No. 13-625

IN THE
Supreme Court of the United States

A. GALLO & CO., ET AL.
Petitioners,

v.

DANIEL C. ESTY, COMMISSIONER, CONNECTICUT DEPARTMENT OF ENERGY AND ENVIRONMENTAL PROTECTION, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

BRIEF OF AMICI CURIAE NEW ENGLAND LEGAL FOUNDATION, CATO INSTITUTE, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, AND SOUTHEASTERN LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

PUBLIC ACTS AND REGULATIONS

Connecticut

LAW REVIEWS

OTHER

INTEREST OF AMICI CURIAE[1]

Amicus curiae New England Legal Foundation ("NELF") is a nonprofit, nonpartisan, public-interest law firm incorporated in Massachusetts in 1977 and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England and the nation, protecting the free-enterprise system, and defending individual economic rights and the rights of private property. NELF's members and supporters include both large and small businesses located primarily in the New England area. NELF has previously filed amicus briefs in this Court, advocating, among other things, in defense of private property rights. NELF filed an amicus brief in support of Petitioners in the Connecticut Supreme Court.

Amicus curiae Cato Institute ("Cato"), founded in 1977, is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. To that end, Cato publishes books and studies, conducts conferences,

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[1] Pursuant to Supreme Court Rule 37.6, Amici state that no party or counsel for a party authored this brief in whole or in part and that no person or entity, other than Amici, made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.2(a), Amici state that all parties were given timely notice to the filing of this brief and have consented to its filing.

and produces the annual Cato Supreme Court Review.

Amicus curiae National Federation of Independent Business Small Business Legal Center ("NFIB Legal Center") is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business ("NFIB") is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses.

NFIB represents 350,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses.

Amicus curiae Southeastern Legal Foundation ("SLF"), founded in 1976, is a national non-profit, public interest law firm and policy center that advocates constitutional individual liberties and free enterprise in the courts of law and public opinion. SLF drafts legislative models, educates the public on important policy issues, and litigates regularly

before this Court. *See, e.g. Stop the Beach Renourishment v. Florida Department of Environmental Protection*, 560 U.S. 702 (2010); *Hawaii v. Office of Hawaiin Affairs*, 129 S. Ct. 1436 (2009); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

Amici's interest in this case arises out of their commitment to the protection of private property rights and economic freedom. The case involves Connecticut's assertion of the power to take private property (i.e., targeted funds of money) for public use without compensation, in violation of the U.S. Constitution.

In the midst of a fiscal crisis, the state legislature passed a bill that imposed on Petitioners a financial exaction so that the state could pay for public benefits that should properly be borne by the public as a whole. Although Petitioners successfully challenged the law in the trial court, the state Supreme Court ruled that Petitioners had *no* right to the money at all. The ruling was contrary to decades of settled expectations concerning their rights to such funds, rights acknowledged even by the state agency charged with implementing the Bottle Bill.

For these reasons and for the further reasons set out in their brief, Amici believe that this is a compelling case for this Court's review. State courts should not be permitted to define established property rights out of existence and thereby justify a state's taking of private property for public use without just compensation.

SUMMARY OF ARGUMENT

In response to a budgetary crisis, in 2009 Connecticut passed a law to escheat all future "unclaimed" redemption values of beverage containers covered by the state's Bottle Bill. The state also attempted to reach back in time to seize four months of additional values, although such money had, for nearly thirty years, been regarded as belonging to Petitioners. This case therefore presents a classic instance of government unjustly imposing on a few persons an economic burden that should be borne by the public at large. The Court has long condemned the use of such shortcuts to achieving a public good.

The review of this Court is all the more warranted because all three branches of state government were involved in the taking or denial of Petitioners' established property rights, and Petitioners have been left without a state remedy for violation of their federal constitutional rights.

In particular, the Connecticut Supreme Court erroneously found that Petitioners' claimed property rights in the money did not exist and therefore could not be violated by the state's actions. The court reached this conclusion without proper examination of the history of the Bottle Bill and its implementation, despite the fact that Petitioners based their defense of their rights on these sources. Instead, the court relied on a law passed in 2008, also in response to the fiscal crisis. The analysis the court then performed to show that Petitioners lacked so-called "incidents of ownership" under that law is fatally flawed.

That 2008 law did not purport to vest Petitioners with new rights or to divest them of established

rights. It was enacted to facilitate legislative fact-finding about the economics of the Bottle Bill and its implementation by the beverage industry, i.e., as an aid to deciding later whether to escheat some or all of the "unclaimed" values. So well established was Petitioners' property interest that the state agency charged with administering the Bottle Bill acknowledged publically that "unclaimed" values under that thirty-year-old program belonged to Petitioners. Confronted with this evidence, the state court brushed aside the obvious meaning of the agency's words.

This Court should not be dissuaded from granting the Petition by the present lack of consensus concerning whether a decision like that of the state court should be reviewed as a judicial taking or a violation of substantive due process. The decision cannot survive review under either doctrine.

ARGUMENT

I. This Is A Classic Case Of Shifting A Public Burden To Private Parties Unjustly And Unfairly.

It is undisputed that this case arises out of Connecticut's response to a severe fiscal crisis. Indeed, the very first facts that the Connecticut Attorney General hastened to put before the state supreme court in his brief emphasized the urgency of the state's financial crisis:

> The facts of this case are not in dispute. The State has for several years been faced with one of the worst economic downturns in its history. On January 20, 2009, the Governor announced that the estimated budget deficit for the

> fiscal year ending June 30, 2009 was nearly $922 million. . . . The Governor later announced that the deficit had increased to approximately $1.056 billion, and that the estimated budget deficit for the next two fiscal years combined was $7.95 billion. . . .

Brief of the Defendants-Appellants with Appendix at 2. The Attorney General then stated that, "[f]aced with this unprecedented budgetary crisis," the state General Assembly had passed a number of "deficit mitigation plans designed to increase state revenues," and "[i]n particular" the two "deficit mitigation" acts that are at the center of this case, An Act Concerning Deficit Mitigation, Pub. Act 08-01 ("2008 Act"), and An Act Concerning Deficit Mitigation for the Fiscal Year Ending June 30, 2009, Pub. Act 09-01 ("2009 Act").

As interpreted by the Connecticut Supreme Court, the 2009 Act mandates the relinquishment of the Petitioners' money, retroactive to a four-month period before the effective date of the act, while the regulation imposed on the money by the 2008 Act supposedly establishes the Petitioners' lack of any property interest in the money during that period. The atmosphere of budgetary panic may be gauged by the fact that although Petitioners' first quarterly accounting under of the 2008 Act was not due until March 15, 2009, the General Assembly passed the 2009 Act on January 15, 2009—barely seven weeks after passing the 2008 Act—to raid the segregated accounts created by the earlier act and take the quarterly balances, whatever those sums might turn out to be.

These facts possess a national significance. For several years, all levels of government in this nation have been especially hard-pressed to find revenues to meet the financial obligations they have undertaken or would like to undertake. Under such exigent circumstances, the direct, uncompensated appropriation of the private property of a targeted few—whether in the form of money or tangible property—can be a tempting shortcut by which to augment government revenues. As Justice Holmes observed, however, "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Eastern Enterprises v. Apfel*, 524 U.S. 498, 523 (1998) (plurality) (quoting *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 416 (1922)).

Sometimes, state appellate courts function adequately as a firebreak against this kind of abuse of power. *See*, e.g., *AFT Michigan v. State*, 825 N.W.2d 595 (Mich. App. 2012) (finding constitutional violations, including impairment of contracts, substantive due process, and takings clause, where government confiscated income of one discrete group in order to fund specific governmental obligation owed to another discrete group); *Wisconsin Medical Society, Inc. v. Morgan*, 787 N.W.2d 22 (Wis. 2010) (finding unlawful taking where state legislated transfer to itself of $200 million of healthcare providers' private money to reduce need to fund Medicaid with state's general revenues); *Tuttle v. New Hampshire Medical Malpractice Joint Underwriting Association*, 992 A.2d 624 (N.H. 2010) (finding impermissible retrospective law where legislation "targets" $110 million of private funds for transfer to state's general fund to pay for public

healthcare). *See also Clean Water Coalition v. M Resort, LLC*, 255 P.3d 247 (Nev. 2011) (unlawful "local tax" imposed when state mandated $62 million, paid by residents and businesses into fund held by interlocal water management coalition for capital improvements, be transferred to state's general fund).

At other times, as now, it becomes necessary for dispossessed parties to appeal to this Court in order to find the relief denied them by their state courts. *See*, e.g., *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) (overturning Florida Supreme Court decision upholding taking of private property). Without this Court's review, the Petitioners will be "forc[ed] . . . to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States,* 364 U.S. 40, 49 (1960) (Takings Clause intended to bar imposition of such burdens).

II. The State Court, Along With The Two Other Branches Of State Government, Is Implicated In The Constitutional Wrongs Petitioners Allege.

This Court has long held that the Due Process Clause of the Fourteenth Amendment prohibits uncompensated takings by the states and that "the prohibitions of the [Fourteenth] [A]mendment refer to *all* the instrumentalities of the state,—to its legislative, executive, and judicial authorities." *Chicago, B. & Q. R. Co. v. Chicago,* 166 U.S. 226, 233, 241 (1897) (emphasis added).

Viewed in that light, the facts of this case strongly support granting the Petition because *all three* branches of Connecticut state government are

implicated in the constitutional wrongs Petitioners allege in the Petition. *See* Barton H. Thompson, *Judicial Takings*, 76 Virginia L. Rev. 1449, 1486-89 (1990); Eduardo Moises Peñalver and Lior Strahilevitz, *Judicial Takings or Due Process*, John M. Olin Law& Economics Working Paper No. 549 (2d Series) at 19 (Apr. 2011). The 2009 Act, concerning which Petitioners complain, was, of course, passed by the General Assembly, which specifically intended to assert the state's ownership of the money. Then the governor signed the 2009 Act, and, also within the executive branch, the state Department of Environmental Protection ("DEP") was charged by the General Assembly with implementing both the 2008 and 2009 "deficit mitigation" Acts and, in particular, with taking custody of the money relinquished unwillingly by Petitioners and depositing it into the state's general revenue fund.

Then, when Petitioners challenged the legality of the 2009 Act as applied to the moneys segregated during the four months prior to the act's effective date, the Connecticut Supreme Court provided the legal justification for the actions of the other branches. Exercising the distinctive judicial function of saying what the law is, the court ruled that the 2009 Act effected *no* taking of Petitioners' money because Petitioners had *no* property interest in the money.

There could hardly be a stronger takings case for this Court's review than one involving a transfer of property from private hands to the public fisc, when the transfer is enabled by all branches of government. As discussed above, a state court may head off a proposed unlawful transfer that the other branches favor. But especially when the political or

economic pressure faced by the state is extreme, private parties may be unable to obtain vindication of their federal constitutional rights in state court.

> [J]udicial decisions in a number of states appear to be influenced on occasion by legislative pressure and direction. Legislatures often send clear public messages, by legislation, resolution, or other means, concerning the direction the state courts should take. Unless legislatures are sending the messages purely as a show for the voters, the legislatures presumably believe that such messages have an impact. Indeed, the desired results are frequently obtained. In a number of recent cases raising claims of judicial takings, for example, the state court announced its apparent shift in law only after the legislature passed or proposed legislation clearly pointing out the direction it wished the court to take. The juxtaposition might be sheer happenstance or might indicate a common trend in societal views concerning the proper allocation of property, but the strength of the connection suggests that state courts do respond in some settings to legislative prompting.

Thompson, *supra* at 1487-88; *see also id* at 1507-8.

When all avenues of relief for federal constitutional violations are foreclosed within a state—especially when all branches of that state's

government are complicit in those violations—this Court must step in and provide the remedy.

III. The State Court Unconstitutionally Took Petitioners' Established Property Right By Committing Numerous Errors In Reasoning.

In deciding that Petitioners lacked any property interest in the money taken by Connecticut, the state court conducted an analysis that was fundamentally flawed in numerous ways. The resulting deprivation of Petitioners' constitutional rights warrants this Court's review.

A. The State Court Looked for Petitioners' Rights in the Wrong Place.

The state court doomed Petitioners' case from the start by searching for—and failing to find—Petitioners' rights in the 2008 Act, for Petitioners had never claimed that their rights derived from that source. As the trial court understood when ruling in favor of Petitioners, these rights antedated the 2008 Act, whose own legal effect simply cannot be gauged accurately unless viewed against a backdrop of thirty years of pre-existing rights and expectations. Remarkably, the state supreme court thought otherwise on all of these points.

Indeed, the state court seems to have paid scant attention to what Petitioners told it in their brief, for the court set itself to examine the 2008 Act "regardless of the status of the refund values before passage of the act, which we are not asked to determine." *A. Gallo and Co. v. Commissioner of Environmental Protection*, 73 A.3d 693, 703 (Conn. 2013). Yet Petitioners had explained and

emphasized, in the very first pages of their argument to that court, the overriding importance to their case of the Bottle Bill as written through 2007 and of the manner in which it had been implemented for nearly thirty years *before* passage of the 2008 Act. One need only read their argument headings to see this: "A. Under the Original Bottle Bill, the Plaintiffs Had a Vested Property Interest in So-Called "Unclaimed refund Values"; "B. The Limitations Imposed by the 2008 Act Did Not Divest the Plaintiffs of Their Property Interests." Brief and Appendix of Plaintiffs-Appellees at 8, 10.

Instead of attending to Petitioners' argument about the real source of their rights, the state court concluded that, because the 2008 Act did not affirmatively set out any of the rights Petitioners claimed, they simply had none. *Gallo*, 73 A.3d at 704. In the state high court's eyes, therefore, the act's silence was fatal to Petitioners' claims. The court should have instead found, as the trial court had, that the silence meant that Petitioners' pre-existing rights remained intact and that the 2008 Act merely regulated how Petitioners would account for a designated dollar portion of their revenues.

As if to compound its error, the state court went on to apply a three-part "incidents of ownership" test and used the results to bolster its conclusion that the 2008 Act not only did not grant Petitioners the rights they claimed but was positively incompatible with those rights. *See id*. at 709-10. The "incidents" examined by the court were the rights to: (1) use the money, (2) earn income from the money and to contract over its terms with other parties, and (3) the right to transfer ownership rights permanently to other parties. *Id*. at 709. The state court concluded that, in light of how the 2008 Act worked,

Petitioners lacked *all* these incidents and did not possess the rights they claimed. *Id*. at 710. The court's analysis was clearly wrong here too; indeed, it erred on every "incident."

The Petitioners *used* the money in exactly the same way they had always used the equivalence portion of their revenues in the past, before the 2008 Act mandated the segregation of funds—i.e., they used it to pay retailers five cents for each container offered for redemption by the latter. In other words, Petitioners paid some of their bills with the money, a fact that, even standing alone, would constitute a compelling "incident" of ownership.

Petitioners also enjoyed the right to *earn interest* from the money and to *contract concerning the terms*. The 2008 Act, other than requiring them to open interest-bearing accounts at financial institutions located in Connecticut, left Petitioners completely free to choose with what kind of financial institution they would contract, and they had an equally free hand in trying to obtain terms earning the highest interest and charging the lowest fees. This latitude of action was important because once interest was paid into the special accounts, it became available for Petitioners to use to pay their obligations to retailers whenever mandatory redemptions exceeded the amount Petitioners had deposited into the accounts as calculated on a per-bottle-sold basis.[2]

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[2] Because Petitioners are required to pay redemption values for some bottles presented to them which they did not themselves sell to retailers, redemption outlays can exceed any amounts that may have been collected previously from retailers to cover anticipated redemption costs. *See* Petition at 6.

Finally, by paying some of their bills from the special accounts, Petitioners permanently *transferred ownership* of the money every time they wrote a retailer a check to pay redemption values.

The real question, then, is not whether Petitioners exercised "incidents of ownership" under the 2008 Act, but how the state court could fail to see that Petitioners continued to own and use the money as they always had, merely subject to the act's new bookkeeping requirements.

B. The State Court Erred in Failing to Recognize That the 2008 Act Was Passed to Assist Legislative Fact-Finding.

The state court's examination of the 2008 Act as the alleged source of Petitioners' substantive rights was also fundamentally misconceived for another reason. As the plain language of the 2008 Act makes clear, the act was concerned with imposing reporting and other regulatory requirements on Petitioners, not with either vesting them with ownership rights or divesting them of such rights. The immediate purpose of the requirements it imposed—which figure so largely in the court's "incidents of ownership" analysis—was *to facilitate legislative fact-finding*. The General Assembly entertained, at least initially, some hesitation about seizing redemption values until it could first gather more information about how the beverage industry worked in this regard and what the ebb and flow of the money might be. One member of the legislature said, for example:

> The bill requires, for the first time[,] that those receipts be accounted for. . . . One of the difficulties in determining

> whether we should collect that revenue is that we don't have any way of measuring what the revenue will be. . . . [T]he first report would be available to us March 15 . . . . and allow us to evaluate whether or not we ought to recapture some or all of the revenue on an ongoing basis.

Brief and Appendix of Plaintiffs-Appellees at A-4 to A-5. (As noted above, within weeks of passage of the 2008 Act, the General Assembly cast aside these concerns and voted to take the quarterly balances *in toto*.)[3]

That such a statutory scheme of accounting is perfectly consistent with private ownership of "unclaimed" values is demonstrated by the fact that New York had, for about 26 years, imposed requirements for segregating redemption funds and accounting for them under GAAP, before it ever purported to escheat the "unclaimed" money to its coffers. *See* N.Y. Comp. Codes R. & Regs. title 6, § 367.11 (eff. July 1, 1983) (Westlaw 2013); 2009 N.Y. Laws, c. 59, pt. SS. § 8 (eff. April 1, 2009)

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[3] Since there was serious discussion in the legislature about the possible need, in light of the budgetary crisis, to start taking the money, it is not terribly surprising to find some members of the General Assembly expectantly referring to the money as "escheats" during debate. The state court relied on this occasional usage in deciding that the legislature did not regard "unclaimed" redemption values as belonging to Petitioners, and from this it then concluded that the money *did not* in fact belong to Petitioners. *See Gallo*, 73 A.3d at 705-706. Seldom has the *ipse dixit* fallacy been carried so far and spread so thick. *See Webb's Fabulous Pharmacies*, 449 U.S. at 164.

(codified as N.Y. Environmental Conservation Law § 27-1012).

C. The State Court Gave No Effect to the DEP's Admission That Petitioners Had an Established Right to the Unclaimed Redemption Values.

The state court also reacted dismissively when Petitioners cited the state DEP's own admission, made as late as January 2009, that they had an established right to "unclaimed" refund values as a consequence of how the Bottle Bill, "enacted in 1978 and . . . effective January 1, 1980," had operated for nearly thirty years. *See* DEP's "Bottle Bill FAQ," attached to Brief and Appendix of Plaintiffs-Appellees at A-1 to A-2. Focusing narrowly on the use of the verb "keep" in the Bottle Bill FAQ, the state court held that the DEP's statement meant only that the distributors "retain[ed]" the unclaimed values, not that they owned them. *See Gallo*, 73 A.3d at 706.

The court's conclusion is plainly wrong, and the court's citation to a dictionary does not change that fact. Question 5 of the FAQ and its answer read as follows (emphasis in original):

> **Who gets the money from bottles that are not returned?**
> Called unclaimed deposits, these monies accumulate from containers that are either thrown away, or recycled through

> curbside programs. These funds are kept by the distributors. [4]

It should be perfectly obvious that "unclaimed" deposits are called that because no one has claimed *ownership* of them. Read in this context, the question of who "gets the money" when no one else has claimed it asks about who gets it by *default ownership*.

Even in the general case, when an issue is raised about who will get to "keep" money, everyone (except, apparently, the Connecticut Supreme Court) understands that the issue concerns who will have the right to *keep and own* the money, not who will "retain" the money in his pocket forever without ever being able to regard it as truly his own. Even writers of sports copy understand this:

> A 23-year-old fan named Cameron Rodriguez hit a half-court shot for $20,000 at an Oklahoma City Thunder game on Nov. 18, one of an unfathomable five fans to complete the feat in a 22-game stretch at Chesapeake Energy Arena, including two in back-to-back games.
>
> Unfortunately, Rodriguez may not *get to keep his haul*, which he earned fair and square by sinking the shot below, because he's a college athlete.

Sam Gardner, "Thunder fan who hit half-court shot may not get to keep his $20K" (available at http://msn.foxsports.com/buzzer/story/fan-who-hit-

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[4] Similarly, the answer to Question 1 says, "The distributor keeps the 0.5 for each unclaimed deposit."

half-court-shot-may-not-get-to-keep-the-20k-he-won-112613) (last visited December 12, 2013) (emphasis added).

Once again, the state court seemed almost determinedly blind to Petitioners' established rights to the money.

IV. Doctrinal Differences Over Judicial Takings Should Not Prevent The Court From Granting The Petition.

In *Stop the Beach Renourishment v. Florida Department of Environmental Protection*, 560 U.S. 702 (2010), six justices of this Court agreed that the Constitution places limits on the power of state courts to define property rights, especially when a state court has held that an established right does not exist and has thereby put its judicial imprimatur on the state's seizure of private property.

Four justices (Chief Justice Roberts and Justices Scalia, Thomas, and Alito) adopted the theory of judicial taking to address such a situation. Two justices (Justices Kennedy and Sotomayor) hesitated to do so, preferring to apply substantive due process in cases where a court has acted arbitrarily by denying the existence of an established property right. (Two justices, Justices Breyer and Ginsburg, believed that the issue did not need to be reached on the facts of that case.)

Like the six justices in *Stop the Beach*, academic commentators differ in their view of the best way to conceptualize what a court does when, in the course of deciding whether another branch of government has taken private property unconstitutionally, the court denies the existence of the established property right which attaches to the property. *See*, e.g.,

Peñalver, *supra*; David Wagner, *A Proposed Approach to Judicial Takings*, 73 Ohio St. L.J. 177 (2012); D. Benjamin Barros, *The Complexities of Judicial Takings*, 45 U. Rich. L. Rev. 903 (2011).

Amici do not entirely agree among themselves on this doctrinal question, and for that reason in their brief have striven to frame the issue raised by this case with a light doctrinal hand. Amici do, however, agree on one thing: the Supreme Court of Connecticut violated the federal constitutional rights of Petitioners under at least one of these theories and it did so in an egregious way. This is a wrong that only this Court has the power to right.

CONCLUSION

For the reasons stated above, this Court should grant the Petition.

Respectfully submitted,

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