No. ____

IN THE
SUPREME COURT OF THE UNITED STATES

SHANE FAITHFUL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a physician who prescribes a controlled substance to a patient for reasons other than medical care has unlawfully "dispensed" the substance, unlawfully "distributed" the substance, or both, for purposes of 21 U.S.C. § 841(a)(1).

2. Whether the Sixth Amendment permits judges to find the facts necessary to support an otherwise unreasonable federal sentence.

RELATED PROCEEDINGS

The following proceedings are directly related to this case:

- *United States v. Faithful*, No. 4:17-cr-419-2, United States District Court for the Southern District of Texas. Judgment entered October 12, 2018.

- *United States v. Gazelle Craig, D.O.; Shane Faithful*, No. 18-20671, United States Court of Appeals for the Fifth Circuit. Judgment entered August 4, 2020; rehearing denied September 22, 2020.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Shane Faithful respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a) is available at 823 F. App'x 231 (5th Cir. 2020).

JURISDICTION

The court of appeals entered judgment on August 4, 2020, Pet. App. 1a, and denied a timely petition for rehearing on September 22, 2020. Pet. App. 36a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

1. Section 841 of Title 21, United States Code, provides in relevant part:

> **(a) Unlawful acts**
>
> Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally–
>
> > (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
> >
> > (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

2. Section 802 of Title 21, United States Code, provides in relevant part:

> As used in this subchapter:
>
> * * *

> (10) The term "dispense" means to deliver a controlled substance to an ultimate user or research subject by, or pursuant to the lawful order of, a practitioner, including the prescribing and administering of a controlled substance and the packaging, labeling or compounding necessary to prepare the substance for such delivery. The term "dispenser" means a practitioner who so delivers a controlled substance to an ultimate user or research subject.
>
> (11) The term "distribute" means to deliver (other than by administering or dispensing) a controlled substance or a listed chemical. The term "distributor" means a person who so delivers a controlled substance or a listed chemical.

3. The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury[.]

4. Additional provisions of the U.S. Code are reproduced in appendix C.

STATEMENT OF THE CASE

I. Background

The Controlled Substances Act, *see* 21 U.S.C. § 801, *et seq.*, makes it unlawful, "[e]xcept as authorized," for "any person" to knowingly "distribute," "dispense," or "possess with intent to" distribute or dispense, a controlled substance. 21 U.S.C. § 841(a)(1). Elsewhere, the CSA authorizes physicians and other registered "practitioners" to engage in each of these behaviors, subject to certain conditions and regulations. *See, e.g.*, *id.* §§ 821, 822(b), 823(b) & (f)-(g). In *United States v. Moore*, 423 U.S. 122 (1975), this Court held that the authority granted in these provisions does not shield registrants from liability under Section 841(a)(1). That is, when doctors and other licensed practitioners possess, distribute, or dispense drugs in ways that "exceed the bounds" of authorized professional practice,

they may be prosecuted like anybody else. *Id.* at 142. The accepted rule is, therefore, that to convict a physician for conduct the CSA otherwise authorizes, the government must prove that the physician's actions either "lack[ed] a legitimate medical purpose" or occurred "outside the usual course of professional practice." *United States v. Armstrong*, 550 F.3d 382, 397 (5th Cir. 2008); *see id.* at 399-400 (collecting circuit decisions so holding).

Pertinent here, the CSA specifically defines both methods of controlled-substance delivery referenced in Section 841(a)(1). The term "dispense" means to "deliver" a controlled substance "by, or pursuant to the lawful order of, a practitioner, including the prescribing and administering" of that substance, and the "packaging, labeling or compounding necessary to prepare the substance for such delivery." 21 U.S.C. § 802(10). The term "distribute," in contrast, "means to deliver (*other than* by administering or *dispensing*) a controlled substance or a listed chemical." *Id.* § 802(11) (emphasis added).

II. Facts and procedural history

In July of 2017, petitioner Shane Faithful and Dr. Gazelle Craig were charged with four CSA violations based on their alleged participation in a scheme to profit by prescribing pain medications, without regard for the drugs' medical necessity, to the patients of their Houston-area pain-management clinic. Pet. App. 2a-5a. The first count covered the two-year span of the clinic's operations, alleging that petitioner, the clinic's administrator, conspired with Dr. Craig, the clinic's sole physician, to "distribute and dispense" hydrocodone (Norco) and carisoprodol (Soma), "not with a legitimate medical purpose and outside the scope of professional practice." Pet. App. 4a-5a. The remaining counts alleged that on three

discrete occasions Dr. Craig, aided and abetted by petitioner, "distributed and dispensed" the same two drugs, again for nonmedical purposes, when she issued prescriptions to a confidential informant (counts 2 and 3) and an undercover agent (count 4) posing as clinic patients. Pet. App. 5a.

Later, at trial, the government chose to narrow the charged *actus reus* for each count to distribution alone, submitting instructions and special verdict forms limiting the jury's consideration to that alternative. Pet. App. 12a. So charged, a first jury was unable to agree on any count, leading to a mistrial. After the ensuing retrial, a second jury convicted petitioner and Dr. Craig on all four counts, finding them guilty of "conspiracy to unlawfully distribute," and "unlawful distribution of," both substances. Pet. App. 5a.

At both trials, the government presented its case on the theory that Dr. Craig, with petitioner's help, violated the CSA upon issuing prescriptions to clinic patients because profit, not medical treatment, motivated her diagnosis. In the trial prosecutor's words, "Dr. Craig distributed controlled substances by writing prescriptions for Norco and Soma without a legitimate medical purpose and outside the scope of professional practice," and "[a]s a co-conspirator and somebody who assisted her in the operation, Shane Faithful is as guilty as if he was the one holding the pen." C.A.5 Record on Appeal at 4321; *see also* Pet. App. 25a. The evidence offered in support of this theory, described in the most verdict-favorable light, fell into two general categories.

The first category focused on suspicious practices at the clinic. *See* Pet. App. 3a-4a. For instance, the clinic required patients to pay in cash before each visit, forbade the use of

cell phones and other electronics, and employed armed security guards. A majority of the clinic's patients were also connected to so-called "facilitators": suspected drug dealers who regularly drove groups of patients to the clinic, provided cash for their visits, took them to the pharmacy to fill their prescriptions, and then traded food or alcohol for the actual medication. Petitioner and Dr. Craig were aware of the facilitators and set up various procedures to accommodate and take advantage of the recurring business they generated. A minority, but still significant percentage of clinic patients—including the informant and undercover agent at the heart of the substantive counts—were not connected to the facilitators. No evidence suggested that these non-facilitator patients ever diverted or intended to divert the medication Dr. Craig prescribed to them.

The second category concentrated on Dr. Craig's prescribing activity and interactions with clinic patients. A physician qualified as an expert in pain management audited 35 patient files, including those of the informant and undercover agent, and testified that, in his opinion: (1) every prescription issued to the 35 sample patients lacked medical justification, as Dr. Craig's treatment of each patient deviated from the applicable standard of care; and (2) the way the clinic operated reinforced this conclusion. Def. C.A.5 Br. 10-11. The informant and agent also testified about their individual appointments. Def. C.A.5 Br. 4-5. They recounted brief exams, without serious inquiry into their medical histories and generalized complaints, followed by the issuance of a prescription for each substance.

As noted, the jury at petitioner's second trial voted to convict on all counts. To reach those verdicts, the jury did not have to find beyond reasonable doubt that any particular

number or percentage of Dr. Craig's prescriptions, and thus the quantity of doses (pills) dispensed through them, issued for illegitimate reasons. *See* 21 U.S.C. § 841(b)(1)(C). Rather, to convict on the substantive counts, the jury had to find an improper motive behind only the six prescriptions issued to the informant and undercover agent. And the conspiracy count only required that the jury find an agreement to issue at least one improperly-motivated prescription per substance.

Under the applicable statute, those findings triggered a range of zero to 20 years' imprisonment on each count. Looking only to the quantity of medication encompassed within the jury's verdicts—even assuming that quantity included each prescription issued to the 35 patients whose files were scrutinized at trial—petitioner's offense conduct and complete lack of criminal history would have produced a total advisory Sentencing Guidelines range of 27 to 33 months (the intersection of a total offense level of 18 and criminal history category of I). Def. C.A.5 Br. 38-39. The Guidelines Manual would have accordingly guided the district court's discretion toward ordering whatever sentences it imposed on the four counts to run concurrently. *See* USSG § 5G1.2(c).

But the probation officer's presentence report did not confine petitioner's Guidelines calculations to the facts established beyond reasonable doubt at trial. As with all drug cases, the report's offense-level calculation was driven by the quantity of controlled substances involved in the offense, *see DePierre v. United States*, 564 U.S. 70, 76 (2011); USSG § 2D1.1(c), with the offense defined to include any "relevant conduct" found by the sentencing judge by a preponderance of evidence. *See* USSG §§ 1B1.3 & 6A1.3, comment.

Under that framework, petitioner was held accountable for *every* prescription that Dr. Craig issued during the clinic's two years and four months of operations. This meant that, instead of the approximately 210 prescriptions connected to patients discussed at trial, petitioner's drug-quantity calculation covered more than 33,000 prescriptions. *See* Def. C.A.5 Br. 11, 16; Pet. App. 4a. Petitioner's final offense level consequently ballooned to 43, with a resulting Guidelines range of *life*, without parole. Because that range far exceeded the governing statute's ceiling, the Guidelines required its adjustment to a flat 960 months (80 years)—that is, the equivalent of consecutive statutory-maximum terms of 240 months (20 years) on each count. Def. C.A.5 Br. 16; *see* USSG § 5G1.2(d).

Over petitioner's objection, the district court adopted the elevated quantity assessment as supported by a preponderance of the evidence. Anchoring its discretion to the elevated 960-month benchmark, the court sentenced petitioner to 420 months, or 35 years (240 months for the conspiracy, consecutive to concurrent 180-month terms for each substantive offense). Pet. App. 5a. Dr. Craig received the same sentence, anchored to the same range. Those 35-year sentences are the highest ever imposed in the federal system for alleged bad-faith prescribing by a margin of 12 years. *See* Adam M. Gershowitz, *Punishing Pill Mill Doctors: Sentencing Disparities in the Opioid Epidemic*, at 29-30, 35-36 (Table 1) (Dec. 13, 2019), available at https://ssrn.com/abstract=3503662.

Petitioner appealed. Pertinent here, he challenged the sufficiency of the evidence and the district court's use of facts the jury was not required to find to materially increase his sentence.

The sufficiency claim centered on the textual distinction between the terms "dispense" and "distribute." Petitioner contended that, under a straightforward reading of the CSA's definitions of those terms, a physician's act of prescribing a controlled substance for nonmedical reasons is an unlawful dispensation, which, in turn, means that the same conduct is not an unlawful distribution. Petitioner accordingly argued that the evidence was insufficient to support the jury's verdicts on the only theory submitted to them, unlawful distribution, because that evidence at most established illegitimate prescribing. At a minimum, he argued, the evidence could not sustain distribution verdicts on the substantive counts, as those counts rested on single-prescription transactions with patients unconnected to the so-called facilitators.

On the sentencing point, petitioner stressed that the substantive reasonableness of his 420-month sentence—more than 30 years above the high end of the Guidelines range that otherwise would have applied—hinged on the district court's drug-quantity finding. He therefore preserved for further review the claim, foreclosed in the Fifth Circuit, that judicial factfinding violates the Sixth Amendment right to trial by jury where, as here, the resulting sentence would otherwise be substantively unreasonable.

The Fifth Circuit affirmed. Pet. App. 35a. As an initial matter, the court of appeals concluded that petitioner failed to preserve plenary review, because he had asserted a general challenge to the sufficiency of the evidence in a post-verdict motion styled as one for "new trial" as opposed to "judgment of acquittal." Pet. App. 7a-11a; *see* Fed. R. Crim. P.

29(c).[*] The court of appeals nevertheless reached the merits of petitioner's interpretive argument, noting that the standard of review did not impact its disposition of that issue. Pet. App. 11a-12a.

On the merits, the court of appeals rejected petitioner's interpretation as inconsistent with *United States v. Harrison*, 651 F.2d 353 (5th Cir. 1981), the precedent it deemed controlling. Pet. App. 12a-16a. Under *Harrison*, the court reasoned, the convictions could be upheld on the theory that petitioner helped Dr. Craig unlawfully "distribute" hydrocodone and carisoprodol by prescribing those drugs for profit instead of medical care. Pet. App. 16a. In noting petitioner's preservation of the foreclosed sentencing claim, Pet. App. 30a-31a, the court did not question petitioner's contention that his 420-month sentence would be substantively unreasonable but for the district court's drug-quantity finding.

Judge Haynes concurred "in the judgment only." Pet. App. 35a.

The court of appeals subsequently denied a timely petition for rehearing en banc. Pet. App. 36a-37a.

[*] In the Fifth Circuit, a "general challenge to the sufficiency of the evidence preserves de novo review as to all potential sufficiency issues." *United States v. Brown*, 727 F.3d 329, 335 (5th Cir. 2013).

REASONS FOR GRANTING THE PETITION

I. The Court should grant the petition to resolve a split in the circuits over whether the Controlled Substances Act classifies a physician's prescribing of controlled substances for nonmedical reasons as unlawful "dispensation" or unlawful "distribution" for purposes of 21 U.S.C. § 841(a)(1).

The question of statutory interpretation presented here concerns the scope of a widely used federal drug statute, 21 U.S.C. § 841(a)(1), in a frequently recurring context: prosecutions targeting doctors and other medical practitioners for allegedly improper prescribing practices. *See Gershowitz*, *supra*, at 2-4, 5 n.13. The circuits openly and intractably disagree as to how to classify that conduct under the Controlled Substances Act's statutory definitions of "dispense" and "distribute," resulting in the same language having three separate meanings across the country. Only this Court can resolve that confusion. Because petitioner's case squarely presents an important question of statutory interpretation that has divided the courts of appeals, the petition for writ of certiorari should be granted.

A. The circuits are deeply divided over the question presented.

The courts of appeals are split in three ways on the question whether a physician has "dispensed" or "distributed" a controlled substance, for purposes of Section 841(a)(1), when he or she prescribes that substance for reasons other than medical care.

At least three circuits, the Third, the Seventh, and the Eleventh, interpret the CSA to classify the unauthorized prescribing of a controlled substance by a physician as unlawful dispensation, not unlawful distribution. *See United States v. Azmat*, 805 F.3d 1018, 1032-34 (11th Cir. 2015); *United States v. Roya*, 574 F.2d 386, 393 (7th Cir. 1978); *United*

States v. Tighe, 551 F.2d 18, 19 (3d Cir. 1977). The Eleventh Circuit's decision in *Azmat* is representative. In that case, a physician claimed that his Section 841(a)(1) convictions for unlawful dispensing should be reversed because his conduct—prescribing pain medication for nontherapeutic reasons—constitutes only unlawful distribution. *See Azmat*, 805 F.3d at 1032-33. The court held the opposite, reaffirming that under its precedent "'prescribing' constitutes 'dispensing,'" not, as the physician claimed, distributing, and that "issuing written prescriptions to patients that enable them to obtain controlled substances constitutes 'dispensing' under [Section] 841(a)(1)." *Id.* at 1033.

Notably, the Eleventh Circuit relied on *United States v. Leigh*, 487 F.2d 206 (5th Cir. 1973), a Fifth Circuit case decided when the two circuits remained one, as controlling on the interpretive point. *See Azmat*, 805 F.3d at 1033 & n.3. The first decision to squarely address the question presented, *Leigh* held that physicians accused of prescribing in a manner not authorized by the CSA have unlawfully dispensed, and accordingly upheld the dismissal of an unlawful-distribution charge based on an allegation of illegitimate prescribing. *See Leigh*, 487 F.2d at 207-08. Relying on a straightforward reading of the definitions of "dispense" and "distribute," the court reasoned that the textual distinction drawn between the two types of delivery "clearly means that a doctor who administers or prescribes a controlled substance is, for purposes of the statute, dispensing it" rather than distributing it. *Id.* at 208. "Obviously," the court noted, "the specific language 'other than by administering or dispensing' is not to be ignored." *Id.* (quoting 21 U.S.C. § 802(11)).

In an analogous context, the Second Circuit has similarly interpreted the distinction between these terms to be a meaningful one. *See United States v. Ekinci*, 101 F.3d 838, 840-43 (2d Cir. 1996). *Ekinci* involved 21 U.S.C. § 860(a), a provision that doubles the maximum penalty for those who violate Section 841(a)(1) "by distributing, possessing with intent to distribute, or manufacturing" drugs within 1,000 feet of schools and other places frequented by minors. As an interpretive matter, the Second Circuit held that Congress's omission of dispensing from the list of predicate offenses was deliberate, and accordingly placed unlawful dispensers beyond Section 860(a)'s reach. *See Ekinci*, 101 F.3d at 840-42. Finding the text dispositive, the court emphasized that the "statutory definitions clearly indicate that 'distribute' and 'dispense' have different meanings because 'distribute' is defined as a delivery other than by dispensing or administering." *Id.* at 842.

To be sure, *Ekinci* did not confront, and thus the Second Circuit has not squarely addressed, the precise question presented here. But the Second Circuit's interpretation of "the difference between 'distribute' and 'dispense' [as] more than a mere technicality or play on words" for purposes of Section 860, *id.* at 843, logically extends to the use of those terms in Section 841(a)(1). After all, "[s]tatutory definitions control the meaning of statutory words . . . in the usual case," *Burgess v. United States*, 553 U.S. 124, 129-30 (2008) (original ellipsis; citation omitted), and courts "normally presume that the same language in related statutes carries a consistent meaning." *United States v. Davis*, 139 S. Ct. 2319, 2329 (2019).

Whereas the first group of circuits read the CSA to classify prescribing as dispensing, not distributing, at least two other circuits, the First and the Ninth Circuits, interpret the Act to require the opposite result. *See United States v. Black*, 512 F.2d 864, 866 (9th Cir. 1975); *United States v. Badia*, 490 F.2d 296, 298 (1st Cir. 1973). In line with the circuits described above, the First and the Ninth Circuits agree that the definition of "dispense" covers prescribing and that what is dispensing may never be distributing. They diverge however, over the scope of the meaning of "dispense" insofar as it requires the delivery to occur "by, or pursuant to the lawful order of, a practitioner[.]" 21 U.S.C. § 802(10).

Focusing on the bracketed phase, "or pursuant to the lawful order of," these courts interpret the CSA to "limit the meaning of 'dispense' to delivery of controlled substances by a physician who is acting in the course of professional practice or research"—that is, lawfully. *Badia*, 490 F.2d at 298; *see Black*, 512 F.2d at 866 ("By definition 'dispense' expressly contemplates a 'lawful order[.]'"). Moving from that premise, these courts reason that drugs prescribed for improper reasons have not been delivered "pursuant to [a] lawful order," and thus, have been distributed, not dispensed, within the meaning of the CSA. *See Black*, 512 F.2d at 866 (reasoning that, "[i]f [a] prescription is not lawful, the 'practitioner' does not dispense; rather, under § 802(11), he 'distributes'—that is, he effects delivery 'other than by dispensing'"); *see also Badia*, 490 F.2d at 298 & n.4. As the First Circuit has acknowledged, "this interpretation of the statutory scheme conflicts with" the interpretation first adopted in *Leigh* and later embraced by the Third, Seventh, and Eleventh Circuit decisions discussed above. *Badia*, 490 F.2d at 298 n.4 (citing *Leigh*, 487 F.2d at 206).

The third cluster of circuits, comprised of at least of the Fifth, Sixth, and Tenth Circuits, interprets the terms "dispense" and "distribute" to each encompass deliveries accomplished via prescription. In other words, these circuits view the textual distinction between those terms as having no substantive effect for purposes of Section 841(a)(1).

Despite initially reading the CSA to locate unauthorized prescribing solely under the umbrella of unlawful dispensing, *see Leigh*, 487 F.2d at 207-08, the Fifth Circuit later reversed course, holding that conduct may form the basis of a conviction for unlawful distributing *as well as* for unlawful dispensing. *See United States v. Harrison*, 651 F.2d 353, 354 & n.1 (5th Cir. 1981); Pet. App. 12a-15a (explaining that *Harrison*'s interpretation displaced *Leigh*). And, under that interpretation, proof that a physician prescribed a controlled substance for nonmedical reasons is sufficient to sustain a conviction for *either* distribution, as in petitioner's case, Pet. App. 16a, *or* dispensation, as in other cases. *E.g.*, *Armstrong*, 550 F.3d at 387-95 (upholding physician's convictions for dispensing and conspiring to dispense via prescription, as well as a nurse's convictions for aiding and abetting that conduct). At least two other circuits, the Sixth and the Tenth Circuits, share this interpretation. *See United States v. Ellzey*, 527 F.2d 1306, 1308 (6th Cir. 1976); *United States v. Fellman*, 549 F.2d 181, 182 (10th Cir. 1977).

These circuits accept that the definition of "dispense," as incorporated into Section 841(a)(1), covers a doctor's prescribing for illegitimate reasons. They disagree, however, that Congress's decision to limit the term "distribute" to drug deliveries made "other than" by dispensing produces a meaningful distinction in that context. According to these courts,

the contrary interpretation first adopted in *Leigh*, and later by the Third, Seventh, and Eleventh Circuits, "create[s] a hyper-technical distinction" in terms that "have no functional difference," *Fellman*, 549 F.2d at 182, and amounts to a mere "play on words." *Ellzey*, 527 F.2d at 1308.

This circuit conflict is ripe for the Court's resolution. First, the conflict is deep: the courts of appeals are split three ways; and each respective interpretation is irreconcilable with the other two. So profound is the confusion that it has led to a situation in which *Leigh*, a prior published Fifth Circuit decision, is viewed as binding precedent in the *Eleventh* Circuit but not in the *Fifth* on the interpretive point. *Compare Azmat*, 805 F.3d at 1033 & n.3 (deeming *Leigh* controlling on the question presented), *with* Pet. App. 12a-15a (finding the opposite). The conflict is also widely acknowledged. Nearly every circuit that has taken a position has expressly highlighted the disagreement. *See Azmat*, 805 F.3d at 1033-34 & n.4 (11th Cir.); *United States v. Genser*, 710 F.2d 1426, 1430-31 (10th Cir. 1983); *United States v. Rosenberg*, 515 F.2d 190, 200 (9th Cir. 1975); *Ellzey*, 527 F.2d at 1308 (6th Cir.); *Badia*, 490 F.2d at 298 n.4 (1st Cir.).

And the conflict is entrenched. The Sixth Circuit previously "decline[d] to overrule the *Ellzey* case." *United States v. Millen*, 594 F.2d 1085, 1087 (6th Cir. 1979). The Fifth Circuit has already moved from one corner of the triangular split to another, *compare Leigh*, 487 F.2d at 207-08, *with Harrison*, 651 F.2d at 354 & n.1, and that court made clear in petitioner's case that it has no interest in reverting back. Indeed, the panel's unpublished opinion indicates that it views the interpretive question as settled, and the full court denied

petitioner's request to revisit that position en banc in light of the circuit split. *See* Pet. App. 36a-37a; Def. C.A.5 Pet. for Reh'g En Banc 8-11. The Eleventh Circuit, moreover, recently cemented its view that the contrary interpretation is correct, not only as a matter of precedent but also as a matter of first principles. *See Azmat*, 805 F.3d at 1033-34 & n.3.

In short, the courts of appeals have taken three flatly inconsistent positions on the question presented, and there is no realistic possibility that the conflict will resolve itself. For the law to become uniform on this point, the Court will have to intervene.

B. The acknowledged conflict over the meaning of this important federal statute warrants review in this case.

This Court has frequently granted certiorari to answer questions of statutory interpretation arising out of Section 841. *See McFadden v. United States*, 576 U.S. 186, 189 (2015); *Burrage v. United States*, 571 U.S. 204, 206 (2014); *DePierre*, 564 U.S. at 72; *Burgess*, 553 U.S. at 126; *Chapman v. United States*, 500 U.S. 453, 456 (1991). The depth of the circuits' confusion over the meaning and import of the definitions of "dispense" and "distribute" in the context of Section 841(a)(1) illustrates why resolving the interpretive conflict raised here is just as important.

Clarity on the question presented would benefit more than just the courts, however. Federal prosecutors vary significantly, both between and within circuits, in their approach to prosecuting physicians suspected of improper prescribing. *Compare, e.g.*, Pet. App. 14a (collecting Fifth Circuit cases submitted to the jury on distribution alone), *with United States v. Kohli*, 847 F.3d 483, 490 (7th Cir. 2017) (submitted on dispensation alone); *Azmat*,

805 F.3d at 1024-25 (same); *Armstong*, 550 F.3d at 386-87 (same); *United States v. Steele*, 147 F.3d 1316, 1317-18 (11th Cir. 1998) (en banc) (same). And this has led the government to advance contradictory positions in several courts of appeals. For instance, in *Azmat*, the government argued on appeal that the defendant-physician's prescribing of pain medication he knew his patients would divert qualified as dispensation, both under the Fifth Circuit's decision in *Leigh* and according to the plain language of the CSA. *See* Brief of Appellee-United States at 11-12, 39-43, *United States v. Azmat*, 805 F.3d 1018 (11th Cir. 2015) (No. 14-13703), 2015 WL 502672, at *11-*12, *39-*43. In petitioner's case, in contrast, the government urged the Fifth Circuit not to follow *Leigh* and to find that the same conduct constitutes distribution, but not dispensation, under the CSA's plain text. *See* Gov't C.A.5 Br. 28-29. It should go without saying that the meaning of statutory language should not shift 180 degrees simply because a trial prosecutor happened to prefer one alternative to the other in a particular case.

The answer to the question presented also has repercussions outside of Section 841(a)(1). The definitions of "dispense" and "distribute" apply across the CSA's entire federal regulatory scheme and are imbedded in numerous provisions with wide-ranging implications. *See, e.g.*, *Gonzales v. Oregon*, 546 U.S. 243, 250-51, 261-75 (2006) (reviewing Attorney General's interpretive rule purporting to prohibit physicians from dispensing controlled substances for assisted suicide); *Wedgewood Vill. Pharmacy v. D.E.A.*, 509 F.3d 541, 549-53 (D.C. Cir. 2007) (reviewing DEA determination that pharmacy was manufacturing and distributing, despite only being registered to dispense, based on its interpretation

of the CSA). Even limited to the criminal sphere, the circuits' three divergent interpretations allow for similarly situated individuals to be treated disparately in several additional contexts, including under provisions that provide enhanced penalties, *see* 21 U.S.C. §§ 859 & 860, or permit the denial of important benefits, *see id.* §§ 862(a) & 862A(a), for drug-related activity involving distribution, but not dispensation.

Take, for example, the enhancement provision applicable only to those who unlawfully "manufacture," "distribute," or "possess with intent to distribute" controlled substances in close proximity to schools and other sensitive areas. 21 U.S.C. § 860(a); *see Ekinci*, 101 F.3d at 840-43. Section 860(a)'s omission of unlawful "dispensers" indicates that Congress did not intend the elevated-penalty provision to cover physicians who prescribe controlled medications for improper reasons merely because they happen to office within 1,000 feet of any school, playground, college or university, or public housing facility. Yet, under two of the circuits' three prevailing interpretations, that conduct *is* subject to the Section 860 enhancement. Apart from invalidating the legislative choice to exempt unauthorized dispensers from the category of drug dealers who deserve aggravated punishment for targeting minors, that result exposes registered practitioners to significantly enhanced penalties for the same conduct based on the fortuity of geography alone.

This case also presents an excellent vehicle for resolving this circuit conflict. Petitioner squarely raised the question presented in the court of appeals. The interpretive issue was thoroughly briefed by both parties and aired at oral argument. And the court of appeals reached and decided that issue.

Moreover, the question presented is outcome determinative for petitioner. The court of appeals disposed of petitioner's sufficiency claim solely on the basis of its answer to the interpretive dispute. *See* Pet. App. 12a-16a. The government rightly did not contend below that the trial evidence was sufficient even under petitioner's preferred interpretation. And the court of appeals did not suggest, much less alternatively hold, that the standard of review would preclude relief under plain error's second, third, or fourth prongs even if petitioner's interpretation controlled. In short, the answer to the question presented represents the difference between conviction and acquittal on likely all four, but at least three, of the charged counts. At worst, a favorable result on this question alone would eliminate three of petitioner's convictions and lower his sentence by 15 years.

C. The decision below is incorrect.

The conflict over the question presented is ample reason for this Court to step in. Review is also warranted, however, because the Fifth Circuit's interpretation is wrong.

The court of appeals concluded that a registered physician's nonmedical prescribing falls within both forms of controlled-substance delivery outlined in the CSA, dispensing and distributing. That reading cannot be reconciled with the statutory text. The Act defines "dispense" to include controlled-substance delivery by a "practitioner" through "prescribing," and it defines "distribute" to mean the delivery of a controlled substance "other than" by dispensing the substance. Yet, under the Fifth Circuit's view, a physician who prescribes a substance to a patient for nonmedical reasons has, in the language of the CSA, delivered that substance by dispensing it *and* other than by dispensing it at the same time.

That makes no sense. However technical it may be, the distinction Congress drew between the terms "dispense" and "distribute" is textual. And that distinction is decisive, because the text also instructs that a physician's delivery of controlled drugs by "prescribing" them is a dispensation.

In relevant part, the CSA provides that, "[e]xcept as authorized by this subchapter," it is "unlawful for any person knowingly or intentionally" to, *inter alia*, "dispense . . . a controlled substance." 21 U.S.C. 841(a)(1). The Act further defines the term "dispense" to "mean" the "delivery of a controlled substance to an ultimate user or research subject *by*, or pursuant to the lawful order of, *a practitioner*, including the *prescribing* and administering of" that substance. *Id.* § 802(10) (emphasis added). And a "dispenser" is a practitioner "who so delivers" a substance "to an ultimate user or research subject." *Id.* It is thus clear from the text of these provisions that Congress intended (1) to make it a crime to unlawfully dispense a controlled substance, and (2) for that crime to cover "a practitioner" who delivers such a substance by "prescribing" or "administering" it in a manner the Act does not authorize. And, "not to be ignored," *Leigh*, 487 F.2d at 208, the "other than" language in the definition of "distribute," 21 U.S.C. § 802(11), instructs that these forms of dispensation are not distributions.

The inquiry need go no further. Prescribing is dispensing; dispensing is never distributing; therefore, prescribing is not distributing. And, as a form of dispensation, prescribing is unlawful under Section 841(a)(1) to the extent it is unauthorized.

Following the statutory road to its destination reinforces this conclusion. Since a dispensation is "unlawful" if it is not "authorized," the question arises: what makes a dispensation unauthorized? Again, the text provides the answer.

Under the Act, the term "practitioner" includes "a physician" who is "registered" by "the jurisdiction in which he practices" to distribute, dispense, administer, and conduct research with controlled substances "in the course of professional practice." 21 U.S.C. § 802(21). "Persons registered to . . . dispense controlled substances . . . are authorized to . . . dispense such substances . . . to the extent authorized by their registration and in conformity with the other provisions of" the CSA, *id.* § 822(b), including the "rules and regulations . . . relating to the registration and control of the . . . dispensing of controlled substances" promulgated by the Attorney General. *Id.* § 821. A registered physician is thus "authorized" to dispense controlled substances via prescription so long as the prescriptions comply with other CSA provisions and the Attorney General's applicable regulations.

The relevant regulations state that, "to be effective," a prescription for a controlled substance "must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice." 21 C.F.R. § 1306.04(a). That means that a prescription is *in*effective, rendering that dispensation *un*authorized, if the prescription is issued either (1) for an illegitimate medical purpose, or (2) outside the scope of professional practice. *See Armstrong*, 550 F.3d at 397. Indeed, the same regulation instructs that a practitioner who knowingly issues or fills such a prescription is "subject to the penalties provided for violations of the provisions of law relating to controlled substances."

The path laid by these provisions is clear. A doctor who prescribes a controlled substance is dispensing that substance. And the requirement that she do so for nonmedical reasons or outside professional bounds simply represents the circumstances in which that act of dispensation becomes unauthorized and, in turn, unlawful. There is no basis, textual or otherwise, for the Fifth Circuit's decision to read the distinction between dispensing and distributing out of Section 841(a)(1). To the contrary, that distinction is an integral part of a carefully calibrated regulatory framework that distinguishes between the manufacturers authorized to manufacture drugs, the distributors authorized to distribute them, and the dispensers authorized to prescribe, administer, and conduct research with them. Congress chose to carry that distinction over to the criminal provisions that punish unauthorized versions of those acts. Because the Fifth Circuit's interpretation renders that choice meaningless, it cannot be correct.

The reasoning that has led the First and Ninth Circuits to conclude that a physician can never unlawfully dispense, and therefore may only be guilty of unlawful distribution, is similarly misguided. As discussed above (Pet. 13), these courts read the phrase "pursuant to the lawful order of" in the definition of "dispense" to limit that term to only authorized activity. That is, they construe the CSA to say that a physician has dispensed only if she has prescribed (or, presumably, administered, packaged, labeled, or compounded) a controlled substance for legitimate medical reasons and in the usual course of her professional practice. *See Badia*, 490 F.2d at 298 & n.4; *Black*, 512 F.2d at 866 & n.3.

That interpretation suffers from at least two obvious flaws. First, it overlooks the significance of the commas bracketing the phrase "or pursuant to the lawful order of." This Court has recognized that it is natural to read a statutory phrase "set aside by commas" as "stand[ing] independent of the language that follows." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). And that is the effect of the commas setting aside the phrase "or pursuant to the lawful order of" in Section 802(10): a controlled substance is considered "dispensed" if it is delivered *either* "by . . . a practitioner" *or* "pursuant to the lawful order of . . . a practitioner." Second, reading the definition of "dispense" to cover only authorized dispensing activity leaves that term entirely inoperative in Section 841(a)(1). Put simply, there is no crime of *unlawful* dispensation if the only way a practitioner, or a person ordered by a practitioner, can "dispense" is if they do so *lawfully*.

A recurring question of statutory interpretation has split the circuits in three ways. The answer to that question matters in petitioner's case. And two of the prevailing views are in serious tension with the relevant statutory text. The Court should grant certiorari to resolve this conflict among the courts of appeals.

II. The Court should grant review to resolve whether the Sixth Amendment permits judicial finding of facts necessary to support an otherwise substantively unreasonable federal sentence.

This case also presents the unrelated, but equally important, question whether the Constitution permits judges to find facts necessary to save a federal sentence from being reversed as substantively unreasonable. Currently, the law in every circuit allows district courts to increase a sentence, sometimes by decades or more, based on facts neither found by a jury nor admitted by the defendant. Several Justices of this Court and numerous judges in the lower courts have voiced serious concerns that this practice violates the Sixth Amendment right to trial by jury, at least where the judge-found facts are essential to the substantive lawfulness of the sentence. The Court should grant certiorari to resolve this open and recurring question of federal sentencing law.

A. The question presented is important.

In *Rita v. United States*, 551 U.S. 338 (2007), this Court held that an appellate presumption of reasonableness for within-Guidelines sentences is constitutional on the ground that the Sixth Amendment does not "automatically forbid" a sentencing judge from taking account of factual matters not determined by a jury. *Id.* at 352. Justice Scalia, joined by Justice Thomas, expressed concern that, in those cases in which a sentence is "upheld as reasonable only because of the existence of judge-found facts," this system would condone violations of the rule established in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), that all facts essential to a lawful sentence must be found by a jury or admitted by the defendant.

Rita, 551 U.S. at 374 (opinion concurring in part and concurring in the judgment). In response, the Court stated that the question posed by Justice Scalia was "not presented by this case." *Id.* at 353.

In the years since, five current and former Justices have expressed serious concerns over the reliance on judge-found facts to elevate a federal sentence to otherwise unreasonable heights. In 2014, Justice Scalia, joined by Justices Thomas and Ginsburg, highlighted the need for the Court to address the question. *See Jones v. United States*, 135 S. Ct. 8, 8-9 (2014) (Scalia, J., dissenting from the denial of certiorari). A jury found the *Jones* petitioners guilty of distributing small amounts of crack cocaine, but acquitted them of participating in a larger distribution conspiracy. *Id.* at 8. But, based on a finding that the petitioners *had* engaged in the charged conspiracy, the district judge imposed sentences far greater than the Guidelines otherwise would have recommended. *Id.*

Justice Scalia believed the petitioners presented a "strong case" that, "but for the judge's finding of fact, their sentences would have been 'substantively unreasonable' and therefore illegal." *Id.* If so, Justice Scalia explained, the sentences violated the constitution:

> The Sixth Amendment, together with the Fifth Amendment's Due Process Clause, 'requires that each element of a crime' be either admitted by the defendant, or 'proved to the jury beyond a reasonable doubt.' Any fact that increases the penalty to which a defendant is exposed constitutes an element of a crime, and 'must be found by a jury, not a judge.' We have held that a substantively unreasonable penalty is illegal and must be set aside. It unavoidably follows that any fact necessary to prevent a sentence from being substantively unreasonable—thereby exposing the defendant to the longer sentence—is an element that must be either admitted by the defendant or found by the jury.

Id. (internal citations omitted). Observing that ever since the question was "left for another day" in *Rita* the courts of appeals had "uniformly taken [the Court's] continuing silence to suggest that the Constitution *does* permit otherwise unreasonable sentences supported by judicial factfinding," Justice Scalia urged the Court to resolve that question in an appropriate case. *Id.* at 9 (original emphasis).

Shortly after Justice Scalia's dissent in *Jones*, then-Judge Gorsuch noted that the "assum[ption] that a district judge may either decrease or increase a defendant's sentence (within the statutorily authorized range) based on facts the judge finds without the aid of a jury or the defendant's consent" is "far from [constitutionally] certain." *United States v. Sabillon-Umana*, 772 F.3d 1328, 1331 (10th Cir. 2014) (citing *Jones*). One year later, then-Judge Kavanaugh remarked that "[a]llowing judges to rely on acquitted or uncharged conduct to impose higher sentences than they otherwise would impose seems a dubious infringement of the rights to due process and to a jury trial." *United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (opinion concurring in the denial of rehearing en banc); *see also id.* ("If you have a right to have a jury find beyond a reasonable doubt the facts that make you guilty, and if you otherwise would receive, for example, a five-year sentence, why don't you have a right to have a jury find beyond a reasonable doubt the facts that increase that five-year sentence to, say, a 20-year sentence?").

Numerous lower-court judges have echoed and elaborated on these concerns. Calling the practice of "using judge-found facts to calculate the applicable sentencing range under the Guidelines" a "widespread problem," Judge Merritt, writing on behalf of five

other judges, has advanced the position that a sentence violates the Sixth Amendment where "the reasonableness—and thus legality—of the sentence depends entirely on the presence of facts that were found by a judge, not a jury[.]" *United States v. White*, 551 F.3d 381, 386-87 (6th Cir. 2008) (en banc) (Merritt, J., dissenting). Other judges have reached the same conclusion. *See Bell*, 808 F.3d at 930-32 (Millett, J., concurring in the denial of rehearing en banc); *United States v. Mercado*, 474 F.3d 654, 660-63 (9th Cir. 2007) (Fletcher, J., dissenting); *United States v. Faust*, 456 F.3d 1342, 1349-51 (11th Cir. 2006) (Barkett, J., specially concurring).

The fact that so many federal appellate judges have concluded that a recurring and consequential sentencing practice is unconstitutional, but feel constrained to allow that practice to persist, demonstrates the necessity of intervention from this Court. And there is no doubt as to the issue's significance to criminal defendants: "It is all too real that advisory Guidelines sentences routinely change months and years of imprisonment to decades and centuries on the basis of judge-found facts[.]" *Rita*, 551 U.S. at 375 n.4 (Scalia, J., concurring in part and concurring in the judgment). "This has gone on long enough." *Jones*, 135 S. Ct. at 9 (Scalia, J., dissenting from denial of certiorari).

B. Judicial finding of the facts necessary to make a sentence reasonable violates the Sixth Amendment.

The precedent that foreclosed petitioner's constitutional claim is incorrect. This Court's modern sentencing jurisprudence shows that the Sixth Amendment prohibits courts from finding facts without which a federal sentence would be unreasonable.

The Sixth Amendment right to trial by jury is a constitutional protection "of surpassing importance." *Apprendi*, 530 U.S. at 476. "Just as the right to vote sought to preserve the people's authority over their government's executive and legislative functions, the right to a jury trial sought to preserve the people's authority over its judicial functions." *United States v. Haymond*, 139 S. Ct. 2369, 2375 (2019) (plurality). That "fundamental reservation of power" ensures that a "judge's authority to sentence derives wholly from the jury's verdict." *Blakely v. Washington*, 542 U.S. 296, 306 (2004). Because "[a] judge's authority to issue a sentence derives from, and is limited by, the jury's factual findings of criminal conduct," *Haymond*, 139 S. Ct. at 2376, the Sixth Amendment, together with the Due Process Clause, requires that "every fact 'which the law makes essential to a punishment' that a judge might later seek to impose" be found beyond reasonable doubt by a jury or admitted by the defendant. *Id.* (quoting *Blakely*, 542 U.S. at 304).

The *Apprendi* line of cases makes clear that the class of facts that are "essential to punishment," and thus implicate the jury-trial right, is not limited to statutorily defined elements. *See Blakely*, 542 U.S. at 301-04 (applying *Apprendi* to facts triggering an elevated range under mandatory state sentencing guidelines); *United States v. Booker*, 543 U.S. 220, 230-37 (2005) (same as to then-mandatory federal guidelines). In *Blakely*, for instance, this Court rejected the idea that a jury "need only find whatever facts the legislature chooses to label elements of the crime," explaining that such a rule "would mean . . . that a judge could sentence a man for committing murder even if the jury convicted him only of illegally possessing the firearm used to commit it—or of making an illegal lane

change while fleeing the death scene." 542 U.S. at 306. "The jury could not function as circuitbreaker in the State's machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish." *Id.* at 306-07 (original emphasis). Instead, the Court emphasized, it is the character of facts as "pertain[ing] to whether the defendant has a legal *right* to a lesser sentence" that "makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned." *Id.* at 309 (original emphasis).

Putting the *Apprendi* rule together with the requirement that federal sentences be "substantively reasonable" dictates that if a sentence would be reversed as unreasonable without a particular fact, then that fact implicates the Sixth Amendment. Federal sentences "must" be "substantive[ly] reasonabl[e]" to survive appellate review. *Gall v. United States*, 552 U.S. 38, 51 (2007); *see Booker*, 543 U.S. at 261-63 (remedial opinion). In other words, a federal criminal defendant whose sentence is deemed unreasonable has a "legal right" to remand for the imposition of a lesser sentence.

The Fifth Circuit precedent that foreclosed petitioner's constitutional claim reasons that judicial finding of the facts necessary to make a sentence reasonable poses no *Apprendi* problem so long as "the defendant's sentence ultimately falls within the statutory maximum term." *United States v. Hebert*, 813 F.3d 551, 565 (5th Cir. 2015). This is the prevailing wisdom in the courts of appeals, *see, e.g.*, *United States v. Ulbricht*, 858 F.3d 71, 128 (2d Cir. 2017); *White*, 551 F.3d at 385, and it is misguided.

That is because, as far as the Sixth Amendment right to a jury trial is concerned, the question is one of *jury*, not statutory, authorization. In the *Apprendi* context, the "statutory maximum" is "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Blakely*, 542 U.S. at 303 (original emphasis). In other words, if the jury's verdict or the defendant's plea "alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied." *Cunningham v. California*, 549 U.S. 270, 290 (2007).

Under the federal system's guided-discretion sentencing regime, it is simply not the case that the facts supporting a guilty plea or verdict automatically authorize a sentence up to the maximum term set by the applicable U.S. Code provision. Absent procedural error, a sentence at or below that maximum is lawful only if it is substantively reasonable. *See Gall*, 552 U.S. at 51. Indeed, the courts of appeals have reversed sentences well below the applicable maximum set out in the statute of conviction as substantively unreasonable. *See, e.g.*, *United States v. Singh*, 877 F.3d 107, 116-17 (2d Cir. 2017) (five-year sentence where maximum was 20 years); *United States v. Chandler*, 732 F.3d 434, 437, 440 (5th Cir. 2013) (35-year sentence where maximum was life). If a particular sentence would be unreasonable under the facts found by a jury or admitted by the defendant, then "the judge acquires th[e] authority [to impose that term] only upon finding some additional fact." *Booker*, 543 U.S. at 235 (quoting *Blakely*, 542 U.S. at 305). In those circumstances, the sentence exceeds "the 'statutory maximum' for *Apprendi* purposes." *Blakely*, 542 U.S. at 303.

C. The question presented warrants review in this case.

This case presents an excellent vehicle for resolving the question whether the Sixth Amendment prohibits judges from finding the facts necessary to sustain an otherwise unreasonable federal sentence.

Petitioner's sentence is an apt example of one that would be unconstitutional under a correct interpretation of the Sixth Amendment limitations on judicial factfinding at sentencing. There is no doubt that, had petitioner been held accountable only for the quantity of controlled substances encompassed within the jury's verdicts, the district court could not reasonably have sentenced him to 420 months in prison—an increase of more than 30 years above the 27–33 month Guidelines range that would have applied otherwise. A variance of that magnitude would plainly be unreasonable in the absence of the district court's additional drug-quantity finding. *Cf. Jones*, 135 S. Ct. at 9 (Scalia, J., dissenting from the denial of certiorari) (citing increase of around 10 years based on judge-found conspiracy as implicating the constitutional issue). The question whether judges may find facts essential to a substantively lawful federal sentence is thus both squarely presented by, and outcome determinative in, petitioner's case. The Court should grant certiorari and finally resolve the question it left open in *Rita*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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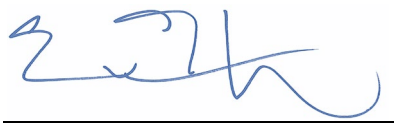

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