No. 24-1084

IN THE

Supreme Court of the United States

STEVEN M. HOHN,

Petitioner,

v.

UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF *AMICI CURIAE* CURRENT AND FORMER FEDERAL AND STATE PROSECUTORS IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI*[1]

Amici are current and former federal and state prosecutors. They are leaders in the community and are deeply familiar with the criminal justice system. They include stakeholders—former trial and appellate judges, United States Attorneys, Assistant United States Attorneys, and elected prosecutors and their deputies—from all stages of the criminal justice process.[2]

Amici have fairly prepared and prosecuted cases to determine whether to deny the liberty of an accused. They concur that prosecutions are to be viewed through a lens fixed on the constitution and upon ethical bright lines. Despite diverse backgrounds, *amici* share a strong interest in maintaining the fairness and public legitimacy of the criminal justice system. Their collective decades of criminal justice experience result in a common conclusion: prosecutions must be premised upon an honest and transparent adherence to constitutional safeguards to protect societal confidence in the verdict. Intentional Government misconduct is taboo.

As detailed in the petition for writ of certiorari, this matter involves shocking yet novel government misconduct—the rogue collection, review, and use of secretly obtained recordings of attorney-client

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1. Pursuant to Rules 37.2 and 37.6, *Amici* certify that all counsel of record received timely notice of *Amici*'s intent to file this brief, and no party or party's counsel authored this brief in whole or in part and that no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief.

2. A full list of amici is attached as an Appendix to this Brief.

communications. The confiscated attorney-client communications, in this case, between Steven Hohn and his defense counsel, cover all the bases of routine criminal defense representation—the dissemination of legal advice, the decision whether to pursue pretrial resolution or to go to trial, analysis of the quantum and reliability of evidence, trial strategy, and the protocol to be used for the attorney-client relationship.

As current and former prosecutors, *amici* have personally considered and shouldered the burdens that ensure the protection of a defendant's Sixth Amendment right to counsel. *Amici* submit that these prosecutorial obligations have not been met here. The Court should grant certiorari and reverse the decision of the United States Court of Appeals for the Tenth Circuit that concludes otherwise.

SUMMARY OF ARGUMENT

Amici current and former prosecutors are dismayed by the Tenth Circuit's response to the systemic misconduct of Kansas law enforcement officers over a seven-year period (2012-2019). The U.S. Attorney's Office for the District of Kansas collected and reviewed communications between defendants held in custody and their attorneys and thereafter prosecuted these defendants with that information in hand. This undermines the fairness of the adversary system by the surreptitious incursion into attorney-client communications, communications that are the centerpiece of the right to counsel under the Sixth Amendment.

In January 2012, Steven Hohn and several co-defendants were indicted on charges for possession and

distribution of methamphetamine. The Assistant U.S. Attorney assigned to his case thereafter intentionally listened to Mr. Hohn's April 23, 2012 recorded attorney-client conversation containing defense strategy and case assessments. Mr. Hohn was convicted in 2013, largely on the testimony of co-defendants receiving prosecutorial benefits to inculpate Mr. Hohn. Mr. Hohn was sentenced to 30 years in prison.

The issue now is whether the Government's flagrant misconduct entitles it to an element of grace: should the Government receive the benefit of requiring Mr. Hohn to establish how the Government's intentional misappropriation of his communications generated by his right to counsel under the Sixth Amendment caused him discreet, trial-specific harm during the prosecution?

Amici urge the Court to refrain from granting any benefits to the Government, or placing any burdens under the law on Mr. Hohn, in these unique circumstances of gross Government misconduct. Undermining the right to counsel by knowing a defendant's pitch selection before the ball is thrown is prejudice *per se*. Prosecutors who have tried cases know that. The Government here listened to recorded attorney-client communications regarding the merits of the evidence and the defense litigation strategy, effectively leaving him with no counsel under the Sixth Amendment.

INTRODUCTION

For almost a decade (2012-2019), the U.S. Attorney's Office for the District of Kansas collected and analyzed more than 1,400 attorney-client communications

between defendants held in custody and their attorneys. The communications were recorded by the prison and thereafter subpoenaed and collected by the U.S. Attorney's Office.

When this enterprise of Government misconduct came to light in 2016, Chief Judge Hon. Julie A. Robinson, a former Assistant U.S. Attorney and prosecutor who was appointed to the bench by President George W. Bush, commenced an exhaustive investigation. A Special Master was appointed to assist. "[T]he Government evaded the Court's questions," "did not cooperate with [the] investigation," caused "lengthy delays," "did not abide by . . . preservation and cooperation directives," undertook the "probable destruction of evidence," "willfully violated myriad Court orders and Special Master directives," had "pattern[s] of similar misconduct in other cases," exhibited a "culture" of misconduct, failed "to timely implement a meaningful litigation hold," made productions "designed to mask the individual source of production," and continues with this "strategy today." *United States v. Carter*, 429 F. Supp. 3d 788, 799-800 (D. Kan. 2019).

In January 2012, Steven Hohn and several co-defendants were indicted on charges for possession and distribution of methamphetamine. His prosecutor, Assistant U.S. Attorney Terra Morehead, subpoenaed and thereafter intentionally listened to Mr. Hohn's April 23, 2012 recorded attorney-client conversation. She never disclosed this conduct, and, in fact, actively concealed that intrusion. Morehead intended to benefit in the prosecution of Mr. Hohn by listening to Mr. Hohn's conversation with his counsel, hence the reason for listening and the subsequent concealment of her bad acts. (Morehead was

disbarred by the Kansas Supreme Court on April 26, 2024, after a career of misconduct as a state and federal prosecutor, including witness interference, suppression of evidence, an undisclosed romantic relationship with a judge, and forcing an eyewitness to lie on the stand which resulted in the 1994 double homicide wrongful conviction of a 17-year-old. *See* Compl. at 3-4, *Citizens for Responsibility and Ethics in Wash. v. Dep't of Justice*, Civ. No. 24-2416 (D.D.C. Aug. 21, 2024).)

Morehead prosecuted Mr. Hohn in 2013 before District Judge Carlos Murguia. Based largely on the testimony of co-defendants receiving prosecutorial benefits to inculpate him, Mr. Hohn was convicted and sentenced by Judge Murguia to 30 years in prison. (Murguia later resigned in response to Judicial Council of the Tenth Circuit, Case No. 10-18-90022, Order, Sept. 30, 2019.)

ARGUMENT

I. THE TENTH CIRCUIT DECISION INVOLVING THE INCURSION INTO THE SIXTH AMENDMENT RIGHT TO COUNSEL CREATES A MATRIX THAT REWARDS GOVERNMENT MISCONDUCT.

The Tenth Circuit's opinion rewards Government misconduct. The opinion relieves the Government from protecting the Sixth Amendment right to counsel and taxes the individual attempting to assert a constitutional right. When the Government unilaterally uses its subpoena power to access electronic recordings of discussions between the accused and legal counsel, then gets caught listening to the discussions, then obstructs the ensuing

district court investigation regarding the prejudice incurred, the Government should not be rewarded. The Government is indeed rewarded here by the Tenth Circuit.

This Court does not reward Government misconduct that intrudes upon constitutional rights by placing a *Strickland*[3] prejudice burden on the accused. *See, e.g.*, *Flowers v. Mississippi*, 588 U.S. —, 139 S. Ct. 2228 (2019) (*Batson* misconduct, 5th Amendment); *Glossip v. Oklahoma*, 604 U.S. —, 145 S. Ct. 612 (2025) (*Napue* misconduct, 14th Amendment); *Wearry v. Cain*, 577 U.S. 385 (2016) (*Brady* misconduct, 14th Amendment); *United States v. Henry*, 447 U.S. 264 (1980) (*Massiah* misconduct, 6th Amendment). The Tenth Circuit has now adopted a *Strickland* prejudice standard and its burden of proof for the claimant—a standard applied to a defendant's ineffective assistance of counsel ("IAC") claim, not a Government misconduct claim. *United States v. Hohn*,123 F.4th 1084, 1095 (10th Cir. 2024) (en banc) (relying upon *United States v. Cronic*, 466 U.S. 648, 658 (1984), an IAC claim). Under such IAC claims, the defendant bears the burden to demonstrate a reasonable probability that, but for the attorney's errors, the outcome of the proceeding would have been different. *Strickland*, 466 U.S. at 703. In those instances, the defendant generally possesses all information necessary to present and support the claim. But not here.

Here, the Government intruded into Mr. Hohn's right to counsel under the Sixth Amendment. When wrongful intrusion results in the Government obtaining the defendant's trial strategy, it will often be unclear

3. *Strickland v. Washington*, 466 U.S. 668 (1984).

whether, and how, the Government's improperly obtained information about the defendant's trial strategy may have been used. Moreover, the Government and the defendant will have unequal access to knowledge. The prosecution team knows what it did and why. The defendant cannot know or prove anything. Even more so when the Government obstructs a three-year district court investigation into the matter and destroys or fails to hold evidence, including evidence of the prejudicial impact on Mr. Hohn. (The inference of course is if the material was exculpatory for the Government, the material would have been held and preserved by the Government and presented to the court.)

Neither Mr. Hohn nor his counsel were invited by the Government to its litigation strategy sessions regarding its intentions to enter plea bargains, use co-defendants as Government witnesses against him, pay consideration to the Government's co-defendant witnesses in exchange for their testimony against him, and/or assess the strength of evidence. Yet, the prosecutor did precisely that with Mr. Hohn by inviting herself to obtain and listen to his recorded conversation discussing these topics with his counsel. *Hohn*, 123 F.4th at 1089 ("they discussed legal advice and trial strategy, 'including: Hohn's desire to have a trial in the matter, ... what he believed the evidence against him to be and problems with that evidence . . .'").

Against this backdrop, the Tenth Circuit now creates a sham prejudice burden for Mr. Hohn that can never be met, thereby leaving a phantom Sixth Amendment right to counsel, not an actual right. Mr. Hohn's Sixth Amendment right "to have the assistance of counsel for his defense" needs an asterisk: *counsel's advice will be

recorded, analyzed, and used by the Government to Mr. Hohn's detriment, and Mr. Hohn must then prove how it was used to his detriment. Even if after listening to the recording, the Government did not alter its prosecution one iota, that is a decision ratified by the content of the protected attorney-client communication. It is not the result of Government goodwill. And that decision results only because of the incursion into Mr. Hohn's protected right, and to his prejudice.

The Government here impermissibly obtained information about Mr. Hohn's trial strategy. *Hohn*, 123 F.4th at 1089. None of the information acquired by the Government had been disclosed by Mr. Hohn or his counsel. For this reason, the "[m]ere possession by the prosecution of otherwise confidential knowledge about the defense's strategy or position is sufficient in itself to establish detriment to the criminal defendant." *Briggs v. Goodwin*, 698 F.2d 486, 494-95 (D.C. Cir. 1983). "The prosecution makes a host of discretionary and judgmental decisions in preparing its case. It would be virtually impossible for an appellant or a court to sort out how any particular piece of information in the possession of the prosecution was consciously or subconsciously factored into each of those decisions." *Id.* The Tenth Circuit concurred with this analysis for 30 years but now has flipped its reasoning in the face of the Government obtaining and reviewing more than 1,400 attorney-client conversations involving hundreds of criminally charged defendants. *United States v. Carter*, 429 F. Supp. 3d 788, 856 (D. Kan. 2019).

Prejudice to the defendant is not part of the calculus. If the prosecutor obtains information relating to a pending

charge by listening to a recorded confidential conversation between the accused and his counsel, there has been a violation of the Sixth Amendment right to counsel. The Government avoids such Sixth Amendment violations by simply applying routine safeguards with minimal burdens. The prosecution team must either refrain from improperly intruding into the attorney-client relationship or insulate itself from privileged trial strategy information that might thereby be obtained.

In certain instances, the Government may have a legitimate interest in investigating independent crimes contemplated or perpetrated by an indicted defendant. Foreseeable intrusion problems can arise and must be red flagged. When an investigation is pursuing non-privileged information but risks obtaining attorney-client communications including trial strategies, the prosecution team must insulate itself from the protected information. Regarding tape recorded telephone calls made by the accused while incarcerated, the Government must shield itself and its case agents from any attorney-client conversations that might be contained on the tapes. The tapes then can be screened by agents unaffiliated with the prosecution. If a tape contains privileged information, the agent must immediately seal and segregate that tape from the others. If only a portion of the tape contains such information, then only a sanitized copy or transcript is to be provided to case agents and prosecutors. *See, e.g., United States v. Noriega*, 764 F. Supp. 1480, 1483 (S.D. Fla. 1991). This is a normal undertaking by United States attorneys.

The Tenth Circuit's decision to reward Government misconduct by placing a prejudice burden on the

defendant creates bad precedent, encourages or ratifies Governmental misbehavior involving constitutional rights, and it places unfair burdens on the accused. If prejudice in such an instance is not presumed, the burden must be on the Government—the party with complete control over the library of information, recordings, documentation, and law enforcement personnel involved. *See Weatherford v. Bursey*, 429 U.S. 545, 548 (1977) (the Government presented evidence to establish the prosecutor was never made aware of the content of the attorney-defendant conferences, discussed *infra*). And the burden should be substantial to ensure the protection of a constitutional right. *See Glossip v Oklahoma*, 604 U.S. —, 145 S. Ct. 612, 627 (2025) ("the beneficiary of [the] constitutional error [must] prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."'" *United States v. Bagley*, 473 U.S. 667, 680 n.9 (1985) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)) (parallel citations omitted).").

Placing the burden on the Government to establish the absence of prejudice upon the infringement of a constitutional right is not unreasonable. For example, when testimony is derived using immunity, "'the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence.'" *Kastigar v. United States*, 406 U.S. 441, 460 (1972) (quoting *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 79 n.18 (1964)). "This burden of proof . . . is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." *Id.* At a minimum, such should be the case here.

Instead, the Tenth Circuit has endorsed the Government's invasion of the right to counsel, the actual prosecutor's review of the attorney-client strategy communications, the Government's obstruction of the district court's investigation into the facts as to the impact of the intrusion, and the Government's complete failure to posit any case as to how Mr. Hohn was not prejudiced by the foregoing.

The Government must not do indirectly what the law absolutely forbids it to do directly, i.e., use its subpoena power to obtain attorney-client communications after the right to counsel has attached to enhance its prosecution and undermine the defense. This is inconsistent with a system of justice that expects integrity from prosecutors, not cheap tricks designed to skirt clear responsibilities. Winning at any cost is not synonymous with pursuing justice. *Strickler v. Greene*, 527 U.S. 263, 281 (1999) (there is a "*special role* played by the American prosecutor in the search for truth in criminal trials." (emphasis added)).

The prosecution is not the representative of an ordinary party to a lawsuit, but of a sovereign with a responsibility not just to win, but to see that justice is done. Hard blows, yes, foul blows no. *Berger v. United States*, 295 U.S. 78, 88 (1935). The ends in our system do not justify the means. Our Constitution does not promise every criminal will go to jail, it promises inalienable rights. As Justice Oliver Wendell Holmes said, it is "a less evil that some criminals should escape than that the Government should play an ignoble part." *Olmstead v. United States*, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting).

The duty to manage this difficult business must be undertaken with the utmost care by those in the best

position and with the power to ensure that it does not go awry. Although the public has an interest in effective law enforcement, and although *Amici* expect law enforcement officers and prosecutors to be tough on crime and criminals, they are not to be tough on the Constitution. "Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." *Mapp v. Ohio*, 367 U.S. 643, 659 (1961) (Clark, J.). These duties imposed on prosecutors by the requirements of the Sixth Amendment right to counsel are hardly novel or burdensome. Staying clear of the defense camp after the accused has exercised the right to counsel is a task undertaken every day. No fair-minded prosecutor could chafe under these mandates.

"In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example . . . If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself." *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

This Tenth Circuit decision is erroneous and merits this Court's review.

II. THE TENTH CIRCUIT MISAPPREHENDS *WEATHERFORD*.

Citing to *Weatherford v. Bursey*, 429 U.S. 545 (1977), the Tenth Circuit asserts "[e]ven when the government intentionally intrudes into the defense camp, the Sixth Amendment is not violated unless the intrusion prejudiced

the defendant during the criminal proceedings." *United States v. Hohn*,123 F.4th 1084, 1095 (10th Cir. 2024) (en banc). That is an overstatement, at best.

Weatherford involved an undercover law enforcement agent (Jack Weatherford) who was arrested and indicted along with defendant Brett Bursey, to maintain Weatherford's cover. Under the belief that Weatherford was Bursey's co-defendant, Bursey's attorney asked Weatherford to attend certain trial preparation sessions. He did. Weatherford then testified for the prosecution at trial but never referred to the preparatory sessions. Bursey was convicted.

Thereafter, Bursey filed a § 1983 civil lawsuit against Weatherford and Pete Strom, Chief of the South Carolina State Law Enforcement Division, alleging a violation to his Sixth Amendment right to counsel. The case was tried by the district court, non-jury. *See Bursey v. Weatherford*, 528 F.2d 483, 485-86 (4th Cir. 1975). In a civil trial, Bursey, as the plaintiff, carried the burden of proof, and the defendants could present rebuttal evidence and any defenses after Bursey rested.

Evidence was presented at Bursey's civil trial "[t]hat following the various meetings with plaintiff [Bursey] and/or [his] attorney nor at any time did the defendant Weatherford discuss with or pass on to defendant Strom, any agents of SLED, or to Solicitor John Foard and/or any of his staff any details or information regarding the plaintiff's trial plans, strategy or anything having to do with the criminal action pending against plaintiff. . . ." *Bursey*, 528 F.2d at 486. "On these facts the district judge concluded that Bursey's constitutional rights had

not been violated . . . [because] . . . Bursey had not been prejudiced as a result of Weatherford's presence during these conferences because their content had not been communicated to Solicitor Foard or Strom." *Id.*

This Court highlighted this evidence. "At no time did Weatherford discuss with or pass on to his superiors or to the prosecuting attorney or any of the attorney's staff 'any details or information regarding [Bursey's] trial plans, strategy, or anything having to do with the criminal action pending against [Bursey].'" *Weatherford*, 429 U.S. at 548.

At trial, technically either party could have presented evidence that Weatherford did not share information from Bursey's conferences with his counsel to prosecutor Foard. Presumably, the evidence was presented by the Government to establish the absence of prejudice or damages. (There appears to be no upside to Bursey presenting such evidence, and there is no reason to believe Bursey would have such proof.)

The factual findings after trial by the district court are in stark contrast to the facts here. It is undisputed that Assistant U.S. Attorney Morehead secured a recording of Mr. Hohn's conference with counsel and reviewed it. "Sure enough, AUSA Morehead later obtained Hohn's calls, and the district court found that she had 'possessed' and 'listened to' Hohn's six-minute attorney call from April 23, 2012, despite the AUSA's sworn denials that she had never heard them." *Hohn*, 123 F.4th at 1090.

The content of the conference and the information reviewed by Morehead is also not in dispute. "[T]hey discussed legal advice and trial strategy, 'including: Hohn's desire to have a trial in the matter, . . . what he

believed the evidence against him to be and problems with that evidence . . .'" *Hohn*, 123 F.4th at 1089. Therein is prejudice. You cannot un-ring Morehead's bell. The Tenth Circuit ignores this.

"Had Weatherford testified at Bursey's trial as to the conversation between Bursey and Wise; had any of the State's evidence originated in these conversations; had those overheard conversations been used *in any other way* to the substantial detriment of Bursey; or *even had the prosecution learned from Weatherford, an undercover agent, the details of the Bursey-Wise conversations about trial preparations*, Bursey would have a much stronger case." *Weatherford*, 429 U.S. at 554 (emphasis added). This "much stronger case" is precisely what transpired with Mr. Hohn. His defense strategy communications with his counsel were obtained by, personally reviewed by, and necessarily considered by the prosecutor, and not innocently so.

Unlike *Weatherford*, the Government here did not establish—*nor could it*—that Mr. Hohn's defense was not impacted in any other way as a result; no, instead, the Government obstructed that investigation for years and destroyed evidence in the process. *United States v. Carter*, 429 F. Supp. 3d 788, 800 (D. Kan. 2019) ("Evidence likely has been lost due to the Government's failure to timely implement a meaningful litigation hold. And the Government's productions to the Special Master and FPD were incomplete and turned over in a manner designed to mask the individual source of production."). *See also Id.* at 799 ("the Government's probable destruction of evidence material to the Special Master's investigation . . ."). Unlike in *Weatherford*, the Government here has failed to establish that the prosecutor's possession, review, and

consideration of Mr. Hohn's discussions with counsel did not occur. It failed to do so not because of bad lawyering, but because it cannot. The district court found that Morehead reviewed the defense strategy communication between Mr. Hohn and counsel.

The Tenth Circuit addresses *Weatherford in passim* but fails repeatedly to properly note the impact here. First, it fails to note that this Court's "much stronger case" scenario has occurred here; to wit, the prosecutor here learned the details of the conversations between Hohn and his counsel about trial preparations. The district court's findings in this regard are untouched.

Second, the Tenth Circuit misses the fact that *the Government* proved the absence of prosecutorial review of the conference between defendant and counsel in *Weatherford*, and failed to do so here.

Third, the Tenth Circuit overstates the findings in this Court's *Weatherford* decision.

> *Shillinger* erred by departing from *Weatherford*, which was and remains binding authority on this court. *Shillinger's* holding contradicts those pronounced in *Weatherford* and its progeny because those cases affirm that, even when the prosecution becomes privy to attorney-client communications without a legitimate law-enforcement purpose, *the defendant still must demonstrate a prejudicial use of the overheard information at trial*. *See* 429 U.S. at 553-54.

Hohn, 123 F.4th at 1097 (emphasis added).

In *Weatherford*, this Court never stated that the criminally charged defendant must prove prejudice; the Court simply pointed out that the evidence at trial and district court's finding was that the content of the conference between Bursey and counsel was not shared with the prosecution. In a § 1983 civil action, that fact is consistent with no prejudice or no damages. In Mr. Hohn's § 2255 habeas corpus proceeding, he established the content of his conference with counsel was reviewed by prosecutor Morehead. As in *Weatherford*, the district court's finding on this issue is similarly undisturbed.

The Tenth Circuit has no basis to reward the Government's misconduct here under *Weatherford*. *Weatherford*, read correctly, was the predicate of the Tenth Circuit's *Shillinger v. Haworth*, 70 F.3d 1132 (10th Cir. 1995) decision. It hardly is "out of step" and "untenable" with this Court's cases. *Hohn*, 123 F.4th at 1087-88.

III. THIS COURT'S SIXTH AMENDMENT DECISIONS ON THE RIGHT TO COUNSEL MAKE CLEAR THAT PREJUDICE IS PRESUMED WHEN GOVERNMENT MISCONDUCT INVADES THE DEFENDANT'S ATTORNEY-CLIENT RELATIONSHIP.

After the right to counsel has attached under the Sixth Amendment, this Court has protected the accused from Government schemes intentionally undertaken to: 1) gain access to conversations involving the accused; 2) listen or eavesdrop via electronic devices to conversations; 3) disguise the arena of communications; or 4) provide a misimpression of the basis of the exchange of information

taking place. This Court's protections of the Sixth Amendment right to counsel are similarly necessary here.

Like Steven Hohn, Winston Massiah was indicted on a federal narcotics charge for importing and facilitating the sale of illegal drugs. Like with Mr. Hohn, the Government believed it was part of a large and well-organized ring, resulting in criminal charges against many defendants.

After Massiah obtained counsel and was released on bail, a co-defendant decided to cooperate with the Government in its continuing investigation. The co-defendant permitted a radio transmitter to be installed under the seat of his car to allow a Government agent (Murphy) to listen to his conversations with Massiah. Murphy, like Morehead, listened. Incriminating statements were made and used against Massiah at his trial. Massiah was convicted. The impact of the incriminating statements on the jury is not addressed by this Court. *See Massiah v. United States*, 377 U.S. 201 (1964).

Here, Mr. Hohn's incriminating words were not presented against him at trial; no, his entire defense strategy and evidence assessment was vetted by the Government and presumably made the predicate for a strategy to be used by the Government to make its case and destroy any defense at trial. Just like with Winston Massiah, Mr. Hohn's Sixth Amendment right to counsel was trampled by the Government. No prejudice showing was required by Massiah. The Government's intrusion upon his Sixth Amendment right to counsel mandated relief. *Id.*

In a second Sixth Amendment right to counsel case reviewed by this Court, a Virginia bank was robbed by

two men wearing masks and carrying guns, while a third man waited in the car. No witnesses were able to identify Billy Gale Henry as one of the participants. About an hour after the robbery, the getaway car was discovered. Inside was found a rent receipt signed by "Allen R. Norris" and a lease, also signed by Norris, for a house in Norfolk. Two men were arrested at the rented house. Discovered with them were the proceeds of the robbery and the guns and masks used by the gunman. They subsequently were convicted of participating in the robbery.

Government agents then traced the rent receipt to Henry. Henry was arrested. At trial, other witnesses connected Henry to the rented house, including the rental agent who positively identified Henry as the "Allen R. Norris" who had rented the house and had taken the rental receipt described earlier. A neighbor testified that prior to the robbery she saw Henry at the rented house with John Luck, one of the two men convicted for the robbery. Palm prints found on the lease agreement matched those of Henry.

Henry was convicted. He later learned that the Government had an agent in jail with him while he was awaiting trial. The agent testified at trial that he heard Henry make incriminating remarks. Like with Mr. Hohn, Henry's right to counsel had attached yet the Government intruded into the relationship nonetheless: Hohn, by listening to his discussions with counsel, and Henry by cutting his counsel out of the interrogation by Agent Nichols.

The case against Henry was strong. His palm print was on the rent receipt found in the get-a-way car for

the property that Henry rented under an alias where he was identified as being with one of the convicted robbers shortly before the robbery. Notwithstanding, Henry was not required to establish prejudice from Nichols' testimony to protect his right to counsel. His conviction was set aside by this Court. *United States v. Henry*, 447 U.S. 264 (1980).

This Court has made clear that Government intrusions into the Sixth Amendment right to counsel will result in no grace for the Government. The Tenth Circuit decision clearly is "out of step" with *Henry*, a decision that followed *Weatherford*—the attempted target with which the Tenth Circuit tries to align. The Tenth Circuit has veered off target imposing a *Strickland* burden of proof requirement on claimants making Sixth Amendment Government misconduct claims. The apples to oranges analysis is misplaced and should be reversed by this Court.

CONCLUSION

For all of the foregoing reasons, *Amici* respectfully submit that the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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May 19, 2025

APPENDIX

TABLE OF APPENDICES

APPENDIX — FULL LIST OF *AMICI CURIAE*

Chesa Boudin, District Attorney, San Francisco (2020-2022)

Gil Garcetti, Los Angeles County District Attorney (1992-2000); Los Angeles County Chief Deputy District Attorney (1984-1988); Los Angeles County District Attorney's Office (1978-2000)

Steve Gaskins, Fellow, American College of Trial Lawyers, Assistant District Attorney, New York County (1978-1982)

Hon. Rudolph J. Gerber, Associate Director, Arizona Criminal Code Commission (1976-77); Deputy Attorney, Maricopa County Attorney's Office (1976-1979); Judge, Maricopa County Superior Court (1979-1985); Associate Presiding Judge, (1985-1988); Judge, Arizona Court of Appeals, Division One (1988-2001)

John Hummel, District Attorney, Deschutes County, Oregon (2015-2022)

Brian A. Jacobs, Assistant United States Attorney, Southern District of New York (2009-2015), Deputy Chief of Appeals, Criminal Division (2014-2015)

Norman D. James, Assistant United States Attorney, Central District of California (1973-1978)

Lawrence S. Krasner: District Attorney of Philadelphia (2018-present)

Miriam Aroni Krinsky, Assistant United States Attorney, Central District of California [Chief, Criminal Appellate Section; Chief, General Crimes Section], and District of Maryland (1987-2002); Chair, Solicitor General's Advisory Group on Appellate Issues; Member, Attorney General's Advisory Committee on Sentencing

Corinna Barrett Lain, S.D. Roberts and Sandra Moore Professor of Law, University of Richmond School of Law, Assistant Commonwealth Attorney (1997-2000)

Alan B. Morrison, Assistant United States Attorney, Southern District of New York (1968-1972)

Bill Nettles, United States Attorney, District of South Carolina (2010-2016)

Jerry L. Newton, Assistant Chief United States Attorney (Criminal Division), Central District of California (1974-1976); Assistant United States Attorney, Central District of California (Criminal Division) (1971-1974)

Pamela Y. Price, District Attorne (y, Alameda County (2023-2024)

Daniel T. Satterberg, Prosecuting Attorney, King County, Washington (2007-2022)

Charles B. Sklarsky, Fellow, American College of Trial Lawyers, Assistant United States Attorney, Northern District of Illinois (1978-1986) [Chief of the Criminal Receiving and Appellate Division; Deputy Chief of the

Criminal Division]; Assistant State's Attorney, Cook County, Illinois (1973-1978)

Eric D. Sparr, District Attorney (2022-present), Prosecutor (2005-present), Winnebago County, Wisconsin