No. 16-1120

In the Supreme Court of the United States

CON-WAY FREIGHT, INCORPORATED, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the results of an election concerning union representation should have been set aside on the ground that certain of petitioner's employees were union agents and committed misconduct during the election campaign.

2. Whether the National Labor Relations Board abused its discretion in declining to set aside the results of an election concerning union representation on the theory that the tabletop voting booth used in the election was not permitted by Board rules and did not appropriately protect voters' privacy.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 838 F.3d 534. The decision and order of the National Labor Relations Board in the unfair labor practice proceeding (Pet. App. 12a-19a) is reported at 363 N.L.R.B. No. 53. The Board's underlying decision and certification of representative (Pet. App. 20a-23a) is unreported. The hearing officer's report on petitioner's objections to the certification election (Pet. App. 24a-178a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 27, 2016. A petition for rehearing was denied on December 12, 2016 (Pet. App. 179a). The petition for a writ of certiorari was filed on March 13, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The National Labor Relations Act (NLRA or Act), 29 U.S.C. 151 *et seq.*, establishes mechanisms to resolve questions concerning union representation, see 29 U.S.C. 159, and to remedy and prevent unfair labor practices, see 29 U.S.C. 158, 160. Among other provisions, the Act sets forth a framework for determining whether a majority of employees in an appropriate bargaining unit desire union representation, 29 U.S.C. 159, and provides for the National Labor Relations Board (NLRB or Board) to conduct and certify the results of secret-ballot elections, 29 U.S.C. 159(c)(1).

The Board's rules permit parties to submit objections to the conduct of an election, and provide for the Board to set aside the results of the vote in the event that it finds objectionable conduct. When a party or its agents is found to have committed misconduct, the Board will overturn the election if the misconduct reasonably tended to interfere with employees' free choice. *NLRB* v. *Gulf States Canners, Inc.*, 634 F.2d 215, 216 (5th Cir.) (per curiam), cert. denied, 452 U.S. 906 (1981). In the event that persons who are not agents of a party to the election committed the misconduct, however, the Board will overturn an election only if a general atmosphere of fear and reprisal rendered a fair election impossible. *Pac Tell Grp., Inc.* v. *NLRB*, 817 F.3d 85, 95 (4th Cir. 2015); *Westwood Horizons Hotel*, 270 N.L.R.B. 802, 803 (1984). "Courts are hesitant to overturn elections when statements cannot be attributed to the union because 'there generally is less likelihood that they affected the outcome.'" *NLRB* v. *Eskimo Radiator Mfg. Co.*,

688 F.2d 1315, 1319 (9th Cir. 1982) (per curiam) (citation omitted).

2. a. Petitioner, a freight services company, operates a facility in Laredo, Texas, that employs over a hundred drivers and dockworkers. Pet. App. 2a. In 2014, several employees at the Laredo facility contacted Teamsters Local 657 (the union), an affiliate of the International Brotherhood of Teamsters, to discuss possible unionization. *Ibid.* Two officials with the union then began holding meetings once or twice a week for all interested employees. *Id.* at 33a-34a; see *id.* at 2a. The union officials discussed the organizing process, including the need to obtain membership cards indicating that employees wanted the union to represent them. *Id.* at 2a, 33a-34a. Several employees "volunteered to provide * * * signature and membership cards to coworkers and to campaign in support of the [u]nion." *Id.* at 2a; see *id.* at 35a. However, union officials did not give the volunteers "specific instructions or training * * * about how to go about dealing with their coworkers in the organizing process," communicate to petitioner's employees that the volunteers were working on the union's behalf, designate these employees "to be a formal or informal committee," list the employees as committee members on union documents, or "send any letter to [petitioner] to indicate that these individuals were working on [the union's] behalf." *Id.* at 34a-35a.

After a sufficient number of employee signatures were collected, the union filed a petition with the Board seeking certification as the exclusive bargaining representative of petitioner's drivers and dockworkers at its Laredo location. Pet. App. 2a. During a secret-ballot election, 55 workers voted in favor of

the union and 49 voted against it, with four additional ballots challenged (a number insufficient to affect the outcome of the election). *Id.* at 3a.

b. Petitioner filed objections, asserting that the election should be set aside. After an evidentiary hearing, a Board hearing officer recommended that the Board overrule petitioner's objections and certify the union as the employees' bargaining representative. Pet. App. 24a-178a.

As relevant here, the hearing officer rejected petitioner's contention that the election should be invalidated on the ground that certain employees were union agents who had engaged in objectionable conduct during the campaign. The hearing officer first concluded that the employees in question were not agents of the union. Pet. App. 37a-46a. "The evidence," the hearing officer stated, "does not show that any of them had actual or apparent authority to speak or act on the [union's] behalf." *Id.* at 38a. The hearing officer explained that the employees' vocally supporting the union, attending organizing meetings, and "soliciting [union] cards from fellow coworkers" was not sufficient to make the employees agents of the union. *Id.* at 38a-39a; see *id.* at 37a-38a (setting out Board cases concerning these activities). The hearing officer added that the union had itself dispatched officials who "were actively involved in the campaign," and that "anyone paying attention would have understood that these [union] officials—not the employee supporters of the [union]—were the ones who spoke and acted on behalf of the" union. *Id.* at 39a.

The hearing officer explained that the cases petitioner invoked to support its agency argument involved employees who had more extensive union ties.

Pet. App. 39a-40a. The Board cases involved, respectively, employees who served on an in-plant organizing committee, see *Pastoor Bros.*, 223 N.L.R.B. 451 (1976), and an employee who relayed information to and from the union as "the union's *only* link with the other employees," see *Bristol Textile Co.*, 277 N.L.R.B. 1637 (1986). Pet. App. 39a-40a. The hearing officer found that decisions from the Third and Fourth Circuits on which petitioner relied were "not consistent with" the Board's approach "and, in any event, they do not support [petitioner's] agency contention." *Id.* at 41a. The hearing officer noted that the Third Circuit had found employees were union agents when they were members of "an in-house organizing committee" established by the union and employees, received special instructions from the union, and acted as liaisons between the union and the other employees, see *NLRB* v. *L & J Equip. Co.*, 745 F.2d 224 (3d Cir. 1984). Pet. App. 42a. But the hearing officer explained that the Third Circuit did not suggest that employees were agents when, as here, they "merely took an active role in furthering their own interests by helping the [union] to win the election." *Id.* at 44a. *PPG Industries, Inc.* v. *NLRB*, 671 F.2d 817 (4th Cir. 1982), similarly involved "members of an 'In-Plant Organizing Committee'" who the union referred to in its literature as "'our' committee" and who "consented to the union providing their names to the employer." Pet. App. 45a. "Such facts," the hearing officer noted, "are absent here." *Ibid.*

In any event, the hearing officer found that the evidence was insufficient to demonstrate that any of the employees whom petitioner alleged were union agents

had engaged in any of the objectionable conduct petitioner had alleged. Pet. App. 26a, 46a-50a, 57a-59a.[1]

The hearing officer also found no merit to petitioner's claim that the election results should be set aside as a result of the Board's use of a tabletop voting booth. Pet. App. 102a-120a. The hearing officer stated that under the Board's precedents, an election conducted with a Board-sanctioned voting booth would be set aside only if "someone actually witnessed how a voter marked his or her ballot." *Id.* at 112a. Here, the hearing officer explained, the election was conducted, without objection from petitioner, using a Board-sanctioned booth: a three-sided, Board-provided cardboard shield that sits on a plastic base and was placed on a table in the polling area. *Id.* at 102a, 104a, 112a. The hearing officer stated that the tabletop configuration of the booth was consistent with *Physicians & Surgeons Ambulance Service, Inc.*, 356 N.L.R.B. 199 (2010), enforced, 477 Fed. Appx. 743 (D.C. Cir. 2012). Pet. App. 112a. The hearing officer also concluded that the configuration was consistent with the Board's procedures and manuals. *Id.* at 118a. Since the election had been conducted using Board-approved equipment and there was "no persuasive evidence" indicating that "anyone * * * saw how any voter marked his or her ballot," *id.* at 112a, the hear-

[1] In determinations that petitioner does not challenge, the hearing officer overruled petitioner's objection to the election based on the claimed misconduct of the union observer, who the hearing officer agreed was a union agent. Pet. App. 26a-27a, 150a-159a. The hearing officer also found that some claimed misconduct was committed by individuals who were not alleged to be union agents, but that the conduct did not warrant setting aside the election. *Id.* at 50a, 59a-60a.

ing officer rejected petitioner's challenge based on the configuration of the booth.

c. The Board adopted the hearing officer's findings and recommendations and certified the union as collective-bargaining representative. Pet. App. 3a, 20a-23a.

d. After petitioner refused the union's request to bargain, the union filed an unfair labor practice charge with the Board. The Board's General Counsel then issued a complaint alleging that petitioner violated Section 8(a)(1) and (5) of the Act, 29 U.S.C. 158(a)(1) and (5). Finding that all issues relevant to the unfair labor practice were or could have been litigated in the representation proceeding, the Board granted the General Counsel's motion for summary judgment, found that petitioner's refusal to bargain with the union violated the Act, and ordered petitioner to bargain with the union. Pet. App. 4a, 12a-15a.

e. The court of appeals enforced the Board's order. Pet. App. 1a-11a. As relevant here, the court upheld the Board's finding that certain employees who campaigned for the union were not union agents. *Id.* at 6a-7a. The court explained that it "appl[ies] common law agency principles in the labor law context," under which "[o]ne of the primary indicia of agency is the apparent authority of the employee to act on behalf of the principal." *Id.* at 6a (quoting *Poly-America, Inc.* v. *NLRB*, 260 F.3d 465, 480 (5th Cir. 2001)). The court added that "'[t]he test of agency in the union election context is stringent, involving a demonstration that the *union* placed the employee in a position where he appears to act as its representative.'" *Ibid.* (quoting *Tuf-Flex Glass* v. *NLRB*, 715 F.2d 291, 296 (7th Cir. 1983)).

Applying those principles, the court of appeals held that the pro-union employees in this case were not union agents. The court emphasized that the union did not appoint any employee to serve on any type of committee, and that no employee served as the primary communications conduit between the union and other employees. Rather, the court observed, "[t]he [u]nion dispatched its own representatives who visited the facility on multiple occasions, meeting with employees to explain the election process and garner support." Pet. App. 6a-7a. The court further explained that in any union election pro-union employees will likely try to persuade their co-workers, but that "[s]uch attempts at persuasion do not make employees agents of a union." *Id*. at 7a.

The court of appeals also rejected petitioner's contention that misconduct during the election period had created an "atmosphere of fear and intimidation" that warranted setting aside the election. Pet. App. 8a-10a. In passing on that argument, the court indicated that there was inadequate evidence to tie union supporters to acts of misconduct. While petitioner had renewed its contention that "[u]nion agents and third parties threatened job loss for employees who did not vote for the [u]nion," the court found that "rumors of termination for those who voted against the [u]nion were unsourced," indicating that the rumors could not be traced to either the employer or to particular employees. *Id.* at 8a-9a. And while petitioner had renewed its contention "that the [u]nion created a secret 'hit list' to threaten anti-[u]nion employees," the court concluded that petitioner "failed to present any solid evidence proving that any alleged 'hit-list' existed." *Ibid.* Similarly, while several employees who opposed

the union testified that their vehicles were vandalized during the campaign, the court found there was "no evidence in the record identifying the vandals." *Id.* at 9a.

The court of appeals also rejected petitioner's voting-booth challenge. Pet. App. 5a-6a. It explained that the election was conducted using "a three-sided cubicle-shaped device specifically designed for elections." *Id.* at 5a. While petitioner contended that the device's tabletop configuration enabled observers "to see more of the voters' upper torso and arms while voting" than would have been possible if a different configuration had been used, the court concluded that this asserted difference did not warrant overturning the election because "[o]bservers were simply not able to see how voters filled out their ballots." *Id.* at 5a-6a.

ARGUMENT

Petitioner contends (Pet. 12-27) that the court of appeals erred in concluding that certain employees were not agents of the union. In addition, petitioner contends (Pet. 27-34) that the court erred in rejecting petitioner's challenge to the configuration of the voting booth used in the union election. The court of appeals correctly rejected those claims, and its fact-bound decision does not conflict with any decision of this Court or of another court of appeals. Further review is unwarranted.

1. a. The court of appeals correctly rejected petitioner's claim that the Board's election should have been invalidated on the ground that certain employees were agents of the union and committed misconduct. The court explained that it "appl[ied] common law agency principles in the labor law context." Pet. App. 6a (citing *Poly-America, Inc.* v. *NLRB*, 260 F.3d 465,

480 (5th Cir. 2001)). The court of appeals recognized that, under those principles, "the apparent authority of the employee to act on behalf of the principal" is "[o]ne of the primary indicia of agency." *Ibid.* (quoting *Poly-America*, 260 F.3d at 480). The recognition of apparent authority as a basis for finding agency is consistent with the Act itself, which specifies that when "determining whether any person is acting as an 'agent' of another person * * * whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." 29 U.S.C. 152(13).

Apparent authority exists "where the principal engages in conduct that 'reasonably interpreted, causes the third person to believe that the principal consents to have the act done'" by the putative agent. *Poly-America*, 260 F.3d at 480 (quoting *Overnite Transp. Co.* v. *NLRB*, 140 F.3d 259, 266 (D.C. Cir. 1998), and Restatement (Second) of Agency § 27 (1992)); accord *NLRB* v. *Downtown Bid Servs. Corp.*, 682 F.3d 109, 115 (D.C. Cir. 2012); *Millard Processing Servs., Inc.* v. *NLRB*, 2 F.3d 258, 262 (8th Cir. 1993) (stating that the "principal must either intend to cause the third party to believe that the agent is authorized to act for it, or should realize that its conduct is likely to create such a belief"), cert. denied, 510 U.S. 1092 (1994); *Bennion* v. *NLRB*, 764 F.2d 739, 743 (10th Cir. 1985) (stating that apparent authority is established only if the "principal knowingly permitted the agent to exercise the authority in question, or in some manner manifested its consent that such authority be exercised") (citation omitted). Accordingly, the court of appeals explained that in determining whether an employee was a union agent, it looked to whether "the union

placed the employee in a position where he appears to act as its representative." Pet. App. 6a (citation and emphasis omitted).

The court of appeals correctly applied this standard to conclude that certain employees who campaigned for unionization were not agents of the union because the union had not placed any of the identified employees in a position where they appeared to act as the union's representatives. As the court and hearing officer each explained, the union did not hold out any of the employees as representatives of the union to other employees or to petitioner. Pet. App. 6a-7a; see *id.* at 33a-36a. The employees at issue did not serve on any organizing committee or receive special training. *Id.* at 34a. Moreover, union representatives themselves visited Laredo and met with employees regularly, serving "as the primary communication conduit" between petitioner's employees and the union. *Id.* at 7a. As a result, the hearing officer found, "anyone paying attention would have understood that [union] officials—not the employee supporters of the [union]—were the ones who spoke and acted on behalf of the" union. *Id.* at 39a.

b. Contrary to petitioner's contention (Pet. 2-3, 11-18), the court of appeals' agency determination does not conflict with decisions of other courts of appeals. Petitioner asserts (Pet. 12, 17) that the court of appeals created a conflict through its characterization of its Restatement-based test for agency as a "stringent" one, Pet. App. 6a, because other courts have called for "liberal construction" or "liberal application" of agency principles under the Act, Pet. 13-15. But the court of appeals' characterization created no conflict because—like other courts—the court below deter-

mines whether an agency relationship exists by looking to whether the union "placed the employee in a position where he appears to act as its representative." Pet. App. 6a (citation omitted); see *Downtown Bid Servs.*, 682 F.3d at 115; *Millard Processing Servs.*, 2 F.3d at 262; *Bennion*, 764 F.2d at 743. Indeed, there is no material difference between the Restatement-based test articulated by the court of appeals and the Restatement-based test that petitioner advocates. See Pet. 16 ("'Apparent authority' exists when the principal engages in conduct that reasonably causes third persons to believe that the principal consents to have the act done on his behalf by the person purporting to act for him."); see also Pet. 17. Moreover, the Fifth Circuit's prior decisions counsel strongly against petitioner's reading of the "stringent" descriptor as constituting a substantive departure: as petitioner notes, the court below has already expressly rejected the argument that the NLRA calls for "narrow application of agency principles." Pet. 15 (quoting *Cramco, Inc.* v. *NLRB*, 399 F.2d 1, 4 (1968)).

In any event, petitioner provides no basis for concluding that any court would find the employees here to be union agents, when they campaigned for the union but were not part of an organizing committee and did not serve as the primary conduit between the union and other workers. As the hearing officer observed, Pet. App. 42a, the Third Circuit case on which petitioner relies, *NLRB* v. *L & J Equipment Co.*, 745 F.2d 224, 233-235 (1984), involved employees who were members of an in-plant union committee that was organized jointly by employees and the union. And while that circuit developed a four-part test to assess whether the "union should be held accountable

for the acts of [committee] members," the court made clear that the union could be charged with the acts of committee members only if, among other requirements, the committee "possess[ed] actual or apparent authority to act on behalf of the union." *Id.* at 234. *L & J Equipment Co.* thus does not support an agency finding with respect to employees who were not members of a union committee at all.

Nor do the Fourth Circuit cases invoked by petitioner support a finding of agency as to employees who were neither members of a union-sanctioned committee nor the union's principal conduits to election participants. The Fourth Circuit cases that petitioner cites (Pet. 14, 21, 25-26), each involved employees who served on union-sanctioned committees or acted as the union's main conduits. In particular, *NLRB* v. *Georgetown Dress Corp.*, 537 F.2d 1239, 1241 (1976), found that employees were union agents based on, among other factors, the employees' membership in an "In-Plant Organizing Committee," notices that tied the committee to the union, and the union's delegation of specific organizing tasks to the employees in question. *PPG Industries, Inc.* v. *NLRB*, 671 F.2d 817, 819 (1982), found that employees were union agents when they were members of an in-plant organizing committee, the union described the committee in handbills as "our employee committee," and union representatives did not have other lines of contact with plant employees. And *NLRB* v. *Kentucky Tennessee Clay Co.*, 295 F.3d 436, 443-445 (2002), found employees to be union agents when the union delegated all of the organizing tasks to the employees, had "minimum" involvement of its own in the campaign, and relied on the employees as its "only conduits" of

information. That court has subsequently emphasized that "[n]ot every employee who supports the union or speaks in its favor is a union agent." *NLRB* v. *Herbert Halperin Distrib. Corp.*, 826 F.2d 287, 291 (1987). And it has declined to find employees to be agents when union officials were heavily involved in the unionization campaign and the employees in question were not designated part of a union committee and did not serve as the sole conduit to the union, distinguishing *Georgetown Dress* and *PPG Industries*. *Ibid.*

c. This case would be a poor vehicle for considering the circumstances under which employees qualify as union agents because alternative grounds also support the Board's refusal to set aside the election results. The Board concluded that not only were the employees in this case not union agents, but that there was insufficient evidence that the employees had committed any of the objectionable conduct that petitioner had alleged. Pet. App. 26a, 46a-50a, 57a-59a. After petitioner renewed its allegations pertaining to three types of misconduct on appeal, the court of appeals did not set aside the Board's factual findings, but instead found, respectively, that the "rumors of termination" on which petitioner relied were "unsourced," thereby declining to find that the union-supporting employees at issue here had spread the rumors; that petitioner "failed to present any solid evidence proving that an alleged 'hit list'" of anti-union employees "existed"; and that there was "no evidence in the record identifying the vandals" who vandalized the vehicles of four union opponents. *Id.* at 9a. In sum, the Board's finding that there was insufficient evidence that the union supporters here commit-

ted misconduct made it legally irrelevant whether those supporters were union agents. Accordingly, this case would be a poor vehicle for addressing the contours of union agency.

2. a. Petitioner is also mistaken in asserting (Pet. 26-34) that the election results should be overturned because the Board conducted the secret-ballot election using a tabletop voting booth that consisted of a three-sided cardboard shield with a plastic base, set upon a table. This Court has recognized that the Board has "a wide degree of discretion" under the Act "in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *NLRB* v. *A. J. Tower Co.*, 329 U.S. 324, 330 (1946). Exercising that discretion, the Board has determined that when a Board agent uses a Board-sanctioned voting booth to conduct an election, the Board will not set aside the election for alleged violations of voter privacy "absent evidence that someone witnessed how a voter marked [a] ballot." *Physicians & Surgeons Ambulance Serv., Inc.*, 356 N.L.R.B. 199, 199 (2010), enforced, 477 Fed. Appx. 743 (D.C. Cir. 2012).[2]

Under these principles, the Board did not abuse its discretion in declining to set aside election results in this case as a result of the use of a tabletop voting booth. At the time of the election here, Board regula-

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[2] Where a sanctioned voting booth is not used, the Board has set aside elections based on voters' belief that someone could observe them while voting, even in the absence of evidence that someone saw the voters' ballots. See, *e.g.*, *Columbine Cable Co.*, 351 N.L.R.B. 1087 (2007) (table without any cover); *Royal Lumber Co.*, 118 N.L.R.B. 1015 (1957) (piece of wood propped up on two oil drums); *Giannasca*, 118 N.L.R.B. 911 (1957) (improvised table).

tions provided that a ballot would be "given to each eligible voter by the Board's agents" and the voter would then mark the ballot "in the secrecy of a voting booth." 29 C.F.R. 101.19(a)(2). A Board manual further specified that the voting booth "may be either metal or cardboard and will normally be supplied by the Regional Office." 2 *Casehandling Manual for Representation Proceedings* §§ 11304.2-11304.3 (Sept. 2014) (*Casehandling Manual*). The election here comported with those procedures: "the Board Agent used an official NLRB-provided voting booth" that consisted "of a plastic, rectangle-shaped base, along with a three-sided piece of cardboard affixed to the top of the base to form a 'U' shape," which was placed upon a tabletop. Pet. App. 102a; see *id.* at 5a. Since the election was conducted using NLRB-approved equipment and "[o]bservers were simply not able to see how voters filled out their ballots," *id.* at 6a, the court of appeals was correct to find that the Board did not abuse its discretion in rejecting petitioner's voting-booth challenge.

Petitioner is mistaken in contending (Pet. 29-31) that the voting configuration here actually violated Board rules. Petitioner contends that a three-sided cardboard shield positioned on a table does not constitute a voting "booth," 29 C.F.R. 101.19(a)(2), which the NLRB's *Casehandling Manual* indicates is "a compartment or cubicle" that "provides privacy" and "also demonstrates the appearance of providing privacy," *Casehandling Manual* § 11304.3. But to the contrary, the "cardboard shield and enclosed writing shelf" fit that description, because it "create[d] a private voting space" in which voters could fill out their ballots. Pet. App. 114a; see *id.* at 118a ("[T]he

cardboard voting shield used here is a voting booth that allows for ballots to be marked in secret."). And other parts of the *Casehandling Manual* confirm that a portable cardboard apparatus like one here qualifies as a voting booth, by stating that a voting booth may be portable and made of cardboard. *Casehandling Manual* §§ 11304.2-11304.3; see Pet. App. 118a ("Since the Casehandling Manual specifically authorizes portable cardboard voting booths, the other references to the voting booth in other parts of that manual must be read to allow cardboard voting booths like the one used in this election.").

b. Petitioner's challenge to the voting-booth configuration in this case does not present a conflict warranting this Court's review. As the hearing officer noted, the Board has repeatedly upheld the use of tabletop voting booths that utilize cardboard voting partitions. See Pet. App. 109a-110a. Petitioner identifies no decision of any court of appeals that has found that the use of such booths conflicts with the Board's rules or manuals. Indeed, petitioner does not identify any prior court decision that addresses whether such booths are compatible with the Board's rules or manuals. Under these circumstances, there is no need for this Court to consider whether the voting booth used in this case was permitted under Board procedures.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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