No. 17-1189

IN THE
Supreme Court of the United States

JORGE AVILA TORREZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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This case presents two important questions concerning the interpretation of the Federal Death Penalty Act (FDPA). The answers determine whether Torrez and numerous similarly situated defendants will live or die. And the government has identified no barrier to the Court's resolution of the questions. The Court should grant certiorari.

I. THE FOURTH CIRCUIT'S REFUSAL TO APPLY THE CATEGORICAL APPROACH CONFLICTS WITH PRIOR DECISIONS

A. The Aggravators Are Textually Indistinguishable From Provisions To Which This Court Has Applied The Categorical Approach

This Court has repeatedly held that when a statute bases consequences on a person's having been "convicted" of a particular offense, the only permissible inquiry is whether the elements of that offense were necessarily proven. The aggravators here, 18 U.S.C. §3592(c)(2) and (c)(4), use the precise language the Court has read to require the categorical approach: They render a defendant death-eligible if he "has previously been convicted of" certain types of offenses.

The government offers no textual argument for its contrary interpretation. It halfheartedly suggests (at 15) that the aggravators' use of the word "involving" calls for a circumstance-specific rather than categorical approach. But this Court has unhesitatingly applied the categorical approach to similarly worded provisions. *See James* v. *United States*, 550 U.S. 192, 201-202 (2007), *overruled on other grounds by Johnson* v. *United States*, 135 S. Ct. 2551 (2015); *Kawashima* v. *Holder*, 565 U.S. 478, 482 (2012); Pet. 17. The government is thus forced to admit (at 16 n.2) "that Congress's use of the word 'involving' does not foreclose application of the categorical approach."

The government also claims (at 15-16) that the aggravators' use of the word "convicted" is not dispositive, because the Court has sometimes applied a circumstance-specific approach to provisions using that word. Even if it were correct, however, that argument provides no textual support for the government's in-

terpretation; it simply suggests that text is not dispositive. At any rate, the government's cases are readily distinguishable.

Nijhawan v. *Holder*, 557 U.S. 29 (2009), addressed a provision allowing removal of noncitizens "'convicted of an aggravated felony,'" including "'an offense that … involves fraud or deceit *in which the loss to the victim or victims exceeds $10,000*.'" *Id.* at 32 (emphasis partly omitted). The question was "whether the italicized language refer[red] to an element of the fraud or deceit 'offense'" or "to the particular circumstances in which an offender committed" such a "crime on a particular occasion." *Id.* The Court adopted the latter reading, reasoning that the phrase "'in which' … calls for a circumstance-specific examination of 'the conduct involved "*in*" the commission of the offense of conviction.'" *Moncrieffe* v. *Holder*, 569 U.S. 184, 202 (2013) (quoting *Nijhawan*, 557 U.S. at 39). The Court has distinguished *Nijhawan* in cases applying the categorical approach, emphasizing that its holding was based on the specific statutory language at issue. *Id.*; *see also Sessions* v. *Dimaya*, 138 S. Ct. 1204, 1218 n.5 (2018) (plurality opinion); *Mellouli* v. *Lynch*, 135 S. Ct. 1980, 1986 n.3 (2015); *Carachuri-Rosendo* v. *Holder*, 560 U.S. 563, 577 n.11 (2010). The prior-conviction aggravators contain nothing like the language in *Nijhawan*.

United States v. *Hayes*, 555 U.S. 415 (2009), likewise concerned an unusually worded provision—one barring gun ownership by people "convicted … of a misdemeanor crime of domestic violence," defined as "a misdemeanor" that "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, *committed by*" a person with a domestic relationship to the victim. *Id.* at 420-421 (emphasis added; internal quotation marks omitted). The

Court held that the categorical approach does not apply to the domestic relationship requirement, largely because of the "committed by" language. *Dimaya*, 138 S. Ct. at 1218 n.5 (plurality opinion); *Mathis* v. *United States*, 136 S. Ct. 2243, 2252 (2016). Again, the FDPA aggravators are different. As in *Taylor* v. *United States*, 495 U.S. 575 (1990), they "refer[] to a person who … has … previous convictions for"—not "a person who has committed"—the specified predicate offenses. *Id.* at 600 (internal quotation marks omitted).

B. The Government's Non-Textual Arguments Are Unpersuasive

None of the government's arguments about statutory purpose justify its counter-textual interpretation.

1. The government argues (at 16-19) that few offenses would trigger the §3592(c)(2) aggravator under the categorical approach. But several federal offenses (at least) do categorically "involv[e] the use or attempted or threatened use of a firearm (as defined in section 921) against another person," 18 U.S.C. §3592(c)(2). For example, the government lists (at 17 & n.3) various "provisions that prohibit use or possession of a firearm (or weapon)," and acknowledges (at 18) that several such provisions—for example, 18 U.S.C. §924(c)(1)(A) and §924(j)—incorporate §921's definition of a firearm. The government claims (at 17) only that those offenses "do not require that a firearm actually be used 'against another person.'" But how could someone be convicted—for example—of "caus[ing] the death of a person through the use of a firearm," 18 U.S.C. §924(j), without having used the firearm "against" the decedent? The government does not say.

At any rate, even if the categorical approach limits the number of offenses that trigger §3592(c)(2), that is no reason to disregard the clear import of the statutory text. The government has made similar arguments, and the Court has rejected them, before. *Compare, e.g.*, *Mathis*, 136 S. Ct. at 2247-2248 (categorical approach does not apply to statutes listing alternative means rather than alternative elements), *and Carachuri-Rosendo*, 560 U.S. at 566 (categorical approach requires that prior conviction be element of state conviction to trigger aggravated-felony provision), *with* U.S. Br. 41-44, *Mathis*, No. 15-6092 (U.S. Mar. 23, 2016) (Court's approach "would severely undermine the [statute's] purposes"), *and* U.S. Br. 47-50, *Carachuri-Rosendo*, No. 09-60 (U.S. Nov. 16, 2009) (similar).

2. The government also argues (at 19-20) that the categorical approach undermines the jury's role of finding and weighing aggravating and mitigating factors. But the jury *does* both find and weigh the prior-conviction aggravators under the categorical approach. At the eligibility phase, the court determines as a matter of law whether the defendant's alleged prior convictions satisfy the aggravators, and the jury then determines as a factual matter whether the defendant actually incurred those prior convictions.[1] Pet. 20. At the selection phase, the jury can then consider all the facts—including the full circumstances of the defendant's prior convictions—in determining the defendant's overall culpability. The categorical approach is thus entirely consistent with the role Congress assigned to the jury.

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[1] It is true, as the government notes (at 20), that a court can lawfully find the fact of a defendant's prior conviction. But Congress can choose to assign that role to the jury, and here it did.

3. Finally, the government contends (at 20-21) that under the categorical approach, the prior-conviction aggravators no longer "'reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of [the capital offense].'" That is true, the government claims, because "defendants who had previously been convicted for the *same conduct* would be treated *differently* for capital sentencing purposes based on" how "the prosecuting jurisdiction defined the statute of conviction." But that argument simply questions the wisdom of Congress's choice to condition death-eligibility on whether a defendant "has previously been convicted of" certain offenses, as opposed to having "previously committed" those offenses. When a consequence hinges on a prior "conviction," the elements of the statute of conviction are not, as the government suggests (at 21), "happenstance." They are the focus of the analysis Congress prescribed.

C. The Government's Vehicle Argument Is Meritless

The government argues (at 23) that this would "be a poor vehicle for the Court to consider [Torrez's] categorical-approach contentions regarding Section 3592(c)(2), because that contention would be subject to review only for plain error." That is wrong for several reasons.

First, the government forfeited its plain-error argument by failing to invoke that standard below. *See, e.g.*, *United States* v. *Encarnacion-Ruiz*, 787 F.3d 581, 586-587 (1st Cir. 2015). Indeed, the government not only failed to argue for plain-error review; it affirmatively stated that de novo review applies. U.S. C.A. Br. 66.

Second, even if plain-error review applied, that would not preclude resolution of the question presented. The Court could simply decide whether there was error and, if so, remand for the Fourth Circuit to apply the remaining elements of the standard. *See, e.g.*, *Tapia* v. *United States*, 564 U.S. 319, 335 (2011) (taking that approach); *Hicks* v. *United States*, 137 S. Ct. 2000, 2000 (2017) (mem.) (Gorsuch, J., concurring in GVR order) (recognizing practice as "routine[]").

Third, although the government focuses only on §3592(c)(2), rather than §3592(c)(4), Torrez has argued at every opportunity that §3592(c)(4) is subject to the categorical approach. And the arguments for applying the categorical approach to each provision are identical. So even if the government were correct that the plain-error standard governed Torrez's challenge to the §3592(c)(2) aggravator, that would not be true of his preserved argument regarding §3592(c)(4).[2]

II. THE FOURTH CIRCUIT ERRED, AND DEPARTED FROM OTHER COURTS' REASONING, BY HOLDING THAT POST-OFFENSE CONDUCT SATISFIES THE PRIOR-CONVICTION AGGRAVATORS

This case also warrants review because—as state and federal appellate courts have held in related contexts—the prior-conviction aggravators do not apply to convictions for conduct postdating the capital offense.

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[2] The government has not suggested that Torrez's death sentence could be upheld if only one of the two prior-conviction aggravators were validly applied. For good reason: Where one aggravator is invalidated, the remaining aggravating and mitigating factors must at least be re-weighed. *See, e.g.*, *Clemons* v. *Mississippi*, 494 U.S. 738, 754 (1990).

A. The Government's Interpretation Of The Statutory Text Is Implausible

The government emphasizes (at 24-25) that §3592(c) requires the factfinder to "consider … which, if any," aggravating factors "exist" at the time of sentencing. But that is undisputed; all agree the factfinder must determine at the time of sentencing whether the defendant "has previously been convicted of" a qualifying offense. Pet. 25. The question is what "previously" means: before the sentencing or before the capital offense?

The government interprets "previously" to refer to any conviction incurred before sentencing, even if it is for conduct postdating the capital offense. But as the petition explains (at 23-24), that interpretation renders "previously" meaningless: *any* conviction considered at sentencing must have occurred before sentencing.

The government responds (at 24) that "previously" retains meaning under its interpretation, because it "clarifies that the relevant aggravating convictions include convictions distinct from those in the capital prosecution" itself. That is implausible for three reasons. First, the notion that "previously" somehow signifies "distinct" defies the plain meaning of "previous": "going or existing before in time." *Webster's Third New International Dictionary* 1798 (1976). Second, and relatedly, other prior-conviction aggravators are triggered by the defendant's having "previously been convicted of *another* Federal or State offense" meeting certain criteria. 18 U.S.C. §3592(c)(3), (d)(1), (d)(3) (emphasis added). In those aggravators, "previously" must have a different meaning from "another," but the government's interpretation collapses the two and makes "another" surplusage. Finally, the statute needs

no clarification in any event; since the aggravators refer to "Federal *or State*" offenses, 18 U.S.C. §3592(c)(2), (c)(4) (emphasis added), it is already clear that they "include convictions distinct from those in the capital prosecution."

B. Even If The Government's Interpretation Were Textually Plausible, It Is Wrong In Light Of Other Indicia Of Statutory Meaning

Even if "previously" could be read as the government suggests, that construction would be far less plausible than Torrez's.

First, the rule of lenity requires that ambiguity in the prior-conviction aggravators be resolved in Torrez's favor. Pet. 25-26. Even if the government's interpretation were plausible, it is hardly the *only* plausible interpretation; lenity therefore forbids it.

Second, the FDPA conditions death-eligibility on the characteristics of the capital *offense*, not the offender; it permits the government to seek the penalty where "the circumstances of the *offense* are such that a sentence of death is justified." 18 U.S.C. §3593(a) (emphasis added).[3] The government suggests (at 25) that prior-conviction aggravators inherently focus on the offender rather than the offense. But that is incorrect: An offense committed after a prior conviction can fairly be regarded as worse than a first-time offense, since it reflects the offender's defiance of prior attempts to de-

[3] The government (at 25) cites *Tuilaepa* v. *California*, 512 U.S. 967, 973 (1994), for the proposition that aggravating factors may focus on either the offense or the offender. But that simply means Congress could, consistent with the Eighth Amendment, have chosen to write the FDPA differently. Congress's actual choice was to focus on the offense. Pet. 24.

ter him. Pet. 24-25. Thus, convictions before the capital offense make *both* the offense *and* the offender "worse"; convictions for conduct after the capital offense make the offender "worse" but not the offense. That is why only the former qualify as predicates.

Third, the government's interpretation raises constitutional concerns by creating a risk that capital sentencing will be arbitrary or swayed by "bias or caprice," *Tuilaepa* v. *California*, 512 U.S. 967, 973 (1994). The government claims (at 27) that the petition identified "no case involving an aggravator even arguably resulting from prosecutorial manipulation." But the petition identifies exactly such a case (at 27 n.4), and it also explains (at 28) that the Eighth Amendment forbids not just *actual* arbitrariness but the risk or perception of arbitrariness. Allowing death sentences to depend on the sequence of prosecutions creates such a risk, even if prosecutors have not fully exploited it.

Fourth, the FDPA's legislative history supports Torrez's interpretation. *See* Pet. 28-29. The government derides (at 27) Torrez's supposed reliance "on the isolated 1991 remarks of [a] single Senator." But that grossly mischaracterizes the legislative history on which Torrez relied: a comprehensive section-by-section analysis of the bill, of the sort regarded as among the most reliable forms of legislative history. *See, e.g.*, *Microsoft Corp.* v. *AT&T Corp.*, 550 U.S. 437, 444 n.3 (2007) (relying on section-by-section analysis); *Almendarez-Torres* v. *United States*, 523 U.S. 224, 234 (1998) (same).

Finally, the government's interpretation conflicts with interpretations of similar provisions by other federal and state appellate courts. Pet. 29-31. Although the government claims (at 26) that "[t]he text and con-

text of those distinct statutory provisions are materially different from Section 3592(c)'s," it tellingly does not identify a single difference. The statutes are similar in all material respects.

III. THE FOURTH CIRCUIT SHOULD CONSIDER HOW *CARPENTER* AFFECTS THIS CASE

At a minimum, the Court should vacate the judgment and remand for the Fourth Circuit to determine whether Torrez is entitled to a new trial under *Carpenter*. The government concedes that "the relevant CSLI was obtained in violation of the Fourth Amendment." And it offers no persuasive reason for the Court to disregard that error.

First, the government claims (at 28) that Torrez is not entitled even to plain-error review because he did not move to suppress the CSLI. But the government not only failed to make that argument below, it affirmatively stated that the CSLI claim *could* be reviewed for plain error. *See* U.S. C.A. Br. 186 ("[Torrez] failed to raise this claim below, subjecting this claim to plain-error standard review."). It thus forfeited any argument against plain-error review. *See United States* v. *Carthorne*, 726 F.3d 503, 509 n.5 (4th Cir. 2013).

At any rate, the government was right the first time: The Fourth Circuit reviews the admission of evidence for plain error where the defendant did not move to suppress. *See, e.g.*, *United States* v. *Claridy*, 601 F.3d 276, 285 (4th Cir. 2010) ("Claridy contends that his statement … should be suppressed[.] … Claridy did not preserve this issue in the district court. Therefore, we review his argument under the plain-error standard.").

Second, the government argues (at 30-31) that admission of the CSLI was warranted under the good-faith exception to the exclusionary rule. But the government forfeited that argument, too, by failing to raise it below.[4] *See, e.g.*, *United States* v. *Ramirez-Rivera*, 800 F.3d 1, 32 (1st Cir. 2015) (good-faith exception can be forfeited); *United States* v. *Archibald*, 589 F.3d 289, 301 n.12 (6th Cir. 2009) (same). At any rate, the Court has GVR'ed cases presenting Fourth Amendment issues notwithstanding the government's assertion of the good-faith exception. *See, e.g.*, *Hexom* v. *Minnesota*, 136 S. Ct. 2544 (2016) (mem.); Br. in Opp. 3-4, *Hexom*, No. 15-1052 (U.S. Apr. 22, 2016) (invoking the exception).

Third, the government argues (at 31) that, because of the good-faith exception, any error in admitting the CSLI could not be plain. But that is simply a roundabout way of seeking to evade the forfeiture of the good-faith exception, and it is forfeited for the same reason.

Finally, the government briefly contends (at 31-32) that the admission of the CSLI did not affect Torrez's rights. But the prosecution invoked the CSLI in both its opening statement and its closing argument. Pet. 35. The Court should not resolve the fact-intensive harmlessness question in the first instance and without full briefing and argument—especially not in a capital case. It should allow the Fourth Circuit to do so. *See, e.g.*, *Ajoku* v. *United States*, 572 U.S. 1056 (2014) (mem.) (GVR'ing over the objection that GVR was un-

[4] That Torrez's argument was barred by Fourth Circuit precedent does not excuse the forfeiture. The government's brief discussed the CSLI issue in detail—including by offering the alternative argument that any error in admitting the evidence did not prejudice Torrez. U.S. C.A. Br. 186-189.

necessary because the conceded error was harmless); Br. in Opp. 19-23, *Ajoku*, No. 13-7264 (U.S. Mar. 10, 2014).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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