No. 19-28

In the Supreme Court of the United States

KENNETH DANIELS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether petitioner's prior Pennsylvania convictions for possession with intent to deliver cocaine, in violation of 35 Pa. Stat. Ann. § 780-113(a)(30) (West 1993 & 2003), qualify as convictions for "serious drug offense[s]" under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(A)(ii).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (E.D. Pa.):

United States v. *Daniels*, No. 15-cr-127 (Nov. 7, 2017)

United States Court of Appeals (3d Cir.):

United States v. *Daniels*, No. 17-3503 (Feb. 7, 2019)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-39a) is reported at 915 F.3d 148.

JURISDICTION

The judgment of the court of appeals was entered on February 7, 2019. On April 1, 2019, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including July 7, 2019, and the petition was filed on July 1, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on one count of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1) and

924(e). Judgment 1. The district court sentenced petitioner to 180 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-39a.

1. In November 2014, an officer on patrol in Chester, Pennsylvania, saw a car with an Ohio license plate turn without signaling. C.A. App. 58-59. The officer stopped the car, and as he approached it, he observed the front-seat passenger—petitioner—lean forward toward the floorboard as if retrieving or concealing something there. *Id.* at 59. Petitioner appeared to the officer to be "extremely nervous," and petitioner continued to move about the passenger seat even after the officer asked him not to do so. *Ibid.*

Petitioner was asked to exit the car, and another officer who had arrived at the scene observed a handgun protruding from underneath the passenger seat. C.A. App. 59. That officer retrieved the firearm, a .45-caliber semiautomatic handgun loaded with seven rounds of ammunition, with its hammer cocked and ready to be fired. *Id.* at 59-60. Petitioner was taken into custody, and he later signed a written confession admitting that the gun was his and that he had been attempting to slide the gun under the seat when the first officer approached the car. *Ibid.*

2. A federal grand jury in the Eastern District of Pennsylvania returned an indictment charging petitioner with possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e). Indictment 1. Petitioner pleaded guilty pursuant to a plea agreement, reserving the right to argue at sentencing and on appeal that his prior convictions did not qualify him for sentencing under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e). Pet. App. 3a; C.A. App. 40-41.

The default term of imprisonment for a knowing violation of Section 922(g) is zero to 120 months. 18 U.S.C. 924(a)(2). The ACCA increases that penalty to a minimum of 15 years, and a maximum of life, if the defendant has "three previous convictions * * * for a violent felony or a serious drug offense." 18 U.S.C. 924(e)(1). The ACCA defines the term "serious drug offense" as either

> (i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or
>
> (ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law.

18 U.S.C. 924(e)(2)(A). The Probation Office reported that petitioner had at least three prior convictions under Pennsylvania law for possession with intent to deliver a controlled substance (cocaine), in violation of 35 Pa. Stat. Ann. § 780-113(a)(30) (West 1993 & 2003). Presentence Investigation Report (PSR) ¶ 24; see PSR ¶¶ 30, 32, 35-36. It determined, based on those convictions, that petitioner qualified for sentencing under the ACCA and calculated an advisory Sentencing Guidelines range of 180 to 210 months. PSR ¶ 80.

Petitioner acknowledged that his "prior drug convictions [we]re for possession with the intent to deliver cocaine" in violation of Pennsylvania law. C.A. App. 25; see Pet. App. 10a n.3. He nevertheless objected to the

Probation Office's determination that those convictions constituted "serious drug offense[s]" under the ACCA. PSR ¶ 24 n.2; C.A. App. 23-26. At all relevant times, and with exceptions not implicated here, 35 Pa. Stat. Ann. § 780-113(a)(30) (West 1993 & 2003) prohibited "the manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance by a person not registered under [the Pennsylvania statute], or a practitioner not registered or licensed by the appropriate State board, or knowingly creating, delivering or possessing with intent to deliver, a counterfeit controlled substance." *Ibid.* Petitioner contended that Section 780-113(a)(30) swept more broadly than the ACCA's definition of a "serious drug offense," asserting that (1) the Pennsylvania statute reaches conduct such as soliciting another to provide drugs and "mere offers to sell" and (2) "under federal law, solicitation will not support a drug trafficking conviction." C.A. App. 25. The district court overruled petitioner's objection, calculated his advisory Sentencing Guidelines range to be 180 to 210 months, and sentenced petitioner to 180 months of imprisonment. *Id.* at 68-71; see Judgment 2.[*]

[*] Petitioner additionally argued that, although the Probation Office had identified a total of four prior convictions for possession with intent to deliver a controlled substance, see PSR ¶ 24, the relevant records for one of the four convictions did not identify the nature of the substance. C.A. App. 70; cf. PSR ¶ 32 (not identifying the substance involved in a 2004 conviction for possession with intent to distribute and noting that the "[c]ircumstances of the offense [we]re not available"). The district court found it unnecessary to resolve that issue, stating that, even without considering that fourth offense, petitioner still had three qualifying convictions under the ACCA. C.A. App. 71.

3. The court of appeals affirmed. Pet. App. 1a-39a.

The court of appeals observed that "[i]t [wa]s undisputed that [the court] must apply the 'categorical' approach in order to decide whether [petitioner] had at least three previous convictions for 'a serious drug offense.'" Pet. App. 6a (quoting 18 U.S.C. 924(e)). The court explained that, under that approach, "a sentencing court may look only to the elements of a defendant's prior conviction, not to the particular facts underlying those convictions," and it must determine whether the elements of that state-law offense fall within the federal definition. *Ibid.* (citations and internal quotation marks omitted).

The court of appeals rejected petitioner's theory that, because the state law includes attempt crimes, and Section 924(e)(2)(A)(ii) does not expressly refer to attempts, his Pennsylvania convictions cannot qualify as "serious drug offense[s]." Pet. App. 8a; see *id.* at 8a-25a; see also Pet. C.A. Br. 16-17. The court joined "every [other] court of appeals to have considered the * * * question" in determining that "a 'serious drug offense' under [Section] 924(e)(2)(A)(ii) includes attempts." Pet. App. 16a; see *id.* at 16a-17a (citing decisions of the Second, Fifth, Eighth, and D.C. Circuits). The court reasoned that "Congress's use of the term 'involving'" in Section 924(e)(2)(A)(ii) "expands the meaning of a serious drug offense beyond the simple offenses of manufacturing, distributing, and possessing a controlled substance." *Id.* at 11a (quoting *United States* v. *Gibbs*, 656 F.3d 180, 184 (3d Cir. 2011), cert. denied, 565 U.S. 1170 (2012)). Congress, the court observed, had "'relied upon general language'" to encompass "'the entire class of serious state drug offenses'" that "'involv[e]'" the enumerated "activities." *Id.* at 12a (citations omitted).

The court of appeals noted that it had previously rejected the contention that "the definition of state serious drug offenses set forth in Section 924(e)(2)(A)(ii) should be limited to the types of crimes identified by the three federal statutes (including the [Controlled Substances Act]) referenced in Section 924(e)(2)(A)(i)." Pet. App. 12a (citing *Gibbs*, 656 F.3d at 185). And it "ha[d] no trouble concluding that a conviction under state law for attempted manufacturing, distributing, or possessing with intent to manufacture or distribute a controlled substance" qualifies as a serious drug offense under Section 924(e)(2)(A)(ii) at least where the state-law offense "also meets the requirements for an attempted drug crime under federal law." *Id.* at 14a; see *id.* at 14a-25a. The court determined that, whatever the precise outer limits of Section 924(e)(2)(A)(ii), "the federal inchoate versions" of the offenses of "manufacturing, distributing, or possessing with the intent to manufacture or distribute a controlled substance * * * clearly satisfy the test." *Id.* at 15a.

The court of appeals reserved judgment on the government's contention that a comparison of the state-law offense with a federal analogue is unnecessary because the text of "Section 924(e) does not require the state statute under which a defendant was convicted to be co-extensive with a federal drug statute." Pet. App. 23a (quoting Gov't C.A. Br. 8); see Gov't C.A. Br. 12-16. The court explained that it need not reach that question because it agreed with the government's alternative argument "that Pennsylvania's approach to attempts as well as the state's doctrine of accomplice liability are coextensive with its federal counterparts." *Id.* at 25a-26a; see *id.* at 25a-39a; cf. Gov't C.A. Br. 9, 16-39. In particular, the court rejected petitioner's contention that Pennsylvania law encompasses acts of solicitation as

attempts that federal law does not cover. Pet. App. 25a, 27a-29a.

The court of appeals observed that both Pennsylvania law and federal law—as reflected in the Controlled Substances Act (CSA), 21 U.S.C. 841 (2012) and 21 U.S.C. 846—follow the Model Penal Code's definition of attempt, which "treat[s] some solicitations as attempts." Pet. App. 27a; see *id.* at 26a-29a. Specifically, the court explained that, under the Model Penal Code's approach, "[s]olicitation may amount to an attempt when it strongly corroborates the actor's criminal purpose." *Id.* at 28a (quoting *Martinez* v. *Attorney Gen.*, 906 F.3d 281, 286 (3d Cir. 2018)). The court noted that, in holding that a violation of an Oregon drug law that similarly followed the Model Penal Code's approach did not constitute an "aggravated felony" under the Immigration and Nationality Act (INA), 8 U.S.C. 1227(a)(2)(A)(iii), the Ninth Circuit had concluded that the Oregon law was broader than the federal-law definition of attempt liability because the Oregon law encompassed solicitation. Pet. App. 28a (citing *Sandoval* v. *Sessions*, 866 F.3d 986 (9th Cir. 2017)). The court of appeals observed, however, that its own precedent applying the INA had "disagreed" with the Ninth Circuit's view of federal attempt liability. *Ibid.* (citing *Martinez*, 906 F.3d at 286).

The court of appeals also reserved judgment on whether a state statute that criminalizes offers to sell controlled substances or solicitation by the buyer would constitute serious drug offenses under Section 924(e)(2)(A)(ii). Pet. App. 30a-39a. The court explained that it had recently found that the Pennsylvania statute under which petitioner had been convicted "does not criminalize mere offers to sell." *Id.* at 30a (citing *United States* v. *Glass*, 904 F.3d 319, 322 (3d Cir. 2018), cert. denied, 139 S. Ct.

840 (2019)); see *id.* at 23a. And although petitioner contended that a different Pennsylvania statute did "criminalize[] a buyer's solicitation," the court observed that petitioner had not been convicted under that other provision. *Id.* at 36a (citing 18 Pa. Cons. Stat. Ann. § 7512(a) (West 2015)); see *id.* at 36a-37a.

DISCUSSION

Petitioner contends (Pet. 1-3, 13-15) that his prior Pennsylvania convictions for possession of cocaine with intent to deliver do not constitute "serious drug offense[s]" that qualify him for sentencing under the ACCA, 18 U.S.C. 924(e)(2)(A)(ii). The court of appeals correctly determined that those convictions do qualify as serious drug offenses under the ACCA. That determination and the court of appeals' reasoning, however, could potentially be affected by this Court's upcoming decision in *Shular* v. *United States*, cert. granted, No. 18-6662 (June 28, 2019). The petition accordingly should be held pending the Court's decision in *Shular* and then disposed of as appropriate in light of that decision.

Petitioner errs in contending (Pet. 7-11, 15-16) that plenary review is warranted in this case irrespective of the Court's decision in *Shular* to resolve disagreement among the courts of appeals concerning whether solicitation constitutes an attempt under the CSA. This case does not arise under the CSA, but under the ACCA. The court of appeals considered the CSA in addressing the scope of the ACCA only because the court engaged in a mode of analysis that the Court may reject or clarify in *Shular*. And in light of the court's construction of the relevant state law, this case would not be a suitable vehicle to address the scope of attempt liability under the CSA in any event. Plenary review is not warranted.

1. The court of appeals correctly determined that petitioner's convictions under Pennsylvania law for possessing cocaine with the intent to deliver it qualify as "serious drug offenses" under 18 U.S.C. 924(e)(2)(A)(ii) notwithstanding the fact that state law includes certain forms of inchoate liability. Pet. App. 4a-39a. But both the result the court reached and its reasoning could potentially be affected by *Shular*. The petition for a writ of certiorari thus should be held pending the Court's decision in that case.

a. As relevant here, the ACCA defines a "serious drug offense" to include "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the [CSA] (21 U.S.C. 802)) for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. 924(e)(2)(A)(ii). The Pennsylvania statute under which petitioner was convicted, 35 Pa. Stat. Ann. § 780-113(a)(30) (West 1993 & 2003), prohibits in relevant part "the manufacture, delivery, or possession with intent to manufacture or deliver[] a controlled substance." *Ibid.* As the court of appeals observed, "it is undisputed that [petitioner's] prior convictions involved cocaine," Pet. App. 10a n.3—which is a controlled substance under both federal and Pennsylvania law—and, as a result, they carried a maximum sentence of ten years under Pennsylvania law. See 21 U.S.C. 802(6), 21 U.S.C. 812 (2012 & Supp. V 2017); 35 Pa. Stat. Ann. § 780-113(f)(1.1) (West 1993 & 2003); *United States* v. *Abbott*, 748 F.3d 154, 159-160 & n.6 (3d Cir. 2014); Gov't C.A. Br. 11 n.4.

A conviction for violating Section 780-113(a)(30) is a conviction for an offense that "involv[es] manufactur-

ing, distributing, or possessing with intent to manufacture or distribute, a controlled substance," 18 U.S.C. 924(e)(2)(A)(ii). See Pet. App. 2a-3a. The word "involve[]" means to "include (something) as a necessary part or result." *The New Oxford Dictionary of English* 962 (2001); see *Oxford American Dictionary* 349 (1980) ("1. to contain within itself, to make necessary as a condition or result"); *The Random House Dictionary of the English Language* 1005 (2d ed. 1987) ("1. to include as a necessary circumstance, condition, or consequence"); *Webster's New International Dictionary* 1307 (2d ed. 1949) ("to contain by implication; to require, as implied elements, antecedent conditions, effect, etc."). And a violation of Pennsylvania's statute "necessarily entail[s]," *Kawashima* v. *Holder*, 565 U.S. 478, 484 (2012), one of the types of conduct specified in 18 U.S.C. 924(e)(2)(A)(ii). See *Kawashima*, 565 U.S. at 484 (construing the term "involve" (brackets omitted)). Indeed, the elements of a violation of Section 780-113(a)(30) track the requirements of Section 924(e)(2)(A)(ii) nearly verbatim.

b. The court of appeals correctly concluded that petitioner's three prior convictions for violating Section 780-113(a)(30) are "serious drug offense[s]," 18 U.S.C. 924(e)(2)(A)(ii), that qualified him for sentencing under the ACCA. Pet. App. 4a-39a. But it arrived at that conclusion by a different analytical path. Instead of inquiring simply whether a conviction under the Pennsylvania drug law "involve[s]" manufacturing, distributing, or possessing with intent to manufacture or distribute a controlled substance, the court reasoned that the scope of Section 780-113(a)(30)—including its version of attempt liability—is not broader than the analogous federal offense under the CSA. See *id.* at 14a-25a. Because that narrower approach supported affirmance,

the court saw no need to reach the government's broader argument that no such comparison to a generic analogue offense is necessary at all. See *id.* at 23a.

Although the court of appeals thus was correct to affirm petitioner's ACCA-enhanced sentence, its reasoning and result implicate the question on which the Court has granted review in *Shular*, *supra*. Contrary to petitioner's contention (Pet. 15-16), the question in that case is not whether the "categorical approach" applies in determining whether a state-law crime is a "serious drug offense" in Section 924(e)(2)(A)(ii). See Gov't Cert. Br. at 8-10, *Shular*, *supra* (No. 18-6662). The question is instead whether, in conducting a categorical analysis under that provision, a sentencing court is required to compare the state-law offense to a "generic" analogue crime. See *id.* at i, 5-6, 8-9. In the government's view, as explained in its brief in that case, *id.* at 7-10, no such comparison is necessary under Section 924(e)(2)(A)(ii). If this Court were to agree, then it should deny certiorari here, as neither the decision below nor the petition suggests that petitioner might prevail under that approach.

Likewise, if the Court in *Shular* were to adopt an approach similar to the court of appeals' approach in this case, then the Court's decision likely would not provide a sound basis to disturb the court of appeals' judgment. If, however, the Court in *Shular* were instead to construe Section 924(e)(2)(A)(ii) as requiring a comparison to a generic analogue offense but a different sort of comparison from the one conducted in the decision below, its interpretation could affect the proper disposition in this case. The Court should therefore hold the petition for a writ of certiorari in this case pending its

decision in *Shular*, and then dispose of the petition as appropriate in light of that decision.

2. Petitioner contends (Pet. 7-11, 15-16) that plenary review is warranted in this case, regardless of the outcome in *Shular*, to resolve a circuit conflict concerning the scope of attempt liability under the CSA—namely, "whether solicitation can by itself constitute an 'attempt' within the meaning of the [CSA]." Pet. i. That contention lacks merit.

a. The cases on which petitioner relies in asserting (Pet. 7-11) a circuit conflict did not concern the ACCA. They instead addressed provisions of the INA and earlier versions of the Sentencing Guidelines that incorporated the CSA by reference. In *Martinez* v. *Attorney General*, 906 F.3d 281 (2018), which concerned the INA, the Third Circuit determined that a form of solicitation that "strongly corroborates the actor's criminal purpose" "may amount to an attempt" for purposes of the CSA. *Id.* at 286. In doing so, it disagreed with the Ninth Circuit's conclusion in another INA case, *Sandoval* v. *Sessions*, 866 F.3d 986, 989-993 (2017). See *Martinez*, 906 F.3d at 286. In *Pascual* v. *Holder*, 723 F.3d 156 (2013) (per curiam), also in the INA context, the Second Circuit held that a bona fide offer to sell narcotics can qualify as the attempted transfer of a controlled substance under the CSA. See *id.* at 158-159. And in the context of former Sentencing Guidelines § 2L1.2 (2007), the Fifth Circuit held, based on a government concession, that offers to sell that are "tantamount to solicitation [are] not proscribed by the" CSA. *United States* v. *Ibarra-Luna*, 628 F.3d 712, 716 (2010); see also *Ibanez-Beltran* v. *Lynch*, 858 F.3d 294, 296 (5th Cir. 2017) (per curiam) (citing *Ibarra-Luna* and stating that an Arizona statute that "lists solicitation offenses that are not

covered in the federal definition" could not be "a categorical match to the federal offense of drug trafficking").

This case, in contrast, does not arise under the CSA or the INA and does not concern the proper application of the Sentencing Guidelines. The court of appeals considered the scope of liability for inchoate offenses under the CSA only as part of its analysis of the ACCA. As discussed above, the necessity of any such consideration of the CSA turns on the antecedent question, presented in *Shular*, of whether any comparison to a federal analogue offense is required in determining whether a crime is a "serious drug offense" under Section 924(e)(2)(A)(ii). If the Court concludes in *Shular* that such a comparison is unnecessary, the scope of attempt liability for violations of the CSA would be irrelevant in this case. And even under the current state of the law—in which courts of appeals are divided on the question in *Shular*—petitioner identifies no court of appeals that would consider his prior Pennsylvania convictions not to be ACCA predicates.

Although petitioner contends (Pet. 2, 7-11) that the courts of appeals are divided on whether solicitation or offers to sell controlled substances constitute attempt under other statutes that incorporate the CSA, he does not point to any similar disagreement under the ACCA. To the contrary, every court of appeals to consider the question has held that convictions under state statutes reaching such conduct qualify as "serious drug offense[s]" under Section 924(e)(2)(A)(ii). See Pet. App. 2a-3a, 25a-26a; *United States* v. *Whindleton*, 797 F.3d 105, 109-111 (1st Cir. 2015), cert. dismissed, 137 S. Ct. 23, and cert. denied, 137 S. Ct. 179 (2016); *United States* v. *Bynum*, 669 F.3d 880, 884-887 (8th Cir.), cert. denied,

568 U.S. 857 (2012); *United States* v. *Vickers*, 540 F.3d 356, 363-366 (5th Cir.), cert. denied, 555 U.S. 1088 (2008). Indeed, the Fifth Circuit—which petitioner cites (Pet. 10) as holding that state statutes reaching offers to sell fall outside of the CSA definition—has long held that such crimes *do* qualify under the ACCA. See *Vickers*, 540 F.3d at 363-366; see also *United States* v. *Thomas*, 698 Fed. Appx. 790, 791 (5th Cir. 2017) (per curiam), cert. denied, 138 S. Ct. 1310 (2018). The "spillover effect[s]" petitioner predicts (Pet. 2) from a decision construing the CSA thus may not extend to Section 924(e)(2)(A)(ii).

The single district-court decision petitioner cites does not demonstrate otherwise. Pet. 10 (citing *Ernst* v. *United States*, 293 F. Supp. 3d 1242 (D. Or. 2017)). The court in *Ernst* relied on the Ninth Circuit's decision in *Sandoval*, *supra*, in concluding that a prior state conviction did not qualify as a serious drug offense under the ACCA. *Ernst*, 293 F. Supp. 3d at 1246-1250. But the court in *Ernst* acknowledged that *Sandoval* did not directly control because it "was not an ACCA case." *Id.* at 1248. Moreover, in a subsequent opinion denying reconsideration, the *Ernst* court explained that it had cited *Sandoval* because that decision's extensive analysis of Oregon law revealed that the state statute at issue "captur[ed] acts that," in the court's view, "do not bear a close enough relationship to the illegal drug trade to constitute conduct 'involving' controlled substance manufacture, distribution, or possession." *Ernst* v. *United States*, 291 F. Supp. 3d 1190, 1194 (D. Or. 2018). Nothing in that analysis suggests that lower courts will disregard the important differences between the CSA and ACCA's definition of "serious drug offense" or reflexively apply precedents interpreting one statute to the other. Indeed, in a decision issued after the petition for a writ of certiorari was

filed, the Ninth Circuit reaffirmed that the same Oregon drug statute at issue in *Sandoval* and *Ernst* qualifies for enhancement under the career-offender provision in the Sentencing Guidelines and that *Sandoval* does not control analysis of the distinct definition in that provision. *United States* v. *Crum*, No. 17-30261, 2019 WL 3849566, at *3 (Aug. 16, 2019) (per curiam) ("[T]he analysis for determining whether an offense qualifies as a 'drug trafficking crime' under the [CSA] is different from the analysis for determining whether an offense qualifies as a 'controlled substance offense' under the Sentencing Guidelines.").

b. In any event, this case would be an unsuitable vehicle for plenary review to resolve any disagreement about state laws that criminalize "mere" offers to buy or sell controlled substances (Pet. i, 11, 13-14) because this case does not implicate that disagreement. As the court of appeals explained, it recently determined that the same Pennsylvania statute under which petitioner was convicted "does not criminalize mere offers to sell" controlled substances. Pet. App. 30a (citing *United States* v. *Glass*, 904 F.3d 319, 322 (3d Cir. 2018), cert. denied, 139 S. Ct. 840 (2019)). Petitioner presents no basis for questioning that determination or for deviating from this Court's "settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law." *Bowen* v. *Massachusetts*, 487 U.S. 879, 908 (1988). Petitioner also argued below that another Pennsylvania law, 18 Pa. Cons. Stat. Ann. § 7512(a) (West 2015), criminalizes solicitation by a buyer. Pet. App. 36a. But as the court of appeals explained, petitioner "was not convicted under Section 7512." *Id.* at 37a. It thus has no bearing here.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's decision in *Shular* v. *United States*, cert. granted, No. 18-6662 (June 28, 2019), and then disposed of as appropriate in light of that decision. In the alternative, the petition should be denied.

Respectfully submitted.

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SEPTEMBER 2019