No. 24-999

In The
Supreme Court of the United States

PREMIER NUTRITION CORPORATION,

Petitioner,

v.

MARY BETH MONTERA, *individually and on behalf of all others similarly situated*,

Respondent.

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

BRIEF OF IDAHO, OHIO, 13 OTHER STATES, AND THE ARIZONA LEGISLATURE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI*

In a sense, certification of state-law issues to state courts has nothing to do with the Constitution—everyone agrees that federal courts *can* decide state-law issues, and everyone agrees that the Constitution never *requires* certification.[1]

But in another sense, certification involves a "constitutional question [] as old as the Constitution" itself: "the proper division of authority between the Federal Government and the States." *New York v. United States*, 505 U.S. 144, 149 (1992). Certification enables federal courts to avoid interference with state prerogatives. For example, federal courts can use certification to confirm a state law's meaning before taking the drastic step of holding another sovereign's law unconstitutional. Even in cases like this one that don't present constitutional challenges, federal courts can use certification to avoid misapplying state law. In either circumstance, certification keeps federal courts from intruding on policy and lawmaking decisions that the Constitution leaves to the states.

Because certification helps preserve the states' role in our constitutional order, *amici* States would like federal courts to exercise their power to certify more often. This case provides an ideal vehicle for the Court to announce principles encouraging more certification.

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[1] Pursuant to Rule 37.2, *amici* States provided timely notice of their intent to file this brief to all parties in the case.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case should have been a dead ringer for certification. Premier Nutrition faced an enormous claim for damages that turned on unsettled questions of New York law. Pet. 17, 20 ($91 million). The claim was one that is largely brought only in federal court, meaning there is "limited precedent" to apply from New York courts. Pet.App.31a. And the unsettled questions are both recurring and fundamental—what constitutes a deceptive practice or false advertising, what is needed to prove causation, and how are statutory damages calculated. The Ninth Circuit has no special expertise in New York law, New York stands ready and willing to answer certified questions, and thousands of businesses in New York would appreciate a definitive answer to these questions instead of more "inconsistent[]" federal precedent. Pet.App.33a.

Yet the Ninth Circuit denied certification in an unexplained footnote at the end of its opinion. Pet.App.41a n.15. No doubt, certification is a matter resting in the "sound discretion of the federal court." *Id.* (quoting *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974)). But if the rule of law means anything, it must mean that there are some neutral criteria for courts to apply so that "the proclivities of individual[]" judges do not govern. *Vasquez v. Hillery*, 474 U.S. 254, 265–66 (1986).

The Ninth Circuit's opinion demonstrates that the lower courts are not sure what criteria should be applied to requests for certification—which is

understandable, since this Court has never provided clear guidance on the question. This case gives the Court an opportunity to do so. The Court should grant certiorari, and adopt a framework that favors certification whenever it stands a fair prospect of preventing federal interference with state affairs.

More certification would have two main benefits from the *amici* States' perspectives. *First*, it would keep federal courts from needlessly interfering with state prerogatives. Specifically, it would prevent the "friction" generated between two sovereigns when a federal court (1) holds unconstitutional a statute that a state might narrowly interpret to avoid the constitutional problem, or (2) misinterprets state law, thereby failing to give effect to the state legislature's work. *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 79 (1997). Through the certification process, state courts—the only ones with the power to provide a definitive interpretation of state law—can resolve these issues themselves.

Second, more certification would encourage the development of state law—a result that would better utilize the decentralized form of government the founding generation left to us. State courts would have more chances to develop state-law doctrine, particularly regarding claims that are often brought in federal court. A renewed emphasis on certification might also incentivize parties to raise and thoroughly develop state-law arguments in the first place. Today, they rarely do, meaning state doctrinal solutions to important policy problems tend to die on the vine. *See* Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* 9 (2018).

REASONS FOR GRANTING CERTIORARI

The petition for certiorari lays out the many reasons why the Ninth Circuit should have certified the state-law questions in this case to the New York Court of Appeals, and why this Court's intervention is necessary to promote a clear and uniform framework for assessing certification across the circuits.

This amicus brief elaborates on a broader, related point: the important role that certification can play in our federalist system. Through certification, courts can avoid needless conflict between state and federal power and help facilitate the thoughtful development of state law.

I. Certification Is a Useful Tool for Avoiding Clashes Between State and Federal Power.

Our federalist system inherently raises the risk of "clashing sovereignty." *McCulloch v. Maryland*, 4 Wheat. 316, 430 (1819). After all, when multiple governments have authority over the same jurisdiction, they will sometimes interfere with or frustrate the exercise of one another's powers.

The Framers set up structural safeguards within the Constitution to minimize these sorts of conflicts. The first line of defense was to limit federal power, which many Federalists believed was sufficient to preserve individual rights and state autonomy even in the absence of a Bill of Rights. As James Wilson explained, if "there is given to the general government no power" over a matter, then "no law . . . can possibly

be enacted to destroy that liberty."[2] Eventually, the Tenth Amendment was ratified to reinforce this "truism." *United States v. Darby*, 312 U.S. 100, 124 (1941). Reciprocally, Article I, Section 10 of the Constitution heads off sovereign clashes by limiting state authority with respect to issues the Framers wanted to entrust to the federal government.

But out of respect for state sovereignty, the judiciary has also developed doctrines to keep the two sovereigns from stepping on each other's toes. These doctrines are less binding than constitutional limitations, but in many instances can be just as important. Abstention doctrines are a perfect example. *See*, *e.g.*, *Younger v. Harris*, 401 U.S. 37, 41 (1971); *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 501 (1941). So are the federalism canons that presume—unless there is a clear statement to the contrary—that Congress does not intend to preempt state law, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), legislate on topics traditionally left to the states, *Bond v. United States*, 572 U.S. 844, 857–59 (2014), or deprive states of sovereign immunity, *Bd. of Trs. v. Garrett*, 531 U.S. 356, 363 (2001). The Court's refusal to review state court decisions resting on an "independent and adequate state ground" also preserves states' primacy over state law. *Glossip v. Oklahoma*, 145 S. Ct. 612, 624 (2025) (cleaned up).

For its part, Congress has reduced state-versus-federal struggles by passing legislation allowing states

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[2] 2 Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 449 (Jonathan Elliot ed., Phila., J.B. Lippincott Co. 2d ed. 1891) (statement at the Pennsylvania ratifying convention on December 1, 1787).

to make key policy decisions. For example, Congress has enacted block-grant programs, in which Congress trusts the states to spend federal funds in whatever ways best serve local communities. *See*, *e.g.*, Child Care and Development Block Grant Act of 2014, Pub. L. No. 113-186, 128 Stat. 1971. Some statutes—particularly environmental statutes—employ a "cooperative federalism" model instead of setting nationwide standards, and this Court is careful to "leave a range of permissible choices to the States" when interpreting such statutes. *Wis. Dep't of Health and Fam. Servs. v. Blumer*, 534 U.S. 473, 495 (2002).

Certification of state-law questions is a conflict-minimizing tool of the same ilk. While not constitutionally required and "not obligatory" under state or federal law, 49 states,[3] Congress, and this Court have all acknowledged that certification is a tool that can minimize sovereign clashes and "help[] build a cooperative judicial federalism." *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974); 28 U.S.C. § 1254 (authorizing certified questions).

Through certification, federal courts can obtain a definitive interpretation of state law, which may either (1) negate any perceived constitutional difficulty that might otherwise lead a court to deny effect to a state's sovereign act, or (2) prevent the federal court from misinterpreting state law and derailing state public policy from its intended course. In either case, certification helps avoid "needless friction with state policies" and preserve "harmonious

[3] Jason A. Cantone & Carly Giffin, *Certified Questions of State Law*, Federal Judicial Center (June 2020), https://tinyurl.com/msp54bf9 (all except North Carolina).

relation[s] between state and federal authority." *Knick v. Twp. of Scott,* 588 U.S. 180, 221 (2019) (Kagan, J., dissenting) (quoting *Pullman*, 312 U.S. at 500–01).

A. Federal courts respect states' sovereignty when they use certification to avoid invalidating state laws.

Where constitutional challenges to state legislation are raised in federal court, certification plays a role similar to the "time-honored" doctrine of constitutional avoidance. *Spector Motor Serv. v. McLaughlin*, 323 U.S. 101, 105 (1944). By "[a]void[ing] . . . guesswork" on questions of state law and obtaining "definite determinations" from state courts that may moot any constitutional concern or clarify a potential non-constitutional ground of decision, the Court can avoid deciding constitutional questions unless absolutely necessary. *Id.*

"If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that [courts] ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Id.* That doctrine reflects the "delicacy" of constitutional adjudication, including the "possible consequences for others" in distinct contexts, "the comparative finality" of constitutional holdings, and "the consideration due to the judgment of other repositories of constitutional power." *Rescue Army v. Mun. Ct. of City of Los Angeles*, 331 U.S. 549, 571 (1947).

Avoiding constitutional questions especially makes sense in cases challenging the

constitutionality of a statute. When a court "declares unconstitutional a legislative act," its ruling "thwarts the will of representatives of the actual people," and the precedential impact of its ruling will curtail the lawmaking body's power to make laws on behalf of its constituency going forward. Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 16–17 (2d ed 1986).

The reasons to avoid constitutional questions are "heightened" still in cases in federal court challenging *state* legislation. *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 79 (1997). In that context, unnecessarily addressing a constitutional issue involves all the potential drawbacks just noted plus one more: the risk of needlessly intervening in another sovereign's exercise of its own authority. Of course, federal courts have a duty to say what the law is—a duty that entails refusing to give effect to state laws when they conflict with the Constitution. *E.g.*, *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 9 (2022). But "the federal tribunal [still] risks friction-generating error when it endeavors to construe a novel state Act not yet reviewed by the State's highest court." *Arizonans for Off. Eng.*, 520 U.S. at 79.

Certification provides the federal courts another way to serve the same values as constitutional avoidance. In constitutional challenges, courts can avoid "federal constitutional issues" by certifying "antecedent" "state-law questions." *Id.* at 76. More specifically, the federal courts can ask the state courts for an "authoritative . . . determination of an unresolved question" of state law, and that interpretation might "moot[]" any constitutional

challenge. *Clay v. Sun Ins. Off. Ltd.*, 363 U.S. 207, 212 (1960). It may well turn out that "any conflict . . . between state law and the [Constitution] is [] purely hypothetical," *McKesson v. Doe*, 592 U.S. 1, 6 (2020), or the state court may illuminate an alternate state-law ground of decision that avoids the constitutional question entirely.

Indeed, "[s]peculation by a federal court about the meaning of a statute in the absence of a prior state court adjudication is particularly gratuitous when" state courts are "willing to address questions of state law on certification from a federal court." *Arizonans for Off. Eng.*, 520 U.S. at 79 (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 510 (1985) (O'Connor, J., concurring)). Today, almost every state permits its courts to accept certified questions, and certified questions are accepted at exceptionally high rates. *See* Eric Eisenberg, Note, *A Divine Comity: Certification (At Last) in North Carolina*, 58 Duke L. J. 69, 71 & n.13 (2008); Rachel Koehn Breland, *Avoiding Rejection: Studying When and How State Courts Declined Certification Questions*, 92 Fordham L. Rev. 1429, 1457–62 (2024).

Nothing in the foregoing paragraphs is novel. On the contrary, this Court has recognized for decades that certification can keep federal courts from needlessly invalidating state laws. *McKesson*, 592 U.S. at 4; *Arizonans for Off. Eng.*, 520 U.S. at 76; *Elkins v. Moreno,* 435 U.S. 647, 662 (1978); *Lehman Bros.*, 416 U.S. at 390–91; *accord Minn. Voters Alliance v. Mansky*, 585 U.S. 1, 28–32 (2018) (Sotomayor, J., dissenting); *Expressions Hair Design v. Schneiderman*, 581 U.S. 37, 56–60 (2017)

(Sotomayor, J., concurring in the judgment); *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 776–78 (2005) (Stevens, J., dissenting).

For these reasons, federal courts should use certification more often, and they should hold it in the same esteem as the constitutional avoidance doctrine as a tool to avoid issuing constitutional declarations regarding state law that "may turn out to be unnecessary." *Expressions Hair Design*, 581 U.S. at 56 (Sotomayor, J., concurring in the judgment). They can also "save time, energy, and resources" in the process. *Lehman Bros.*, 416 U.S. at 391.

B. Federal courts interfere with state policy and prerogatives when they misinterpret state law.

Even when state laws are not at risk of being held unconstitutional, certification can still help avoid sovereign conflicts by limiting occasions for federal courts to misapply state law.

One of the Founders' great insights was that "diffus[ing] sovereign power"—both among the three branches of government and between state and federal government—would "secure[] . . . libert[y]" against "arbitrary power." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 536 (2012) (cleaned up); The Federalist No. 51 (J. Madison) (J. Cooke, ed., 1961) ("Ambition must be made to counteract ambition"). The Constitution therefore affords each branch of the federal government and the states tools they can use to stop the others from abusing their authority. *See Printz v. United States*, 521 U.S. 898, 920–22 (1997).

But the same tools that help combat overreach can also end up *facilitating* overreach when used improperly.

Consider judicial review of a federal law. Congress enacts the law and the courts interpret it and apply it to concrete disputes. If Congress passes a law that exceeds its authority, the courts will refuse to give it effect. *E.g.*, *Iancu v. Brunetti*, 588 U.S. 388, 399 (2019). But with the power to interpret the law comes the power to *misinterpret* it. When the courts misinterpret the laws that Congress passed, they inadvertently intrude on the legislative power. After all, misapplying a law that Congress passed is equivalent, in practice, to applying a law that Congress never passed. *See* William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 Geo. L. J. 1361, 1399–1400 (1988); Reed Dickerson, *The Interpretation and Application of Statutes* 253 (1975); *cf.* Jonathan F. Mitchell, *Stare Decisis and Constitutional Text*, 110 Mich. L. Rev. 1, 64–65 (2011).

Once again, these concerns are present and amplified when federal courts interpret and apply state law. Federal courts' "pronouncements on the content of state law inherently involve a significant intrusion on the prerogative of the state courts to control that development." *Lexington Ins. Co. v. Rugg & Knopp, Inc.*, 165 F.3d 1087, 1092 (7th Cir. 1999) (cleaned up). "Until corrected by the state supreme court," incorrect decisions "inevitably skew the decisions of [those] who rely on them and inequitably affect the losing federal litigant who cannot appeal the decision to the state supreme court." Dolores K. Sloviter, *A Federal Judge Views Diversity*

Jurisdiction through the Lens of Federalism, 78 Va. L. Rev. 1671, 1681 (1992). Those decisions "may even mislead lower state courts that may be inclined to accept federal" decisions as correctly interpreting state law. *Id*. Federal courts' intervention thus risks "interrupt[ing] . . . the orderly development and authoritative expositions of state law." *Factors, Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278, 282 (2d Cir. 1981).

Mistakes are, to some extent, unavoidable. Courts are staffed with judges; judges are people; people err. As Justice Scalia put it, "responsible attorneys, and even responsible judges, sometimes make mistakes." *Dart Cherokee Basin Operating Co., LLC v. Owens*, 574 U.S. 81, 100 (2014) (Scalia, J., dissenting).

But courts *can* take steps to limit errors, and that's where certification comes in. Certification enables federal courts to obtain a definitive answer on the meaning of state law directly from "the final arbiters of state law in our federal system." *United States v. Taylor*, 596 U.S. 845, 859 (2022). In the process, they eliminate the risk of committing a "friction-generating error" causing a clash between the two equal sovereigns. *Arizonans for Off. Eng.*, 520 U.S. at 79.

Of course, the *state court* might itself misinterpret state law, undermining the interests of its own legislature. However, by and large, state courts are "better equipped" to interpret state-law questions than federal courts. *Exec. Plaza, LLC v. Peerless Ins. Co.*, 717 F.3d 114, 118 (2d Cir. 2013). State courts have more experience with the state's laws and are more likely to understand the pertinent history and local interpretive norms. *See Lehman*, 416 U.S. at

390–91. Moreover, when a state court *does* misinterpret state law, it does not give rise to the same clashing-sovereigns concerns that attend when federal courts do the same.

* * *

There are certainly times when certification will not be advisable, like when the parties need an answer more quickly than the certification process would allow or when the question is easy enough that certification would be a waste of time. But in many other cases, certification will "greatly simplif[y]" disputes and promote the proper development of state law. *McKesson*, 592 U.S. at 5 (cleaned up).

Perhaps the greatest obstacle to lower courts embracing certification and realizing the benefits of certification, however, is the lack of guidance from the Court on when it is appropriate. As Petitioner has shown, Pet. 23–32, the circuits are deeply divided on what considerations should guide their "sound discretion" to certify questions of state law. *Lehman Bros.*, 416 U.S. at 391. Unguided discretion invites arbitrariness—the decision to certify or not ought to rest on something other than judicial whim, and when (as here) courts deny certification without applying or analyzing some set of established factors, parties have no way to know what influenced the decision *other than* judicial whim. Pet.App.41a n.15.

Lower courts have indicated that they "would welcome" "further guidance" on when certification is appropriate, and this petition presents an opportunity to offer that guidance. *Lindenberg v. Jackson Nat'l Life Ins. Co.*, 919 F.3d 992, 1001–02

(6th Cir. 2019) (Bush, J., dissenting from denial of rehearing en banc). It may be impossible to fashion a bright-line rule governing when to certify, but the Court can at least adopt a framework for federal courts to use. At a minimum, the Court should require federal courts to consider the importance of the underlying state interest. *E.g.*, *United States v. Defreitas*, 29 F.4th 135, 142 (3d Cir. 2022).

II. More Certification Will Promote the Development of State Law.

Encouraging federal courts to certify more state-law questions to state courts would also foster the development of state law. State law is an integral feature of the tapestry of laws affecting citizens' everyday lives, both in terms of rights and obligations. Yet all too often state law is never expounded upon by the state's supreme court. A renewed emphasis on certification promises to change that.

"Our Nation boasts not one Constitution but 51, meaning American constitutionalism concerns far more than what began in Philadelphia" in 1787. *Thompson v. Dall. City Attorney's Off.*, 913 F.3d 464, 471 (5th Cir. 2019). When the Framers "split the atom of sovereignty," they established "two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it." *Alden v. Maine*, 527 U.S. 706, 751 (1999) (cleaned up). "Paramount among the States' retained sovereign powers is the power to enact and enforce any laws that do not conflict with federal law." *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 595 U.S. 267, 277 (2022).

As a result, Americans have two sets of rights—one emanating from federal law, and one from state law. The U.S. "Constitution sets a floor for the protection of individual rights" that is "sturdy and often high," but states "possess authority to safeguard individual rights above and beyond the rights secured by the U. S. Constitution" if they choose. *Am. Legion v. Am. Humanist Ass'n*, 588 U.S. 29, 72 (2019) (Kavanaugh, J., concurring).

And in many instances, the states *have* chosen to provide their citizens with greater individual rights. In Idaho, for example, the state constitution's right against unreasonable searches and seizures "provides greater protection than the parallel provision in the Fourth Amendment of the U.S. Constitution." *State v. Donato*, 135 Idaho 469, 472 (2001). Ohio's constitution offers express conscience protections absent from the federal constitution. *See* Ohio Const., art. 1 § 7; *Humphrey v. Lane*, 89 Ohio St. 3d 62, 67 (2000). And both Idaho and Ohio's constitutions contain greater protection (at least textually) for gun ownership than the Second Amendment. *See* Idaho Const., art. 1 § 11; Ohio Const., art. 1 § 4. Similar points can be made for every one of the other forty-eight states and the District of Columbia. *See generally* Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* (2018); William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977).

The Constitution's decentralized approach to governance enables states to enact laws that reflect a greater sensitivity "to the diverse needs of a heterogeneous society," including "the diversity of

interests and preferences of individuals in different parts of the nation." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (first quote); Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. Chi. L. Rev. 1484, 1493 (1987) (second quote). Allowing a state's citizens to pursue the policies they want without having to involve the entire nation in lawmaking "increases opportunity for citizen involvement in democratic processes"; "allows for more innovation and experimentation in government"; and "makes government more responsive by putting the states in competition for a mobile citizenry." *Gregory*, 501 U.S. at 458.

Still, state law often goes underdeveloped and underutilized, taking a back seat to federal law in most litigation. Certification offers a way to help state law flourish.

Most obviously, more certification would mean more opportunities for state courts to announce binding interpretations of state law. As Petitioner explains, various doctrines of federal jurisdiction and choice of law can conspire to ensure that some claims are essentially *never* brought in state court. Pet. 33–34. Other claims may not reach state court as often as they otherwise would due to the relative ease of securing diversity jurisdiction, including the low amount-in-controversy threshold for diversity cases and the ability to remove cases to federal court. 28 U.S.C. § 1332(a); *see Dart Cherokee*, 574 U.S. at 88–89.

To be clear, diversity jurisdiction plays an important role by assuring "non-resident litigants" that they can litigate in "courts free from susceptibility to potential local bias." *Guar. Tr. Co. of*

N.Y. v. York, 326 U.S. 99, 111 (1945). But certification offers a way for federal courts to serve their role with "[d]ue regard for the rightful independence of state governments." *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 109 (1941) (cleaned up). State courts get an opportunity to weigh in on the meaning of state law, while federal courts continue providing a forum in which out-of-state litigants can proceed free from bias.

Of course, if there is some reason to doubt whether the state court can impartially adjudicate the state-law issue, the federal court should decline to certify. But there is little reason to think this will happen frequently. Certified questions are ordinarily purely legal, so resolving those questions won't present the temptation to favor one party the same way resolving factual disputes would. The state court would be declaring a general legal rule that will apply prospectively to in- and out-of-state parties alike.

More certification would also give lawyers an incentive to raise and develop state-law theories in the first place. Today, many lawyers treat state-law claims "as quintessential arguments of last resort, if they raise them at all." Sutton, *51 Imperfect Solutions* at 9. That is often bad for clients, but it is bad for federalism, too.

However, if federal courts certified state-law questions more often, they would send a clear message to litigants: vigorously pursue state-law theories, because federal courts are taking state law seriously. This would result in a feedback loop, in which more certification would lead to more thoughtful state-law arguments, which would lead to

even more certification. And as certification generates more binding pronouncements of state law, that will stimulate even more thoughtful state-law arguments—and the cycle begins anew. Even in cases where federal courts do *not* certify, an enhanced interest in certification from federal courts would lead to better briefing of the state-law questions that the federal courts choose to resolve themselves.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

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