No. 04-1502

In the Supreme Court of the United States

HORN FARMS, INC., PETITIONER

v.

MIKE JOHANNS,
SECRETARY OF AGRICULTURE, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
MICHAEL JAY SINGER
JOHN S. KOPPEL
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the Secretary of Agriculture reasonably interpreted the "prior-converted wetland" exemption to a wetlands-protection provision of the Food Security Act of 1985, 16 U.S.C. 3822(b)(2)(D), to apply only to land that did not have "wetland" status on the effective date (December 23, 1985) of the statutory program.

2. Whether Congress engaged in impermissible coercion under the Spending Clause of the Constitution, Art. I, § 8, Cl. 1, when it conditioned the receipt of certain farm subsidies upon preservation of wetlands.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 397 F.3d 472. The opinion of the district court (Pet. App. 12a-52a) is reported at 319 F. Supp. 2d 902.

JURISDICTION

The judgment of the court of appeals was entered on February 2, 2005. The petition for a writ of certiorari was filed on May 2, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Wetland Conservation Provisions (commonly known as the "Swampbuster" provisions) of the Food Security Act of 1985 (1985 Act), 16 U.S.C. 3821-3824, farmers are generally ineligible for certain United States Department of Agriculture (USDA) farm subsidies if they convert wetlands to farmland. See 16 U.S.C. 3821(b) and (c). In 1996, however, Congress provided an exemption from ineligibility that applies when a farmer converts "[a] wetland previously identified as a converted wetland (if the original conversion of the wetland was commenced before December 23, 1985), but that the Secretary determines returned to wetland status after that date." Pub. L. No. 104-27, § 322(b), 110 Stat. 988 (16 U.S.C. 3822(b)(2)(D)). This case involves the application of Section 3822(b)(2)(D) to wetlands that were converted to farm use at some point in the relatively distant past, reverted to wetland status before December 23, 1985, and were restored to agricultural status in 1998. See Pet. App. 2a.

The Secretary of Agriculture has consistently construed the Swampbuster provisions to incorporate December 23, 1985—the original effective date of the Swampbuster program—as the benchmark date for establishing the wetland or cropland status of land. The Secretary's regulations define the term "[c]onverted wetland" to mean "a wetland that has been drained, dredged, filled, leveled, or otherwise manipulated * * * for the purpose of or to have the effect of making possible the production of an agricultural commodity." 7 C.F.R. 12.2(a) ("Wetland determination" Subsection (3)). A converted wetland is categorized as "[n]on-wetland" if "the conversion * * * occurred prior to

December 23, 1985, and on that date, the land did not meet wetland criteria but an agricultural commodity was not produced and the area was not managed for pasture or hay." 7 C.F.R. 12.2(a) ("Wetland determination" Subsection (7)(ii)). The regulations define the term "[p]rior-converted cropland" to mean "a converted wetland where the conversion occurred prior to December 23, 1985, an agricultural commodity had been produced at least once before December 23, 1985, and as of December 23, 1985, the converted wetland did not support woody vegetation." 7 C.F.R. 12.2(a) ("Wetland determination" Subsection (8)).

Thus, under the USDA regulations implementing Section 3822(b)(2)(D), a particular tract can be certified as a prior-converted wetland, thereby triggering the statutory exemption, only if the tract was suitable for agricultural uses as of December 23, 1985. The Natural Resources and Conservation Service (NRCS) within USDA is responsible for technical determinations regarding the application of the statutory and regulatory criteria to particular tracts. 7 C.F.R. 12.5(b)(1)(i)-(ii).

2. Gene Horn owns and operates petitioner Horn Farms, Inc., which farms approximately 1400 acres in Fulton and Cass Counties, Indiana. Pet. App. 13a. In 1995, Mr. Horn purchased the acreage at issue in this litigation. *Ibid.* In 1998, believing that the parcel had previously been farmed but had reverted to wetland status due to lack of maintenance, Mr. Horn cleared several tracts of trees and vegetation and restored a drainage system for the production of agricultural commodities. *Ibid.*

In March 1999, the NRCS district conservationist conducted a site-assessment of the relevant parcel. Pet. App. 13a-14a. The district conservationist determined

that, because the parcel had reverted to wetland status prior to December 23, 1985, the tracts that Mr. Horn had cleared and drained in 1998 did not qualify as prior-converted wetlands under 16 U.S.C. 3822(b)(2)(D). Pet. App. 14a. Based on that assessment, NRCS notified petitioner that the agency had made a preliminary technical determination that 6.2 acres of the parcels at issue were wetlands as of December 23, 1985. *Id.* at 15a-16a. The County Committee terminated petitioner's federal benefits beginning with the 1999 crop year, and no subsequent payments have been made. *Id.* at 16a.

3. After a failed mediation attempt and unsuccessful administrative appeals, petitioner filed suit in federal district court. Pet. App. 16a-19a. Petitioner alleged, *inter alia*, that (a) the Swampbuster provisions of the Farm Security Act violate the Spending Clause of the United States Constitution, Art. I, § 8, Cl. 1, by impermissibly coercing benefit recipients to comply with the conditions of payment, and (b) the decisions of the USDA resulting in the termination of petitioner's benefits were arbitrary, capricious, an abuse of discretion, and not in accordance with the law. The district court granted and denied each side's summary judgment motion in part, but ultimately provided relief to petitioner. Pet. App. 12a-52a.

a. The district court rejected petitioner's Spending Clause challenge to the Swampbuster provisions at issue in this case. Pet. App. 36a-39a. The court agreed with petitioner that "the Swampbuster provisions are coercive, in fact, they give the USDA a big club with which to protect wetlands." *Id.* at 37a. The court observed, however, that "establishing that Congress has placed 'unconstitutional conditions' on the receipt of federal funding is an uphill battle," *ibid.*, and that "Congress

can condition appropriation in very important ways that permit the creation of public policy indirectly which sometimes could not be done directly," *id.* at 38a. The court concluded that, while Congress might lack authority to forbid the conversion to agricultural use of the wetlands on petitioner's property, the challenged conditions on federal agricultural subsidies do not violate the Constitution. See *id.* at 38a-39a.

b. The district court held that USDA had acted arbitrarily and capriciously by refusing to treat the parcels at issue as prior-converted wetlands. See Pet. App. 39a-47a. Petitioner construed the phrase "after that date" in 16 U.S.C. 3822(b)(2)(D) to mean "after the date that the wetland was originally converted." Pet. App. 42a. Under that view, all wetlands that were originally converted to agricultural use before the effective date of the original Swampbuster provisions (December 23, 1985) would fall within the Section 3822(b)(2)(D) exemption even if they had already reverted to wetland status by that date. *Ibid.*

The district court found the language of Section 3822(b)(2)(D) to be ambiguous, see Pet. App. 42a, 44a, and it stated that the agency's interpretation was reasonable, see *id.* at 44a. The court recognized that, under established principles of administrative law, the determination that USDA's construction was reasonable "would ordinarily end the analysis." *Ibid.* Based on a passage from the legislative history of the initial 1985 legislation, however, the court concluded that Congress had considered the question and had endorsed petitioner's reading of the relevant statutory provision. See *id.* at 44a-47a.

4. The court of appeals reversed. Pet. App. 1a-11a.

a. The court of appeals sustained the USDA's denial of farm subsidies to petitioner, holding that the challenged agency action rested on a permissible construction of 16 U.S.C. 3822(b)(2)(D). Pet. App. 4a-7a. The court stated that "Section 3822(b)(2)(D) is ambiguous. The referent of 'that date' could be December 23, 1985, as the Secretary contends, but it also could be the date on which the wetland was 'previously identified' or the date on which the 'original conversion . . . was commenced'." *Id.* at 4a. The court found, however, that "[s]everal contextual elements support the Secretary's reading," *ibid.*, and it concluded that the Secretary's interpretation "is the most sensible understanding of the legislation," *id.* at 5a. The court explained, *inter alia*, that "when 'that date' is understood to be December 23, 1985, the subsection is a non-degradation clause: the legislation protects wetlands as they actually existed on the date of its enactment, penalizing withdrawals without attempting to restore lands then under agricultural production." *Ibid.* Under petitioner's interpretation, by contrast,

> [r]eading "that date" to be the time of original conversion would allow net reductions in wetlands after the legislation's enactment—and would allow them in ways that are difficult to police, because there would be few records to show the date of original conversion, so farmers who drained wetlands after 1985 could make hard-to-refute claims that they were just going back to some long-forgotten state of affairs.

Ibid.

The court of appeals also held that the Secretary's interpretation of 16 U.S.C. 3822(b)(2)(D) was entitled to deference under the principles announced in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Pet. App. 5a. The court explained that the agency's construction of Section 3822(b)(2)(D) is expressed in regulations adopted after notice-and-comment rulemaking and "concerns the Secretary's administration of a federal program." *Ibid.* The court further held that a single statement by one of the 1985 Act's sponsors, on which the district court had relied, provided no basis for rejecting the USDA's construction of the relevant statutory language. The court explained that (i) the statement in question was made in 1985 and thus could not shed meaningful light on the proper construction of the 1996 amendments, and (ii) the view of a single legislator could not in any event override the responsible agency's reasonable interpretation of an ambiguous statutory provision. See *id.* at 5a-7a.

b. The court of appeals rejected petitioner's "contention that Congress lacks authority to make subsidies contingent on preserving wetlands." Pet. App. 7a; see *id.* at 7a-8a. The court explained that, under this Court's decision in *South Dakota* v. *Dole*, 483 U.S. 203, 207-208 (1987) (*Dole*), "conditions set on expenditures must (i) promote the general welfare, (ii) be unambiguous (at least when they affect states), and (iii) relate to a legitimate federal interest." Pet. App. 7a-8a. The court held that the challenged condition on agricultural subsidies satisfies each of those requirements, *id.* at 8a, and that it was consequently "unnecessary to determine whether the legislation could be supported at any event by the national commerce power," *ibid.* (citing *Wickard* v. *Filburn*, 317 U.S. 111 (1942)). The court also ob-

served that petitioner's argument, if taken to its logical conclusion, "would demolish * * * the whole system of agricultural subsidies," since "if it is unduly 'coercive' to link agricultural subsidies to how the farmer uses (or misuses) agricultural land, it must be unduly 'coercive' to link the subsidy to the agricultural product." *Id.* at 7a.[1]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. Relying on dicta in *Gunn* v. *United States Department of Agriculture*, 118 F.3d 1233 (8th Cir. 1997), cert. denied, 522 U.S. 1111 (1998), and *Barthel* v. *United States Department of Agriculture*, 181 F.3d 934 (8th Cir. 1999), petitioner contends that "[t]he Eighth Circuit's opinions stand in marked contrast to the Seventh Circuit's decision below, because the Eighth Circuit may have ultimately permitted the Petitioner's activities on his farmland." Pet. 14; see Pet. 10-15 (alleging the existence of a circuit conflict on the question presented here). Petitioner's reliance on *Gunn* and *Barthel* is misplaced. Neither of those decisions construed 16 U.S.C. 3822(b)(2)(D) or its key phrase "that date," and the reasoning of the Eighth Circuit in *Gunn* and *Barthel* is

[1] In addition, the court of appeals held that petitioner had received constitutionally adequate opportunities for administrative review of the USDA district conservationist's converted-wetlands determination, particularly since the dispute between the parties was legal rather than factual, Pet. App. 8a-9a; and that the Secretary's denial of continued farm-subsidy payments to petitioner did not implicate 5 U.S.C. 558, which deals with applications for federal "licenses," Pet. App. 9a-11a. Petitioner does not challenge those holdings in this Court.

fully consistent with the Seventh Circuit's analysis in this case.

a. *Gunn* involved a 160-acre tract in Iowa. 118 F.3d at 1235. Until 1906, "the acreage was wetlands and not arable." *Ibid.* A drainage system installed in 1906 allowed some cultivation to take place, and improvements performed in 1992 by the local drainage district increased the amount of land that could be used for agricultural purposes. *Id.* at 1235-1236. Based on those improvements, USDA "concluded that 28.2 acres of Gunn's land were wetlands that had been converted by the drainage district's recent [1992] activities and could not be farmed by Gunn without his losing eligibility for farm benefit programs." *Id.* at 1236.

In challenging USDA's determination, Gunn argued, *inter alia*, that he was entitled to an exemption under 16 U.S.C. 3822(b)(1)(A), which states that use of converted wetlands for agricultural production shall not disentitle a person to farm subsidies "if the conversion of the wetland was commenced before December 23, 1985." 118 F.3d at 1238. Gunn contended that, because the land was initially drained for agricultural purposes in 1906, "the land became 'converted wetland' before December 23, 1985, and remains in that classification forever, whatever may have happened later." *Ibid.* The court of appeals rejected that claim, deferring to USDA's view that the 28.2 acres "did not become converted wetland until 1992," when the 1992 improvements to the drainage system "further degraded the wetland characteristics of the farm." *Ibid.* The court explained that USDA's interpretation of Section 3822(b)(1)(A) was "sufficiently plausible to meet the *Chevron* test" and "also accord[ed] with the general purpose of the

statute—to preserve those wetland characteristics still in existence in 1985." *Ibid.*

Thus, like the Seventh Circuit in the instant case, the Eighth Circuit in *Gunn* recognized that USDA's reasonable interpretation of ambiguous Swampbuster provisions is entitled to deference. The Eighth Circuit's observation that "the general purpose of the statute [is] to preserve those wetland characteristics still in existence in 1985," 118 F.3d at 1238, also accords with the Seventh Circuit's understanding. Compare Pet. App. 5a (noting with approval that, under USDA's interpretation of 16 U.S.C. 3822(b)(2)(D), that provision "is a non-degradation clause: the legislation protects wetlands as they actually existed on the date of its enactment, penalizing withdrawals without attempting to restore lands then under agricultural production"). Petitioner's claim of a circuit conflict is therefore unfounded.

b. Petitioner's reliance on *Barthel* is similarly misplaced. The Eighth Circuit in *Barthel* held that USDA had acted unlawfully by refusing to allow landowners to deepen a drainage ditch. See 181 F.3d at 935-939. Under the approach taken by the agency in that case, the landowners were required to maintain the ditch at its December 23, 1985, depth, even though leaving the ditch at that level resulted in the flooding of land that had been suitable for farming as of 1985. See *id.* at 937. In the court of appeals' view, that approach "misse[d] the clear focus [of] the Swampbuster provisions and the implementing regulations." *Ibid.* The court explained:

> The unambiguous focus of the statute and implementing regulations is to maintain the status quo of the manipulated wetlands—not the drainage ditch. And a technical determination that establishes the

> level of a culvert in a ditch, but which produces a result contrary to the previous status quo of the wetlands cannot stand. The statute and regulations mandate that the Barthels should be able to have the water and farming regime they had before December 23, 1985.

Id. at 938 (footnote omitted). The Eighth Circuit's analysis in *Barthel*, which was premised on the view that the Swampbuster provisions are intended to preserve but not expand wetland acreage (as compared to the December 23, 1985, baseline), is fully consistent with the Seventh Circuit's decision in the instant case. See pp. 9-10, *supra*.

2. Petitioner contends (Pet. 15-20) that the court of appeals' application of *Chevron* principles warrants review by this Court. That contention lacks merit.

In *Chevron*, this Court held that,

> [w]hen a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter. * * * [I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

467 U.S. at 842-843. Consistent with those principles, the Seventh Circuit explained that, because the disputed Swampbuster provision is ambiguous, Pet. App. 4a, and because the Secretary's interpretation of that provision "is expressed in regulations adopted after notice and opportunity for comment and concerns the Secretary's

administration of a federal program," *id.* at 5a (citations omitted), that interpretation "receives all of the deference contemplated by *Chevron*," *ibid.* Applying that deferential standard, the court correctly sustained the agency's approach, finding it to be not only reasonable, but "the most sensible understanding of the legislation." *Ibid.*

Petitioner does not dispute the Seventh Circuit's conclusion that the relevant statutory language is ambiguous. Petitioner does argue (Pet. 17-20) that the court of appeals erred in its understanding of the history of 16 U.S.C. 3822(b)(2)(D). The court of appeals, however, correctly concluded that the only aspect of the legislative history that even relates to the Swampbuster program—then-Representative Daschle's general statement at the time the 1985 Act was passed—was not entitled to any significant weight because it occurred 11 years before the particular exemption at issue here was enacted in 1996. See Pet. App. 5a-6a.

In any event, petitioner does not contend that the court of appeals misstated the legal standards governing judicial review of federal agency action. Nor does petitioner claim that any other court of appeals has rejected the Secretary's interpretation of Section 3822(b)(2)(D) or construed that provision in a different manner. Because petitioner has failed to identify a circuit conflict or any recurring question of broad legal importance, its challenge to the court of appeals' application of *Chevron* principles does not warrant this Court's review.

3. Petitioner contends (Pet. 20-30) that further review is warranted to "clarify" (Pet. 20) the scope of Congress's authority under the Spending Clause to condition the receipt of federal funds upon compliance

with statutory requirements. That contention lacks merit.

The Constitution authorizes Congress to "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." Art. I, § 8, Cl. 1. "Incident to this power, Congress may attach conditions on the receipt of federal funds." *Dole*, 483 U.S. at 206; see *New York* v. *United States*, 505 U.S. 144, 167 (1992). This Court has made clear that the spending power is "not limited by the direct grants of legislative power found in the Constitution," but can be used to achieve broad policy objectives beyond Article I's "enumerated legislative fields." *Dole*, 483 U.S. at 207 (citations omitted).

Although conditions imposed on the receipt of federal funds generally raise no constitutional concern, the Court in *Dole* identified four limitations on Congress's spending power. First, the Spending Clause by its terms requires that Congress legislate in pursuit of "the general welfare." *Dole*, 483 U.S. at 207 (quoting U.S. Const. Art. I, § 8, Cl. 1). Second, if Congress imposes conditions on a State's receipt of federal funds, it "must do so unambiguously . . ., enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Ibid.* (quoting *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981)). Third, this Court's decisions "have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated to the federal interest in particular national projects or programs." *Ibid.* (internal quotation marks omitted). Fourth, the obligations imposed by Congress may not violate any independent constitutional provisions, *id.* at

208—a limitation that reflects "the unexceptionable proposition that the power may not be used to induce the States to engage in activities that would themselves be unconstitutional," *id.* at 210.

Petitioner does not contend that the Swampbuster provisions at issue in this case run afoul of any of the foregoing limitations on Congress's spending authority. Rather, petitioner argues (Pet. 22-24) that Congress has impermissibly "coerced" it to refrain from converting wetlands to agricultural uses by conditioning the grant of federal farm subsidies on compliance with the Swampbuster provisions. This Court's decisions "have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" *Dole*, 483 U.S. at 211 (quoting *Steward Mach. Co.* v. *Davis*, 301 U.S. 548, 590 (1937)).[2] The Court has not suggested, however, that conditions on the receipt of federal funds can be declared invalid simply because potential recipients find the federal offer too tempting to decline. As the Court recognized in *Dole*, every federal spending statute "is in some measure a temptation." *Ibid.* (quoting *Steward Mach. Co.*, 301 U.S. at 589). But "to hold that motive or temptation is equivalent to coercion is to plunge the law in endless diffi-

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[2] The Court in *Dole* made that observation in the course of reviewing conditions on grants of federal money to States. In her dissenting opinion in that case, Justice O'Connor expressed the view "that the spending power may not be used in a way that coerces states to surrender fundamental attributes of their sovereignty." Pet. App. 7a (citing *Dole*, 483 U.S. at 212-218 (O'Connor, J., dissenting)). As the court of appeals observed, that concern is inapplicable here, since petitioner "is not a governmental body and lacks any sovereignty that can be trampled upon." *Ibid.*

culties." *Ibid.* (quoting *Steward Mach. Co.*, 301 U.S. at 589-590).

Petitioner cites no decision of this Court that has struck down a condition on federal spending as impermissibly coercive.[3] Petitioner identifies only one court of appeals decision that has invalidated a spending condition on that ground, see Pet. 26-27 (citing *Bradley* v. *Arkansas Dep't of Educ.*, 189 F.3d 745, 757-758 (8th Cir. 1999)), and petitioner acknowledges that the panel decision in *Bradley* has been superseded by the contrary holding of the Eighth Circuit sitting en banc, see Pet. 27 (citing *Jim C.* v. *Arkansas Dep't of Educ.*, 235 F.3d 1079, 1082 (8th Cir. 2000), cert. denied, 533 U.S. 949 (2001)). As the Ninth Circuit has observed, "[t]he coercion theory has been much discussed but infrequently applied in federal case law, and never in favor of the challenging party." *Nevada* v. *Skinner*, 884 F.2d 445, 448 (9th Cir. 1989), cert. denied, 493 U.S. 1070 (1990); see, *e.g.*, *Doe* v. *Nebraska*, 345 F.3d 593, 598-600 (8th Cir. 2003); *West Virginia* v. *United States Dep't of Health & Human Servs.*, 289 F.3d 281, 291-292 (4th Cir. 2002); *Jim C.*, 235 F.3d at 1082; *Kansas* v. *United States*, 214 F.3d 1196, 1202 (10th Cir.) ("[T]he coercion theory is unclear, suspect and has little precedent to support its application."), cert. denied, 531 U.S. 1035 (2000). Petitioner's conjecture (Pet. 28) that "the result in this case may certainly have been different" if the dispute had arisen in the Fourth Circuit provides no basis for review by this Court.

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[3] In light of the more recent pronouncements of this Court and other federal courts, petitioner's reliance (Pet. 24-25) on dicta in *United States* v. *Butler*, 297 U.S. 1, 70-71 (1936)—a decision based on the Tenth Amendment rather than on the Spending Clause (see Pet. 24)—is misplaced.

Petitioner's "coercion" argument is especially misguided, moreover, because it is inconsistent with the core premise of the federal farm subsidy programs from which petitioner seeks to benefit. The legitimacy of those programs depends entirely on the proposition that a grant of federal funds may be conditioned on the recipient's agreement to devote his land to the particular (*i.e.*, agricultural) uses that the programs are designed to foster. As the court of appeals explained:

> [I]f it is unduly "coercive" to link agricultural subsidies to how the farmer uses (or misuses) agricultural land, it must be unduly "coercive" to link the subsidy to the agricultural product. A farmer can't get federal payments for growing (or not growing) soybeans, without actually growing the soybeans or allowing the land to lie fallow. The sort of argument [petitioner] presses would demolish, not the Swampbuster legislation, but the whole system of agricultural subsidies.

Pet. App. 7a.

Petitioner thus seeks the best of both worlds. Petitioner contends that Congress, in dispensing federal money, cannot constitutionally distinguish between farmers who comply with limits on wetland conversion and farmers who do not. Petitioner's ultimate objective, however, is to benefit financially from a federal subsidy program that favors agricultural over non-agricultural uses of land. Neither precedent nor logic suggests that the Constitution bars Congress from utilizing the former funding criterion while allowing it to use the latter.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
PETER D. KEISLER
Assistant Attorney General
MICHAEL JAY SINGER
JOHN S. KOPPEL
Attorneys

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