No.

In the Supreme Court of the United States

HCA HEALTH SERVICES OF OKLAHOMA, INC., d/b/a OU MEDICAL CENTER d/b/a CHILDREN'S HOSPITAL, and OU MEDICAL CENTER,

Petitioners,

v.

NATHAN SHINN, a minor, by and through his parents, BRITTANY SHINN and BRANDON SHINN, and BRITTANY SHINN and BRANDON SHINN,

Respondents.

On Petition for a Writ of Certiorari to The Oklahoma Court of Civil Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

On the day trial was scheduled to begin in a case in which her reelection campaign chairman was lead counsel for the plaintiffs, the trial judge directed a judgment of liability against the defendants as a sanction for alleged violations of discovery orders. The motion for sanctions had been filed that very morning, and the judge had refused to give the defendants more than an hour between the time they received the motion and the time of the hearing on the motion. She also refused to permit the defendants an opportunity to file a written response to the motion, much less to introduce evidence in opposition. After the trial judge instructed the jury to consider the fact that the defendants had committed "perjury" and engaged in "disobedience of a direct Court order," the jury returned an $18 million verdict, $9 million of which were punitive damages. The Oklahoma appellate courts found nothing wrong with the procedures resulting in this extraordinary award. The questions presented are:

1. Whether the Due Process Clause of the Fourteenth Amendment requires recusal of a judge in a case in which the chair of her ongoing reelection campaign is lead counsel for one of the parties.

2. Whether the Due Process Clause of the Fourteenth Amendment requires courts to provide parties with particularized notice and an opportunity to present evidence and to submit a written response before imposing a severe sanction such as dismissal or direction of a judgment on liability.

RULE 29.6 STATEMENT

HCA Health Services of Oklahoma, Inc., d/b/a OU Medical Center, is wholly owned by Hospital Corp., LLC, which is wholly owned by Healthtrust, Inc.-The Hospital Company, which is wholly owned by HCA Inc. Hercules Holding II, LLC ("Hercules") is the parent company of HCA Inc., currently owning approximately 97.5% of its common stock. Some members of Hercules are affiliated with Merrill Lynch & Co., Inc., which is a publicly traded company.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, HCA Health Services of Oklahoma, Inc., d/b/a OU Medical Center d/b/a Children's Hospital, and OU Medical Center (collectively, "HCA"), respectfully petition for a writ of certiorari to review the judgment of the Oklahoma Court of Civil Appeals in this case.

OPINIONS BELOW

The opinion of the Oklahoma Court of Civil Appeals (App., *infra*, 1a–31a) and its opinion on rehearing (*id.* at 32a–63a) are unpublished. The dissent accompanying the Oklahoma Supreme Court's denial of the petition for a writ of certiorari (*id.* at 64a–65a) is unpublished. The order of the Oklahoma Supreme Court denying HCA's petition for a writ of mandamus (*id.* at 66a–69a) is unpublished.

JURISDICTION

The judgment of the Oklahoma Court of Civil Appeals was entered on May 9, 2008. HCA timely filed a petition for discretionary review in the Oklahoma Supreme Court, which was denied on May 11, 2009. On July 20, 2009, Justice Breyer extended the time for filing a petition for a writ of certiorari until September 8, 2009. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No State shall * * * deprive any person of life, liberty, or property, without due process of law.

STATEMENT

The Fourteenth Amendment guarantees that no person may be deprived of property without due process of law. In the context of civil litigation, this entitles a litigant to an impartial arbiter, meaningful notice, and the opportunity to mount every available defense before its property can be taken in the form of a damages judgment. In this case, the Oklahoma courts failed to provide petitioner HCA with any of those indispensable safeguards: HCA was denied an impartial arbiter and was subjected to a directed judgment of liability as a discovery sanction—resulting in an $18 million verdict—without either meaningful notice or the opportunity to put on a defense to the allegations that resulted in the sanction. Review and reversal are warranted to bring the Oklahoma courts into line with this Court's precedents and to resolve a deep division among the lower courts regarding the procedural safeguards that must be employed before a party can be subjected to a severe sanction such as dismissal or a directed judgment.

The first major deviation from due process occurred when the Oklahoma courts permitted the trial judge to continue presiding after lead counsel for the plaintiffs (respondents here) was named chairman of her reelection campaign. This Court has just confirmed that "a constitutionally intolerable probability of actual bias" exists when a state-court judge presides over an action involving the person "directing the judge's election campaign when the case was pending or imminent." *Caperton* v. *A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2262, 2263–2264 (2009). There can be no doubt that the trial judge was required to recuse herself under *Caperton* and that the Okla-

homa courts violated HCA's due process rights by allowing her to continue to preside. Because *Caperton* was not decided until after the Oklahoma courts had rebuffed HCA's efforts to obtain the trial judge's recusal, the petition should be granted, the judgment below vacated, and the case remanded for further consideration in light of *Caperton*.

Perhaps not coincidentally, the due process violations accelerated after the trial judge was given *carte blanche* to handle the case. Just days after the Oklahoma Supreme Court refused to disqualify her, she entered the most severe of possible discovery sanctions—a directed judgment of liability against HCA, followed by an exceptionally prejudicial jury instruction on punitive damages. This sanction was hastily imposed in response to a motion filed on the day the trial was scheduled to begin. Rather than allowing HCA a meaningful opportunity to respond, the trial judge set a hearing within the hour—barely giving HCA's counsel time to read the 19-page motion and contact their client. During that hearing, she refused to allow HCA either to submit a written response or to present evidence in its defense. Instead, without even so much as a recess to ponder the result or to review any of the disputed discovery, she took respondents' allegations at face value and immediately entered a sanction that stripped HCA of its right to defend against the allegations.

And the judge was not done. After a trial on damages, she instructed the jury that, in determining whether to impose punitive damages and in what amount, it could consider HCA's "perjury" and "disobedience of a direct Court order." So instructed, the jury awarded respondents $9 million in compensatory damages and $9 million in punitive damages.

The Oklahoma appellate courts found nothing wrong with either the procedure employed in imposing sanctions or the jury instruction on punitive damages. In embracing a process that lacked particularized notice, afforded HCA no meaningful opportunity to defend itself against the charges, and resulted in an $18 million deprivation of property, the Oklahoma courts deepened two ever-growing splits regarding the procedural safeguards that must be provided before the imposition of serious sanctions. Plenary review is warranted to resolve these two important divisions of authority.

A. Background

This case arises out of an accidental injury caused to Nathan Shinn, an infant child, by a night nurse at the Children's Hospital at Oklahoma University Medical Center, a facility owned by HCA. App., *infra*, 2a. Nathan was in the hospital because he had been born with a congenital brain anomaly known as holoprosencephaly. Trial Tr. 204, 517, 528. As a symptom of this tragic condition, Nathan's brain was one-third of the normal size, and Nathan had no prospect for long-term survival. *Id.* at 204–205. Indeed, he died from this condition shortly after the trial in this case. During his stay in the hospital, Nathan sustained injuries to his skull when Nurse Renny Jacob hit his head against a nightstand while changing his crib sheets. App., *infra*, 2a. The injuries resolved themselves without medical intervention, and Nurse Jacob, who initially denied knowledge of the incident, soon thereafter confessed her involvement and resigned from her position. *Id.* at 3a.

Respondents sued HCA in Oklahoma district court on July 11, 2005, alleging negligence and seek-

ing compensatory and punitive damages. The case was assigned to District Judge Barbara G. Swinton, who was elected in 2002 and faced a reelection campaign in 2006.

B. Pretrial Proceedings

During the pretrial proceedings, the parties had a series of disputes about the scope of discovery and Judge Swinton's eligibility to preside over the case.

After the parties exchanged document requests and objections, HCA filed a motion to compel respondents to provide a signed authorization to release certain medical records. The court granted HCA's motion and ordered respondents to supplement their discovery by May 11, 2006. Respondents missed that deadline and belatedly provided some additional discovery on May 30 but failed to include the signed release ordered by the court. After a round of correspondence between counsel, HCA filed a motion for discovery sanctions on July 20. Meanwhile, on July 17, respondents filed their own motion to compel, which HCA moved to strike as procedurally improper. On August 25, the trial court denied HCA's motion for sanctions and reserved ruling on HCA's motion to strike while simultaneously ordering HCA to supplement its discovery. HCA made supplemental productions on August 30 and September 20.

While discovery was ongoing, HCA learned that respondents' lead counsel, Jerry Durbin, had become the chairman of Judge Swinton's reelection campaign[1] and that Mr. Durbin and his law firm col-

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[1] See Petitioners' Appendix ("Mandamus Pet. App.") A, ex. A, *HCA Health Services of Oklahoma, Inc.* v. *Swinton*, No. 103,926 (Okla. filed Oct. 27, 2006), available at https://www.ok.gov/

leagues were responsible for 27% of Judge Swinton's campaign contributions.[2] HCA believed that Judge Swinton's conflict of interest violated its due process rights and sought to disqualify Judge Swinton from further participation in the case.

Oklahoma law dictates a four-step process for seeking the disqualification of a trial court judge. See OKLA. STAT. tit. 20, § 1403; OKLA. DIST. CT. R. 15. A party must first make an informal request for recusal. If the judge declines to recuse, the party must next make a formal motion to the trial judge. If the judge still will not recuse, the party may represent the formal request to the chief judge of the county where the case is pending. If the chief judge refuses to intervene, the aggrieved party then may file a mandamus petition in the Oklahoma Supreme Court. *Ibid.*

Following that procedure, on September 21, 2006, HCA requested *in camera* that Judge Swinton recuse herself. App., *infra*, 59a; Mandamus Pet. App. C. She refused but stayed further consideration of HCA's motion to strike respondents' motion to compel additional discovery pending appellate review of the recusal issue. Mandamus Pet. App. C, at 15–16. The next day, HCA filed its formal recusal motion with Judge Swinton (Mandamus Pet. App. A), which she denied on the spot (Mandamus Pet. App. B, at 12). HCA then sought review from the chief judge, who on October 5 concluded that he lacked jurisdiction because Judge Swinton had denied the

ethics/crs/so1/view_so1.php?reg_id=106308&action=public&report_num=41083.

[2] See Mandamus Pet. App. A, ex. B, available at https://www.ok.gov/ethics/crs/c1r/view_c1r.php?reg_id=106308&action=public&report_num=41784.

formal recusal motion without first conducting a hearing. Mandamus Pet. App. B, at 13.

On October 13, HCA filed a petition for a writ of mandamus or prohibition in the Oklahoma Supreme Court. *HCA Health Servs. of Okla., Inc.* v. *Swinton*, No. 103,870 (Okla. filed Oct. 13, 2006). The court scheduled argument for November 7. Because trial was set to begin on October 30, HCA sought an emergency stay, which prompted the Oklahoma Supreme Court to advance the hearing to October 20. On October 26, the court denied the emergency stay but instructed the chief judge of the trial court to hold his own hearing on the recusal issue by the end of that day. App., *infra*, 66a. The chief judge held his hearing and upheld the trial judge's refusal to recuse. Mandamus Pet. App. B, at 17.

HCA then renewed its petition for mandamus in the Oklahoma Supreme Court (*HCA Health Servs. of Okla., Inc.* v. *Swinton*, No. 103,926 (Okla. filed Oct. 27, 2006)), contending that the trial judge's continued participation in the case violated the Due Process Clause. On October 27, the court accepted jurisdiction over the mandamus petition, but—over the dissent of Justice Opala—denied the writ. App., *infra*, 68a–69a.

That same day, pursuant to a three-day-old order from Judge Swinton denying HCA's motion to strike (Mandamus Pet. App. B, at 16), HCA supplemented its discovery responses for the third time. By this point, only three days remained before trial.

C. Sanctions

On the day trial was scheduled to commence, respondents filed a written motion seeking discovery sanctions. In their 19-page motion, respondents

complained about the timing of discovery (which HCA viewed as a function of the recusal process and the accompanying stay) and HCA's failure to produce certain documents (most of which did not exist). HCA sought the opportunity to review the motion and to respond in writing, but Judge Swinton insisted on a hearing within the hour. At the hearing, HCA reiterated its position that it had not received adequate notice and that it was entitled to an opportunity to formulate a response and to submit evidence that would rebut respondents' allegations. App., *infra*, 101a. Instead, having reviewed none of the discovery materials that were produced by HCA, the court took the representations of respondents' counsel at face value, ruled immediately from the bench that HCA had committed discovery violations, directed a judgment against HCA on liability, and ordered that a trial on damages commence the next day. *Id.* at 101a–104a. In issuing this ruling, Judge Swinton specifically faulted HCA for "hoping that the Motion to Disqualify the trial judge would get them the continuance they previously sought" and opined that HCA's efforts to disqualify her "may have played [a] part in the failure to provide the necessary documents in this case for the plaintiffs to be properly prepared." *Id.* at 102a.

At the conclusion of the trial, the court instructed the jury that HCA had "conducted itself in violation of the laws of the State of Oklahoma," that "[t]his conduct ha[d] occurred in [her] Courtroom" and "include[d] a violation of the laws of the State of Oklahoma, as to perjury and disobedience of a direct Court order," and that, in determining the appropriateness and amount of punitive damages for HCA's tort, the jury could "consider [HCA's] perjury and direct disobedience of a Court order." App., *infra*, 34a–

35a. Having been thus instructed, the jury returned a verdict of $9 million in compensatory damages and $9 million in punitive damages.

D. Appellate Review

HCA appealed, raising a range of issues. The Oklahoma Court of Civil Appeals affirmed in all respects. App., *infra*, 1a–31a.

The court acknowledged that there was no evidence that HCA had been warned of the possible sanction it faced but concluded that "affirmative notice from the Trial Court informing HCA of the possibility of a directed verdict was unnecessary because the record clearly demonstrates that counsel for HCA was aware of, and indeed asked for, a similar discovery sanction." App., *infra*, 11a. Thus, because HCA had filed its own motion for discovery sanctions, the court concluded that HCA "had sufficient notice of the sanction ultimately imposed." *Ibid.* The court failed to address HCA's contention that it was denied an opportunity to be heard before the sanction was imposed.

In an opinion accompanying the denial of rehearing, the court specifically addressed the district court's denial of "counsel's request for the opportunity to file a written response to the factual assertions in [respondents'] motion and to supplement the record with the documents produced by HCA." App., *infra*, 54a. The court "beg[a]n with the observation that the timing of the [sanctions] hearing * * * was primarily the result of HCA's untimely discovery responses" (*ibid.*) and concluded that there was no violation of due process because "[t]he sanctions hearing concerned what HCA had failed to do" and "[t]he record establishes that there was a significant discrep-

ancy between what the district court ordered HCA to produce on August 25, and what it produced in response to that order" (*id.* at 55a). The court reasoned that HCA was not entitled to submit documents to show that "it had substantially complied with the [trial] court's order," because "it is clear that substantial compliance was not satisfactory to the district court." *Id.* at 57a.[3]

Finally, the court concluded that any due process violation stemming from the trial court's failure to permit a written response was cured when, after the sanctions had been entered and the verdict was rendered, the trial court permitted HCA to submit a written response to a motion for *additional* sanctions filed by respondents. App., *infra*, 55a.

HCA timely petitioned for discretionary review in the Oklahoma Supreme Court. Over the dissents of three justices, certiorari was denied. App., *infra*, 64a. Vice-Chief Justice Taylor filed a written dissent in which he decried the "fundamental denial of the right to a fair trial" that resulted from Judge Swinton's punitive damages instruction. *Id.* at 65a. In his view, "[a]fter the trial judge branded the defendant an outlaw and a perjurer, any hope of a fair trial for the defendant was lost." *Ibid.* As he saw it, although the punitive damages instruction "might have been given to a jury in an entertaining movie or television show, * * * it should never have been given to a jury in an Oklahoma courtroom." *Ibid.*

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[3] Ironically, in reviewing the substance of the sanction order, the Court of Civil Appeals refused to consider documents, subpoenas, summonses, and notices of deposition because they "were not before the Trial Court at the time of the decision appealed." App., *infra*, 7a n.2.

REASONS FOR GRANTING THE PETITION

As this Court held just three months ago in *Caperton*, due process requires a judge to recuse herself from any case in which a person with a personal stake has had a significant and disproportionate influence in directing the judge's election campaign. Here, while the case was ongoing, respondents' lead attorney was serving as chairman of the trial judge's reelection campaign. Judge Swinton's failure to recuse herself accordingly violated HCA's due process rights. Because the Oklahoma Supreme Court denied HCA's due process claim without the benefit of *Caperton*, the Court should grant the petition, vacate the judgment below, and remand for further consideration in light of *Caperton*.

Even setting aside the recusal issue, there is an independent basis warranting plenary review. Judge Swinton entered a devastating sanction against HCA for alleged discovery shortcomings—a directed judgment on liability plus a judicial assertion that HCA committed "perjury," the inevitable effect of which was to inflame the jury into returning an award that was out of all proportion to respondents' injuries and the gravity of the underlying conduct attributable to HCA. But in its rush to judgment, the court failed to provide particularized notice of the sanction it was considering and the basis therefor and denied HCA the opportunity to explain—with evidence—that the sanctions motion was based on inaccurate and misleading factual assertions. Although lower courts routinely consider and impose severe sanctions, they are divided on whether, in such circumstances, due process requires particularized notice and the opportunity to present evidence or a written response.

I. THE COURT SHOULD GRANT, VACATE, AND REMAND FOR FURTHER CONSIDERATION IN LIGHT OF *CAPERTON*.

This Court should grant the petition, vacate the judgment below, and remand for further consideration ("GVR") in light of *Caperton*. The Oklahoma courts considered whether due process required Judge Swinton to recuse herself in 2006. The Oklahoma Supreme Court denied discretionary review of the final judgment on May 11, 2009. Less than a month later, on June 8, this Court issued its decision in *Caperton*, which bears directly on the recusal issue in this case.

As this Court has explained, a GVR order is appropriate

> [w]here intervening developments, or recent developments that [this Court] ha[s] reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation.

Lawrence ex rel. Lawrence v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam). That standard is satisfied here, because *Caperton* requires a judge to disqualify herself from a case in which her campaign manager represents a party. The fact that the Oklahoma Supreme Court considered this issue in ruling on an interlocutory mandamus petition is no obstacle to a GVR order.

A. *Caperton* Forbids A Judge From Hearing A Case In Which Her Campaign Manager Is Lead Counsel.

The Constitution requires recusal when "the probability of actual bias on the part of the judge or decisionmaker is too high." *Withrow* v. *Larkin*, 421 U.S. 35, 47 (1975). In *Caperton*, this Court addressed the applicability of this recusal requirement to judges who, pursuant to state law, win their jobs through public election. The Court held that due process is violated "when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent." *Caperton*, 129 S. Ct. at 2263–2264. Needless to say, an attorney working on a contingency-fee basis has just such "a personal stake" in the outcome of a tort case. Indeed, the decision itself expressly reaches attorneys. *Id.* at 2263.

The principle set forth in *Caperton* applies squarely to this case. While the case was pending, respondents' lead attorney was "directing the judge's election campaign" by serving as chairman of Judge Swinton's reelection campaign. In addition, that lawyer's firm accounted for 27% of Judge Swinton's campaign contributions. The probability of bias resulting from the judge's relationship with lead counsel is manifest on its face, and is confirmed by the judge's uncritical acceptance of the allegations by respondents' counsel in their sanctions motion and at the hearing.

Because the courts below did not have the benefit of *Caperton* when they rejected HCA's argument that

due process required the trial judge to recuse, a GVR is plainly warranted.

B. HCA Preserved Its Challenge To The Trial Judge's Eligibility By Following The Procedure Prescribed By State Law.

Although the Oklahoma Supreme Court issued its ruling on Judge Swinton's disqualification before trial, that is no obstacle to a GVR. This Court has the power to "consider all of the substantial federal questions determined in the earlier stages of the litigation" (*Reece* v. *Georgia*, 350 U.S. 85, 87 (1955)), even if they were not passed upon during the final appeal in the case. The "power to probe issues disposed of on appeals prior to the one under review is, in the last analysis, a 'necessary correlative' of the rule which limits [this Court] to the examination of final judgments." *Urie* v. *Thompson*, 337 U.S. 163, 172–173 (1949).

HCA preserved this Court's review of Judge Swinton's eligibility to preside over the case by following the procedure for interlocutory review prescribed by Oklahoma law. As the Oklahoma Supreme Court has explained:

> a party seeking disqualification of a judge in a civil proceeding must make an *in camera* request of the judge to disqualify or to transfer the cause to another judge as required by Rule 15, and then upon the judge's refusal the party must file a written application in the cause, as required by [OKLA. STAT. tit. 20,] § 1403, and upon refusal of the motion, re-present the motion to the Chief Judge or the Presiding Judge as required by [Okla-

> homa District Court] Rule 15. * * * [I]f the judge is not then disqualified as requested, the party seeking disqualification may seek extraordinary relief in the form of mandamus as authorized by Rule 15 and § 1403, *or as an alternative to a mandamus proceeding*, preserve the disqualification issue for review on appeal from the subsequent judgment.

Pierce v. *Pierce*, 39 P.3d 791, 796 (Okla. 2001) (emphasis added); see also *ibid.* ("after a party preserves the disqualification issue in the trial court the alleged error may be raised by a mandamus proceeding *or* in a subsequent appeal") (emphasis in original).

Here, HCA preserved the recusal issue by making the *in camera* request required by Rule 15, the written application required by § 1403, the representation required by Rule 15, and the mandamus petition to the Oklahoma Supreme Court, which accepted briefs, heard arguments, and rendered a ruling that prompted a dissent.

The interlocutory nature of this review process is inconsequential: "Local rules of practice cannot bar this Court's independent consideration of all substantial federal questions actually determined in earlier stages of the litigation by the court whose final adjudication is brought here for review." *Urie*, 337 U.S. at 172. Accordingly, the recusal issue was fully preserved.[4]

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[4] In its order denying rehearing, the Oklahoma Court of Civil Appeals addressed HCA's contention that Judge Swinton violated Oklahoma law by ruling on various issues while the disqualification proceedings were ongoing. In the course of this discussion, the court noted that "HCA did not appeal the chief judge's order denying the motion to disqualify and that ruling is

II. IN THE ALTERNATIVE, PLENARY REVIEW IS WARRANTED TO RESOLVE A DEEP SPLIT OVER THE SAFEGUARDS THAT MUST BE AFFORDED PARTIES BEFORE THE IMPOSITION OF SEVERE SANCTIONS.

In addition to the *Caperton* issue, this case presents a recurring issue of great importance that merits plenary review. Although this Court has indicated that parties must receive notice and an opportunity to be heard before sanctions can be imposed, the lower courts are divided as to both the nature of the notice required and the extent of a party's entitlement to respond. The exceedingly minimalist view espoused by the Oklahoma courts in this case conflicts with multiple decisions of federal courts of appeals and state courts of last resort. Those courts have held that parties must be given both particularized notice in advance of the hearing and the opportunity to present evidence or written arguments in response to allegations of sanctionable conduct.

Because litigants increasingly are wielding discovery sanctions as a sword, this Court's review is urgently needed to harmonize the law and to ensure that parties receive the procedural protections to which due process entitles them.

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now final." App., *infra*, 61a. That may be true for purposes of the Oklahoma Court of Civil Appeals' ability to revisit the propriety of Judge Swinton's refusal to recuse at the rehearing stage, but it is irrelevant to whether the interlocutory procedure prescribed by Oklahoma law and followed by HCA was sufficient to preserve the issue for *this Court's* review.

A. The Lower Courts Are Deeply Divided Regarding The Procedural Safeguards That Must Be Provided Before The Imposition Of Severe Sanctions.

A court contemplating the imposition of sanctions must comport with due process, because "there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." *Societe Internationale pour Participations Industrielles et Commerciales, S.A.* v. *Rogers*, 357 U.S. 197, 209 (1958). This principle is deeply rooted. See, *e.g.*, *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322, 349–351 (1909); *Hovey* v. *Elliott*, 167 U.S. 409, 417–418 (1897). More recently, this Court has cautioned that, regardless of the alleged misconduct or the contemplated penalty, sanctions "certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record." *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 767 (1980). Otherwise, courts would "possess the right to inflict the very wrongs which they were created to prevent." *Hovey*, 167 U.S. at 418.

All courts—including the court below (App., *infra*, 52a–53a)—recognize that "notice" and the "opportunity to be heard" are constitutional imperatives. But they part ways soon thereafter, revealing intolerable variations in the procedural safeguards that are afforded to parties confronted with the threat of severe sanctions.

By holding that parties threatened with sanctions are entitled to neither particularized notice nor an opportunity to make a written response or introduce evidence in their defense, the Oklahoma courts

have widened two already deep divisions among the lower courts. This Court's intervention is required to provide necessary guidance as to the safeguards that must be afforded parties before the imposition of serious sanctions.

1. As the Eighth Circuit has recognized, "[c]ourts are split on whether" there exists "a right to prior notice before the imposition of sanctions." *Jensen* v. *Fed. Land Bank*, 882 F.2d 340, 341 (8th Cir. 1989).

The Second, Third, Ninth, Tenth, and Federal Circuits and four state supreme courts have concluded that due process requires particularized notice. For example, the Second Circuit has held that,

> [a]t a minimum, the notice requirement mandates that the subject of a sanctions motion be informed of: (1) the source of authority for the sanctions being considered; and (2) the specific conduct or omission for which the sanctions are being considered.

Mackler Prods., Inc. v. *Cohen*, 225 F.3d 136, 144 (2d Cir. 2000) (quoting *In re 60 E. 80th St. Equities, Inc.*, 218 F.3d 109, 117 (2d Cir. 2000)). The Ninth Circuit has likewise held that "particularized notice is required to comport with due process" (*In re DeVille*, 361 F.3d 539, 549 (9th Cir. 2004) (internal quotation marks omitted)), and it has expressly recognized that there is "a distinction between the general notice about sanctions and notice that sanctions are being considered" (*Tom Growney Equip., Inc.* v. *Shelley Irrigation Dev., Inc.*, 834 F.2d 833, 836 n.5 (9th Cir. 1987)). In the jurisdictions that follow this approach, the notice must identify "particular factors that [the party facing sanctions] must address if [it] is to avoid sanctions" (*Jones* v. *Pittsburgh Nat'l Corp.*, 899 F.2d

1350, 1357 (3d Cir. 1990)) and "will usually require notice of the precise sanctioning tool that the court intends to employ" (*In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 278 F.3d 175, 191 (3d Cir. 2002) (quoting *Fellheimer, Eichen & Braverman, P.C.* v. *Charter Techs., Inc.*, 57 F.3d 1215, 1225 (3d Cir. 1995))).[5] In these jurisdictions, the requirement of particularized notice applies regardless of the nature of the sanction, and regardless of whether the sanction is to be levied against the party or the party's attorney. Moreover, the required notice must give the party threatened with sanctions "sufficient time in which to prepare its case against imposition of sanctions." *Lindey's, Inc.* v. *Goodover*, 872 P.2d 767, 772 (Mont. 1994).[6]

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[5] See also *1-10 Indus. Assocs.* v. *United States*, 528 F.3d 859, 867–868 (Fed. Cir. 2008) (collecting cases); *United States ex rel. Jimenez* v. *Health Net, Inc.*, 400 F.3d 853, 857 (10th Cir. 2005) ("Due process requires us to give Appellants notice that we are contemplating imposing sanctions and an opportunity to respond."); *Jensen*, 882 F.2d at 341 (8th Cir.) (adopting holding of *Tom Growney*); *Carr* v. *Hovick*, 451 N.W.2d 815, 819 (Iowa 1990) ("[t]o comport with due process, the court here should have notified [the party's] counsel that sanctions were being contemplated"); *Ohio Furniture Co.* v. *Mindala*, 488 N.E.2d 881, 883 (Ohio 1986) (per curiam); *Griffin* v. *Griffin*, 500 S.E.2d 437, 439 (N.C. 1998) ("It is not adequate for the notice to say only that sanctions are proposed. The bases for the sanctions must be alleged."); *Kilpatrick* v. *Bullough Abatement, Inc.*, 199 P.3d 957, 967 (Utah 2008).

[6] See also *United States* v. *1948 S. Martin Luther King Dr.*, 270 F.3d 1102, 1116 (7th Cir. 2001) (reversing sanction where party was denied "adequate time to prepare a response"); *Kirshner* v. *Uniden Corp. of Am.*, 842 F.2d 1074, 1082 (9th Cir. 1988) (finding two days to be "inadequate time to prepare a defense and to travel * * * to attend the hearing"); *Town of New Hartford* v. *Conn. Res. Recovery Auth.*, 970 A.2d 570, 577 (Conn. 2009) ("It

In contrast, the Fifth, Seventh, and Eleventh Circuits and the Maine Supreme Judicial Court agree with the Oklahoma courts that virtually *any* notice is sufficient. The rule in the Fifth Circuit is illustrative: "Like all court orders, discovery orders are to be obeyed when issued, and sanctions for violating such orders may be imposed without an explicit prior warning or a litany of precautionary instructions." *FDIC* v. *Conner*, 20 F.3d 1376, 1383 (5th Cir. 1994).[7]

This understanding of the notice requirement—and its role in effectuating due process—differs markedly from that of the jurisdictions that have held that due process requires particularized notice. As a consequence, the constitutional safeguards afforded parties facing sanctions depend entirely on the jurisdiction in which the case arises. The present case well illustrates that. If this case had arisen in any of the jurisdictions that construe due process to require particularized notice, the sanction imposed

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is well established that '[i]t is fundamental in proper judicial administration that no matter shall be decided unless the parties have fair notice that it will be presented in sufficient time to prepare themselves upon the issue.'") (quoting *Osterlund* v. *State*, 30 A.2d 393, 395–396 (Conn. 1943)).

[7] See also *Riccard* v. *Prudential Ins. Co.*, 307 F.3d 1277, 1294 (11th Cir. 2002) ("Rule 11 itself 'constitutes a form of notice' that sanctions can be imposed for a baseless motion"); *Tamari* v. *Bache & Co. (Lebanon) S.A.L.*, 729 F.2d 469, 472 (7th Cir. 1984) ("In general, where a party has received adequate notice that certain discovery proceedings are to occur by a specific date, and that party fails to comply, a court may impose sanctions without a formal motion to compel the discovery from the opposing party."); *St. Paul Ins. Co.* v. *Hayes*, 770 A.2d 611, 615 (Me. 2001) ("We have never said that the trial court must 'warn' a party before sanctioning that party with dismissal or default.").

by the trial court here would have been deemed unconstitutional, because the Oklahoma Court of Civil Appeals acknowledged the absence of "explicit evidence" of "affirmative notice from the Trial Court informing HCA of the possibility of a directed verdict" (App., *infra*, 10a–11a), let alone notice that HCA would be branded a perjurer. Moreover, HCA was given less than an hour before being called to the dock to defend itself. That clearly would have resulted in reversal in the many jurisdictions that recognize that the right to defend is meaningless without adequate time to prepare.

2. The lower courts likewise are divided as to the scope of a party's due process right to be heard prior to the imposition of severe sanctions. This Court has explained that the opportunity to be heard "must be granted at a meaningful time and in a meaningful manner" (*Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965)), but the lower courts have deviated dramatically as to what that means.

First, several state courts of last resort have concluded that due process requires that the party confronted with the threat of serious sanctions be afforded an evidentiary hearing. The Montana Supreme Court, for example, has held that "a hearing is necessary to provide the party with due process by affording it a sufficient opportunity to defend against the imposition of sanctions." *Smith* v. *Elec. Parts, Inc.*, 907 P.2d 958, 962 (Mont. 1995). The Florida Supreme Court has similarly held that, under the Due Process Clause, the party against whom sanctions are sought must be afforded "the opportunity to present witnesses and other evidence." *Moakley* v. *Smallwood*, 826 So. 2d 221, 227 (Fla. 2002). For its part, the West Virginia Supreme Court of Appeals

has ruled that due process requires that, before rendering judgment on liability as a sanction, courts must conduct "an evidentiary hearing," during which the party seeking the sanction bears the burden of establishing willful noncompliance with a court order and the opposing party is afforded the opportunity to justify its noncompliance. *Doulamis* v. *Alpine Lake Property Owners Ass'n*, 399 S.E.2d 689, 693–694 (W. Va. 1990) (per curiam). The Alaska Supreme Court has likewise interpreted the Due Process Clause to require an evidentiary hearing "on issues of consequence" (*Smith* v. *Groleske*, 196 P.3d 1102, 1106 (Alaska 2008)), as have the supreme courts of Minnesota (*Uselman* v. *Uselman*, 464 N.W.2d 130, 144 (Minn. 1990)) and California (*In re Marriage of Flaherty*, 646 P.2d 179, 190 (Cal. 1982)).

Second, although they do not require a full evidentiary hearing, at least four federal courts of appeals have held that due process requires an opportunity to respond in writing before sanctions can be imposed. The Fifth, Ninth, and Tenth Circuits have required at least the opportunity to brief potential sanctions (*Pac. Harbor Capital, Inc.* v. *Carnival Air Lines, Inc.*, 210 F.3d 1112, 1118 (9th Cir. 2000); *Resolution Trust Corp.* v. *Dabney*, 73 F.3d 262, 268 (10th Cir. 1995); *Childs* v. *State Farm Mut. Auto. Ins. Co.*, 29 F.3d 1018, 1027 (5th Cir. 1994)), and the Third Circuit, recognizing that "[d]ismissal is a harsh sanction which should be resorted to only in extreme cases" (*Dyotherm Corp.* v. *Turbo Mach. Co.*, 392 F.2d 146, 148–149 (3d Cir. 1968)), has vacated such a sanction where the sanctioned party was not "afforded an opportunity to explain the circumstances" of the alleged misconduct (*Harris* v. *Cuyler*, 664 F.2d 388, 390 (3d Cir. 1981)). Certainly, none of these courts would have upheld a directed judgment

imposed as a sanction one hour after the filing of a written motion without affording the accused party the opportunity to present evidence in its defense.

Third, several courts have held that, because "[a]n evidentiary hearing serves as a forum for finding facts," such a hearing is unnecessary "when sanctions are based entirely on an established record." *Schlaifer Nance & Co.* v. *Estate of Warhol*, 194 F.3d 323, 335 (2d Cir. 1999). Following this rule, the New Mexico Supreme Court has held that evidentiary hearings are unnecessary if the misconduct is "mirrored in the record." *United Nuclear Corp.* v. *Gen. Atomic Co.*, 629 P.2d 231, 237 (N.M. 1980). The Sixth, Seventh, and Eighth Circuits have held similarly. See *Chrysler Corp.* v. *Carey*, 186 F.3d 1016, 1022 (8th Cir. 1999); *Silverman* v. *Mut. Trust Life Ins. Co.* (*In re Big Rapids Mall Assocs.*), 98 F.3d 926, 929 (6th Cir. 1996); *Kapco Mfg. Co.* v. *C & O Enters., Inc.*, 886 F.2d 1485, 1495 (7th Cir. 1989) (per curiam).

The Oklahoma courts have adopted a fourth position, at the least protective end of the spectrum. They rejected HCA's request for an evidentiary hearing. They refused to allow HCA to submit a written response to respondents' 19-page written motion. And they did not base their sanctions on evidence already in the record. To the contrary, they relied solely on the representations made by respondents in their motion and at the hearing. See App., *infra*, 54a–55a.[8] In adopting this position, the Oklahoma

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[8] Indeed, the evidence necessary for the trial court's sanctions *could not* have appeared in the record. Under Oklahoma law, as in federal courts, discovery requests and responses are not filed in court. See, *e.g.*, OKLA. STAT. tit. 12, §§ 3226, 3234.

courts are joined only by the Fourth Circuit, which has rejected the holdings of other courts that allegations of bad faith require an evidentiary hearing in favor of the blanket position that "[d]ue process does not require an evidentiary hearing before sanctions are imposed." *In re Kunstler*, 914 F.2d 505, 521 (4th Cir. 1990). By embracing such a narrow notion of the right to be heard, the Oklahoma courts have further widened a schism that only this Court can close.

B. The Oklahoma Courts' Understanding Of The Procedures Required By Due Process Is Manifestly Wrong.

The Oklahoma courts held that it is perfectly permissible to impose a directed judgment of liability and to tell a jury that the defendant perjured itself and violated express court orders after less than an hour's notice and without affording the defendant the opportunity to introduce evidence or to submit a written response to the allegations upon which the motion for sanctions is based. With respect to both notice and the opportunity to be heard, the Oklahoma courts' minimalist approach is manifestly wrong.

1. Although "the concept of fair notice [is] the bedrock of any constitutionally fair procedure" (*Lankford* v. *Idaho*, 500 U.S. 110, 120–121 (1991)), HCA was never told—until the moment the trial court ruled from the bench—that the court questioned its compliance with existing court orders or was contemplating the draconian sanction that it ultimately imposed. The brief time that elapsed between indictment and conviction was materially indistinguishable from a sanction meted out on the spot and divested the "opportunity to be heard" of any practical significance.

Greater and more specific notice would have allowed HCA to offer a more effective response to the exaggerated charges levied by respondents. With less than an hour to read the motion and to communicate among themselves and with their client, counsel for HCA had no opportunity to perform legal research on the applicable standards, no opportunity to review HCA's document productions in order to demonstrate compliance with court orders, and no opportunity to marshal evidence showing that various documents requested by respondents did not exist. And although a showing of "willfulness" is constitutionally required before an adverse judgment can be entered as a sanction (*Societe Internationale*, 357 U.S. at 212), HCA had neither the knowledge that the trial court was contemplating that sanction nor the time to establish the steps it had taken to comply with its obligations in good faith. The Constitution requires notice at a "meaningful" time (*Armstrong*, 380 U.S. at 552), but the trial court's insistence on holding a hearing (and ruling from the bench) less than an hour after service of the motion for sanctions rendered the concept of fair notice meaningless.[9]

The Oklahoma Court of Civil Appeals asserted that "the timing of the hearing on the Shinns' motion [for sanctions] was primarily the result of HCA's untimely discovery responses." App., *infra*, 54a. However, the notion that a party can be deprived of a fair opportunity to defend itself simply because the court believes the other side's assertions that the party is guilty as charged is foreign to American jurispru-

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[9] See also *Dailey* v. *Vought Aircraft Co.*, 141 F.3d 224, 231 (5th Cir. 1998) (finding due process violation where party was "given only two days' or less notice of the hearing").

dence. Much to the contrary, as this Court has recognized, the need for fair procedures is particularly acute when a court evaluates conduct that could result in litigation-ending sanctions. *Roadway Express*, 447 U.S. at 767.

On the merits of the issue, the Oklahoma Court of Civil Appeals held that, under the Oklahoma Supreme Court's decision in *Payne* v. *DeWitt*, 995 P.2d 1088 (Okla. 1999), the Due Process Clause does not require particularized, advance notice and instead is satisfied whenever "a litigant on whom the discovery sanction of a directed verdict is imposed [is] warned [of the possibility of the sanction] by any source, including the litigant's own counsel." App., *infra*, 11a.[10] The court held that the notice requirement was satisfied here because HCA filed its own motion for discovery sanctions against respondents and thereby indicated its awareness that discovery violations can result in sanctions. *Ibid.* Thus, there was no need for "explicit evidence" that "notice was given" by the court that it was considering the premature termination of HCA's right to defend itself. *Id.* at 10a.

This minimalist understanding of "notice" strips the constitutional guarantee of any practical value. Notice is necessary "so that the subject of the sanctions motion can prepare a defense." *60 E. 80th St. Equities*, 218 F.3d at 117. Additionally, it ensures that "the judge will have time to consider the severity and propriety of the proposed sanction in light of the attorneys' explanation for their conduct" and facilitates appellate review by guaranteeing that "the

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[10] The court confirmed the constitutional nature of this ruling in its opinion on rehearing. See App., *infra*, 52a.

facts supporting the sanction will appear in the record." *Kirshner* v. *Uniden Corp. of Am.*, 842 F.2d 1074, 1082 (9th Cir. 1988). Moreover, the requirement of particularized notice can play an important curative role: If "the sanctioned party is on notice that its pattern of behavior will result in sanctions if it continues" (*Kilpatrick* v. *Bullough Abatement, Inc.*, 199 P.3d 957, 967 (Utah 2008)), the party has "one last chance to obey the court order in full" before the entry of a sanction that might deprive it of its right to a trial (*Ohio Furniture Co.* v. *Mindala*, 488 N.E.2d 881, 883 (Ohio 1986) (per curiam)). Contrary to the evident belief of the Oklahoma courts, severe sanctions such as dismissal or a directed judgment on liability should be reserved for truly defiant conduct (see *Societe Internationale*, 357 U.S. at 212), not awarded as the grand prize in a game of "gotcha."

Unsurprisingly, given the central role that notice has always played as a bulwark of due process, the viewpoint of the Oklahoma Court of Civil Appeals is irreconcilable with this Court's precedents. The Court has explained that "[n]otice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act" (*Lambert* v. *California*, 355 U.S. 225, 228 (1957)) or on the basis of actions already taken. Indeed, "[e]lementary notions of fairness enshrined in [this Court's] jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 574 (1996). This Court has required particularized notice in a wide range of scenarios—from the possible foreclosure on a tax lien (*Covey* v. *Town of Somers*, 351 U.S. 141, 146 (1956)) to the possible imposition of the death penalty (*Lankford*,

500 U.S. at 122). One particularly instructive case—*In re Ruffalo*, 390 U.S. 544 (1968)—involved attorney disciplinary proceedings. In *Ruffalo*, this Court considered whether misconduct identified for the first time during a disciplinary hearing could be the basis for sanctions. The Court concluded that the "absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived [the attorney facing discipline] of procedural due process." *Id.* at 552. Under that standard, particularized notice is required, and the decision below should be reversed.

2. When a party faces sanctions, notice is useless without a meaningful opportunity to respond. After providing insufficient notice, the Oklahoma courts compounded their error by refusing to allow HCA "to file a written response to the factual assertions in the Shinns' motion [or] to supplement the record with the documents produced by HCA." App., *infra*, 54a.

Although the court below acknowledged that, under this Court's precedents, a trial court may not dismiss an action for a *plaintiff's* discovery violation "without affording [the] party the opportunity for a hearing on the merits of the cause" (App., *infra*, 53a (quoting *Goldman* v. *Goldman*, 883 P.2d 181, 184 (Okla. App. 1992))), it concluded that no hearing is necessary before a court imposes a directed judgment of liability for a *defendant's* discovery violation. The court concluded that it was sufficient that "counsel for the Shinns made a detailed record." *Id.* at 54a.

That rationale is manifestly incorrect. As this Court recently reiterated, "the Due Process Clause prohibits a State from punishing an individual without first providing that individual with 'an opportu-

nity to present every available defense.'" *Philip Morris USA* v. *Williams*, 549 U.S. 346, 353 (2007) (quoting *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972)). The right to introduce evidence in one's defense is required whenever a party's substantial rights are affected. But where a "reputation is at stake," the opportunity to be heard is "especially important." *Prudential Ins. Co.*, 278 F.3d at 191. Sanctions deprive a party of property but also "act as a symbolic statement about the * * * quality and integrity" of the party and its lawyers. *Ibid.* (internal quotation marks omitted).

Here, the Oklahoma courts punished HCA severely—directing a judgment against it on liability and labeling it a "perjur[er]"—without giving it more than an hour's notice, without allowing it to file a written response to the charges upon which the punishment was based, and without permitting it to introduce evidence in its defense. In short, the Oklahoma courts effectively permitted HCA to present *no* available defense, much less "every available defense," before imposing a massive deprivation of property.[11]

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[11] The Oklahoma Court of Civil Appeals stated that any lack of due process was cured by subsequent proceedings in which respondents sought additional monetary sanctions for the same alleged discovery violations and HCA was finally able to file a written response. App., *infra*, 55a. However, due process is required *before* the deprivation of property; even if the trial court had reconsidered its original decision to direct a verdict of liability—which it did not—later proceedings could not cure the constitutional defect: "A subsequent hearing to alter or amend the sanctions that have been previously imposed does not satisfy due process, or cure a previous due process violation." *Heal* v. *Heal*, 762 A.2d 463, 469 (R.I. 2000); accord *Dailey*, 141 F.3d at 229–230; *Tom Growney*, 834 F.2d at 836–837; *Textor* v. *Bd. of*

C. This Case Is An Excellent Vehicle For Providing The Lower Courts With The Necessary Guidance On This Important And Recurring Issue.

This case is an ideal vehicle for resolving the divisions in the lower courts regarding the procedural safeguards that must be provided to litigants before the imposition of severe sanctions. There can be no question that HCA squarely presented its due process objections—it challenged the adequacy of the notice that it received and requested the opportunity to file both a written response to the sanctions motion and to present evidence in its defense—only to be rebuffed at every turn. See App., *infra*, 75a, 101a. It raised these same issues on appeal (Brief in Chief of HCA at 6–12) and, after an unsatisfactory resolution by the Oklahoma Court of Civil Appeals, sought rehearing (Petition for Rehearing at 4–5). The Court of Civil Appeals, in its two opinions, squarely rejected HCA's due process arguments. App., *infra*, 7a–12a, 51a–58a. HCA then sought discretionary review on these issues in the Oklahoma Supreme Court (Petition for a Writ of Certiorari at 8–10), but that court denied review. App., *infra*, 64a.

Not only has the due process issue been presented and passed upon, but it clearly is an important one that recurs with great frequency. Motions for sanctions have become a regular feature of civil litigation. Indeed, while sanctions may once have been used mainly as a shield to protect litigants from recalcitrant refusals to comply with basic discovery obligations, they now much more often are used as a sword to provide a party with a strategic advantage.

Regents of N. Ill. Univ., 711 F.2d 1387, 1395 (7th Cir. 1983); see also *Armstrong*, 380 U.S. at 550–551.

The number and frequency of cases in which a plaintiff has sought an order barring a defendant from contesting liability, for example, have increased dramatically in recent years. See Jonathan J. Dunn & William J. King, *Discovery Sanctions as an Independent Case Strategy: An Alarming Trend in Litigation*, ABA FIDELITY & SURETY LAW COMM. NEWSLETTER, Winter 2002, at 17 ("[A] recent trend in litigation involves opposing counsel propounding discovery solely to obtain sanctions."). Given the stakes—millions or billions of dollars in liability and a serious blow to the reputations of the defendant and its counsel—it is imperative that adequate procedural safeguards be provided before the imposition of such a severe sanction.

The importance of the issue is well-illustrated by this case, in which the trial court directed a judgment of liability against HCA and then instructed the jury that HCA had committed perjury, without so much as permitting HCA to respond to respondents' allegations in writing or to introduce evidence in its defense. The ultimate outcome is an $18 million judgment that bears no relationship to the extent of the injury or the degree of reprehensibility of the underlying conduct. Further review is warranted to make clear that the Constitution requires much more before a party can be deprived of property in this way.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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