No. 10-918

In the Supreme Court of the United States

STEPHEN HENDERSON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
LANNY A. BREUER
Assistant Attorney General
CLAIRE MCCUSKER MURRAY
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the district court committed plain error in finding that petitioner's guilty plea to a state drug felony, which resulted in the imposition of a suspended sentence, was a prior conviction for purposes of sentence enhancement.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes and rule: Page

In the Supreme Court of the United States

No. 10-918

STEPHEN HENDERSON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is reported at 613 F.3d 1177.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 2010. A petition for rehearing was denied on September 10, 2010 (Pet. App. B1). On December 2, 2010, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including January 10, 2011, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Missouri, petitioner

was convicted on one count of conspiracy to distribute and possess with the intent to distribute more than five kilograms of cocaine, in violation of 21 U.S.C. 841(a)(1) and 846, and one count of distributing more than five kilograms of cocaine, in violation of 21 U.S.C. 841(a)(1). Petitioner was sentenced to life imprisonment, to be followed by ten years of supervised release. Pet. App. A4; Judgment 2-3. The court of appeals affirmed. Pet. App. A1-A17.

1. In 2008, a confidential informant advised Drug Enforcement Administration (DEA) agents that the informant had purchased more than 50 kilograms of cocaine from petitioner. Presentence Report (PSR) ¶ 8. DEA agents then investigated petitioner's activities, and in March 2008, they monitored a drug transaction in which petitioner delivered ten kilograms of cocaine to a confidential informant. PSR ¶ 9. The investigation revealed that petitioner regularly sold between 10 and 30 kilograms of cocaine to six different buyers. *Ibid.* DEA agents then searched petitioner's girlfriend's house, as well as his alternate residence, seizing over $1.2 million in cash. PSR ¶ 10. Petitioner admitted that the seized money was proceeds from the sale of cocaine. *Ibid.*

2. A federal grand jury sitting in the Eastern District of Missouri returned a six-count indictment against petitioner and his supplier, who was charged as a co-conspirator. PSR ¶ 1. The indictment charged petitioner with one count of conspiring to distribute and possess with the intent to distribute more than five kilograms of cocaine, in violation of 21 U.S.C. 841(a)(1) and 846, and one count of knowingly and intentionally distributing more than five kilograms of cocaine, in violation of 21 U.S.C. 841(a)(1). PSR ¶¶ 1-2.

Under 21 U.S.C. 841(b)(1)(A), an offender who is convicted of manufacturing, distributing, dispensing, or possessing with intent to distribute large quantities of a controlled substance—in the case of cocaine, five kilograms or more—is subject to a mandatory minimum sentence if he commits the offense "after two or more prior convictions for a felony drug offense have become final." Before petitioner's trial, the government filed a criminal information detailing his two previous felony drug offenses and advising the court that, if convicted, petitioner would be subject to a mandatory minimum term of life imprisonment. PSR ¶ 3; see 21 U.S.C. 851.

Following petitioner's conviction, the PSR found that petitioner had previously been convicted of two Missouri drug felonies: illegal possession of a controlled substance (cocaine) in 1989 and illegal sale of cocaine in 1993. PSR ¶¶ 29, 33. The PSR therefore found that petitioner was subject to a mandatory minimum life sentence. PSR ¶¶ 67-68. Although petitioner objected to the applicability of the mandatory life sentence, he did not contest that his prior convictions were predicate offenses for purposes of Section 841(b)(1)(A). See PSR Addendum ¶¶ 67-68.

The district court sentenced petitioner to life imprisonment, to be followed by ten years of supervised release. Pet. App. A6; Judgment 2-3.

3. For the first time on appeal, petitioner argued that he was not eligible for the Section 841(b) sentencing enhancement because his 1989 felony conviction had resulted in a suspended imposition of sentence, whereby he served a year's probation in lieu of imprisonment. Pet. App. A16; see Pet. C.A. Br. 47-49. Petitioner argued that because a crime culminating in a suspended imposition of sentence constitutes neither a "conviction,"

nor a "final judgment" for most purposes under Missouri law, see *Yale* v. *City of Independence*, 846 S.W.2d 193, 195 (Mo. 1993) (en banc), his 1989 felony was not a predicate for purposes of the Section 841(b) sentence enhancement.

The court of appeals affirmed. Pet App. A1-A17. The court relied on Eighth Circuit precedent holding that "the question of what constitutes a 'prior conviction' for purposes of [Section] 841(b)(1)(A) is a matter of federal, not state, law." *Id.* at A16 (quoting *United States* v. *Craddock*, 593 F.3d 699, 701 (8th Cir. 2010)). Moreover, the court of appeals pointed out that under the same precedent, "a suspended imposition of sentence qualifies as such a prior conviction." *Ibid.* Accordingly, the court held that petitioner was properly subject to the enhanced sentence under Section 841(b). *Ibid.*

ARGUMENT

Petitioner contends (Pet. 11-25) that this Court's review is warranted because the courts of appeals are divided over whether state or federal law governs the definition of a "prior conviction" for purposes of the sentence enhancement provision of 21 U.S.C. 841(b). He further contends (Pet. 26-29) that the court of appeals violated the rule of lenity in choosing the more stringent of two lines of circuit case law governing the issue in question. Those contentions lack merit, and the decision below does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

1. a. Petitioner errs in arguing that state law should govern whether his 1989 felony constitutes a prior con-

viction for purposes of Section 841(b).[1] In *Dickerson* v. *New Banner Institute, Inc.*, 460 U.S. 103, 119 (1983), this Court recognized that "in the absence of a plain indication to the contrary, * * * it is to be assumed when Congress enacts a statute that it does not intend to make its application dependent on state law." *Ibid.* (citation and alteration omitted); see also, *e.g.*, *Taylor* v. *United States*, 495 U.S. 575, 590-592 (1990). This rule "makes for desirable national uniformity" in the interpretation and application of federal statutes, "unaffected by varying state laws, procedures, and definitions of 'conviction.'" *Dickerson*, 460 U.S. at 112. In reliance on *Dickerson*, the courts of appeals have uniformly held that a state court's imposition of probation following a defendant's guilty plea is a "conviction" for purposes of 21 U.S.C. 841(b)'s sentence enhancement. See *United States* v. *Miller*, 434 F.3d 820, 823-824 (6th Cir.), cert. denied, 547 U.S. 1086 (2006); *United States* v. *Cisneros*, 112 F.3d 1272, 1280-1282 (5th Cir. 1997); *United States* v. *Mejias*, 47 F.3d 401, 402 (11th Cir. 1995); *United States* v. *Gomez*, 24 F.3d 924, 930 (7th Cir.), cert. denied, 513 U.S. 909 (1994); *United States* v. *Campbell*, 980 F.2d 245, 249-251 (4th Cir. 1992), cert. denied, 508 U.S. 952 (1993).

---

[1] Because petitioner failed to raise in the district court his objection to the court's reliance on his 1989 conviction, his claim is subject to review only for plain error. See Fed. R. Crim. P. 52(b); *United States* v. *Olano*, 507 U.S. 725, 731-732 (1993). To establish reversible plain error, petitioner must show that (1) there was an error, (2) that was plain, (3) that affected his substantial rights, and (4) that seriously affected the fairness, integrity, or public reputation of judicial proceedings. See *Johnson* v. *United States*, 520 U.S. 461, 466-467 (1997). Petitioner cannot meet this heavy burden because, as explained in the text, the courts below correctly applied Section 841(b) to his 1989 felony.

In *Dickerson*, the manager of a company had previously pleaded guilty to a state criminal offense. The state court noted his plea and imposed a sentence of probation, but deferred—and eventually expunged—its judgment pursuant to state law. 460 U.S. at 107-108. This Court nevertheless held that the manager had been "convicted" for purposes of a federal statute barring firearms transactions by companies managed by convicted felons. See *id.* at 110-122. In reaching this conclusion, this Court emphasized that the manager had pleaded guilty to the state offense, noting that, in some circumstances, this Court had "considered a guilty plea alone enough to constitute a 'conviction.'" *Id.* at 112. In addition, this Court pointed out that the manager's sentencing judge had placed him on probation following his guilty plea. That action was effectively an adjudication of guilt because "one cannot be placed on probation if the court does not deem him to be guilty of a crime." *Id.* at 113-114. Furthermore, because the subsequent expungement meant "no more than that the State has provided a means for the trial court not to accord a conviction certain continuing effects under state law," this Court determined that it did not "alter the legality of the previous conviction and [did] not signify that the defendant was innocent of the crime to which he pleaded guilty." *Id.* at 115.[2]

---

[2] Congress responded to *Dickerson* by providing that, for purposes of the firearms laws, "[w]hat constitutes a conviction of such a crime [punishable by imprisonment for a term exceeding one year] shall be determined in accordance with the law of the jurisdiction in which the proceedings were held." 18 U.S.C. 921(a)(20). Although this provision means that state law now controls what constitutes a "conviction" in the firearms context, *Dickerson* continues to control the meaning of "con-

The same result should follow here. Section 841(b) contains no indication that Congress intended the imposition of the sentence enhancement to depend on whether state law would define a defendant's suspended sentence as a "conviction." See 21 U.S.C. 841(b) ("If any person commits a violation [of particular drug provisions] after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release."). By contrast, when Congress does intend to utilize a state law definition of "conviction," it typically uses explicit language to that effect. See, *e.g.*, 18 U.S.C. 921(a)(20) (for purposes of sentence enhancement, "[w]hat constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held").

Under federal law, petitioner's 1989 felony drug offense clearly constitutes a "conviction." Petitioner pleaded guilty and was placed on probation. PSR ¶ 29. These actions indicate that the court actually adjudicated him guilty, and the imposition of a suspended sentence did not "alter the legality of the previous conviction and [did] not signify that [petitioner] was innocent." *Dickerson*, 460 U.S. at 115; see Mo. Ann. Stat. § 557.011(2)(3) (West 1996) (allowing a court to suspend the imposition of sentence "[w]henever any person *has been found guilty* of a felony or a misdemeanor") (emphasis added).

Congress enacted Section 841(b) to impose enhanced punishment on repeat drug offenders. See, *e.g.*, *United States* v. *LaBonte*, 520 U.S. 751, 758-759 (1997). Peti-

---

viction" in other statutes, such as Section 841(b), that do not define that term.

tioner's two prior state court convictions demonstrate that he is a repeat drug offender. Missouri's provision for suspending the imposition of sentence was designed to show leniency to a deserving (and often first-time) offender. See *Yale* v. *City of Independence*, 846 S.W.2d 193, 195 (Mo. 1993) (en banc) ("with suspended imposition of sentence, trial judges have a tool for handling offenders worthy of the most lenient treatment").[3] That state law policy does not enable him to avoid a federal statute providing an enhanced punishment if he goes on to commit additional drug crimes. The court of appeals thus correctly determined that petitioner's 1989 felony offense constituted a prior conviction for purposes of Section 841(b).[4]

b. Contrary to petitioner's contention (Pet. 11-18), the decision below does not conflict with the Ninth Circuit's decisions in *Ramirez-Altamirano* v. *Holder*, 563 F.3d 800, 811-812 (2009), and *Rice* v. *Holder*, 597 F.3d 952, 956-957 (2010), with the Tenth Circuit's decision in

---

[3] Even Missouri recognizes that suspended sentences do not bar treatment of the defendant as a recidivist. See Mo. Ann. Stat. § 558.016 (West 1999) (Missouri's recidivism statute subjects offenders who have "pleaded guilty" to a prior felony to enhanced sentences, even if the prior felony resulted in a suspended imposition of sentence); *State* v. *Talkington*, 25 S.W.3d 657 (Mo. Ct. App. 2000); see also Mo. Ann. Stat. § 491.050 (West 1996) (allowing witnesses who have previously pleaded guilty to a crime to be impeached by their prior "convictions," even if the court receiving the guilty plea imposed a suspended sentence).

[4] Petitioner's reliance (Pet. 21-22) on 18 U.S.C. 3607 is misplaced. As this Court recognized in *Dickerson*, 460 U.S. at 118, the creation of a statute providing that *some* adjudications resulting in probation do not count as convictions for repeat offender statutes "would be superfluous" if Congress thought that *all* adjudications resulting in such sentences do not count as prior convictions.

United States v. *Stober*, 604 F.2d 1274 (1979) (en banc), or with a decision of any other court of appeals.

None of the cases petitioner cites interprets 21 U.S.C. 841(b), the statute at issue here. Instead, the Ninth Circuit's decisions in *Ramirez-Altamirano* and *Rice* interpret Section 1229b(b)(1)(C) of Title 8 of the United States Code, which provides that, to be eligible for cancellation of removal, an alien must not have "been convicted of an offense" that would render him otherwise inadmissible or deportable. In both cases, an alien who had illegally entered the United States sought cancellation of removal. *Ramirez-Altamirano* and *Rice* followed a line of Ninth Circuit cases holding that an expunged conviction or suspended sentence does not constitute a conviction for purposes of the cancellation of removal statute. But those cases do not hold that state law definitions govern the federal removal law. Instead, in each case, the court reasoned that the Equal Protection Clause mandates that first-time state drug offenders be treated identically to first-time federal drug offenders, who may be eligible for cancellation of removal under the Federal First Offender Act. 18 U.S.C. 3607; *Ramirez-Altamirano*, 563 F.3d at 806; *Rice*, 597 F.3d at 956.

The government does not concede the merits of the Ninth Circuit's reasoning in *Ramirez-Altamirano* and *Rice*—reasoning that every other court of appeals to consider the issue has rejected. See, *e.g.*, *Wellington* v. *Holder*, 623 F.3d 115, 118-122 (2d Cir. 2010), petition for cert. pending, No. 10-933 (filed Jan. 28, 2011); *Elkins* v. *Comfort*, 392 F.3d 1159, 1162-1164 (10th Cir. 2004); *Resendiz-Alcaraz* v. *United States Att'y Gen.*, 383 F.3d 1262, 1266-1271 (11th Cir. 2004); *Madriz-Alvarado* v. *Ashcroft*, 383 F.3d 321, 328-331 (5th Cir. 2004); *Acosta*

v. *Ashcroft*, 341 F.3d 218, 222-227 (3d Cir. 2003); *Gill* v. *Ashcroft*, 335 F.3d 574, 577-579 (7th Cir. 2003). Moreover, the Ninth Circuit's reasoning in *Ramirez-Altamirano* and *Rice* is not in tension with the Eighth Circuit's ruling in petitioner's case, which arises under a different statute outside the immigration context and raises no equal protection concerns. Cf. *United States* v. *Moore*, 543 F.3d 891, 897 (7th Cir. 2008) ("That [a] federal defendant may face harsher punishment than his state counterpart, or vice versa, simply does not raise equal protection concerns.").[5] Indeed, the government is aware of *no* case—in the Ninth Circuit or elsewhere—applying the reasoning of *Ramirez-Altamirano* and *Rice* to sentence enhancements under Section 841(b).

The alleged conflict with *Stober* is equally illusory. Ruling before *Dickerson*, the Tenth Circuit held in *Stober* that a defendant's previous guilty plea, followed by a deferred judgment, did not constitute a prior conviction for purposes of a federal firearms statute. 604 F.2d at 1276. Insofar as *Stober* relied on state law to determine whether a prior state adjudication constitutes a "conviction," *Stober*'s validity after *Dickerson* is doubtful. See *United States* v. *Pennon*, 816 F.2d 527,

[5] Similarly, petitioner's reliance on the Full Faith and Credit Act, 28 U.S.C. 1738, is unavailing. That statute "obligates federal courts to give effect to the judgments of state courts," but its underlying principles "are simply not implicated when a federal court endeavors to determine how a particular state criminal proceeding is to be treated, as a matter of federal law, for the purpose of sentencing the defendant for a distinct and unrelated federal crime." *United States* v. *Fazande*, 487 F.3d 307, 308 (5th Cir. 2007); see, *e.g.*, *United States* v. *Jones*, 415 F.3d 256, 265 (2d Cir. 2005); *United States* v. *Guthrie*, 931 F.2d 564, 571 (9th Cir. 1991); *United States* v. *Carter*, 186 Fed. Appx. 844, 847 (10th Cir. 2006) (unreported).

528-529 (10th Cir.), cert. denied, 484 U.S. 987 (1987). But even if that were not the case, *Stober* is distinguishable. The Oklahoma Deferred Judgment Act at issue in *Stober* stipulated that a defendant's judgment is deferred "before a judgment of guilt." *Stober*, 604 F.2d at 1276; Okla. Stat. tit. 22, § 991c (Supp. 1977); see also *Stober*, 604 F.2d at 1276 ("This is *not* a deferred sentencing statute but a deferred judgment act."). Missouri's suspended judgment statute contains no analogous language; instead, it applies "[w]henever any person *has been found guilty* of a felony or a misdemeanor." Mo. Ann. Stat. § 557.011(2)(3) (West 1996) (emphasis added). In addition, unlike petitioner's guilty plea, Stober's guilty plea "was not accepted." 604 F.2d at 1278. Accordingly, the *Stober* court concluded, Stober's "guilt was not established." *Id.* at 1277-1278. By contrast, petitioner's guilt clearly was established in the 1989 proceeding: petitioner's plea was accepted, he was "found guilty," Mo. Ann. Stat. § 557.011(2)(3) (West 1996), and he was placed on probation, PSR ¶ 29, indicating that the state court "deem[ed] him to be guilty of a crime," *Dickerson*, 460 U.S. at 113-114.[6]

---

[6] Petitioner's reliance (Pet. 17) on *Gubbels* v. *Hoy*, 261 F.2d 952 (9th Cir. 1958), also lacks merit. There, the Ninth Circuit held that an adjudication by court-martial was not a predicate conviction for the purposes of deportation. The court grounded its decision in a provision of immigration law barring deportation if the court that sentenced the defendant "ma[d]e, at the time of first imposing judgment or passing sentence, or within thirty days thereafter, a recommendation * * * that such alien not be deported," 8 U.S.C. 1251(b)(2) (1952); see 261 F.2d at 953-956. In particular, the Ninth Circuit pointed out that "a court-martial is an *ad hoc* body" and therefore poorly adapted "to the practical working of the procedures contemplated by [the statute]." *Id.* at 955-956. Petitioner's 1989 Missouri drug conviction raises no similar concerns.

2. Petitioner further contends (Pet. 26-29) that the Eighth Circuit has two conflicting lines of precedent addressing whether a guilty plea resulting in a suspended sentence constitutes a "conviction" for purposes of Section 841(b). Petitioner argues that, under the rule of lenity, the court below should have decided his case in accordance with the line of precedent more favorable to defendants. Petitioner's claim does not warrant review for several reasons. The court of appeals did not address this issue, see Pet. App. A1-A17, which petitioner raised for the first time in his reply brief in that court, see Pet. C.A. Reply Br. 25-26. Recognizing that it is "a court of review, not of first view," this Court generally declines to consider issues not addressed below. *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005). In addition, this Court does not grant review to resolve intra-circuit conflicts. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). But even if this court did resolve such intra-circuit splits, there is none here—the Eighth Circuit is unified in its rejection of petitioner's interpretation of 20 U.S.C. 841(b). Finally, even if the Eighth Circuit were divided on this issue, the rule of lenity would not apply to petitioner's claim: Section 841(b) contains no "grievous ambiguity," and the rule applies to statutory interpretation, not to the choice of which circuit precedent to follow.

a. Contrary to petitioner's contention, the Eighth Circuit does not currently have two conflicting lines of case law interpreting Section 841(b)'s enhancement provision. Rather, every panel to consider the issue has found that Missouri's suspended sentences support sentence enhancement under Section 841(b). See, *e.g.*, *United States* v. *Craddock*, 593 F.3d 699, 701-702 (8th Cir. 2010); *United States* v. *Davis*, 417 F.3d 909, 912-913

(8th Cir. 2005), cert. denied, 546 U.S. 1144 (2006); *United States* v. *Slicer*, 361 F.3d 1085, 1086-1087 (8th Cir.), cert. denied, 543 U.S. 914 (2004); *United States* v. *Franklin*, 250 F.3d 653, 665 (8th Cir.), cert. denied, 534 U.S. 1009 (2001); *United States* v. *Ortega*, 150 F.3d 937, 948 (8th Cir. 1998), cert. denied, 525 U.S. 1087 (1999).

Petitioner notes that *United States* v. *Stallings*, 301 F.3d 919, 921-922 (8th Cir. 2002), appears to take a different position. There, the Eighth Circuit determined that a defendant's prior California conviction that had been suspended pursuant to state law was not a proper predicate for a Section 841(b) enhancement. *Stallings* did not discuss *Dickerson* or relevant circuit case law interpreting Section 841(b). Instead, it relied heavily on the Ninth Circuit's previous determination that suspended sentences imposed under California law are not "convictions" in other contexts. *Id.* at 922 (discussing *United States* v. *Robinson*, 967 F.2d 287, 293 (9th Cir. 1992)).

Subsequent Eighth Circuit panels have been unequivocal in declining to follow *Stallings*. See, *e.g.*, *Craddock*, 593 F.3d at 701-702 (refusing to apply *Stallings* to the imposition of a suspended sentence under Missouri law); *Davis*, 417 F.3d at 912-913 (same); *Slicer*, 361 F.3d at 1086-1087 (reversing a district court that had relied on *Stallings* because *Stallings* did not address 21 U.S.C. 841' s finality requirement). Indeed, no panel of the Eighth Circuit has ever cited *Stallings* favorably, and no district court within the circuit has relied on *Stallings* since the court of appeals reversed the first district court to do so in *Slicer*. To the extent that petitioner seeks a writ of certiorari based on a purported conflict within Eighth Circuit case law, his case thus reaffirms that "[i]t is primarily the task of a Court of

Appeals to reconcile its internal difficulties." *Wisniewski*, 353 U.S. at 902; see also *Davis* v. *United States*, 417 U.S. 333, 340 (1974). The Eighth Circuit has reconciled the internal difficulty presented by *Stallings* by effectively confining that case to its facts.

b. Even if the Eighth Circuit were divided on this issue, the rule of lenity would not have required the court of appeals to apply *Stallings* in petitioner's case. As petitioner concedes (Pet. 28), the "rule of lenity traditionally applies to ambiguity within statutes." See, *e.g.*, *United States* v. *Santos*, 553 U.S. 507 (2008); *United States* v. *Granderson*, 511 U.S. 39 (1994); *United States* v. *Thompson/Center Arms Co.*, 504 U.S. 505 (1992); *Crandon* v. *United States*, 494 U.S. 152 (1990); *Williams* v. *United States*, 458 U.S. 279 (1982); *Bifulco* v. *United States*, 447 U.S. 381 (1980). Moreover, the rule applies only where a statute includes a "grievous ambiguity or uncertainty," such that, "after seizing everything from which aid can be derived," a court "can make no more than a guess as to what Congress intended." *Muscarello* v. *United States*, 524 U.S. 125, 138-139 (1998) (citations, internal quotation marks, and alterations omitted). That is not the case here. Although Section 841(b) does not define "conviction," *Dickerson* makes clear that "[i]n the absence of a plain indication to the contrary," it is to be assumed that a federal statute's application turns on federal law. 460 U.S. at 119. As discussed above, the courts of appeals have uniformly reached that conclusion, and *none* has found that the statute is grievously ambiguous on that point.

Nor is petitioner correct to contend (Pet. 28) that given *Stallings*, "the rationale behind the rule [of lenity], that due process requires fair notice to the defen-

dant of the consequences of his actions, necessitates that" the rule apply to his case. Petitioner's drug conspiracy lasted from June 2006 to March 2008. PSR ¶ 1. Had petitioner surveyed the relevant case law during or before that period, he would have discovered at least two Eighth Circuit cases imposing enhanced sentences on defendants situated similarly to himself. See *Davis*, 417 F.3d at 912-913; *Slicer*, 361 F.3d at 1086-1087. In light of the statute's clarity and those cases, petitioner had sufficient notice of the enhanced consequences he would face if he violated the federal drug laws. Cf. *Smith* v. *United States*, 508 U.S. 223, 239 (1993) ("The mere possibility of articulating a narrower construction * * * does not by itself make the rule of lenity applicable.").

Finally, this Court has repeatedly declined to review claims substantially similar to the one raised by petitioner.[7] See, *e.g.*, *Lehan* v. *United States*, 130 S. Ct. 1735 (2010) (No. 09-5661); *Brown* v. *United States*, 528 U.S. 963 (1999) (No. 98-2059); *Campbell* v. *United States*, 508 U.S. 952 (1993) (No. 92-7444). There is no reason for a different result in this case.

---

[7] A similar question is presented by *Williams* v. *United States*, petition for cert. pending, No. 10-8465 (filed Jan. 14, 2011).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General
LANNY A. BREUER
Assistant Attorney General
CLAIRE MCCUSKER MURRAY
Attorney

MARCH 2011