Nos. 10-50072

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff – Appellee,

v.

JESSE VASQUEZ,
Defendant – Appellant.

Appeal from the United States District Court for the Central District of California,
No. CR 07-202-DOC

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND STANFORD LAW SCHOOL JUSTICE ADVOCACY PROJECT IN SUPPORT OF PETITION FOR REHEARING *EN BANC*

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CORPORATE DISCLOSURE STATEMENT

Amici here are the National Association of Criminal Defense Lawyers and the Stanford Law School Justice Advocacy Project. Neither *amicus* issues stock or has a parent corporation.

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INTEREST OF THE *AMICI CURIAE*

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association working on behalf of criminal defense attorneys to promote justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has approximately 9,000 direct members in 28 countries, and its 90 affiliated state, provincial, and local organizations consist of up to 40,000 attorneys, including private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL files numerous *amicus* briefs each year in the Supreme Court, the federal courts of appeals, and state high courts. NACDL's mission is to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, as well as the justice system as a whole.

The Stanford Law School Justice Advocacy Project represents prisoners across the country serving life sentences for nonviolent crimes and advocates for improved criminal justice policies. In conjunction with and on behalf of the NAACP Legal Defense and Educational Fund, the Project co-authored the Safe Neighborhoods and Schools Act of 2014 ("Proposition 47"), the California statute at issue in this appeal.

The amici share a strong interest in the fair and efficient administration of criminal justice. The panel decision here undercuts California's judgment that

certain crimes should not be treated as felonies, not only for future sentences, but for the purposes of three-strikes and other anti-recidivism statutes. More important, the decision will result in improper prolongation of prison terms for hundreds of federal inmates who do not meet the requirements of their sentencing statutes, properly construed.[1]

INTRODUCTION

The rehearing petition in this case raises issues of fairness and federalism that are exceptionally important to the administration of justice in the Circuit. The question presented is important both to large numbers of prisoners serving unjustly enhanced sentences and to federal corrections institutions whose populations will disproportionately reflect aging inmates serving lengthy sentences that are not justified under a proper interpretation of federal law. And the question cuts to the core of a State's power to define the character and effects of crimes and criminal convictions.

This appeal squarely addresses a question that the Supreme Court explicitly left open in *McNeill v. United States*, 563 U.S. 816 (2011): For purposes of sentencing under 21 U.S.C. § 841(b)(1)(A), how federal courts should treat prior state convictions when the State "lowers the maximum penalty available to an

[1] Pursuant to Fed. R. App. P. 29(c)(5), *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their counsel, and their members made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

offense and makes that reduction available to defendants previously convicted and sentenced for that offense." *Id.* at 825 n.1. Without acknowledging this footnote, the panel opinion in the present case incorrectly asserts that *McNeill* resolves this case.

The question presented turns on the decision of the people of California to categorically change the status of certain nonviolent drug offenses and convictions from felonies to misdemeanors. In the aftermath of a court-ordered reduction in prison population, California voters enacted Proposition 47, Cal. Penal Code § 1170.18, a sweeping criminal justice reform initiative that reduced penalties for non-violent offenses and ensured that a higher proportion of prison capacity was devoted to the most hardened and dangerous criminals. Proposition 47 reclassified several nonviolent felonies—including possession for personal use of most illegal drugs—as misdemeanors. Proposition 47 thus reflects a fundamental reordering of sentencing priorities and specifically rejects extended incarceration based on nonviolent drug offenses.

Critically for this case, Proposition 47 gave retroactive effect to California's revised judgment about the categorical severity of the affected offenses. The new law created a mechanism for individuals who had been previously convicted of the listed former felonies to petition a state court to reclassify their felony drug convictions as misdemeanors. The statute explicitly states that convictions

reclassified as misdemeanors under its authority "shall be considered a misdemeanor for all purposes." Cal. Penal Code § 1170.18(k).

The panel decision gives this provision no effect (slip op. 15-16), and thus significantly erodes the effect of state judgments about the status of crimes—and criminal convictions—under state law. The federal sentencing statute at issue, 21 U.S.C. § 841(b)(1)(A), provides for a mandatory life sentence when the defendant has "two or more prior convictions for a felony drug offense." As pertinent to the prior California state-law conviction at issue here, however, a "felony drug offense" must be "punishable by imprisonment for more than one year under any law * * * *of a State*." *Id.* § 802(44) (emphasis added). That is, when the government seeks to use a state-law conviction to enhance a federal sentence, it is the law of the pertinent State that determines whether a drug offense is a felony.

By holding that federal—rather than state—law controls in this circumstance, the panel rejected California's judgment that certain drug offenses should be treated categorically as misdemeanors "for all purposes." That state judgment about the character of state crimes applies not merely to crimes committed in the future but also to any consequences flowing from crimes and convictions taking place in the past. Just as federal law necessarily must look to state law at the time of sentencing when determining whether the crime underlying a prior state-law conviction was a felony, federal law also should look to state law

to determine whether a conviction for an offense that has been reclassified as a misdemeanor can still serve as a valid predicate for a life sentence under a federal anti-recidivism law.

The panel decision warrants rehearing en banc in light of the issue's recurring importance and the panel's fundamental misapplication of controlling law. A significant number of federal inmates could benefit from the application of Proposition 47 under 21 U.S.C. § 841(b)(1)(A) and similar provisions. Moreover, retroactive application would reduce the number of older federal inmates who are unlikely to engage in serious or violent crimes when released, and whose continued incarceration consequently provides limited public benefits. By disregarding the clearly expressed will of California's voters in applying a federal statute that, as pertinent here, relies on state law for its content, the panel decision increases the importance of the issues presented because it takes away the power of a State to determine the character of its own crimes and convictions. And the panel's incorrect interpretation of federal law, which in critical parts of its reasoning diverges from Circuit precedent, additionally confirms that rehearing en banc is appropriate.

ARGUMENT

I. Rehearing En Banc Is Warranted Because The Application Of Proposition 47 To Federal Anti-Recidivism Statutes Is An Important And Recurring Issue.

A. Proposition 47 Embodies The Will of California Voters To Decrease Both Direct And Indirect Penalties For Minor Drug Possession And To Reduce Prison Populations.

In November 2014, nearly 60% of California voters enacted Proposition 47. California Secretary of State, *Statement of Vote: November 4, 2014 General Election* at 15,http://elections.cdn.sos.ca.gov/sov/2014-general/pdf/2014-complete-sov.pdf. Also known as the Safe Neighborhoods and Schools Act, Proposition 47 reclassified several nonviolent felony offenses as misdemeanors. As relevant here, Proposition 47 reclassified drug possession for personal use, *see* Cal. Health & Safety Code § 11350(a), from a felony to a misdemeanor. Proposition 47 also created a mechanism for individuals convicted of such offenses to petition a California court for a "recall of sentence," which reclassifies a felony conviction as a misdemeanor. Cal. Penal Code § 1170.18.

These modifications reflect California voters' fundamental reassessment of the dangers posed by low-level drug possession and the high costs associated with imprisoning these nonviolent offenders, both directly for drug possession offenses and indirectly when prior drug possession convictions trigger sentence enhancements. Proposition 47 thus rejects lengthy prison sentences for persons

convicted of minor drug possession. Instead of imprisoning nonviolent offenders for decades, California's voters declared that prison spending should be "focused on violent and serious offenses." Proposition 47, § 2, http://vig.cdn.sos.ca.gov/2014/general/pdf/text-of-proposed-laws1.pdf.

Proposition 47 was enacted against the backdrop of an aging and dangerously overcrowded prison population. Just three years before Proposition 47 passed, the Supreme Court described "[t]he degree of overcrowding in California's prisons [a]s exceptional." *Brown v. Plata*, 563 U.S. 493, 502 (2011). Operating at nearly double capacity, California's prisons were so overcrowded that conditions deteriorated to the level of an Eighth Amendment violation. *See id.* To alleviate these unconstitutional conditions, California was ordered to reduce its overall prison population by 46,000 inmates. *Id.* at 501.

This overcrowding resulted in part from anti-recidivism sentencing laws that could produce very long sentences based on prior convictions for nonviolent offenses. As one report explained, California's "prison population includes many people convicted under the three-strikes law who are serving lengthy sentences for trivial infractions such as petty theft, minor drug possession, or minor drug sales." Marie Gottschalk, *Sentenced to Life: Penal Reform and the Most Severe Sanction*, 9 Ann. Rev. L. & Soc. Sci. 353, 365 (2013). These lengthy prison sentences have had acute effects on the demography of California's prisons. "Between 1990 and

2013, the share of prisoners age 50 and older grew from 4% to 21%." Ryken Grattet & Joseph Hayes, Public Policy Institute of California, *California's Changing Prison Population* (April 2015), http://www.ppic.org/main/publication_show.asp?i=702. Because "aging offenders tend to have greater health care needs," California's aging prison population "present[s] a particular challenge with respect to providing constitutionally mandated adequate health care and controlling prison health care costs." *Id.* Yet inmates over 50 years old generally pose much smaller risks of recurrent violence upon release than younger inmates do. *See* Human Rights Watch, *Old Behind Bars: The Aging Prison Population in the United States* 81-82 (2012) (citing data from New York, Florida, Ohio, and Colorado). By reclassifying several felony offenses as misdemeanors, Proposition 47 counteracts these long-term trends.

Indeed, Proposition 47 has substantially changed California's jail and prison populations. It is estimated that there has been a "50 percent decline in the number of individuals being held or serving sentences for Prop 47 offenses. This change drove an overall decline in the jail population of 9 percent in the year following the proposition's passage." Mia Bird, et al., Public Policy Institute of California, *How Has Proposition 47 Affected California's Jail Population?*, at 3 (2016) http://www.ppic.org/content/pubs/report/R_316MB3R.pdf. The biggest decrease in convictions among the category of offenses reclassified by Proposition 47 was seen

in drug possession cases. *See id.* at 10 fig. 6. And in the first nine months after its passage, approximately 4,500 prison inmates were released under Proposition 47. *See* Rebecca Beitsch, The Pew Charitable Trusts, *States at a Crossroads on Criminal Justice Reform* (Jan. 28, 2016) http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/01/28/states-at-a-crossroads-on-criminal-justice-reform. These figures are unsurprising given the number of individuals incarcerated for minor drug crimes: as of December 2010, 8,445 people (or 5.2% of California's inmates) were imprisoned for mere drug possession. California Dep't of Corrections & Rehabilitation, *California Prisoners & Parolees*, at 16 tbl. 8 (2011) http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/CalPris/CALPRISd2010.pdf.

Proposition 47's stated purpose was to "maximize alternatives for nonserious, nonviolent crime," such as drug possession for personal use. Proposition 47, § 2. With its forward-looking application and its reclassification of prior convictions, Proposition 47 evidences California voters' commitment to ensure that prisons are reserved for violent felons and that those convicted of nonviolent offenses serve shorter terms.

B. The Concerns Animating Proposition 47 Also Apply At The Federal Level.

If Proposition 47 were correctly applied to reduce federal sentences that rely on the former felony status of crimes that have been reclassified as misdemeanors,

the impact on the federal system also would be substantial. Approximately *half* of all federal prisoners are incarcerated for drug crimes. E. Ann Carson, Bureau of Justice Statistics, *Prisoners in 2014*, at 17 tbl. 12 (2015) http://www.bjs.gov/content/pub/pdf/p14.pdf; *see also* 21 U.S.C. § 841(a) (penalties at issue here apply only to felony drug offenses). And because California is the most populous State in the Union, a significant number of federal inmates are likely to have a prior conviction that is eligible for reclassification as a misdemeanor under Proposition 47. The sheer number of federal inmates likely to benefit from Proposition 47 counsels in favor of en banc review.

Moreover, because Section 841 imposes a mandatory twenty-year sentence for defendants with one prior felony drug offense conviction and a mandatory life sentence for defendants with two prior felony drug offense convictions, many individuals eligible for a sentence reduction (and possibly for immediate release) have already spent substantial time in prison. 21 U.S.C. § 841(b)(1)(A). These inmates are also likely to be older, and, thus, as in California's prison system, more expensive to keep confined due to healthcare costs, while presenting a reduced threat of future violence. *See* Office of the Inspector General, U.S. Dep't of Justice, *The Impact of an Aging Inmate Population on the Federal Bureau of Prisons* 10 (Feb. 2016) https://oig.justice.gov/reports/2015/e1505.pdf (noting that "average cost per inmate rises with age, with the 8,831 inmates age 18 and 24 costing an

average of $18,505 each and the 157 inmates ago 80 and older costing an average of $30,609 each"); United States Sentencing Commission, *Recidivism Among Federal Offenders: A Comprehensive Overview*, 23 (March 2016) http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf ("Those released into the community who were below age twenty-one had the highest rearrest rate, 67.6 percent. Conversely those oldest at age of release, over sixty years old, had the lowest recidivism rate, 16.0 percent.").

California voters have declared that inmates convicted of nonviolent drug possession should not serve long and expensive prison sentences. The proper interpretation of a federal sentencing law that relies upon state felony classifications should respect that choice.

The effects of the panel decision reach beyond Proposition 47. In rejecting the application of Proposition 47 to federal inmates, the panel ensured that any new criminal-justice reform statute enacted by any State within this Circuit would not affect the application of federal anti-recidivism sentencing statutes. The panel's decision holds that Section 841 silently imposes a federal rule that borrows state felony classifications only as they apply at the moment of sentencing in federal district court. That rationale would undercut the policy choices of States to retroactively lower criminal penalties to align better with the social costs of

particular crimes. The panel's holding broadly prohibits the assimilation of changes in state law to federal sentences, diluting States' power to redefine the effects of state convictions and equally disserving the policies of the federal sentencing statutes. The human and economic costs of that approach are manifest.

II. Rehearing En Banc Is Warranted Because The Panel Decision Is Incorrect And Conflicts With Circuit Precedent.

Rehearing is necessary here because the panel decision misconstrues Section 841, using reasoning that conflicts with previous decisions of this Court. As relevant here, Section 841 imposes a mandatory life sentence if a defendant commits a federal drug offense "after two or more prior convictions for a felony drug offense." 21 U.S.C. § 841(b)(1)(A). A "felony drug offense" is defined (again as relevant here) as "an offense that *is punishable* by imprisonment for more than one year under any law * * * *of a State*." *Id.* § 802(44) (emphases added). Thus, federal law expressly references and assimilates state law in determining whether a defendant is eligible for a mandatory life sentence. Because the definition is stated in the present tense, moreover, federal law incorporates changes to state law that reclassify a particular defendant's conviction from a felony to a misdemeanor. Indeed, it would be incongruous for federal law to treat a state conviction as more serious than the State itself understands it to be.

"[T]he intentions behind both Proposition 47 and the federal sentencing enhancement in § 841 are better served by considering the prior offense as a

misdemeanor after its redesignation as such by the state court." Order Granting Mot. to Dismiss Information at 13, *United States v. Pagan*, No. CR 14-684 (C.D. Cal. Apr. 1, 2016), ECF No. 786. Proposition 47 provides that a reclassified felony conviction "shall be considered a misdemeanor *for all purposes*" except possession of firearms. Cal. Penal Code § 1170.18(k) (emphasis added). And Proposition 47 states not once, but twice, that it should be interpreted broadly. *See* Proposition 47, § 15 ("This act shall be broadly construed to accomplish its purposes."); *id.* § 18 ("This act shall be liberally construed to effectuate its purposes."). These statements reflect California voters' desire to enact wide-ranging reform.

The panel thus erred in focusing on Section 841's text in isolation without properly taking into account the very definition of a "felony drug offense" in Section 802(44)—a definition that accords substantial deference to the authority under which a conviction arose. That definition should resolve the question presented in this case in favor of applying Proposition 47 here.

The panel also apparently misread *McNeill v. United States*, 563 U.S. 816 (2011). There, a defendant claimed that courts assessing whether a predicate offense is a serious drug offense for purposes of the Armed Career Criminal Act (ACCA) should look to the State's classification of the prior offense at the time of sentencing for the ACCA offense. The Supreme Court rejected that approach, holding that courts should look to the state sentence at the time of conviction for

the *state* offense to determine if the predicate offense qualifies for an ACCA enhancement. *See id.* at 817-18. There is an obvious and important difference between a defendant whose *personal* conviction for a felony offense has been reduced to a misdemeanor based on a state's *categorical* judgment that certain crimes are not, and never should have been, felonies, and a defendant, like the petitioner in *McNeill*, who seeks a windfall because a State happened to change its laws in the meantime—but without affecting his or her conviction.

Indeed, the Court expressly noted this distinction and reserved the question presented here. Pointing out that the case did "not concern a situation in which a State subsequently lowers the maximum penalty available to an offense and makes that reduction available to defendants previously convicted and sentenced for that offense"—the situation presented by the rehearing petition—the Court warned that it did "not address whether or under what circumstances a federal court could consider the effect of that state action." *Id.* at 825 n.1 (internal citation omitted). By relying on *McNeill*, the panel failed to heed the Court's "explicit disclaimer[]." *Zubik v. Burwell*, 136 S. Ct. 1557, 1561 (2016) (Sotomayor, J., concurring). The full Court should address the issue in recognition that *McNeill* does not control its resolution.

Finally, as the Petition explains, the panel decision conflicts with at least two prior decisions of this Court.

First, in holding that "a state granting post-conviction relief from a *state* conviction cannot undermine a *federal* sentence enhancement based on that conviction" (slip op. at 7) (emphasis in original)), the panel decision conflicts with *United States v. McChristian*, 47 F.3d 1499 (9th Cir. 1995). In *McChristian*, this Court held that, for purposes of sentence enhancement, a "district court should refrain from relying on a conviction that has been held invalid by a state court" (*id.* at 1504)—in that case, ten years after the original conviction. Thus, under *McChristian*, a State's grant of post-conviction relief most certainly *can* "undermine a *federal* sentence enhancement based on that conviction."

Second, in refusing to consider the effect of the changed status of a state conviction under state law, the panel decision conflicts with *United States v. LaValle*, 175 F.3d 1106 (9th Cir. 1999), which held that "a defendant who successfully attacks a state conviction may seek review of any federal sentence that was enhanced because of the prior state conviction." *Id.* at 1108 (citing decisions from four circuits and ordering federal sentence reopened on collateral review).

Thus, it is no surprise that, before the panel decision, the district courts in California had reached conflicting results on the effect of Proposition 47 on existing federal sentences. *Compare* Order Granting Mot. to Dismiss Information, *United States v. Pagan*, No. CR 14-684 (C.D. Cal. Apr. 1, 2016), ECF No. 786 (finding that Proposition 47 applies to Section 841 sentences) *and United States v.*

Norwood, 2016 WL 269571 (C.D. Cal. Jan. 15, 2016) (same) *and* Order Granting Mot. for Resentencing, *United States v. Summey*, No. CR 08-181(C.D. Cal. Sept. 30, 2015), ECF No. 75 (same) *with* Order [denying motion for sentence reduction], *United States v. Spearman*, No. CR 93-1027(C.D. Cal. Nov. 30, 2015), ECF No. 237 (agreeing with panel decision). Because the panel incorrectly interpreted federal and state law, rehearing en banc is warranted.

CONCLUSION

The panel decision should be reheard.

Respectfully submitted,

Dated: June 10, 2016

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June 10, 2016

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9th Circuit Case Number(s) 10-50072

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