**No. 19-5946**

IN THE
# Supreme Court of the United States

ANTHONY CARL SPENCE,
*Petitioner*,

v.

UNITED STATES OF AMERICA,
*Respondent*.

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

# PETITIONER'S REPLY TO THE BRIEF IN OPPOSITION

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The government does not dispute that the circuits are divided on the important question of statutory interpretation: whether, absent an express indication of extraterritorial application, a sentencing court can enhance a defendant's offense level under the Sentencing Guidelines based on foreign conduct that is not a crime against the United States. The government prefers instead to argue that the Court should deny the petition because: (1) another actor can resolve the split; (2) the merits of the lower court decision are correct; (3) this case presents vehicle issues. But none of those arguments offer a persuasive reason to deny certiorari. Thus, the Court should grant the petition.

### I. The government does not seriously dispute the existence of a circuit split on the question presented.

This petition presents a straightforward question of statutory interpretation: Whether, absent an express indication of extraterritoriality, Congress exercised or delegated its authority in directing the Commission to promulgate the guidelines to allow for an increase in a defendant's offense level based on foreign conduct that is not a crime against the United States. Pet. i. The government does not seriously dispute that the circuits have differing views about whether, consistent with the presumption against extraterritoriality, a sentencing court can enhance a defendant's offense level under the Sentencing Guidelines based on foreign conduct that is not a crime against the United States. BIO 14-16 (discussing the circuit conflict). Instead, the government suggests that, "[a]ny tension in the circuits would not warrant this Court's review" because Congress or the Sentencing Commission could "answer the question presented." BIO 15.

But the speculative possibility about whether Congress *could* pass a different statute expressly applying the guidelines to foreign conduct, or the Commission *could* amend the guidelines is no reason for the Court to deny certiorari. The question here is whether under the *existing statutory scheme*, Congress expressly authorized the guidelines to apply to extraterritorial conduct, or whether it delegated that authority to apply the guidelines extraterritorially to the Commission itself, and if the Commission has exercised its authority. Whether Congress *could* pass a statute that expressly applies the guidelines to extraterritorial conduct would not resolve this question. And, without this Court's intervention, the question remains whether Congress delegated the authority for the Commission to *amend* the guidelines to apply to foreign conduct.

Moreover, there is little reason to believe Congress or the Commission will act to address the question presented. As for Congress, the circuit conflict about whether the guidelines allow courts to calculate a defendant's guidelines range based on foreign conduct has persisted for nearly two decades without legislative action. There is nothing to suggest Congress intends to address the question presented, unless this Court intervenes and requires Congress to supply the requisite clear statement to overcome the presumption against extraterritoriality.

As to the Commission, not only will there remain an open question about whether Congress has authorized the Commission to apply the guidelines to foreign conduct, and whether the Commission has exercised its delegated authority, but the Commission has no quorum of commissioners to promulgate changes to the guidelines. *See* 28 U.S.C. § 994(a); About the Commissioners, U.S. Sent'g Comm'n, *https://www.ussc.gov/commissioners* (last visited January 20, 2020). Thus, even if the Court found that Congress gave the Commission the authority to

amend the guidelines, the likelihood that the Commission will resolve the issue is exceedingly low. As a result, the circuit conflict will persist without this Court's intervention.

## II. The government's merit arguments provide no reason to deny certiorari.

The government's merits argument fare no better in providing the Court with a sound reason to deny certiorari. Not only are those arguments better left to be addressed at the merits stage of this case, but those arguments also underscore the important statutory question at issue.

1. The "Sentencing Commission promulgates the guidelines by virtue of an express congressional delegation of authority for rulemaking." *Stinson v. United States*, 508 U.S. 36, 44 (1993). Because "Congress legislates against the backdrop of the presumption against extraterritoriality," it only makes sense to apply the presumption against extraterritoriality to the both the statutory provisions implementing the guidelines, and the guidelines themselves. *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991).

The government acknowledges that the presumption against extraterritoriality applies to all acts of Congress. BIO 9-10. Yet the government claims that the presumption "does not apply to the Guidelines or the statutory provisions they implement," reasoning that the purpose of the guidelines are to guide the sentencing court's exercise of its discretion. BIO 11.

But this Court's precedent does not limit the presumption of extraterritorial application based on a statute's purpose. To the contrary, presumption against extraterritoriality rests on the perception that Congress ordinarily legislates on domestic, not foreign, matters. *Smith v. United States*, 507 U.S. 197, 204, n. 5 (1993). And the presumption applies regardless of whether there is a risk of conflict between the American statute and a foreign law. *See Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 173-174 (1993). Thus, the precedent of this Court suggests the

presumption against extraterritoriality applies to all Congressional statutes, including the statues implementing the guidelines, and by extension, the guidelines themselves.

2. Next, the government argues that even if the presumption against extraterritoriality did apply to the guidelines, "the relevant statutory provisions include the requisite clear statement to overcome it." BIO 12. But just the opposite is true.

"When a statute gives no clear indication of an extraterritorial application, it has none." *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 255 (2010). Here, although Congress granted the Commission substantial discretion in formulating guidelines, that discretion is not boundless and Congress did not expressly invoke extraterritorial application.

For instance, Congress charged the Commission with three goals: to "assure the meeting of the purposes of sentencing as set forth" in the Act; to "provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records ... while maintaining sufficient flexibility to permit individualized sentences," where appropriate; and to "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process." 28 U.S.C. § 991(b). Congress also articulated general goals for federal sentencing and imposed upon the Commission a variety of specific requirements. *See* §§ 994(b)—(n). Nowhere in these directives did Congress expressly delegate or direct to the Commission to apply the guidelines to extraterritorial conduct when calculating a defendant's guidelines range, as required to overcome a presumption against extraterritoriality.

Indeed, it is dubious that Congress delegated the Commission the power to apply the guidelines to extraterritorial conduct that Congress itself has not invoked in directing the Commission to promulgate the guidelines. Congress, in fact, requires the guidelines to be

"consistent with all pertinent provisions of title 18, United States Code," to which the presumption against extraterritoriality applies. § 994(b)(1). Thus, the better reading of the statutes implementing the guidelines implies the guidelines are bound by the same presumption against territoriality that applies to the entirety of the U.S. code.

Trying to shift the debate away from whether Congress intended for the guidelines to apply to extraterritorial conduct, the government points to 18 U.S.C. § 3661, suggesting that, "a sentencing court need not ignore relevant conduct abroad in determining an appropriate sentence." BIO 12. But this petition does not ask the Court to decide whether sentencing judges may *ever* consider foreign conduct at sentencing; it is limited to consideration of foreign conduct in calculating a defendant's guidelines range. Even so, the plain text of § 3661 expresses no clear indication to consider extraterritorial conduct in calculating a defendant's guidelines range that is not a crime against the United States.

**III. The question here is presented in a clean vehicle.**

The government's remaining arguments seek to cast doubt on the suitability of this case to address the question presented. First, the government claims that applying "the presumption would have no effect on the analysis here because the consideration of foreign conduct involves a permissible domestic application of the Guidelines." BIO 13. No so. Here, there is no dispute that the government could not "charge [petitioner] for the distribution in Jamaica." BIO 14 (quoting Sent. Tr. 19). Thus, the lower's court's reasoning exclusively rests on declining to extend the

presumption against extraterritorial application to the guidelines. BIO 12-13. As a result, the question here is presented cleanly and does not concern a domestic application of the guidelines.

The government also suggests this case presents vehicle problems because "the record strongly suggests that the district court would have imposed the same sentence regardless of whether it applied the two-level distribution enhancement." BIO 16. But this case presents a clean vehicle because neither the government nor the Panel below addressed any prejudice resulting from erroneous guidelines range. Moreover, "in the ordinary case a defendant will satisfy his burden to show prejudice by pointing to the application of an incorrect." *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1347 (2016). And here the sentencing court did not state it would have imposed the same sentence without the erroneous guidelines calculation. Thus, the guidelines error alone should be enough to establish prejudice. Even so, rather than prejudge the prejudice inquiry, the Court's better practice is to leave that question for the parties to address on remand.

## CONCLUSION

This case presents a circuit conflict on an important question of statutory interpretation, in a clean vehicle. For this reason, and for the reasons stated in the petition and this reply, the Court should grant the petition to address whether Congress exercised or delegated that authority in directing the Commission to promulgate the guidelines to allow for an increase in a defendant's offense level based on foreign conduct that is not a crime against the United States. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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