No. _____

In the Supreme Court of the United States

ROMAN BELDUCEA-MANCINAS, *PETITIONER*,

V.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS OF THE FIFTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Ramon Belducea-Mancinas was sentenced as a career offender based on pre-2018 federal convictions for conspiracy to distribute marijuana. In December 2018, Congress narrowed the definition of marijuana to exclude hemp. The Fifth Circuit already defined "controlled substance" in the Sentencing Guidelines as a substance controlled by the federal Controlled Substances Act. Yet, the court of appeals held the error was not plain because the court had not decided this precise question. Had Belducea been prosecuted in the Ninth Circuit, the error would have been deemed plain.

The question presented is:

Is it obvious error to find a prior federal drug trafficking conviction is a "controlled substance offense" under the Sentencing Guidelines when the substance trafficked is not, at the time of sentencing, categorically a federally controlled substance?

No. _____

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v.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS OF THE FIFTH CIRCUIT

Petitioner Roman Belducea-Mancinas asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on April 26, 2022.

PARTIES TO THE PROCEEDING

The caption names all parties to the proceeding in the court whose judgment is sought to be reviewed.

RELATED PROCEEDINGS

All proceedings directly related to the case are:

- *United States v. Belducea-Mancinas*, No. 4:20-cr-00273-DC (W.D. Tex. Oct. 30, 2020) (judgment)
- *United States v. Belducea-Mancinas*, No. 20-50929 (5th Cir. Apr. 26, 2022) (unpublished opinion)

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DECISION BELOW

A copy of the unpublished opinion of the court of appeals, *United States v. Belducea-Mancinas*, No. 20-50929 (5th Cir. Apr. 26, 2022) (per curiam), is attached to this petition as the Appendix.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit were entered on April 26, 2022. This petition is filed within 90 days after entry of judgment or order sought to be reviewed. *See* Sup. Ct. R. 13.1, 13.3. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. The Sentencing Reform Act instructs courts to calculate:

> (4) the kinds of sentence and sentencing range established for—
>
> (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines— …
>
> (ii) that … are in effect on the date the defendant is sentenced[.]

18 U.S.C. § 3553(a)(4)(ii).

2. Effective December 21, 2018, the federal Controlled Substances Act defines "marihuana" as:

> (16)(A) Subject to subparagraph (B), the term "marihuana" means all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from

> any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin.
>
> (B) The term "marihuana" does not include--
>
> (i) hemp, as defined in section 1639o of Title 7; or
>
> (ii) the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

21 U.S.C. § 802(16) (Dec. 21, 2018).

3. "Hemp" is defined as "the plant Cannabis sativa L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis." 7 U.S.C. § 1639o (2018).

4. The definition of "marihuana" before the 2018 amendment was:

> (16) The term "marihuana" means all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin. Such term does not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

21 U.S.C. § 802(16) (effective through Dec. 20, 2018).

SENTENCING GUIDELINES PROVISION INVOLVED

1. Policy statement 1B1.11 provides:

> (a) The court shall use the Guidelines Manual in effect on the date that the defendant is sentenced.
>
> (b)(1) If the court determines that use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the ex post facto clause of the United States Constitution, the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed.
>
> (2) The Guidelines Manual in effect on a particular date shall be applied in its entirety. The court shall not apply, for example, one guideline section from one edition of the Guidelines Manual and another guideline section from a different edition of the Guidelines Manual. However, if a court applies an earlier edition of the Guidelines Manual, the court shall consider subsequent amendments, to the extent that such amendments are clarifying rather than substantive changes.
>
> …

U.S.S.G. §1B1.11.

2. Guideline §4Bl.2(b) provides:

> The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance….

INTRODUCTION

The district court determined that Ramon Belducea-Mancinas was a career offender based on his pre-2018 federal marijuana drug trafficking convictions. The court sentenced him to 151

months' imprisonment, the bottom of the career-offender range. If he had not been deemed a career offender, his Guidelines range would have been 77 to 96 months' imprisonment.

On appeal, Belducea argued that the district court plainly erred by applying the career offender guideline when his prior federal marijuana convictions were categorically broader than a §4B1.2 controlled substance offense because the former included hemp and the latter does not.

Had Belducea been prosecuted in the Ninth Circuit, his sentence would have been vacated due to the plain error. *See United States v. Bautista*, 989 F.3d 698, 705 (9th Cir. 2021). The Fifth Circuit held, however, that the law was "unsettled" because it "has never held that a pre-2018 predicate conviction does not qualify as a 'controlled substance offense' for purposes of the career offender guideline because hemp was subsequently removed from the CSA prior to the time of federal sentencing." Pet. App. 2. But the Fifth Circuit had already held that the term "controlled substance" in the Guidelines is defined by the federal CSA. *United States v. Gomez-Alvarez*, 781 F.3d 787 (5th Cir. 2021). The straightforward application of precedent, statutes, and the Guidelines render the error plain.

STATEMENT

Ramon Belducea-Mancinas pleaded guilty to possessing marijuana with the intent to distribute it. The presentence report concluded he was a career offender based on prior federal convictions from 2010, 2012, and 2016 for conspiring to possess marijuana with the intent to distribute it. *See* 21 U.S.C. § 841(a)(1), (b)(1)(C), (b)(1)(D); 21 U.S.C. § 846. The career offender guideline produced an advisory Guidelines range of 151 to 188 months' imprisonment. Without the career offender guideline, Belducea's range would have been 77 to 96 months' imprisonment. The court sentenced Belducea as a career offender to 151 months' imprisonment.

On appeal, Belducea argued his prior federal marijuana convictions do not categorically qualify as a generic "controlled substance offense" under §4B1.2(b) because Congress removed hemp from the federal schedule of controlled substances by amending the definition of marijuana in 21 U.S.C. § 802(16) to exclude "hemp," which it defined as a cannabis sativa L. plant with a delta-9 tetrahydrocannabinol ("THC") concentration of 0.3 percent or less. Agriculture Improvement Act of 2018, Pub. L. 115-334, Title XII, § 12619(a), 132 Stat. 5018 (Dec. 20, 2018) ("2018 Farm Bill").

Belducea acknowledged his challenge was subject to plain-error review, but he argued a straight forward application of

precedent, 18 U.S.C. § 3553(a)(4)(ii), and U.S.S.G. §1B1.11 and §4B1.2 dictated the result:

- Fifth Circuit precedent defines "controlled substance" by looking to federal law.[1] *United States v. Gomez-Alvarez*, 781 F.3d 787, 794 (5th Cir. 2015) (adopting reasoning of *United States v. Leal-Vega*, 680 F.3d 1160 (9th Cir. 2012), in interpretation of §2L1.2); *United States v. Arayatanon*, 980 F.3d 444, 453 n.8 (5th Cir. 2020) ("Because the qualifying prior convictions in §2L1.2 and §4B1.2(b) are defined in substantially the same way, 'cases discussing these definitions are cited interchangeably.'" (citation omitted)).
- Congress instructs courts to apply the version of the Sentencing Guidelines in effect at sentencing absent ex post facto concerns. 18 U.S.C. § 3553(a)(4)(ii); *see Peugh v. United States*, 569 U.S. 530, 533 (2013); U.S.S.G. §1B1.11.
- Guideline §4B1.2 uses the present tense and defines a "controlled substance offense" for both the instant offense and prior convictions. *See* U.S.S.G. §4B1.1, §4B1.2.

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[1] The circuits are split on this question. *Guerrant v. United States*, 142 S. Ct. 640, 640 (2022) (Sotomayor & Barrett, JJ., statement regarding certiorari denial) (describing circuit split).

Belducea also pointed to the Ninth Circuit's plain-error decision in *United States v. Bautista*, 989 F.3d 698, 705 (9th Cir. 2021). Like the Fifth Circuit, the Ninth Circuit had previously held that the term "controlled substance" in the §2L1.2 "drug trafficking offense" definition is informed by the federal CSA. *United States v. Leal-Vega*, 680 F.3d 1160, 1167 (9th Cir. 2012). The Ninth Circuit held that the §4B1.2 "controlled substance" term was also defined by the federal CSA, and that the version of the CSA that applied to the definition was obviously the one in effect at the time of sentencing. *Bautista*, 989 F.3d at 705.

The Fifth Circuit affirmed in an unpublished opinion. Pet. App. The court of appeals noted that it "has never held that a pre-2018 predicate conviction does not qualify as a 'controlled substance offense' for purposes of the career offender guideline because hemp was subsequently removed from the CSA prior to the time of federal sentencing." Pet. App. 2. Framing the case law as "unsettled," the court said any error could not be obvious. Pet. App. 3. A concurring judge wrote that, while not plain, there was sentencing error. Pet. App. 4. According to the concurrence and other circuit courts, the version of the CSA in effect at the time of federal sentencing, absent ex post facto concerns, applies to the §4B1.2 "controlled substance offense" definition. Pet. App. 4; *see United States*

v. Abdulaziz, 998 F.3d 519, 524–31 (1st Cir. 2021); *United States v. Crocco*, 15 F.4th 20, 23 n.3 (1st Cir. 2021) ("One thing is certain: if the federal CSA is chosen as the source of the definition, it is the version of the federal CSA in effect at the time of the instant federal sentencing that governs."); *United States v. Williams*, 850 F. App'x 393, 398 (6th Cir. 2021) (unpublished) ("[T]he district court should have employed the schedule (federal or state) effective at the time of sentencing."); *Bautista*, 989 F.3d at 703–04; *see also United States v. Hope*, 28 F.4th 487, 504–05 (4th Cir. 2022) (in the Armed Career Criminal Act context); *United States v. Jackson*, 36 F.4th 1294, 1300 (11th Cir. 2022) (in the ACCA context, finding that the schedule in affect at time of ACCA offense applies).

REASON FOR GRANTING THE WRIT

The decision below deepens a circuit conflict, and the Court should give courts and defendants guidance about this recurring, important issue.

The Fifth Circuit's refusal to find plain error deepens a circuit split. The Ninth Circuit, with the same legal backdrop to the Fifth Circuit, found plain error under circumstances nearly identical to Belducea's. *Bautista*, 989 F.3d at 705. Both circuits had held that the federal CSA informed the definition of "controlled substance" in guideline §2L1.2. *Id.* at 702 (citing *United States v. Leal-Vega*,

680 F.3d 1160 (9th Cir. 2012)); *Gomez-Alvarez*, 781 F.3d at 794 (same). Against that precedent, the Ninth Circuit held that the federal CSA obviously applied to the definition of "controlled substance" in guideline §4B1.2. *Bautista*, 989 F.3d 702. Fifth Circuit law also dictates that result. *See Arayatanon*, 980 F.3d at 453 n.8; *Gomez-Alvarez*, 781 F.3d at 794.

The Ninth Circuit further held that, because the Sentencing Reform Act requires courts to apply the Guidelines manual in effect at the time of sentencing, the version of the CSA that defines "controlled substance" is obviously the one in effect at the time of sentencing. *Bautista*, 989 F.3d at 703; *see* § 3553(a)(4)(ii). Some circuits, like the Fifth Circuit, have held that application of the current CSA is not obvious—and thus the error cannot be plain. *See* Pet. App. 2; *Williams*, 850 F. App'x at 402.

This Court should resolve the important question of which version of the Controlled Substances Act applies to the §4B1.2 "controlled substance offense" definition. The Court often declines taking cases regarding the Guidelines. *See, e.g.*, *Guerrant v. United States*, 142 S. Ct. 640, 640 (2022) (denying petition about §4B1.2); *Longoria v. United States*, 141 S. Ct. 978, 978 (2021) (denying petition about §3E1.1); *Braxton v. United States*, 500 U.S. 344, 348–49 (1991) (choosing to not resolve the first question "because the

Commission has already undertaken a proceeding that will eliminate circuit conflict over the meaning of §1B1.2"). The Court recognizes that Congress gave the Sentencing Commission the duty to "periodically review and revise" the Guidelines and the power to decide which revisions are retroactive. *Braxton*, 500 U.S. at 348 (citing 28 U.S.C. § 944(o), (u) and U.S.S.G. §1B1.10).

But the Sentencing Commission has not had enough commissioners to provide courts and defendants guidance for three years—spanning two presidential administrations. Even President Biden's recent nomination of commissioners is no guarantee they will be confirmed.[2]

Meanwhile, "unresolved divisions among the Courts of Appeals can have direct and severe consequences for defendants' sentences." *Guerrant*, 142 S. Ct. at 641 (Sotomayor & Barrett, JJ., statement). Defendants like Belducea are subjected to significantly higher Guidelines ranges than they would be if prosecuted in a different circuit. The Court should address the issue so that

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[2] *See* White House, Press Release, President Biden Nominates Bipartisan Slate for the United States Sentencing Commission (May 11, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/05/11/president-biden-nominates-bipartisan-slate-for-the-united-states-sentencing-commission/.

Belducea does not serve a sentence double his correct Guidelines range.

CONCLUSION

FOR THESE REASONS, Belducea asks this Honorable Court to grant a writ of certiorari.

Respectfully submitted.

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DATED: July 25, 2022