No.

In the Supreme Court of the United States

KENNETH DANIELS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Controlled Substances Act (CSA) makes it a crime to "distribute * * * a controlled substance." 21 U.S.C. 841(a). The Act includes an "attempt" to distribute within the meaning of "distribute" (21 U.S.C. 802(8), (11)) and separately criminalizes "attempts" (21 U.S.C. 846). There is a deep and acknowledged conflict among the courts of appeals on the question whether solicitation—that is, a mere offer to buy or sell a controlled substance—can by itself constitute an "attempt" within the meaning of that language.

The disagreement is impeding the uniform administration not only of the Controlled Substances Act, but also of other statutes that depend on the CSA's proscriptions. The question whether solicitation constitutes an attempt under the CSA dictates, for example, whether a state drug offense that criminalizes solicitation categorically qualifies as a "serious drug offense" under the Armed Career Criminal Act (ACCA), 18 U.S.C. 924(e)(2)(a)(ii). The same holds true for the determination under the Immigration and Nationality Act whether a state drug offense categorically qualifies as an "aggravated felony." 8 U.S.C. 1101(a)(43)(B).

The outcome of this case, which involves a criminal prosecution under the ACCA, turns cleanly on the answer to the question presented.

The question presented is whether solicitation can by itself constitute an "attempt" within the meaning of the Controlled Substances Act.

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Petitioner Kenneth Daniels respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-39a) is reported at 915 F.3d 148.

JURISDICTION

The court of appeals entered its judgment on February 7, 2019. On April 1, 2019, Justice Alito entered an order extending the time for filing a petition for a writ of certiorari to and including July 7, 2019. This Court's jurisdiction rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Controlled Substances Act provides in relevant part that "[t]he terms 'deliver' or 'delivery' mean the actual, constructive, or attempted transfer of a controlled substance or a listed chemical." 21 U.S.C. 802(8). It provides further that "[a]ny person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy." 21 U.S.C. 846.

INTRODUCTION

The courts of appeals are openly divided on the question whether solicitation (that is, a mere offer to buy or sell) is unlawful under the federal Controlled Substances Act (CSA). The answer to the question directly affects enforcement of the CSA itself and also determines which state drug offenses categorically qualify as "serious drug offense[s]" within the meaning of the ACCA and as "aggravated felon[ies]" under the Immigration and Nationality Act (INA).

The Ninth Circuit has held that "offering to deliver a controlled substance does not cross the line between preparation and attempt for the purposes of the Controlled Substances Act." *Sandoval* v. *Sessions*, 866 F.3d 986, 990 (9th Cir. 2017). The Fifth Circuit has agreed with the Ninth. See *United States* v. *Ibarra-Luna*, 628 F.3d 712, 716 (5th Cir. 2010).

In contrast, the Third Circuit has held that "[s]olicitation, like any number of other acts, can amount to a federal attempt" under the CSA. *Martinez* v. *Attorney Gen.*, 906 F.3d 281, 287 (3d Cir. 2018). The Third Circuit has "expressly disagreed with" the Ninth Circuit's decision in *Sandoval*. App., *infra*, 28a. The Second Circuit has aligned with the Third. See *Pascual* v. *Holder*, 723 F.3d 156, 159 (2d Cir. 2013).

The disagreement between the Second and Third Circuits on the one hand and the Fifth and Ninth Circuits on the other hand is producing intolerable variability in the administration of the Nation's criminal laws, with very real consequences for criminal defendants. The CSA is one of the most frequently enforced federal criminal laws; the Bureau of Justice Statistics reports that 13% of all arrests nationwide—1.8 million of 14 million—are for drug-related crimes, nearly all of which involve concurrent state and federal jurisdiction, implicating the CSA. Whether the statute criminalizes solicitations is thus certain to affect countless criminal prosecutions.

And as this case demonstrates, the conflict has a significant spillover effect on other statutory schemes. Thousands of criminal defendants every year face harsh mandatory minimum sentences under the Armed Career Criminal Act. The question presented affects a significant portion of those sentences because many States' drug trafficking laws (like Pennsylva-

nia's) criminalize solicitation, either outright or under their criminal attempt schemes. If, as we contend, the federal CSA does *not* criminalize bare solicitation under any circumstance (and is thus narrower than the analogous state drug laws), it follows that thousands of criminal defendants are being sentenced to unlawfully overlong terms of incarceration. Similarly, countless foreign nationals are being deported on the basis of having committed crimes that are wrongly being treated as "aggravated felon[ies]" under the INA.

This case proves the point. If petitioner's prosecution had proceeded in the Ninth Circuit, he would not have been subject to the ACCA's mandatory minimum, and his guidelines range would have been 92 to 115 months. But because petitioner's prosecution proceeded within the Third Circuit, his Pennsylvania solicitation offense was deemed a "serious drug offense" for purposes of the ACCA. He was therefore sentenced pursuant to Section 924(e)'s 15-year mandatory minimum. Imposition of such harsh mandatory minimum sentences should not turn on the luck of the geographic draw. Further review is accordingly warranted.

STATEMENT

A. Factual background

Chester police officers saw a vehicle turn at an intersection without using a turn signal. The officers stopped the car, in which petitioner was a passenger. While speaking with the driver of the car, one of the officers felt that petitioner looked nervous. The officer instructed petitioner to exit the car. A second officer spotted a handgun underneath the passenger seat. The officers arrested petitioner, and petitioner admitted to possession of the firearm.

B. Procedural background

1. Petitioner pleaded guilty to one count of being a felon in possession of a firearm in violation of 18 U.S.C. 922(g)(1) and 924(e). App., *infra*, 3a.

Petitioner had at least three prior convictions under Pennsylvania's drug trafficking statute, 35 Pa.C.S. 780-113(a)(30). App., *infra*, 3a. The government thus moved to sentence petitioner to a 15-year mandatory minimum term of imprisonment under the Armed Career Criminal Act, 18 U.S.C. 924(e). App., *infra*, 3a.

Petitioner reserved his right to appeal his designation as an armed career criminal. App., *infra*, 3a. As relevant here, he argued that Pennsylvania's drug trafficking statute is broader than the federal Controlled Substances Act, and it thus cannot categorically constitute a "serious drug offense" under Section 924(e)(2)-(A)(ii). *Ibid.* That is so, petitioner contended (in part) because the Pennsylvania statute criminalizes solicitations of drug transactions, whereas the federal CSA does not. See *ibid.* On this basis, petitioner argued that he could not be sentenced as an armed career criminal. *Ibid.* Petitioner's Sentencing Guidelines range otherwise would have been 92 to 115 months. *Ibid*.

The district court rejected petitioner's arguments and sentenced him to 15 years' imprisonment. See App., *infra*, 4a.

2. The court of appeals affirmed. App., *infra*, 1a-39a. As pertinent to the question presented, the court determined first that Section 924(e)(2)(A)(ii)'s definition of a "serious drug offense" includes attempts. App., *infra*, 23a.

The court next addressed petitioner's argument that "Pennsylvania law sweeps more broadly than federal law because," under the auspices of attempt liabil-

ity, "it criminalizes offers to sell, mere preparation, and solicitation by the buyer," which the Controlled Substances Act does not. App., *infra*, 25a.

In rejecting that argument, the court concluded that the Model Penal Code, on which the court has held that the CSA's definition of attempt is based, "treat[s] some solicitations as attempts." App., *infra*, 27a-29a. In particular, solicitations and offers constitute attempts under the CSA when they amount to "intent and a substantial step towards the commission of the crime." App*., infra*, 28a (quoting *United States* v. *Glass*, 904 F.3d 319, 323 n.3 (3d Cir. 2018), cert. denied, 139 S. Ct. 840 (2019)). That being so, the court concluded that "[t]he federal and Pennsylvania approaches to attempt liability in the drug offense context are essentially identical," and petitioner's prior convictions were therefore categorically serious drug offenses. App., *infra*, 26a.

On its way to that conclusion, the court of appeals acknowledged and "expressly disagreed" with conflicting authority from the Ninth Circuit. App., *infra*, 28a. "Although [it may be] strongly corroborative of intent to commit a crime," the Ninth Circuit had reasoned, "offering to deliver a controlled substance does not cross the line between preparation and attempt for the purposes of the [federal] Controlled Substances Act." *Ibid.* (quoting *Sandoval*, 866 F.3d at 990). The Third Circuit rejected that reasoning, finding it inconsistent with its interpretation of the Model Penal Code. See App., *infra*, 28a-29a.

REASONS FOR GRANTING THE PETITION

All of the criteria for a grant of certiorari are satisfied. First, the decision below perpetuates an acknowledged conflict on a discrete question of federal statutory law. The conflict is producing divergent outcomes in

the direct enforcement of the Controlled Substances Act and marked sentencing disparities for similarly situated criminal defendants under the ACCA. Whereas petitioner would not have been sentenced as an armed career criminal in the Ninth Circuit, he was so sentenced in the Third Circuit. The difference added more than five years to petitioner's sentence.

Second, the issue is tremendously important. The CSA is one of the most frequently enforced federal criminal laws, and the question whether mere solicitation constitutes a violation under 21 U.S.C. 846 is certain to arise often. In addition, ACCA mandatory minimum sentences are common. In every year since 2010, more than 5,000 federal felons have been convicted under the Act, and most are facing the full 180-month mandatory minimum sentence. William H. Pryor Jr. et al., *Mandatory Minimum Penalties for Firearms Offenses in the Federal Criminal Justice System*, U.S. Sentencing Comm'n, 46 (Mar. 2018), perma.cc/GL2A-Q6P4. Yet in every State where the question presented is implicated, imposition of that mandatory minimum will have turned on the bad luck of having been prosecuted in an unfavorable circuit rather than a favorable one. That is no way to administer a national system of criminal justice.

Finally, the court of appeals erred. As the Ninth Circuit has correctly recognized, "the mere offer to deliver a controlled substance—*i.e.*, the act of soliciting delivery—is not a drug trafficking crime under the Controlled Substances Act." *Sandoval* v. *Sessions*, 866 F.3d 986, 991 (9th Cir. 2017). Holding otherwise violates the *expressio unius* canon and the rule of lenity. Accordingly, "a [state] statute that punishes the mere offer to deliver a controlled substance" is broader than

the CSA. *Ibid*. Further review of the Third Circuit's contrary holding in this case is warranted.

A. The courts of appeals are openly divided on the question presented

The courts of appeals expressly disagree over whether the Controlled Substances Act criminalizes bare solicitations of drug transactions as attempts. The Third Circuit held that it does. But in doing so, it acknowledged that it was "expressly disagree[ing]" with the Ninth Circuit's contrary holding. App., *infra*, 28a. And the split is deeper than the Third Circuit recognized: whereas the Second Circuit has aligned with the Third, the Fifth Circuit has aligned with the Ninth. This is a mature conflict that will not be resolved without this Court's intervention.

1. Relying principally on its previous holding in *Martinez* v. *Attorney General*, 906 F.3d 281, 287 (3d Cir. 2018), the **Third Circuit** below held that solicitation "can amount to a federal attempt" under the Controlled Substances Act. App., *infra*, 29a. That is, solicitation by itself can establish "intent and a substantial step towards the commission of the crime." App., *infra*, 28a. Accord App., *infra*, 27a (the CSA "treat[s] some solicitations as attempts").

Because, in the lower court's view, the CSA criminalizes solicitations as attempts in at least some circumstances, "[t]he federal and Pennsylvania approaches to attempt liability in the drug offense context are essentially identical." App., *infra*, 26a. And because the state offense is not broader than the generic federal offense, according to the court below, a conviction under the Pennsylvania drug statute is for a "serious drug offense" within the meaning of the ACCA. App., *infra*, 25a.

Consistent with the Third Circuit's decision in this case, the **Second Circuit** has held that "an offer to sell drugs—made with the intent and ability to carry out the transaction—is both a 'substantial step' and an 'overt act' in the attempted sale of a controlled substance" and therefore violates the CSA. *Pascual* v. *Holder*, 723 F.3d 156, 159 (2d Cir. 2013). On that ground, the Second Circuit held in *Pascual* that the underlying conviction was categorically for an aggravated felony under the INA. Petitioner therefore would have received the same outcome in the Second Circuit as he did in the Third Circuit.[1]

2. The holdings of the Second and Third Circuits are at odds with the holdings of the Fifth and Ninth Circuits.

Take first the **Ninth Circuit's** decision in *Sandoval* v. *Sessions*, 866 F.3d 986 (9th Cir. 2017). The Ninth Circuit there applied the categorical approach to the question whether the petitioner in that case was deportable for having committed an aggravated felony under the INA. This analysis required the court—like the Third Circuit in this case—to "determine whether the meaning of 'attempt' under the Controlled Substances Act includes solicitation." *Id.* at 989.

The Ninth Circuit held straightforwardly that it does not: "mere solicitation of controlled substances

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[1] So too in the **Eighth Circuit.** Without addressing the underlying question of how correctly to interpret the CSA, that court has held that solicitation qualifies as a serious drug offense under the ACCA. See *United States* v. *Bynum*, 669 F.3d 880, 886 (8th Cir. 2012) ("[W]e conclude that knowingly offering to sell drugs is a 'serious drug offense' under the ACCA," even when the offer is not "genuine, made in good faith, or * * * accompanied by an actual intent to distribute a controlled substance."). Accord *United States* v. *Hill*, 912 F.3d 1135, 1136-1137 (8th Cir. 2019) (per curiam).

does not constitute 'attempted' delivery under the Controlled Substances Act." *Sandoval*, 866 F.3d at 989. Dispelling any doubt, the court reiterated: "offering to deliver a controlled substance does not cross the line between preparation and attempt for the purposes of the Controlled Substances Act." *Id*. at 990. And this holding was consistent with prior Ninth Circuit law on the subject. See *United States* v. *Rivera-Sanchez*, 247 F.3d 905, 909 (9th Cir. 2001) (en banc) ("We have previously considered whether solicitation offenses are aggravated felonies under 8 U.S.C. § 1101(a)(43)(B) and have concluded that they are not."); *Leyva-Licea* v. *INS*, 187 F.3d 1147, 1150 (9th Cir. 1999) (holding that the CSA does not criminalize solicitation).

The Ninth Circuit thus held in *Sandoval* that a prior conviction under the Oregon drug trafficking law was not categorically an aggravated felony within the meaning of the INA. "[U]nder Oregon law, [an] offer to deliver a controlled substance is enough" to constitute an attempt. *Sandoval*, 866 F.3d at 991. Yet "the mere offer to deliver a controlled substance—*i.e.*, the act of soliciting delivery—is not a drug trafficking crime under the Controlled Substances Act." *Ibid*. The Ninth Circuit thus held that Oregon's drug trafficking law is broader than the CSA and "is not an aggravated felony under the categorical approach." *Ibid*.

The conflict between the Ninth and Third Circuits is undeniable. As the Third Circuit explained in this case, the Oregon statute at issue in *Sandoval* "resembles New Jersey's trafficking law," which is substantively the same as Pennsylvania's. App., *infra*, 28a (citing *Martinez*, 906 F.3d at 286). Like New Jersey and Pennsylvania, "Oregon allow[s] solicitation to amount to attempt." *Martinez*, 906 F.3d at 286 (citing *Sandoval*, 866 F.3d at 990). Thus, in ruling against petitioner

in this case, the Third Circuit "expressly disagreed" with *Sandoval* and its interpretation of the CSA. App., *infra*, 28a. See also *Martinez*, 906 F.3d at 286 (rejecting *Sandoval* as "unpersuasive").

Accordingly, petitioner would *not* have been subject to a 15-year mandatory minimum sentence if his case had arisen within the Ninth Circuit. See, *e.g.*, *Ernst* v. *United States*, 293 F. Supp. 3d 1242, 1248-1250 (D. Or. 2017) (ordering resentencing in light of *Sandoval* because, under *Sandoval*, "Oregon's drug delivery statute is not categorically a serious drug offense under the ACCA").

In line with the Ninth Circuit, the **Fifth Circuit** has held that the CSA does not criminalize solicitations. In *United States* v. *Ibarra-Luna*, 628 F.3d 712 (5th Cir. 2010), that court noted that "[t]he government concedes that a mere offer to sell, without evidence of [actual] possession or transfer, is tantamount to solicitation and is not proscribed by the Controlled Substances Act." *Id.* at 716 (citing *Rivera-Sanchez*, 247 F.3d at 908-909). It therefore declined to impose a guidelines-based recidivism enhancement for a prior drug trafficking offense. See also *Davila* v. *Holder*, 381 F. App'x 413, 415-416 (5th Cir. 2010) ("Because [the defendant] could have been convicted under [the state law of conviction] for an offer to sell (which is not an offense under the CSA), he has not categorically committed a drug trafficking crime.").

Against this background, the division among the courts of appeals is evident. The Second and Third Circuits have held that the CSA criminalizes solicitations as attempts in some circumstances. Thus, those courts are enforcing the CSA, the INA, and the ACCA in fundamentally inconsistent manners. This Court should

not tolerate such variability in the administration of the Nation's criminal and immigration laws.

B. The question presented is important, and this is a suitable vehicle for review

1. The importance of the question presented is self-evident. Prosecutions for violations of 21 U.S.C. 846, which criminalizes attempts and conspiracies under the CSA, are exceedingly common. A simple Westlaw search suggests that there are around 700 written federal decisions every year in cases involving violations of Section 846.[2] And that says nothing of the many more cases that result in non-litigated plea deals. As we noted in the introduction, there are millions of arrests for violations of the CSA and similar state laws every year. Whether Section 846 criminalizes solicitations as attempts thus has far-reaching consequences for countless Section 846 prosecutions.

Yet, as this case demonstrates, the importance of the question presented extends far beyond prosecutions under the CSA itself. That is because the CSA is the jumping-off point for determining under the categorical approach whether a state drug trafficking law is a "serious drug offense" under the ACCA (18 U.S.C. 924(e)(2)(a)(ii)) or an "aggravated felony" under the INA (8 U.S.C. 1101(a)(43)(B)). The answer to the question presented has enormous implications for thousands of individuals' lives and liberties.

Many state drug trafficking laws prohibit solicitation. Some do so plainly, by expressly prohibiting offers to buy or sell controlled substances.[3] Others prohibit

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[2] A search for "adv: violat! /10 '21 usc 846'" turned up 701 results in the past 12 months and 2,262 results in the past three years.

[3] See, *e.g.*, Conn. Gen. Stat. § 21a-240(50); N.Y. Penal Law § 220.00(1); Tex. Health & Safety Code § 481.002(8).

solicitation by including solicitation within their definitions of attempt.[4] In this case, the Third Circuit held that Pennsylvania "treat[s] some solicitations as attempts." App., *infra*, 27a. Either way, when state law prohibits solicitation in at least some circumstances, it exceeds the scope of the CSA as interpreted by the Fifth and Ninth Circuits. And if the state laws are broader than the federal CSA, then defendants with prior convictions under those laws should not be being sentenced under the ACCA or deported under the INA. The practical impact of the question presented is thus far-reaching.

2. This case is a clean vehicle for addressing the question presented. The question whether the CSA criminalizes solicitation as an attempt was fully litigated by the parties below. The Third Circuit resolved the issue in a detailed opinion that acknowledged the division of authority and expressly rejected the Ninth Circuit's reasoning. And, again, the Third Circuit's concluded that Pennsylvania law "treat[s] some solicitations as attempts." App., *infra*, 27a. It is thus undisputed that if the CSA does not criminalize solicitations of any kind (as held by the Fifth and Ninth Circuits), the Pennsylvania statute is broader than the CSA.

Finally, there is no serious doubt that petitioner would have been sentenced to a significantly shorter term of imprisonment if the district court had not applied the ACCA's 15-year mandatory minimum. Without imposition of that mandatory minimum, petition-

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[4] See, *e.g.*, *United States* v. *Madkins*, 866 F.3d 1136, 1146 & n.5 (10th Cir. 2017) (construing Kan. Stat. Ann. § 21-5705); *Martinez*, 906 F.3d at 286 (construing N.J. Stat. Ann. § 2C:35-5(a)(1); *Sandoval*, 866 F.3d at 990-991 (construing Or. Rev. Stat. § 475.992 (renumbered as Or. Rev. Stat. § 475.752)).

er's guidelines range would have been 92 to 115 months. App., *infra*, 3a. Assuming an in-range sentence, petitioner therefore would have been sentenced to a term of incarceration at least five years shorter than what he currently faces. The question is thus squarely presented for this Court's review.

C. The decision below is wrong

The clean presentation of an important issue of law that has divided the courts of appeals is ample reason to grant the petition. Further review is all the more warranted because the decision below is wrong.

1. Congress's omission of the words "solicitation" and "offers to buy or sell" from Sections 802(8) and 846 must be understood as intentional.

Section 802(8) defines "[t]he terms 'deliver' or 'delivery' [to] mean the actual, constructive, or attempted transfer of a controlled substance or a listed chemical, whether or not there exists an agency relationship." Section 846 similarly provides for criminal liability when a person "attempts or conspires to commit any offense defined in this subchapter."

Both of these provisions offer a series of "items expressed [as] members of an 'associated group or series,'" thus "justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 168 (2003). If Congress had intended to include "offers to buy or sell controlled substances" within the definition of "deliver" or "delivery" (21 U.S.C. 802(8)) or within the list of inchoate crimes covered by the CSA, it would have said so. But as the Ninth Circuit correctly observed, "[t]he Controlled Substances Act does not mention solicitation, unlike attempt and conspiracy." *Sandoval*, 866 F.3d at 989.

This omission must be understood as deliberate, not only by stand-alone operation of the *expressio unius* canon, but also because Congress elsewhere in the CSA *did* expressly criminalize offers to buy or sell. Section 863(a), for example, makes it "unlawful for any person * * * to sell *or offer for sale* drug paraphernalia." 21 U.S.C. 863(a) (emphasis added). Section 831(a) similarly requires online pharmacies to comply with certain notice requirements concerning "the delivery or sale *or offer for sale* of controlled substances." 21 U.S.C. 831(a) (emphasis added). "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983).

The Third Circuit did not consider these points. Its view, instead, is that a solicitation alone can amount to an attempt because an offer can be "strongly corroborative of the actor's criminal purpose" and by itself amount to "a substantial step towards the commission of the crime." App., *infra*, 27a-28a. That position conflates solicitation with the overt-act requirement under attempt law. As the Sixth Circuit explained in a sentencing guidelines case touching on the same issue:

> With respect to the crime of solicitation, the great weight of American authority holds as a general proposition that mere criminal solicitation of another to commit a crime does not itself constitute an attempt. * * * [T]he definition of attempt and solicitation are not only different, but the offenses are analytically distinct. The gist of criminal solicitation is enticement, whereas an attempt requires an intent to commit a specific crime, an overt act and

> failure to consummate that crime. This being true, to call solicitation an attempt is to delete the element of overt act.

United States v. *Dolt*, 27 F.3d 235, 239 (6th Cir. 1994). That reasoning is dispositive here.

2. Although Congress's conspicuous omission of the words "solicitation" and "offers to buy or sell" from Sections 802(8) and 846 is enough to answer the question presented in petitioner's favor, any ambiguity on this score would have to be construed against the government under the rule of lenity.

The rule of lenity is "a sort of junior version of the vagueness doctrine." *United States* v. *Lanier*, 520 U.S. 259, 266 (1997) (quotation marks omitted). It is a "canon of strict construction of criminal statutes," requiring "resol[ution of] ambiguity in a criminal statute" against the prosecutor, so that the statute is read "to apply it only to conduct clearly covered." *Ibid*. "Application of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability." *Liparota* v. *United States*, 471 U.S. 419, 427 (1985).

Application of that rule in this context requires interpreting the CSA not to criminalize mere solicitations, confirming that the decision below is wrong.

D. The Court should grant the petition regardless of the recent grant of review in *Shular* v. *United States*, No. 18-6662

Further review is warranted in this case notwithstanding the Court's recent grant of review in *Shular* v. *United States*, No. 18-6662. The question presented in *Shular* is whether the categorical approach applies

to Section 924(e)(2)(a)(ii) at all. For two reasons, the grant of review in *Schular* should not impede further review in this case.

First, *Shular* will have no bearing on the outcome of this case. It was "undisputed" in the proceedings below "that [the court] must apply the 'categorical' approach in order to decide whether [petitioner] had at least three previous convictions for 'a serious drug offense'" under Section 924(e)(2)(a)(ii). App, *infra*, 6a. Because the government waived any argument in this case that the categorical approach does not apply, the outcome here will continue to turn exclusively on the question presented regardless of the outcome in *Shuler*. See *Sessions* v. *Dimaya*, 138 S. Ct. 1204, 1232 (2018) (Gorsuch, J., concurring in part and concurring in the judgment) ("[N]ormally courts do not rescue parties from their concessions, maybe least of all concessions from a party as able to protect its interests as the federal government.").

Second, even if the Court sided with the government on the question presented in *Shular*—that is, even if it held that the categorical approach is inapplicable to Section 924(e)(2)(a)(ii)—the importance of the question presented in this case would persist. It would continue to impact the direct implementation of the CSA itself, and it would continue to influence the categorical approach under the INA's definition of an "aggravated felony." 8 U.S.C. 1101(a)(43)(B). Thus, the question presented requires resolution regardless of the outcome in *Shular*.

For those two reasons, the Court should resolve the question presented independent of the grant in *Shuler*. At minimum, the Court should hold the petition in this case and dispose of it as appropriate after rendering judgment in *Shuler*.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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