No. 19-527

In the Supreme Court of the United States

PAUL HUSKISSON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether evidence seized from petitioner's house pursuant to a search warrant was admissible under the independent source doctrine, when officers entered the house before applying for the warrant but no information obtained inside affected the officers' decision to apply for the warrant or the magistrate's decision to issue the warrant.

2. Whether petitioner forfeited any claim for resentencing under Section 401 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5220, by failing to seek relief on that basis in the court of appeals.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-15) is reported at 926 F.3d 369. The orders of the district court denying petitioner's motion to suppress (Pet. App. 16-20, 21-29, 30-41) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 5, 2019. On August 22, 2019, Justice Kavanaugh extended the time within which to file a petition for a writ of certiorari to and including October 18, 2019, and the petition was filed on October 17, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Indiana, petitioner was convicted of possessing with the intent to distribute 500 grams or more of methamphetamine, in violation of

21 U.S.C. 841(a)(1) and 21 U.S.C. 841(b)(1)(A)(viii) (2012). Judgment 1; Pet. App. 7. He was sentenced to 240 months of imprisonment, to be followed by ten years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1-15.

1. In February 2016, U.S. Drug Enforcement Administration (DEA) agents arrested Anthony Hardy on drug-conspiracy charges and related offenses. Pet. App. 2. Hardy admitted his role in the conspiracy and agreed to cooperate, leading the DEA agents to his drugs and guns. *Ibid.* He also identified two of his suppliers, one of whom was petitioner. *Ibid.* Hardy provided extensive information about petitioner's drug trafficking. *Ibid.* He told the agents that he had purchased methamphetamine from petitioner six times during the preceding five months; that the sales took place at petitioner's house and at a car lot petitioner owned; and that petitioner's source expected a shipment of 10 to 12 pounds of methamphetamine the following day. *Ibid.* Later that day, at the agents' direction, Hardy called petitioner, and petitioner agreed to sell Hardy 10 to 12 pounds of methamphetamine the following day. *Id.* at 2-3. Special Agent Michael Cline and other DEA agents listened to and recorded the conversation. *Id.* at 2.

The following day, Hardy arranged the details of the drug deal in a series of recorded telephone calls. Pet. App. 3. Hardy and petitioner agreed to carry out the drug sale at petitioner's home that evening. *Ibid.* The officers' plan was to conduct a "buy-bust" operation: Hardy would go into petitioner's home and conduct the deal as planned; if he saw drugs on the premises, he would signal that fact to the waiting agents by opening the trunk of his car and taking off his hat. Gov't C.A.

Br. 5. The agents would then enter and secure the house while Special Agent Cline obtained a warrant, waiting to search the house for evidence until the warrant was issued. *Id.* at 5-6.

That evening, Hardy went to petitioner's house as agreed. Pet. App. 3. Special Agent Cline followed Hardy's car, set up surveillance outside petitioner's house, and watched Hardy enter the house. *Ibid.* Within an hour, a car pulled into petitioner's driveway. *Ibid.* Two men exited the car and carried a cooler into the house. *Ibid.* Ten minutes later, Hardy emerged from the house and gave the prearranged signal. *Id.* at 3-4. Special Agent Cline ordered his team to enter petitioner's house and secure the scene. *Id.* at 4. Once inside, the agents arrested petitioner and the two men who had arrived with the cooler. *Ibid.* At the time, no search warrant had been issued, and petitioner refused to consent to a search of his residence. *Ibid.* While they were securing the premises, the agents saw in plain sight in the kitchen an open cooler with ten saran-wrapped packages of a substance that appeared to be—and later tested positive for—methamphetamine. *Ibid.*

While agents secured the house, Special Agent Cline left with Hardy to prepare applications for search warrants for petitioner's house and his workplace. Pet. App. 4. The warrant application for petitioner's house described petitioner's past drug deals with Hardy and Hardy's telephone calls with petitioner in the hours leading up to the drug deal. *Ibid.* It also included Hardy's description of what he had witnessed inside petitioner's house. Specifically, it recounted that after Hardy arrived, petitioner called his suppliers. *Ibid.* Two minutes later, a man came to the door and stated

that he had five pounds of methamphetamine. *Ibid.* After speaking with petitioner, the man made a phone call, and another man walked in with a cooler. *Ibid.* That man took out of the cooler ten saran-wrapped packages that appeared to Hardy to be methamphetamine. *Ibid.* Hardy then went outside to give the prearranged signal. *Ibid.* The warrant application also contained the following two sentences: "The law enforcement officers observed an open cooler with ten saran wrapped packages that contained suspected methamphetamine. The suspected methamphetamine later field tested positive for the presence of methamphetamine." *Id.* at 5.

The magistrate judge issued the search warrant approximately four hours after the initial entry. Pet. App. 5. During the search, officers seized the drugs in the cooler, along with other evidence. See *id.* at 19.

2. A federal grand jury charged petitioner with possessing with the intent to distribute 500 grams or more of methamphetamine, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2. Indictment 1. Petitioner moved to suppress the methamphetamine found in his house, arguing that the DEA agents had unlawfully entered without a warrant or exigent circumstances, and that they had included tainted evidence from the illegal entry in their application for a search warrant. See Pet. App. 5, 30-33.

After an evidentiary hearing, the district court denied the motion, relying on the independent source exception to the exclusionary rule. Pet. App. 33-41. The court found that Special Agent Cline "planned to and would have sought a search warrant regardless of the discovery of the methamphetamine packages" and that the warrant application was sufficient to establish probable cause "even without th[e] references" to "the evi-

dence seized and information obtained following the illegal entry." *Id.* at 39-40. The court later denied a motion for reconsideration. *Id.* at 26-27.

At trial, three DEA agents, including Special Agent Cline, testified about their plan to apply for a search warrant. Pet. App. 7. All three confirmed that the initial entry of petitioner's house was intended only to "'secure the residence while the search warrants were getting prepared and approved,' and that the entry team 'waited for the search warrant to be signed'" before searching the house. *Ibid.* Petitioner renewed his motion to suppress during trial, and the district court again denied it. *Id.* at 16-20. The jury found petitioner guilty. *Id.* at 7.

Before trial, the government had given notice of its intent to seek an enhanced penalty based on petitioner's prior conviction for a felony drug offense. D. Ct. Doc. 130, at 1 (Apr. 5, 2017); see 21 U.S.C. 841(b)(1)(A) (2012) (providing for a sentence of 20 years to life for any person who violates Section 841(a) "after a prior conviction for a felony drug offense has become final"). On January 31, 2018, the district court sentenced petitioner to the statutory-minimum term of 240 months of imprisonment, to be followed by ten years of supervised release. Judgment 1-3.

3. The court of appeals affirmed. Pet. App. 1-15. As relevant here, petitioner argued that the district court erred in denying his motion to suppress, renewing his contention that the officers' initial warrantless entry of his house violated the Fourth Amendment and that the independent source doctrine did not apply. *Id.* at 7. The court of appeals agreed that the agents' initial entry was unlawful. *Ibid.* The court determined, however, that the evidence was admissible under the independent

source doctrine, which "holds that illegally obtained evidence is admissible if the government also obtains that evidence via an independent legal source, like a warrant." *Id.* at 8 (citing *Murray* v. *United States*, 487 U.S. 533, 542 (1988); *Segura* v. *United States*, 468 U.S. 796, 814 (1984)). The independent source doctrine, the court explained, "recognizes that the goal of the exclusionary rule is to put 'the police in the same, not a worse, position than they would have been in if no police error had occurred.'" *Ibid.* (quoting *Nix* v. *Williams*, 467 U.S. 431, 443 (1984)). The court explained that it was required to ask two critical questions: (1) whether "the illegally obtained evidence affect[ed] the magistrate's decision to issue the warrant"; and (2) whether it "affect[ed] the government's decision to apply for the warrant." *Id.* at 9 (citing *Murray*, 487 U.S. at 542; *United States* v. *Etchin*, 614 F.3d 726, 736-738 (7th Cir. 2010), cert. denied, 562 U.S. 1156 (2011); *United States* v. *Markling*, 7 F.3d 1309, 1315-1316 (7th Cir. 1993)).

To answer the first question, the court of appeals "evaluate[d] whether the warrant application contained sufficient evidence of probable cause without the references to tainted evidence." Pet. App. 12. The court found that it did. *Id.* at 12-13. It noted that petitioner had "not dispute[d]" in the district court that "the warrant application submitted to the magistrate judge contained enough information to establish probable cause 'to believe that the entry team would discover evidence of a crime inside at the moment that they knocked on his door.'" *Id.* at 12 (quoting *Etchin*, 614 F.3d at 735) (brackets omitted). And the court of appeals itself determined that the warrant application contained "plenty of untainted evidence of probable cause." *Id.* at 13. The

court observed that the application detailed Hardy's admissions about his drug deals with petitioner, his nine recorded phone calls with petitioner, and Hardy's account of what he saw in petitioner's house. *Ibid.* "Presented with that amount and nature of evidence," the court found, "the magistrate judge would have issued the search warrant even without the discussion of the field-tested methamphetamine." *Ibid.*

As to the second question, the court of appeals determined that the district court did not "clear[ly] err[]" in finding that "the DEA task force planned to apply for a warrant regardless of finding methamphetamine during the illegal entry." Pet. App. 13; see *id.* at 14. The court of appeals acknowledged that the officer who testified at the suppression hearing had made an inconsistent statement, but it explained that the district court reasonably concluded that such "an errant statement * * * did not outweigh the other evidence of the government's plan to request a search warrant, regardless of what they found in the house." *Id.* at 14.

The court of appeals also rejected, in a footnote, petitioner's contention that the independent source doctrine was categorically inapplicable in cases involving "flagrant police misconduct," a contention petitioner purported to derive from *United States* v. *Madrid*, 152 F.3d 1034 (8th Cir. 1998). Pet. App. 8-9 n.2. The court explained that such an exception was foreclosed by Seventh Circuit precedent and was inconsistent with "the Supreme Court's test in" *Murray* v. *United States*, *supra*. Pet. App. 9 n.2. In addition, the court explained that that, since its decision in *Madrid*, the Eighth Circuit "itself has limited [the purported exception] to narrow circumstances of egregious police misconduct." *Ibid.*

(citing *United States* v. *Swope*, 542 F.3d 609, 616-617 (8th Cir. 2008), cert. denied, 555 U.S. 1145 (2009)).

ARGUMENT

Petitioner first contends (Pet. 12-24) that the court of appeals erred in determining that the evidence seized pursuant to the search warrant was admissible under the independent source doctrine. The court of appeals' decision is correct, and no clear conflict exists among the courts of appeals that would warrant this Court's review. Petitioner next requests (Pet. 24-28) that this Court vacate his sentence and remand the case to the court of appeals to consider whether he is entitled to resentencing under a provision of the First Step Act of 2018, Pub. L. No. 115-391, § 401, 132 Stat. 5220, that reduces the minimum penalty associated with certain drug-trafficking offenses. Petitioner, however, forfeited that claim by failing to present it to the court of appeals in the first instance, despite an opportunity to do so. This Court recently denied two petitions that sought the same disposition in a similar posture. See *Pizarro* v. *United States*, 140 S. Ct. 211 (2019) (No. 18-9789); *Sanchez* v. *United States*, 140 S. Ct. 147 (2019) (No. 18-9070). The same result is warranted here.

1. a. The Fourth Amendment "protects the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,'" but "says nothing about suppressing evidence obtained in violation of this command." *Davis* v. *United States*, 564 U.S. 229, 236 (2011); see *Herring* v. *United States*, 555 U.S. 135, 139 (2009); *Arizona* v. *Evans*, 514 U.S. 1, 10 (1995). To "supplement the [Amendment's] bare text," this Court "created the exclusionary rule, a deterrent sanction that bars the prosecution from introducing evidence obtained by way of a Fourth

Amendment violation." *Davis*, 564 U.S. at 231-232. Nevertheless, because the exclusion of reliable evidence has "significant costs," suppression of evidence "'has always been [the Court's] last resort, not [its] first impulse.'" *Utah* v. *Strieff*, 136 S. Ct. 2056, 2061 (2016) (quoting *Hudson* v. *Michigan*, 547 U.S. 586, 591 (2006)). This Court has accordingly deemed the exclusionary rule "applicable only where its deterrence benefits outweigh its substantial social costs." *Ibid.* (quoting *Hudson*, 547 U.S. at 591) (ellipses omitted). The independent source doctrine is one of "several exceptions to the [exclusionary] rule" that reflect that principle. *Ibid.*

In *Murray* v. *United States*, 487 U.S. 533 (1988), this Court held that, under the independent source doctrine, evidence seized pursuant to a search warrant may be admissible even when that evidence was previously discovered during an illegal search. *Id.* at 536-541. The Court explained that when law enforcement officers have an independent source for challenged evidence, they should be placed in no worse a position than if the unlawful conduct had not occurred. *Id.* at 537; see *Strieff*, 136 S. Ct. at 2061 ("[T]he independent source doctrine allows trial courts to admit evidence obtained in an unlawful search if officers independently acquired it from a separate, independent source."). In applying the independent source doctrine, "[t]he ultimate question * * * is whether the search pursuant to warrant was in fact a genuinely independent source of the information and tangible evidence at issue here." *Murray*, 487 U.S. at 542. In particular, the Court explained that the doctrine would not apply "if the agents' decision to seek the warrant was prompted by what they had seen during the initial entry, or if information obtained dur-

ing that entry was presented to the Magistrate and affected his decision to issue the warrant." *Ibid.* (footnote omitted).

The lower courts correctly applied *Murray* and determined that this case involved a genuinely independent source of information. Pet. App. 12-15, 36-41. As to the first issue—whether the decision to seek the warrant was "prompted by" the initial entry, *Murray*, 487 U.S. at 542—petitioner does not challenge the district court's finding that "the agents planned to and would have sought a search warrant regardless of the discovery of the methamphetamine packages." Pet. App. 40. And the court of appeals explained why that finding was not clearly erroneous but rather was reasonable in light of the evidence as a whole. See *id.* at 13-15.

As to the second issue—whether the information from the initial entry "affected [the magistrate's] decision to issue the warrant," *Murray*, 487 U.S. at 542—the lower courts likewise determined that the initial entry did not change the outcome. Pet. App. 12-13, 38-39. Petitioner contends in passing that the agents' disclosure in the warrant application that they had already seen drugs inside petitioner's home "unquestionably 'affected' the magistrate's decision to issue a warrant." Pet. 21-22 (citation omitted). That contention is incorrect. In analogous contexts, this Court has made clear that courts should not inquire into a magistrate's subjective decisionmaking but instead should evaluate whether the permissible material in the warrant application objectively demonstrates probable cause. In particular, in *Franks* v. *Delaware*, 438 U.S. 154 (1978), the Court held that, even in evaluating warrants tainted by false evidence, courts must decide whether, once the false infor-

mation is "set to one side," the other information establishes probable cause; if so, the evidence should be admitted. *Id.* at 171-172. And the Court then applied the same standard in *United States* v. *Karo*, 468 U.S. 705 (1984), upholding a search pursuant to a warrant that followed a Fourth Amendment violation because it was "clear that the warrant affidavit, after striking the [illegally obtained facts], contained sufficient untainted information to furnish probable cause for the issuance of the search warrant." *Id.* at 721. Neither *Murray*'s reference to information "affect[ing] [the magistrate judge's] decision to issue the warrant," 487 U.S. at 542, nor its characterization of the evidence's alternative source as "genuinely independent," *ibid.*, suggests a departure from the well-settled rule, reflected in the Court's prior decisions in both *Franks* and *Karo*, that suppression is an inappropriate remedy where probable cause exists to support the warrant apart from any tainted evidence that may have been presented to the magistrate judge.[1]

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[1] Every court of appeals to squarely consider the issue has rejected the notion that *Murray* requires a subjective inquiry into the magistrate's decisionmaking. In line with *Franks* and *Karo*, those courts have recognized that a search warrant acquired subsequent to an illegal entry may constitute a genuine independent source even for evidence viewed during an initial illegal entry, provided that the warrant affidavit, purged of tainted facts and conclusions derived from the illegal entry, contains sufficient evidence to constitute probable cause for issuance of the warrant. See, *e.g.*, *United States* v. *Hassan*, 83 F.3d 693, 697-698 & n.6 (5th Cir. 1996) (per curiam); *United States* v. *Walton*, 56 F.3d 551, 554 (4th Cir. 1995); *United States* v. *Ford*, 22 F.3d 374, 378-380 (1st Cir.), cert. denied, 513 U.S. 900 (1994); *United States* v. *Markling*, 7 F.3d 1309, 1315-1317 (7th Cir. 1993); *United States* v. *Restrepo*, 966 F.2d 964, 970-971 (5th Cir. 1992), cert. denied, 506 U.S. 1049 (1993); *United States* v. *Herrold*, 962 F.2d 1131, 1139-1144 (3d Cir.), cert. denied, 506 U.S.

The warrant application in this case contained sufficient untainted evidence to establish probable cause. In the district court, petitioner "did not dispute" that finding. Pet. App. 12. Even in this Court, petitioner does not meaningfully develop any argument that the untainted evidence in the warrant application was insufficient to establish probable cause. And even assuming that a challenge to the sufficiency of the untainted evidence had been properly preserved, the record forecloses it. As the court of appeals observed, the warrant application contained "plenty of untainted evidence of probable cause." *Id.* at 13. It "detailed" not only Hardy's "initial admissions to agent Cline about his drug-dealing history with [petitioner]" and "Hardy's nine phone calls with [petitioner]," but also "Hardy's account of what he saw in [petitioner's] house after he arrived," including the methamphetamine later seized pursuant to the warrant. *Ibid.*

b. Rather than challenging the court of appeals' application of *Murray* on the facts here, petitioner primarily contends (Pet. 12-13, 17-22) that *Murray* should not apply at all if officers conduct a warrantless search while a warrant application is being prepared, asserting that applying the independent source doctrine to what he characterizes as "flagrant" Fourth Amendment violations would inadequately deter police misconduct. This Court, however, considered and rejected a similar argument in *Murray* itself, reasoning that the doctrine would *not* give an officer who already has probable cause an incentive to enter illegally before seeking a warrant. 487 U.S. at 539-540. The Court explained that

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958 (1992); *United States* v. *Salas*, 879 F.2d 530, 537-539 (9th Cir.), cert. denied, 493 U.S. 979 (1989).

such an officer not only would run the risk that a warrant would not issue, but also would bear the "much more onerous burden" in subsequent proceedings of showing that "no information gained from the illegal entry affected either the law enforcement officers' decision to seek a warrant or the magistrate's decision to grant it." *Id.* at 540.[2] And requiring suppression even where, as here, both the decision to seek the warrant and the decision to issue it were unaffected by information obtained in the earlier search would be directly contrary to the core principle underlying the independent source doctrine by leaving law enforcement in a worse position than if the earlier search had not occurred. See, *e.g.*, *id.* at 541-542; *Nix* v. *Williams*, 467 U.S. 431, 443 (1984).

Petitioner's contrary contentions lack merit. Petitioner argues (Pet. 18) that the new rule he seeks would be "consistent" with this Court's principal decisions discussing the independent source doctrine—*Murray* v. *United States*, *supra*, and *Segura* v. *United States*, 468 U.S. 796 (1984)—because in those cases the illegally obtained information was not mentioned in the warrant applications. See Pet. App. 18-20. But *Murray* made clear that the independent source doctrine applies unless illegally obtained evidence is both "presented to the Magistrate" and actually "affect[s] his decision to issue the warrant." 487 U.S. at 542. "[W]hat counts," in other words, "is whether the actual illegal search *had any effect* in producing the warrant." *Id.* at 542 n.3 (emphasis added). Where, as here, the agents would have sought

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[2] Of course, when exigent circumstances exist, officers may conduct a search of a residence without waiting for a warrant. See, *e.g.*, *Payton* v. *New York*, 445 U.S. 573, 590 (1980).

the warrant even without the illegal entry, and the warrant application contained sufficient untainted information to establish probable cause, no sound reason exists to believe that "the search pursuant to [the] warrant was [not] in fact a genuinely independent source of the" contested evidence, regardless of the misconduct's alleged flagrancy. *Id.* at 542.

Petitioner notes (Pet. 17-18) that two other exceptions to the exclusionary rule—the good-faith exception and the attenuation doctrine—take into account whether the officers' underlying Fourth Amendment violation was "flagrant." But neither exception is analogous to the independent source doctrine. Unlike the independent source doctrine, neither the good-faith exception nor the attenuation doctrine is animated by the concern that the exclusionary rule might "put the police in a worse position than they would have been in absent any error or violation." *Murray*, 487 U.S. at 537 (quoting *Nix*, 467 U.S. at 443). To the contrary, the good-faith exception applies regardless of whether the contested evidence was obtained as a result of the officers' unlawful conduct. See, *e.g.*, *Davis*, 564 U.S. at 238. And the attenuation doctrine—which applies where the causal nexus between the officer's misconduct and the contested evidence is too remote—affirmatively presumes that the contested evidence would not have been obtained without the unlawful conduct. See, *e.g.*, *Strieff*, 136 S. Ct. at 2061. The good-faith exception and the attenuation doctrine thus differ from the independent source doctrine in a critical respect: They ask whether other considerations independently warrant admitting the unlawfully obtained evidence even though doing so may put the police in a *better* position than they would

have been in without the misconduct. A violation's flagrancy may be germane to that inquiry. But it has no logical relevance under the independent source doctrine, where the officers' misconduct did not improve law enforcement's position.

This Court's treatment of the closely related inevitable discovery doctrine confirms that no special rule exists for flagrant misconduct. Under the inevitable discovery doctrine, illegally obtained evidence is admissible if it "would have been discovered even without the unconstitutional source." *Strieff*, 136 S. Ct. at 2061. As this Court has repeatedly observed, inevitable discovery is "in reality an extrapolation from the independent source doctrine." *Murray*, 487 U.S. at 539; see *Nix*, 467 U.S. at 443-444 ("There is a functional similarity between these two doctrines in that exclusion of evidence that would inevitably have been discovered would also put the government in a worse position, because the police would have obtained that evidence if no misconduct had taken place."); accord Pet. 14 n.2, 15 (acknowledging that the doctrines are "closely related" and "close cousin[s]"). And this Court's inevitable-discovery cases have squarely rejected an "absence-of-bad-faith requirement" of the sort that petitioner proposes in this case—precisely because such a requirement would impermissibly "put the police in a worse position than they would have been in if no unlawful conduct had transpired." *Nix*, 467 U.S. at 445 (emphasis omitted). The same logic applies *a fortiori* where the contested evidence was not merely destined to be discovered through an independent source, but was in fact obtained through an independent source.

c. Petitioner contends (Pet. 13-16) that the decision below conflicts with the Eighth Circuit's decision in

United States v. *Madrid*, 152 F.3d 1034 (1998). In *Madrid*, officers conducted an extensive warrantless search of a suspect's residence. *Id.* at 1035-1036. A federal agent then prepared an application for a search warrant for the residence, which included information obtained during the warrantless search. *Id.* at 1036. The Eighth Circuit found that evidence seized pursuant to the search warrant should have been suppressed. *Id.* at 1041. The court initially determined that it was "not convinced that the warrant was supported by probable cause or that the decision to issue the warrant was unaffected by the illegally obtained information." *Id.* at 1040. The court then stated, however, that the evidence should be suppressed in any event because the officers had "exploit[ed] their presence in the home." *Id.* at 1041. The court noted that the officers "went upstairs and downstairs on two or three occasions, detained and searched the occupants, seized wallets and placed them in envelopes marked 'evidence,' and leafed through personal mail and a notebook." *Id.* at 1040. The court reasoned that "the severity of the police misconduct" took the case outside the scope of the "inevitable discovery" (or, more accurately, "independent source[]") doctrine. *Id.* at 1041.

As a preliminary matter, it is far from clear whether the Eighth Circuit's decision in *Madrid* rested entirely, or merely partially, on its conclusion that the officers had "exploit[ed] their presence in the home" during the earlier, warrantless search. 152 F.3d at 1041. The Eighth Circuit also indicated that the warrant may not have been supported by probable cause and that the decision to issue the warrant may have been affected by information obtained during the warrantless search.

Id. at 1040. This case, in which the warrant was supported by probable cause, and in which the lower courts expressly found that the decision to issue the warrant was not affected by information obtained during the warrantless search, see Pet. App. 12-13, 38-39, thus differs substantially from *Madrid* in respects that were highlighted in the opinion in that case.

In any event, if *Madrid* were read to have squarely held that the independent source doctrine is invariably inapplicable when officers "exploit" their presence in a residence during a warrantless search, that decision would be incorrect for the reasons explained above. See pp. 8-15, *supra*. And in the two decades since *Madrid* was decided, no other federal court of appeals has relied on such a reading of *Madrid* to find the independent source doctrine inapplicable.[3] Even the Eighth Circuit has not adopted that reading of *Madrid* in applying the independent source doctrine. To the contrary, as the decision below recognized, subsequent Eighth Circuit decisions have implicitly narrowed *Madrid* to reach, at most, "egregious police misconduct." Pet. App. 9 n.2. For example, in *United States* v. *Swope*, 542 F.3d 609 (2008), cert. denied, 555 U.S. 1145 (2009), the Eighth Circuit applied the independent source doctrine to allow the admission of evidence obtained pursuant to a warrant where police had unlawfully entered a home and

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[3] Petitioner asserts (Pet. 14-15) that, in *United States* v. *Dent*, 867 F.3d 37 (2017), the First Circuit "expressed agreement" with *Madrid*, as construed by petitioner. Pet. 14. But *Dent* in fact explicitly declined to take a view on *Madrid*, even as limited to particularly egregious misconduct: "Whether we would follow *Madrid* we need not decide today." *Dent*, 867 F.3d at 41; see *ibid.* (describing *Madrid* as involving a "blatant search through personal effects"). *Dent* then proceeded to apply the independent source doctrine and reject the defendant's motion to suppress. *Id.* at 42.

included observations from that entry in the warrant application. *Id.* at 612, 617. The court conducted the same two-step inquiry under *Murray* that the court of appeals conducted here, asking both whether "the officers would have sought a warrant without the illegally obtained information" and whether "the untainted portions" of a warrant application "[we]re sufficient to support a finding of probable cause." *Id.* at 616. After *Swope*, it is unclear what remaining vitality *Madrid* has, at least outside circumstances more egregious than those present here. As a result, no pressing need exists for this Court to intervene and clarify the application of the independent source doctrine in the present context.

Finally, petitioner asserts (Pet. 15) that three state supreme courts have considered the flagrancy of the officers' misconduct under "state-law equivalents" of the independent source and inevitable discovery doctrines. *Ibid.* (citing *State* v. *Holland*, 823 A.2d 38, 48 (N.J. 2003) (interpreting "Article I, paragraph 7 of the New Jersey Constitution"); *State* v. *Holly*, 833 N.W.2d 15, 32 (N.D. 2013) (interpreting "the North Dakota Constitution"); *State* v. *Phelps*, 297 N.W.2d 769, 774 (N.D. 1980) (same); *Smith* v. *State*, 948 P.2d 473, 481 (Alaska 1997) (interpreting the Alaska constitution)). A state court's interpretation of state law does not, however, create a conflict with the court of appeals' interpretation of federal law, much less a conflict warranting this Court's intervention. See Sup. Ct. Rule 10(a).

2. Petitioner separately requests (Pet. 24-28) that this Court grant the petition for a writ of certiorari, vacate his sentence, and remand to the court of appeals to consider, in the first instance, whether he is entitled to resentencing under the First Step Act. Petitioner's request is unsound.

a. Petitioner was sentenced under 21 U.S.C. 841(b)(1)(A) (2012). At the time of petitioner's February 2016 offense conduct and his January 2018 sentencing, Section 841(b)(1)(A) provided for a minimum penalty of 20 years of imprisonment for a defendant who violated Section 841(a) "after a prior conviction for a felony drug offense ha[d] become final." 21 U.S.C. 841(b)(1)(A) (2012). Section 401(a) of the First Step Act later amended Section 841(b)(1)(A) to provide for a minimum penalty of 15 years of imprisonment for a defendant with a single qualifying prior conviction. See § 401(a)(2)(A)(i), 132 Stat. 5220. The First Step Act also altered the predicate offenses that trigger the enhanced penalty, by amending Section 841(b)(1)(A) to replace the term "felony drug offense" with, as relevant here, the term "serious drug felony." *Ibid.*; see § 401(a)(1), 132 Stat. 5220 (amending 21 U.S.C. 802 to add a new definition of "serious drug felony").

Petitioner is not eligible to benefit from those amendments. Section 401(c) of the First Step Act provides that "the amendments made by [Section 401] shall apply to any offense that was committed before the date of enactment of this Act, *if a sentence for the offense has not been imposed* as of such date of enactment." 132 Stat. 5221 (emphasis added). Petitioner's sentence was imposed on January 31, 2018, see Judgment 1—well before the First Step Act was enacted on December 21, 2018. Accordingly, the amendments made by Section 401 do not apply to petitioner's offense.

Petitioner contends (Pet. 26-27) that the First Step Act applies to all criminal cases "pending on direct review or not yet final," but that contention is incompatible with the statutory language. Pet. 27 (citation omitted). As noted, Congress instructed that the relevant

provisions of the First Step Act apply only to pending cases where "a sentence * * * has not been imposed." § 401(c), 132 Stat. 5221. The ordinary meaning of the term "imposed" is that a sentence is "imposed" when it is pronounced by the district court. Congress routinely uses the term "impose" to refer to the act of sentencing by the trial court, not the pendency of a case on direct appeal. See, *e.g.*, Fed. R. Crim. P. 32(b)(1) ("The court must impose sentence without unnecessary delay."); 18 U.S.C. 3553(a) ("factors to be considered in imposing a sentence") (capitalization omitted); 18 U.S.C. 3661 (no limit on information the district court may consider "for the purpose of imposing an appropriate sentence"); 18 U.S.C. 3742 (specifying the grounds on which a party may appeal "an otherwise final sentence" that "was imposed"); 21 U.S.C. 851(b) (challenge to an information alleging a sentencing enhancement must be made "before sentence is imposed"). This Court, too, uses the term "impose" to describe the district court's actions and not the pendency of the case on direct appeal. See, *e.g.*, *Molina-Martinez* v. *United States*, 136 S. Ct. 1338, 1347 (2016) (observing that the record did not explain why the district court "chose the sentence it imposed"); *Pepper* v. *United States*, 562 U.S. 476, 492 (2011) (explaining that the likelihood a defendant will reoffend is a factor that a "district court[] must assess when imposing sentence"); *Gall* v. *United States*, 552 U.S. 38, 51 (2007) (noting that appellate courts review "the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard").

Adhering to the plain meaning of the term "imposed" in the First Step Act is consistent with the "ordinary practice" in federal sentencing "to apply new penalties to defendants not yet sentenced, while withholding that

change from defendants already sentenced." *Dorsey* v. *United States*, 567 U.S. 260, 280 (2012). That practice is codified in the saving statute, 1 U.S.C. 109, which specifies that the repeal of any statute will not have the effect "to release or extinguish any penalty, forfeiture, or liability incurred under such statute" unless the repealing act so "expressly provide[s]."

Every court of appeals to have considered the question, including the court below, has found that the plain text of the First Step Act proscribes its application to sentencing orders issued before December 21, 2018. See *United States* v. *Aviles*, 938 F.3d 503, 510 (3d Cir. 2019) ("Congress's use of the word 'imposed' thus clearly excludes cases in which a sentencing order has been entered by a district court [before December 21, 2018] from the reach of the amendments made by the First Step Act."); *United States* v. *Wiseman*, 932 F.3d 411, 417 (6th Cir. 2019) (same); *United States* v. *Pierson*, 925 F.3d 913, 928 (7th Cir. 2019) (same), petition for cert. pending, No. 19-566 (filed Oct. 28, 2019).

Petitioner's contrary arguments lack merit. Petitioner invokes (Pet. 27) *Griffith* v. *Kentucky*, 479 U.S. 314 (1987), in which this Court held that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final." *Id.* at 328. But that principle applies to "a newly declared constitutional rule," *id.* at 322, not to a statutory amendment, which is instead subject to the saving statute's default rule. See *Dorsey*, 567 U.S. at 280 (describing the different "ordinary practice" applicable in sentencing cases involving statutory amendments). Petitioner also points (Pet. 27) to Section 401(c)'s heading: "Applicability to pending

cases." First Step Act § 401(c), 132 Stat. 5221 (capitalization altered). By its plain terms, however, that heading simply conveys Section 401(c)'s subject matter—*i.e.*, that the provision identifies the cases, among those "pending" at the time of the First Step Act's enactment, to which the amendments apply. Section 401(c)'s heading does not state that the amendments apply to *all* "pending cases," much less to all cases "pending" on direct appeal. Finally, petitioner contends (Pet. 26-27) that, had Congress intended for the relevant amendments not to apply to cases on direct appeal, it would have used the language it adopted in connection with the First Step Act's amendments to certain provisions of Title 18. See, *e.g.*, § 402(b), 132 Stat. 5221 ("The amendments made by this section [to 18 U.S.C. 3553(f)] shall apply only to a conviction entered on or after the date of enactment of this Act."). But the fact that other parts of the First Step Act apply based on the date a conviction is entered says nothing about Congress's choice to use the date of the imposition of a sentence in Section 401(c).

b. This Court has recently granted three petitions for writs of certiorari, vacated the respective judgments, and remanded to the courts of appeals to consider the applicability of the First Step Act on appeal, notwithstanding the government's observation that the defendants' sentences had been imposed before the enactment of the statute. See *Jefferson* v. *United States*, No. 18-9325 (Jan. 13, 2020); *Richardson* v. *United States*, 139 S. Ct. 2713 (2019) (No. 18-7036); *Wheeler* v. *United States*, 139 S. Ct. 2664 (2019) (No. 18-7187). *Wheeler* involved the same provision at issue here, while *Jefferson* and *Richardson* involved the identically worded Section 403(b). See Br. in Opp. at 11-15, *Jefferson*, *supra*

(No. 18-9325); Br. in Opp. at 22-25, *Wheeler*, *supra* (No. 18-7187); Br. in Opp. at 12-16, *Richardson*, *supra* (No. 18-7036). Petitioner asks (Pet. 27-28) that the Court likewise grant, vacate, and remand here. A similar disposition would not be warranted here, however, for two reasons.

First, unlike the defendants in *Richardson* and *Wheeler*, petitioner had the opportunity to present his claim for resentencing under the First Step Act to the court of appeals, but he failed to do so. The First Step Act was enacted while petitioner's appeal was still pending in the Seventh Circuit, more than five months before the court of appeals ultimately entered its judgment. See Pet. App. 1. Although, as petitioner observes (Pet. 27-28), the parties' briefs in the case had already been filed, petitioner could have raised the issue by other means—for example, by requesting leave to file a supplemental brief addressing the effect of the statute on his sentence. See, *e.g.*, *Pierson*, 925 F.3d at 927-928 (considering an identical claim under Section 401 of the First Step Act that was raised for the first time in the defendant's supplemental brief); see also C.A. Doc. 38, at 2-3, *Pierson*, *supra* (No. 18-1112) (defendant's motion for leave to file supplemental brief); accord *Rent-A-Center, W., Inc.* v. *Jackson*, 561 U.S. 63, 75-76 & n.5 (2010) (determining that a party forfeited an argument in the court of appeals when he "could have submitted a supplemental brief" addressing the issue in the period between the intervening legal development and the court of appeals' entry of judgment). The five-month period for a supplemental filing here is substantially longer than the one-week period available to the petitioner in *Jefferson*. See Br. in Opp. at 13, *Jefferson*, *supra* (No. 18-9325). This Court recently denied two petitions

that sought the same disposition on the same First Step Act question in a similar posture to this case. See *Pizarro*, 140 S. Ct. 211; *Sanchez*, 140 S. Ct. 147. The same result is warranted here.

Second, a remand would be futile. As noted above, the Seventh Circuit has already determined, in a precedential decision, that a defendant may not benefit from Section 401's amendment to the recidivist drug-trafficking enhancement on direct appeal if he was sentenced before the effective date of the First Step Act. See *Pierson*, 925 F.3d at 928 ("Sentence was 'imposed' here within the meaning of § 401(c) when the district court sentenced the defendant, regardless of whether he appealed a sentence that was consistent with applicable law at that time it was imposed."). Petitioner does not attempt to distinguish that decision, and no reason exists to believe that the Seventh Circuit would revisit its holding if this case were remanded. The same was not true in *Wheeler* or *Richardson*, where the issue remained undecided, or in *Jefferson*, where the issue had not been decided in binding precedent. See Br. in Opp. at 14-15, *Jefferson*, *supra* (No. 18-9325). By contrast, this Court denied certiorari in *Sanchez*, where binding circuit precedent foreclosed the same argument petitioner presses here. See 8/13/19 Gov't Letter at 1, *Sanchez*, *supra* (No. 18-9070).

Because petitioner's First Step Act claim is both forfeited and without merit, no reasonable probability exists that the court of appeals would remand this case for resentencing in light of that statute. See *Greene* v. *Fisher*, 565 U.S. 34, 41 (2011) (explaining that this Court will not grant, vacate, and remand in light of an intervening development unless, as relevant here, "a reasonable probability" exists that the court of appeals will

reach a different conclusion on remand) (quoting *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996)) (per curiam).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 2020