No. _____

IN THE
Supreme Court of the United States

JAVIER CORONA-VERDUZCO,
Petitioner,
v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The First Step Act of 2018 amended the statutory requirements for enhancing a defendant's sentence after a drug conviction under 21 U.S.C. § 841. Prior to receiving an enhanced sentence, a defendant must now have a "serious drug felony" conviction where "the offender served a term of imprisonment of more than 12 months." The question presented is:

Whether the phrase "served a term of imprisonment of more than 12 months" in the First Step Act unambiguously allows a defendant to sustain two "serious drug felony" convictions simultaneously, based on the plain text of the statute, without relying on extratextual sources of authority?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Javier Corona-Verduzco respectfully requests this Court to issue a writ of certiorari to review the opinion of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The Eighth Circuit's judgment and opinion affirming the judgment of the district court is reported at 963 F.3d 720 (8th Cir. 2020), and is included in Appendix A.

JURISDICTION

The decision of the Court of Appeals affirming the district court's judgment and sentence was entered on June 24, 2020. Petitioner did not file a petition for rehearing. This Court has jurisdiction under 28 U.S.C. § 1291 and Sup. Ct. R. 13.3.

STATUTORY PROVISIONS INVOLVED

The First Step Act of 2018, Pub. L. No. 115-391, S.756 (2018).

SEC. 401. REDUCE AND RESTRICT ENHANCED SENTENCING FOR PRIOR DRUG FELONIES.

(a) CONTROLLED SUBSTANCES ACT AMENDMENTS.—The Controlled Substances Act (21 U.S.C. 801 et seq.) is amended—

(1) in section 102 (21 U.S.C. 802), by adding at the end the following:

"(57) The term 'serious drug felony' means an offense described in section 924(e)(2) of title 18, United States Code, for which

"(A) the offender served a term of imprisonment of more than 12 months; and

"(B) the offender's release from any term of imprisonment was within 15 years of the commencement of the instant offense.

Codified, at 21 U.S.C. § 802(57)(A)

21 U.S.C. § 841

(a) Unlawful acts . . . [I]t shall be unlawful for any person to knowingly or intentionally . . . possess with intent to manufacture, distribute, or dispense a controlled substances . . .

(b) Penalties . . . [A]ny person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving—

(viii) "50 grams or more of methamphetamine" . . . "commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment of not less than 15 years. . . ."[A]fter 2 or more prior convictions for a serious drug felony or serious violent felony" the mandatory minimum is "not less than 25 years."

21 U.S.C. § 851. Proceedings to establish prior convictions

(b) Affirmation or denial of previous conviction

If the United States attorney files an information under this section, the court shall after conviction but before pronouncement of sentence inquire of the person with respect to whom the information was filed whether he affirms or denies that he has been previously convicted as alleged in the information, and shall inform him that any challenge to a prior conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence.

STATEMENT OF THE CASE

Jury Trial and Sentencing

In 2019, Mr. Corona-Verduzco was convicted, after a jury trial, of possession with intent to distribute methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A), and reentry of a removed alien after an aggravated felony in violation of 8 U.S.C. §§ 1326(a) and (b)(2).

Before trial, the government filed its *Notice and Information of Intent To Use Prior Convictions to Enhance Punishment* ("Notice"), pursuant to the "First Step Act." At the pre-trial conference, the government informed the district court that it

filed its Notice under the First Step Act, because the First Step Act changed the law regarding Mr. Corona-Verduzco's mandatory minimum sentence. At the pre-trial conference, the district court acknowledged the filing of the Notice by the government, and asked if defense counsel had any comment about the filing, to which defense counsel stated "no." (Pre-Trial Tr., pg. 8). In response, the district court stated "there's nothing really I would expect you to say. It's just that's a notice that's required to be filed to make sure everybody knows what we're looking at." (Pre-Trial Tr., pg. 8).

The Notice stated "that it intends to rely on the following prior convictions for serious drug felonies":

> 07/13/2006 – **Possession with Intent to Distribute Methamphetamine**; U.S. District Court, Western District of Missouri; Case No. 05-00194-01-CR-W-GAF;
>
> 01/11/2006 – **Conspiracy to Distribute Methamphetamine;** U.S. District Court, Western District of Missouri; Case No. 05-00368-01-CR-W-GAF.

Id.

The two cases were consolidated for sentencing, and Mr. Corona-Verduzco was sentenced to the same sentence (135 months' imprisonment) in both cases to run concurrently. Mr. Corona-Verduzco appealed this sentence, and the Eighth Circuit amended the judgment in 2007, holding on direct appeal that the district court made it unambiguous that the court intended to sentence Mr. Corona-Verduzco to "a 'total' term of 135 months" on the two counts. *See United States v.*

Corona-Moret, 256 Fed.Appx. 873, 873 (8th Cir. 2007).[1]

At the 2019 sentencing hearing, the district court concluded that Mr. Corona-Verduzco had a "25-year mandatory minimum [sentence] on count 1." Sent Tr., pg. 5. The district court ultimately sentenced Mr. Corona-Verduzco to 360 months' imprisonment on Count I, and 240 months' imprisonment on Count II, to run concurrently. Before sentencing him to that enhanced sentence, the district court did not inquire about Mr. Corona-Verduzco's prior convictions, as required by 21 U.S.C. § 851(b).

Appeal to the Eighth Circuit

The sole issue raised on appeal before the Eighth Circuit was whether the district court's failure to conduct a 21 U.S.C. § 851 enhancement hearing was reversible error, because the lower court improperly calculated his mandatory minimum sentence after the First Step Act. A panel of the Eighth Circuit affirmed.

In reaching its decision, the Eighth Circuit concluded that because the district court is required under 21 U.S.C. § 851 to inquire about the defendant's prior convictions before enhancing a sentence under § 841(b), the district court erred in failing to conduct the § 851(b) hearing. Slip op., pg. 3, 8. However, it held that the error was harmless because Mr. Corona-Verduzco's mandatory minimum sentence of twenty-five years was properly calculated, based on its interpretation of the First Step Act. Slip op., pg. 8.

The Eighth Circuit acknowledged that its analysis required interpreting the

[1] Corona-Moret is another name used by Mr. Corona-Veduzco.

text of §841(b), which was amended by the First Step Act. Slip op., pg. 2, 6, 7. After the First Step Act, to be subject to an enhanced sentence under § 841(b), the panel opinion also acknowledged that a defendant must have previously committed a "serious drug felony", where "the offender served a term of imprisonment of more than 12 months." 21 U.S.C. § 802(57)(A). *Id*. at 2.

In rejecting Mr. Corona-Verduzco's argument that he only served one term of imprisonment on the two consolidated cases, the Court of Appeals concluded that relevant statutory language under the First Step Act — "the offender served a term of imprisonment of more than 12 months" — "refers to the sentence imposed, not the time served." Slip op., pg. 6. Because Mr. Corona-Verduzco had his two prior sentences "imposed" at the same time, the Eighth Circuit concluded that he had two "serious drug felony" convictions, and that therefore the § 851(b) error was harmless because an inquiry would not have changed his mandatory minimum sentence. *Id*. at 8.

REASON FOR GRANTING THE WRIT

The First Step Act of 2018, enacted on December 21, 2018, significantly amended how defendants' sentences may be enhanced after a drug conviction under 21 U.S.C. § 841. Before the First Step Act, the relevant inquiry was whether a defendant had sustained a "felony drug conviction", which did not require that a defendant serve any prison time for it to be used to enhance a defendant's sentence under § 841. But that term has since been repealed by Congress, and replaced with the term "serious drug felony." To be subject to an enhanced sentence under §841(b), a defendant must now have committed a "serious drug felony", for which "the offender served a term of imprisonment of more than 12 months." 21 U.S.C. § 802(57)(A). And, critically, the First Step Act does not permit a defendant to serve two "serious drug felony" convictions simultaneously, based on the plain text of the statute.

In interpreting this statutory language, the only relevant inquiry is the plain meaning of the text, when it definitively resolves the issue. In a series of opinions, this Court has recently highlighted that courts cannot rely on extratextual sources of authority when the text itself is unambiguous. The decision below is incorrect, because the Eighth Circuit ignored the plain text — that requires a prior sentence of more than 12 months be "served" for it to constitute a "serious felony conviction" § 802(57)(A). Instead, the Eighth Circuit concluded that the phrase "the offender served a term of imprisonment of more than 12 months", means "the sentence imposed, *not the time served*." Slip op., pg. 6 (emphasis added). In reaching that

conclusion, the Eighth Circuit primarily relied on extratextual sources of authority that preceded the enactment of the First Step Act. The Eighth Circuit also ignored that this Court has concluded that a similar phrase — "term of imprisonment" in 18 U.S.C. § 3624(b)(1) regarding calculating good time credit for prisoners — "refers to prison time *actually served* [rather] than the sentence imposed by the judge." *Barber v. Thomas*, 560 U.S. 474, 484-5 (2010) (emphasis added).

This case is an excellent vehicle to resolve this issue, because the statutory interpretation issue was squarely addressed below. The question presented is also exceptionally important because it will determine not only how numerous criminal defendants will be sentenced after the First Step Act, but will also shed light on issues of statutory interpretation where Congress amends just one part of a larger existing criminal code.

I. This Court has recently emphasized that extratextual sources are improper sources of authority to interpret unambiguous Congressional language.

"We begin, as always, with the text." *Esquivel Quintana v. Sessions*, 137 S. Ct. 1562, 1568 (2017). Statutory interpretation is not always clear when courts rely on extratextual sources of authority in interpreting a statute. What happens then? This Court, in a series of recent cases, has held that such extratextual sources are irrelevant to interpreting a statute. Yet lower courts are still not listening.

"When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit." *Bostock v. Clayton Cty., Georgia*, 140 S.

Ct. 1731, 1737 (2020). "When interpreting Congress's work in this arena, no less than any other, our charge is usually to ascertain and follow the original meaning of the law before us." *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2468 (2020). "That is the only 'step' proper for a court of law." *Id.* "To be sure, if during the course of our work an ambiguous statutory term or phrase emerges, we will sometimes consult contemporaneous usages, customs, and practices to the extent they shed light on the meaning of the language in question at the time of enactment." *Id.* However, "[l]egislative history, for those who take it into account, is meant to clear up ambiguity, not create it." *Milner v. Department of Navy*, 562 U.S. 562, 574 (2011).

Interpreting text is straightforward, because the sole inquiry is the plain meaning of the words employed. "This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment. After all, only the words on the page constitute the law adopted by Congress and approved by the President." *Bostock*, 140 S.Ct. at 1738. Interpreting text ordinarily involves using a dictionary. *See Bostock*, 140 S.Ct. at 1740 (using Webster's New International Dictionary to define "discriminate"); *see also Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2380 (2020) (relying on various dictionaries to define "provide"); *see also Shular v. United States*, 140 S. Ct. 779, 785 (2020) (using dictionary to define "involve").

This Court's holding in *United States v. Davis,* 139 S.Ct. 2319, 2332 (2019), that the residual clause of § 924(c)(3)(B) was unconstitutional, is a useful example of statutory interpretation of a criminal statute. This Court struck down

§ 924(c)(3)(B), based on previous cases from this Court holding that textually similar residual clauses were unconstitutional. *Id.* at 2325-6, analyzing *Johnson v. United States*, 135 S.Ct. 2551, 2555 (2015) (holding that residual clause of 18 U.S.C. § 924(e)(2) is unconstitutional) and *Sessions v. Dimaya*, 138 S.Ct. 1204, 1209 (2018) (holding that residual clause of 18 U.S.C. § 16 is unconstitutional).

In rejecting the government's argument in *Davis* that § 924(c)(3)(B) was constitutional, this Court stated that it "would be effectively stepping outside our role as judges and writing new law rather than applying the one Congress adopted." *Id*. at 2324. In interpreting § 924(c)(3)(B), this Court noted that it had "already read the nearly identical language of 18 USC § 16(b)" in favor of the defendant's position, and "importantly, the Court did so without so much as mentioning the practical and constitutional concerns" and "[i]nstead, the Court got there based entirely on the text." *Id*. at 2327-8. Ultimately, the majority in *Davis* struck down the residual clause of § 924(c)(3)(B), despite any "bad social policy consequences", and that some offenses "may now be punished somewhat less severely", because "the consequences cannot change our understanding of the law." *Id.* at 2335.

Davis demonstrates that a similar two-step analysis applies to resolve this issue of interpreting § 802(57)(A) of the First Step Act. First, a court must look to this Court's previous interpretations of similarly worded statutes. That step exposes that "[r]ight out of the gate, the government faces a challenge" because this Court has "already read the nearly identical language" in favor of Mr. Corona Verduzco's interpretation of the First Step Act in *Barber v. Thomas*, 560 U.S. 474, 483 (2010).

Davis, 139 S.Ct. at 2328. And the second step of *Davis* is to confirm this Court's prior statutory interpretation of the language was accurate and complete, and is consistent with the specific language employed in § 802(57)(A) of the First Step Act. *Davis*, and other recent decisions of this Court, demonstrate why the petition for certiorari should be granted.

II. The Eighth Circuit's decision is wrong.

In interpreting 21 U.S.C. § 802(57)(A) of the First Step Act, the Eighth Circuit: 1) disregarded the text; 2) heavily relied on extratextual sources of authority, and 3) ignored this Court's prior interpretation of similar statutory language in *Barber v. Thomas*, 560 U.S. 474, 483 (2010). Not surprisingly then, based on this analysis, it reached the wrong result.

In its statutory interpretation, the Court of Appeals focused on the phrase "term of imprisonment" from §802(57)(A) and concluded that "the offender served a term of imprisonment of more than 12 months" "refers to the sentence imposed, not the time served." Slip op., pg. 6. But the panel opinion's interpretation of the statutory language ignored that Congress used the word "served", and that the term "served" must be given meaning. It is a cardinal principle of statutory interpretation that courts "must give effect, if possible, to every clause and word of a statute." *Loughrin v. United States*, 573 U.S. 351, 358 (2014).

The Eighth Circuit also ignored this Court's contrary interpretation of the phrase "term of imprisonment" in *Barber v. Thomas*, 560 U.S. 474, 483 (2010). *Barber* highlights why the petition for certiorari should be granted.

A. The Eighth Circuit ignored the holding of *Barber*, and instead relied on unhelpful dicta.

In *Barber*, this Court determined how the Bureau of Prisons should calculate good time credit for prisoners, pursuant 18 U.S.C. § 3624(b)(1). 560 U.S. at 483. The *Barber* Court concluded that the phrase "term of imprisonment" can mean "the sentence that the judge imposes" or "the time that the prisoner actually serves," depending on the context. Slip op, pg. 6, quoting *Barber*, 560 U.S. at 484. The Eighth Circuit noted that in *Barber*, this Court concluded the phrase "term of imprisonment" "'*almost* certainly' refers to the sentence imposed, not the time actually served (otherwise prisoners sentenced to a year and a day would become ineligible for credit as soon as they earned it)." Slip op, pg. 6, quoting *Barber*, 560 U.S. at 483 (emphasis added). But the Eighth Circuit failed to acknowledge how this Court resolved the statutory interpretation issue, which is important because this Court has "already read the nearly identical language" in favor of Mr. Corona Verduzco's interpretation of the First Step Act. *See Davis*, 139 S.Ct. at 2328.

Specifically, the *Barber* Court held that "the phrase 'term of imprisonment' at issue refers to prison time actually served, rather than the sentence imposed by the judge." *Barber*, 560 U.S. at 484-5. In reaching that conclusion in *Barber*, this Court rejected the prisoners' contrary interpretation that BOP was improperly crediting prisoners' sentences, because the relevant metric "requires a straightforward calculation based upon length of the term of imprisonment that the sentencing judge imposes, not the length of time that the prisoner actually serves." *Id*. at 479. "We are unable . . . to reconcile petitioners' approach with the *statute*."

Id. (emphasis added).

The Eighth Circuit relied on *Barber* to reach a different interpretation of the phrase "term of imprisonment" in the First Step Act, but then failed to acknowledge that its analysis is contrary to the holding of *Barber*. The Court of Appeals instead relies on *Barber*'s dicta, that the "term of imprisonment . . . *almost* certainly refers to the sentence imposed." Slip op, pg. 6, quoting *Barber*, 560 U.S. at 483 (emphasis added), But because *Barber* rejected the interpretation relied on by the Eighth Circuit, this analysis is "purest of dicta", because it "form[ed] no part of [*Barber*'s] holding." *United States v. Santos*, 553 U.S. 507, 523 (2008).

B. The Eighth Circuit also disregarded the plain text of the statute, in favor of improper extratextual considerations.

The plain language of the First Step Act also supports the conclusion that the term of imprisonment refers to the time that the prisoner actually serves, not the sentence imposed. Again, the First Step Act requires for a "serious drug felony" that "the offender served a term of imprisonment of more than 12 months." 21 U.S.C. § 802(57)(A). The term "served", pursuant to its ordinary and common definition, means "to put in (a term of imprisonment)." https://www.merriam-webster.com/dictionary/serve.

Mr. Corona Verduzco's case illustrates why the Eighth Circuit's statutory interpretation is wrong. To reach its conclusion—that Mr. Corona-Verduzco was put in a term of imprisonment twice for the same 135 months' imprisonment sentence—requires a strained interpretation of that word so that he "served" 270 months. Such was not the case, because Mr. Corona-Verduzco was instead sentenced once to a

total term of 135 months on both counts.

The Eighth Circuit simply did not give meaning to the word "served", when interpreting § 802(57)(A) of the First Step Act. "This Court presumes that a legislature says what it means and means what it says in a statute." *Dodd v. United States*, 545 U.S. 353, 353 (2005). Had Congress wanted the First Step Act to consider time "imposed", as opposed to "served", it would have used the word "imposed" in 21 U.S.C. § 802(57)(A). But this is not the language of the First Step Act.

Because the text of § 802(57)(A) is unambiguous, this Court's statutory interpretation should end here. "When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit." *Bostock*, 140 S. Ct. at 1737. That interpretation mandates the conclusion that Mr. Corona-Verduzco only has one "serious drug felony" because he was only imprisoned once to "a 'total' term of 135 months" on the two counts. *See United States v. Corona-Moret*, 256 Fed.Appx. 873, 873 (8th Cir. 2007). Thus, the Eighth Circuit erred in concluding that the district court's error in failing to conduct a hearing pursuant to 21 U.S.C. § 851 was harmless, because Mr. Corona-Verduzco's 25 year mandatory minimum sentence was improperly calculated.

C. Other cannons of statutory interpretation favor petitioner's interpretation of the First Step Act.

The Eighth Circuit relied heavily on improper extratextual considerations when interpreting § 802(57)(A) of the First Step Act. To begin with, the Eighth

Circuit relied on its own case law that interpreted the now repealed term "felony drug conviction", to interpret the novel language of the First Step Act, "serious drug felony." Specifically, the court held that "separate offense in separate cases are two prior convictions under §841(b)(1)(A)", when interpreting the term "felony drug conviction." Slip op., pg. 7, citing *United States v. Gray*, 152 F.3d 816, 821-22 (8th Cir. 1998). In fact, the Eighth Circuit relied heavily on its own prior case law that interpreted the now repealed term "felony drug conviction" based on the logic that while the First Step Act "reduced mandatory minimums, it did not amend the structure and procedure for the § 841(b)(1)(A) enhancements or the general purpose of the statute . . . to target recidivism." Slip op., pg. 7.

The Eighth Circuit's analysis is wrong, because what the court needed to interpret was the First Step Act, and the purpose of that act of Congress is unambiguous. The First Step Act did what it said it would, "Reduce and Restrict Enhanced Sentencing For Prior Drug Felonies." *See* The First Step Act of 2018, Pub. L. No. 115-391, S.756 (2018), title of Sec. 401. The Eighth Circuit is also mistaken that the First Step Act only "reduced mandatory minimums" Slip op., pg. 7, because it also restricted and limited the number of mandatory minimum sentences that could be imposed, requiring a higher hurdle for past convictions prior to them being used by prosecutors to enhance a sentence under 21 U.S.C. § 841. Critically, the First Step Act amended the now repealed term "felony drug conviction", which was blind to whether the defendant served any term of imprisonment after the conviction. *See United States v. Davis*, 417 F.3d 909, 912–13 (8th Cir. 2005)

(defendant's Missouri drug conviction constituted a "felony drug conviction", and was properly used to enhance the defendant's sentence under 21 U.S.C. § 841(b), even though he received probation); *see also United States v. Slicer*, 361 F.3d 1085, 1086 (8th Cir. 2004) (same).

But this is not the case anymore after the First Step Act. If a defendant is sentenced to probation, it is unambiguous that while that conviction was a "felony drug conviction", it is *not* a "serious drug felony." To read the statute otherwise, is to read out of the statute the phrase "the offender served a term of imprisonment of more than 12 months" in § 802(57)(A).

"When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect." *Intel Corp. Inv. Policy Comm. v. Sulyma*, 140 S. Ct. 768, 779 (2020). Here, while the First Step Act materially amended how courts may enhance sentences based on § 841(b)(1)(A), the Eighth Circuit gave no meaning to the amendment. Because the First Step Act was passed in 2018, the Eighth Circuit's holdings prior to the First Step Act's passage could not have possibly interpreted the statutory language defining a "serious drug felony." The Eighth Circuit erred in concluding to the contrary.

The meaning of the First Step Act can also be discerned by looking to other provisions of the First Step Act. To give just one example, the First Step Act also significantly amended how defendants must be sentenced for gun-related crimes under 18 U.S.C. § 924(c), repealing harsh mandatory "stacking" sentences. Prior to the First Step Act, a criminal defendant "convicted of two § 924(c) violations in a

single prosecution faced a 25-year minimum for the second violation." *Davis*, 139 S. Ct. at 2324, fn 1, citing *Deal v. United States*, 508 U.S. 129, 132 (1993). But the First Step Act amended the law, so that only a second §924(c) violation committed after a prior § 924(c) conviction has become final "will trigger the 25-year minimum." *Id.*

Finally, to interpret the words of Congress, the Eighth Circuit relies on a word not in § 802(57)(A), "concurrent", and how Eighth Circuit case law has previously held that "concurrent sentences are separate and distinct sentences." Slip op., pg. 6. This is an extratextual consideration that should be disregarded in the statutory analysis, because Congress used the phrase "the offender served a term of imprisonment of more than 12 months" in § 802(57)(A), and "the phrase 'term of imprisonment' at issue refers to prison time actually served rather than the sentence imposed by the judge." *Barber*, 560 U.S. at 484-5. Although Mr. Corona-Verduzco was sentenced to two 135 month sentences to run concurrently, that is irrelevant to interpreting the plain language of § 802(57)(A).

Regardless, the notion that Mr. Corona-Verduzco served two distinct sentences of time simultaneously is at best a construct, divorced from the plain meaning of the words used in § 802(57)(A). The Eighth Circuit's reliance on the term "concurrent" does not acknowledge that there is a significant different between "concurrent" and "consecutive" sentences. *See Dean v. United States*, 137 S. Ct. 1170, 1174 (2017) (noting that "separate firearm offense" under 18 U.S.C. § 924(c) "must be in addition to and consecutive to the sentence for the underlying predicate

offense.).

The Eighth Circuit treats "concurrent" and "consecutive" sentences identically under § 802(57)(A), but only those serving "consecutive" sentences "actually serve" two distinct sentences. *Barber*, 560 U.S. at 484-5. Again, had Mr. Corona-Verduzco served two distinct 135 month sentences consecutively, he would have had to serve a 135 months' imprisonment sentence, and then start all over and serve yet another 135 month's imprisonment sentence (for a total of 270 months' imprisonment). In that example, Mr. Corona-Verduzco would have "actually served" two sentences with "a term of imprisonment of more than 12 months." § 802(57)(A). But he did not, and therefore does not have two "serious drug felony" convictions.

Nowhere is it more striking that the Eighth Circuit's statutory interpretation is wrong than its failure to give meaning to the term "served." A hypothetical, other than serving prison sentences, further explains why. Often soldiers refer to having "served" a tour of duty. *See McCarty v. McCarty*, 453 U.S. 210, 216 (1981) (discussing how appellant commenced active duty in the Army, and then was assigned to "successive tours of duty)" When soldiers serve two tours of duty, under the plain, ordinary language, the reader understands those two tours of duty did not occur simultaneously. Similarly, when one stays focused on interpreting the phrase — "the offender served a term of imprisonment of more than 12 months" — it is unambiguous that Mr. Corona-Verduzco (and other similarly situated defendants) do not have two convictions for "serious drug offenses" where only one period of time is "actually served" in prison.

D. The rule of lenity inures to petitioner's benefit.

To the extent that this Court discerns any ambiguity in the text of §802(57)(A), that ambiguity must be resolved in favor of criminal defendants, whose mandatory minimum sentences are being significantly increased. The rule of lenity ensures that "legislatures and not courts . . . define criminal activity." *United States v. Bass*, 4040 U.S. 336, 348 (1971). It also safeguards due process by ensuring that laws provide "fair warning" as applied, *McBoyle v. United States*, 283 U.S. 25, 27 (1931), and "embodies" a civilized society's "instinctive distaste[] against men languishing in prison unless the lawmaker has clearly said they should." *Bass,* 404 U.S. at 348 (quoting Henry J. Friendly, Mr. Justice Frankfurter and the Reading of Statutes, in Benchmarks 196, 209 (1967)).

In its opinion, the Eighth Circuit acknowledged that the phrase "term of imprisonment" in §802(57)(A) had two plausible readings. *See* Slip op., pg. 6 (concluding it can mean "'the sentence that the judge imposes', or 'the time that the prisoner actually serves.'"). It further acknowledged that §802(57)(A), when applied to a "concurrent" sentence, also had two potential meanings. Slip op, pg. 6 (multiple terms of imprisonment run "concurrently", or alternatively for a "single, aggregate term of imprisonment").

While the Eighth Circuit concluded that the rule of lenity does not apply "[o]n the facts here", Slip op, pg. 8, this was not a factual issue it was interpreting in §802(57)(A). Rather, it was a legal issue — one that the Eighth Circuit acknowledged had ambiguity. Based on this ambiguity, the Eighth Circuit should

have applied the rule of lenity to rule in favor of petitioner.

III. The question presented is exceptionally important, and this case presents an ideal vehicle for resolving it.

The question presented is exceptionally important, because unless this Court intervenes petitioner (and other similarly situated defendants) will continue to be incarcerated based on enhanced, mandatory minimum sentences, contrary to the clear intent of Congress after the First Step Act. This is precisely this Court's role, to intervene to prevent an unnecessary deprivation of liberty, especially when it involves the interpretation of an act of Congress. *See Davis,* 139 S.Ct. at 2332; *Dimaya*, 138 S.Ct. at 1209; *Johnson*, 135 S.Ct. at 2555; *see also Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1902 (2018) (concluding that the risk of unnecessary deprivation of liberty particularly undermines the fairness, integrity, or public reputation of judicial proceedings in the context of a plain Guidelines error because Guidelines miscalculations ultimately result from judicial error, as the district court is charged in the first instance with ensuring the Guidelines range it considers is correct).

Petitioner's proper mandatory minimum sentence was 15 years—not 25 years as calculated by the district court because he does not have two "serious drug felony" convictions, as defined by Congress in the First Step Act. This issue impacts numerous individuals, because enhanced sentences under 21 U.S.C. § 841

are commonplace, with hundreds of individuals having their statutory minimum sentence enhanced every year.[2]

This is precisely why Congress acted in passing the First Step Act — to ensure that sentencing enhancements are applied in a more equitable fashion to decrease America's prison population. *See generally*, The First Step Act of 2018: An Overview, Congressional Research Service (March 4, 2019), at https://fas.org/sgp/crs/misc/R45558.pdf. But the First Step Act cannot operate as intended by Congress, if this Court fails to ensure that the plain language is given meaning.[3]

The question presented is exceptionally important because it will also shed further light on issues of statutory interpretation where a legislature amends just one part of a larger criminal code. Grating certiorari will also ensure that lower courts will not improperly use extratextual considerations, when the plain language of the statute is unambiguous.

Finally, this case is an excellent vehicle to resolve this issue, because the statutory interpretation issue was squarely raised and resolved below. Thus,

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[2] https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180712_851-Report-Figures.pdf

[3] This Court has granted other petitions of certiorari, which raised issues of statutory interpretation under the First Step Act. *See, for example, Jefferson v. United States*, 140 S.Ct. 861 (2020) (granting petition for certiorari, and remanding for further consideration based on the First Step Act); *see also Richardson v. United States,* 139 S.Ct. 2713 (2019) (same). To the extent that this Court believes that the Eighth Circuit should instead reconsider this issue based on a similar GVR disposition, Mr. Corona-Verduzco expressly requests that relief.

nothing would prevent this Court from reaching the merits of the important question presented in this petition for certiorari.

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It is sometimes important not to lose the forest for the trees. Congress significantly amended recidivism based enhanced sentences under 21 U.S.C. § 841 in the First Step Act, but you would not know it from the Eighth Circuit's opinion in this case. The First Step Act was passed by Congress to ensure that sentences were not enhanced in the same old way, which is unambiguous from the statutory text. Because Mr. Corona-Verduzco's mandatory minimum sentence was improperly calculated, this Court should ensure that justice is done — and that the law is set straight for all of the others in Mr. Corona-Verduzco's position — now and in the future.

CONCLUSION AND PRAYER FOR RELIEF

The petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

Appendix A – Judgement and Opinion of the Eighth Circuit Court of Appeals