No. __-_____

IN THE

Supreme Court of the United States

ANIBAL LUCAS GARCIA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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May 17, 2021

QUESTION PRESENTED

I.

This case concerns a methodological problem in applying the categorical approach. The categorical approach compares the elements of a state crime with some categorical benchmark such as, here, the generic crime of forgery. While federal law determines the contours of the generic crime, state law controls the elements of the state offense.

However, state law may be unclear, lacking cases which address the issue, or having conflicting cases, or inconsistent application in practice. Further, state court decisions have different levels of formality, from published on-point pronouncement of the state's highest court, down to unpublished trial level decisions.

This case highlights the tension between the categorical approach's focus on elements and a state's formal law, and the pronouncement of this Court in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007) that a person may show overbreadth by pointing to a case where state law was *actually applied* in the overbroad manner argued. The Courts below are more frayed than split on how to make this determination; there are fractured panel opinions and inconsistencies even within circuits. Some Courts require a clear pronouncement by the state's highest court; other consider inferences from ambiguous nonbinding state sources.

In this case, the statutory text of Virginia forgery is within the generic limits. However, state intermediate appellate decisions and a trial court decision appear to expand the scope of liability beyond the statutory text and the generic limits. Therefore, the question presented is:

> Whether under *Duenas-Alvarez* and Virginia state decisions, Va. Code § 18.2-168, forgery of public records, is an aggravated felony as a crime relating to forgery under 8 U.S.C. § 1101(a)(43)(R).

PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page.

RELATED CASES

(1) *United States v. Lucas Garcia*, No. 19-4906, United States Court of Appeals for the Fourth Circuit. Judgment entered December 16, 2020.

(2) *United States v. Lucas Garcia*, No. 3:19CR29-REP, United States District Court for the Eastern District of Virginia. Judgment entered November 22, 2019.

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PETITION FOR WRIT OF CERTIORARI

Anibal Lucas Garcia respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at pages 1a to 2a of the appendix to the petition and is available at 831 F. App'x. 90 (4th Cir. 2020). The district court's memorandum opinion appears at pages 3a to 14a of the appendix, and is available at 2019 WL 4195345 (E.D.Va. 2019).

JURISDICTION

The district court in the Eastern District of Virginia had jurisdiction under 18 U.S.C. § 3231. The Fourth Circuit had jurisdiction under 28 U.S.C. § 1291. That court issued its opinion and judgment on December 16, 2020. This Court's order of March 19, 2020, extended the deadline for filing a petition for certiorari to 150 days after the date of the lower court's judgment. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person . . . shall be deprived of life, liberty, or property, without due process of law[.]

Title 8, United State Code, Section 1326 provides in relevant part:

> (a) In general Subject to subsection (b), any alien who—
>
> (1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under title 18, or imprisoned not more than 2 years, or both.

. . .

(d) Limitation on collateral attack on underlying deportation order

In a criminal proceeding under this section, an alien may not challenge the validity of the deportation order described in subsection (a)(1) or subsection (b) unless the alien demonstrates that—

(1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;

(2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and

(3) the entry of the order was fundamentally unfair.

Title 8, United State Code, Section 1101(a)(43)(R) defines an "aggravated felony" to include:

(R) an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year;

STATEMENT OF THE CASE

Introduction

Anibal Lucas Garcia is a citizen of Guatemala. Unlike many illegal reentry defendants, he initially entered the United States legally, on a work visa, in 2004. App. 3a. However, he overstayed his visa, and came to the attention of immigration officers after he was convicted of public records forgery in violation of Va. Code § 18.2-168. *Id*. He received a sentence of two months unsuspended, and then was subjected to expedited removal proceedings. *Id*.

Mr. Lucas was served with a Form I-851 which alleged, as the sole ground of removability, that his Virginia conviction was an aggravated felony. *Id*. The officer who served the form on Mr. Lucas testified that it was his practice to ask aliens, "Habla English?" and if they answered yet, to read the entire form to them, eliciting only a "yes" or "no" response. C.A.J.A. 218-220. He testified that, instead of applying the categorical approach to determine whether a conviction is an aggravated felony, he simply relies on the name of the conviction. C.A.J.A. 214.

Mr. Lucas Garcia signed the required forms and was removed in 2010. App. 4a.

Proceedings in the District Court

Mr. Lucas returned to the United States and was indicted in February 2019 for a violation of 8 U.S.C. § 1326. App. 4a. He filed a motion to dismiss the indictment, alleging that his Virginia forgery conviction was not an aggravated felony, and that therefore his removal order on that basis was invalid. App. 1a.

At the hearing, Mr. Lucas presented expert testimony that his English proficiency was not good enough to understand the advisals on Form I-851. C.A.J.A. 144-170. The immigration officer who served the form on Mr. Lucas testified as described above. C.A.J.A. 204-223. On the law, Mr. Lucas, relying on this Court's opinion in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), argued that Virginia cases illustrated two ways in which Virginia forgery was broader than generic forgery. First, a person could be convicted of forgery where the Commonwealth never proved knowledge that the instrument was forged, because Virginia law, unlike nearly all other jurisdiction, has a presumption of knowledge from possession. App. 7a; *compare Oliver v. Commonwealth*, 35 Va. App. 286, 295 (Va. Ct. App. 2001) "[P]ossession of a forged [writing] by an accused, which he claims as a payee, is *prima facie* evidence that he either forged the instrument or procured it to be forged.") *and Fitzgerald v. Commonwealth*, 227 Va. 171, 174 (1984) (evidence of simple possession of forged document "will support a verdict of guilty") *with Price v. United States*, 70 F.2d 467, 468 (4th Cir. 1934) ("The naked act of possessing and passing counterfeit money does not necessarily give rise to a legitimate inference of guilty knowledge."). C.A.J.A. 17, 25. Second, he argued, Virginia aiding and abetting liability, unlike nearly every other jurisdiction, included simply being present while an acquaintance commits the crime, and failing to object. C.A.J.A. 26-27; s*ee Spruill v. Commonwealth*, 2002 WL 31655322 (Va. Ct. App. 2002) (unpublished) (upholding conviction for person who stood nearby while

friend passed forged check). Both of these aspects, he urged, made Virginia forgery broader than generic forgery.

The district court denied the motion in a written opinion. App. 3a-15a. Mr. Lucas Garcia entered a conditional plea of guilty, preserving his right to appeal the denial of the motion, and was sentenced to 10 months. He appealed to the Fourth Circuit.

Proceedings in the Court of Appeals

The Fourth Circuit affirmed Mr. Lucas Garcia's conviction. App. 1a-2a. In relevant part, it held that his claims were "without merit" and his Virginia forgery conviction was an aggravated felony. App. 2a. It declined to address the Virginia cases illustrating overbroad application on which Mr. Lucas relied. *Id.*

REASONS FOR GRANTING THE PETITION

I. The Question Presented is Important Because It Provides an Opportunity to Clarify the Meaning and Application of *Gonzales v. Duenas-Alvarez* and Provide a Methodology for Determining State Law Under the Categorical Approach

This Court's opinion in *Duenas-Alvarez* has precipitated controversy in the lower courts. The holding which has proved difficult to parse is this:

> [T]o find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute requires more than the application of legal imagination to a state statute's language. It requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime. To show that realistic probability, an offender, of course, may show that the statute was so applied in his own case. But he must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues.

Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007). A large part of the debate concerns whether a defendant must point to a case illustrating overbroad application, or whether he can rely on clear statutory text or court pronouncements of a principal alone. Several petitions for certiorari highlighting this split have been filed (and denied) in recent terms. *See, e.g.*, *Vega-Ortiz v. United States*, No. 17-8527, *cert. denied* Oct. 1, 2018; *Bell v. United States*, No. 19-39, *cert. denied* Oct. 7, 2019.

A better place to start in untangling *Duenas-Alvarez*, however, is how to analyze state law when a defendant does actually produce a state case that illustrates application of state law beyond generic limits. This case presents such an opportunity. Do state trial-level cases count? Do unpublished intermediate state court opinions count? Do the facts recounted by the state court control, or its legal holdings? May a federal court speculate about what a state high court would hold, as in diversity jurisdiction cases? This case provides an opportunity to answer many of these questions: it involves a state statute that, considered alone, is facially generic, but state trial court and intermediate appellate court opinions that expand the scope of the statute beyond generic limits.

Recent published Circuit cases with accompanying dissents and concurrences disclose disagreements in how to treat unpublished intermediate state court decisions or state trial court decisions. In *Matthews v. Barr*, 927 F.3d 606, 610 (2d Cir. 2019), *cert. denied* 141 S.Ct. 158 (2020), the petitioner, a citizen of Ireland, was ordered removed due to a conviction under New York Penal Law § 260.10(1). That

statute punishes conduct "likely to be injurious to the physical, mental or moral welfare" of a minor under seventeen. *Id*. at 611. The government argued that this was a crime of "child abuse, child neglect, or child abandonment," 8 U.S.C. § 1227(a)(2)(E)(i), making him deportable.

The majority noted that this Court "has not yet 'specif[ied] what type of evidence may be used to satisfy the 'realistic probability' requirement." *Id*. at 618 (quoting *Nicanor-Romero v. Mukasey*, 523 F.3d 992, 1005 (9th Cir. 2008), *overruled on other grounds by Marmolejo-Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009)) (citing *Jean-Louis v. Att'y Gen.*, 582 F.3d 462, 481–82 (3d Cir. 2009)). It noted that the text of the statute fell within generic limits; therefore the petitioner had the burden of demonstrating a "realistic probability" under *Duenas-Alvarez* that New York would apply the statute to conduct that was not child abuse. *Id*. at 620.

He pointed to a New York trial-level case denying a motion to dismiss, where the state alleged that a mother left her four year old child home alone for fifteen minutes to get groceries. *Id*. at 620-21. In addition, *amici* submitted charging documents showing that people were charged under the statute in New York for conduct that all agreed showed no risk of danger to a child. *Id*. at 622.

But the majority declined to accord any respect to the state trial court's pronouncements, given its own interpretation of New York law:

> While we appreciate the dissent's concern that some statements by trial courts may not correctly interpret the state statute, there is no question that the statute, as interpreted by the New York Court of Appeals, is a categorical match with the BIA's definition, and there is no New York appellate decision cited by the dissent that has

> upheld a conviction that sweeps more broadly than the BIA definition

Id. at 621. Thus, *Matthews* falls at the end of the spectrum looking only to a state's formal law and disregarding state practice and trial courts.

In dissent, Judge Carney took issue with the majority's disregard for actual state practice and exclusive focus on appellate decisions. *Id*. at 631-32.

> To import into the Court's "realistic probability" test a requirement that the state appellate courts describe the farthest contours of the state law's application strikes me as both unworkable and inappropriate, particularly in the context of a misdemeanor crime, and where (as here) courts are unlikely ever to have the opportunity to do so. An approach that by definition focuses on only the 0.8% of convictions that are secured following a jury trial (and the even smaller percentage that are subsequently upheld on appellate review) will necessarily fail to grasp "the elements of the offense in practice."

Id. (quoting *Whyte v. Lynch*, 807 F.3d 463, 469 (1st Cir. 2015)).

Judge Murguia in the Ninth Circuit has also expressed concern that the proper data to illustrate how state law is actually applied in practice is lacking due to the prevalence of guilty pleas that never reach appeal. *Betansos v. Barr*, 928 F.3d 1133, 1147 (9th Cir. 2019) (Murguia, J., concurring) (access to trial court records "would illuminate the possibly broader conduct for which individuals are prosecuted pursuant to various state statutes.").

The flipside of *Matthews* came in *Bah v. Barr*, 950 F.3d 203 (4th Cir. 2020). There, the Fourth Circuit considered whether Virginia's controlled substance statutes are broader than the federal schedules and indivisible. It held the statute

divisible as to substance, based on the pronouncement of an intermediate appellate court that the "specific type of substance" was an actus reus element of the offense. *Id*. at 208. However, it acknowledged that the case in which that statement came did not concern the act element, but only the intent. *Id*. at 208. It inferred from context that "type of substance" referred to a particular substance and not a class of substances. *Id*.

The dissent there took issue with the *in*formality of the state decisions on which the majority relied. "But, respectfully, a single *ambiguous* published state appellate court decision paired with an *unpublished* appellate memorandum decision do not clearly state anything definitive." *Id*. at 212 (Thacker, J., dissenting) (emphasis in original).[1]

Taking that position to the extreme is the Ninth Circuit. That court has refused, *en banc*, to consider unpublished state appellate decisions under the categorical approach in a case on divisibility. It held flatly: "Many of these [state] decisions [cited by the defendant] are unpublished, and we will not rely on them." *United States v. Martinez-Lopez*, 864 F.3d 1034 (9th Cir. 2017) (en banc).

These opinions and dissents and concurrences show the need for this Court to provide a framework for analyzing state law under the categorical approach and *Duenas-Alvarez*. The need for consistency is especially high here because any

[1] This is an abrupt turn for the Fourth Circuit. Prior to *Duenas-Alvarez*, it refused to even allow a defendant to point to his own case as an overbroad application under the categorical approach. *See United States v. Wilson*, 951 F.2d 586, 588 (4th Cir. 1991) (Wilkinson. J., extolling the virtues to the categorical approach, refusing to allow defendant to present evidence that his robbery conviction was only pickpocketing).

resolution will not exclusively benefit the government or defendants. In *Matthews*, it was the petitioning alien who pointed to state trial decisions articulating an overbroad theory. In *Bah*, it was the government that argued that dictum in intermediate appellate decisions resolved the issue in its favor. The government won both times, but at the cost of a consistent rule for determining state law under the categorical approach.

II. The Fourth Circuit is Wrong

Virginia forgery sweeps more broadly than generic forgery in two ways. First, Virginia's expansive aiding and abetting liability includes those who are present and fail to object to passing a forged check. Second, Virginia approves convictions for forgery upon proof only of simple possession of a forged document, where the defendant cannot prove lack of knowledge of the forged character. Both aspects of forgery place Virginia law well outside the generic boundaries of forgery as established by consulting cases from other jurisdictions, treatises, and the Model Penal Code.

There is no dispute that generic forgery is "the false making or materially altering, with intent to defraud, of any writing, which, if genuine, might apparently be of legal efficacy or the foundation of a legal liability." *Alvarez v. Lynch*, 828 F.3d 288 (4th Cir. 2016). "[K]nowledge that the instrument is forged and counterfeited is essential to make out the crime [of uttering a forged document]." *United States v. Caril*, 105 U.S. 611, 613 (1881).

The Virginia statute at issue, Virginia Code § 18.2-168, provides:

> If any person forge a public record, or certificate, return, or attestation, of any public officer or public employee, in relation to any matter wherein such certificate, return, or attestation may be received as legal proof, or utter, or attempt to employ as true, such forged record, certificate, return, or attestation, knowing the same to be forged, he shall be guilty of a Class 4 felony.

"Forge," as used in § 18.2-168, is not defined by statute. "Forgery is a common law crime in Virginia. It is defined as 'the false making or materially altering with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy, or the foundation of legal liability.'" *Henry v. Commonwealth*, 63 Va. App. 30, 38 (2014).

A. Virginia's Presumption of Forgery from Simple Possession is an Overbroad Theory of Prosecution

So far so good for the government. If one simply compares the language of the statute and the pronouncement in *Henry* with the agreed generic definition, Virginia forgery appears to be generic. Despite this primary definition of the offense, a distinct line of Virginia cases establish an alternative *prima facie* showing that a prosecutor may make. "[P]ossession of a forged [writing] by an accused, which he claims as a payee, is *prima facie* evidence that he either forged the instrument or procured it to be forged." *Oliver v. Commonwealth*, 35 Va. App. 286, 295 (Va. Ct. App. 2001) (quoting *Fitzgerald v. Commonwealth*, 227 Va. 171, 174 (1984)). Virginia law holds that proof of possession is sufficient on its own for a finding of guilt; it "will warrant submission of the issue of guilt of forgery to the jury, and will support a verdict of guilty if the jury so finds." *Fitzgerald*, 35 Va. App. at 174. In order to rebut this evidence, the defendant must convince the jury

that his possession was innocent. *Bullock v. Commonwealth*, 205 Va. 558, 563 (1964) (requiring "an explanation *satisfactory to the jury* as to how he came into possession of the instrument.") (emphasis added). Virginia courts thus treat *possession of a forged instrument* as a sufficient theory of guilty for forgery, and lack of knowledge of the forgery as an affirmative defense. *See, e.g.*, *Pugh v. Commonwealth*, 2017 WL 2255788 (Va. App. 2017) (unpublished) (holding evidence sufficient to sustain conviction for forgery where "Pugh failed to rebut the presumption that he knew the check was forged").

Because simple possession of a forged instrument is a sufficient showing on which a jury may base a finding of guilt, it is the base element of the crime, as defined by this Court for categorical analysis purposes. *See Mathis v. United States*, 136 S.Ct. 2243, 2255 (2016) (element is fact that jury "necessarily found" in order to convict).

Comparing generic forgery with the Virginia rule announced in *Fitzgerald*, *Bullock*, *Oliver*, and *Pugh*, yields a different result. When Congress writes about forgery, it has not meant the simple possession of a forged document. "The naked act of possessing and passing counterfeit money does not necessarily give rise to a legitimate inference of guilty knowledge." *Price v. United States*, 70 F.2d 467, 468 (4th Cir. 1934); *see also Caril*, 105 U.S. at 613 ("[K]nowledge that the instrument is forged and counterfeited is essential to make out the crime [of uttering a forged document]."). Such a broad rule has been rejected in other jurisdictions. "[I]t cannot be the law that each person through whose hands such a bill might pass, the

endorsement turning out to be a forgery, is to be presumed, prima facie to have made the forged endorsement." *Miller v. State*, 51 Ind. 405, 406 (Ind. 1875).

B. Virginia's Aiding and Abetting Liability is Overbroad

Virginia also has a surprisingly broad view of accomplice liability. In *Spruill v. Commonwealth*, 2002 WL 31655322 (Va. Ct. App. 2002) (unpublished), the defendant accompanied her niece and a friend on a shopping trip. Her friend, "Ms. Johnson[,] presented a counterfeit traveler's check in exchange for merchandise [at a store] while Spruill and Ms. Wright stood by." *Id*. When the car was later pulled over, police found blank counterfeit travelers checks in a pouch on the back of the front passenger seat, near where Ms. Spruill was sitting. *Id*. This was held sufficient to convict Spruill not only of aiding and abetting the larceny, but of aiding and abetting the actual forgery of the blank traveler's checks that Ms. Johnson used. *Id*.

This is because under Virginia law, although mere presence is not sufficient, a conviction can be based on presence and a failure to intervene.

> [I]t is certain that proof that a person is present at the commission of a crime without disapproving or opposing it**,** is evidence from which, in connection with other circumstances, it is competent for the judge or jury to infer that he assented thereto, lent to it his countenance and approval, and was thereby aiding and abetting the same.

Id. (citations omitted) (emphasis added). Therefore Ms. Spruill's standing near the cash register while her friend used counterfeit checks, and being present in the car her friend was driving with the counterfeit checks, was sufficient evidence to convict her of forgery. *Id*.

In *Duenas-Alvarez*, this Court compared California's aiding and abetting liability, as applied in particular cases, with the majority of other jurisdictions, finding no significant difference. Here, however, there is such a difference. As Professor LaFave explained, mere presence can only be the basis for accomplice liability where there is a "communicated assurance of passivity" but does not lie where the defendant is present, "mentally approves," and "refuse[s] to intervene." LaFave, *Substantive Criminal Law* § 13.2 (2d ed.). The Model Penal Code likewise requires an affirmative action advancing the crime unless there is a duty to intervene. Model Penal Code § 2.01. Federal law requires an affirmative act as well. *See Hicks v. United States*, 150 U.S. 442, 450 (1893) (reversing conviction where jury was instructed that it could convict if defendant was present for the purposes of aiding the principal); *Rosemond v. United States*, 134 S.Ct. 1240, 1245 (2014). Thirty seven jurisdiction have rejected the proposition that a failure to object or intervene can constitute aiding and abetting. C.A.J.A. 47-64 (50-state survey).

So *Spruill* represents an outlier position. The majority rule does not impose liability for a failure to intervene in the commission of a crime, unless the defendant had a duty to intervene. *Id*. Virginia, on the other hand, allows accomplice liability based solely on evidence that the defendant was present, knew of the crime, and failed to intervene or object. It is significantly outside the limits of generic aiding and abetting. Therefore, Mr. Lucas Garcia's conviction for Virginia forgery is not generic forgery, and not an aggravated felony.

III. This Case is a Good Vehicle for Resolving the Question Presented

This case is an excellent vehicle to resolve the question presented. The classification of Mr. Lucas Garcia's Virginia forgery conviction as an aggravated felony was the sole basis for the Fourth Circuit's opinion. There are no ancillary issues that must be determined before resolving this question, and the issue was raised and litigated in the district court and on appeal.

That the opinion here is unpublished is not a reason to refuse certiorari, for two reasons. First, the Fourth Circuit has been presented with argument on the scope of Virginia aiding and abetting under *Duenas-Alvarez* before and continues to issue unpublished opinions. *See United States v. Pritchett*, 733 F. App'x., 128 (4th Cir. 2018) (unpublished), *certiorari denied*, 139 S.Ct. 850 (2019). Second, that the opinion was unpublished is a symptom of the problem with how the Courts of Appeal treat arguments under state law. Contrast the Fourth Circuit's summary treatment in this case with the Ninth Circuit's treatment of a new argument on Washington aiding and abetting under the categorical approach in a thorough and reasoned opinion. *United States v. Valdivia-Flores*, 876 F.3d 1201 (9th Cir. 2017). The Fourth Circuit's decision should not evade review because it repeatedly refuses to provide any reasoning on an important issue.

It is true that Mr. Lucas Garcia's case presents other issues that must be resolved if his conviction is not an aggravated felony; in particular, whether his deportation on an invalid basis subjects his deportation order to collateral attack. However, the resolution of those issues will depend on this Court's opinion in

United States v. Palomar-Santiago, No. 20-437 (petition for certiorari granted Jan. 8, 2021, argued Apr. 27, 2021). Counsel has filed two petitions for certiorari involving the same type of administrative removal order and arguments, before the same district court, in *United States v. Gonzalez-Ferretiz*, No. 20-6049 and *United States v. Segura-Virgen*, No. 20-6066. The government has asked that those petitions, raising the same issues that underlie Mr. Lucas Garcia's case, be stayed pending *Palomar-Santiago*. Therefore this Court could stay consideration of this petition pending *Palomar-Santiago*, *Gonzalez-Ferretiz*, and *Segura-Virgen*. However, it could resolve the categorical approach question unique to this case, and which was the only basis for the Fourth Circuit's decision, and remand for further proceedings.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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