No. _____

IN THE

Supreme Court of the United States

VICKIE L. SANDERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. If a state retroactively reduces a felony drug conviction to a misdemeanor, can the government rely on that newly-reclassified misdemeanor conviction to satisfy the recidivist provisions of 21 U.S.C. § 841, which call for an enhanced sentence when a defendant has at least one previous conviction for a "felony drug offense"?

2. If 21 U.S.C. § 841 permits a federal court to count as a "felony drug offense" a state conviction that the state has retroactively reduced to a misdemeanor, is § 841 contrary to the Fifth Amendment's rights to due process and equal protection and the Tenth Amendment's federalism principles?

3. Whether the Court should grant the petition for a writ of certiorari, vacate the sentence, and remand to the Seventh Circuit for consideration of this case in light of the Ninth Circuit's ruling that California methamphetamine convictions, like Ms. Sanders's, cannot serve as predicate offenses for federal recidivist provisions?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Vickie L. Sanders respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

DECISION BELOW

The decision of the United States Court of Appeals for the Seventh Circuit is available at 909 F.3d 895, and is reprinted in the Appendix (App.) at 1a.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on December 3, 2018. App. 1a. On February 28, 2019, Justice Kavanaugh extended the time to file this petition to April 18, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law."

The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

STATUTORY PROVISIONS INVOLVED

Title 21 U.S.C. § 841(b)(1)(B) (2018) provides in relevant part:

> If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment . . . .

Title 21 U.S.C. § 841(b)(1)(C) (2018) provides in relevant part:

> If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years . . . .

Title 21 U.S.C. § 802(44) (2018) provides:

> The term "felony drug offense" means an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances.

Title 21 U.S.C. § 802(14) (2018) provides in relevant part: "The term 'isomer' means the optical isomer . . . ."

Cal. Health & Safety Code § 11033 (1996) provides: "As used in this division, except as otherwise defined, the term "isomer" includes optical and geometrical (diastereomeric) isomers."

Cal. Penal Code § 1170.18(f) (2016) provides:

> A person who has completed his or her sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under this act had this act been in effect at the time of the offense, may file an application before the trial court that entered the judgment of conviction in his or her case to have the felony conviction or convictions designated as misdemeanors.

Cal. Penal Code § 1170.18(g) (2016) provides: "If the application satisfies the criteria in subdivision (f), the court shall designate the felony offense or offenses as a misdemeanor."

Cal. Penal Code § 1170.18(k) (2016) provides:

> Any felony conviction that is recalled and resentenced under subdivision (b) or designated as a misdemeanor under subdivision (g) shall be considered a misdemeanor for all purposes, except that such resentencing shall not

> permit that person to own, possess, or have in his or her custody or control any firearm or prevent his or her conviction under Chapter 2 (commencing with Section 29800) of Division 9 of Title 4 of Part 6.

STATEMENT OF THE CASE

Petitioner Vickie L. Sanders pleaded guilty to: conspiracy to manufacture 50 grams or more of methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), 846, and 841(b)(1)(B) (Count 1); attempt to manufacture methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C), and 846 (Count 2); and possession of pseudoephedrine knowing it would be used to manufacture methamphetamine, in violation of 21 U.S.C. § 841(c)(2) (Counts 3, 4, 5, and 6). The statutory sentencing range for a violation of § 841(b)(1)(B) was five to 40 years' imprisonment; if, however, the individual violates § 841 after a "prior conviction for a felony drug offense has become final," the sentencing range increases to 10 years' to life imprisonment. 21 U.S.C. § 841(b)(1)(B) (2018). The government notified Ms. Sanders, pursuant to 21 U.S.C. § 851, that she was subject to § 841's recidivist provisions based on her 1996 felony conviction for possession of a controlled substance in violation of Cal. Health & Safety Code § 11350(a).

Prior to sentencing, a California court reclassified Ms. Sanders's 1996 felony conviction to a misdemeanor under California Proposition 47, Cal. Penal Code § 1170.18 (2017). Ms. Sanders objected to application of § 841's recidivist provisions, arguing that her 1996 California conviction was no longer for a "felony drug offense." The district court overruled Ms. Sanders's objection, reasoning that "as soon as a defendant has two felony drug convictions on their record that become final, that

defendant has violated § 841," and "[i]t does not matter whether a state court later reclassifies one of the offenses to a misdemeanor." App. at 27a. Ms. Sanders's sentencing guidelines range was 87 to 108 months' imprisonment. The ten-year mandatory minimum, however, resulted in an effective guideline range of 120 months' imprisonment. The district court imposed concurrent sentences of 120 months' imprisonment for Count 1 and 87 months' imprisonment for each of Counts 2 through 6.

On appeal, Ms. Sanders argued that the plain language of 21 U.S.C. § 841(b)(1)(B) and precedent provided: that a felony reclassified to a misdemeanor by a state court was not a "felony drug offense"; that the case upon which the district court relied to deny relief was poorly reasoned and should not be adopted; and that the district court's interpretation of § 841's recidivist provisions is contrary to the Fifth Amendment's rights to due process and equal protection and the Tenth Amendment's federalism principles. On December 3, 2018, the United States Court of Appeals for the Seventh Circuit affirmed the judgment of the district court. *United States v. Sanders*, 909 F.3d 895, 906 (7th Cir. 2018).

REASONS FOR GRANTING THE WRIT

I. Ms. Sanders does not qualify for a recidivist sentence under 21 U.S.C. § 841 because she did not have a "prior conviction for a felony drug offense" at the time of sentencing.

Pursuant to 21 U.S.C. § 841's recidivist provisions at the time of Ms. Sanders's sentencing, an individual who commits a specified federal drug offense after "a prior conviction for a felony drug offense has become final" is subject to a sentencing enhancement. Ms. Sanders' sentence imposed pursuant to § 841 was enhanced based on a 1996 California drug possession conviction. In 1996, that conviction was a felony offense. Before the federal sentencing in this case, however, California retroactively reduced the offense to a misdemeanor conviction "for all purposes," except gun possession, under Proposition 47. Cal. Penal Code § 1170.18(k) (2016). Thus, Ms. Sanders did not have a "felony drug offense" at the time of her federal sentencing. The sentence imposed violates the federal statutes, Ms. Sanders's constitutional rights to due process and equal protection as guaranteed by the Fifth Amendment Due Process Clause, and Tenth Amendment principles of federalism.

A. The plain language of 21 U.S.C. § 841's recidivist provisions indicates that courts may not rely on a state conviction, retroactively reduced to a misdemeanor, to enhance a sentence.

Pursuant to 21 U.S.C. § 802(44) (2018), a "felony drug offense" is defined as "an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances." To determine whether an offense "is punishable by imprisonment for

more than one year," courts look to the state's statutory maximum sentence. *Burgess v. United States*, 553 U.S. 124, 134-35 (2008). Section 802(44) indicates Congress's intent to rely upon the state's judgment of which prior crimes are serious enough to be felony offenses for purposes of § 841's recidivist provisions; under § 802(44), the state makes that judgment by providing for a maximum sentence of more than one year. *See United States v. Rodriquez*, 553 U.S. 377, 388 (2008) (in the context of the ACCA, "Congress chose to defer to the state lawmakers' judgment" to indicate which crimes they deem "serious" as indicated by a sentence of ten years' incarceration or greater); *see also Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 111-12 (1983) (under the gun control statutes, which concern any person who "has been convicted . . . of a felony," "conviction" is a question of federal law, but "the predicate offense and its punishment are defined by the law of the State"). District courts, therefore, must defer to state law when classifying prior state convictions under §§ 802(44) and 841.

B. California Proposition 47 implemented the State's judgment that Ms. Sanders's offense warranted no more than 12 months' imprisonment; her prior California drug possession conviction, therefore, is not a qualifying felony drug offense under 21 U.S.C. § 841's recidivist provisions.

California Proposition 47 reduced certain previously designated felony drug offenses to misdemeanors. *United States v. Diaz*, 838 F.3d 968, 971 (9th Cir. 2016). By doing so, it implemented the judgment of the people of the State of California to . . . [r]equire misdemeanors instead of felonies for nonserious, nonviolent crimes like . . . drug possession," and to "[a]uthorize consideration of resentencing for anyone who is currently serving a sentence for any of the offenses listed herein that are now

misdemeanors." Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 3, p. 70, available at http://vig.cdn.sos.ca.gov/2014/general/pdf/text-of-proposed-laws1.pdf (last accessed Apr. 9, 2019). In other words, California determined that some individuals were not guilty of felonious conduct as previously convicted.

The law made specified drug-related offenses, such as Ms. Sanders's possession offense, punishable "by imprisonment in a county jail for not more than one year." Cal. Health & Safety Code § 11350(a) (2015). Proposition 47 also provided a way for individuals previously convicted of felonies to petition the court for resentencing under the new law. Cal. Penal Code §§ 1170.18(f) and (g) (2016). Once a court designates a conviction a misdemeanor, it "shall be considered a misdemeanor for all purposes" except under gun ownership laws. *Id.* at § 1170.18(k). California courts have acknowledged Proposition 47's broad scope: "Proposition 47 explicitly anticipates that redesignation of an offense as a misdemeanor will affect the collateral consequences of a felony conviction," including that defendants will no longer be "exposed to sentence enhancements." *People v. Khamvongsa*, 214 Cal. Rptr. 3d 623, 625 (Cal. Ct. App. 2017); *see also People v. Abdallah*, 201 Cal. Rptr. 3d 198, 206 (Cal. Ct. App. 2016) ("One of the chief reasons for reducing a wobbler to a misdemeanor is that under such circumstances the offense is not considered to be serious enough to entitle the court to resort to it as a prior conviction of a felony for the purpose of increasing the penalty for a subsequent crime." (internal quotation marks omitted)). These far-reaching and mandatory reclassification provisions

indicate that California intended to remedy unnecessarily harsh sentences that did not reflect the seriousness of the crime.

Prior to Ms. Sanders's federal sentencing, California vacated her 1996 felony drug possession conviction and, consistent with Proposition 47, sentenced her for an offense which provides for no more than twelve months' imprisonment—a misdemeanor. The district court's reliance on a misdemeanor conviction to enhance Ms. Sanders's sentence is contrary to §§ 841 and 802(44).

C. This Court's precedent indicates that a federal recidivist sentence cannot rely on a state conviction retroactively reduced by state law.

This Court has indicated that courts cannot rely on a vacated state sentence to enhance a sentence under a federal recidivist statute. In *Johnson v. United States*, 544 U.S. 295 (2005), this Court acknowledged that its precedent had always assumed "that a defendant given a sentence enhanced for a prior conviction is entitled to a reduction if the earlier conviction is vacated." *Id.* at 303 (citing *Custis v. United States*, 511 U.S. 485 (1994)); *Daniels v. United States*, 532 U.S. 374 (2001)). The government, too, had assumed that an enhanced sentence would cease to stand if a state vacated the underlying conviction. *Johnson*, 544 U.S. at 302-03.

Similarly, in *Custis v. United States*, 511 U.S. 485, 497 (1994), this Court assumed that a sentence enhanced under the ACCA could no longer stand after a state vacated a predicate conviction. The defendant objected to the use of two Maryland convictions to enhance his sentence. *Custis*, 511 U.S. at 488. Unlike Ms. Sanders's case, a state court had not adjusted the defendant's convictions; rather, he

sought to collaterally attack his prior state convictions in his federal case. *Id.* This Court held that, with the exception of the right to appointed counsel, a defendant could not collaterally attack a predicate state conviction during his federal sentencing. *Id.* at 496-97. This Court continued: "If Custis is successful in attacking these state sentences, he may then apply for reopening of any federal sentence enhanced by the state sentences." *Id.* at 497

In *Daniels v. United States*, 532 U.S. 374 (2001), this Court then extended *Custis* to 28 U.S.C. § 2255 proceedings. The defendant, whose sentence was enhanced under the ACCA, filed a motion under § 2255 arguing that his sentence was unconstitutional because it was based on invalid state offenses. *Daniels*, 532 U.S. at 377. This Court concluded that the defendant could not use § 2255 to collaterally attack his state convictions, but it reiterated: "If any challenge to the underlying conviction is successful, the defendant may then apply for reopening of his federal sentence." *Id.* at 382.

Most recently, in *McNeill v. United States*, 563 U.S. 816 (2011), this Court found that a defendant could not seek relief from a recidivist enhancement based on a non-retroactive change to a state law. There, the defendant argued that courts should look to the state's classification of a predicate offense at the time of federal sentencing. *McNeill*, 563 U.S. at 818. This Court disagreed, holding that courts must look to the state law at the time of the state-court conviction. *Id.* at 817-18. This Court, however, noted that a retroactive law is different:

> As the Government notes, this case does not concern a situation in which a State subsequently lowers the maximum penalty applicable to an

> offense and makes that reduction available to defendants previously convicted and sentenced for that offense. Brief for United States 18, n. 5; *cf.* 18 U.S.C. § 3582(c)(2). We do not address whether or under what circumstances a federal court could consider the effect of that state action.

McNeill, 563 U.S. at 825 n.1. This note was for good reason—there is a difference between a defendant whose conviction was reduced to a misdemeanor based on the state's judgment that the conduct was not serious enough to warrant a felony and a defendant who seeks a windfall because the state simply changed a law subsequent to his conviction.

D. Lower courts are split on the question of whether a state felony that the state reduced to a misdemeanor is a "felony drug offense" under 21 U.S.C. § 841.

Lower courts are divided on the question that this Court left open in *McNeill*: Whether a federal court can impose a recidivist sentence based on a state conviction that the state retroactively reduced to a misdemeanor prior to the federal sentencing? 563 U.S. at 825 n.1.

In this case, the Seventh Circuit ruled that "California's later decision to reclassify [a] felony as a misdemeanor does not alter the historical fact of the prior conviction becoming final—which is what § 841 requires." *Sanders*, 909 F.3d at 901 (internal brackets and quotation marks omitted). The Third, Ninth, and Tenth Circuits are in accord with the Seventh Circuit's reasoning in *Sanders*. *United States v. London*, 747 F. App'x 80, 84-85 (3d Cir. 2018); *United States v. Diaz*, 838 F.3d 968, 971 (9th Cir. 2016); *United States v. McGee*, No. 18-5019, 2019 WL 181593, at *6 (10th Cir. Jan. 14, 2019).

The Eleventh Circuit, on the other hand, assumed that a New York law that retroactively reduced a state sentence undermined a federal recidivist sentence. *Cortes-Morales v. Hastings*, 827 F.3d 1009, 1014 (11th Cir. 2016). That defendant received an enhanced sentence under the ACCA based on prior New York drug convictions. *Id.* at 1011-12. After his federal conviction was final, the defendant applied for resentencing under New York's Drug Law Reform Act ("DLRA"), which provided sentencing relief to certain New York drug defendants. *Id.* at 1013. New York, however, decided that the defendant did not qualify for resentencing under the statute. *Id.* As a result, the defendant was not entitled to relief from his federal recidivist sentence. *Id.* at 1016. The Eleventh Circuit, however, acknowledged that the analysis would have been different had the New York court determined that the DLRA applied retroactively to the defendant. *Id.* at 1016.

District courts have also concluded that they cannot rely on a state court conviction, retroactively reduced to a misdemeanor, to enhance a sentence. For instance, a defendant in the Southern District of New York had been convicted of New York drug crimes that carried a maximum sentence of twenty-five years' imprisonment at the time of conviction. *See United States v. Jackson*, No. 13 Crim. 142(PAC), 2013 WL 4744828, at *3 (S.D.N.Y. Sept. 4, 2013). The DLRA lowered the maximum sentences for those crimes to nine years. *Id.* Although the law made those changes retroactive, the defendant was not eligible for state resentencing because he was no longer incarcerated. *Id.* at *4. The district court granted his pre-trial motion objecting to the use of those convictions as predicate offenses to enhance his sentence

under the ACCA. *Id.* Citing to *McNeill*, the district court reasoned that a change of law need not be made personally retroactive to a defendant—the change of law need only be "available to defendants previously convicted and sentenced." *Id.* at *4 (quoting *McNeill*, 563 U.S. at 825 n.1). Otherwise, the court explained, absurdity would result because the defendant would be punished more harshly than "an identical defendant who committed precisely the same crime" who was either sentenced later or "remained incarcerated and therefore was eligible to apply for resentencing." *Jackson*, 2013 WL 4744828, at *6.

The Southern District of New York came to the same conclusion in another case, noting that *McNeill* indicated that the statute "should be interpreted to avoid disparate outcomes for similarly situated defendants." *United States v. Calix*, No. 13 CR 582(RPP), 2014 WL 2084098, at *15 (S.D.N.Y. May 13, 2014). That district court also emphasized that Congress intended to "defer to the state lawmakers' judgment" in recidivist provisions. *Id.* at *15. New York's judgment, the court reasoned, was evident through its decision to apply the DLRA retroactively and "the consistent view of state lawmakers that the Rockefeller drug laws were too severe, then as now." *Id.* (internal ellipses and quotation marks omitted).

E. The lower courts' opinions rely on faulty reasoning.

The Third, Seventh, and Tenth Circuits adopted the Ninth Circuit's reasoning in *United States v. Diaz*, 838 F.3d 968 (9th Cir. 2016). In *Diaz*, the defendant's sentence was enhanced under 21 U.S.C. § 841 based on two prior California felonies. *Diaz*, 838 F.3d at 971. After his federal conviction was final, the defendant

successfully petitioned a California court under Proposition 47 to reclassify one of his felonies to a misdemeanor. *Id.* The defendant then filed a § 2255 motion arguing that he was entitled to resentencing because the felony that supported his federal recidivist sentence no longer existed. *Id.* Relying on *McNeill*, the *Diaz* Court rejected the claim: "Proposition 47 does not change the historical fact that [the defendant] violated § 841 'after two or more prior convictions for a felony drug offense [had] become final.'" *Id.* (quoting 21 U.S.C. § 841(b)(1)(A)). In so doing, the Ninth Circuit ignored this Court's "explicit disclaimer[]" that *McNeill* did not control cases where the state had made *retroactive* changes. *See Zubik v. Burwell*, 136 S. Ct. 1557, 1561 (2016) (Sotomayor, J. concurring) (lower courts should not ignore the Supreme Court's "explicit disclaimers"). It also ignored the government's prior concession that *McNeill* did not control where a state had retroactively reduced a predicate conviction.

Diaz reasoned that the state's retroactive designation of the defendant's conviction to a misdemeanor was analogous to cases in which it declined to alter a sentence after a predicate offense had been dismissed or expunged. *Diaz*, 838 F.3d at 973. Those cases cited to one exception—"where the dismissal or expungement alters the legality of the original state conviction—such as where there was a trial error or it appears the defendant was actually innocent of the underlying crime." *Id.* Reclassification of a felony to a misdemeanor, the court reasoned, did not fall into either of those exceptions. *Id.*

The legality requirement on which the Ninth Circuit relies is drawn from *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103 (1983). In *Dickerson* the Supreme Court defined the term "conviction" for purposes of the Gun Control Act of 1968. *Dickerson*, 460 U.S. at 105. The statute at issue made it unlawful for any person "who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year' to ship, transport, or receive any firearm or ammunition in interstate commerce." *Id.* (quoting 18 U.S.C. §§ 922(g), (h)). The *Dickerson* Court concluded that a dismissed or expunged conviction prohibited gun ownership because "expunction under state law does not alter the historical fact of the conviction." *Dickerson*, 460 U.S. at 115. The Court noted two exceptions to this language: where an action of the state "alter[s] the legality of the previous conviction" or "signif[ies] that the defendant was innocent." *Id.*

Relying on *Dickerson*, the *Diaz* court reasoned that an expunction was "a more drastic change than merely reclassifying a misdemeanor." *Diaz*, 838 F.3d at 974. The reclassification of a conviction to a misdemeanor under Proposition 47 did not fit into either of the exceptions identified in *Dickerson*. *Id.* But *Diaz*'s reasoning is flawed. An expungement, as defined in *Dickerson*, is not "more drastic" than Proposition 47's reclassification of certain felonies to misdemeanors. *See United States v. Hines*, 133 F.3d 1360, 1364 (10th Cir. 1998) (the definition of "expunged" varies by state).

The Iowa law at issue in *Dickerson* provided that "[u]pon discharge from probation, if judgment has been deferred under section 789A.1, the court's criminal record with reference to the deferred judgment shall be expunged. The record

maintained by the supreme court administrator required by section 789A.1 shall not be expunged . . . ." *Dickerson*, 460 U.S. at 108 n.4 (quoting Iowa Code § 789A.6 (Supp. 1978)). The Iowa expungement law did not remove the conviction from all records, and it was not an indication from the state that the individual was innocent of the offense of conviction. Rather, the statute assumed that the defendant had committed the charged conduct, but had successfully completed probation.

Proposition 47, on the other hand, reflects the state of California's judgment that individuals convicted of certain offenses were not guilty of felonious conduct. As relevant here, Proposition 47 reclassified drug possession for personal use from a felony to a misdemeanor and provided for retroactive application. Cal. Penal Code § 1170.18. These changes reflect California's reassessment of the seriousness and danger associated with low-level drug possession. Its purpose was to "require misdemeanors instead of felonies for *nonserious*, *nonviolent* crimes like petty theft and drug possession." *People v. Valencia*, 397 P.3d 936, 948 (Cal. 2017) (quoting Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 3, p. 70)) (emphasis added). The initiative, however, left more serious and dangerous offenses designated as felonies. Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 2, p. 70, at http://vig.cdn.sos.ca.gov/2014/general/pdf/text-of-proposed-laws1.pdf (last accessed Apr. 9, 2019) ("Proposition 47 Voter Information Guide") (Proposition 47's purpose is "to ensure that prison spending is focused on violent and serious offenses"). For instance, the "act ensures that sentences for people convicted of dangerous crimes like rape, murder, and child molestation are not changed." *Id.*

California courts have recognized that Proposition 47's relief reaches further than that of an expungement: Unlike the reclassification of a felony to a misdemeanor, "expungement of the record . . . is a reward for good conduct and has never been treated as obliterating the fact that the defendant has been convicted of a felony." *People v. Tidwell*, 200 Cal. Rptr. 3d 567, 573 (Cal. Ct. App. 2016) (internal citations and quotation marks omitted). Proposition 47, on the other hand, "erase[s] the [prior felony] conviction[]." *Id.* It provides that a reclassified misdemeanor "shall be considered a misdemeanor *for all purposes*" except firearm possession. Cal. Penal Code § 1170.18(k) (emphasis added). Notably, Proposition 47 states twice that it should be interpreted broadly. Proposition 47 Voter Information Guide, § 15 ("This act shall be broadly construed to accomplish its purposes."); *Id.* § 18 ("This act shall be liberally construed to effectuate its purposes."). California's intent is clear—a felony reduced to a misdemeanor pursuant to Proposition 47 is "more drastic" than an expungement. In particular, the legislature and the court by reclassifying the offense to a misdemeanor, have made a determination that its laws were too harsh, that the defendant was not guilty of felonious conduct, and that the conviction should be considered a misdemeanor "for all purposes."

F. The government previously acknowledged that a federal recidivist enhancement cannot rely on a state conviction retroactively reduced by state law.

The government acknowledged in *McNeill* that federal recidivist statutes should give effect to retroactively-reduced state sentences. There, the defendant argued that courts should determine the maximum penalty for a potential predicate

offense by looking to the state statute at the time of the federal sentencing; the government argued that the court should look to the state statute's maximum term of incarceration at the time of the state sentencing. *McNeill*, 563 U.S. at 818. In so arguing, the government pointed out to this Court:

> Of course, if a State subsequently lowered the maximum penalty and made that reduction available to defendants previously sentenced as of the same date as the defendant now at issue, the defendant could plausibly look to that reduced maximum as stating the law applicable to his previous conviction. For example, if such a defendant had taken advantage of state sentence-modification proceedings to lower his sentence in accordance with a reduced maximum, *cf.* 18 U.S.C. 3582(c), that reduced maximum could apply to his conviction for ACCA purposes.

Brief for United States at 18 n.5, *McNeill v. United States*, 563 U.S. 816 (2011) (No. 10-5258), 2011 WL 1294503. This Court acknowledged the government's concession in ruling that the defendant was not entitled to relief. *McNeill*, 563 U.S. at 825 n.1 ("As the Government notes, this case does not concern a situation in which a State subsequently lowers the maximum penalty applicable to an offense and makes that reduction available to defendants previously convicted and sentenced for that offense."); s*ee also Johnson*, 544 U.S. 302-03 ("The Government shares Johnson's preliminary assumption that if he filed his § 2255 motion in time, he is entitled to federal resentencing now that the State has vacated one of the judgments supporting his enhanced sentence."). Given that the government has used this argument to its advantage in other cases, it should not be able to use the opposing argument to its advantage here.

G. Construing 21 U.S.C. § 841's recidivist provisions to ignore the application of retroactive state sentencing produces the absurd results that McNeill hoped to avoid.

In *McNeill*, this Court was concerned that absurd results would follow from looking to current, non-retroactive state law, rather than looking to the law at the time of the previous offense. *McNeill*, 563 U.S. at 822. Such an interpretation, this Court noted, "would make ACCA's applicability depend on the timing of the federal sentencing proceeding," and there is no principled explanation for:

> why two defendants who violated [18 U.S.C.] § 922(g) on the same day and who had identical criminal histories—down to the dates on which they committed and were sentenced for their prior offenses—should receive dramatically different federal sentences solely because one's § 922(g) sentencing happened to occur after the state legislature amended the punishment for one of the shared prior offenses.

McNeill, 563 U.S. at 823.

Where the state has given retroactive effect to state law, the foregoing concern is no longer present. If the state law in *McNeill* had been made retroactive, both defendants in the above hypothetical would be entitled to relief and they would not wind up with dramatically different sentences.

Another absurdity results if courts fail to recognize changes made retroactive by the state: The length of a defendant's sentence would depend on the date on which an unrelated state crime was committed. There is no principled reason why two defendants with identical criminal histories, who violated 21 U.S.C. § 841 on the same day, should receive dramatically different federal sentences solely because one's prior conviction occurred before, and the other's occurred after, the state legislature decreased the punishment. But that is the consequence of the district court's

interpretation of § 841's recidivist provisions. Here, Ms. Sanders, who was convicted of her predicate offense in 1996, is subject to a ten-year mandatory minimum. Another similarly-situated defendant who violated § 841 on the same day as Ms. Sanders, but was convicted of the identical predicate offense in 2017, would not be subject to a ten-year mandatory minimum. It is absurd that the individual who has abstained from criminal conduct the longest would receive the harshest sentence.

H. Construing 21 U.S.C. § 841's recidivist provisions to allow the government to rely on a retroactively-reduced state conviction to enhance a federal sentence raises serious doubts about the statute's constitutionality.

The Seventh Circuit's construction of § 841's recidivist provisions calls into doubt the statute's constitutionality. *See Jennings v. Rodriguez*, 138 S. Ct. 830, 842 (2018) (a cardinal principle of statutory construction holds that courts should construe statutes to avoid constitutional doubt). Such a construction implicates violations of due process, equal protection, and federalism.

The right to due process demands that a court rely upon only proper and accurate information when imposing sentence. *United States v. Tucker*, 404 U.S. 443, 447 (1972). Here, the district court relied upon a misdemeanor conviction as the "felony drug offense" to trigger § 841's recidivist provisions. Ms. Sanders, however, no longer stands convicted of a felony, because the California state court vacated her felony conviction and resentenced her to a misdemeanor. An interpretation of § 841's recidivist provisions that allows the court to use Ms. Sanders's misdemeanor to enhance her sentence raises serious doubts about the statute's constitutionality.

Under the Fifth Amendment, "equal protection of the laws means that all persons similarly situated should be treated alike." *United States v. Brucker*, 646 F.3d 1012, 1017 (7th Cir. 2011) (internal brackets and quotation marks omitted). Equal protection is denied "[w]hen the law lays an unequal hand on those who have committed intrinsically the same quality of offense and . . . [subjects] one and not the other" to a harsher punishment. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

The Seventh Circuit's construction of § 841's recidivist provisions creates two classes—those who committed their predicate crime before California passed Proposition 47, and those who committed their predicate crime after California passed Proposition 47. The distinction between the two classes is wholly unrelated to the date or nature of the current federal crime or the nature of the prior conviction. For instance, Ms. Sanders was convicted of violating § 841 in 2018; she was convicted in California of possession of a controlled substance in 1996 (predicate conviction). Because she committed her predicate conviction before California passed Proposition 47 in 2014, she is subject to a sentence of ten years' to life imprisonment pursuant to § 841(b)(1)(B)'s recidivist provisions. A similarly-situated individual, convicted of violating § 841 on the same exact day as Ms. Sanders, with an identical predicate conviction in 2015, would be subject to a sentence of only five to forty years' imprisonment.

The foregoing results are irrational and unrelated to any legitimate government interest. Although the government has an interest in punishing

recidivists, it has no legitimate interest in punishing more harshly those recidivists that have abstained from criminal conduct the longest. To avoid rendering § 841's recidivist provisions unconstitutional, this Court should interpret the recidivist provisions so as to exclude state convictions that the state retroactively reduces to a misdemeanor.

The Seventh Circuit's statutory construction is contrary to the Tenth Amendment right to be free from "government action taken in excess of the authority federalism defines." *Bond v. United* States, 564 U.S. 211, 220 (2011) ("[A] litigant, in a proper case, [may] challenge a law as enacted in contravention of constitutional principles of federalism."). Federalism represents "a system . . . in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Younger v. Harris*, 401 U.S. 37, 44 (1971). This concern is heightened with respect to state criminal justice matters. *Id.* at 46.

Ms. Sanders was convicted under the federal drug statute that provides for a ten-year mandatory minimum when the defendant has a prior conviction for a "felony drug offense," defined as "an offense that is punishable by imprisonment for more than one year under *any law of . . . a State*." 21 U.S.C. § 802(44) (emphasis added). The statute specifically refers to state law, ensuring that federal sentencing enhancements rely upon the law of the relevant state to determine the felony status of a predicate offense. In Proposition 47, the state of California expressed its

judgment that non-violent offenses, such as drug possession, were not felonious conduct, and that prior felonies for such offenses should be reduced to misdemeanors "for all purposes." Cal. Penal Code § 1170.18(k).

The Seventh Circuit's interpretation of § 841's recidivist provisions gave no deference to California's decision to reduce Ms. Sanders's conviction to a misdemeanor "for all purposes." By doing so, it ignored the mandate to respect state law, eroding the state's ability to determine a crime's status even though the federal statute explicitly relies on state law. The court also ignored the federal statute's mandate to look to state law to determine a prior conviction's felony status by treating Ms. Sanders's misdemeanor as a felony. Such an interpretation of § 841's recidivist provisions deprives the state of its power to determine the nature and consequences of its own convictions.

II. As interpreted by the lower court, 21 U.S.C. § 841's recidivist provisions are contrary to the Fifth Amendment's rights to due process and equal protection and the Tenth Amendment's federalism principles.

The lower courts did not address the constitutional arguments raised in this appeal. Their interpretation of § 841's recidivist provisions runs afoul of the rights to due process and equal protection guaranteed by the Fifth Amendment's Due Process Clause. It is also contrary to the Tenth Amendment's federalism principles.

A. Ms. Sanders's sentence violates her due-process rights because it is based on a prior felony conviction that has been erased by the state that imposed it.

Subjecting Ms. Sanders to a ten-year mandatory minimum on the basis of a prior state offense that was reduced to a misdemeanor "for all purposes" is contrary

to due process. The right to due process demands that a sentence not be longer than is authorized by law and that the court rely upon only proper and accurate information when imposing sentence. *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980); *Tucker*, 404 U.S. at 447. A sentence based on "assumptions concerning [a defendant's] criminal record which [are] materially untrue," is "inconsistent with due process of law." *Townsend v. Burke*, 334 U.S. 736, 741 (1948).

In *Hicks v. Oklahoma*, 447 U.S. 343, 344-45 (1980), the defendant's two prior felonies within the preceding ten years triggered a mandatory 40-year term of imprisonment as provided by the state's habitual offender statute. After conviction, the mandatory 40-year provision of the habitual offender statute was declared unconstitutional. *Id.* at 345. The appellate court affirmed the sentence because it was "within the range of punishment that could have been imposed." *Id.* This Court reversed, finding a due-process violation. *Id.* at 346. A defendant, this Court reasoned, has a "substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion." *Id.* "Such an arbitrary disregard of [a defendant]'s right to liberty is a denial of due process of law." *Id.*

Ms. Sanders was subject to a ten-year mandatory minimum solely on the basis of a prior drug felony that no longer exists. Once the district court determined that the California conviction qualified as a prior felony drug offense under the statute, the court had no choice but to sentence her to a minimum of ten years. But Ms. Sanders's conviction is now a misdemeanor, not a felony. Due process demands that

Ms. Sanders be sentenced based on accurate information; her sentence based on the vacated felony conviction, which was a misdemeanor conviction at the time of the federal sentencing, is contrary to that right.

B. Ms. Sanders's sentence violates her right to equal protection because it treats similarly-situated defendants differently based only on the date of their predicate state convictions.

Applying recidivist enhancements to defendants who committed their predicate offense before the passage of Proposition 47 violates equal protection principles. Under the Fifth Amendment, "equal protection of the laws means that all persons similarly situated should be treated alike." *Brucker*, 646 F.3d at 1017 (internal brackets and quotation marks omitted). Equal protection is denied "[w]hen the law lays an unequal hand on those who have committed intrinsically the same quality of offense and . . .[subjects] one and not the other" to a harsher punishment. *Skinner*, 316 U.S. at 541. When two classes are created to receive different treatment, the question is whether "there is a rational relationship between the disparity of treatment and *some* legitimate governmental purpose." *Brucker*, 646 F.3d at 1017 (internal quotation marks omitted) (emphasis in original).

The Seventh Circuit's construction of § 841's recidivist provisions creates two classes—those convicted of their predicate crime before California passed Proposition 47 and those convicted of their predicate crime after California passed Proposition 47. This division treats defendants convicted of committing the same federal offense, with identical predicate offenses, differently without "some ground of difference that rationally explains the different treatment." *Eisenstadt v. Baird*, 405 U.S. 438, 447

(1972). The distinction is related only to the dates on which the two individuals committed their predicate offenses—a distinction that is wholly unrelated to the date or nature of the current federal crime or the nature of the prior conviction.

The foregoing results are irrational and unrelated to any legitimate government interest. Although the government has an interest in punishing recidivists, it has no legitimate interest in punishing more harshly those recidivists that have abstained from criminal conduct the longest. To avoid rendering § 841's recidivist provisions unconstitutional, this Court should interpret the statute so as to exclude state convictions that the state retroactively reduces to a misdemeanor.

C. Ms. Sanders's sentence is contrary to the Tenth Amendment's federalism principles because it gives no deference to California's ability to determine the nature of its crimes.

The district court's failure to give effect to California Proposition 47, which retroactively reduced certain felonies to misdemeanors, is contrary to the principles of federalism. The Supreme Court has recognized that individuals enjoy a Tenth Amendment right to be free from "government action taken in excess of the authority federalism defines." *Bond*, 564 U.S. at 220 ("[A] litigant, in a proper case, [may] challenge a law as enacted in contravention of constitutional principles of federalism."). Federalism represents "a system . . . in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Younger*, 401 U.S. at 44. This concern is heightened with respect to state criminal justice matters. *Id.* at 46.

Sections 841 and 802(44) reflect the concept of federalism by directing courts to rely on state law to determine a state offense's status. The statute defines "felony drug offense," as "an offense that is punishable by imprisonment for more than one year under *any law of . . . a State*." 21 U.S.C. § 802(44) (emphasis added). In Proposition 47, the state of California expressed its judgment that non-violent offenses, such as drug possession, were not felonious conduct and that prior felonies for such offenses should be reduced to misdemeanors "for all purposes." Cal. Penal Code § 1170.18(k).

The district court, however, ignored the state's ability to decide the classification of its own criminal offenses when it ignored California Proposition 47's mandate to reclassify certain offenses to misdemeanors "for all purposes." Rather, the district court interpreted §§ 841 and 802(44) as incapable of accommodating a state's reclassification of its offenses, even where the federal statute explicitly refers to state law. Such an interpretation infringes on the states' ability to determine the nature and consequences of state crimes and is contrary to federalism principles set forth in the Tenth Amendment.

III. The Court should grant the petition, vacate the sentence, and remand to the Seventh Circuit for consideration of this case in light of the Ninth Circuit's ruling that California methamphetamine convictions are broader than the federal recidivist definitions and cannot serve as predicate offenses under the reasoning this Court set forth in *Mathis v. United States*, 136 S. Ct. 2243 (2016).

Ms. Sanders's recidivist sentence under 21 U.S.C. § 841 was based on her 1996 conviction for possession of methamphetamine in violation of Cal. Health & Safety Code § 11350(a). Approximately one month after the Seventh Circuit issued its

opinion in this case, the Ninth Circuit concluded in *Lorenzo v. Whitaker*, 752 F. App'x 482, 485 (9th Cir. 2019), that California's definition of methamphetamine is broader than the federal definition. California methamphetamine convictions, therefore, cannot serve as predicate offenses under § 841's recidivist provisions. Under *Lorenzo*'s reasoning, Ms. Sanders' California methamphetamine possession conviction cannot support her recidivist sentence under § 841.

Courts apply a three-step analysis in determining whether a state statute qualifies as a federal controlled substance offense. *United States v. Martinez-Lopez*, 864 F.3d 1034, 1038 (9th Cir. 2017). First, courts determine whether the state law is a categorical match with the relevant federal definition. *Taylor v. United States*, 495 U.S. 575, 599-600 (1990). Under this categorical approach, courts "focus solely on whether the elements of the crime of conviction sufficiently match the elements of [the] generic [crime], while ignoring the particular facts of the case." *Mathis*, 136 S. Ct. at 2248. If the state law covers the same or less conduct than the federal definition, the two definitions match categorically, and the inquiry ends. *Id.* Under that scenario, the state conviction automatically comes within the reach of the federal definition. *Taylor*, 495 U.S. at 599.

If the state and federal statutes are not a categorical match, courts move on to step two, where they must determine whether the state statute is divisible. *Martinez-Lopez*, 864 F.3d at 1038. A statute is divisible if it "sets out one or more elements of the offense in the alternative." *Descamps v. United States*, 570 U.S. 254, 257 (2013). In *Mathis v. United States*, 136 S. Ct. 2243, 2248-49 (2016), this Court explained that

statutes containing disjunctive lists do not necessarily list alternative elements that describe multiple crimes. 135 S. Ct. at 2249. The court must look to "authoritative sources of state law to determine whether the state statute sets forth alternative elements or alternative means of satisfying the same element. *Id.* at 2256. *Mathis* envisioned two "easy" scenarios: (1) a state court decision "definitively answers the question," or (2) the statute "on its face . . . resolve[s] the issue." *Id.* If the statute is indivisible, the inquiry ends, and no conviction under the state statute can satisfy the federal definition.

If the statute is divisible, the court proceeds to step three. The court applies the "modified categorical approach" and looks to certain underlying state documents to determine under which part of the state statute the individual was convicted. *Descamps*, 133 S. Ct. at 2285. If the documents reveal that the individual was convicted of elements satisfying the federal definition, the state conviction can serve as a predicate offense. *See Shepard v. United States*, 544 U.S. 13, 16 (2005).

In *Lorenzo*, the Ninth Circuit considered whether convictions for possession of methamphetamine, in violation of California Health and Safety Code § 11378, and transportation of methamphetamine, in violation of California Health and Safety Code § 11379(a), qualified as state-law violations "relating to a controlled substance" under 8 U.S.C. § 1227(a)(2)(B)(i). 752 F. App'x at 484. First, the court concluded that California's definition of methamphetamine is broader than the federal definition of methamphetamine. *Id.* at 484. In particular, California methamphetamine includes optical and geometric isomers, while federal methamphetamine includes only optical

isomers. *Id.* (citing Cal. Health & Safety Code § 11033 and 21 U.S.C. §§ 802(14), 812). Second, the court considered whether the statute was divisible. *Id.* In previous cases, the Ninth Circuit concluded that California Health and Safety Code § 11378 was divisible and that courts could look to certain documents to determine the controlled-drug type. *United States v. Ocampo-Estrada*, 873 F.3d 661, 668-69 (9th Cir. 2017). In *Lorenzo*, however, the court concluded that "the methamphetamine element" is indivisible, "because the different varieties of methamphetamine covered by California law are alternative means of committing a single crime rather than alternative elements of separate crimes." 752 F. App'x at 486 (citing *Mathis*, 136 at 2248-49). As a result, the modified categorical approach was not applicable. *Lorenzo*, 752 F. App'x at 486. The defendant's methamphetamine convictions under California Health & Safety Code §§ 11378 and 11379(a), therefore, were not controlled-substance offenses under the federal definition.

Lorenzo's reasoning is applicable to Ms. Sanders's California conviction for possession of methamphetamine in violation of Cal. Health & Safety Code § 11350(a). The first question is whether California methamphetamine is broader than the federal definition under 21 U.S.C. § 841. At the time of conviction, California's Uniform Controlled Substances Act provided that "the term 'isomer' includes optical and geometrical (diastereomeric isomers)." Cal. Health & Safety Code § 11033 (1996). California methamphetamine, therefore, includes both optical and geometric isomers of methamphetamine. *Lorenzo*, 752 F. App'x at 485.

At the time of Ms. Sanders's federal sentencing, 21 U.S.C. § 841 (2018) provided for enhanced sentences when a defendant had at least one prior conviction for a "felony drug offense." Relevant to this case, § 841(b)(1)(B) provided for ten years' to life imprisonment and § 841(b)(1)(C) provided for not more than 30 years' imprisonment "after a prior conviction for a felony drug offense has become final." Section 802(44) defines a "felony drug offense" as "an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances." Methamphetamine was listed as a "stimulant" under 21 U.S.C. § 812 Schedule II(c) and Schedule III(a)(3) (2018). The federal statute specified that "methamphetamine" includes "its salts, isomers, and salts of isomers." *Id.* Section 802(14) (2018) clarified that "[t]he term 'isomer' means the optical isomer . . . ." California's methamphetamine definition, therefore, is broader than the federal methamphetamine definition, because California's definition includes both optical and geometrical isomers and the federal definition includes only optical isomers.

Second, the court must determine whether the statute is divisible—whether it "sets out one or more elements of the offense in the alternative." *Descamps*, 570 U.S. at 257. In *Mathis*, this Court explained that statutes containing disjunctive lists do not necessarily list alternative elements that describe multiple crimes. 135 S. Ct. at 2249. The possession statute is divisible to the extent that it list different drugs. *See United States v. Martinez-Lopez*, 864 F.3d 1034, 1036-37 (9th Cir. 2017) (holding that

Cal. Health & Safety Code § 11352 is divisible). The methamphetamine element, however, is not divisible, "because the different varieties of methamphetamine covered by California law are alternative means of committing a single crime rather than alternative elements of separate crimes." *Lorenzo*, 752 F. App'x at 486.

Because the methamphetamine element is not divisible, there is no need to proceed to step three. The California methamphetamine possession statute under which Ms. Sanders was convicted sweeps more broadly than the federal definition under 21 U.S.C. § 841. Ms. Sanders, therefore, is entitled to resentencing without application of § 841's enhanced penalties.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

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Respectfully submitted,

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