NO. _____

IN THE

Supreme Court of the United States

_____ TERM, 20__

DARNELL MCCONNELL, II,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether "controlled substance[s]" in the Federal Sentencing Guidelines § 4B1.2(b) are limited to those substances defined and regulated under the federal Controlled Substances Act, 21 U.S.C. § 801 et seq.

PARTIES TO THE PROCEEDINGS

The caption contains the names of all parties to the proceedings.

DIRECTLY RELATED PROCEEDINGS

This case arises from the following proceedings in the United States District Court for the Southern District of Iowa, and the United States Court of Appeals for the Eighth Circuit:

United States v. McConnell, 3:19-cr-00113-001 (S.D. Iowa) (criminal proceedings), judgment entered December 19, 2020.

United States v. McConnell, 21-1086 (8th Cir.) (direct criminal appeal), opinion and judgment entered March 14, 2022.

There are no other proceedings in state or federal trial or appellate courts, or in this Court directly related to this case.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Darnell McConnell, II, respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is unreported and available at 2022 WL 761538 (8th Cir. 2022) and is reproduced in the appendix to this petition at Pet. App. p. 8.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit entered judgment on March 14, 2022, Pet. App. p. 10. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

28 U.S.C. § 994:

> (h) The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and—
>
> (1) has been convicted of a felony that is—
>
> (A) a crime of violence; or
>
> (B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46; and
>
> (2) has previously been convicted of two or more prior felonies, each of which is—
>
> (A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46

U.S.S.G. § 4B1.1:

(a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

(b) Except as provided in subsection (c), if the offense level for a career offender from the table in this subsection is greater than the offense level otherwise applicable, the offense level from the table in this subsection shall apply. A career offender's criminal history category in every case under this subsection shall be Category VI.

U.S.S.G. § 2K2.1(a)(2):

(a) Base Offense Level (Apply the Greatest):

. . .

(2) 24, if the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense

U.S.S.G. § 4B1.2(b) defines a "controlled substance offense" as follows:

The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

STATEMENT OF THE CASE

A. Introduction

This petition presents a significant split of authority on the proper interpretation of U.S.S.G. § 4B1.2—namely, what a "controlled substance offense" means under the Sentencing Guidelines. That, in turn, implicates U.S.S.G. § 4B1.1(a), which provides a career offender enhancement where a "defendant has at least two prior felony convictions of . . . a controlled substance offense."

Courts in nine circuits have weighed in on this question presented and have split four to five: four circuits hold that "controlled substance offenses" should include substances criminalized under state law, even if the conduct is not illegal under federal law, while five circuits hold that "controlled substance offense" comprises only those offenses criminalized under the federal Controlled Substances Act.

This split is wide, entrenched, and has been in existence for more than a decade. This Court should intervene because there is no indication that the Sentencing Commission will resolve this issue. The Commission has never requested public comment on the meaning of "controlled substances" in § 4B1.2, and is unlikely to do so in the near future, given that it currently lacks a quorum to review or clarify the Guidelines. *Cf. Braxton v. United States*, 500 U.S. 344, 348–49 (1991) (declining to resolve Guidelines issue because the Commission had undertaken a proceeding to resolve conflict).

In the meantime, the division of authority will continue to have a deleterious effect, with defendants receiving disparate sentences solely depending on the location

of the sentencing court. Indeed, this issue affects approximately 1,200 to 2,000 defendants every year—roughly 3% of all federal defendants are classified as career offenders. Such a designation drastically increases defendants' sentences. On average, the career-offender designation increases the Guidelines minimum by 84 months. Consequently, unless this Court intervenes, thousands of defendants every year will continue to receive widely divergent sentences not because of their past conduct nor their present offense, but purely based on where they happen to be sentenced.

B. Factual Background

In the summer of 2019, law enforcement received information, both from informants and social media, that Mr. McConnell was selling drugs and firearms. PSR ¶¶ 12-19.[1] Based upon this information, law enforcement obtained a search warrant for Mr. McConnell's residence. PSR ¶ 20. The search revealed controlled substances and firearms. PSR ¶ 20.

C. Proceedings at District Court

Mr. McConnell was indicted in the Southern District of Iowa with two counts of being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) & 924(a)(2). R. Doc. 1. Pursuant to a plea agreement, Mr. McConnell pleaded guilty to one of the counts. R. Doc. 31.

[1] In this petition, "R. Doc." refers to the criminal docket in Southern District of Iowa Case No. 3:19-cr-00113-001, and is followed by the docket entry number. "Sent. Tr." refers to the sentencing transcript in Southern District of Iowa Case No. 3:19-cr-00113-001.

The case proceeded to sentencing. The presentence investigation report ("PSR") calculated Mr. McConnell's base offense level at 22. PSR ¶ 35. The PSR increased Mr. McConnell's base offense level because the offense involved a semiautomatic firearm that is capable of accepting a large capacity magazine, and Mr. McConnell had a prior conviction for a controlled substance offense: Illinois manufacture/delivery of a controlled substance - cocaine, in violation of 720 ILCS 570/401(d). PSR ¶¶ 35, 53. He received a two-level enhancement for number of firearms, and an additional two-level enhancement because the firearm was stolen. PSR ¶¶ 36-37. The PSR also recommended a four-level enhancement under USSG § 2K2.1(b)(6)(B) for possessing the firearm in connection with another felony offense—drug trafficking. PSR ¶ 38. After a three-level reduction, Mr. McConnell's recommended total offense level was 27. PSR ¶ 46. Combined with a criminal history category IV, this resulted in an advisory guideline range of 100 to 120 months of imprisonment. PSR ¶ 146; U.S.S.G. § 5G1.1(a).

As relevant to this petition, Mr. McConnell objected to his base offense level. R. Doc. 40, 45. He argued that his Illinois drug conviction was overbroad and did not qualify as a controlled substance offense. R. Doc. 40, 45.

The case proceeded to sentencing. Mr. McConnell asserted that his Illinois conviction was overbroad, as Illinois's controlled substance statute includes substances outside of the federal definition. Sent. Tr. pp. 5-6. The district court overruled Mr. McConnell's objection to his base offense level and accepted the PSR's

calculation of the advisory Guideline range. Sent. Tr. p. 8. The court sentenced Mr. McConnell to 100 months of imprisonment, the low-end of the Guideline range. Sent. Tr. p. 14.

D. Proceedings on Appeal

Mr. McConnell appealed, maintaining his challenge to the increase to his base offense level. The Eighth Circuit Court of Appeals summarily affirmed. *United States v. McConnell*, No. 21-1086, 2022 WL 761538 (8th Cir. 2022). The Court noted that the argument was rejected by *United States v. Henderson*, 11 F.4th 713 (8th Cir. 2021), and that the panel was bound by that decision.

In *Henderson*, the court acknowledged that 720 ILCS 570/401 is "categorically broader than the federal definition," but found that because the "Guidelines provide no separate definition of 'controlled substance,'" convictions under Illinois' drug laws constituted controlled substance offenses. *United States v. Henderson*, 11 F.4th 713, 717-19 (8th Cir. 2021).

In *Henderson*, the Eighth Circuit joined a decade-long circuit split[2] regarding whether "controlled substance[s]" are defined exclusively by federal law, or whether the phrase also includes state-regulated drugs. After *Henderson* was decided, the

[2] This is an estimated starting point. Courts disagree about when the present split began. *See United States v. Sanchez-Garcia*, 642 F.3d 658, 661 (8th Cir. 2011) (citing *United States v. Leiva–Deras,* 359 F.3d 183, 189 (2d Cir. 2004) and *United States v. Kelly*, 991 F.2d 1308, 1316 (7th Cir. 1993)); *United States v. Ruth*, 966 F.3d 642, 654 (7th Cir. 2020) (acknowledging split and citing *United States v. Hudson* 618 F.3d 700 (7th Cir. 2010)). This may be because § 4B1.2's "controlled substance offense" is defined identically to "drug trafficking offense" under U.S.S.G. § 2K1.2. Both were drafted to mirror "serious drug offense" under 28 U.S.C. 924(e); case law regarding these phrases goes back further than that of § 4B1.2 but arguably sheds light on the meaning of "controlled substance offense."

Fourth, Seventh, Eighth, and Tenth Circuits read "controlled substance[s]" to include substances regulated by federal law as well as additional substances regulated by state law. Consequently, this permits offense level enhancements for defendants who were convicted under state laws which are broader than their federal counterpart, the Controlled Substances Act. Defendants in these circuits face enhanced punishment regardless of whether their behavior was criminalized under federal law.

In contrast, the First, Second, Third, Fifth, and Ninth Circuits limit the definition of "controlled substance[s]" to those outlined in the CSA. In these circuits, defendants will not receive enhanced offense levels for prior drug convictions under state statutes that criminalize a broader array of substances than federal law. For example, federal law defines cocaine as cocaine, its salts, optical and geometric isomers, and salt of isomers; Illinois Statute § 570/206(b)(4) also includes positional isomers in its definition of cocaine, thereby punishing an additional substance that federal law does not. Defendants convicted of Illinois Statute § 570/206(b)(4), such as Mr. McConnell, have committed a "controlled substance offense" in the Fourth, Seventh, Eighth, and Tenth Circuits, but not in the First, Second, Third, Fifth, and Ninth Circuits. These differing approaches lead to disparities in sentencing throughout the country for otherwise similar defendants.

REASONS FOR GRANTING THE WRIT

I. A DIRECT CONFLICT EXISTS AMONG THE COURTS OF APPEALS

A. Five Circuits Define "Controlled Substance" Solely By Reference to the Federal Controlled Substances Act.

The First, Second, Third, Fifth, and Ninth Circuits interpret "controlled substance[s]" to include only federal substances offenses under the Controlled Substances Act.

Interpreting § 4B1.2, the Ninth Circuit reasoned that the Guidelines' goal of sentencing uniformity supporting using the Controlled Substances Act to define "controlled substances:"

> We have interpreted the term "controlled substance" as used in the Guidelines to mean a substance listed in the Controlled Substances Act ("CSA"), 21 U.S.C. § 801 et seq. As we noted in *Leal-Vega*, construing the phrase in the Guidelines to refer to the definition of "controlled substance" in the CSA—rather than to the varying definitions of "controlled substance" in the different states—furthers uniform application of federal sentencing law, thus serving the stated goals of both the Guidelines and the categorical approach.

United States v. *Bautista*, 989 F.3d 698, 702 (9th Cir. 2021) (citing *United States v. Leal-Vega*, 680 F.3d 1160 (9th Cir. 2012)).

The Second Circuit also interpreted § 4B1.2 in relation to the CSA and noted a textual basis for its holding:

> [W]e find that "controlled substance" refers exclusively to substances controlled by the CSA. . . . Although a "controlled substance offense" includes an *offense* "under federal or state law," that does not also mean that the *substance* at issue may be controlled under federal or state law.

United States v. Townsend, 897 F.3d 66, 68–70 (2d Cir. 2018) (emphasis in original). The Second Circuit further supported its conclusion by citing the *Jerome* presumption, which prescribes that "the application of a federal law does not depend on state law unless Congress plainly indicates otherwise." *Id.* at 71. "Because of the presumption that federal—not state—standards apply to the Guidelines . . . if the Sentencing Commission wanted 'controlled substance' to include substances controlled under only state law to qualify, then it should have said so." *Id.* at 70 (citations omitted).

The Fifth Circuit adopted the Ninth Circuit's reasoning, concluding that the Controlled Substances Act defines which offenses constitute predicates for sentence enhancements. *United States v. Gomez-Alvarez*, 781 F.3d 787, 793–94 (5th Cir. 2015) (citing to *United States v. Leal-Vega*, 680 F.3d 1160 (9th Cir. 2012)) ("For a prior conviction to qualify as a 'drug trafficking offense,' the government must establish that the substance underlying that conviction is covered by the CSA.").[3]

Finally, both the First Circuit and district courts within the Third Circuit have defined "controlled substance" by reference to federal law. The First Circuit noted that "[b]ecause we are interpreting the federal sentencing guidelines and utilizing the categorical approach (a creation of federal case law), this federally based approach is appealing," because "federal courts cannot blindly accept anything that a state

[3] Although *Gomez-Alvarez* interpreted "drug trafficking offense" under § 2L1.2, rather than "controlled substance offense" in § 4B1.2, this statutory distinction is "immaterial," because § 4B1.2 and § 2L1.2 define these terms identically. *Bautista*, 989 F.3d at 702 (stating "[t]he relevant text in the two provisions is identical.")

names or treats as a controlled substance." *United States v. Crocco*, 15 F.4th 20, 23 (1st Cir. 2021) (internal quotations omitted). It found the competing approach, endorsed by the Fourth, Seventh, Eighth and Tenth Circuits to be "fraught with peril." *Id.*

The district courts of the Third Circuit have resolved the issue in favor of a single, federal definition under the Controlled Substances Act. *United States v. Miller*, 480 F. Supp. 3d 614, 621 (M.D. Pa. 2020) ("To be abundantly clear, we hold that, for purposes of career-offender classification, the term 'controlled substance' in Section 4B1.2(b) 'must refer exclusively to those drugs listed under federal law—that is, the [federal] CSA.'" (citing *Townsend*, 897 F.3d at 71)); *United States v. Jamison*, 502 F. Supp. 3d 923 (M.D. Pa. 2020); *United States v. Lewis*, No. 20-583 (FLW), 2021 WL 3508810 (D.N.J. 2021).[4] These courts treated the federal CSA as a sensible "federal counterpart" to § 4B1.2's definition of "controlled substance," noting that "[u]niformity in federal sentencing is paramount, particularly with respect to application of the career-offender enhancement. Indeed, it is one of the primary goals of the Guidelines." *Miller*, 480 F. Supp. 3d at 620, 621.

Had Mr. McConnell been tried in any of the above circuits, this Guidelines' range would have been significantly lower than what he received in the Eighth Circuit.

[4] The Third Circuit has not yet weighed in on this issue, but the government has requested review on this question in *United States v. Lewis*, No. 20-583 (FLW), 2021 WL 3508810 (D.N.J. 2021).

B. Four Circuits Define "Controlled Substance" With Reference to the State Definition of "Controlled Substances."

Aside from the Eighth Circuit, three circuits have found that the plain text of § 4B1.2 incorporates state definitions of "controlled substances."

The Fourth Circuit explicitly stated as much in *United States v. Ward*, 972 F.3d 364, 374 (4th Cir. 2020):

> The term "controlled substance offense" means an offense under federal *or state law*. § 4B1.2(b) (emphasis added). Thus, the Commission has specified that we look to *either* the federal or state law of conviction to define whether an offense will qualify.

The Seventh Circuit came to a similar conclusion:

> We see no textual basis to engraft the federal Controlled Substance Act's definition of "controlled substance" into the career-offender guideline. The career-offender guideline defines the term controlled substance offense broadly, and the definition is most plainly read to "include state-law offenses related to controlled or counterfeit substances punishable by imprisonment for a term exceeding one year."

United States v. Ruth, 966 F.3d 642, 654 (7th Cir. 2020) (citing *United States v. Hudson*, 618 F.3d 700, 703 (7th Cir. 2010)).

The Tenth Circuit also found that absent a clear directive in § 4B1.2(b)'s reference to "controlled substance," the courts should use state definitions:

> [B]y not referencing the Controlled Substance Act definition in § 4B1.2(b), the Commission evidenced its intent that the enhancement extend to situations in which the state-law offense involved controlled substances not listed in the Controlled Substance Act.

United States v. Jones, 15 F.4th 1288, 1294 (10th Cir. 2021).

C. Three Circuits Have Yet to Resolve This Issue.

The D.C. Circuit has not yet reached the merits of the issue.

The Sixth Circuit appears, in several unpublished opinions, to agree with the Fourth, Seventh, Eighth, and Tenth Circuits:

> [B]ecause the Guidelines specifically include offenses under state law in § 4B1.2, the fact that Illinois may have criminalized the "manufacture, import, export, distribution, or dispensing" of some substances that are not criminalized under federal law does not prevent conduct prohibited under the Illinois statute from qualifying, categorically, as a predicate offense.

United States v. Smith, 981 F. App'x 483, 488 (6th Cir. 2017); *see United States* v. *Sheffey*, 818 F. App'x 513 (6th Cir. 2020) (finding that even if overbroad, the state law was severable and federal law regulated the substance at issue). Yet, in other unpublished opinions, the Sixth Circuit appears to favor the other side of the split. *See United States v. Pittman*, 736 F. App'x 551, 554 (6th Cir. 2018) ("Because [the state law] criminalizes the distribution of at least some substances that are not 'controlled substances' within the meaning of 21 U.S.C. § 802(6), it necessarily criminalizes some actions that are not 'controlled substance offenses' within the meaning of USSG § 4B1.2(b).").

The Eleventh Circuit has, in an unpublished opinion, applied Florida state law's definition of 'controlled substance' to enhance an individual's sentence:

> We have twice held that [Florida statute § 893.13] is a controlled substance offense under § 4B1.2(b). Under the prior panel precedent rule, we are bound by our prior decisions "unless and until [they are] overruled or undermined to the point of abrogation by the Supreme Court or by this court sit[t]ing *en banc*." And *there is no overlooked argument exception to the rule.*

United States v. *Peraza*, 754 F. App'x 908, 910 (11th Cir. 2018) (citations omitted) (emphasis added).

Although the defendant in *Peraza* argued, like Mr. McConnell, that his Florida conviction was not a "controlled substance offense" because it was broader than § 4B1.2, the Eleventh Circuit declined to consider this argument. Under the prior panel precedent doctrine, the Eleventh Circuit will not weigh in on a split until it encounters the issue for a state statute it has not previously upheld as a "controlled substance offense."

Thus, eleven of the twelve courts of appeals have addressed Mr. McConnell's issue in some manner and have roughly split down the middle on its resolution. So long as that is the case, there is no possibility of uniform federal sentencing law.

II. THE EIGHTH CIRCUIT'S DECISION IS WRONG ON THE MERITS

A. The Eighth Circuit's Decision is Contrary to the Text of § 4B1.2.

The Eighth Circuit was incorrect in *Henderson* when it claimed that "there is no textual basis to graft a federal law limitation onto a [federal] career-offender guideline." 11 F.4th at 718-19. Instead, the plain text and authorizing statute, 28 U.S.C. § 994(h), indicate that § 4B1.2 does not incorporate state law definitions of controlled substances.

The Commission's authority to promulgate regulations for career offenders stems from 28 U.S.C. § 994(h). Section 994(h) instructs the Commission to provide for enhanced sentencing of defendants who had been convicted of two prior felonies that were "offense[s] described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import

and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46." 28 U.S.C. § 994(h)(2)(b).

The Commission originally drafted § 4B1.2 with this mandate in mind, explicitly incorporating § 994(h)'s references to the Controlled Substances Act. See U.S.S.G. § 4B1.2 (1987) ("The term 'controlled substance offense' as used in this provision means an offense identified in 21 U.S.C. §§ 841, 952(a), 955, 955a, 959; §§ 405B and 416 of the Controlled Substance Act as amended in 1986, and similar offenses.").[5] Indeed, if § 4B1.2 were interpreted to include controlled substances not outlined in the Controlled Substances Act, contrary to § 994(h), there is a colorable argument that the Commission exceeded its authority.

Additionally, although the Commission has modified § 4B1.2 once, this amendment only reinforced that "controlled substance[s]" are limited to substances outlined in the Controlled Substances Act. The current version of § 4B1.2 originated in 1989. As the Sentencing Commission states, this alteration was intended to bring the definition of "controlled substance offenses" in line with "serious drug offense[s]" in the Armed Career Criminal Act. U.S. Sent'g Comm'n, Report to the Congress: Career Offender Sentencing Enhancements, at App. A-8 (2016) (citing U.S.S.G. App.

[5] Early court opinions interpreting § 4B1.2 determined that the Guidelines permitted enhanced sentencing based on state convictions only where the prior conviction also could have been charged under federal law. *United States v. Stewart*, 761 F.3d 993, 999 (9th Cir. 2014), *United States v. Jemine*, 555 F. App'x 624, 625 (7th Cir. 2014), *United States v. Najar*, 225 F.3d 660 (6th Cir. 2000), *United States* v. *Gonsalves*, 121 F.3d 1416, 1419 (11th Cir. 1997), *United States v. Consuegra*, 22 F.3d 788 (8th Cir. 1994), *United States* v. *Brown*, 23 F.3d 839, 841 (4th Cir. 1994), *United States v. Whyte*, 892 F.2d 1170 (3d Cir. 1989).

C, amend. 268 (Nov. 1, 1989)). In turn, "serious drug offense[s]" are explicitly limited to substances defined under federal law. 18 U.S.C. § 924(e)(2)(A). Therefore, the 1989 revision reinforces Mr. McConnell's argument that controlled substances only include those substances under the Controlled Substance Act.

The structure of § 4B1.2 further supports Mr. McConnell's interpretation of the Guideline. Section 4B1.2 defines a "controlled substance offense [as] an offense under federal or state law," that prohibits the manufacture, import, export, distribution, dispensing, or possession "of a controlled substance." U.S.S.G. § 4B1.2(b). "Offense" is the subject of the sentence and the phrase "under federal or state law" modifies that term. "Federal or state law" does not modify the term "controlled substance."

As such, § 4B1.2 permits state convictions to justify sentencing enhancements but does not define controlled substances by reference to state law. "To include substances controlled under only state law, the definition should read '... a controlled substance *under federal or state law*.' But it does not." *Townsend*, 897 F.3d at 70. (emphasis in original). Rather, to determine whether an offense is a controlled substance offense, "the *conduct* of which the defendant was convicted is the focus of inquiry." U.S.S.G. § 4B1.2 n.2 (emphasis added); see also *United States v. Nardello,* 393 U.S. 286, 293–295 (1969).

B. The Eighth Circuit's Approach Contravenes the Guidelines Goal of Avoiding Sentencing Disparity.

The practice followed by the Fourth, Seventh, Eighth, and Tenth circuits upsets the "precise calibration of sentences," *Payne* v. *Tennessee*, 501 U.S. 808, 820 (1991), that Congress established, see United States Sent'g Comm'n, Guidelines Manual, 2 (Nov. 2021) (describing Congress' "three objectives" in enacting the Sentencing Reform Act of 1984 as combating crime, reasonable uniformity in sentencing, and proportionality); *Rita* v. *United States*, 551 U.S. 338, 349 (2007) ("Congress 'sought *uniformity* in sentencing by narrowing the wide disparity in sentences imposed by different federal courts for similar criminal conduct.'").

Further, the Eighth Circuit's method "turns the categorical approach on its head." *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1570 (2017); *see also Descamps v. United States*, 570 U.S. 254 (2013). The Eighth Circuit now permits two identical defendants to receive different sentences "based on exactly the same conduct, depending on whether the State of his prior conviction happened to call that conduct" a controlled substance offense. *See United States v. Taylor*, 495 U.S. 575, 591 (1990). This type of disparate outcome is precisely what the Guidelines were designed to avoid. *Rita*, 551 U.S. at 349 (stating that the Guidelines developed "a system that imposes appropriately different sentences for criminal conduct of different severity" not based upon the geographic location where the crime was committed.).

Such an approach has been consistently rejected in other areas of criminal law. Cf. *Taylor*, 495 U.S. at 590–91 (1990) (rejecting the use of state-law definitions of

"burglary" for sentence enhancement purposes because "[t]hat would mean that a person . . . would, or would not, receive a sentence enhancement based on exactly the same conduct, depending on whether the State of his prior conviction happened to call that conduct 'burglary.'"); *Esquivel-Quintana*, 137 S. Ct. at 1570 (rejecting argument that "sexual abuse of a minor" encompasses all state convictions regardless of state's age of consent, because "defining [an offense] . . . as whatever is illegal under the particular law of the State where the defendant was convicted" turns "the categorical approach on its head"); *Nardello,* 393 U.S. at 293–94 (finding it untenable that "[g]iving controlling effect to state classifications would result in coverage . . . if appellees' activities were centered in Massachusetts, Michigan, or Oregon, but would deny coverage in Indiana, Kansas, Minnesota, or Wisconsin"). Controlled substance offenses are no different.

The text, drafting history, and general principles of criminal law show that the Eighth Circuit is wrong on the merits.

III. THE QUESTION PRESENTED RAISES AN IMPORTANT AND RECURRING ISSUE

Roughly 3% of federal defendants are sentenced as career offenders every year. United States Sentencing Commission, *Report to Congress: Career Offender Sentencing Enhancements*, 18 (2016) (hereinafter "COSE"). That translates to approximately 1,200 to 2,000 defendants who are annually designated as "career criminals." *Id*.

Moreover, statistics regarding § 4B1.1 career offenders likely underestimate the number of defendants affected by the § 4B1.2 definition of "controlled substance." Section 4B1.2 applies not only to those sentenced under § 4B1.1 (*i.e.*, defendants whose instant offense is a crime of violence or controlled substance offense), but also to defendants sentenced under other provisions of the Guidelines that incorporate § 4B1.2's definitions. At least three other sections—§ 2K1.3 (instant offense involving explosive materials), § 2K2.1 (instant offense is the unlawful possession of a firearm by a felon), § 5K2.17 (instant offense is crime of violence or controlled substance offense committed with a semiautomatic firearm)—incorporate § 4B1.2's definition of "controlled substance offense." Mr. McConnell, for example, was sentenced under § 2K2.1. Alone, those sentenced under § 2K2.1 make up over 11% of the Bureau of Prison population. U.S. Sent'g Comm'n, *Use of Guidelines and Specific Offense Characteristics* (2020).

Drug trafficking offenses dominate the federal docket (40.4%) with career offenders disproportionally affected: three-quarters of career offenders were convicted of drug offenses. COSE, at 2 (2016); *Use of Guidelines and Specific Offense Characteristics*, at 51 (2020).

The number of career offenders facing drug convictions will likely increase as states legalize marijuana or otherwise reform their drug laws. Given the slow pace of federal drug reform, courts will continue to face challenges as the discrepancies between federal and state laws grow. Lower courts will continue to grapple with this

question as they reconcile broad state criminal laws with this Court's treatment of offenses with multiple means in *Mathis v. United States*. 579 U.S. 500 (2016).

The severity of the career offender designation also demonstrates the need for this Court's clarification. The career offender designation increases the final Guidelines range for over 91% of defendants sentenced under § 4B1.1. COSE, at 21 (2016). Notwithstanding the Sentencing Commission's finding that drug offenders generally have less serious criminal histories and recidivate at a lower level, the "the career offender directive has the greatest impact on federal drug trafficking offenders because of the higher statutory maximum penalties for those offenders." *Id*. at 2.

Moreover, U.S.S.G. § 2K2.1(a)(2) of the Guidelines "substantially" increase one's sentence. *Henderson*, 11 F.4th at 717; *see also Crocco*, 15 F.4th at 24 n.4 (the career-offender designation increased the "guideline range from 77-96 months to 210-240 months."). For offenders with less extensive criminal histories, the guideline minimum increases on average by 84 months with the application of the career offender label.

IV. THE COURT CANNOT LEAVE THIS QUESTION TO THE COMMISSION

Although the Sentencing Commission could resolve this issue, it has not done so for more than a decade and there is no indication that the Commission will do so in the near future. The Commission has not had a quorum since 2019, and today consists of a single member whose term expires in October 2022. Put simply: This

issue is metastasizing and this Court is the only entity capable of resolving the confusion.

More still, this Court need not wait for the Commission to act. Sentencing courts and courts of appeals are already acting to sentence thousands of defendants annually to divergent sentences. And as recognized in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), the interpretation of federal regulations like the Guidelines remains firmly in the hands of the Court. *Kisor*, 139 S. Ct at 2415; see also *United States* v. *Nasir*, 982 F.3d 144 (3d Cir. 2020) (interpreting *Kisor* as requiring courts to make an independent inquiry into the Sentencing Guideline's meaning and interpretation).

Finally, since *Henderson*, all courts of appeals except the D.C. Circuit have faced this question and have split roughly evenly on the outcome. That an overwhelming majority of circuits have weighed in on this case makes it an ideal time for this Court's consideration, contrary to *Guerrant v. United States*, No. 21 ___ (2022) (cert denied), *United States* v. *Ruth*, 966 F.3d 642 (7th Cir. 2020), cert. denied, 141 S. Ct. 1239 (2021); *United States* v. *Ward*, 972 F.3d 364 (4th Cir. 2020), cert. denied, 141 S. Ct. 2864 (2021).

V. THIS CASE IS AN IDEAL VEHICLE TO RESOLVE THE SPLIT

Mr. McConnell preserved this question at sentencing and again on appeal. Moreover, Mr. McConnell's case presents a straightforward question of federal statutory interpretation: whether a "controlled substance" is defined exclusively by federal law or also includes state-controlled substances not regulated federally. Further, Mr. McConnell's case is unencumbered by procedural anomalies.

CONCLUSION

Mr. McConnell respectfully requests that the Petition for Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,

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