No. 20-7778

In the
Supreme Court of the United States

Gerald Scott,

Petitioner,

v.

United States of America,

Respondent.

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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Two developments since Scott filed his petition confirm the need to resolve the split over whether crimes of physical inaction require the "use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i).

First, the Third Circuit has made certain the "conflict on the question" here will "persist." Brief for the United States in Opposition ("BIO") at 18. The government had claimed the split could dissipate if the en banc circuit overruled *United States v. Mayo*, 901 F.3d 218 (3d Cir. 2018), which holds that causing "injury without any affirmative use of force [does not] satisfy" the clause here. *Id.* at 228. But rather than scuttle *Mayo* as the government asked, *see United States v. Harris*, 3d Cir. 17-1861, Brief for the United States (Aug. 27, 2018) at 16-30, the circuit has vacated the en banc proceedings that imperiled it. *See id.*, Order of Sept. 17, 2021. Thus *Mayo*, and this split, are here to stay.

Second, this Court decided *Borden v. United States*, 141 S. Ct. 1817 (2021), in which all the Justices agreed the clause here requires physical action. This guts the Second Circuit's premise that "a defendant's use of force does not depend on his own actions in initiating or applying injurious force." Pet. App. 8a. *Borden* is the latest confirmation that physical inaction is no "use of physical force against" anyone.

What we have here, then, is a stubborn split where one side is plainly wrong. Eleven circuits have weighed in (four en banc), and the stakes are immense: whether a whole class of crimes fits this ubiquitous clause, which will determine if people face consequences like deportation and years-longer prison sentences or not. Certiorari is warranted.

DISCUSSION

I. The Circuits Are Decisively Split Over this Recurring Question

"[I]t cannot be doubted that there is an important need for uniformity in federal law." *Michigan v. Long*, 463 U.S. 1032, 1040 (1983). But there's no uniformity in the application of the clause here, which arises daily: people convicted of crimes like Scott's will face consequences such as a 15-year mandatory minimum (§ 924(e)(2)(B)(i)), a far higher Sentencing Guidelines range (U.S.S.G. § 4B1.2(a)(1)), a consecutive sentence of at least 5 years (§ 924(c)(3)(A)), and deportation (§ 16(a)) – or not – based solely on where in the country their cases are litigated.[1]

But as "the application of federal legislation is nationwide," *Jerome v. United States*, 318 U.S. 101, 104 (1943), there can be only one answer to the question here. And courts – including, tellingly, the Second Circuit – are waiting. "Given the pronounced divisions in the Second Circuit's *en banc* decision," and the pronounced circuit split, "there is reason to think that certiorari may be granted." *United States v. Angel Padilla*, 2021 WL 3056292, at *5 (S.D.N.Y. 2021) (staying that case for this one). *See also, e.g., Eladio Padilla v. United States*, 2d Cir. 21-978, Docket Entry 30 (same); *Johnson v. United States*, 2d Cir. 21-481, Docket Entry 40 (same).

Indeed, *Johnson v. United States*, 576 U.S. 591 (2015), has led to several lower-court disputes this Court has had to resolve. And "more are likely to follow." *Borden*, 141 S. Ct. at 1835 n.2 (Thomas, J., concurring). Here we are.

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[1] If the district court has to "reinstate Scott's original sentence" of 22 years, Pet. App. 54a, then he – who was released on January 5, 2018, is now 56, and has lived without incident since his release – would have to go back to jail for 11 years.

The government acknowledges this split: "Almost every court of appeals that has considered the issue after *Castleman* has recognized that a crime that can be committed by omission may qualify . . . under the [] clause" here. BIO at 17.

One of the contrary courts is the Third Circuit, however, which just decided it will not "revisit the holding of *Mayo*." *Id*. at 18. The chance for that was *Harris*, an en banc case involving crimes of recklessness and inaction in which the government asked the circuit to overrule *Mayo*. But rather than do so, the circuit dissolved the en banc case "[i]n light of *Borden*" and sent *Harris* back to the 3-judge panel for adjudication per *Borden* and circuit law: *Mayo*. *See Harris*, Order of Sept. 17, 2021.

This now "indisputable circuit conflict" would warrant certiorari even if the Third Circuit were alone. Reply Brief for United States at 1, *United States v. Taylor*, No. 20-1459. For example, review has been granted to resolve a "5-1" split over whether one crime fits § 924(c)(3)(A)'s iteration of the clause here. *Id*. at 5.

The question whether crimes of omission fit this clause is likewise weighty, and the Third Circuit is not alone: the Fifth, Sixth and Ninth Circuits agree with it. (The Fourth Circuit is itself split, *see* Pet. 12-13). The circuits on the other side – the First, Second, Seventh, Eighth, Tenth and Eleventh – say a single line in *United States v. Castleman*, 572 U.S. 157 (2014), "Compels the Conclusion" that crimes of omission fit the clause if injury results. Pet. App. 27a. *See also* Pet. 13-14.

But, the government admits, "*Castleman* did not decide the omission issue." BIO at 19. As such, the en banc Fifth Circuit did not disturb its prior ruling that the "'use of physical force' is not necessary to . . . inflict excessive pain upon a child

by depriving the child of medicine or by some other act of omission." *United States v. Resendiz-Moreno*, 705 F.3d 203, 205 (5th Cir. 2013). "*Castleman* does not address whether an omission, standing alone, can constitute the use of force." *United States v. Reyes-Contreras*, 910 F.3d 169, 181 n.25 (5th Cir. 2018) (en banc). The law of the Fifth Circuit – like that of the Third – is thus "settled." BIO at 19. As "*Castleman* does not address" this issue, *Reyes-Contreras*, 910 F.3d at 181 n.25, the circuit has reaffirmed, post-*Castleman*, that "causing injury to a child . . . is not categorically a crime of violence . . . because [it] may be committed by both acts and omissions." *United States v. Martinez-Rodriguez*, 857 F.3d 282, 286 (5th Cir. 2017). *See United States v. Taylor*, 873 F.3d 476, 482 (5th Cir. 2017) ("[U]nder *Martinez-Rodriguez*, Texas's injury-to-a-child offense is broader than the ACCA's elements clause.").[2]

The Sixth Circuit also holds (also en banc) that a "'failure to act' to prevent serious physical harm to a victim when the defendant has a legal duty to do so" is a crime committed "without any 'physical force'" and is thus "too broad" to fit the clause here. *United States v. Burris*, 912 F.3d 386, 398-99 (6th Cir. 2019) (en banc). The government says the crimes in *Burris* didn't fit "because they could be committed by causing 'certain serious mental harms without using physical force.'" BIO at 19 (quoting *Burris*, 912 F.3d at 399). Yet the "without using physical force" part is what mattered. Besides "mental harms," the case involved a mother's

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[2] This additional split – over whether *Castleman* "Compels" the answer here, Pet. App. 27a, or "avowedly did not contemplate the question," *Mayo*, 901 F.3d at 228 – is additional reason to grant Scott's petition. The circuits are divided over both the inaction question and whether *Castleman* answers it. These two conflicts can be resolved at once by deciding this case.

"failure to protect each child from physical and sexual abuse." *Burris*, 912 F.3d at 399. The court explained that, because she "did not have any physical contact with" two of the abused children, she committed that failure-to-protect crime "without any 'physical force.'" *Id.* The government calls this "'dictum,'" BIO at 20 (quoting a concurrence), but the court didn't see it that way, and its view that the clause here requires "physical contact" is in lockstep with Sixth Circuit (and this Court's) cases. *See United States v. Verwiebe*, 874 F.3d 258, 261 (6th Cir. 2017) ("A defendant uses physical force whenever his volitional act sets into motion a series of events that results in the application of a 'force.'") (quoting *Johnson v. United States*, 559 U.S. 133, 140 (2010)) (abrogated on other grounds by *Borden*); *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004) (The clause here requires force to "actually be applied."). The circuit has even cited *Mayo* in ruling that "failing to protect a child is not in itself a violent felony." *Dunlap v. United States*, 784 F. App'x 379, 389 (6th Cir. 2019).

The Ninth Circuit also agrees: As "one cannot . . . use force against another in failing to do something," a manslaughter offense requires no "'use of physical force against the person of another,' because a defendant can be convicted of [it] for an omission." *United States v. Trevino-Trevino*, 178 F. App'x 701, 703 (9th Cir. 2006). True, that ruling was not issued "after *Castleman*." BIO at 17. But as the government implicitly admits, it makes no sense to use that case as a dividing line: "*Castleman* did not decide the omission issue." *Id.* at 19. Also true, the circuit's decision is "not precedent." *Id.* at 20. Yet that makes no difference here, s*ee, e.g., Eastern Associated Coal Corp. v. United Mine Workers of Am., Dist. 17*, 531 U.S. 57,

61 (2000) (citing "unpublished" ruling among those in circuit split), and, as with *Burris*, the Ninth Circuit's ruling matches its (and this Court's) precedents. *See United States v. Laurico-Yeno*, 590 F.3d 818, 821 (9th Cir. 2010) (An offense must "be in the category of 'violent, active crimes' before it can qualify" under this clause, so a crime requiring "'application of force on the victim by the defendant'" qualifies.) (quoting *Leocal*, 543 U.S. at 11, and a state court ruling).

As for the circuits on its side, the government notes "this Court has declined to grant review." BIO at 17. But the early denials are explained by the lack of percolation— which isn't said to be lacking now that 11 of the 12 circuits (including four en banc) have weighed in. *See* Pet. 10-14. And the recent cases either posed a different question, *see Baez-Martinez v. United States*, No. 20-5075, Petition at i ("Whether crimes that may be committed recklessly with a depraved heart mens rea . . . can qualify as a 'violent felony'"), or had vehicle problems— which aren't present in this case. *See United States v. Rumley*, 952 F.3d 538, 551 (4th Cir. 2020) ("'There must be a realistic probability' . . . that the described conduct would be prosecuted under the statute. And Rumley has not made this showing.") (citations omitted).

In sum, "*Castleman* did not decide the omission issue," BIO at 19, which has divided 11 circuits and been debated exhaustively— most recently in the 120 pages of dueling opinions in the en banc court below. Because the split here will not dissipate, a resolution is needed to end the opposing answers to this recurring, highly consequential question. Scott's case, which presents the issue squarely and has no vehicle problems, is the means of doing so.

II. *Borden* is the Latest Repudiation of the Second Circuit's View

This Court's decision in *Borden*, issued after Scott filed his petition, is the most recent rejection of the Second Circuit majority's view: all the Justices agreed the clause here requires physical action.

The four-Justice plurality: The clause "demands that the perpetrator direct his action at, or target, another individual." *Borden*, 141 S. Ct. at 1825. He must have "deployed" or "directed force at another." *Id.* at 1827. The clause reaches only a "narrow 'category of violent, active crimes.'" *Id.* at 1830 (citation omitted). "[I]t captures [] 'violent, active' conduct alone," namely conduct constituting an "active employment of force against another person." *Id.* at 1834 (citation omitted).

Justice Thomas: "As I have explained before, . . . the 'use of physical force' [is a] phrase [that] 'has a well-understood meaning applying only to intentional acts.'" *Id.* at 1835 (Thomas, J., concurring) (quoting *Voisine v. United States*, 136 S. Ct. 2272, 2279, 2290 (2016) (Thomas, J., dissenting)). "When a person talks about 'using force' against another, one thinks of intentional acts— punching, kicking, shoving, or using a weapon." *Voisine*, 136 S. Ct. at 2284 (Thomas, J., dissenting). "In my view, a 'use of physical force' most naturally refers to cases where a person intentionally creates force and intentionally applies that force against a [person]." *Id.* at 2285. Thus, "when an individual does not engage in any violence against persons . . . there is no 'use' of physical force." *Id.* at 2287.

And the dissent: The text "'limits the scope' of the use-of-force clause to 'crimes involving force applied to another person.'" *Borden*, 141 S. Ct. at 1839

(Kavanaugh, J., dissenting) (citation omitted). The "word 'against' is often defined to mean 'mak[ing] contact with.' That is the logical meaning of 'against' in the context of ACCA's use-of-force clause." *Id.* at 1846 (citation omitted).

Accordingly, someone who sits and watches his charge suffer a heart attack, slide below the water in a bathtub, or swallow a handful of allergy-inducing peanuts, engages in no "active employment of force against [that] person." *Id.* at 1834 (plurality op.). "The 'use of physical force,' as *Voisine* held, means the 'volitional' or 'active' employment of force." *Id.* at 1825 (citing *Voisine*, 136 S. Ct. at 2279-81). Yet the heart attack, bathwater and peanuts, as with "waves crashing against the shore," *id.* at 1826, "have no volition— and indeed, cannot naturally be said to 'use force.'" *Id.* Nor has the caregiver used those forces "against" his charge: he has not "direct[ed] any action at," *id.* at 1825, or "deployed" force against anyone. *Id.* at 1827. His inaction entails no "force applied to another," *id.* at 1839 (Kavanaugh, J., dissenting), and no "mak[ing] contact with" anybody. *Id.* at 1846. He neither "creates [any] force" nor "applies [any] force." *Voisine*, 136 S. Ct. at 2285 (Thomas, J., dissenting). His passivity, though criminal, is not an "act[] of violence." *Id.* at 2284. And as he "does not engage in any violence against [his charge] . . . there is no 'use' of physical force." *Id.* at 2287. His crime is outside the clause here.

Borden follows a long line of this Court's rulings on that clause— all of which have limited it to "violent, active crimes," *Leocal*, 543 U.S. at 11, requiring a "physical act" of force "exerted upon" or "directed against a person." *Johnson*, 559 U.S. at 139. All the "various definitions of 'use' imply action," *Bailey v. United*

States, 516 U.S. 137, 145 (1995), meaning "an active employment of force" is needed. *Voisine*, 136 S. Ct. at 2279. And the "against" language means the force must "actually be applied." *Leocal*, 543 U.S. at 11. There must be "contact" resulting from "'the physical force of the offender.'" *Stokeling v. United States*, 139 S. Ct. 544, 553 & 555 (2019) (citation omitted). Thus, a crime "does not have 'as an element the . . . use of physical force against the person of another'" if the crime "amounts to a form of inaction." *Chambers v. United States*, 555 U.S. 122, 127-28 (2009).

The inevitable conclusion given this uniform wall of precedent is that a crime of inaction – which involves no physical act, no application of force, and no contact – entails no "use of physical force against" anyone.

The government's argument to the contrary reprises the majority's below. It maintains that a caregiver who sits and watches his charge have a heart attack "'use[s]' force in the ordinary sense of that word – he 'employ[s]' or 'utilize[s]' it for his desired purposes – by intentionally taking advantage of the force to seriously injure (and ultimately kill)." BIO at 12 (quoting Pet. App. 22a). This view derives not from any ruling of this Court on the clause here, but from one definition of "use" that means "to avail oneself of." *Smith v. United States*, 508 U.S. 223, 229 (1993). Yet *Smith* held "the exchange of a gun for narcotics constitutes 'use' of a firearm." *Id*. at 225. That is no "form of inaction." *Chambers*, 555 U.S. at 128. "Language, of course, cannot be interpreted apart from context." *Smith*, 508 U.S. at 229.

The context here is a clause requiring not just the "use of physical force" but the use of that force "against the person of another." Again, this "demands that the

perpetrator *direct his action at*" someone. *Borden*, 141 S. Ct. at 1825 (plurality op.; emphasis added). The text "'limits the scope' of the use-of-force clause to 'crimes involving force *applied to* another person.'" *Id.* at 1839 (Kavanaugh, J., dissenting) (emphasis added; citation omitted). There must be "'physical force *of the offender*.'" *Stokeling*, 139 S. Ct. at 555 (emphasis added; citation omitted).

Sitting still while an external force strikes one's charge doesn't fit that bill. Whatever "desired purposes" are advanced by "taking advantage of the force" through complete passivity, BIO at 12, there is no "active employment of force against another person." *Borden*, 141 S. Ct. at 1834 (plurality op.). The caregiver hasn't "create[d] [the] force," *Voisine*, 136 S. Ct. at 2285 (Thomas, J., dissenting), or "deployed" or "directed" it, *Borden*, 141 S. Ct. at 1827 (plurality op.), or "applied" it. *Id.* at 1839 (Kavanaugh, J., dissenting). He's simply let the force run its course. Though foul, his physical inaction is not a "use of physical force against" his charge.

Nothing in *Castleman* holds (or hints) otherwise. That case concerned a crime of commission, not omission, and "did not decide" the question here. BIO at 19. Nonetheless, the government says the line in it the majority below seized on – "the knowing or intentional causation of bodily injury necessarily involves the use of physical force," 572 U.S. at 157 – is "directly relevant" because the clause here is "materially identical" to the one in *Castleman*. BIO at 15. Not so.

The clause in *Castleman* defined a "misdemeanor crime of domestic violence" as requiring only the "use of physical force." 572 U.S. at 161. Unlike here, it didn't require force to be used "against the person of another." As *Borden* explains,

"'against another,' when modifying the 'use of force,' demands that the perpetrator direct his action at" someone. 141 S. Ct. at 1825 (plurality op.). The text "'limits the scope' of the use-of-force clause to 'crimes involving force applied to another person.'" *Id.* at 1839 (Kavanaugh, J., dissenting) (quoting government brief).[3]

The government says *Castleman*'s "key reasoning" is that "the 'use of force' in poisoning a drink 'is *not* the act of "sprinkling" the poison; it is the act of *employing poison knowingly* as a device to cause physical harm.'" BIO at 16 (emphasis in BIO; quoting *Castleman*, 572 U.S. at 171). Yet "employing" the poison is done by adding it to the drink: that's how the poisoner "direct[s] his action at" the victim. *Borden*, 141 S. Ct. at 1825. *Castleman*'s "key reasoning" is simply that an indirect "application of force," 572 U.S. at 170, counts just as much as a direct one: "That the harm [of poisoning] occurs indirectly, rather than directly (as with a kick or punch), does not matter. Under Castleman's logic, after all, one could say that pulling the trigger on a gun is not a 'use of force' because it is the bullet, not the trigger, that actually strikes the victim." *Id.* at 171. Poisoning, kicking, punching and shooting are all uses of force: one person needn't lay hands on another, as the "concept of 'force' encompasses even its indirect application." *Id.* at 170. But this "Court has never held, in *Castleman* or any other case, that *omissions* constitute indirect force."

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[3] The government claims the distinction between the clauses in *Castleman* and *Borden* "does not support petitioner's argument here, which concerns the language regarding 'use' of force." BIO at 15-16 n.*. But Scott's argument obviously isn't based solely on the word "use." As explained throughout his petition, "[o]rdinary English and this Court's rulings thoroughly confirm that physical inaction is not a 'use of physical force against the person of another.'" Pet. 2.

Rumley, 952 F.3d at 552 (Motz, J., concurring; emphasis in original). No wonder: an omission entails no "application of force," directly or indirectly, by or to anyone. *Castleman*, 572 U.S. at 170. There's no "force applied" or "contact" at all. *Borden*, 141 S. Ct. at 1839, 1846 (Kavanaugh, J., dissenting).

As *Borden* also confirms, the clause here doesn't come from the common law: the "phrase 'use of physical force against the person of another' is [not] a term of art; there is not, even in the dissent's imagining, any historical or distinctly legal meaning associated with that language." *Id*. at 1828 (plurality op.). And contra the citation-less claim of the majority below, there is no "common law background recognizing omission as action." Pet. App. 25a. As shown, *see* Pet. 24-28, the conflation of inaction and action is a product of modern state statutes decreeing that "omit[ting] to perform an act" is an "act." BIO at 13. Many states had so decreed by the time Congress wrote the clause here in the 1980s, but if *that's* what the majority meant by "common law background," it doesn't change anything. If Congress had wanted to incorporate the states' practice of deeming inaction action, it would have used like text. It didn't: the clause Congress wrote speaks of the "use of physical force against the person of another"— not of an "act" or "omitting to perform an act" or, for that matter, the "causation of bodily injury." BIO at 15. And *Borden* is but the latest case to make crystal clear that Congress's text requires physical action.

That's why the circuit had to "perform[] contortions" to rule against Scott. Pet. App. 75a (Leval, J., joined by Katzmann, Lohier, Carney and Pooler, JJ., dissenting). This Court has always said the clause here requires action; thus, when

asked in *Chambers* if a crime of inaction qualified, the Court said no. This is not a close question: physical inaction is no "use of physical force against" anyone.

Indeed, the government acknowledges that in *Chambers* this Court "stated that [a] failure-to-report [to prison] offense would not qualify under the ACCA's elements clause," objecting only that "the Court did not explicitly rely on that . . . in resolving the question presented." BIO at 21. Yet the question presented was "whether the 'failure to report' crime satisfies ACCA's 'violent felony' definition," *Chambers*, 555 U.S. at 127, which of course required deciding if the crime fit either of the definition's then-extant clauses— including the one here. The Court said no.

"It is easy to imagine a failure to report to prison," the government says, "that does not involve any use of force whatsoever. But the same is not true of a homicide committed by a defendant who 'inten[ds] to cause serious physical injury to another person.'" BIO at 21 (quoting N.Y. Penal Law § 125.20(1)). Yet one need "imagine" nothing here: New York's highest court has held a "'passive' defendant" can commit manslaughter by "failing to seek emergency medical aid" for his charge. *People v. Wong*, 81 N.Y.2d 600, 608 (1993) (citing *People v. Steinberg*, 79 N.Y.2d 673, 680 (1992)). Thus, the government "abandoned" its initial claim that the crime can't be committed by inaction, Pet. App. 20a, and the en banc court accepted that the "*least* serious conduct [the crime] covers," *Borden*, 141 S. Ct. at 1832 (emphasis in original), is "no physical action at all." Pet. App. 21a. It's immaterial that such inaction must be "intentional." BIO at 22. Intentional or not, "no physical action," Pet. App. 21a, is no "use of physical force against" anybody.

Unable to identify any ruling of this Court in its favor, the government tries to distinguish the multiple precedents above that doom its argument. *See* BIO at 21-23. But that effort is just a rehash of the circuit majority's "slicing the baloney mighty thin." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1215 (2018). It focuses on the technical holdings of the cases while ignoring why the Court ruled as it did: because the clause here requires one person's application of force to another person's body. *See* Pet. 30-35. The offense here requires no such thing.

The upshot of all this is that New York manslaughter isn't a "violent" crime. However odd this might sound to "a man on the street," Pet. App. 5a, that guy doesn't decide this question. As shown, courts across the country have ruled in the years since the 2015 *Johnson* decision that all kinds of "violent"-sounding crimes – murder, manslaughter, rape, carjacking and armed assault – require no "use of physical force against" a person for one reason or another. *See* Pet. 20-21 n.3. Those rulings, like those of the district court and 3-judge panel here, are the result of faithfully applying this Court's precedents in the post-*Johnson* world: without the capacious (but unworkably vague) residual clause definition of "violent" crime, fewer crimes qualify as "violent." If Congress wants to change that, it knows how. Meanwhile, "shoehorning" a crime "into statutory sections where it does not fit" isn't an option. *Leocal*, 543 U.S. at 13. *See also Borden,* 141 S. Ct. at 1835 (Some courts' "workaround [to *Johnson*] was to read the elements clause broadly. But the text of that clause cannot bear such a broad reading.") (Thomas, J., concurring).

Finally, the rule of lenity. As shown, there's no need for it here given the lack

of any ambiguity. This Court's rulings could not be clearer that physical inaction is not a "use of physical force against the person of another." But were there actual confusion about that, this case would be the poster child for lenity: this Court has *always* said the clause here requires action; it has *never* said inaction qualifies; and in *Chambers*, the government agrees, it said a crime of inaction does "not qualify under the ACCA's elements clause." BIO at 21. No "contortions" to the contrary, Pet. App. 75a, can justify a 15-year mandatory minimum that neither that clause nor any ruling of this Court even suggests— let alone clearly requires.

Lenity, a rule of due process, "bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *United States v. Lanier*, 520 U.S. 259, 266 (1997). Again, that describes this case to a tee. *See also* Brief of FAMM and the National Association of Criminal Defense Lawyers as Amici Curiae in Support of Petition for a Writ of Certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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