petition for En Banc Rehearing so that the en banc Court can pass judgment on the issue of first impression for this Circuit. The panel held that a plaintiff can sue a governmental official in his or her individual capacity—*after* the statute of limitations has expired and after most discovery deadlines have passed—if the official was previously named in his official capacity.[1] The panel's decision challenges the majority of the Circuit Courts that have addressed the question and also goes against several additional district court decisions.

The Amici Curiae believe the en banc Court should consider the strong policy arguments that contest the panel's holding. The decision will force local

[1] *Sanders-Burns v. City of Plano*, No. 08-40459, 2009 U.S. App. Lexis 17661 (5th Cir., Aug. 7, 2009).

governments and governmental officials to guess—at their peril—whether officials are being sued in an official capacity, individual capacity, or both. As the relevant case law clearly notes, suits against officials in their official capacity are dramatically different than suits against officials in their individual capacity. While official capacity suits mirror claims against the governmental entity, individual capacity suits impose individual liability. This distinction impacts both the governmental entity and its officials.

In official immunity suits, governmental entities and officers are faced with the same claim. They can pursue a common defense and common discovery. Individual capacity suits, however, raise different claims with different elements. Governmental entities and officials are entitled to know how the plaintiff frames their claim so that precious resources will not be wasted in unnecessary legal costs.

Requiring a plaintiff to clearly state whether the suit is brought against an individual in his or her individual versus official capacity asks very little. However, the costs of defending lawsuits from multiple standpoints is high. The Court should draw a bright line and refuse to allow plaintiffs to name governmental officials in their individual capacity after the statute of limitations has run. Alternatively, the en banc Court should strictly limit the panel's decision to the facts and procedural history of the case.

III. SPLIT AMONG THE CIRCUITS.

Officer Cabezuela's Petition for En Banc Rehearing has fully identified the split among the Circuits. The District of Columbia, Sixth, and Eleventh Circuits have previously held differently than the panel.[2] Only the Seventh Circuit has held like the panel, and that case included a strong dissent.[3]

IV. DISTRICT COURT CASES REJECT PANEL'S APPROACH.

In addition to the district court in this case, two other district courts have also rejected late filed claims against officials in their individual capacity after the limitations period has expired.[4] A district court in the Eighth Circuit rejected a similar claim, saying: "Plaintiff's failure to include Azbell as a defendant when she instituted this action was not due to a mistake in identifying the proper defendant; rather, Plaintiff simply chose not to include Azbell in her suit."[5] Likewise, the Connecticut district court also rejected an untimely individual capacity claim.[6] The court held that this was "not the type of 'mistake' encompassed by Rule 15(c)'s relation-back provision."[7] Thus, late-filed individual capacity claims have been rejected by district courts in the Second and Eighth Circuits.

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[2] *Atchinson v. Dist. of Columbia*, 73 F.3d 418 (D.C. Cir. 1996); *Colvin v. McDougall*, 62 F.3d 1316 (11th Cir. 1995); *Lovelace v. O'Hara*, 985 F.2d 847 (6th Cir. 1993); *see also Rendall-Speranza v. Nassim*, 107 F.3d 913 (D.C. Cir. 1997); *Brown v. Georgia Dep't of Revenue*, 881 F.2d 1018 (11th Cir. 1989).
[3] *Hill v. Shelander*, 924 F.2d 1370 (7th Cir. 1991).
[4] *Cupe v. Lantz*, 470 F. Supp. 2d 128 (D. Conn. 2007); *Smith v. Paladino*, 317 F. Supp. 2d 884 (W.D. Ark. 2004).
[5] *Smith*, 317 F. Supp. 2d at 888.
[6] *Cupe*, 470 F. Supp. 2d 128.
[7] *Id*. at 136.

V. MULTIPLE PUBLIC POLICIES SUPPORT REVERSAL.

The public policy reasons behind the qualified immunity defense are important and well-settled. In 1982, the U.S. Supreme Court stated:

> [I]t cannot be disputed seriously that claims frequently run against the innocent, as well as the guilty – at a cost not only to the defendant officials, but to society as a whole. These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties."[8]

The panel's holding thwarts the public policy ideals protected by the doctrine of qualified immunity. The decision allows—and arguably encourages—plaintiffs to file pleadings that are uncertain and vague about the capacity in which they choose to sue governmental officials. This uncertainty is not a matter without consequence to governmental entities and their officials.[9]

One of the first decisions faced by city attorneys is whether the governmental entity and official can pursue a common defense and common discovery. In official capacity claims, a common strategy is appropriate, allowing the governmental entity to save thousands of dollars in legal fees. However, in

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[8] *Harlow v. Fitzgerald*, 457 U.S. 800, 813-814 (1982) (internal citations omitted).

[9] Other courts have recognized that there are significant consequences attached to plaintiffs' decisions regarding the capacity in which government employees are sued. *See Pearlman v. City of Fort Worth*, No. 4:08-CV-393-A, 2008 U.S. Dist. Lexis 87881 (N.D. Tex. Oct. 30, 2008); *Scott v. City of Cleveland*, No. 1:08-CV-774, 2009 U.S. Dist. Lexis 25679 (E.D. Tex. Mar. 30, 2009); *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 657 (Tex. 2008).

individual capacity claims, it is necessary to defend against additional elements and pursue additional discovery. Needless to say, the cost is even greater when a plaintiff hopes to go back—after the passage of discovery deadlines and the limitations period—and reframe his case as an individual capacity case. The Court should draw a bright line against post-limitations changes in capacity.

Proper notice of capacity is also crucial to the official. If an official is sued in his individual capacity, his or her personal assets are at stake. The official may choose to hire an independent counsel. The official cannot fairly protect his or her interest when the plaintiff chooses to first raise an individual capacity claim after the expiration of limitations—after proof to vindicate the official may have been lost—and after most, if not all, discovery deadlines have passed. Like the entity, individual officials have a right to know in what capacity they are being sued.

The panel's decision eviscerates the benefits of qualified immunity by allowing plaintiffs to raise individual capacity claims after the statute of limitations and after discovery deadlines. When individual capacity claims are made "[e]ven such pretrial matters as discovery are to be avoided if possible, as 'inquiries of this kind can be peculiarly disruptive of effective government.'"[10] Requiring a plaintiff to clearly state whether suit is brought in an official or individual capacity is a small burden for the plaintiff. The burden should not be shifted to the defending

[10] *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (quoting *Harlow*, 457 U.S. at 817).

governmental entities and officials. After all, the plaintiff chooses what case to bring. The costs created by uncertain pleading is disproportionately large to governmental entities and officials.

CONCLUSION

The en banc Court should reverse the panel's holding which allowed Officer Cabezuela to be sued in his individual capacity after the expiration of the limitations period. The Court should affirm the district court's dismissal of the claims against Officer Cabezuela in his individual capacity. Alternatively, the Court should strictly limit the panel's decision to the specific procedural facts of the case presented.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I shipped two true and correct copies and one computer readable disk copy (in portable document file format) of the BRIEF OF AMICI CURIAE SUPPORTING APPELLEE JOSEPH CABEZUELA'S PETITION FOR EN BANC REHEARING to all counsel of record, via Federal Express for next day delivery, in compliance with Fed.R.App.P. 25(b)(d) and 31(b), and 5th Cir. R. 31.1 on September 8, 2009, as follows:

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Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

Pursuant to Fed.R.App.P. 32(a)(5)-(7) and 5th Cir. R. 32.1, 32.2, and 32.3, the undersigned certifies this brief complies with the type-volume, typeface, and type style requirements of Fed.R.App.P. 32(a)(5)-(7).

1. This brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) because this brief contains 1,751 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii) and 5th Cir. R. 32.2. Further, the text of the brief is 7 1/2 pages. *See* Fed.R.App.P. 35(b)(2); Fed.R.App.P. 29(d).

2. This brief complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App.P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font with Times New Roman type style.

3. The undersigned counsel understands a material misrepresentation in completing this certificate or circumvention of the type-volume limits in Fed.R.App.P. 32(a)(7) may result in the Court's striking the brief and imposing sanctions against the person signing the brief.

_____

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APPENDIX "D"

U.S. Supreme Court Amicus Curiae Brief Sample – *Smith v. Barrow*
(Test for evaluating "clearly established law" in qualified immunity analysis.)

No. 07-1089

In The
Supreme Court of the United States

DR. HERMAN SMITH,
Petitioner,

v.

KAREN JO BARROW,
Respondent.

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

BRIEF OF *AMICUS CURIAE* INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[*]

The International Municipal Lawyers Association (IMLA) is a nonprofit professional organization that serves as a resource for local government attorneys. IMLA is an advocate for the nation's local governments and provides its 1,400 members with information and advice on legal issues facing local governments.

Local governments are composed of numerous public officials, including but not limited to, police officers, librarians, building inspectors, code enforcement officers, and elected officials. The doctrine of qualified immunity shields public officials from damages actions unless their conduct was unreasonable in light of clearly established law. *Elder v. Holloway*, 510 U.S. 510, 512 (1994). There are nearly 87,900 local governments in the United States, including over 3,000 county governments, over 19,400 municipal governments, over 16,500 townships, over 13,500 school districts and over 35,100 special districts.[1] With more than 11.5 million full-time

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[*] Counsel of record for all parties waived the right to receive notice at least 10 days prior to the due date of the amicus curiae's intention to file this brief. The parties' consent to amicus briefing and the waiver of the 10 days notice requirement is being filed concurrently with this brief. In accordance with SUP. CT. R. 37.6, amici states that no counsel for either party has authored this brief in whole or in part, and no person other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of the brief.

[1] *See* U.S. Bureau of Census, Federal, State and Local Governments, 2002 Census of Governments, *Preliminary Report*

employees,[2] local governments account for 10.5% of full-time employment in the United States.[3] By contrast, state governments account for only 3.5% and the federal government for only 2.2% of full-time employment.[4]

The members of IMLA have an immediate interest in the departure by the Fifth Circuit from the well-established principles of qualified immunity for public officials. More specifically, the threshold standard for imposing personal liability on a public official must be clarified and applied uniformly across the United States. A judicial interpretation that admits that the standard for evaluating the public official's action is not clear, but still imposes liability, greatly diminishes the firmly rooted tradition of immunity jurisprudence. The central purpose of affording public officials qualified immunity from suit is to protect them "from undue interference with their duties and from potentially disabling threats of liability." *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982). Public officials routinely make decisions that place limits on a

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No. 1, July 2002 *available at* http://ftp2.census.gov/govs/cog/2002COGprelim_report.pdf.

[2] *See* U.S. Bureau of Census, *Local Government Employment and Payroll*, March 2003, *available at* http://ftp2.census.gov/govs/apes/03locus.txt.

[3] *See* U.S. Department of Labor, Bureau of Labor Statistics, *Industry at a Glance*, December 29, 2005, *available at* http://www.bls.gov/iag/government.htm.

[4] *Id.*

citizen's or employee's constitutional rights. They limit the expression of dancers in sexually oriented businesses, they limit religious expression on police uniforms and in public areas, and they put internet filters on library computers, to name a few examples. Public officials also know that these decisions are subject to three possible levels of scrutiny — rational basis, heightened scrutiny, or strict scrutiny — depending on the constitutional right being infringed. Thus, if it is arguable that only a rational basis and not strict scrutiny should apply in evaluating a particular action, the official cannot be said to act with conscious disregard for the established law when the standard for evaluating their conduct is unclear.

STATEMENT OF THE CASE

IMLA adopts the Statement of the Case set forth in the Brief of Petitioner.

SUMMARY OF ARGUMENT

It is well-settled that public officials are protected by the doctrine of qualified immunity. "The Supreme Court has characterized the doctrine as protecting 'all but the plainly incompetent or those who knowingly violate the law.'" *Cozzo v. Tangipahoa Parish Council-President Gov't*, 279 F.3d 273 (5th Cir. 2002) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). A required element of the imposition of liability on a public official has always been a threshold showing of a violation of a "clearly established law." This case requires that the Supreme Court determine whether the law is "clearly established" when there is judicial disagreement in the

case about the standard of review of the public official's action. Additionally, does a pretrial determination of a constitutional question in a qualified immunity appeal deny the defendant the opportunity to have his immunity protection decided by the facts determined by the jury?

In resolving this matter, the Court should hold that the standard for "clearly established law" is not only knowing that a constitutional right exists, but knowing what standard applies in evaluating the action that interfered with that right. There is nothing in the history of the doctrine that supports using a different standard. The standard that the Fifth Circuit suggests should be flatly rejected. Instead, the Court should apply the test that has evolved in qualified immunity jurisprudence. This will bring a consistency in standards across the federal circuits, while confirming the importance of the qualified immunity protections balanced against the rights of the citizen or employee.

The Fifth Circuit's broad interpretation of "clearly established law" will result in public officials acting with timidity and hesitation while they research conflicting legal opinions and attempt to determine future federal precedent. Even the experienced District Court jurist was unaware of "this clearly established law" when he evaluated the school administrator's conduct by a rational basis standard. Dilution of the protections of qualified immunity may deter able people from public service and inhibit public servants in their discretionary actions. *Harlow*, 457 U.S. at 815 – 17.

Finally, a pretrial determination of a Constitutional question in a qualified immunity appeal should not deny the defendant the opportunity to argue his objective good faith to the jury. A summary judgment motion is a threshold determination based on the facts as *alleged* by the plaintiff. The intent is to protect the public servant from the substantial costs of litigation, prevent excessive disruption of government, and permit resolution of patently insubstantial claims. *Id.* at 818-19. It should not operate to deprive the public servant the opportunity to prove his entitlement to qualified immunity based on the factual determination made by the jury. A public official cannot reasonably be said to "to know" that the law forbade such conduct, when the jury found that the conduct that required heightened scrutiny of his actions did not take place. This Court should grant Smith's petition in order to address these important issues concerning qualified immunity.

ARGUMENT

A. The test for "clearly established law" should be not only knowing that a right exists, but knowing what standard applies in evaluating the action that interfered with that right.

To determine whether a public official is entitled to qualified immunity, the court must first answer the threshold question whether, taken in the light most favorable to the party asserting the injury, the alleged facts show that conduct violated a constitutional right. *Saucier v. Katz*, 533 U.S. 194, 201 (2001) (citing *Siegert v. Gilley*, 500 U.S. 226, 232 (1991)). "If no

constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity." *Id.* If a violation could be made out on a favorable view of the parties' submissions, "the next, sequential step is to ask whether the right was clearly established." *Id.*; *Davis v. Scherer*, 468 U.S. 183, 190 (1984). "The objective reasonableness of allegedly illegal conduct is assessed in light of the rules clearly established at the time it was taken." *McClendon v. City of Columbia*, 258 F.3d 432, 438 (5th Cir. 2001) (footnote omitted). Thus, "clearly established" includes the rules in existence for evaluating the conduct, not just the existence of the right. For more than eighty years, the due process interest of parents to direct the upbringing and education of their children, standing alone, warranted no more than rational-basis review. *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 289 (5th Cir. 2001).

In general, "liberty under law extends to the full range of conduct which the individual is free to pursue." *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); *see also Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting) (describing liberty as "a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints"). The recognition of a parent's liberty interest in choosing to educate her children in a private school does not *per se* mean that it is a fundamental right subject to strict scrutiny.

Generally, the equal protection guarantee of the Constitution is satisfied when the government

differentiates between persons for a reason that bears a rational relationship to an appropriate governmental interest. *See Heller v. Doe*, 509 U.S. 312, 320 (1993). However, in limited circumstances when the subject of the different treatment is a member of a class that historically has been the object of discrimination, the Supreme Court has required a higher degree of justification than a rational basis, either strict or intermediate scrutiny. Under the strict scrutiny test, the government must demonstrate a compelling need for the different treatment and that the provision in question is narrowly tailored to achieve its objective. *See McLaughlin v. Florida*, 379 U.S. 184, 192 (1964). Under intermediate scrutiny, the government must at least demonstrate that the classification is substantially related to an important governmental objective. *See United States v. Virginia*, 518 U.S. 515, 533 (1996). The suspect or quasi-suspect classes that are entitled to heightened scrutiny have been limited to groups generally defined by their status, such as race, national ancestry or ethnic origin, alienage, gender and illegitimacy, and not by the conduct in which they engage. The administrator's decision in this case, was based on the conduct that the employee engaged in — choosing to educate her children in a private school — and not on her status. Where rational-basis scrutiny applies, the government actor need not articulate his reasoning at the moment a particular decision is made. Rather, the burden is upon the challenging party to negate "'any reasonably conceivable state of facts that could provide a rational basis for the [regulation].'" *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 367 (2001) (quoting *Heller*, 509 U.S. at 320; *FCC v. Beach*

Communications, Inc., 508 U.S. 307, 313 (1993)). Under a rationale basis analysis, the burden at trial should have been on the plaintiff to show that no reasonably conceivable state of facts existed to support the regulation.

Where heightened scrutiny applies, a restriction on a constitutional protected right will be upheld if the government "assert[s] a substantial interest in support of its regulation," "demonstrate[s] that the restriction directly and materially advances that interest[,]" and draws the regulation narrowly. *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 624 (1995). Regulations on commercial speech or based on gender are some of the types of cases subject to a heightened scrutiny standard of review. *Pagan v. Fruchey*, 492 F.3d 766, 771 (6th Cir. 2007). By requiring the defendant superintendent to "prove that the employee's selection of private school materially and substantially affects the state's education mission," the Fifth Circuit is applying *de facto* heightened or strict scrutiny.

In *Barrow I* the parental interests were combined with free exercise interests, therefore the Fifth Circuit reversed the district court's finding of qualified immunity because of the application of a stricter standard than rational basis review. *See Wis. v. Yoder*, 406 U.S. 205, 233 (1972). ("When the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a reasonable relation to some purpose within the competency of the State is required to sustain the validity of the State's requirement under the First Amendment." (citations and internal quotations

omitted)). Thus, while the Court employed more than a rational basis standard with reference to the First Amendment free exercise clause, it is clear that the due process interest of parents to direct the upbringing and education of their children, standing alone, warranted no more than rational-basis review. *Barrow II* removed the possibility of a religious element to Barrow's claims. The Fifth Circuit, while acknowledging "it is possible to argue" that the rationale basis test applied, still maintained that the school district had the burden to show that Barrow's decision had a "materially adverse effect on the public school district". This impermissible shifting of the burden to the defendant superintendent, stripped him of the qualified immunity protection, a protection deemed necessary in order to have effective government. See *Harlow,* 457 U.S. at 817.

For all these reasons, this Court should reject a standard for "clearly established law" that admits that the standard of review that should apply under these circumstances is uncertain.

B. A pretrial determination of a constitutional question in a qualified immunity appeal should not deny the defendant the opportunity to argue his objective good faith to the jury.

Immunity protects the public from unwarranted timidity on the part of public officials by, for example, "encouraging the vigorous exercise of official authority," *Butz* v. *Economou,* 438 U.S. 478, 506 (1978), by contributing to "'principled and fearless

decision-making,'" *Wood* v. *Strickland,* 420 U.S. 308, 319 (1975) (quoting *Pierson v. Ray*, 386 U.S. 547, 554 (1967) and by responding the concern that would, in Judge Hand's words, "'dampen the ardor of all but the most resolute, or the most irresponsible'" public officials. *Harlow,* 457 U.S. at 814 (quoting *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2nd Cir. 1949) (L. Hand, J.), cert. denied, 339 U.S. 949 (1950); see also *Mitchel v. Forsythl,* 472 U.S. 511, 526 (1985) (lawsuits may "distract officials from their governmental duties"). Thus, the purpose of the immunity doctrine is not only to protect public officials from liability for damages, but also to protect them from substantial costs, which result from merely being required to defend. *Elliot v. Perez*, 751 F.2d 1472, 1476-79 (5th Cir. 1985). A summary judgment motion is merely a threshold determination. This initial inquiry requires the court to determine if the official's conduct violated a constitutional right by reviewing the alleged facts in the light most favorable to the party asserting the injury. *Siegert,* 500 U.S. at 232. The intent of allowing a ruling early on that issue is so that the costs and expenses of trial are avoided where the immunity defense is dispositive. *Saucier*, 533 U.S. at 200. It should not operate to deprive the public servant the opportunity to prove his entitlement to qualified immunity based on the factual determination made by the jury. A public official cannot reasonably be said to "to know" that the law forbade such conduct, when the jury found that the conduct that required heightened scrutiny of his actions, did not take place. When a case is remanded for trial following the denial of qualified immunity on appeal, the defendant official

is still entitled to assert the defense at the trial of the merits.

In this case, upon remand from the Fifth Circuit, the District Court refused to allow the Superintendent a reasonable opportunity to present evidence in support of his qualified immunity defense. The Fifth Circuit affirmed, citing the doctrine of the law of the case. In fact, because the jury actually rejected Barrow's free exercise claim that had been assumed during the first appeal and because additional evidence was offered at trial that was not presented during summary judgment, the "case" in *Barrow III* was not the same as the "case" in *Barrow I*. The Fifth Circuit's application of law of the case is at odds with other circuit courts and improperly insulated from review an incorrect ruling on substantive constitutional law — a ruling that is binding on thousands of public officials. For the Fifth Circuit to say that the jury's findings of fact are irrelevant to a public servant's entitlement to immunity ignores the considerable importance of qualified immunity in the efficient operation of government.

Although entitlement to qualified immunity is a legal question to be decided to the court, the factual issues underlying the qualified immunity analysis may be submitted to a jury. *Willingham v. Crooke*, 412 F.3d 553, 558-59 (4th Cir. 2005). In those cases in which genuine issues of fact material to the qualified immunity defense remain, the factual dispute should be resolved at trial by the trier of fact. *Johnson v. Breeden*, 280 F.3d 1308, 1318 (11th Cir. 2002); see also *Oliveira v. Mayer*, 23 F.3d 642, 650 (2d Cir. 1994)

("The District Court should have let the jury (a) resolve these factual disputes and (b) based on its findings, decide whether it was objectively reasonable for the defendants to believe that they were acting within the bounds of the law when they detained the plaintiffs"). This being the case, "the district court should submit factual questions to the jury and reserve for itself the legal question of whether the defendant is entitled to qualified immunity on the facts found by the jury." *Willingham*, 412 F.3d at 560. Since the jury rejected the free exercise claim in this case, the District Court should have reviewed the defendant's actions by the rational basis test. That is what District Court did in *Barrow I*, and he found that the superintendent was entitled to immunity.

C. Reversal is necessary to ensure efficient operation of local governments.

This case illustrates the type of decisions that should be entitled to qualified immunity protections. It is easy to see the potential difficulty public officials would have if the standard for clearly established violation of a constitutional right were diluted to the level set by the Fifth Circuit. Would every conflicting opinion issued among the circuits be subject to review and scrutiny by public officials in the hopes that the decisions they make guess which circuit's opinion will prevail in the future?

Public officials should be denied qualified immunity on summary judgment only when the alleged violation is of a clearly established constitutional right and the standard of review of that violation is clearly

understood as established by existing precedent. Even then, the defendant should be entitled to present evidence of his entitlement to immunity to the jury. Denial of the right to a qualified immunity defense under such circumstances will result in overburdening public officials and adversely affect operational efficiency of government. This case presents an opportunity to avoid such harm to public officials.

CONCLUSION

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

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