No. 08-1467

In The
Supreme Court of the United States

NICOLAS CARRANZA,
Petitioner,

v.

ANA CHAVEZ, CECILIA SANTOS, JOSE CALDERON, ERLINDA FRANCO, AND DANIEL ALVARADO,
Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

1. Should a United States court exercise jurisdiction over claims asserted by United States and foreign citizens against a United States citizen pursuant to the Alien Tort Statute, 28 U.S.C. Sec. 1350, and the Torture Victim Protection Act, Note to 28 U.S.C. Sec. 1350, when the defendant might be immune from suit in El Salvador based upon a Salvadoran law that provides amnesty from claims brought in El Salvador?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statute

Rules

STATEMENT OF THE CASE

I. Facts of this case.

A United States jury found Nicolas Carranza liable for his role in gross human rights violations, including torture of the plaintiffs, extrajudicial killing of the plaintiffs' relatives, and crimes against humanity, and awarded the plaintiffs compensatory and punitive damages. Carranza now seeks to avoid this liability.

For a further statement of the facts of this case, Respondents hereby incorporate by reference the "Background" section of the opinion rendered in this case by the United States Court of Appeals for the Sixth Circuit. (App. to Pet. for Writ of Cert. 3a-5a.)

II. Proceedings in this case.

Before beginning the trial on the merits, the United States District Court for the Western District of Tennessee ruled as a matter of law that the case should not be dismissed on comity grounds. The court ruled that the Salvadoran Amnesty Law neither prohibits legal claims filed outside El Salvador nor conflicts with the Alien Tort Statute, 28 U.S.C. Sec. 1350 ("ATS"), or the Torture Victim Protection Act, Note to 28 U.S.C. Sec. 1350 ("TVPA"). (App. to Pet. for Writ of Cert. 81a-93a.)

At no time during the district court proceedings did Carranza satisfy his burden of proving the affirmative defense that the Salvadoran Amnesty Law barred the plaintiffs from bringing their claims in a United States court. Carranza did not even submit the text of the Salvadoran Amnesty Law to the court in support of his

pre-trial dispositive motions or at any time during the trial in this case. Throughout the proceedings, Carranza failed to present any evidence to prove his entitlement to amnesty in the United States or even in El Salvador. Indeed, Carranza now argues that the amnesty law does not necessarily apply to cases, such as this one, that involve "fundamental human rights." (Pet. for Writ of Cert. 12.)

At the conclusion of the trial, which took place over the course of three weeks in 2005, the jury returned a six million dollar verdict in favor of Plaintiffs Cecilia Santos, Jose Calderon, Erlinda Franco, and Daniel Alvarado ("Plaintiffs"). (App. to Pet. for Writ of Cert. 28a-30a.) Following the trial, the district court denied Carranza's motion for judgment notwithstanding the verdict, new trial, and/or remittitur. (*Id.* at 25a-51a.) Carranza appealed the district court's decision to the Sixth Circuit.

In his appellate brief, Carranza argued that "[t]he Standard of Review regarding the application of the Doctrine of Comity is whether or not the Court abused its discretion in failing to apply the Doctrine of Comity." Carranza thereby waived his right to claim at this stage that the Sixth Circuit should have applied a de novo standard of review to the district court's comity analysis.

The Sixth Circuit heard oral argument by the parties and by amicus, the Republic of El Salvador, on October 28, 2008. At oral argument, counsel for the Republic of El Salvador reluctantly admitted that the United States Department of State did not accept his request to participate in the appeal.

The Sixth Circuit unanimously affirmed the jury's verdict on March 17, 2009. (App. to Pet. for Writ of Cert. 1a-24a.)

REASONS FOR DENYING THE PETITION

I. Carranza does not allege any Rule 10 reason for granting his petition for certiorari.

Nicolas Carranza's petition for certiorari fails to state any reason set forth in Rule 10 of the Rules of the United States Supreme Court to justify granting his petition. Carranza has merely petitioned this Court to right what he incorrectly believes to be a misapplication of a properly stated rule of law.

Carranza's petition does not, and cannot, claim (1) that any decisions of the United States courts of appeals are in conflict on the issues presented by his petition, (2) that any such conflict exists between the decisions of the courts of appeals and any decision of a state court of last resort, (3) that the decisions of the lower courts in this matter decided an important question of federal law that has not been, but should be, decided by this Court, or (4) that the lower courts' decisions conflict with any relevant decisions of this Court. *See* SUP. CT. R. 10.

Carranza cannot allege any relevant splits in judicial authority because the law of international comity, which lies at the foundation of Carranza's petition, is well-settled in the United States. As this Court has held, principles of international comity do not affect a United States court's application of domestic law where there is no true conflict between such law and any relevant foreign law. *Hartford Fire*

Ins. Co. v. Cal., 509 U.S. 764, 798-99 (1993); *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 555 (1987) ("[T]he threshold question in a comity analysis is whether there is in fact a true conflict between domestic and foreign law.") (Blackmun, J., concurring in part and dissenting in part); *see also In re Simon*, 153 F.3d 991, 999 (9th Cir. 1998) ("[G]eneral principles of international comity . . . [a]re limited to cases in which 'there is in fact a true conflict between domestic and foreign law.'"); *In re Maxwell Commc'n Corp.*, 93 F.3d 1036, 1049 (2d Cir. 1996) ("International comity comes into play only when there is a true conflict between American law and that of a foreign jurisdiction."). Carranza does not question *Hartford Fire*'s authority or suggest that the lower courts have divided when interpreting it. Carranza merely argues that the Sixth Circuit misapplied *Hartford Fire* to the facts of this case.

Carranza similarly does not allege any split in judicial authority concerning the prudential considerations that guide a court's decision whether to apply United States law when confronted with an allegedly conflicting foreign law. Rather, Carranza appropriately cites this Court's 2004 decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), as the authority enumerating such considerations.

Unable to allege any split in judicial authority related to the issues he presented to the district court and the Sixth Circuit Court of Appeals, Carranza merely seeks a reversal of the Sixth Circuit's decision, which he claims misapplied the precedents this Court set forth in *Hartford Fire* and *Sosa*. As Rule 10 makes clear, however, a "petition for a writ of certiorari is

rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." SUP. CT. R. 10.

Having stated no Rule 10 reason for granting a petition for certiorari and relying merely on the assertion that the Sixth Circuit's decision misapplied the well-settled law of international comity, Carranza's petition should be denied.

II. The jurisdiction granted by the ATS and TVPA extends to this case.

Carranza's assertion that the jurisdiction granted by the ATS and TVPA does not extend to this case ignores the clear language of both statutes and the facts at the heart of this case. Moreover, Carranza's attempt to overcome the weakness of his jurisdictional argument by simultaneously arguing that he is protected by the Salvadoran Amnesty Law for the purpose of the comity analysis and unprotected by the same law for the purpose of an untimely exhaustion of remedies defense is inherently contradictory and without merit.

The TVPA creates a civil cause of action for damages against any person who "subjects an individual to torture . . . or subjects an individual to extrajudicial killing." Note to 28 U.S.C. Sec. 1350.

The ATS provides courts in the United States with jurisdiction over claims by aliens injured by a tort "committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. Sec. 1350. As stated in this Court's decision in *Sosa v. Alvarez-Machain*, Congress's enactment of the TVPA

confirmed the jurisdictional reach of the ATS to encompass claims based upon torture and extrajudicial killing. 542 U.S. 692, 727-28 (2004).

In *Sosa*, this Court meticulously reviewed the history of the ATS. *Id.* at 712-38. For nearly two hundred years following its enactment, the ATS conferred jurisdiction over only three widely-accepted common law causes of action: violation of safe conducts, infringement of the rights of ambassadors, and piracy. *Id.* at 712, 724. When Congress passed the TVPA, however, it confirmed the federal courts' recent articulation of a broader jurisdictional reach for the ATS. The TVPA provides "a clear mandate . . . that establishes an unambiguous and modern basis for federal claims of torture and extrajudicial killing." *Id.* at 727-28.

Plaintiffs Cecilia Santos and Daniel Alvarado were brutally tortured in El Salvador, and both Erlinda Franco's husband and Jose Calderon's father were murdered by the Salvadoran military. The jury found the torture of Alvarado and the assassination of Franco to be crimes against humanity. In light of *Sosa*, Carranza's claim that the ATS and TVPA do not extend to Plaintiffs' claims simply rings hollow. To the contrary, Congress expressly intended the acts inflicted upon Plaintiffs to lie at the very core of these two statutes.

Carranza attempts to sidestep *Sosa*'s straightforward holding on the jurisdictional reach of the ATS by focusing not on the language of the two statutes or the facts underlying Plaintiffs' claims but, rather, on considerations of comity and "full faith and credit." Such considerations, which will be addressed

in subsequent sections of this brief, have no bearing upon the jurisdiction granted by the ATS and the TVPA. Simply put, this suit was brought in a United States court by United States citizens and aliens against a United States citizen pursuant to two United States statutes expressly intended to address torture and murder. The jurisdiction granted by the ATS and TVPA clearly extends to this case.

In a further attempt to overcome the weakness of his jurisdictional argument, Carranza alternately asserts the jurisdiction of the TVPA does not extend to this case because Plaintiffs failed to exhaust their Salvadoran remedies before initiating this action. During the proceedings at the district court level, however, Carranza conceded that Plaintiffs' Salvadoran remedies had been exhausted because the Salvadoran Amnesty Law would bar all suits against Carranza in El Salvador. Having already conceded this point, Carranza has waived and cannot now assert his right to an exhaustion defense. Even if Carranza had not waived his exhaustion defense, he could not now simultaneously claim to be protected by the Salvadoran Amnesty Law for the purpose of his comity analysis and unprotected by the Salvadoran law for the purpose of an exhaustion defense.

III. This Court's decision in *F. Hoffman-LaRoche v. Empagran* does not support Carranza's petition for certiorari.

Carranza's reliance on *F. Hoffman-LaRoche v. Empagran*, 542 U.S. 155 (2004), upon which he bases the first of his two arguments for granting his petition, is misplaced both factually and legally.

Empagran concerned the application of the Foreign Trade Antitrust Improvements Act ("FTAIA") to alien plaintiffs seeking to use United States courts to redress anticompetitive conduct that caused only foreign injury. *Id.* at 158. In *Empagran*, plaintiff citizens of the Ukraine, Australia, Ecuador and Panama each bought vitamins from defendants wholly outside of the United States and then attempted to bring price-fixing claims in United States courts under the authority of the Sherman Act. *Id.* at 159-160.

With no explanation or justification, Carranza asserts that *Empagran* "describes perfectly [Plaintiffs], in the context of anti-trust instead of tort." (Pet. for Writ of Cert. 17.) Even the most cursory comparison of the *Empagran* facts to the facts in this case reveals how dramatically Carranza overstates his point. As Carranza notes, *Empagran* dealt solely with "claims that included foreign conduct with strictly foreign repercussions." (*Id.* at 16.) In contrast, Plaintiffs' case against Carranza includes two United States citizens suing a United States citizen under the authority of two United States statutes that grant domestic remedies to Plaintiffs that in no way affect El Salvador's legal regime. Far from exactly describing Plaintiffs, the *Empagran* facts describe a scenario bearing little, if any, relevance to Plaintiffs' case.

Empagran's legal analysis is also irrelevant to Plaintiffs' case. The FTAIA expressly excludes from the Sherman Act's reach much anticompetitive conduct that causes only foreign injury, and the Court's opinion is entirely concerned with Congress's express intent for the Sherman Act not to apply to a subset of foreign commercial activity. *See Empagran*, 542 U.S. at 158. The ATS and TVPA contain no comparable territorial

limitation. To the contrary, both statutes expressly grant access to the federal courts to plaintiffs seeking to redress torture and extrajudicial killings that took place in foreign nations. As the Sixth Circuit held in its opinion below, "*Empagran* is of little relevance to the law at issue in this case." (App. to Pet. for Writ of Cert. 15a.) The defendant's interpretation of *Empagran* would eviscerate the intent, purpose, meaning, and scope of the two statutes.

IV. International comity principles do not require this Court to reverse the Sixth Circuit.

A. Carranza cannot invoke international comity principles in his defense because he did not prove his entitlement to amnesty under the Salvadoran Amnesty Law.

International comity principles could not have affected the district court's exercise of jurisdiction over Plaintiffs' claims because Carranza failed to prove he would have been entitled to amnesty if Plaintiffs had sued him in El Salvador.

Any defendant asserting an amnesty defense bears the burden of proving entitlement to the amnesty because the protection of a law of general amnesty functions as an affirmative defense. *See Dixon v. United States*, 548 U.S. 1, 8 (2006) (noting that the common law burden of proving affirmative defenses rests on the defendant); *cf. Crawford-El v. Britton*, 523 U.S. 574, 587 (1998) ("[Q]ualified immunity is an affirmative defense and . . . the burden of pleading it rests with the defendant.") (quotations omitted);

Harlow v. Fitzgerald, 457 U.S. 800, 812 (1982) ("The burden of justifying absolute immunity rests on the official asserting the claim."). As with any affirmative defense, if a defendant does not prove his or her entitlement to be covered by an amnesty law, a plaintiff's claims against him or her will not be barred, and the defendant will have to stand trial.

Throughout the proceedings in the district court, Carranza ignored his burden of proof. Carranza never introduced facts into the record to prove his entitlement to amnesty and, remarkably, never even entered the text of the Salvadoran Amnesty Law into the record as evidence.[1] Moreover, Carranza now suggests in his petition for certiorari that he could stand trial for his actions in El Salvador. In response to the Sixth Circuit's "speculation" that Plaintiffs' claims against him would be barred in El Salvador, Carranza's petition counters that "the Supreme Court of El Salvador has specifically inferred the discretion of Salvadoran courts to waive the immunity of the Amnesty Law in particular cases involving 'fundamental human rights.'" (Pet. for Writ of Cert. 12.) By suggesting today that he might not be protected by the Salvadoran Amnesty Law were he to be sued for the same or similar acts in El Salvador, Carranza highlights his failure to prove his entitlement to an amnesty defense.

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[1] The full text of the Salvadoran Amnesty Law was submitted in this case only after the Sixth Circuit specially requested a copy of the law from the defendant just days before oral argument on appeal.

Carranza also misleads this Court by suggesting that the lower courts equitably tolled the statute of limitations in this case due to his immunity from suit. The equitable tolling decision was grounded completely in evidence of continuing violence in El Salvador that prohibited Plaintiffs from safely pursuing their case. It was not based in any way upon Carranza proving his entitlement to immunity. (App. to Pet. for Writ of Cert. 10a-12a.)

Carranza further misleads this Court by suggesting the district court prevented him from proffering the only expert intended to testify to the effect of the Salvadoran Amnesty Law. (Pet. for Writ of Cert. 10.) The district court prevented Dr. David Escobar Galindo from testifying to the jury because his proposed testimony was simply a legal conclusion resolving an ultimate issue at trial, which is not an appropriate subject for expert testimony. (App. to Pet. for Writ of Cert. 37a. (citing *Berry v. City of Detroit*, 25 F.3d 1342, 1353-54 (6th Cir. 1994)).) Dr. Galindo was not proffered as a fact witness, and Carranza cannot now suggest that Galindo's exclusion prevented Carranza from convincing the Court that the Salvadoran Amnesty Law would have applied to him in El Salvador.

Because Carranza never proved that the Salvadoran Amnesty Law would have barred Plaintiffs' claims against him if their claims had been brought in El Salvador, principles of international comity did not need to be addressed by the lower courts and do not need to be revisited by this Court.

B. Carranza cannot invoke international comity principles because the ATS and TVPA do not conflict with the Salvadoran Amnesty Law.

Even if Carranza had met his burden of proving his entitlement to amnesty under the Salvadoran Amnesty Law, comity principles would not have affected the district court's exercise of jurisdiction over Plaintiffs' claims because the Salvadoran Amnesty Law does not conflict with the ATS or TVPA.

The issue of comity only arises when "there is in fact a true conflict between domestic and foreign law." *Hartford Fire*, 509 U.S. at 798 (quotation omitted); *see also Societe Nationale Industrielle Aero*, 482 U.S. at 555. There is no conflict for comity purposes "where a person subject to regulation by two states can comply with the laws of both." *Hartford Fire*, 509 U.S. at 799 (citation omitted). The current case complied with both the Salvadoran Amnesty Law and the ATS and TVPA because the Salvadoran Amnesty Law does not prohibit legal claims filed outside El Salvador.

As the Sixth Circuit stated in its opinion below, a "statute must not be interpreted as having extraterritorial effect without a clear indication that it was intended to apply outside the country enacting it." (App. to Pet. for Writ of Cert. 14a.) Nowhere in the text of the Salvadoran Amnesty Law does the Salvadoran legislature indicate an intent for the law to apply extraterritorially, nor did Carranza attempt to prove otherwise. (*Id.* at 110a-115a.) Seeing no evidence of exterritorial intent in the plain language of the amnesty law, the district court properly rejected Carranza's comity analysis, and the Sixth Circuit

properly affirmed the district court's ruling. (*Id.* at 14a, 90a.)

In holding that the Salvadoran Amnesty Law cannot be construed to apply extraterritorially, the Sixth Circuit cited the decision in *BMW Stores, Inc. v. Peugeot Motors of America, Inc.*, 860 F.2d 212, 215 n.1 (6th Cir. 1988). In *BMW Stores*, the statute at issue protected car dealers within Kentucky and did not have any language indicating it was intended to protect dealers extraterritorially. *Id.* at 214. The Sixth Circuit affirmed the principle that "unless the intent to have a statute operate beyond the limits of the state or country is clearly expressed or indicated by its language, purpose, subject matter, or history, no legislation is presumed to be intended to operate outside the territorial jurisdiction of the state or country enacting it." *Id.* at 215 n.1. No such language appears in the Salvadoran Amnesty Law. (App. to Pet. for Writ of Cert. 110a-115a.)

The Salvadoran Amnesty Law, therefore, does not apply extraterritorially, and Carranza can stand trial in the United States under the jurisdiction of the ATS and TVPA without conflicting with the amnesty law in El Salvador. Accordingly, there is no basis to apply a comity analysis in this case.

C. Even if international comity principles applied to Plaintiffs' claims, the practical consequences of letting the Sixth Circuit's decision stand do not provide adequate grounds to grant Carranza's petition.

Unable to present any reason for this Court to grant his petition, Carranza seizes upon the "practical consequences" language of the *Sosa* decision as a predicate to articulate a wholly unsubstantiated "parade of horribles." Carranza's assessment of the practical consequences of letting the Sixth Circuit's opinion stand should be rejected because his analysis (1) is not supported by the facts and (2) relies wholly upon facts that are not the proper subject of judicial notice.

1. Carranza's speculation about the practical consequences of letting the Sixth Circuit's decision stand is not supported by recent history or the facts of Plaintiffs' case.

Carranza claims, without support, that his petition should be granted because the district court's decision "undermines the very vehicle of El Salvador's transformation from a war torn charnel house to a robust democracy." (Pet. for Writ of Cert. 17.) Carranza fails to mention, however, that the Salvadoran democracy has grown more robust over the past decade even while courts in the United States have tried multiple prominent Salvadorans for torture and murder pursuant to the ATS and TVPA.

In 1999, a representative of the estates of three American nuns and one lay worker who were murdered by members of the Salvadoran National Guard invoked the ATS and TVPA to sue the former director of the Salvadoran National Guard and the former Salvadoran Minister of Defense for their murders. *Ford ex rel. Estate of Ford v. Garcia*, 289 F.3d 1283, 1286 (11th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003). After a much-publicized trial, the jury issued a verdict in the officers' favor, which was later affirmed by the Eleventh Circuit. *Id.* at 1287.

A few years later, the United States District Court for the Eastern District of California entered a ten million dollar judgment against Alvaro Rafael Saravia for his role in the assassination of Salvadoran Archbishop Oscar Romero. *Doe v. Saravia*, 348 F. Supp. 2d 1112 (E.D. Cal. 2004). Archbishop Romero, one of the most important critics of the rampant human rights abuses in El Salvador, had implored the military to lay down their arms and stop murdering Salvadoran citizens days before he was killed. *Id.* at 1121. As in *Ford*, the *Saravia* claims were based upon the ATS and TVPA. *Id.* at 1142.

The ATS and TVPA were, again, the bases of claims against former leaders of the Salvadoran military in *Arce v. Garcia*, 434 F.3d 1254 (11th Cir. 2006). In *Arce*, a federal jury awarded over 54 million dollars to three Salvadoran refugees who had been subjected to torture by members of the Salvadoran military between 1979 and 1983. *Id.* at 1256. Like Carranza, the two defendants in *Arce* were top commanders in the Salvadoran military during that period. *Id.* The Eleventh Circuit affirmed the verdict. *Id.*

Each of these trials was conducted publicly with significant media attention in the United States and El Salvador. The courts' exercise of jurisdiction and refusal to defer to the Salvadoran amnesty over the past ten years has not undermined the Salvadoran peace or impaired the growth of democracy in El Salvador.

Not only has Carranza failed to allege or demonstrate any negative effect in El Salvador as a result of these prior cases, he has also failed to demonstrate that the well-publicized verdict in his own case, which was announced over three years ago, has had any adverse effect in El Salvador. To the contrary, Carranza points to the recent election and installation of FMLN candidate Mauricio Funes to the presidency of El Salvador as a testament to the vitality of El Salvador's democracy. (Pet. for Writ of Cert. 8, 12.) Carranza cannot reasonably argue that his case or the earlier three cases discussed above grievously damaged the peace and stability of El Salvador while simultaneously heralding the vitality of the Salvadoran democracy and civil society. Obviously, such cases have not destroyed the peace and democracy of El Salvador.

Carranza also claims that if this Court were to deny his petition, "[r]elations between the United States and El Salvador would suffer as well as those of the United States with every other country that would perceive the blatant violation of El Salvador's sovereignty that is the lower courts' decision." (*Id.* at 23.) Carranza offers no support for this statement. Moreover, when questioned on this point in oral argument, counsel for amicus, the Republic of El Salvador, admitted that the United States Department

of State did not accept his request to participate in the appeal of this matter.[2] The State Department's decision not to participate in this case simply does not comport with Carranza's claim that the exercise of jurisdiction by the district court has harmed or will harm United States relations with El Salvador and the international community.

2. Carranza's speculation relies on an abuse of the judicial notice doctrine.

In support of the assertions refuted above, Carranza relies heavily, and improperly, on the doctrine of judicial notice. In six different footnotes, Carranza asks this Court to take judicial notice of internet documents that are not a part of the record in this case. Plaintiffs would have vehemently challenged the use of these documents at trial, and their judicial notice at this stage in the litigation is wholly inappropriate.

Carranza's petition cites an article posted on www.america.gov for the proposition that the United States considers the amnesty to be critical to El Salvador's peace. (*Id.* at 6.) Later, Carranza cites a website purporting to present a decision of the Supreme Court of El Salvador for the proposition that Carranza may not be protected by the Salvadoran Amnesty Law. (*Id.* at 12.) On four other occasions,

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[2] Considering the State Department's rejection of Carranza's request to intervene, Carranza's argument that this case should be left to the political branches should not be given weight. Moreover, because Carranza did not raise "political question" justiciability concerns at any stage of the district court proceedings, he cannot do so at this point in the litigation.

Carranza presents the Court with articles intended to establish (1) the United States' estimate of the Salvadoran war's death toll, (2) the political affiliations of Ruben Zamora, (3) the results of the most recent Salvadoran election, and (4) the outcome of the trial of two Salvadoran guerillas. (*Id.* at 3, 5, 12, 24.)

Federal Rule of Evidence 201 allows for judicial notice only when the facts proffered are "not subject to reasonable dispute." FED. R. EVID. 201(b). Plaintiffs would have challenged the admissibility of each of the documents discussed above and would have strenuously challenged a number of the facts Carranza asserts are contained therein. Carranza simply cannot foist such "proof" upon the Court at this stage in the litigation for assertions that are totally unsupported by evidence in the record.

CONCLUSION

For the foregoing reasons, Nicolas Carranza's petition for certiorari should be denied.

Respectfully submitted,

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