No. 11-381

IN THE
Supreme Court of the United States

STANDARD INVESTMENT CHARTERED, INC.,
Petitioner,
v.
NATIONAL ASS'N OF SECURITIES DEALERS, ET AL.,
Respondents.

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

BRIEF OF AMICI CURIAE PUBLIC CITIZEN, CONSUMER ACTION, PROJECT ON GOVERNMENT OVERSIGHT, AND U.S. PIRG IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF AMICI CURIAE[1]

Public Citizen, Inc., a non-profit consumer advocacy organization with more than 225,000 members and supporters nationwide, appears on behalf of its members before Congress, administrative agencies, and the courts to advocate for enactment and effective enforcement of laws protecting consumers, workers, and the general public. Since its founding forty years ago, Public Citizen has been a strong advocate for government and corporate accountability, and has consistently opposed the extension of immunity doctrines and other barriers to holding institutions accountable to ordinary people.

Consumer Action is a nonprofit organization that has championed the rights of underrepresented consumers nationwide since 1971. Throughout its history, the organization has dedicated its resources to promoting financial literacy and advocating for consumer rights and fair access and treatment before regulatory bodies and civil courts. Consumer Action works to achieve these goals with the assistance of its national network of more than 8,000 community based organizations.

The Project On Government Oversight (POGO), established in 1981, is an independent nonprofit that

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[1] At least 10 days prior to the filing of this brief, counsel of record for all parties received notice of the intention of amici to file this brief. No counsel for a party authored this brief in whole or in part. No party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than amici made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief.

investigates and exposes corruption and other misconduct in order to achieve a more effective, accountable, open, and ethical federal government. POGO made its mark by looking into Pentagon waste, fraud, and abuse, and now investigates national defense and homeland security concerns, government subservience to commercial interests, abuses in federal spending, excessive secrecy, and mismanagement of natural resources. POGO has a keen interest in ensuring that financial regulatory organizations are held accountable for protecting the public.

U.S. PIRG (Public Interest Research Group) is a federation of 28 non-profit, non-partisan state Public Interest Research Groups. The PIRGs have worked on behalf of American consumers since 1970 for a fair and competitive marketplace, a sustainable economy, and a responsive, democratic government. In association with the U.S. PIRG Education Fund, PIRG policy experts, researchers, organizers, and advocates have authored reports, generated media coverage, organized citizens, and won important victories in the areas of consumer protection, public transportation, product safety, health care, and good government. U.S. PIRG is supported by contributions from its hundreds of thousands of citizen members.

REASONS FOR GRANTING THE WRIT

The decision below is the latest in a line of federal appellate cases that grant absolute immunity to non-governmental "Self Regulatory Organizations" (SROs) on the rationale that, since SROs perform regulatory functions on behalf of the SEC, SROs must enjoy a level of immunity comparable to that of the SEC—that is, sovereign immunity. The notion that sovereigns are immune from suit predates the Repub-

lic itself. By contrast, the sporadic practice of granting sovereign immunity (or "derivative sovereign immunity") to entities that are not themselves sovereigns or appendages of a sovereign is of much more recent vintage, and has been subject to inconsistent application in the lower courts. The petition should be granted to resolve the tension among circuit decisions applying sovereign immunity to non-sovereign entities and to provide needed guidance regarding when—and whether—non-sovereign entities are entitled to derivative sovereign immunity.

Federal appellate case law reflects three inconsistent positions regarding the availability of sovereign immunity to non-sovereign entities. The most historically grounded view is that sovereign immunity is simply inappropriate for non-sovereign entities. Another view, espoused by the majority of decisions on this issue, is that sovereign immunity can extend to non-sovereign entities, but only if a sovereign entity would be legally responsible for a financial judgment. Finally, at the extreme end of the spectrum are cases (including the decision below) granting derivative sovereign immunity to private, non-governmental SROs such as respondent National Association of Securities Dealers, Inc. (NASD) regardless of whether any sovereign's treasury is at risk.

The disarray among the courts of appeals regarding the availability of sovereign immunity for non-sovereigns is both inter- and intra-circuit. Underlying this confusion is a fundamental question this Court has never resolved: is the extension of sovereign immunity to non-sovereigns consistent with the nature and history of sovereign immunity itself? The Court should hear this case to assess the propriety of cloak-

ing non-sovereigns with sovereign immunity and, if it finds the practice to be warranted at all, to provide the lower courts with standards for applying this novel application of sovereign immunity doctrine.

I. The Second Circuit's Approach To SRO Immunity Is A Dramatic Expansion Of Sovereign Immunity.

The decision below held that petitioner's suit could not proceed because the respondents—which are non-governmental, corporate entities and their officers, Pet. App. 2a—are entitled to "absolute immunity from private damages suits in connection with the discharge of their regulatory responsibilities." Pet. App. 5a. SRO immunity began as a limited extension of this Court's judicial-immunity jurisprudence, but courts later used the language and operation of sovereign immunity principles to expand SRO immunity far beyond the function-based immunity generally afforded to non-sovereign actors.

A. The general principle of sovereign immunity traces its roots to the well-established principle of English law that "the Crown could not be sued without consent in its own courts." *Alden v. Maine*, 527 U.S. 706, 715 (1999). In light of "the dignity that is consistent with their status as sovereign entities," *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002), federal, state and tribal governments are protected by sovereign immunity from suits seeking to subject these sovereigns to monetary liability. *See, e.g., Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 48-52 (1994) (focusing on the question of a sovereign's financial liability as the most salient factor in determining whether a state-created entity is immune); *Edelman v. Jordan*, 415 U.S. 651, 663

(1974) ("[A] suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment.").[2]

Hewing closely to the purpose and origin of the doctrine as one that upholds the dignity and shields the finances of a *sovereign*, this Court has been reluctant to extend the doctrine to non-sovereign entities, even entities created by or entwined with sovereigns. For example, a State's sovereign immunity "does not extend to counties and similar municipal corporations," even though they share some portion of state power. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977). Likewise, this Court has refused to extend sovereign immunity to regulatory bodies created by two or more states under the Interstate Compact Clause, even though such entities may be "exercising a specially aggregated slice of state power." *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 400-01 (1979); *see also Hess*, 513 U.S. at 52.

In contrast to the blanket immunity available to sovereign entities such as federal, state, and tribal governments, the types of immunity this Court has granted to non-sovereign persons are more limited and based on functional concerns, rather than struc-

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[2] Because of the "clos[e] analogy" between federal and state sovereign immunity, *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999); *see generally Sossamon v. Texas*, 131 S. Ct. 1651, 1658 n.4 (2011) (collecting authorities), this brief draws on Eleventh Amendment jurisprudence in its discussion of sovereign immunity principles even though the sovereign whose immunity is at issue here is the federal government.

tural principles or dignitary interests. Thus, most government officers receive only qualified immunity, *see, e.g., Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982), under which they are often shielded but may be sued if they violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. Select groups of officials are entitled to absolute immunity, but only for such sensitive government functions as legislating, adjudicating, or prosecuting. *See id.* at 807 (summarizing narrow range of activities to which absolute immunity applies). Unlike sovereign immunity, this absolute immunity is based on function; thus, for instance, a judge is absolutely immune for judicial rulings, *see, e.g., Stump v. Sparkman,* 435 U.S. 349, 359-60 (1978), but not personnel decisions, *see Forrester v. White*, 484 U.S. 219, 229-30 (1988).

Recognizing that other governmental officers and sometimes even non-governmental individuals perform the same functions that trigger absolute immunity for judges and prosecutors, courts have extended absolute immunity to individuals engaged in such functions as judging and prosecuting—but only to the extent that the individuals are engaged in those functions. *See, e.g.*, *Butz v. Economou,* 438 U.S. 478, 512-14 (1977) (agency adjudicator entitled to judicial immunity); *Int'l Union, UAW v. Greyhound Lines, Inc.,* 701 F.2d 1181, 1185 (6th Cir. 1983) (arbitrator entitled to judicial immunity).

B. Against this backdrop, in *Austin Municipal Securities, Inc. v. National Ass'n of Securities Dealers, Inc.*, 757 F.2d 676 (5th Cir. 1985), the Fifth Circuit extended function-based absolute immunity to SROs. The recipients of this first grant of quasi-judicial and

quasi-prosecutorial absolute immunity were engaged in the same functions that justify immunity for judges and prosecutors: specifically, the defendants in *Austin* were sued for their actions in disciplining NASD member firms through an NASD disciplinary committee. *See id.* at 681-83. The grant of immunity flowed from the prosecutorial and adjudicatory roles performed by the NASD and its disciplinary committee members, *see id.* at 689-93, not the nature of the corporation for which they were performed—and certainly not from the fact that they were performing these functions at the behest of the sovereign.[3]

Over time, however, courts moved beyond the purely functional discussion in *Austin* and began to invoke SROs' status as a quasi-government regulator to liken SRO immunity to sovereign immunity, to expand SRO immunity beyond adjudicatory and prose-

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[3] *Austin* did mention the SEC's sovereign immunity once, but not as a basis for SRO immunity. The court's entire discussion of sovereign immunity, distinguishing *Owen v. City of Independence,* 445 U.S. 622 (1980) (rejecting immunity for violations of 42 U.S.C. § 1983 by a municipality), reads as follows:

> Furthermore, *Owen* involved the application of traditional sovereign immunity to local governmental units. The NASD exercises quasi-governmental authority pursuant to a statutory scheme enacted by the national sovereign. The NASD's actions are more akin to those of the SEC, which has sovereign immunity from damage suits, *Sprecher v. Graber,* 716 F.2d 968, 973-74 (2d Cir. 1983), than to municipal activities. Although the NASD possesses no sovereign power, *we conclude that under the rationale of Butz, it requires absolute immunity from civil liability for actions connected with the disciplining of its members.*

Id. (emphasis added).

cutorial functions, and ultimately to declare SRO immunity co-extensive with that of the SEC. For instance, the analysis in *Barbara v. New York Stock Exchange, Inc.*, 99 F.3d 49 (2d Cir. 1996), began with a functional discussion of immunity, following *Austin*, but then observed that "the Exchange performs a variety of regulatory functions that would, in other circumstances, be performed by a government agency. Yet government agencies, including the SEC, would be entitled to sovereign immunity . . . ." *Id.* at 59. The Second Circuit explained that the NYSE's "special status and connection to the SEC influences our decision to recognize an absolute immunity." *Id.* Building on the Second Circuit's discussion in *Barbara*, the Ninth Circuit announced in *Sparta Surgical Corp. v. National Ass'n of Securities Dealers, Inc.*, 159 F.3d 1209 (9th Cir. 1998), that SRO immunity swept beyond adjudicatory and prosecutorial functions because, "[c]onsistent with their role in regulation of the securities market, self-regulatory organizations have been granted immunity from suit *when acting in a quasi-governmental capacity*." *Id.* at 1214 (emphasis added).

In *D'Alessio v. New York Stock Exchange, Inc.*, 258 F.3d 93 (2d Cir. 2001), the Second Circuit completed the transition from the judicious, functional approach of *Austin* to today's sweeping application of derivative sovereign immunity to SROs: "The NYSE, as a[n] SRO, *stands in the shoes of the SEC* in interpreting the securities laws for its members and in monitoring compliance with those laws. It follows that the NYSE should be entitled to *the same immunity enjoyed by the SEC* when it is performing functions delegated to it . . . ." *Id.* at 105 (emphasis added); *accord*, *DL Capital Group, LLC v. Nasdaq Stock Market, Inc.*, 409 F.3d

93, 97 (2d Cir. 2005) (explaining that because an SRO "performs a variety of regulatory functions that would, in other circumstances, be performed by [the SEC]—an agency which is accorded sovereign immunity from all suits for money damages—the NYSE should, in light of its special status and connection to the SEC, out of fairness be accorded full immunity from suits for money damages, as well" (citations and internal quotation marks omitted; alteration in original)); *cf. Sprecher v. Von Stein*, 772 F.2d 16, 18 (2d Cir. 1985) (holding SEC enjoys sovereign immunity). After *D'Alessio*, the Second Circuit no longer asks (as the Fifth Circuit did in *Austin*) whether the SRO was performing a function that would entitle a government actor to absolute immunity. Rather, the Second Circuit affords the SRO sovereign immunity whenever the SRO is performing its regulatory functions. *See, e.g.*, *In re NYSE Specialists Sec. Litig.*, 503 F.3d 89, 96 (2d Cir. 2007); *DL Capital Group,* 409 F.3d at 97.

Even the Eleventh Circuit, which disagrees with the Second Circuit over the breadth of SRO immunity, *see* Pet. 27-28, has explained SRO immunity in terms of sovereign immunity: "Because they perform a variety of vital governmental functions, but lack the sovereign immunity that governmental agencies enjoy, SROs are protected by absolute immunity when they perform their statutorily delegated adjudicatory, *regulatory*, and prosecutorial functions." *Weissman v. Nat'l Ass'n of Sec. Dealers, Inc.*, 500 F.3d 1293, 1296 (11th Cir. 2007) (en banc) (emphasis added).

As a result of the expansion of SRO immunity beyond its origin as a limited extension of the doctrines of judicial and prosecutorial immunity, courts have granted SROs immunity for a wide variety of activi-

ties, including several far removed from the adjudicatory or prosecutorial functions for which an analogous SEC official would enjoy absolute immunity. As summarized in the decision below, the Second Circuit has granted SRO immunity

> where the alleged misconduct concerned (1) disciplinary proceedings against exchange members, (2) the enforcement of security rules and regulations and general regulatory oversight over exchange members, (3) the interpretation of the securities laws and regulations as applied to the exchange or its members; (4) the referral of exchange members to the SEC and other government agencies for civil enforcement or criminal prosecution under the securities laws, and (5) the public announcement of regulatory decisions.

Pet. App. 6a (citations omitted). And the decision below "add[s] to that list an SRO's amendment of its bylaws where . . . the amendments are inextricable from the SRO's role as a regulator." *Id.* at 6a-7a. Although some of the activities to which SRO immunity has been applied—such as disciplinary proceedings and enforcement of rules—seem compatible with long-recognized principles of functional absolute immunity for judges and prosecutors, others—such as announcing regulatory decisions and, most glaringly, the amendment of an SRO's bylaws (the subject of the decision below)—are clearly not. The only rationale that appears to support these latter extensions of immunity is the principle that the SRO may partake of the SEC's sovereign immunity.

II. Circuit Court Jurisprudence Regarding The Extension Of Sovereign Immunity To Non-Sovereign Entities Is Internally Inconsistent.

The decision below reflects a theory of derivative sovereign immunity that is far broader than, and in sharp conflict with, other courts' cautious jurisprudence regarding the extension of sovereign immunity to non-sovereign entities.

Traditionally, sovereign immunity has been reserved for sovereigns, along with their appendages (an "arm of the state" or state official) if the sovereign would be legally responsible for the judgment. *See, e.g.*, *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429-31 (1997) (state agency); *Smith v. Reeves*, 178 U.S. 436, 439 (1900) (state official).

Accordingly, there is some doubt whether sovereign immunity can ever apply to private entities. "By their nature, such entities are not arms of the state." *Del Campo v. Kennedy*, 517 F.3d 1070, 1078 (9th Cir. 2008). Additionally, an expansion of sovereign immunity to private entities would "call[] into question the distinctive nature of states as sovereign entities" and create "restrictions on federal legislative as well as judicial authority with regard to [private] entit[ies]" granted sovereign immunity. *Id.* at 1076. Thus, at least one case has concluded that "private entities have no place within the … sovereign immunity legal framework." *Id.*

Other cases have entertained the possibility of extending sovereign immunity to non-sovereign actors, but most of these cases have done so subject to an important limitation: a private entity can partake of sovereign immunity only where a suit against the en-

tity implicates the treasury of a sovereign. For instance, the Eleventh Circuit held that sovereign immunity extended to a private health-care claims administration corporation and a private managed care corporation because judgments against them would come out of Florida's treasury pursuant to the State's agreement with those entities. *See Shands Teaching Hosp. & Clinics, Inc. v. Beech St. Corp.*, 208 F.3d 1308, 1311-13 (11th Cir. 2000). Following similar reasoning, the Fifth, Ninth, and D.C. Circuits have extended sovereign immunity to private corporations that act as fiscal intermediaries between the government and beneficiaries under the Medicare program. *See Anderson v. Occidental Life Ins. Co.*, 727 F.2d 855, 856 (9th Cir. 1984); *Matranga v. Travelers Ins. Co.*, 563 F.2d 677, 677 (5th Cir. 1977); *Pine View Gardens, Inc. v. Mutual of Omaha Ins. Co.*, 485 F.2d 1073, 1074-75 (D.C. Cir. 1973).

Most of the cases rejecting sovereign immunity for private entities have used the same criterion—whether a sovereign would be responsible for the judgment. For instance, the Fifth Circuit held that a company that distributed Medicaid funds on behalf of the State of Texas lacked sovereign immunity, mainly because Texas was not responsible for judgments against it. *See United States ex rel. Barron v. Deloitte & Touche, L.L.P.*, 381 F.3d 438, 440-41 (5th Cir. 2004); *see also Rochester Methodist Hosp. v. Travelers Ins. Co.*, 728 F.2d 1006, 1014-16 (8th Cir. 1984) (rejecting sovereign immunity for fiscal intermediary under the Medicare program). For similar reasons, the Eleventh Circuit rejected sovereign immunity for a private debt-collection company that ran a "bad-check diversion program" for and on behalf of Florida prosecutors. *See Rosario v. Am. Corrective Counseling*

Servs., Inc., 506 F.3d 1039, 1042-43, 1046-47 (11th Cir. 2007). The Ninth Circuit rejected sovereign immunity for a state-created development authority that issued bonds in furtherance of its state-mandated objectives but had its own corporate identity and was responsible for repayment of the bonds. *See Durning v. Citibank, N.A.*, 950 F.2d 1419, 1421, 1424-28 (9th Cir. 1991). And the Sixth Circuit held that a federally-funded foundation for the eradication of agricultural pests was not entitled to sovereign immunity because the government would not be liable for a judgment against the foundation, did not control the foundation, and did not define the foundation as an arm of the government. *See Parrett v. S.E. Boll Weevil Eradication Found., Inc.*, 155 F. App'x 188, 189, 192-93 (6th Cir. 2005).

In sharp contrast to the many cases tying the availability of derivative sovereign immunity to the question of an actual sovereign's financial liability, the decision below—and, indeed, the entire line of SRO immunity cases—applied derivative sovereign immunity to non-sovereign entities without any suggestion that any sovereign's treasury is at risk when an SRO is sued. In fact, as the Second Circuit itself has elsewhere explained, "[t]he NASD is a private actor, not a state actor. It is a private corporation that receives no federal or state funding. Its creation was not mandated by statute, nor does the government appoint its members or serve on any NASD board or committee." *Desiderio v. Nat'l Ass'n of Securities Dealers, Inc.*, 191 F.3d 198, 206 (2d Cir. 1999). Nonetheless, in the SRO immunity cases the fact that the SRO is performing a government function is dispositive, and the potential for liability on the part of a sovereign is irrelevant. *See, e.g.,* Pet. App. 5a ("There

is no question that an SRO and its officers are entitled to absolute immunity from private damages suits in connection with the discharge of their regulatory responsibilities."); *In re NYSE Specialists Sec. Litig.*, 503 F.3d at 96 ("[S]o long as the 'alleged misconduct falls within the scope of the quasi-governmental powers delegated to the NYSE,' absolute immunity attaches." (quoting *D'Alessio*, 258 F.3d at 106)); *but cf. Rosario*, 506 F.3d at 1047 ("Eleventh Amendment immunity has never been held to apply simply because an independent contractor performs some government function."); *Durning*, 950 F.2d at 1426, 1428 (rejecting sovereign immunity even though entity in question performed "an essential government function").

Emblematic of the courts' failure to address the conflict in derivative sovereign immunity jurisprudence is the uneasy coexistence within some circuits of cases espousing two different and contradictory rules on the subject. For instance, the Ninth Circuit has both ruled out sovereign immunity for non-sovereign entities, *see Del Campo*, 517 F.3d at 1076 ("[O]ur cases confirm that private entities have no place within the state sovereign immunity legal framework."), and applied sovereign immunity principles to SROs, *see Sparta Surgical*, 159 F.3d at 1214 ("Consistent with their role in regulation of the securities market, self-regulatory organizations have been granted immunity from suit when acting in a quasi-governmental capacity."). And the Eleventh Circuit's *non-SRO* derivative sovereign immunity cases follow the majority rule that sovereign immunity extends to a non-sovereign only where an actual sovereign's treasury is at risk, *see Rosario*, 506 F.3d at 1046; *Shands*, 208 F.3d at 1311-13, but that same court has

also extended sovereign immunity to SROs without considering whether an actual sovereign could be financially liable for a judgment against an SRO, *see Weissman*, 500 F.3d at 1296-98.

III. Extending Sovereign Immunity To Non-Sovereigns Is Inconsistent With History And Precedent.

This Court has identified sovereigns' "solvency and dignity" as the core interests underpinning sovereign immunity. *Hess*, 513 U.S. at 52. Extending sovereign immunity to SROs advances neither interest. The extension of sovereign immunity to SROs also produces the bizarre result that a corporate entity—which lacks the democratic accountability that legitimizes our federal and state governments—can avail itself of the same protections as actual governments subject to oversight via the democratic process. *Cf. Hess*, 513 U.S. at 42 (rejecting sovereign immunity for an entity born of a bi-state compact, in part because its "political accountability is diffuse" and it "lack[s] the tight tie to the people of one State an instrument of a single State has").

Indeed, the extension of sovereign immunity to non-sovereign entities has rendered employees of non-sovereigns *better* protected than government employees (i.e., employees of an actual sovereign). For instance, the decision below, by dismissing all the defendants—individuals and SROs alike, *see* Pet. App. 2a—shields SRO employees with sovereign immunity for activities in connection with an amendment of the organization's bylaws, whereas employees of an actual sovereign (the government) would enjoy only qualified immunity for an action of this kind, which involves no adjudicative or prosecutorial function. *See Sprecher,*

772 F.2d at 18 (applying qualified immunity to SEC officials); *see generally Harlow*, 457 U.S. at 807 ("For executive officials in general . . . our cases make plain that qualified immunity represents the norm.").

IV. This Case Is A Good Vehicle For Addressing The Problems Created By The Overextension Of Sovereign Immunity.

An effort to harmonize the jurisprudence of sovereign immunity in the context of non-sovereigns could fruitfully begin with the issue of SRO immunity presented in this case. First, the nature of SROs, which are purely private entities that perform important regulatory functions, would provide a rich factual context in which to develop a rule that conforms the role of immunity in our judicial system with historical practice and the rule of law. The rule the Court announces in this case could provide guidance for many other contexts as well and move the federal courts of appeals toward a more coherent and sensible immunity jurisprudence.

Second, consideration of immunity in the SRO context benefits from a quarter of a century of percolation in the lower courts, including significant doctrinal developments by several circuits since the Fifth Circuit first recognized SRO immunity in 1985. Therefore, this Court's consideration of the proper scope and nature of immunity applicable to SROs would be informed not only by the parties here but also by the views of the Second, Fifth, Ninth, Eleventh, and D.C. Circuits over the years. *See* Part I.B, *supra*; Pet. 24-29.

Finally, recent economic upheavals dramatically illustrate the significant effect that the decisions of fi-

nancial regulators have on the national economy. This Court's consideration of the sovereign immunity issue in this case will ensure doctrinal uniformity and correctness in this particularly important context.

CONCLUSION

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

Respectfully submitted,

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