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NO. \_\_\_\_\_

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IN THE  
**Supreme Court of the United States**

\_\_\_\_\_ TERM, 20\_\_

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HEATHER MARIE NEWHOUSE, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

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

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**PETITION FOR WRIT OF CERTIORARI**

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## **QUESTION PRESENTED**

(1) Whether the United States Sentencing Commission exceeded its authority by adding inchoate offenses to the definition of “controlled substance offense” through the Guideline commentary?

## **PARTIES TO THE PROCEEDINGS**

The caption contains the names of all parties to the proceedings.

## **DIRECTLY RELATED PROCEEDINGS**

*United States v. Newhouse*, 4:19-cr-00017-001 (S.D. Iowa) (criminal proceedings), judgment entered January 22, 2021.

*United States v. Newhouse*, 21-1280 (8th Cir.) (direct criminal appeal), judgment entered May 2, 2022.

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**PETITION FOR WRIT OF CERTIORARI**

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The petitioner, Heather Newhouse, through counsel, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in case No. 21-1280, entered on May 2, 2022.

**OPINION BELOW**

On May 2, 2022, a panel of the Court of Appeals entered its opinion affirming the judgment of the United States District Court for the Southern District of Iowa. The decision is unpublished and available at 2022 WL 1308259.

## **JURISDICTION**

The Court of Appeals entered its judgment on May 2, 2022. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## **RELEVANT STATUTORY PROVISIONS**

### **USSG § 4B1.2(b)**

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 (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

### **USSG § 4B1.2, cmt. n.1**

“Crime of violence” and “controlled substance offense” include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.

## STATEMENT OF THE CASE

In late 2018, Ms. Newhouse delivered methamphetamine to a controlled informant on several occasions. PSR ¶¶ 15-20<sup>1</sup>. Law enforcement stopped Ms. Newhouse three times between 2018 and 2019. PSR ¶¶ 20-21. During these stops, law enforcement found methamphetamine and firearms. *Id.*

On July 17, 2019, Ms. Newhouse was charged by third superseding indictment in the Southern District of Iowa with nine charges related to the distribution of methamphetamine and the possession of firearms. R. Doc. 17. The indictment also alleged Ms. Newhouse was subject to statutory enhancements for having a prior conviction for a serious drug felony. *Id.*

On March 20, 2019, Ms. Newhouse pleaded guilty to one count of possession of methamphetamine with intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A), and one count of carrying a firearm in relation to a drug trafficking offense, in violation of 18 U.S.C. § 924(c)(1)(A)(i), pursuant to a plea agreement. R. Doc. 39. The government agreed to dismiss the remaining counts at sentencing. *Id.* Further, the government agreed to withdraw the notice of a prior serious drug felony. *Id.* Ms. Newhouse preserved the right to appeal her sentence. *Id.*

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<sup>1</sup> In this brief, “R. Doc.” refers to the district court docket, criminal Case No. 4:19-cr-00017-001 in the United States District Court for the Southern District of Iowa. “Sent. Tr.” refers to the official transcript of the sentencing hearing held January 22, 2021, available at R. Doc. 88. “PSR” refers to the presentence report prepared for sentencing in the case available at R. Doc. 55.

The case proceeded to sentencing. The presentence investigation report (“PSR”) recommended a base offense level of 32, based upon 50 grams or more of methamphetamine. PSR ¶ 30. She also received a two-level increase for obstruction of justice. PSR ¶ 34.

However, the PSR recommended an increased base offense level of 37, finding that Ms. Newhouse was a career offender. PSR ¶ 36. The PSR relied upon Ms. Newhouse’s two prior convictions under Iowa’s controlled substances statute, Iowa Code § 124.401(1), for methamphetamine offenses, asserting these were controlled substance offenses under the Guidelines. PSR ¶¶ 36, 45, 47. After a three-level reduction for acceptance of responsibility, the PSR calculated an adjusted offense level of 34. PSR ¶ 39. Combined with a criminal history category VI, Ms. Newhouse’s advisory guideline range was 262 to 327 months of imprisonment. PSR ¶ 136. The PSR acknowledged that Ms. Newhouse’s conviction under 18 U.S.C. § 924(c) required a mandatory 60-month term, to be imposed consecutively to any other term of imprisonment under USSG § 5G1.2(a). PSR ¶ 136.

Ms. Newhouse objected to the guideline range. R. Doc. 54. Specifically, she objected to the application of the career-offender enhancement. *Id.* She argued that her Iowa controlled substance convictions did not qualify as controlled substance offenses. R. Doc. 54, 72. Ms. Newhouse noted that her statute of conviction included attempt, conspiracy, and aiding and abetting. *Id.* She asserted that



attempt, conspiracy, and aiding and abetting were improperly added to the Guideline definition of “controlled substance offense” through the commentary. *Id.*

At sentencing, the district court overruled Ms. Newhouse’s objection to the career-offender enhancement. Sent. Tr. pp. 13-14. The court accepted the PSR’s calculation of the Guideline range—262–327 months of imprisonment, with an additional 60 months for the 18 U.S.C. § 924(c) offense. The court granted a ten percent reduction to Guideline range. Sent. Tr. p. 16. Ultimately, the court sentenced Ms. Newhouse to 240 months of imprisonment—180 months on the drug offense, and 60 months on the 18 U.S.C. § 924(c) offense, to run consecutively. Sent. Tr. p. 35.

Ms. Newhouse appealed to the Eighth Circuit Court of Appeals, maintaining her challenge to the application of the career-offender enhancement. She asserted that her Iowa convictions did not qualify because inchoate offenses were not properly included in the Guideline definition of controlled substance offense. The Eighth Circuit affirmed Ms. Newhouse’s sentence. *United States v. Newhouse*, No. 21-1280, 2022 WL 1308529 (8th Cir. May 2, 2022). The circuit found that it had rejected the argument that inchoate offenses were improperly added through the commentary in *United States v. Mendoza-Figueroa*, 65 F.3d 691, 694 (8th Cir. 1995). *Id.*

## REASONS FOR GRANTING THE WRIT

A circuit split exists on whether the Sentencing Commission exceeded its authority by adding inchoate offenses through the commentary to the definition of “controlled substance offense.” While the Eighth Circuit and others have rejected the argument, *see United States v. Adams*, 934 F.3d 720 (7th Cir. 2019), the Third, Fourth, Sixth, and D.C. Circuits have all adopted Ms. Newhouse’s position. *See United States v. Campbell*, 22 F.4th 438 (4th Cir. 2022); *United States v. Nasir*, 982 F.3d 144, 156-60 (3d Cir. 2020) (en banc), *vacated and remanded on other grounds*, 142 S. Ct. 56, (2021), *aff’d on remand*, 17 F.4th 459, 467-72 (3d Cir. 2021) (en banc); *United States v. Havis*, 927 F.3d 382 (6th Cir. 2019) (en banc); *United States v. Winstead*, 890 F.3d 1082, 1091, (D.C. Cir. 2018). This Court should grant the petition for writ of certiorari to address this circuit split.

### **I. THE SENTENCING COMMISSION EXCEEDED ITS AUTHORITY BY ADDING INCHOATE AND PRECURSOR OFFENSES TO THE DEFINITION OF “CONTROLLED SUBSTANCE OFFENSE” THROUGH THE GUIDELINE COMMENTARY.**

“Controlled substance offense” is defined under USSG § 4B1.2(b) as an offense punishable by a term exceeding one year “that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.” The guideline commentary states that “‘controlled substance offense’ include[s] the offenses of

aiding and abetting, conspiring, and attempting to commit such offenses.” USSG § 4B1.2, cmt. n.1.

USSG § 4B1.2(b) states that “[t]he term ‘controlled substance offense’ means an offense” that is one of an exhaustive list of six enumerated drug offenses: (1) manufacture, (2) import, (3) export, (4) distribution, or (5) dispensing of a controlled substance (or a counterfeit controlled substance), or the (6) possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense. By using the word “means” rather than “includes,” the plain language of the guideline excludes any other definition of the term “controlled substance offense.” *See Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 162 (2012); *Burgess v. United States*, 553 U.S. 124, 130 (2008). Under traditional rules of statutory construction, then, this Court is prohibited from adding attempt, aiding and abetting, or conspiracy offenses to the text of § 4B1.2(b).

Without any expansive terms in the text of § 4B1.2(b) that might be interpreted to include inchoate offenses, the commentary to § 4B1.2 has no legal force. The only valid function of commentary is to interpret or explain the text of § 4B1.2 itself. *Stinson v. United States*, 508 U.S. 36, 45 (1993). In keeping with the Sentencing Commission's delegated administrative powers, *Id.* at 45-46, “application notes are interpretations of, not additions to, the Guidelines themselves.” *United States v. Rollins*, 836 F.3d 737, 742 (7th Cir. 2016) (en banc) (emphasis in original); *id.* at 739 (commentary has “no legal force independent of

the guideline,” but is “valid (or not) only as an interpretation of § 4B1.2”); *United States v. Soto-Rivera*, 811 F.3d 53, 58-62 (1st Cir. 2016); *United States v. Shell*, 789 F.3d 335, 345 (4th Cir. 2015) (reaffirming that commentary in § 4B1.2 cannot have “freestanding definitional power”). This is because, unlike the guideline text itself, the commentary is not subject to the requirements of Congressional review and a notice and comment period. See *Havis*, 927 F.3d at 386 (citing *Mistretta v. United States*, 488 U.S. 361, 380-94 (1989)).

The Sentencing Commission thus has no power to “expand” the textual definition to include the otherwise excluded inchoate offenses or precursor offenses through an application note in the commentary. *Soto-Rivera*, 811 F.3d at 60. In other words, it cannot “add” to a definition in the text of the guidelines because commentary has no “independent” force. *Rollins*, 836 F.3d at 742. When commentary adds to a guideline, it is “necessarily inconsistent with the text of the guideline itself.” *Id.* When such conflict occurs, *Stinson* dictates that the guideline text controls:

If . . . commentary and the guideline it interprets are inconsistent in that following one will result in violating the dictates of the other, the Sentencing Reform Act itself commands compliance with the guideline.

508 U.S. at 43.

Addressing this very argument, the Sixth Circuit held in an *en banc* decision that the guidelines’ definition of controlled substance offense does not include attempt crimes. *Havis*, 927 F.3d at 387, *reconsideration denied*, 929 F.3d 317 (6th

Cir. 2019). The Sixth Circuit so held for the reasons urged above. “[T]he Commission used Application Note 1 to *add* an offense not listed in the guideline. But application notes are to be ‘interpretations of, not additions to, the Guidelines themselves.’” *Id.* at 386 (quoting *United States v. Rollins*, 836 F.3d 737, 742 (7th Cir. 2016) (en banc)) (original emphasis).

The Third Circuit followed *Havis*, noting it was necessary to protect the separation of powers. *Nasir*, 982 F.3d at 159. The court stated: “If we accept that the commentary can do more than interpret the guidelines, that it can add to their scope, we allow circumvention of the checks Congress put on the Sentencing Commission, a body that exercises considerable authority in setting rules that can deprive citizens of their liberty.” *Id.* The Fourth Circuit recently also adopted this reasoning. *United States v. Campbell*, 22 F.4th 438 (4th Cir. 2022).

This Court should grant the petition for writ of certiorari to address the circuit split and find that the Sentencing Commission exceeded its authority by adding offenses to the definition of controlled substance offense through the commentary.

Ms. Newhouse’s case is an appropriate vehicle for this issue because, if this argument is accepted, her statute of conviction is overbroad on its face. The Iowa Supreme Court has definitively held that how the § 124.401(1)(c) violation is committed—conspiracy, attempt, etc.—is an alternative mean. *State v. Corsi*, 686 N.W.2d 215, 222 (Iowa 2004). Further, like the statute at issue in *Havis*, “attempt”

is included within the definition of delivery under Iowa law. Iowa Code § 124.101(7). Finally, aiding and abetting is inherent in every Iowa offense as an alternative mean. *United States v. Boleyn*, 929 F.3d 932 (8th Cir. 2019).

### CONCLUSION

For the foregoing reasons, Ms. Newhouse respectfully requests that the Petition for Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,

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