
No. _____

In the

Supreme Court of the United States

SOHIEL KABIR, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

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

Petition for a Writ of Certiorari

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QUESTION PRESENTED FOR REVIEW

Does the aggravating role enhancement for “leader[s]” or “organizer[s]” of concerted criminal activity in section 3B1.1(c) of the United States Sentencing Guidelines require that the defendant have exercised control over co-participants in the criminal conduct?

Statement of Related Proceedings

- *United States v. Sohiel Kabir*,
 - Case No. 12-cr-92-VAP-1 (C.D. Cal., June 11, 2021)
- *United States v. Sohiel Kabir*,
 - 51 F.4th 820 (9th Cir. Oct 24, 2022)

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

Sohiel Kabir petitions for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in his case.

I. OPINIONS BELOW

The opinion of the court of appeals is reported at 51 F.4th 820 (9th Cir. 2022). (App. 1a; *United States v. Kabir*, 51 F.4th 820 (9th Cir. 2022).) The ruling of the district court is unreported, and was rendered orally. (App. 11a (transcript of resentencing hearing, 12-cr-92-VAP-1 (C.D. Cal., June 7, 2021).)¹

II. JURISDICTION

The judgment of the court of appeals was entered on October 24, 2022. (App. 1a.) Rehearing was not sought. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

¹ Citations to “App.” are to the appendix to this petition. Citations to “ER” are to the Excerpts of Record filed in the court of appeals.

III. CONSTITUTIONAL, STATUTORY, AND SENTENCING GUIDELINES PROVISIONS INVOLVED

United States Sentencing Guidelines Section 3B1.1:

Based on the defendant's role in the offense, increase the offense level as follows:

- (a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.
- (b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels.
- (c) If the defendant was an organizer, leader, manager or supervisor in any criminal activity other than described in (a) or (b), increase by two levels.

IV. INTRODUCTION

The Circuits are starkly divided over the requirements of a widely-applied and frequently interpreted provision of the United States Sentencing Guidelines, impacting thousands of defendants every year: Section 3B1.1's offense level enhancement for "organizer[s]," "leader[s]," "manager[s]," and

“supervisor[s]” of jointly-undertaken criminal activity.² The Second, Fourth, Sixth, Eleventh, and D.C. Circuits require that the defendant exercise “control” over co-participants to qualify for any of these categories. The First, Third, and Tenth require control for “leader[s],” “supervisor[s]” and “manager[s],” but not “organizer[s].” The Fifth, Seventh, and Eighth do not require control at all, instead applying an indeterminate multi-factor test. And while the Ninth Circuit purports to require control for all of § 3B1.1’s categories, its precedent in this and other cases instead deems the “control” standard satisfied by mere “organizational responsibility,” which can consist of nothing more than defendant’s non-controlling advice to co-participants or facilitation of their conduct. The Circuits’ intractable disagreement about § 3B1.1’s widely-applied enhancement calls for this Court’s clarification.

This case illustrates the harm from the Ninth and other circuits’ watered-down standard, which saddled Mr. Kabir with an unwarranted two-point enhancement despite his lack of control over others. The Ninth Circuit was wrong to jettison control as a requirement. Indeed, a defendant’s exercise of control over others is the central focus of Section 3B1.1, which treats the

² For numbers of defendants to whom § 3B1.1 has been applied in fiscal years 2021, 2020, and 2019, see United States Sentencing Commission Reports, “Chapter 3 Adjustments, Guideline Calculation Based,” *available at <https://www.ussc.gov/research/data-reports/guideline>* (last visited January 12, 2023, and discussed in more detail in section VI(C), below).

defendant's degree of control over co-participants as the rubric for gauging his culpability and corresponding offense level increase. Subsections (a) and (b), applicable to large criminal organizations, impose a four-point enhancement on the most-authoritative individuals—"organizers" and "leaders"—while reserving a reduced three-point enhancement for less-powerful (but still commanding) "managers" and "supervisors" and no enhancement at all on joint actors with no such authority. While subsection (c) collapses the "organizer" "leader," "manager" and "supervisor" categories for smaller criminal organizations, they all still require an elevated hierarchical position over others. The Ninth and other Circuits' acceptance of mere advice to co-participants as a substitute for control threatens to expand Section 3B1.1's enhancement to virtually all joint perpetrators, erasing the Guideline's goal of singling out particularly culpable co-participants for enhanced punishment. Certiorari is needed to clarify that control over others is required—as the Second, Fourth, Sixth, Eleventh, and D.C. Circuits have held—and correct the Ninth and other Circuits' divergent approach.

V. STATEMENT OF THE CASE

Sohiel Kabir was convicted of terrorism-related charges for conspiring with three other people to travel to Afghanistan and engage in armed conflict

against American soldiers. (App. 3a.)³ On resentencing after an initial appeal in which two of his four convictions were reversed, the district court enhanced Kabir’s sentence after finding that he qualified as an “organizer” or “leader” of the four-person conspiracy under section 3B1.1(c) of the United States Sentencing Guidelines.⁴ (App. 17a-18a.) That provision instructs district courts to add two points to a defendant’s offense level if it finds he “was an organizer, leader, manager, or supervisor in any criminal activity” not involving five or more participants, and that was not “otherwise extensive.” U.S.S.G. § 3B1.1(c). The Ninth Circuit had previously held that § 3B1.1(c) requires that the defendant have exercised control over others to

³ Kabir cites the court of appeals’s opinion for facts as to which there is no dispute.

⁴ When sentencing criminal defendants, district courts must consider various statutory factors set forth in 18 U.S.C. § 3553(a), including the United States Sentencing Guidelines. *See* 18 U.S.C. § 3553(a)(4); *United States v. Booker*, 543 U.S. 220, 259-60 (2005). Though the Guidelines are advisory rather than mandatory, district courts must still consult them and take them into account at sentencing. *Hughes v. United States*, 138 S. Ct. 1765, 1772 (2018). The Guidelines assign advisory sentencing ranges based on (1) a numerical “offense level” that is fixed by the pertinent Guideline provision, and increased or decreased based on various aggravating or mitigating circumstances; and (2) a “criminal history category” based largely on the number and type of the defendant’s prior criminal convictions. *See* U.S.S.G. ch. 2 (“Offense Conduct”); ch. 3 (“Adjustments”); ch. 4 (“Criminal History and Criminal Livelihood”); ch. 5 (“Determining the Sentence”). Higher offense levels and higher criminal history categories translate into more severe recommended sentencing ranges. *See* U.S.S.G. ch. 5, pt. A (sentencing table).

be an “organizer” or “leader” in the absence of a criminal organization. *United States v. Harris*, 999 F.3d 1233, 1235 n.1 (9th Cir. 2021). But it upheld Kabir’s enhancement on appeal here—despite the absence of a criminal organization—after concluding that he exercised not control but mere “organizational responsibility,” based on his facilitation of co-conspirators’ conduct and provision of advice they voluntarily followed. (App. 5a-6a.)

A. Trial Evidence Shows Kabir Advised his Co-Conspirators and Facilitated their Conduct, but did not Control Them

The most the record shows, or the district court found, was that Kabir acted as a role model and facilitator for his three co-conspirators; he did not control or coerce them. As the panel opinion notes, he was “alleged to have indoctrinated [them] with a militant Islamist⁵ ideology through social media and other online content,” encouraged them to travel to Afghanistan, and instructed them on how to pack and train for their contemplated mission.

(See App. 4a-5a.) After Kabir himself traveled from Los Angeles to Afghanistan, he communicated with the others (who were still in Los Angeles) to encourage them to “train and prepare for jihad” and “come on

⁵ The term “Islamist” was used by the court of appeals, and is used in this brief, not to “refer generally to Islam as a religion” but instead to “indicate[] a connection with a radical political ideology based on fundamentalist forms of Islam.”(App. 8a (citing *Islamist*, dictionary.com/browse/islamist)).

down” to Afghanistan as well. (App. 5a-6a.) He advised them of travel routes to Kabul, Afghanistan, arranged an apartment for them to use to when they arrived, and reassured them that “everything’s set up for you guys out here,” and that he had informed members of Al-Qaida or the Taliban that they were coming. (App. 6a.) The district court found that Kabir told them “what to pack, how to pack, how to train, what guns to use when practicing, and what sorts of physical training to undertake.” (App. 5a.) But no evidence suggested Kabir threatened or coerced them, or that he would have taken any action against them—or that they would have suffered any consequence—had they disregarded his recommendations.

Though the co-conspirators followed Kabir’s suggestions, they did so of their own accord. In the words of the court of appeals, they “train[ed] with assault rifles on firing ranges; practice[d] their skills with paintball activities; and obtain[ed] passports to travel to Afghanistan.” (App. 6a.) One “even withdrew from college, obtained a refund of his tuition money, and sold his car in order to raise money for” the trip. (App. 6a.) In November 2012, after Kabir told the other three men that he was “leaving on a one-way mission” and implied it might involve C4 explosives, they bought airline tickets to Afghanistan (through Mexico and Turkey) and were arrested as they were driving to Mexico to embark on their journey. (App. 4a.) Kabir was

apprehended by United States military personnel in Afghanistan, who turned him over to the FBI. (App. 4a.)

B. The District Court Applies the “Organizer”/“Leader” Enhancement, Though Kabir Never Controlled Co-Participants

Kabir was convicted after a jury trial of four charges—conspiracy to provide material support to terrorists (18 U.S.C. § 2339A), conspiracy to provide support to a designated foreign terrorist organization (18 U.S.C. § 2339B), conspiracy to commit an offense against the United States (18 U.S.C. § 371), and conspiracy to commit murder (18 U.S.C. § 1117)—and was sentenced to 300 months’ imprisonment. (App. 4a.) After two of those charges were reversed on appeal, Kabir returned to district court for resentencing.⁶ (App. 4a.)

At resentencing, Kabir was assigned a base offense level of 33, pursuant to Guidelines provisions governing conspiracy to commit murder and aiding and abetting. U.S.S.G. §§ 2A1.5, 2X1.1. (App. 9a n.3, 18a.) He also received a total enhancement to his offense level of fourteen points, consisting

⁶ The reversed convictions were for conspiracy to provide material support to a designated foreign terrorist organization in violation of 18 U.S.C. § 2339A, and conspiracy to commit an offense against the United States in violation of 18 U.S.C. § 371. Kabir’s convictions for conspiracy to provide material support to terrorists and conspiracy to commit murder were affirmed. App. 4a; *see also United States v. Kabir*, 828 F. App’x 396, 401 (9th Cir. 2020).

of: (1) a twelve-point enhancement under U.S.S.G. § 3A1.4(a) for committing “a felony that involved, or was intended to promote, a federal crime of terrorism” (App. 19a), and (2) a two-point enhancement under U.S.S.C. § 3B1.1(c), based on the district court’s conclusion that he had served as an organizer or leader. (App. 19a.) Though the resulting calculation yielded offense level 47, that level was reduced to 43, the highest level permitted under the Guidelines. (App. 19a; U.S.S.G. ch.5 pt. A, cmt. n.2.) And while Kabir’s criminal history would ordinarily have placed him in category V, the “federal crime of terrorism” enhancement elevated it to category VI. (App. 9a n.4.) His resulting Guidelines range, based on offense level 43 and criminal history category VI, was life imprisonment.⁷

Kabir urged the district court not to apply the leader/organizer enhancement under Guidelines section 3B1.1(c) because he did not exercise control over his co-conspirators. (App. 16a.) The district court rejected that argument, deeming it sufficient that Kabir acted as the role model and inspiration for the other men and advised them about how to engage in the criminal conduct, including “what to pack, how to pack, how to train, what

⁷ See United States Sentencing Guidelines, ch. 5, pt. A, Sentencing Table.

guns to use when practicing [and] what sorts of physical training to undertake.” (App. 17a-18a.)

C. The Ninth Circuit Upholds the Leader/Organizer Enhancement Based on Kabir’s Advice to Co-Conspirators and Facilitation of their Conduct

Kabir reiterated his objection to the leader/organizer enhancement on appeal, again arguing that the trial evidence failed to show he exercised control over the co-conspirators. *See United States v. Kabir*, Ninth Cir. appeal no. 21-50141, Dkt. No. 17 (Appellant’s Opening Brief) at 18-20. In support of that argument, he pointed to Ninth Circuit caselaw holding that merely instructing co-participants about how to engage in the relevant criminal conduct—such as wiring money to overseas bank accounts or drafting fraudulent tax returns—does not suffice. *Id.* at 20 (citing and discussing *United States v. Holden*, 897 F.3d 1057, 1064 (9th Cir. 2018); *United States v. Whitney*, 673 F.3d 965, 969, 975-76 (9th Cir. 2012)).

The Ninth Circuit rejected this argument, holding that Kabir qualified as a “leader” or “organizer” under U.S.S.G. § 3B1.1(c) because he exercised “the necessary influence and ability to coordinate the [other participants’] behavior . . . so as to achieve [a] desired criminal result.” (App. 5a (quoting *United States v. Doe*, 778 F.3d 814, 826 (9th Cir. 2015)). In support of that conclusion, the Ninth Circuit invoked its precedent stating that “control” can “include[] organizational responsibility” (App. 5a) and then cited—as

evidence of Kabir’s organizational responsibility—Kabir’s provision of advice to his co-conspirators, which they followed. (App. 5a-6a.) The panel specifically emphasized the district court’s finding that Kabir told the co-conspirators “what to pack, how to pack, how to train, what guns to use when practicing, [and] what sorts of physical training to undertake.” (App. 5a.) It rejected Kabir’s argument that these were merely “suggestions,” reasoning that “the record shows that his co-conspirators did what Kabir told them to do” by, *i.e.*, “train[ing] with assault rifles on firing ranges; practic[ing] their skills with paintball activities; . . . obtain[ing] passports to travel to Afghanistan,” and (in one co-conspirator’s case) withdrawing from college and using his refunded tuition money for travel. (App. 6a.)

The panel also focused on various arrangements Kabir made to facilitate the co-conspirators’ trip: advising them of travel routes to Afghanistan, reassuring them that all arrangements were taken care of, and that “everything’s set up for you guys out here,” and Kabir’s representation to the others that he had told members of al-Qaida and the Taliban about them “coming through.” (App. 6a.) Finally, it pointed to Kabir’s recruitment of two of the co-conspirators, and approval of a third joining the group, to hold “[t]he district court’s finding that these facts in the aggregate proved that Kabir was a ‘leader’ or ‘organizer’ has ample support in the record.” (App. 6a.)

VI. REASONS FOR GRANTING THE WRIT

The Ninth Circuit panel's holding that "leader/organizer" status is satisfied by facilitation and advice that co-participants voluntarily follow—instead of actual control—puts it on the wrong side of a deep and fundamental circuit split as to § 3B1.1's meaning. This Court should grant certiorari to affirm that § 3B1.1 leader/organizer status requires not merely advice or facilitation of conduct (as the Fifth, Seventh, Eighth, and now Ninth Circuits hold), but actual exercise of control over participants' conduct, as required by the Second, Fourth, Sixth, Eleventh, and D.C. Circuits. The Circuits' conflicting approaches to this important and oft-recurring question warrant clarification by this Court. Defendants' eligibility for the sentencing enhancement should not depend on the geographic location where they are prosecuted.

A. The Circuits Are Split over the Requirements of U.S.S.G. § 3B1.1's Leader/Organizer Enhancement

A three-way split exists among the Circuits as to the requirements for leader/organizer status under Guidelines Section 3B1.1.

The first group, comprised of the Second, Fourth, Sixth, Eleventh, and D.C. Circuits, requires that the defendant occupy a hierarchically superior role vis-à-vis co-participants, so as to exercise control over them. *See United States v. Wilson*, 832 F. App'x 147, 155 (4th Cir. 2020) (Section 3B1.1

enhancement is permitted only when the government shows the defendant “was an organizer, leader, manager or supervisor of *people* . . . [and] “wields the *actual* exercise of control over those people”) (citing and quoting prior Circuit precedent) (cleaned up); *United States v. Martinez*, 584 F.3d 1022, 1026 (11th Cir. 2009) (for § 3B1.1 to apply, “there must be evidence that the defendant exerted some control, influence or decision-making authority over another participant in the criminal activity.”); *United States v. Quigley*, 373 F.3d 133, 139 (D.C. Cir 2004) (“[A]ll persons receiving an enhancement [under § 3B1.1] must exercise some control over others.”); *United States v. Gort-Didonato*, 109 F.3d 318, 321 (6th Cir. 1997) (“[A] defendant must have exerted control over at least one individual within a criminal organization for the enhancement of § 3B1.1 to be warranted”); *United States v. Brinkworth*, 68 F.3d 633, 342 (2d Cir. 1995) (“Section 3B1.1 requires only that the defendant . . . exercise[] some control over others involved in the commission of the offense”) (internal citation and quotation omitted); *United States v. Kelley*, 36 F.3d 1118, 1129 (D.C. Cir. 1994) (agreeing with cases holding that section 3B1.1 applies only to those who exercise control over criminally responsible subordinates).

A second group, comprised of the First, Third, and Tenth Circuits, holds that control is required only for a defendant to qualify for the § 3B1.1 enhancement as a “leader, supervisor, or manager,” but not as an “organizer.”

See United States v. Adair, 38 F.4th 341, 354 (3d Cir. 2022) (“Organizer” status is met when the defendant “generates a coherent functional structure for coordinated criminal activity,” while “leader” status requires “high-level directive power or influence over criminal activity.”); *United States v. Tejada-Beltran*, 50 F.3d 105, 112 (1st Cir. 1995) (While “leader” implies the exercise of some degree of dominance or power in a hierarchy, . . . [o]ne may be classified as an organizer, though perhaps not as a leader, if he coordinates others so as to facilitate the commission of criminal activity.”); *United States v. Valdez-Arieta*, 127 F.3d 1267, 1270 (10th Cir. 1997) (“While control over others is required for a finding that a defendant was a leader, supervisor, or manager, we hold that no such finding is necessary to support an enhancement for acting as an *organizer* under § 3B1.1(c). A defendant can organize an illegal activity without exercising control over the other participants in the activity.”)

Finally, a third group of Circuits, including the Fifth, Seventh, Eighth, and—particularly after the decision in this case—Ninth, does not require control for either “organizer” or “leader” status under § 3B1.1. *See United States v. Aderinoye*, 33 F.4th 751, 756 (5th Cir. 2022) (“Our precedent does not limit the [§ 3B1.1] enhancement to defendants who controlled other participants in the scheme; it is enough that the defendant managed the criminal enterprise’s property, assets, or activities.”); *United States v. Pira*,

535 F.3d 724, 730 (7th Cir. 2008) (“[T]his court has held that an upward adjustment under section 3B1.1(c) does not require an explicit finding that the defendant exercised control, so long as the criminal activity involves more than one participant and the defendant played a coordinating or organizing role.”) (internal citation and quotation marks omitted); *United States v. Grady*, 972 F.2d 889 (8th Cir. 1992) (per curiam) (upholding an enhancement under § 3B1.1(a) and stating, “We define the term ‘organizer or leader’ broadly.... [The defendant] may be an organizer or leader without having directly controlled his coconspirators.”) (internal citation and quotation marks omitted). The Ninth Circuit’s decision in this case reflects this same approach, holding that the “control” required to qualify as a “leader” or “organizer” can consist of mere “organizational responsibility” predicated on facilitation and advice. (App. 5a.)

B. The Second, Fourth, Sixth, Eleventh, and D.C. Circuits’ Approach is Correct; “Leader/Organizer” Status Requires Control Over Others

The correct approach is that of the Second, Fourth, Sixth, Eleventh, and D.C. Circuits, requiring control over co-participants to qualify for an enhancement under § 3B1.1. The entire structure of section 3B1.1 confirms its focus on control over others as both a proxy for increased culpability and a prerequisite to an enhanced offense level. Subsections (a) and (b) prioritize (for large criminal organizations) more-controlling “organizer[s]” and

“leader[s],” subject to a four-point enhancement, over slightly-less-controlling—but still hierarchically elevated—“manager[s] and supervisors[s]” subject to a three-point enhancement, with no enhancement for “everyone else.” *Quigley*, 373 F.3d at 139. “These levels differ only in degree rather than in kind.” *Id.* (cleaned up). Together, their structure “represents a policy judgment that the more control . . . the offender exercises over the conspirators the more culpable that offender is, and the greater sentence she deserves.” *Id.* Control over others is the driving concept.

Application Note 4⁸ confirms that the Guideline views subsection (a) organizers and leaders as more authoritative—and, for that reason, more blameworthy—than the subsection (b) managers and supervisors, by expressly “distinguish[ing] a leadership and organizational role from one

⁸ Application Note 4 provides: “In distinguishing a leadership and organizational role from one of mere management or supervision, titles such as “kingpin” or “boss” are not controlling. Factors the court should consider include the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others. There can, of course, be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy. This adjustment does not apply to a defendant who merely suggests committing the offense.”

of *mere* management or supervision” based on enumerated factors.⁹ *Quigley*, 373 F.3d at 139-40 (quoting Guideline 3B1.1, cmt. n. 4) (emphasis added). “An application note guiding the distinctions between two levels of enhancement which refers to one as ‘mere’ and recites a list of factors inclusive of degrees of such factors as participation and planning, organizing, controlling, and exercising authority over others [as does Application Note 4], is as the very least strongly suggestive of a hierarchical relationship between the two.” *Id.* at 140. The fact that more control over co-participants translates to a higher offense level enhancement reflects the Guideline’s overriding concern with the extent to which the defendant exercised such control.

Some circuits misinterpret Application Note 4’s inclusion in its factor test of “control and authority exercised over others” to mean control is merely one non-dispositive factor bearing on, rather than a threshold prerequisite to, § 3B1.1’s applicability. *See, e.g., United States v. Weaver*, 716 F.3d 439, 442-43 (7th Cir. 2013); *United States v. Harry*, 960 F.2d 51, 54 (8th Cir. 1992). But the factor test in Application Note 4 does not address whether or not the Guideline applies; it is instead intended to help “distinguish[] a leadership and organizational role from one of mere management or supervision” in

⁹ The commentary and application notes are authoritative unless plainly erroneous, inconsistent with the Guideline, or contrary to the Constitution or federal law. *Stinson v. United States*, 508 U.S. 36, 45 (1993).

large criminal organizations.¹⁰ All of these categories presuppose some degree of control over subordinates, because all reflect a hierarchical relationship. *Quigley*, 373 F.3d at 139-40. “The gravamen of [§ 3B1.1] is control, organization, and responsibility for the actions of other[s].” *United States v. Albers*, 93 F.3d 1469, 1488 (10th Cir. 1996) (cleaned up).

Further evidence of the control requirement to qualify as an “organizer, leader, manager, or supervisor” is provided by Application Note 2.¹¹ That note states that in order to qualify for an “adjustment” under section 3B1.1, the defendant “must have been the organizer, leader, manager, or supervisor of one or more other participants.” U.S.S.G. § 3B1.1, cmt. n.2 (emphasis added). By contrast, a defendant can qualify for an “upward *departure*”—rather than an upward “adjustment”—if he “did not organize, lead, manage, or supervise another participant, but [only] exercised management responsibility *over the*

¹⁰ See *United States v. Graham*, 162 F.3d 1180, 1185 n.5 (D.C. Cir. 1998) (Application note 4 “governs in cases in which the court must distinguish an organizer or leader from a manager or supervisor.”).

¹¹ Application Note 2 states, “To qualify for an adjustment under this section, the defendant must have been the organizer, leader, manager, or supervisor of one or more other participants. An upward departure may be warranted, however, in the case of a defendant who did not organize, lead, manage, or supervise another participant, but who nevertheless exercised management responsibility over the property, assets, or activities of a criminal organization.”

property, assets, or activities of a criminal organization.” *Id.* (emphasis added).

Adjustments and departures are different: an “upward adjustment” shifts the Guidelines range up, whereas an “upward departure” involves “imposition of a sentence outside the applicable guidelines range or . . . a sentence that is otherwise different from the guideline sentence.” U.S.S.G. § 1B1.1, cmt. n. F; *see also United States v. Ochoa-Gomez*, 777 F.3d 278, 285 (5th Cir. 2015) (Prado, J., concurring) (explaining the distinction between adjustments to the Guidelines range and departures from that range).

Application Note 2 makes clear that the type of relief provided in section 3B1.1 subsections (a)-(c)—an upward “adjustment” of the Guidelines range—requires that the defendant occupied a position of control over “one or more of the other *participants*,” not merely over the organization’s property or conduct. It is only the separate sentencing action of “upward[ly] depart[ing]” from the Guidelines range—an approach not addressed or provided for in section 3B1.1—that is permitted where the defendant did not occupy that hierarchical role in relation to other participants, but merely managed criminal “property, assets, or activities.” *See Ochoa-Gomez*, 777 F.3d at 284 (Prado, J., concurring) (recognizing that “the plain text of Application Note 2 . . . requires evidence of supervising or managing *other participants* to support the adjustment,” but “recommends only an *upward departure* in cases where

the defendant managed the organization's property or activities); *Gort-Didonato*, 109 F.3d at 321-22 (drawing the same distinction). Application Note 2 therefore "makes it pellucid that the management of criminal activities (as opposed to the management of criminal actors) may ground an upward departure but not an upward role-in-the-offense adjustment" under the Guideline. *United States v. Ramos-Paulino*, 488 F.3d 459, 464 (1st Cir. 2007). Section 3B1.1's Guideline adjustments require control over co-participants.

The background commentary confirms the particular importance of control as a prerequisite to the § 3B1.1 enhancement for non-extensive criminal organizations addressed in subsection (c): the type involved here. It states in relevant part, "[i]n relatively small criminal enterprises [covered in subsection (c)] that are not otherwise to be considered as extensive in scope or in planning or preparation, the distinction between organization and leadership, and that of management and supervision, is of less significance than in larger enterprises [covered in subsections (a) and (b)] that tend to have clearly delineated divisions of responsibility." U.S.S.G. § 3B1.1, background cmt.

As organizational tasks are less likely to be formally delegated within small criminal groups, such tasks are unlikely to indicate any elevated or authoritative role on the part of the individual performing them. Indeed,

participants in small criminal groups likely routinely exchange advice about how to accomplish their criminal goals. Even when a participant “orchestrates” a particular transaction, merely coordinating the necessary activity to achieve a criminal result does not necessarily entail exercising authority over those who carry out the plan. *Martinez*, 584 F.3d at 1028 (“While a person who orchestrates a transaction may also be one who organizes and supervises the transaction, the orchestrator just as easily could be a subordinate charged with dealing with the relatively minor details of completing that transaction.”) Focusing on whether a defendant organized activities, rather than whether he or she controlled other people, cannot reliably distinguish more-culpable from less-culpable participants in the small criminal organizations covered in § 3B1.1(c).

Because section 3B1.1 and its commentary treat a defendant’s control over others as the measuring stick for culpability and enhanced punishment, only the Second, Fourth, Sixth, Eleventh, and D.C. Circuits’ control-over-others requirement comports with its text and meaning. Focusing on a defendant’s mere assistance to co-participants or facilitation of their activities, as the Ninth Circuit did here, misses the mark and would expand Guideline 3B1.1 beyond any intelligible limits. Particularly in small criminal organizations like the ones covered by subsection (c), all participants are likely to help organize the criminal activity or provide co-participants with

the type of advice Kabir offered his co-conspirators, such as how to train, prepare, or travel to a destination. Indeed, mutual assistance is the essence of joint criminal conduct. Such ubiquitous acts cannot provide a basis for singling out particular co-participants for enhanced penalties. *See, e.g., Holden*, 897 F.3d at 1065 (enhancement not established by defendant's instructing of co-defendant on how to send fraud proceeds to overseas accounts); *Whitney*, 673 F.3d at 969, 975-76 (role adjustment not satisfied by defendant's acts of providing co-defendant with tax forms and information on filing false tax returns). Such vague and expansive application would defy § 3B1.1's express limitation to hierarchically-elevated individuals, rather than all participants in joint illegal conduct.

C. This Court Should Grant Certiorari to Resolve the Conflict

This Court should grant certiorari to harmonize the Circuits' conflicting approaches to Guideline 3B1.1's widely-applicable and frequently-invoked enhancements. Its provisions impact thousands of criminal defendants nationwide each year, having been applied to 2,403 criminal defendants in

fiscal year 2021,¹² 2,291 in fiscal year 2020,¹³ and 3,328 in fiscal year 2019.¹⁴

The Circuits' inconsistent approaches to its application unfairly subject these thousands of defendants to differing Guidelines ranges for comparable conduct, based solely on the fortuity of the jurisdiction in which they are prosecuted. Such disparities in Guidelines calculations harm defendants' substantial rights and jeopardize the proceedings' fairness, integrity, and public reputation. *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1908 (2018). This Court is the only entity with the power to fix the problem, and it should grant certiorari to do so.

¹² See United States Sentencing Commission, “Chapter Three Adjustments, Guideline Calculation Based” (Fiscal Year 2021) at 2, available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/2021/Ch3_Guideline_Based.pdf (last visited January 12, 2023).

¹³ See United States Sentencing Commission, “Chapter Three Adjustments, Guideline Calculation Based” (FY 2020) at 2, available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/Ch3_Guideline_Based.pdf (last visited January 12, 2023).

¹⁴ See United States Sentencing Commission, “Chapter Three Adjustments, Guideline Calculation Based” (FY 2019) at 2, available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/2019/Ch3_Guideline_Based.pdf (last visited January 12, 2023).

VII. CONCLUSION

For the foregoing reasons, Mr. Kabir respectfully requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

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