No. 23-886

In the Supreme Court of the United States

CARLOS GUARDADO,

Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MASSACHUSETTS SUPREME JUDICIAL COURT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Double Jeopardy Clause prohibits retrial when a post-conviction change in the law requires the government to prove a fact that it did not need to prove under the law that was in effect at the time of trial.

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INTRODUCTION

Petitioner Carlos Guardado's request for review of a ruling by the Massachusetts Supreme Judicial Court ("SJC") that he may be retried for certain firearm possession offenses should be denied. At the time of petitioner's convictions, well-established Massachusetts law held that evidence of a valid firearms license was an affirmative defense to the charged crimes rather than an element of the Commonwealth's case-in-chief. On petitioner's direct appeal, however, following this Court's decision in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022), the SJC overruled its prior decisions and held that licensure must be proven by the Commonwealth as an element of those charges. The SJC also determined that double jeopardy did not bar retrial because the Commonwealth had no reason to introduce evidence on licensure at the time of trial.

Petitioner asks this Court to review that determination based largely upon a purported split of authority that does not withstand scrutiny. Contrary to petitioner's assertions, nine federal courts of appeal have answered the question presented in a manner consistent with the decision below. At least five state courts of last resort have done the same. Meanwhile, petitioner fails to identify any federal court decision that squarely conflicts with the decision of the SJC. Petitioner is left with a single plurality opinion from the Pennsylvania Supreme Court that does not clearly address the question presented and, as far as respondent can tell, has never been cited for the proposition at issue. Under these circumstances, no

split of authority exists that warrants this Court's review.

Moreover, the decision below is correct. For over a century, this Court has made clear that, in general, a criminal defendant who successfully appeals a judgment may be tried a second time, despite the strictures of the Double Jeopardy Clause. An exception to that rule applies where the reviewing court finds that the government failed to offer sufficient evidence to prove its case at trial, because the trial court should have entered a judgment of acquittal in that circumstance. The decisions of this Court establish, however, that evidentiary insufficiency *not* due to a failure by the government does not result in a double jeopardy bar. Where, as here, the insufficiency was created by a post-trial change in law, as opposed to a failure of proof, a straightforward application of this principle demonstrates the correctness of the decision below.

Accordingly, the petition should be denied. *See* Sup. Ct. R. 10.

STATEMENT

1. On January 26, 2019, the Boston Police Department received information from a confidential informant, known as "Z," that an individual with petitioner's name was in possession of an unlicensed silver firearm stored in a black backpack. Pet. App. 24a. Z said that the individual was driving a green Honda Accord with a Maine license plate, and would be in Watertown, Massachusetts later that day. *Id.* According to Z, the individual worked at a particular auto parts store. *Id.*

Acting on Z's tip, law enforcement officers headed toward Watertown. Pet. App. 25a. Less than an hour after police spoke with Z, petitioner was observed at a Watertown mall in a green Honda bearing a Maine license plate. *Id.* A criminal records check confirmed that petitioner did not have a firearms license. *Id.* Petitioner entered the auto parts store described by Z. *Id.*

Some time later, as petitioner left the store, he was approached by police. Pet. App. 25a. His vehicle was searched, and a silver, nine-millimeter Smith & Wesson firearm was found in the glove compartment. Pet. App. 26a. The gun was loaded with a fifteen-round magazine containing two rounds of ammunition. *Id.* Another fifteen-round magazine was located in the glove compartment. *Id.* One of the officers present at the scene recovered a black backpack, which was identified as belonging to petitioner, from inside the store's employee storage area. *Id.* Petitioner was then placed under arrest. Pet. App. 27a.

2. A Middlesex County grand jury indicted petitioner for one count of illegal possession of a firearm, two counts of illegal possession of a large capacity feeding device, one count of illegal possession of ammunition, and one count of illegal possession of a loaded firearm. Pet. App. 27a. At a jury trial in June of 2021, and consistent with then-existing Massachusetts law, the Commonwealth offered no evidence regarding lack of licensure, and the trial judge's jury instructions did not require the jury to find that petitioner did not have a firearms license. Pet. App. 3a, 51a. Petitioner was convicted on all

counts apart from one count of illegal possession of a large capacity feeding device. Pet. App. 3a, 28a.

3. After petitioner's 2021 convictions but while his direct appeal was pending, this Court held in *Bruen*, 597 U.S. at 10, that the Second and Fourteenth Amendments to the United States Constitution protect an individual's right to carry a firearm outside the home.

On petitioner's direct appeal, the SJC held, in relevant part, that *Bruen* had abrogated longstanding Massachusetts precedent regarding the allocation of burdens of production and proof in firearm possession prosecutions. *See Commonwealth v. Guardado*, 206 N.E.3d 512, 538-41 (Mass. 2023) ("*Guardado I*"); Pet. App. 52a-56a.[1] For decades, the SJC had treated licensure as an affirmative defense to charges involving the unlawful possession of firearms or ammunition, holding that a defendant bore an initial burden of producing evidence that he possessed a firearms license. *See*, *e.g.*, *Commonwealth v. Powell*, 946 N.E.2d 114, 124 (Mass. 2011), *cert. denied*, 565 U.S. 1262 (2012); *Commonwealth v. Colon*, 866 N.E.2d 412, 428-29 (Mass.), *cert. denied*, 552 U.S. 1079 (2007); *Commonwealth v. Jones*, 361 N.E.2d 1308, 1310-11 (Mass. 1977). Only after a defendant made a threshold showing of licensure did the burden shift to the Commonwealth to prove its absence. Pet. App. 52a-53a. Following *Bruen*, however, the SJC concluded that, "to convict a defendant of unlawful possession of a firearm, the Commonwealth must

[1] Respondent will cite to the decisions below by reference to petitioner's appendix, unless referring to the decisions by name is helpful in context.

prove 'as an element of the crime charged' that the defendant in fact failed to comply with the licensure requirements for possessing a firearm." Pet. App. 57a (citation omitted). Finding that the Commonwealth did not introduce evidence that petitioner lacked a firearms license, the SJC ordered that petitioner's convictions (aside from the large capacity magazine conviction) be set aside and that not guilty verdicts be entered. Pet. App. 8a, 62a-63a.

4. In a motion for reconsideration, the Commonwealth challenged the remedy that the SJC had ordered, arguing that retrial should be permitted on the firearm offenses that were vacated. *Commonwealth v. Guardado*, 220 N.E.3d 102, 104 (Mass. 2023) ("*Guardado II*"); Pet. App. 2a. Following additional briefing and oral argument, the SJC agreed. Pet. App. 2a. After conducting a searching review of relevant caselaw, the SJC held that "[b]ecause the evidence against the [petitioner] was insufficient only when viewed through the lens of a legal development that occurred after trial, the Commonwealth ha[d] not 'been given [a] fair opportunity to offer whatever proof it could assemble' at trial." Pet. App. 9a (quoting *Burks v. United States*, 437 U.S. 1, 16 (1978)); *see also* Pet. App. 13a-14a. The SJC explained that "[w]ithout the ability to gaze into the future of [the SJC's] and [this Court's] rulings, and without any notice from the [petitioner] of an intent to raise the issue of licensure, the Commonwealth simply had no reason to believe that any evidence concerning licensure would be necessary." Pet. App. 10a. Consequently, the SJC held, the Commonwealth was entitled to retry petitioner on the vacated offenses. Pet. App. 17a.

REASONS TO DENY THE WRIT

This Court should deny the petition because it fails to demonstrate a split on the question presented, and because the decision below was correct.

I. The Split Of Authority Posited In The Petition Is Illusory.

Courts that have considered the question have overwhelmingly concluded that, where a post-trial change in law requires the government to prove a fact that it did not need to prove under the law in effect at the time of trial, double jeopardy principles do not prohibit retrial. Petitioner's attempt to establish a split of authority depends on federal cases decided under a single federal statute, 18 U.S.C. § 924(c)(1), in a scenario significantly different from the one presented here, along with a single plurality decision of the Pennsylvania Supreme Court. Because the § 924(c)(1) cases do not squarely conflict with the SJC's decision, and because both federal and state courts have otherwise overwhelmingly agreed with the SJC's approach to double jeopardy in the circumstances presented here, there is no split of authority warranting this Court's review.

A. Federal courts of appeal and state supreme courts to consider the question presented have reached the same conclusion as the SJC.

As petitioner acknowledges, the Third, Fourth, Sixth, Eighth, Ninth, and D.C. Circuits have all agreed with the SJC on the question presented. Pet. 20-22. For example, the D.C. Circuit recently held that "a defendant cannot make out a sufficiency

challenge as to offense elements that the government had no requirement to prove at trial under then-prevailing law." *United States v. Reynoso*, 38 F.4th 1083, 1091 (D.C. Cir. 2022); *see also United States v. Harrington*, 997 F.3d 812, 817 (8th Cir. 2021) (where evidence "was rendered insufficient by a post-conviction change in the law, the setting aside of a conviction on this basis is equivalent to a trial-error reversal rather than to a judgment of acquittal," and double jeopardy does not apply); *United States v. Nasir*, 982 F.3d 144, 176 (3d Cir. 2020) ("Though a failure of proof usually results in acquittal, the Double Jeopardy Clause is not implicated when the law has changed on appeal. Retrial is thus allowed and warranted."), *vacated on other grounds*, 142 S. Ct. 56 (2021)[2]; *United States v. Houston*, 792 F.3d 663, 670 (6th Cir. 2015) (where circuit law changed following a decision of this Court, retrial would not raise double jeopardy concerns because "the government would not be seeking a second bite at the apple," but rather "a *first* bite under the right legal test") (emphasis in original); *United States v. Ellyson*, 326 F.3d 522, 533 (4th Cir. 2003) (no double jeopardy concerns where "[a]ny insufficiency in proof was caused by the subsequent change in the law . . ., not the government's failure to muster evidence"); *United States v. Kim*, 65 F.3d 123, 126-27 (9th Cir. 1995) (remanding for new trial "to permit the Government to present its case in accordance with the recent change in law").

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[2] Petitioner correctly observes that *Nasir* was vacated on other grounds by this Court. Pet. 20 n.4. Nonetheless, a panel of the Third Circuit stated its view on the question presented here and decided it consistently with the SJC below.

Moreover, contrary to petitioner's assertions, the Seventh, Tenth, and Eleventh Circuits have reached the same conclusion too. Pet. 13-18. The Eleventh Circuit, for example, held that a new trial was the "appropriate remedy" where "[any] insufficiency of evidence is accompanied by trial court error whose effect may have been to deprive the Government of an opportunity or incentive to present evidence that might have supplied the deficiency." *United States v. Robison*, 505 F.3d 1208, 1224-25 (11th Cir. 2007) (citation and internal quotation marks omitted).[3] Similarly, the Seventh Circuit explained in *United States v. Gonzalez* that, where circuit law on an element of the offense changed post-trial, the error leading to reversal of the conviction is "more akin to trial error than to the legal insufficiency of the evidence," and retrial is permitted. 93 F.3d 311, 323 (7th Cir. 1996). And in *United States v. Wacker*, the Tenth Circuit found no double jeopardy barrier to retrial where the government "cannot be held responsible for 'failing to muster' evidence sufficient to satisfy a standard which did not exist at the time of trial." 72 F.3d 1453, 1465 (10th Cir. 1995) (citation omitted). And while the Second Circuit declined to decide the question in *United States v. Bruno* because "the government conceded that it would present no new evidence" on retrial, the court "recognize[d] that in some cases there may be sound reasons for refusing to consider the sufficiency of the evidence where there has been a subsequent change in law." 661 F.3d 733, 742-43 (2d Cir. 2011).

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[3] This case's purported conflict with another Eleventh Circuit case, *see* Pet. 17-18, is addressed *infra* at 20-22 & n.7.

Thus, at least nine of the twelve circuit courts of appeal have adopted the position of the SJC below. Petitioner's claim that this Court should intervene because the Seventh and Tenth Circuits disagree with the SJC (despite the language quoted above), and that *Robison* does not reflect current law in the Eleventh Circuit, depends entirely on a distinct line of cases under 18 U.S.C. § 924(c)(1) and is refuted *infra* Part I-B.

A consensus is developing among state supreme courts as well. Petitioner acknowledges that the Connecticut Supreme Court has answered the question presented consistently with the SJC. Pet. 22; *see State v. Drupals*, 49 A.3d 962, 976 n.12 (Conn. 2012) ("[W]hen we establish a newly articulated standard in a statute, the defendant may be retried without violating the constitution's double jeopardy provision."). But petitioner fails to recognize that the highest courts in at least Colorado, Illinois, Missouri, and the District of Columbia have done the same. As the Illinois Supreme Court held, for example, "[c]ourts considering this issue agree that where a reviewing court determines that the evidence presented at trial has been rendered insufficient only by a posttrial change in the law, double jeopardy concerns do not preclude the government from retrying the defendant." *People v. Casler*, 181 N.E.3d 767, 783 (Ill. 2020) (citing cases from the Fourth, Eighth, Ninth, and Tenth Circuits); *see also McDonald v. People*, 494 P.3d 1123, 1135 (Colo. 2021) (government "cannot be held responsible for failing to muster evidence sufficient to satisfy a standard that, at the time of trial, didn't need to be met"); *Osborne v. District of Columbia*, 169 A.3d 876, 887 n.12 (D.C. 2017) ("Like many other courts, we decline to prohibit retrial where

a post-trial change in the law has altered the elements of proof."); *State v. Liberty*, 370 S.W.3d 537, 555 (Mo. 2012) (rejecting double jeopardy challenge and allowing retrial because "the State was unaware that conviction on the additional seven counts would require it to present" certain evidence). Moreover, the Supreme Court of Alabama has found the same position to be "sound" in dicta. *Ex parte Gentry*, 727 So. 2d 141, 146-47 (Ala. 1999) (if reversal on appeal "was based solely on the failure of the State to produce evidence that was not theretofore generally understood to be essential to prove the crime of burglary. . . the prohibition against double jeopardy would not bar reprosecution"). And the Supreme Court of Georgia observed in dicta that retrial might be possible if "the evidence was legally insufficient only because of a change in the substantive law after trial," without actually deciding the question. *Jefferson v. State*, 854 S.E.2d 528, 530 (Ga. 2021).

In the face of this consensus, petitioner fails to cite a single decision squarely considering the question presented and reaching a conclusion contrary to the SJC's.

B. The cases arising under 18 U.S.C. § 924(c)(1), upon which petitioner relies, present a different scenario and therefore do not establish a split of authority.

All of the circuit court decisions that petitioner claims create a split with the SJC—*Gonzalez* and *Hightower* in the Seventh Circuit; *Smith*, *Miller*, and *Wacker* in the Tenth Circuit; and *Mount* in the Eleventh Circuit—involve a single statute, 18 U.S.C. § 924(c)(1), and a scenario significantly different from the one presented here. Because these cases are

readily distinguishable from the SJC's decision, this Court's intervention is not needed.

Section 924(c)(1) "imposes a 5-year minimum term of imprisonment upon a person who 'during and in relation to any crime of violence or drug trafficking crime . . . *uses* or *carries* a firearm.'" *Bailey v. United States*, 516 U.S. 137, 138 (1995) (emphasis added). In *Bailey*, this Court held that "uses" under the statute required the government to show "that the defendant actively employed the firearm during and in relation to the predicate crime." *Id.* at 150. This was a narrower definition of "uses" than the one previously applied in several circuits. *See, e.g.*, *Gonzalez*, 93 F.3d at 318.

Importantly, however, *Bailey* did not affect the definition of "carries," and it thus did not affect the government's motivation to introduce evidence of a defendant's conduct relating to firearms in those circuits; such evidence was of obvious relevance both before and after *Bailey* under both the "uses" and "carries" prongs. Instead, the decision merely narrowed the firearm-related circumstances that would prove a "uses" violation under Section 924(c). And it affected only one of the two *alternative* methods of proving the firearm element of the charge. *See* 18 U.S.C. § 924(c)(1) (applying to person who "uses *or* carries a firearm") (emphasis added). That the government was not blindsided by a new evidentiary burden post-*Bailey* is demonstrated by the fact that, in a number of the post-*Bailey* cases—including cases cited by petitioner—the government did not even request retrial on "use," essentially conceding that it had presented all available firearms-related evidence at the first trial and would have nothing to add at a

retrial. *See, e.g.*, *Smith*, 82 F.3d at 1566; *United States v. Mount*, 161 F.3d 675, 677-78 (11th Cir. 1998); *Gonzalez*, 93 F.3d at 319.[4]

That is nothing like the case at bar, in which *Guardado I* established an entirely new element for the Commonwealth to prove—one as to which the Commonwealth previously had no reason to present evidence because caselaw had explicitly defined it as an affirmative defense. *See, e.g.*, *Commonwealth v. Gouse*, 965 N.E.2d 774, 785-86 (Mass. 2012).

This difference is critical because the government's responsibility—or lack thereof—for its failure to present evidence is an important consideration in double jeopardy jurisprudence. *See, e.g.*, *Lockhart v. Nelson*, 488 U.S. 33, 42 (1988) (permitting retrial where erroneous admission of certain evidence may have deterred government from presenting other evidence that would have addressed evidentiary deficiency); *Burks*, 437 U.S. at 16 (ordinarily, government "cannot complain of prejudice" where acquittal results from insufficiency of evidence, "for it

[4] Some courts have found that the government's concession that it would not present additional evidence in a new trial is relevant to the double jeopardy analysis. *See, e.g.*, *Bruno*, 661 F.3d at 743 (declining to consider government's change-of-law arguments in response to double jeopardy claim because, "[a]t oral argument the government conceded that it would present no new evidence if Bruno were retried"); *United States v. Mansfield*, No. 18-CR-00466-PAB, 2019 WL 3858511, at *4 (D. Colo. Aug. 16, 2019) (unpublished) (suggesting that acquittal in change-of-law scenario might be appropriate only where "the facts bearing on the defendant's culpability under the corrected legal standard are so clear and uncontested that retrial would be futile" or "the government has conceded that it does not intend to offer any additional evidence on remand.").

has been given one *fair* opportunity to offer whatever proof it could assemble") (emphasis added); *Tibbs v. Florida*, 457 U.S. 31, 41 (1982) ("the rule barring retrial [is] 'confined to cases where the prosecution's failure is clear'") (quoting *Burks*, 437 U.S. at 17); *Houston*, 792 F.3d at 670 (rejecting standard sufficiency analysis where law changed post-trial because that would "measure the evidence introduced by the government against a standard it did not know it had to satisfy and potentially prevent it from ever introducing evidence on that element"); *Robison*, 505 F.3d at 1224-25 (double jeopardy did not bar new trial where insufficiency was accompanied by trial court error "whose effect may have been to deprive the Government of an opportunity or incentive to present evidence that might have supplied the deficiency") (citation omitted).

The double jeopardy issues raised in the *Bailey*/§ 924(c)(1) cases are thus significantly different than the one presented here. Even apart from this systemic issue, however, a close review of the precedent demonstrates that petitioner has failed to establish a square split between the SJC decision below and any of the jurisdictions he cites.

Tenth Circuit. Petitioner's suggestion that the Tenth Circuit's decision in *Wacker* supports a circuit split, Pet. 14-15, is not defensible. In *Wacker*, several co-defendants were convicted of use of a firearm under Section 924(c) prior to *Bailey*. The government had charged only "use" and not "carry" under the statute. *Wacker*, 72 F.3d at 1462, 1463 n.5. On appeal after *Bailey*, the Tenth Circuit reversed defendants' "use" convictions premised on pistols found in a truck and a filing cabinet, and denied retrial. *Id.* at 1463-64, 1480.

The court reasoned that, under *Bailey*, "[a] defendant cannot be charged under § 924(c)(1) merely for storing a weapon near drugs or drug proceeds." *Id.* at 1463 (quoting *Bailey*, 516 U.S. at 508). As to another "use" conviction, however—relating to a gun that was carried by a defendant while picking marijuana—the court remanded for retrial. *Id.* at 1464-65. The court observed that permitting retrial on that count was "not inconsistent with the Double Jeopardy Clause" because the reversal was "analogous to one based on trial error: the legal standard under which the jury was instructed and under which the government presented its proof was incorrect." *Id.* at 1465. The court concluded that, "whenever a conviction is reversed solely for failure to produce evidence that was not theretofore generally understood to be essential to prove the crime, . . . double jeopardy does not bar reprosecution." *Id.* (citation omitted).[5] This reasoning is, of course, fully consistent with that of the SJC below.

Petitioner nonetheless erroneously insists that *Wacker* supports his view, dismissing the above language as dicta because "the Tenth Circuit had already concluded that the government *had* mustered evidence to satisfy the correct, post-*Bailey* standard."

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[5] Although the *Wacker* court did not explain why this reasoning was inapplicable to the other "use" charges, it may have been because the court determined that the evidence as to where those guns were stored was fully presented at the first trial, so retrial would have been futile (e.g., a gun in a filing cabinet could not have been "actively employed"). Regardless, the fact that the *Wacker* court treated different "use" charges differently in analyzing double jeopardy itself undermines petitioner's arguments here, since if petitioner were correct, no retrials should have been permitted.

Pet. 15 (emphasis in original). That is incorrect; the *Wacker* court did *not* draw that conclusion. To the contrary, it held that acquittal was not warranted because the government had satisfied the standard in effect *before* the *Bailey* decision, and that the government *could not be held responsible* for *failing* to satisfy the post-*Bailey* standard:

> Under the 'use' standard in place at the time, the evidence adduced at appellants' trial was sufficient to sustain the section 924(c) convictions. Thus, the district court did not err in refusing to grant a judgment of acquittal because of insufficient evidence on those counts. Moreover, the government here cannot be held responsible for 'failing to muster' evidence sufficient to satisfy a standard which did not exist at the time of trial.

72 F.3d at 1465. The court also noted that the government would be permitted to present "additional evidence, if available" on "use" at a new trial. *Id.* The court then described in extensive detail why the change in law there obviated any double jeopardy concerns. *Id.*

Unsurprisingly, multiple courts have cited *Wacker* for the proposition that retrial does not violate double jeopardy principles where the law changes post-trial—including the Tenth Circuit itself. *See, e.g.*, *Nasir*, 982 F.3d at 176 n.42; *United States v. Arciniega-Zetin*, 755 F. App'x 835, 842 (10th Cir. 2019) (unpublished); *Houston*, 792 F.3d at 670; *United States v. Ford*, 703 F.3d 708, 711 (4th Cir. 2013); *Bruno*, 661 F.3d at 743 n.2. Petitioner's alternative theory—that the *Wacker* court's lengthy double jeopardy analysis is dicta, Pet.

14-15, despite all indications that the court considered it necessary to its decision, *Wacker*, 72 F.3d at 1465—is untenable.

Two other Tenth Circuit decisions cited by petitioner, *United States v. Smith*, 82 F.3d 1564 (10th Cir. 1996), and *United States v. Miller*, 84 F.3d 1244 (10th Cir. 1996), do not support his position either. *See* Pet. 13-14. Both of those cases concern a scenario not presented here, namely, when a statute permits conviction under either of two theories, and the law changes after conviction with respect to one theory but not the other. The question in both *Smith* and *Miller* was how to proceed given a jury verdict that did not distinguish between the "use" and "carry" prongs of § 924(c).

In *Smith*, the defendant was indicted under Section 924(c) for "knowingly us[ing] or carr[ying] firearms," and was convicted prior to *Bailey*. 82 F.3d at 1566. Following the *Bailey* decision, the government conceded that the evidence "was insufficient to support a conviction for use of a firearm," but argued that it "was sufficient to support a conviction for *carrying* a firearm." *Id.* (emphasis added). The government did not ask for a new trial or affirmance based on the "use" prong; rather, it asked the court to affirm the conviction based on "carries." *Id.* at 1566. The court therefore evaluated sufficiency on the *carry prong only*. *Id.* at 1567-68. Concluding that the evidence "was fatally insufficient on carrying," the court held that retrial "under the carrying prong" was prohibited on double jeopardy grounds. *Id.* at 1566, 1567 n.2. That conclusion is both plainly correct and irrelevant here, because *Bailey* did not alter Tenth Circuit law as to the

definition of "carries" in Section 924(c). Thus, a retrial on "carries" would have given the government a second chance at proving its case *under the same law as before*—precisely what this Court rejected in *Burks*. *See Burks*, 437 U.S. at 16 (holding that "the prosecution cannot complain of prejudice [where] it has been given one fair opportunity to offer whatever proof it could assemble").

In *Miller*, similarly to *Smith*, the indictment alleged that the defendant "violated 18 U.S.C. § 924(c)(1) both by 'using' and by 'carrying' firearms," and the defendant was convicted prior to *Bailey*. 84 F.3d at 1256-57. Given the possibility that the jury had convicted the defendant solely based upon the pre-*Bailey* standard for "uses," the court vacated the conviction. *Id.* at 1357. But in *Miller*, unlike *Smith*, the evidence presented at trial was sufficient to sustain a conviction under the "carries" prong. *See id.* at 1260 ("[W]e conclude that a jury could find that he carried the firearm."). The court therefore ordered a new trial on the "carries" prong. *Id.* at 1261. That holding is entirely consistent with *Smith* and with the SJC's decision below because, again, *Bailey* did not change the standard for a conviction under the "carries" prong. Therefore, allowing a retrial on "carries" if the government had *not* initially presented sufficient evidence to convict under that prong would plainly violate *Burks* by giving the government a "proverbial 'second bite at the apple.'" *Burks*, 437 U.S. at 17; *see also Smith*, 82 F.3d at 1566. But in the SJC's decision below, there was no "alternative" theory of unlawful possession of a firearm which the government could be faulted for not pursuing at trial.

In any event, to the extent *Miller* raised any doubts about the Tenth Circuit's position on the question presented, they were eliminated when the court reiterated *Wacker's* double jeopardy analysis seven years later. *See United States v. Pearl*, 324 F.3d 1210, 1214 (10th Cir. 2003) (relying on *Wacker* for the proposition that, "[b]ecause the government cannot be held responsible for failing to muster evidence sufficient to satisfy a standard . . . which did not exist at the time of trial, and because this is trial error rather than pure insufficiency of evidence, Mr. Pearl may be retried without violating double jeopardy") (internal quotation marks omitted).[6]

In short, nothing in the Tenth Circuit's decisions is inconsistent with the SJC's decision below, and to the extent (if any) that the Tenth Circuit's decisions are in tension with each other, that is an intra-circuit matter that the Tenth Circuit itself can resolve. Petitioner's attempt to establish a split warranting this Court's review based on the Tenth Circuit therefore fails.

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[6] Furthermore, in a development not noted by Petitioner, a closely-related aspect of *Miller* was overruled by a subsequent Tenth Circuit decision. *See United States v. Holland*, 116 F.3d 1353, 1359 n.4 (10th Cir. 1997) (holding that a reviewing court may affirm a post-*Bailey* § 924(c) conviction (rather than ordering a retrial) where the jury was instructed on carrying, there was no dispute that the defendant carried a firearm on his person or in his vehicle, and "the jury verdict necessarily includes an inherent finding of 'carrying during and in relation to the drug crime'"; further noting that "[t]he result in … *Miller* would therefore be different under the analysis we use here," and that "[w]e have circulated this footnote to the en banc court, which has unanimously agreed that to the extent any of our earlier cases can be viewed as inconsistent with our holding here, they are overruled").

Seventh Circuit. The Seventh Circuit cases petitioner relies on are no more indicative of a split than the Tenth Circuit cases. In *Gonzalez*, the government charged the defendant with using or carrying a firearm under Section 924(c), but the jury was instructed only on "use." 93 F.3d at 311, 317-18. Importantly, the government did not defend the "use" conviction after *Bailey* and asked for retrial *on the carrying prong only*. *See Gonzalez*, 93 F.3d at 319 ("The government concedes that the conviction cannot stand because the jury instruction employed the pre-*Bailey* definition of 'use.' . . . However, the government seeks a remand of the case for retrial . . . on the theory that the defendants 'carried' rather than 'used' the shotgun."); *see also id.* ("the government concedes that there was no 'use'"). The simple fact that, in *Gonzalez*, the government did not request retrial on the legal theory as to which the law had changed distinguishes *Gonzalez* from the case at bar.

Moreover, the *Gonzalez* court's ultimate conclusions are fully consistent with the decision below. In particular, the court held that there was "no impediment to permitting the retrial of the matter under the definitions that *Bailey* has now approved," and that, in light of *Bailey*, "the error in the earlier proceedings" was "more akin to trial error than to the legal insufficiency of the evidence." *Gonzalez*, 93 F.3d at 323; *see also id.* (favorably citing *Wacker* for allowing retrial "on the ground that the earlier standard did not afford the government sufficient notice of what had to be proved"). *Gonzalez* recognized the importance of a post-trial change in law to the analysis of a double jeopardy issue, and thus falls on the same side of the purported "split" as the D.C. Circuit, Illinois Supreme Court, and many other

courts mentioned above. *See, e.g.*, *Reynoso*, 38 F.4th at 1091 (citing *Gonzalez* for the proposition that, where circuit law on a government's burden changes on appeal, defendant's challenge should be understood as claim of trial error rather than insufficiency of evidence); *Casler*, 181 N.E.3d at 783 (same).

United States v. Hightower, 96 F.3d 211 (7th Cir. 1996), does not help petitioner either. The defendant there was convicted of using (but not carrying) a firearm under Section 924(c). Following *Bailey*, the government "essentially conceded" that the conviction would have to be vacated. There is no indication that the government requested retrial on the "use" issue. *Hightower*, 96 F.3d at 215. The *Hightower* court thus did not address whether retrial on "use" would be appropriate, and did not specifically address the question presented here. Finding that the evidence at trial would not have supported a conviction on "carry," the court declined to remand for a new trial on that ground, based on ordinary double jeopardy principles unrelated to a change in law. *Id.* at 215. Nothing in *Hightower* is inconsistent with the decision below.

Eleventh Circuit. The Eleventh Circuit's decision in *Mount*, 161 F.3d 675, is similarly unhelpful to petitioner. The defendant challenged his conviction under Section 924(c) after *Bailey*. *Mount*, 161 F.3d at 677. The government conceded insufficient evidence of "use," and argued only that the conviction "may be upheld under the 'carry' prong." *Id.* at 677-78. In analyzing whether a new trial was appropriate, the *Mount* court therefore considered whether the evidence at trial was sufficient to convict Mount under "carry," but not "use." 161 F.3d at 678-80. As in *Hightower*, the *Mount* court did not specifically

address the question presented here. Concluding that the evidence at trial did not support a finding under "carry," the court vacated the conviction and disallowed retrial, again based on ordinary double jeopardy principles unrelated to a change in law. *Id.* at 680-81; *see also id.* at 678 ("If the record does not contain sufficient evidence under which a properly instructed jury could have convicted Mount of 'carrying' the firearm, then double jeopardy principles mandate that we vacate the conviction and remand to the district court with directions to enter a judgment of acquittal on the count in question."). Again, as with *Smith* from the Tenth Circuit and *Hightower* from the Seventh, retrial on a theory ("carry") as to which the government had failed to offer sufficient evidence at trial, but where the law governing that theory *had not changed* post-trial, would have been a straightforward double jeopardy violation under *Burks*. And, again as with *Smith* and *Hightower*, that situation is readily distinguishable from the SJC's decision below, where the statute affords only one theory for conviction and where the law *did* change with respect to that theory.

Unlike *Mount*, the Eleventh's Circuit's decision in *Robison* explicitly addressed the question presented here. 505 F.3d 1208. There, the definition of the statutory term "navigable waters" used in a jury charge was rendered inaccurate after trial by a decision of this Court, requiring the defendants' convictions under the Clean Water Act to be reversed. *Id.* at 1211. The court rejected the defendants' claim that they were entitled to judgments of acquittal, finding instead that a new trial is appropriate where any "insufficiency of evidence is accompanied by trial court error whose effect may have been to deprive the Government of an opportunity or incentive to present

evidence that might have supplied the deficiency." *Id.* at 1224-25. That circumstance occurred in *Robison* because the trial court's application of a later-invalidated definition "deprived the government of any incentive to present evidence that might have cured any resulting insufficiency." *Id.* at 1225.

The *Robison* court thus clearly held that double jeopardy principles do not bar a new trial where a post-trial change in law requires the government to prove a fact that it did not need to prove at trial. Multiple courts have cited *Robison* for that proposition. *See, e.g.*, *Osborne*, 169 A.3d at 887 n.12; *Ford*, 703 F.3d at 711; *Bruno*, 661 F.3d at 742. None has suggested—as petitioner incorrectly does, Pet. 17-18—that *Mount* calls *Robison* into doubt or that the state of the law in the Eleventh Circuit is unclear on this issue.[7] Petitioner's attempt to establish a split based on Eleventh Circuit precedent therefore fails.

Pennsylvania Supreme Court. Given the absence of any split among the federal courts of appeal, petitioner is left to rely on a single, sharply-divided state supreme court case, *Commonwealth v. Shade*, 681 A.2d 710 (Pa. 1996).[8] *See* Pet. 18-19. The

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[7] And even if the Eleventh Circuit's law were unsettled due to some perceived conflict between *Robison* and *Mount*, that is a matter that the Eleventh Circuit itself can resolve without this Court's intervention.

[8] Three of the seven justices in *Shade* joined the opinion of the court, one justice authored a separate concurrence, and three justices dissented. 681 A.2d at 711; *see id.* at 713 (Cappy, J., concurring) ("I concur in the result reached by the majority."); *id.* at 715, 717 (Castille, J., joined by Nigro and Newman, JJ., dissenting). The reasoning in *Shade* therefore is not binding on courts in Pennsylvania. *See Commonwealth v. Bethea*, 828 A.2d 1066, 1073 (Pa. 2003) *("*When a court is faced with a plurality

plurality opinion in *Shade* did not address the question presented here; indeed, the term "double jeopardy" appears nowhere in that opinion. 681 A.2d at 711-13. While a concurring opinion by a single justice made general references to double jeopardy and the effect of a change in law, *id.* at 713-15, that discussion was not referenced in the plurality opinion. And neither the plurality nor the concurrence in *Shade* cited cases in other jurisdictions that had explicitly discussed the question presented as of 1996, including *Wacker*, 72 F.3d at 1453; *Kim*, 65 F.3d at 123; and *United States v. Weems*, 49 F.3d 528 (9th Cir. 1995).

Notably, no other case appears to cite *Shade* for the proposition that petitioner ascribes to it. To the extent that *Shade* can be read to make any holding on the question presented, the decision is a sole outlier that contradicts at least nine courts of appeal and five state high courts. And given the splintered nature of the decision, the Pennsylvania Supreme Court may itself step in and clarify the law in a future majority opinion.

Petitioner's assertion of a square split in authority on the question presented is meritless.

II. The Decision Below Is Correct.

This Court should deny the petition for the further reason that the SJC did not err. It correctly concluded that, when a post-trial change in law requires the government to prove a fact that it did not need to prove at trial, double jeopardy does not bar retrial. Pet. App. 8a-10a.

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opinion, usually only the result carries precedential weight; the reasoning does not.").

A. The SJC's decision is consistent with this Court's double jeopardy jurisprudence.

The SJC's analysis below is fully consistent with the decisions of this Court. In particular, this Court's opinions in *Burks* and *Lockhart* dictate the result reached by the SJC here.

It is well settled that "a criminal defendant who successfully appeals a judgment against him 'may be tried anew . . . for the same offence of which he had been convicted." *Tibbs*, 457 U.S. at 39-40 (quoting *United States v. Ball*, 163 U.S. 662, 672 (1896)). In *Burks*, this Court "carved a narrow exception," *Tibbs*, 457 U.S. at 40, to that "general rule," *Lockhart*, 488 U.S. at 39, holding that "the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient." *Burks*, 437 U.S. at 18; *see also Lockhart*, 488 U.S. at 39 (describing *Burks* principle as "an exception" to retrial rule). The rationale for that exception was that a reversal for evidentiary insufficiency indicates "a determination that the government's case against the defendant was so lacking that the trial court should have entered a judgment of acquittal, rather than submitting the case to the jury." *Lockhart*, 488 U.S. at 39 (citing *Burks*, 437 U.S. at 16-17).

Burks emphasized that a reversal based purely on insufficient trial evidence implicates the Double Jeopardy Clause specifically because it demonstrates *a failure of proof on the part of the government*—which trial errors do not. 437 U.S. at 15 ("reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the

government has failed to prove its case"); *id.* at 11 (insufficiency finding results in retrial bar because double jeopardy "forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding"); *Tibbs*, 457 U.S. at 41 (bar on successive prosecutions "prevents the State from honing its trial strategies and perfecting its evidence through successive attempts at conviction").

In contrast, double jeopardy does not bar retrial where, as here, evidentiary insufficiency results not from the government's evidentiary shortfall, but from a separate trial error. *Lockhart* illustrates this point. There, evidence of a prior conviction, without which there was insufficient evidence to support the jury's habitual-offender verdict, was erroneously admitted against the defendant. 488 U.S. at 40. The improper introduction of evidence was not due to prosecutorial misconduct. *Id.* at 36 n.2. This Court held that double jeopardy did not bar retrial—despite the fact that the properly admitted evidence was insufficient to support the verdict—because reversal was not "based *solely* on evidentiary insufficiency," but rather fell into the category of "trial error." *Id.* at 40 (emphasis added); *see also id.* at 39 (describing *Burks* as applying when a conviction is reversed "on the *sole* ground that the evidence was insufficient to sustain the jury's verdict") (emphasis added). *Lockhart* found that this result was compelled by "the logic of *Burks*," emphasizing the focus in *Burks* on the government's role in creating an evidentiary insufficiency:

> *Burks* was careful to point out that a reversal based solely on evidentiary

> insufficiency has fundamentally different implications, for double jeopardy purposes, than a reversal based on such ordinary "trial errors" as the "incorrect receipt or rejection of evidence." While the former is in effect a finding "that the government has failed to prove its case" against the defendant, the latter "implies nothing with respect to the guilt or innocence of the defendant," but is simply "a determination that [he] has been convicted through a judicial process which is defective in some fundamental respect."

Lockhart, 488 U.S. at 40 (quoting *Burks*, 437 U.S. at 14-16). Since the insufficiency in *Lockhart* was due to a defect in the process rather than the government's failure of proof, there was no bar to "allow[ing] the prosecutor an opportunity to offer evidence of another prior conviction to support the habitual offender charge." *Lockhart*, 488 U.S. at 42. "Permitting retrial in this instance," this Court held, "is not the sort of governmental oppression at which the Double Jeopardy Clause is aimed." *Id*.

The SJC correctly applied these principles here. The evidentiary insufficiency arose only because a post-trial change in the law added a new element that the Commonwealth was required to prove, not because the Commonwealth had failed to satisfy the burden of proof that was applicable at the time of trial. Pet. App. 9a-10a. The error therefore was not "based *solely* on evidentiary insufficiency," *Lockhart*, 488 U.S. at 40

(emphasis added), and permitting retrial would not improperly "afford the government an opportunity for the proverbial 'second bite at the apple,'" *Burks*, 437 U.S. at 17. Petitioner's convictions did not result from a presentation of evidence "so lacking that it should not have even been *submitted* to the jury." *Burks*, 437 U.S. at 16 (emphasis in original).[9]

Petitioner and his *amici* misconstrue *Burks* and its progeny. The result in *Burks* was different than here because *Burks* did not involve a post-trial change in law. Petitioner's description of *Burks* as holding that "there can be a retrial after 'trial error' only when there was not 'evidentiary insufficiency,'" Pet. 30, is simply not correct; *Burks* contains no such holding. *Lockhart*, which cited *Burks* as support for the conclusion that retrial was permitted where evidentiary insufficiency resulted from a trial error, *see Lockhart*, 488 U.S. at 40-41, rules out any such interpretation of *Burks*. Notably, petitioner fails to cite *Lockhart* at all. And petitioner ignores the

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[9] Petitioner contends that the "logical implication" of the SJC's decision is that retrial is permissible whenever there is a trial error (e.g., incorrect jury instructions) that accompanies evidentiary insufficiency. *See* Pet. 33-34. Nothing in the SJC's decision suggests that result. Double jeopardy may bar retrial in cases that involve both an instructional error and a sufficiency error—where, for example, the parties and the trial judge incorrectly understand the *existing* law regarding the elements of the crime. *See, e.g.*, *Commonwealth v. Munoz*, 426 N.E.2d 1161, 1164-65 (Mass. 1981). The inapplicability of the double jeopardy bar here does not follow automatically from the incorrect jury instruction. Rather, it is a consequence of the fact that the evidentiary insufficiency was not due to the government's failure of proof, but the result of a post-trial change in law.

discussion in *Burks* of whether a retrial would afford the government "an opportunity for the proverbial second bite at the apple." 437 U.S. at 17. That concern is absent when a post-trial change in law requires the government to prove a fact it did not need to prove at trial.

Petitioner's attempt to support his position with *Musacchio v. United States*, 577 U.S. 237 (2016), fares no better. Pet. 26-27. In *Musacchio*, this Court addressed "a sufficiency challenge when a jury instruction adds an element to the charged crime and the Government fails to object." *Id.* at 243. The defendant argued that his sufficiency claim should have been assessed against the incorrect instruction, with its heightened burden of proof. *Id.* at 241. This Court disagreed, holding that sufficiency "should be assessed against the elements of the charged crime, not against the erroneously heightened command in the jury instruction." *Id.* at 243.

Musacchio provides no support for petitioner's position because it addresses a wholly different set of circumstances. The issue of a post-trial change in law—particularly one that resulted in a new element that the government had not previously been required to prove—was not before this Court in *Musacchio*. Even more significantly, *Musacchio's* holding is not grounded in the Double Jeopardy Clause at all. Indeed, the conviction in *Musacchio* was affirmed, so the question of whether retrial was appropriate did not arise, and double jeopardy is not discussed in the opinion. *See* 577 U.S. at 249. In contrast to *Musacchio*, *Burks* and *Lockhart* provide clear guidance regarding the appropriate result here, where

a conviction is secured through a defective judicial process, as discussed above.[10]

Finally, petitioner relies on a line of cases involving an "acquittal"—a term to which "the Double Jeopardy Clause attaches special weight." *Tibbs*, 457 U.S. at 41. Pet. 28-29. Under those cases, "a verdict of acquittal is final, ending a defendant's jeopardy, and even when 'not followed by any judgment, is a bar to a subsequent prosecution for the same offence.'" *Green v. United States*, 355 U.S. 184, 188 (1957) (quoting *Ball*, 163 U.S. at 671). This rule applies whether the acquittal was due to a jury's verdict or a trial judge's finding, and whether it was correct or mistaken. *See, e.g.*, *McElrath v. Georgia*, 601 U.S. 87, 89 (2024) (jury's verdict of "not guilty by reason of insanity" acquitted defendant, notwithstanding the presence of other, inconsistent "guilty but mentally ill" verdicts); *Evans v. Michigan*, 568 U.S. 313, 320 (2013) (erroneous determination by trial court that state's evidence was insufficient to support conviction constituted an acquittal for double jeopardy purposes); *Smith v. Massachusetts*, 543 U.S. 462, 467-68 (2005) (defendant acquitted when trial judge allowed defendant's motion

[10] Petitioner's reliance on *United States v. Simpkins*, 90 F.4th 1312 (10th Cir. 2024) is similarly misplaced. Pet. 27, 31-32. *Simpkins* presented the inverse situation to that in *Musacchio*. There, the jury instructions omitted an element of the offense, and the Tenth Circuit nevertheless assessed a sufficiency of the evidence challenge against the actual elements of the crime. 90 F.4th at 1316. Finding the evidence insufficient, the court ordered a judgment of acquittal. *Id.* at 1318. *Simpkins* involved no change in the law at all. No new element was added on appeal. Instead, the government was precluded from retrying the defendant where it concededly offered no evidence of an essential element of the offense under well-settled law. *See id*.

for required finding of not guilty by resolving elements of charged offense in his favor); *Smalis v. Pennsylvania*, 476 U.S. 140, 144-45 (1986) (government could not appeal judgment of acquittal entered by trial court); *Sanabria v. United States*, 437 U.S. 54, 68-69, 78 (1978) (trial court's "erroneous resolution" of charge in defendant's favor amounted to acquittal for insufficient evidence and barred retrial).

These cases are all inapplicable here because there was no acquittal at petitioner's trial, nor should there have been at the time. Petitioner's "expectation of repose" from successive prosecutions does not materialize absent an acquittal. *Evans*, 568 U.S. at 319. The SJC properly applied the general rule that retrial is not barred by double jeopardy when a defendant "has succeeded in getting his conviction set aside for error in the proceedings below," *Lockhart*, 488 U.S. at 39, where the "narrow exception" in *Burks* does not apply, *Tibbs*, 457 U.S. at 40. Accordingly, the acquittal cases cited by petitioner are irrelevant to the question presented.

B. There is a clear distinction between a change in law that affects the government's burden of proof and mere application of existing law.

There is no merit to petitioner and *amici's* suggestion that the SJC's decision draws an unreasonable distinction between changes in the law and clarifications of the law for double jeopardy purposes. Pet. 30-34; Amicus Br. 14-16. The distinction is reasonable and clear. A change in the law occurs when a court reverses or overturns the

existing law of a jurisdiction. When such a change occurs post-trial and requires the government to prove a fact it was not required to prove at the time of trial, any evidentiary insufficiency was not caused by the government's failure of proof, and retrial is permitted. That is what occurred below. Where a court merely clarifies existing law, on the other hand, the government's burden has not changed, and the double jeopardy bar applies. That was the situation in the cases petitioner cites.

Both *United States v. Hillie*, 14 F.4th 677, 683 (D.C. Cir. 2021), Pet. 31, and *People v. Pennington*, 400 P.3d 14, 18 (Cal. 2017), Pet. 32, presented sufficiency-of-the-evidence challenges to the government's proof of certain elements at trial. Both courts construed the terms based on their understanding of relevant precedent, found the evidence to be insufficient, and ordered the entry of not guilty verdicts. *Hillie*, 14 F.4th at 684-92 (construing "lascivious exhibition" in sexual exploitation of minor prosecution in manner contrary to several other circuits); *Pennington*, 400 P.3d at 22-24 (adopting construction of "peace officer" previously announced by a California Court of Appeal nearly ten years earlier). Neither case involved a change of existing law in the jurisdiction altering the elements to be proved, unlike what the SJC did in *Guardado I*. *See* 206 N.E.3d at 538.

Nor was there a change in the law on appeal in *United States v. Simpkins*, 90 F.4th 1312 (10th Cir. 2024). Pet. 31-32. There, in contrast to the instant case, "the government completely overlooked" an element requiring proof that the defendant was not an "Indian" at trial, and then sought to avoid appellate

review of the issue altogether. *Id.* at 1314-15, 1318. The government in *Simpkins* had every reason to know the actual elements of the offense, and there can be no serious contention that it was unfairly denied the opportunity to prove them in the first instance. Pet. 32.

Lastly, in *Commonwealth v. Munoz*, 426 N.E.2d 1161, 1163 (Mass. 1981), Pet. 23-24, 31-32, the SJC reversed the defendant's conviction for operating an uninsured motor vehicle, holding that the Commonwealth could not rely on an affirmative defense of insurance because insurance was an element of the crime charged. *Id.* As the SJC, interpreting its own prior decision, observed in *Guardado II*, *Munoz* "involved an error that was contrary to the state of the law in the Commonwealth at the time of the defendant's trial"; thus, the *Munoz* court simply "clarified the state of the law given existing precedent." 220 N.E.3d at 108. Since the court merely applied existing law, the Commonwealth was not blindsided.[11]

Each of these cases involved an application of prevailing law to conclude that the government's proof on an existing element of the offense was insufficient. None involved a post-trial change in the law requiring the government to prove an additional element. Certainly, none is like the case at bar, in which the court reversed decades of established precedent to hold that a fact that was previously an affirmative

[11] The fact that the model jury instruction in *Munoz* was inaccurate made no difference. In Massachusetts, model jury instructions are not "binding law." *Commonwealth v. Quinn*, 789 N.E.2d 138, 145 n.14 (Mass. 2003).

defense—and as to which the government therefore had no reason to introduce evidence—was now part of the government's case in chief. Petitioner's argument based on clarifications of law should be rejected.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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