No. 23-5338

IN THE
SUPREME COURT OF THE UNITED STATES

KEITH A. PENN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

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

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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QUESTION PRESENTED

> Whether the legal test announced in *Shular v. United States* — a state "serious drug offense" is an offense with elements that "necessarily entail one of the types of *conduct*" identified in 18 U.S.C. § 924(e)(2)(A)(ii) — broadly encompasses preliminary steps and attempts to engage in the identified conduct?

Conflict with Shular

The government argues that Penn erroneously contends the decision below conflicts with *Shular v. United States*, 140 S. Ct. 779 (2020). (BIO at 7). The government argues the dispositive question is whether an attempted transfer of a controlled substance constitutes "distributing" under 18 U.S.C. § 924(e)(2)(A)(ii). (BIO at 7). The government contends the panel decision properly consulted "dictionaries, state law and federal law" in concluding an attempted transfer constitutes "distributing" under § 924(e)(2)(A)(ii). (BIO at 7). And the government argues the petition "does not directly engage with the definition of "distributing," and "does not proffer any sound basis for questioning the court of appeals' understanding of that term." (BIO at 7).

The government overlooks a number of points. Although the panel relied on federal law (the Controlled Substances Act, 21 U.S.C. § 801 et. seq.) to conclude that distribution encompasses attempts to distribute, *Shular* rejected any reliance on the Controlled Substances Act in the interpretation of § 924(e)(2)(A)(ii). *Id.* at 787. The difference in the text of the Controlled Substance Act and § 924(e)(2)(A)(ii) "makes any divergence in their application unremarkable." *Id.* at 787 (quoting the

Government's Brief at 22). The fact that the panel's decision relied on the Controlled Substances Act demonstrates a conflict with *Shular* and provides a "sound basis" for questioning the panel's conclusion.

In *Shular*, the petitioner argued the Court should look to the elements of the states' drug offenses to ascertain the Congressional intent to incorporate the nearly unanimous requirement of a *mens rea* element in ACCA's serious state drug offenses. (*Shular*, Petitioner's Initial Brief at 7, 12-13, 21-22 & Appendix). But the Court was unmoved by the argument. By adopting the government's proposed test, the Court necessarily opined that a survey of state law did not illuminate the intent of Congress in the enactment of § 924(e)(2)(A)(ii). But a survey of state law is precisely what the panel below relied upon to support its conclusion that "distributing" broadly encompasses attempts to distribute. *Penn*, 63 F.4th at 1312, n. 1. The government has done nothing to explain why a survey of the states' laws was irrelevant, in *Shular*, to determine whether Congress intended to include a *mens rea* element in the state "serious drug offenses," but is now relevant to determine whether Congress intended to include *attempted* conduct in the state "serious drug offenses." The fact that the panel's decision relied on a survey of state law to support its conclusion demonstrates a conflict with *Shular* and provides a "sound basis" for questioning the panel's conclusion.

Regarding the panel's reliance on dictionary definitions, the government contends Penn did not "directly engage with the definition of "distributing."" (BIO at 7). But Penn did rely on a dictionary definition of "distribution." (Pet. at 26) ("The

action of dividing and dealing out or bestowing in portions among a number of recipients; apportionment; allotment"). If the government meant to suggest a distinction between "distribution" and "distributing," Penn notes the circuit court actually relied on the dictionary definition of "distribute," *United States v. Penn*, 63 F.4th at 1305, 1312 (11th Cir. 2023), and any distinction between the related terms distribute, distribution, and distributing, is much ado about nothing. More importantly, the panel's reference to the broad and indeterminate "process" of distribution comes not from any dictionary but from the panel, itself, or possibly from 21 U.S.C. § 802(15) (defining the term "manufacture" to include the "processing of a drug").[1] But, of course, *Shular* instructed that the terms of the Controlled Substance Act play no role in the interpretation of § 924(e)(2)(A)(ii). *Id.* at 787.

The government failed to address Penn's argument that the plain meaning of "distribution" of a controlled substance requires the apportionment, or allotment, of a controlled substance among multiple recipients. (Pet. at 25-26). Applying the plain meaning of "distribution" makes sense under ACCA because the statute targets "serious drug offenses." It is logical to conclude that Congress intended to target offenders engaged in the trafficking of drugs throughout the community. The Florida statute at issue, however, does not require apportionment or allotment of drugs to

[1] The fact that *United States v. Prentice*, 956 F.3d 295 (5th Cir. 2020), also concocted the phrase "conduct *that is part of a process of* distribution" only deepens the split of authority and heightens the conflict with *Shular*. *Prentice*, 956 F.3d at 300 (emphasis in original).

multiple recipients. The Florida statute, therefore, does not qualify, categorically, as a serious drug offense under the plain meaning of "distribution" or "distributing."

The government and the panel below discount the plain meaning of the terms "conduct" and "activity" employed by the Court in *Shular*. They overlook the basic point that *Shular* interpreted § 924(e)(2)(A)(ii). The Court's interpretation may be regarded as "judicial gloss," but that is no reason to downplay or ignore the language employed by the Court. Where the Court opined that the elements of the state serious drug offense must include the "conduct" or the "activity" of "distributing," the government and the panel missed the mark by advocating the broader, ambiguous, "process" of distribution. The lack of reliance on the plain meaning of "conduct" and "activity" circumvents the appropriate degree of deference due the Court's decisions. This, too, provides a sound basis for questioning the panel's interpretation of "distributing" and demonstrates conflict with *Shular*.

Conflict with Fields

The government argues the decision below does not conflict with the decision in *United States v. Fields*, 53 F.4th 1027 (6th Cir. 2022), because *Fields* addressed the ACCA conduct of "manufacturing" rather than "distributing." (BIO at 8-9). The suggestion is that the cases are distinguishable on that basis. And the government argues the Kentucky statute at issue in *Fields* applied even where the defendant was not yet capable of manufacturing a controlled substance. (BIO at 8-9).

The government overlooks the point that the conflict in the decisions lies not in type of conduct involved—manufacturing vs. distributing—or the state's

interpretation of the state statute. The conflict pertains to the methodologies employed by the circuit courts in the interpretation of § 924(e)(2)(A)(ii) and the application of *Shular*. *Shular* holds § 924(e)(2)(A)(ii) describes a class of state offenses with elements that necessarily entail one of the types of conduct identified in § 924(e)(2)(A)(ii). The *Shular* test applies to manufacturing as well as distributing, so the factual distinctions between the conduct of manufacturing and the conduct of distributing is not a basis for distinguishing the cases. *Fields* held the Kentucky statute penalized one who possessed a precursor chemical *with the intent* to manufacture a controlled substance. *Id.* at 1049-50. The Kentucky offense, however, did not require the actual *conduct* of manufacturing, so it did not satisfy the *Shular* test. "Intent to take an action does not necessarily mean the action will occur." *Id.* at 1050-51. *Fields* held *Shular* requires the actual conduct of manufacturing. *Id.* at 1051. In contrast, the panel below held the actual conduct of distributing is not required; the mere attempt to distribute is sufficient. The conflict in methodologies is thus exposed.

CONCLUSION

For the reasons above and in the Petition, the Court should grant the writ.

Respectfully submitted,

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