No. 09-1494

In The Supreme Court of the United States

MICHAEL KLEINMAN, SCOTT WADE and JOHN TRAVIS,

Petitioners,

v.

CITY OF SAN MARCOS, TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICI CURIAE* TEXAS ACCOUNTANTS AND LAWYERS FOR THE ARTS; VOLUNTEER LAWYERS & PROFESSIONALS FOR THE ARTS; NORTHWEST LAWYERS AND ARTISTS; COMIC BOOK LEGAL DEFENSE FUND; ARTCAR FEST; ART HISTORIAN DOUGLAS NICKEL, PHD; INDIVIDUAL ARTISTS; AND COLLEGE ART ASSOCIATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does the First Amendment protect only "great works of art"?*

* *Amici curiae* agree with Petitioners that the Fifth Circuit also erred when it held that Respondent could ban any public display of the artwork even if it was worthy of First Amendment protection in the Fifth Circuit's eyes. *See* Pet. at 13-16. *Amici*, therefore, urge the Court to grant certiorari on both questions presented in the petition. To avoid duplicative argument, *amici* are focusing on the first question presented: "Does the First Amendment protect only 'great works of art' "?

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INTEREST OF *AMICI CURIAE*

Texas Accountants and Lawyers for the Arts

The Texas Accountants and Lawyers for the Arts (TALA) was formed in 1979 to meet the legal and accounting needs of artists and nonprofit organizations.[1] TALA provides free legal and accounting services to arts nonprofits and artists from all creative disciplines, including visual artists, musicians, actors, dancers, filmmakers, and writers. Over 600 attorneys and accountants donate their time to artists and nonprofit organizations that are unable to afford professional services. TALA is concerned that, if the Fifth Circuit's decision is not reversed, the artists that it assists will not be protected by the First Amendment unless their work is deemed "great." Given the relatively small number of artworks that – by definition – can be considered "great," this means that the vast majority of the artists that TALA assists will have no First Amendment protection for their works.

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[1] The parties were notified ten days prior to the due date of this brief of the intention to file. The parties have consented to the filing of this brief.

No party, or counsel for any party, has authored this brief in whole or in part or made any monetary contribution intended to fund the preparation or submission of this brief. Counsel for *amici* has not received any fee for – and has paid all costs associated with – preparing this brief. *See* S. CT. R. 37(6).

Volunteer Lawyers & Professionals for the Arts

The Volunteer Lawyers & Professionals for the Arts – formerly Tennessee Volunteer Lawyers for the Arts – is a Nashville, Tennessee organization that provides pro-bono legal services to low-income artists of all disciplines, as well as legal and business assistance to emerging nonprofit arts organizations. It is part of the Arts & Business Council of Greater Nashville.

Northwest Lawyers and Artists

Northwest Lawyers and Artists (NWLA) is a Portland, Oregon organization that provides information and support to artists and arts organizations throughout the State of Oregon. NWLA's attorney board members provide hundreds of hours of reduced rate and *pro bono* services to artists. In addition, NWLA educates artists in Oregon through workshops and artist-friendly legal-education seminars.

Comic Book Legal Defense Fund

The Comic Book Legal Defense Fund is a nonprofit organization dedicated to the protection of the First Amendment rights of the comics art form and its community of retailers, creators, publishers, librarians, and readers. When comic books began in the 1930s, few would have considered them to be "great" art. Today, however, some comic books are indisputably "great" art, with comics even having

been awarded the Pulitzer Prize. ART SPIEGELMAN, MAUS: A SURVIVOR'S TALE (1991). And recognized "great" artists, such as Roy Lichtenstein, have drawn inspiration from comic books. Because of comic books' particular history of scorn and attack – before eventual acceptance as an artform – the Comic Book Legal Defense Fund is particularly concerned about the Fifth Circuit's ruling that only "great" art is entitled to First Amendment protection.

ArtCar Fest

ArtCar Fest is a festival for and about ArtCars, which are licensed, registered and insured vehicles that an artist has permanently altered in an artistic fashion. The unique aspect of their medium is that these artists bring art into the world every day as they drive their vehicles to work, to the store, and on highways. ArtCar Fest is the only festival in the world that focuses exclusively on this medium, and the only one founded and run by ArtCar artists. More information on ArtCar Fest can be found at its web-site, http://www.artcarfest.com.

Art Historian Douglas Nickel, PhD

Douglas Nickel, PhD is the Andrea V. Rosenthal Professor of Modern Art at Brown University. He specializes in the history of photography and modern art. Prof. Nickel served ten years as a curator at the San Francisco Museum of Modern Art, where he organized traveling exhibitions on the work of Carleton

Watkins and Lewis Carroll. Prior to his arrival at Brown, he was director of the Center for Creative Photography and associate professor of art history at the University of Arizona in Tucson.

Individual Artists

Butch Hancock is a country music singer-songwriter and a member of The Flatlanders. In addition to his musical career, Hancock is an acclaimed visual artist whose photographs and ink drawings are contained in private collections and displayed in art galleries.

Kelly Lyles is a painter living in Seattle, Washington. Artcars are a special interest of Lyles. She features artcars in her works, and she has created several artcars that she regularly displays. An overview of Lyles' work can be found on her website, http://www.kellyspot.com/. Lyles' work has been featured in galleries throughout the country, as well as in books, magazines, newspapers, and television. Lyles displays her work – and the work of others – in public view on her own property.

Leo Aston is an artist in Houston, Texas. He creates sculptures from found objects, including palm fronds, discarded metals, musical instruments, doors, and furniture. He displays these objects on his property in public view.

Alan Pogue is a documentary photographer in Austin, Texas who heads the Texas Center for Documentary Photography. Pogue's work has appeared in publications throughout the country and the world, including The New York Times Magazine, the Boston Globe, the Washington Post, the Los Angeles Times, and Kyodo News in Japan. Pogue's work focuses on social justice.

Jan D. Elftman is an artist and educator in Minneapolis, Minnesota. Her artwork has been exhibited locally, nationally, and internationally. She is also the curator of the annual ArtCar Parade in Minneapolis presented by Intermedia Arts of Minnesota. Examples of Elftman's work can be found at her personal website, http://www.corktruck.com.

Philo Northrup is an artist in San Francisco, California. He is also the co-founder of ArtCar Fest. Northrup has been making ArtCars for 25 years and organizes ArtCar visits to schools, hospitals, and art venues throughout the country. His artwork has been exhibited at the California Museum of Art, San Jose Museum of Art, USC Museum of Art, Triton Museum of Art, Museum of New Mexico, the LACE Annualé, and the Bayannale.

Harrod Blank is a documentary filmmaker and artcar artist living in Berkeley, California. His works include the 1992 film *Wild Wheels*, which documents the artcar phenomenon in America, and the 1998 follow-up *Driving the Dream*, which focuses on the artists behind the cars. His films have been shown on

PBS, TBS, and in cities all over the country. He has created three art cars of his own: Oh My God!, Pico de Gallo, and The Camera Van. He is also co-founder of ArtCar Fest. Blank is currently renovating a building complex in Douglas, Arizona to become a museum and learning center for artcars, which will be called "Artcar World." Examples of Blank's work can be found at his personal website, http://www.harrodblank.com.

Emily Duffy is an artist in Northern California. She is also festival director for ArtCar Fest. Her artwork has been featured at the San Jose Museum, the Juste Pour Rire Festival, and The Petersen Museum. Duffy's BraBall sculpture (a 1,800 pound ball of brassieres) is part of the permanent collection at the American Visionary Art Museum in Baltimore.

Graydon Parrish is a painter in Austin, Texas. His style is a mix of classical realism and contemporary realism. His work can be found in the New Britain Museum of American Art, Austin Museum of Art, Tyler Museum of Art, Mead Art Museum, and private collections throughout the United States and Europe. Examples of Parrish's work can be found at his personal website, http://www.graydonparrish.com.

These artists are concerned about the effect that the Fifth Circuit's ruling that only "great" art is entitled to First Amendment protection will have on artists. They are concerned that if only what is deemed "great" art has First Amendment protection,

then the government can suppress art that it finds threatening.

College Art Association

College Art Association ("CAA") is a membership organization representing 14,000 practitioners and interpreters of visual art and culture, including artists, art historians, scholars, curators, conservators, collectors, educators, art publishers and other visual arts professionals, who join together to cultivate the ongoing understanding of art as a fundamental form of human expression. Another 2,000 university art and art history departments, museums, libraries and professional and commercial organizations are institutional members of CAA. CAA is committed to the highest professional and ethical standards of scholarship, creativity, connoisseurship, criticism, and teaching. CAA has a long-standing interest in issues relating to the First Amendment and the freedom of artistic and scholarly expression because its members create art, write about art, display art, and use art in the classroom and in published works. CAA asks that the Court grant the petition because CAA members have a substantial direct interest in governmental action that affects visual art and because the decision below predicates First Amendment protection on an insupportable inquiry into whether art is "great."

SUMMARY OF ARGUMENT

The Fifth Circuit held that only "great" art is entitled to First Amendment protection. While the court also considered – out of an abundance of caution – whether the artwork could be banned if it had First Amendment protection, its holding that only "great" art is entitled to First Amendment protection is binding on all courts within that circuit.

The Fifth Circuit's test will require courts to act as art critics and determine whether the artwork in question is suitably great to be entitled to First Amendment protection. History shows that it is difficult to determine whether artists and art are great. History is replete with examples of artists who were denigrated during their time, but who are regarded as great today.

By limiting First Amendment protection to only "great" art, the Fifth Circuit improperly bases constitutional rights on a court's subjective aesthetic judgment. This Court has warned that, in the First Amendment area, subjective judgments can be a public rationalization of an improper decision. Under the Fifth Circuit's test, there is a danger that government-approved art will receive First Amendment protection, while art that is not in favor will be deemed "not great," thus falling outside the First Amendment.

This Court should grant certiorari and hold that all works of art – wherever they may fall on the spectrum between ordinary and "great" – are fully

protected by the First Amendment because they have some expressive content.

ARGUMENT

In *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 569 (1995), this Court considered whether a parade was entitled to First Amendment protection. This Court noted that it had often held that symbolic speech was protected, and it recognized that "a narrow, succinctly articulable message is not a condition of constitutional protection." *Id*. This Court held that if such protection turned on the articulation of a particular message, then the First Amendment "would never reach the *unquestionably shielded* painting of Jackson Pollock, music of Arnold Schönberg, or Jabberwocky verse of Lewis Carroll." *Id*. (emphasis added). The obvious point of this Court's examples was to demonstrate that abstract works of art – visual, musical, or even nonsense verse – are fully protected by the Constitution, even though an overt message is not being communicated.

The Fifth Circuit asserted that this Court's invocation of Pollock, Schönberg, and Carroll effectively limited the scope of First Amendment protection. Rather than recognizing that the Court cited these examples for the proposition that artworks are entitled to First Amendment protection even when their meaning is not particularized or readily apparent, the

Fifth Circuit held that the First Amendment protected only "great works of art." *Kleinman v. City of San Marcos*, 597 F.3d 323, 326 (CA5 2010). Because the Fifth Circuit first determined that the artwork in this case was not "great" or "fine" art – which then informed its view that the work did not serve predominantly expressive purposes – the court held that it was not protected by the First Amendment and could be regulated by the City. *Id*. at 326-27.

This Court should grant certiorari and hold that all works of art – wherever they may fall on the spectrum between ordinary and "great" – are fully protected by the First Amendment because they have some expressive content.

I. The Fifth Circuit held that only "great works of art" are entitled to First Amendment protection.

The City of San Marcos may argue that the Fifth Circuit did not really hold that only "great" works of art have First Amendment protection. It may focus on the Fifth Circuit's First Amendment analysis of the artwork at issue and its application of the intermediate-scrutiny test to hold that the City's restrictions were permissible as applied. *Id*. at 328-29. But that would not be an accurate characterization of the Fifth Circuit's opinion. Petitioners argued that "visual art" is protected by the First Amendment, *see id*. at 326¸ but the court of appeals

expressly rejected that contention by holding that only "great" art is entitled to full First Amendment protection. Although the standard established by the Fifth Circuit is novel and untethered to any precedent of this Court, its opinion is binding on federal courts in that circuit. *United States v. Wright*, 496 F.3d 371, 375 n.10 (CA5 2007).

The Fifth Circuit also asserted that neither in *Hurley*, nor in other cases, has this Court "elaborated on the extent of First Amendment protection for visual non-speech objects or artworks." *Kleinman*, 597 F.3d at 326. Regardless whether this Court has done that in so many words, other courts of appeal and lower courts have been guided by this Court's precedents to conclude that works of visual art are fully protected by the First Amendment, without regard to whether they meet the test of "greatness."[2] The breadth and scope of that protection is amply demonstrated in the Brief of *Amicus Curiae* Texas Civil Rights Project filed in this case. *See* Brief of *Amicus Curiae* Texas Civil Rights Project in Support

[2] *See, e.g., White v. City of Sparks*, 500 F.3d 953, 956 (CA9 2007) ("So long as it is an artist's self-expression, a painting will be protected under the First Amendment, because it expresses the artist's perspective."); *ETW Corp. v. Jireh Pub. Inc.*, 332 F.3d 915, 924 (CA6 2003) (First Amendment protection includes "paintings, drawings, engravings, prints, and sculptures"); *Bery v. City of New York*, 97 F.3d 689, 696 (CA2 1996) ("paintings, photographs, prints and sculptures . . . always communicate some idea or concept to those who view it, and as such are entitled to full First Amendment protection").

of Petitioners at 7-9, *Kleinman v. City of San Marcos*, No. 09-1494 (U.S. July 8, 2010).

The Fifth Circuit determined that the artwork was entitled to no First Amendment protection because it was not "great." *Kleinman*, 597 F.3d at 326-27. Only out of what it called "an abundance of caution" did the Fifth Circuit even consider whether public display of the artwork could be banned if it had First Amendment protection. *Id*. at 328.

Under Fifth Circuit precedent, each of these determinations is an alternative holding. In the Fifth Circuit, an alternative holding is a binding decision of the court and is not dicta. *Wright*, 496 F.3d at 375 n.10 ("But it's well-settled that alternative holdings are binding, they are not dicta"). So, the Fifth Circuit's holding that only "great works of art" are entitled to the full protection of the First Amendment is binding on all federal district courts in Texas, Mississippi, and Louisiana. It is also binding on all panels within the Fifth Circuit itself, unless the Fifth Circuit reconsiders the issue *en banc* or this Court acts. *See Santos-Sanchez v. United States*, 548 F.3d 327, 334 (CA5 2008). The Fifth Circuit declined to reconsider the issue *en banc* in this case, so this Court is the only avenue left. App. 56.

II. Limiting First Amendment protection to "great" art improperly bases constitutional rights on a court's subjective aesthetic judgment.

"What is art?" is one of the perennial philosophic questions. An entire philosophic discipline – aesthetics – is devoted to its inquiry. *See* ROBERT STECKER, AESTHETICS AND THE PHILOSOPHY OF ART: AN INTRODUCTION (2005). Despite wrestling with the question since at least Plato, there is no agreed-upon answer. *See* ALEXANDER SESONSKE, WHAT IS ART? AESTHETIC THEORY FROM PLATO TO TOLSTOY (1965).

The question "What is *great* art?" raises the inquiry by an order of magnitude. Yet that is what the Fifth Circuit requires as a threshold inquiry in any First Amendment case where art is involved. Before a district court in the Fifth Circuit can decide whether government action restricting a particular artwork is valid, it must first act as art critic and philosopher to determine whether the work not only is art that communicates protected expression, but also is "great" art.

A. History shows that it is difficult to determine whether artists and art are "great."

The history of art is replete with examples of artists who are today universally acclaimed as great, but who were not regarded that way during their own time.

Paul Cézanne, Vincent van Gogh, and Paul Gauguin are today regarded as the giants of post-impressionism. *See generally*, JOHN REWALD, POST-IMPRESSIONISM: FROM VAN GOGH TO GAUGUIN (1978). But their contemporaries did not always recognize the greatness of their art. For example, Kenyon Cox, a prominent American painter and critic of their day, was dismissive of their work.[3] Cox said that Cézanne was "absolutely without talent," van Gogh was "too unskilled to give quality to an evenly laid coat of paint," and Gauguin was a "decorator tainted with insanity." MILTON W. BROWN, THE STORY OF THE ARMORY SHOW 159 (1988).

Although Henri Matisse is today one of the most celebrated artists of the twentieth century, he was not considered "great" by many critics in his day. JOHN ELDERFIELD, HENRY MATISSE: MASTERWORKS FROM THE MUSEUM OF MODERN ART 8 (1996). As one scholar has noted, the contemporary criticism of Matisse "was angry, vicious, and almost psychotic in its ferocity." THE STORY OF THE ARMORY SHOW 168. Even The New York Times described Matisse's works as "ugly," "coarse," and "revolting in their inhumanity." *Id*. at 171-72.

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[3] H. WAYNE MORGAN, KENYON COX, 1856-1919: A LIFE IN AMERICAN ART ix (1994) ("In the first two decades of [the twentieth] century Kenyon Cox was among the best known cultural figures in the United States. This reputation rested on his activities as a painter and critic.").

What we now consider as great works of art have not merely been slow to reach acceptance, but have, at times, been met with actual hostility. Among the most famous examples of this is the reaction to the music and ballet *The Rite of Spring*. Today, many consider Igor Stravinsky's music "the most important and influential musical work of the twentieth century," but that was not the immediate reaction of the audience at the premiere.[4] When the work premiered in Paris in 1913, the audience was so shocked by the music and ballet that it rioted. 18 THE NEW GROVE DICTIONARY OF MUSIC AND MUSICIANS (Stanley Sadie ed.) (1980).

The problems inherent in the Fifth Circuit's test are nicely illustrated by the United States Government's own difficulties in deciding what is art, let alone art that is "great." Constantin Brancusi is "the most widely admired sculptor of our time." Margherita Andreotti, *Brancusi's Golden Bird: A New Species of Modern Sculpture*, 19 MUSEUM STUDIES No. 2 at 135 (1993). Yet the United States Customs Service was not always a fan. In the 1920s, Brancusi shipped his *Bird in Flight* sculpture to a collector in the United States. Under customs law at the time, art works were duty free. *Art: Custom House Esthetes*, TIME, Dec. 17, 1928 (available at http://www.time.com/time/

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[4] *See* DAVID BROWN, GOD & GRACE OF BODY: SACRAMENTS IN ORDINARY 283 (2007) (noting that the readers of BBC MUSIC MAGAZINE voted *The Rite of Spring* "the century's most influential piece of music").

magazine/article/0,9171,928613,00.html) (last accessed July 1, 2010). But the Customs Service determined that Brancusi's sculpture was not art; instead, it was "a manufacture of metal," which had a 40% tariff. *Id*. Brancusi sued the Customs Service and won, with the Customs Court declaring that his sculpture was a work of art. *Brancusi v. United States*, 54 Treas. Dec. 428 (Cust. Ct. 1928); *see also Miniature Fashions, Inc. v. United States*, 55 Cust. Ct. 154, 157 (1965).

In this case, the City of San Marcos did not have trouble recognizing art: It stipulated that Petitioners' work was intended to be – and was – a work of "artistic expression." App. 60-61. The Fifth Circuit permitted the City to ban its public display because it was (according to that court) not "great" art.

B. Under the Fifth Circuit's "greatness" test, relatively few contemporary artists and art can expect First Amendment protection.

Under the "greatness" test established by the Fifth Circuit, the First Amendment does not fully apply to artworks that are not "great." The Fifth Circuit's holding would allow "non-great" artworks to be banned without even applying the First Amendment standards that this Court has established. Even if the artworks are indisputably "good," they can still be banned under the Fifth Circuit's rule. It is only

those artworks that reach the pinnacle of "greatness" that qualify for First Amendment protection.[5]

Even if the Fifth Circuit's test were grounded in the Constitution or this Court's precedents – which it is not – one central problem with the new test is that whether, and how, a work is determined to be "great" involves, at best, a murky inquiry. Is "great" a synonym for iconic – meaning that the work has stood the test of time, is on museum display, is published in catalogues, and is the subject of broad and sustained scholarly commentary? If so, then the First Amendment will protect only a relatively few artists who are working today. Instead, the Fifth Circuit would protect only artists who are universally acclaimed, whether because their work is hanging in museums, is widely taught in art history curricula, or is acquired for large sums of money. Experience shows that those are generally not the artists – and those are unlikely to be the artworks – most in need of First Amendment protection from governmental regulation.

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[5] Of course, that does not mean that artworks deemed "great" are not at risk of being banned. In this case the Fifth Circuit, out of "an abundance of caution," assessed the application of the city ordinance to the artwork using the intermediate scrutiny First Amendment analysis, even though it had held this non-great artwork did not, in fact, deserve any First Amendment protection. *Kleinman*, 597 F.3d at 328. It held that the government could prohibit public display of this artwork under the "junked vehicle" ordinance. *Id*. at 328-29.

Cézanne and Gauguin were not universally regarded as great in their own day. Perhaps only a relatively small number of artists working today could realistically lay claim to being "great." Under the Fifth Circuit's test, few – if any – contemporary artists and artworks will be protected in full by the First Amendment.

An irony of the Fifth Circuit's rule is that it protects artwork that might not have been protected when it was created. While many artworks hanging in museums might be able to meet the greatness standard today, they might not have been able to do so when they were created. *See* II(A) above. So Cézanne's great works of art would be fully protected today, but that would not necessarily have been the case in 1920. Neither the First Amendment nor the artwork itself has changed in the interim, but, under the Fifth Circuit's rule, a work that might not have had any First Amendment protection in 1920 would be fully protected in 2010. Unworkable would be a generous characterization of the Fifth Circuit's rule.

C. Limiting First Amendment protection to art that is "great" creates a danger that unpopular art will be banned and requires courts to render artistic judgments.

This Court has been understandably wary of allowing the government to rely on subjective judgments in the First Amendment area. It has warned

that subjective judgments can be "a public rationalization" of an improper decision. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 510 (1981). And this Court has explained that aesthetic judgments are "necessarily subjective." *Id*.

Art universally acclaimed as "great" is far more likely to be "approved" by the government. That art, however, does not need the protection afforded by the First Amendment. As this Court's precedents demonstrate, expression that is unpopular or at the margins most needs the protection of the First Amendment against arbitrary governmental action. The Fifth Circuit's requirement that art must be "great" before it is entitled to First Amendment protection gives governments almost limitless discretion to regulate or prohibit display of a wide range of artistic expression.

The inherent subjectivity in the "great" versus "not-great" determination also poses considerable challenge for judicial review of government actions to regulate or prohibit the display of art. Cases in an analogous area – whether an artist has the right, under the Visual Artists Rights Act, 17 U.S.C. § 106A(a)(3)(B), to prevent the destruction of her work of art because it is "of recognized stature" – shows that the Fifth Circuit's rule will require courts to make difficult judgments as to the "greatness" of an artwork, whether drawing on their own experience or based on the often conflicting testimony of a

cavalcade of art historians and art "experts."[6] The Fifth Circuit's rule will impose considerable burdens, both on the artist seeking to challenge government action based on the artwork not being sufficiently "great" as to warrant full First Amendment protection and on the court required to assess the constitutionality of that act.

[6] *See, e.g.*, *Martin v. Indianapolis*, 192 F.3d 608 (CA7 1999) (in absence of expert testimony, relying on press descriptions and letters to determine whether destroyed artwork had artistic merit); *Scott v. Dixon*, 309 F. Supp.2d 395, 400 (E.D.N.Y. 2004) ("stature" is "generally established through expert testimony"); *Pollara v. Seymour*, 150 F. Supp.2d 393, 397-98 (N.D.N.Y. 2001) (denying defendant's motion for summary judgment based on affidavits of artist-plaintiff's art experts); *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303, 325 (S.D.N.Y. 1974) ("recognized stature" means meritorious, as recognized by art experts, the artistic community, or some cross-section of society), *rev'd in part on other grounds*, 71 F.3d 77 (CA2 1995).

CONCLUSION

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

Respectfully submitted,

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