No. 14-165

IN THE

Supreme Court of the United States

TAURUS D. HOYLE,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF

The government does not dispute that the Ninth and Tenth Circuits, at least, have reached diametrically opposite results on the question presented here. Nor does the government dispute that the question raises an important issue, transcending petitioner's case and affecting potentially thousands of defendants in criminal proceedings around the country. Also undisputed is this petition provides an ideal vehicle for resolving the question presented, free from any factual or procedural detractions.

What the government does offer in its opposition brief does nothing to disturb the need for this Court's review. While the government attempts to distinguish numerous circuit court decisions on each side of the split, it says precious little about the undisputed split between the Ninth and Tenth Circuits, which alone warrants certiorari. Moreover, that other circuits' cases might be distinguished does not change the fact that those circuits nonetheless gave ample indications regarding which side of the split they would join. And besides, this Court grants certiorari on the basis of indications and dicta, not just square holdings in cases on all fours.

To the extent the government's opposition rises and falls with the merits of the decision below—indeed, the government spends the vast majority of its opposition brief on the merits—such analysis is best left to merits briefing *after* certiorari is granted. In any event, the government's argument, like the Tenth Circuit's below, runs contrary to this Court's precedent and plain statutory language. Properly construed, the statute, 18 U.S.C. § 921(a)(20), controls and trumps the Guidelines. This Court should

grant certiorari to make sure that the Ninth Circuit's correct result applies to criminal defendants no matter where they happen to reside.

ARGUMENT

I. AS THE GOVERNMENT CONCEDES, CIRCUIT COURTS ARE SPLIT ON THE QUESTION PRESENTED

The government concedes, as it must, that a square conflict exists between at least the Tenth and Ninth Circuits. Opp. 6, 16. That warrants this Court's review. The government responds that review is not warranted because no other circuit has joined the split, and the Ninth Circuit is an outlier that might (someday) reconsider its views. But review would be needed even if, perhaps especially if, the government were correct that the Ninth Circuit is destined to stand alone. In any event, the government is mistaken that no other circuit has joined the split.

Again, the undisputed conflict between the Tenth and Ninth Circuits calls for certiorari review. The Court's rules and practice do not require that multiple circuits weigh in on an issue before granting certiorari. And on a number of occasions, two has been enough. *See, e.g.*, *Burlington N. R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454 (1987) (writ of certiorari granted to resolve a conflict between the Eighth and Tenth Circuits); *Park 'n Fly v. Dollar Park & Fly*, 469 U.S. 189 (1985) (same regarding a split between the Seventh and Ninth Circuits). Significantly, the Ninth and Tenth Circuits—the two circuits the government admits are in conflict—comprise fifteen States and two United States territories; their conflict thus means that more than a quarter of the population of the United States is already subject to dif-

fering rules. *Circuit Population*, WIKIPEDIA, http://en.wikipedia.org/wiki/United_States_courts_of_appeals (last visited Nov. 24, 2014) (citing *2010 Census*, U.S. CENSUS BUREAU, 2010). Nothing more is required before granting certiorari.

This analysis would not change even if the government were correct that the Ninth Circuit is an outlier. *See, e.g.*, *United States v. Turkette*, 452 U.S. 576, 578 (1981) (certiorari to the First Circuit when it decided an issue contrary to all other circuits that had weighed in). Even if every court to consider this question in the future were to side with the Tenth, the application of a different rule in the Ninth—the largest of the circuits by landmass and population—would be cause enough for concern.

But the Ninth Circuit is not an outlier, for both sides of the undisputed circuit split run deeper than the two circuits the government admits are in conflict. Starting with the Tenth Circuit side of the split, the government disputes that the First, Third, Sixth, and Eighth Circuits have joined the Tenth. Opp. 18-19. However, the government's attempt to distinguish those circuits' cases from the Tenth Circuit's decision below as involving a different provision of § 921(a)(20) is beside the point. Rather, the relevant marker, as petitioner demonstrated, Pet. 11-13, is the reasoning in those decisions, which erroneously concluded, along with the Tenth Circuit, that the purpose of § 921(a)(20) is entirely different from the purpose of the Guidelines, and therefore the Guidelines do not have to yield to the statute. Not surprisingly, the Third Circuit even explicitly highlighted the Ninth Circuit's decision in *United States v. Palmer*, 183 F.3d 1014 (1999), as reaching the result contrary

to that of the Eighth Circuit's decision that the Third Circuit chose to follow. *See United States v. Shelton*, 91 F. App'x 247, 249 (3d Cir. 2004) (citing *United States v. Morris*, 139 F.3d 582 (8th Cir. 1998), in support, and *Palmer* (9th Cir.), to acknowledge the split in authorities).

And on the Ninth Circuit side of the split, the government disputes "that the Fourth Circuit agrees with *Palmer*." Opp. 17-18. But there, too, the government points merely to a few potentially distinguishing features of the Fourth Circuit's cases in petitioner's brief. *Id.* (discussing *United States v. Metheney*, 11 F. App'x. 92 (4th Cir. 2001), and *United States v. Hayes*, 68 F. App'x 432 (4th Cir. 2003)). That, again, is beside the point. What the government ignores is language in those decisions that suggests the Fourth Circuit is likely to follow *Palmer* in an appropriate case raising the question presented here, which is what petitioner stressed in his brief. Pet. 11.

In sum, the government is wrong to believe that its ability to distinguish cases on either side of the split makes this petition unworthy of certiorari. This Court has relied on indications, rather than demanding holdings, in determining the extent of a circuit split. *See, e.g.*, *Martin v. Hadix*, 527 U.S. 343, 352 (1999) (granting certiorari to the Sixth Circuit based, in part, on the D.C. Circuit's "suggesti[on] in dicta" that it would decide the issue differently). Just so here, as other circuits have indicated on which side of the undisputed split between the Ninth and Tenth Circuits they line up. This case is ripe for this Court's review.

II. THE TENTH CIRCUIT DEPARTED FROM THIS COURT'S PRECEDENT

The government spends the vast majority of its opposition brief on the merits of the question presented, trying to demonstrate why the Tenth Circuit got the question right, and the Ninth Circuit wrong. Opp. 7-17. That the government disagrees with petitioner on the merits is not surprising. After all, the question produced the undisputed circuit split between at least the Ninth and Tenth Circuits. The disagreement calls for this Court's resolution. The government's argument, however, is also incorrect in the following three ways.

First, the government's interpretation of the key phrase "for purposes of this chapter" in § 921(a)(20) is mistaken. The government acknowledges that petitioner's reading of the word "purpose"—which would include sentencing enhancement, for sentencing is one purpose of the chapter, as stated in 18 U.S.C. § 924—comports with dictionary definition. Opp. 12. But the government then sets that definition aside and argues instead that "the phrase 'for purposes of this chapter' specifies the relevant statutory provisions to which the limitation applies." *Id.* The government ignores, however, that § 921(a) already includes such a specifying provision when it opens with, "as used in this chapter." Indeed, Congress frequently employs the phrase "as used in" to specify that a term carries a certain meaning when it appears in a certain code location. *See, e.g.*, 18 U.S.C. § 1961 (RICO definition section begins with umbrella phrase "[as] used in this chapter"); 21 U.S.C. § 802 (Controlled Substances Act definition section begins with umbrella phrase "[a]s used in this title"). The

phrase "for purposes of this chapter," as it appears in § 921(a)(20), therefore must mean something different than "as used in this chapter," for "a legislature is presumed to have used no superfluous words." *Platt v. Union P.R. Co.*, 99 U.S. 48, 58 (1879). And the plain reading of "for purposes of this chapter" shows that § 921(a)(20) applies to sentencing enhancements and so must trump the Guidelines' contrary provision. Pet. 13-17 (relying on *United States v. LaBonte*, 520 U.S. 751 (1997)).

Petitioner's plain reading of the phrase "for purposes of this chapter" as encompassing sentencing is further reinforced by the fact that only some subsections of § 921(a) include the phrase "for purposes of this chapter." Absent evidence to the contrary, and the government offers none, when Congress uses different language in different parts of the statute, "it is generally presumed that Congress acts intentionally and purposely" in its variation. *Russello v. United States*, 464 U.S. 16, 23 (1983).

Second, the government incorrectly relies upon *Kimbrough v. United States*, 552 U.S. 85 (2007), as "bear[ing] a closer resemblance" to this case than does *LaBonte*. Opp. 15-16. *Kimbrough* sheds no light on the case at hand because the issue there did not involve a specific statutory provision that was argued to be in conflict with the Guidelines. Instead, the rejected argument in *Kimbrough* "lack[ed] grounding in the text of the 1986 Act," which was the statute at issue in that case. 552 U.S. at 102-05. Here, as in *LaBonte*, a specific statutory provision—"for purposes of this chapter," § 921(a)(20)—pinpoints a clear conflict between the statute and the Guidelines. For this reason, too, there would be no need,

contrary to the government's suggestion, for the Ninth Circuit to reconsider *Palmer* "[i]n light of * * * this Court's intervening decision in *Kimbrough*." Opp. 17. Even the Tenth Circuit's erroneous decision below saw no relevance in *Kimbrough* and did not cite it in the course of departing from *Palmer*. If the government's reading of *Kimbrough* were correct, it would have been strange for the Tenth Circuit not to mention that decision as a, if not the, reason not to follow the Ninth Circuit.

Finally, the government argues that *Palmer* is "internally inconsistent" because the Ninth Circuit concluded that convictions for which civil rights have been restored cannot be counted in determining the offense level assigned to a crime under the Guidelines, but can be counted in establishing a defendant's criminal history category. *See Palmer*, 183 F.3d at 1017; Opp. 16-17. Proper understanding of § 921(a)(20) and the Guidelines removes any inconsistency.

The Guidelines range for each criminal sentence is a product of a matrix with two inputs. U.S.S.G. § 1B1.1. The first input is the "offense level," which is calculated based on "[o]ffense [c]onduct" and other "[r]elevant [c]onduct." U.S.S.G. § 1B1.3(a). Put simply, the "offense level" tells us what the defendant *did*. The second input is the defendant's "criminal history category," which accounts for the number and severity of an individual's past convictions. U.S.S.G. § 4A1.1 *et seq*. The "criminal history category" tells us who the defendant *is*. Thus, each element—the severity of the offense and the character of the offender—is taken into account, as required by the federal sentencing scheme. *See* 18 U.S.C. § 3553(a)(1)

(instructing a sentencing court to consider "the nature and circumstances of the offense and the history and characteristics of the defendant").

In light of this two-variable calculation method deployed throughout the Guidelines, the Ninth Circuit's decision is hardly internally inconsistent. The phrase "for purposes of this chapter" in § 921(a)(20) extends to sentence enhancements for the charged *offense*. *See* § 924. There is thus a *LaBonte* conflict between the statute and a defendant's offense level calculation under the Guidelines. But the "chapter"—Chapter 44—has nothing to say about enhancements based on characteristics of a particular *offender*. And so it was quite consistent for the Ninth Circuit to conclude that no conflict exists between the statute and the criminal history calculations in the Guidelines.

In sum, this Court's guidance is needed because the Tenth Circuit's decision contradicts both this Court's precedent and a federal statute's plain language. And as even the government appears to concede (through silence), this is an opportune vehicle and time for the Court to bring order to the chaos in the courts below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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