No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

PETE MANNING,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

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

PETITION FOR A WRIT OF CERTIORARI

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January 10, 2024

QUESTION PRESENTED

In federal sentencing, the U.S. Sentencing Guidelines typically call for a higher advisory Guidelines range if the defendant has been convicted of a prior "controlled substance offense." But in defining the term "controlled substance," two circuit splits have developed.

1. Is the term "controlled substance" defined by the drug schedules that existed at the time of the prior predicate conviction, or the drug schedules that exist at the time of the federal offense or federal sentencing?

2. Does the term "controlled substance" refer only to those substances controlled under federal law, or does it also include separate substances controlled only under state-law drug schedules?

PARTIES TO THE PROCEEDINGS

Petitioner, the defendant-appellee below, is Pete Manning.

The Respondent, the appellant below, is the United States of America.

RELATED PROCEEDINGS

U.S. Court of Appeals for the Third Circuit: *U.S. v. Pete Manning*, No. 22-1986 (Sept. 22, 2023) (not reported)

U.S. District Court for the District of New Jersey: *U.S. v. Pete Manning*, No. 3:20-cr-00105-MAS (Apr. 21, 2022) (not reported)

Other proceedings before this Court have presented the same issue—whether U.S.S.G. §4B1.2(b) includes state-court offenses involving a controlled substance, which substance is not currently controlled under federal law, for example:

- *Lewis v. United States*, No. 23-198 – certiorari denied December 11, 2023
- *Demont v. United States*, No. 22-7904 – certiorari denied October 10, 2023

Other proceedings before this Court have presented the analogous issue—whether the Armed Career Criminal Act, 18 U.S.C. §924(e)(2)(A)(ii), includes state-court offenses involving a controlled substance, which substance is not currently controlled under federal law:

- *Brown v. United States*, No. 22-6389 – oral argument November 27, 2023
- *Jackson v. United States*, No. 22-6640 – oral argument November 27, 2023

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Pete Manning, hereby petitions this Court for a writ of certiorari to review the final order of the U.S. Court of Appeals for the Third Circuit.

OPINIONS BELOW

The order of the Third Circuit is not reported, and is reproduced at Petition Appendix ("Pet. App.") 3a. *See also* Pet. App. 6a (U.S. Motion for Summary Reversal).

JURISDICTION

The Court of Appeals entered judgment on September 22, 2023. Pet. App. 3a. Petitioner filed a timely petition for rehearing by panel and rehearing *en banc*, which was denied on October 19, 2023. Pet. App. 1a-2a.

This Court has jurisdiction over this timely filed petition under 28 U.S.C. §1254(1).

PROVISIONS INVOLVED

28 U.S. Code §994(h) states:

> (h) The [Sentencing] 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. Sentencing Guidelines §4B1.1(a) states:

> (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.

U.S. Sentencing Guidelines §4B1.2(b) (2021) states:

> (b) 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.

U.S. Sentencing Guidelines §4B1.2(b) (2023) states:

> (b) CONTROLLED SUBSTANCE OFFENSE.—The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—
>
> > (1) 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; or
> >
> > (2) is an offense described in 46 U.S.C. § 70503(a) or § 70506(b).

INTRODUCTION

This petition presents two persistent circuit splits regarding the categorical approach. The categorical approach is a tool often used to apply the Armed Career Criminal Act (ACCA) and the federal Sentencing Guidelines. It requires courts to compare the elements of a predicate offense to a relevant comparator—such as the elements of a generic offense. If a predicate offense categorically "matches" the comparator, a harsher penalty applies under federal law.

This particular case involves the categorical approach's application to the Sentencing Guidelines. Under the Guidelines, defendants who have committed prior "controlled substance offense[s]" receive significantly enhanced sentences, under U.S.S.G. §4B1.1(a). The Guidelines define a "controlled substance offense" as "an offense under federal or state law" involving "a controlled substance." U.S.S.G. §4B1.2(b). The Guidelines, however, do not define "controlled substance." To define that term, courts look to controlled substance schedules, such as the federal Controlled Substances Act (CSA). Using the categorical approach, courts then compare that schedule against the predicate to determine whether the defendant's prior offense involved a "controlled substance."

But this application of the categorical approach presents two complications: drug schedules change over time; and States and the federal government disagree about what precise substances should be controlled. This case provides an example: Over the Government's objection, Petitioner Manning was sentenced without a Career Offender adjustment under U.S.S.G. §4B1.1. Specifically, the District Court determined Mr. Manning's 2010 New Jersey conviction for distributing heroin was

not a "controlled substance offense" under U.S.S.G. §4B1.2(b), because New Jersey law defined "heroin" in a categorically broader manner than the federal Controlled Substances Act's (CSA) definition of "heroin." Consequently, the District Court calculated Mr. Manning's guidelines range as 24-30 months in prison, rather than the Career Offender range of 151-188 months in prison, and sentenced Mr. Manning to 30 months in prison. Pet. App. 7a-10a. The Court of Appeals reversed based on circuit precedent holding that the term "controlled substance" in §4B1.2(b) means any substance "regulated by *either* federal or state law." *United States v. Lewis*, 58 F.4th 764, 768-69 (3d Cir. 2023). Pet. App. 11a-13a.

This Career Offender analysis presents two legal questions which have deeply divided the circuits, and which the Sentencing Commission has refused to resolve.

First, when defining a "controlled substance" to create the comparator for the categorical approach, should the sentencing court look to the drug schedule in effect at the time when federal law imposes an additional consequence as a result of the defendant's predicate offense? Or should the court rely on an outdated drug schedule from the time of the predicate conviction? The same question arises in the context of ACCA, with respect to a predicate "serious drug offense" enhancement under 18 U.S.C. §924(e)(2)(A)(ii). *See Brown v. United States*, No. 22-6389, and *Jackson v. United States*, No. 22-6640 (oral argument held Nov. 27, 2023). The Circuits have adopted three different approaches based on divergent applications of *McNeill v. United States*, 563 U.S. 816 (2011). *McNeill* concerned whether historic or contemporary law defines a predicate offense's elements for ACCA. Five circuits read

McNeill narrowly and define the federal comparator for the Guidelines or ACCA based on drug schedules in effect when the federal consequences associated with that predicate attach. This is the "time-of-consequences approach." By contrast, two circuits read *McNeill* broadly and look to drug schedules from the time of the predicate offense. This is the "time-of-conviction approach." Meanwhile, two more circuits apply *McNeill* inconsistently depending on whether the case involves ACCA or the Guidelines. These circuits apply the time-of-consequences approach in ACCA cases, but the time-of-conviction approach for the Guidelines.

Second, does "controlled substance" mean only drugs on the federal schedule? Or does "controlled substance" also include drugs that individual states have deemed controlled? The statute directing the Commission to create the Career Offender adjustment lacks any reference to state controlled substance laws, *see* 28 U.S.C. §994(h)(1)(B) and (2)(B)—despite Congress's reference elsewhere in §944 to state law and state predicates, *see, e.g.*, §994(i)(1) ("two or more prior Federal, State, or local felony convictions"). Three circuits define a "controlled substance" by exclusive reference to federal law. Six circuits, by contrast, hold that "controlled substance" means any substance regulated by federal or state law.

The Sentencing Commission has indicated that it will not resolve the issues. The Commission labeled the federal-or-state-law question as a "priority," requested public comment on that issue, and even amended other aspects of the definition of "controlled substance." *See* Final Priorities for Amendment Cycle, 87 Fed. Reg. 67756, 67756 (Nov. 9, 2022). *Compare* U.S.S.G. §4B1.2(b) (2021), *with id.* (2023). Yet

the Commission declined to resolve the federal-or-state-law question. *See* Sentencing Guidelines for United States Courts, 88 Fed. Reg. 7180, 7200-7201 (Feb. 2, 2023); Sentencing Guidelines for United States Courts, 88 Fed. Reg. 28254, 28276 (May 3, 2023). The Commission's priorities for the upcoming amendment cycle include discussing the use of the "categorical approach" in determining career-offender status.[1] But the Commission did not expressly identify resolving either circuit split as a priority.

A writ of certiorari should be granted so that this Court may resolve those two issues. This Court has already granted review of two ACCA cases implicating the first question presented, *Brown v. United States*, No. 22-6389, and *Jackson v. United States*, No. 22-6640 (oral argument Nov. 27, 2023). This petition provides a clean vehicle to resolve the timing question for purposes of *the Guidelines*—in the same term or shortly after this Court resolves the timing question for the ACCA in *Brown* and *Jackson*. Additionally, this Court should ensure the uniform application of federal sentencing law, by providing guidance on the definition of "controlled substance" in §4B1.2(b). *See* Supreme Court Rule 10(a).

Alternatively, it is respectfully requested this petition be held in abeyance pending decision in *Brown* and *Jackson*, and thereafter disposed of in light of the *Brown* and *Jackson* decision.

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[1] *See* U.S. Sentencing Comm'n, Federal Register Notice of Final 2023-2024 Priorities 4, <https://www.ussc.gov/sites/default/files/pdf/amendmentprocess/federal-register-notices/20230824_fr_final-priorities.pdf>.

STATEMENT OF THE CASE

A. Legal Framework

At sentencing, criminal defendants with certain previous convictions for "controlled substance offense[s]" are subject to enhanced penalties. *E.g.*, U.S.S.G. §4B1.1(a). The Sentencing Guidelines define a "controlled substance offense" as:

> 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 the possession of a controlled substance…with intent to manufacture, import, export, distribute, or dispense.

U.S.S.G. §4B1.2(b) (2021). *See also* U.S.S.G. §4B1.2(b) (2023). The Guidelines do not define the term "controlled substance."

To determine whether a prior conviction qualifies as a predicate offense, courts apply the "categorical approach." *See Taylor v. United States*, 495 U.S. 575, 598-599 (1990). Under the categorical approach, the facts of the predicate offense are irrelevant. Instead, the categorical approach compares the elements of a predicate offense to a generic comparator, such as a generic offense or "some other criterion," to determine whether the predicate is a categorical match. *Shular v. United States*, 140 S. Ct. 779, 783 (2020). The purpose of the categorical approach—and the reason courts use a standard comparator across all cases—is to ensure "that all defendants whose convictions establish the same facts will be treated consistently, and thus predictably, under federal law." *Moncrieffe v. Holder*, 569 U.S. 184, 205 n.11 (2013). The categorical approach thus reflects the longstanding presumption that "federal laws are not to be construed so that their application is dependent on state law."

Taylor, 495 U.S. at 591 (citing *Dickerson v. New Banner Inst.*, 460 U.S. 103, 119-120 (1983)).

B. Procedural History

1. In 2020, Petitioner Manning pleaded guilty to a one-count Information, charging him with distribution of heroin, in violation of 21 U.S.C. §841(a)(1), (b)(1)(C). The Pre-Sentence Report (PSR) recommended classifying Manning as Career Offender, under U.S.S.G. §4B1.1(a), alleging that his current §841(a)(1) conviction was a "controlled substance offense," his 2012 possession with intent to distribute heroin conviction in Pennsylvania state court was a "controlled substance offense," and his 2010 distribution of heroin near school property conviction in New Jersey state court was a "controlled substance offense." Classification as a Career Offender resulted in an advisory Guidelines range of 151-188 months in prison. PSR ¶¶ 27, 35, 36, 46, 85. Pet. App. 7a-9a.

The District Court, consistent with its rulings in other cases, found Mr. Manning's 2010 New Jersey conviction for distributing heroin was not a "controlled substance offense" under §4B1.2(b), because New Jersey law defined "heroin" in a categorically broader manner than the federal Controlled Substances Act's (CSA) definition of "heroin." Pet. App. 8a-9a. Thus, the District Court concluded, Mr. Manning did not have at least two prior felony "crime of violence" or "controlled substance offense" convictions, under §4B1.1(a). Without the Career Offender adjustment, Mr. Manning's advisory Guidelines range was 24-30 months in prison.

The court sentenced Mr. Manning to 30 months in prison, and 3 years of supervised release. Pet. App. 8a-9a.

2. The Government appealed the sentence to the U.S. Court of Appeals for the Third Circuit. Pet. App. 10a. After staying the appeal pending decision in *United States v. Lewis*, 58 F.4th 764 (3d Cir. 2023), the Court of Appeals granted the Government's motion to summarily reverse and remand for resentencing. Pet. App. 3a-17a.

Specifically, *Lewis* held that the term "controlled substance" in U.S.S.G. §4B1.2(b) means a substance "regulated by *either* federal or state law," and the analysis asks whether the substance was regulated at the time of the prior state-court conviction, not whether the substance is regulated at the time of the federal offense or federal sentencing. *Lewis*, 58 F.4th at 768-69, 771 (emphasis original). The Government argued that *Lewis* meant the District Court's ruling—that Manning's 2010 New Jersey "heroin" conviction involved a substance not regulated under current federal law, rendering it not a "controlled substance offense"—was wrong. Pet. App. 11a-13a. On that basis, the Court of Appeals reversed and remanded for resentencing. Pet. App. 3a-17a.

3. Mr. Manning filed a petition for rehearing by panel and rehearing *en banc*. Manning noted that the *Lewis* decision was at odds with Congress's directive in 28 U.S.C. §994(h). Section 994(h) specifically references, as the touchstone for a controlled substance offense:

> 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.

28 U.S.C. §994(h)(1)(B) and (2)(B). It is anomalous that Congress would specifically reference the federal CSA in §994(h) as the touchstone for what §4B1.2(b) should be, but courts would ignore the federal CSA when interpreting the term "a controlled substance" in §4B1.2(b). Congress's explicit references to State law and State predicate convictions—in §994(i)(1), for example, "two or more prior Federal, State, or local felony convictions"—demonstrates that omission of any reference to state law and state-law schedules in §994(h) was intentional and should be given effect.

The Court of Appeals denied rehearing by panel and rehearing *en banc* on October 19, 2023. Pet. App. 1a-2a.

This timely petition for certiorari follows.

REASONS FOR GRANTING THE PETITION

I. The Circuits are split over whether *McNeill* dictates a time-of-consequences or time-of-conviction approach.

This Court should grant this petition to resolve the first question presented. The Third Circuit's *Lewis* decision, applied against Petitioner Manning below, deepens an acknowledged circuit split over the application of *McNeill* to defining a "controlled substance" in Sentencing Guidelines cases and a "serious drug offense" in ACCA cases. Five circuits read *McNeill* narrowly and look to the drug schedule in effect when federal consequences attach (the "time-of-consequences approach"). Two circuits read *McNeill* broadly and look to the drug schedule in effect at the time of the

predicate offense (the "time-of-conviction approach"). Two more circuits—including the Third Circuit below—adopt the time-of-consequences approach for ACCA analysis[2] but the time-of-conviction approach for Sentencing Guidelines analysis.[3]

This Court already acknowledged that this question presents an important issue worthy of resolution when it granted certiorari in two ACCA cases raising this precise question. *See Brown*, No. 22-6389; *Jackson*, No. 22-6640. This Court could grant this petition to decide this question in the context of the Sentencing Guidelines. At minimum, the Court should hold this petition pending resolution of *Brown* and *Jackson*.

A. The Circuits are deeply divided over the application of *McNeill* to the timing question.

In both Sentencing Guidelines and ACCA cases, the First, Second, Fourth, Ninth, and Tenth Circuits read *McNeill* narrowly and define the relevant federal comparator based on a controlled substance schedule in effect when federal consequences attach. The Sixth and Eleventh Circuits read McNeill broadly and look to law in effect at the time of the predicate conviction. Finally, the Third Circuit and Eighth Circuits apply the former approach in Guidelines cases and the latter approach in ACCA cases. Even looking at just Guidelines cases, the circuits are divided 3-3: the First, Second, and Ninth Circuits apply a time-of-consequences approach, and the Third, Sixth, and Eighth Circuits apply a time-of-conviction approach. The Court should resolve this entrenched split.

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[2] *United States v. Brown*, 47 F.4th 147, 153, 155-56 (3d Cir. 2022).

[3] *United States v. Lewis*, 58 F.4th 764, 771 (3d Cir. 2023).

1. The First, Second, Fourth, Ninth, and Tenth Circuits define a "controlled substance" based on the federal drug schedule in effect when federal consequences attach. These circuits read *McNeill* narrowly as defining only the elements of a predicate offense—not the elements of the relevant federal provision against which the predicate offense is compared.[4]

Consider the Ninth Circuit. In *United States v. Bautista*, 989 F.3d 698 (9th Cir. 2021), the defendant committed a state-law offense, after which Congress amended the federal CSA to narrow the definition of the substance in question, *id.* at 701. The Ninth Circuit held that the state conviction no longer qualified as a controlled substance offense because the state-law predicate offense did not categorically match the current federal drug schedule. *Id.* at 703. The Ninth Circuit explained that this approach promotes "uniformity in federal sentencing law." *Id.* In contrast, "[a]pplying superseded versions of the" relevant schedule "depending on when in the past a defendant committed an identical state crime would cause the very sentencing disparities Congress has repeatedly stated it intends to avoid." *Id.* at 703-704.

In so holding, the Ninth Circuit squarely rejected the Government's argument that *McNeill* required defining the comparator "at the time of the prior state conviction." *Id.* at 703. As the Ninth Circuit explained, *McNeill* has nothing to say

[4] These circuits are further sub-divided over whether to use the drug schedule in effect at sentencing or at the time the federal offense was committed. *Compare, e.g.*, *United States v. Hope*, 28 F.4th 487, 504-505 (4th Cir. 2022), *with, e.g.*, *United States v. Williams*, 61 F.4th 799, 808 (10th Cir. 2023).

on that question: *McNeill* speaks to how to determine the elements of a predicate offense, not the elements of the comparator. *See id*. at 703-704. And in *Bautista*, only the comparator had changed. It "would be illogical to conclude that federal sentencing law attaches 'culpability and dangerousness' to an act that, at the time of sentencing, Congress has concluded is not culpable and dangerous." *Id*. at 703. Indeed, adopting the Government's approach "would prevent amendments to federal criminal law from affecting federal sentencing and would hamper Congress' ability to revise federal criminal law." *Id*.

The First Circuit has likewise adopted the time-of-consequences approach to define "controlled substance." *See United States v. Abdulaziz*, 998 F.3d 519, 523-31 (1st Cir. 2021). As the First Circuit explained, McNeill confirms that "the elements of the state offense of conviction are locked in at the time of that conviction," meaning courts must "look back to the time of conviction…to discern the elements of" a predicate offense. *Id*. at 525. But *McNeill's* "backward-looking inquiry" says nothing about whether the definition of controlled substance is also "locked in as of the time of the previous conviction." *Id*. at 526-527 (internal quotation marks omitted). Echoing the Ninth Circuit, the First Circuit emphasized the oddity of applying a federal sentencing enhancement "based in no small part on a judgment about how problematic that past conduct is when viewed as of the time of the sentencing itself…without regard to whether the conduct" involved a substance that is no longer controlled. *See id*. at 528.

The Second Circuit also follows the time-of-consequences approach. *United States v. Gibson*, 55 F.4th 153, 162-167 (2d Cir. 2022). Like the First and Ninth Circuits, the Second Circuit reads *McNeill* as narrowly focused on how to define the predicate, not the comparator. *Id.* at 162. The Second Circuit has also emphasized the logic of looking to modern drug schedules: A "defendant's culpability and dangerousness plainly change in the eyes of federal law when the conduct for which he was previously convicted under state law is no longer unlawful." *Id.* Indeed, controlled substance schedules are intended to be "a moving target," and the federal CSA has frequently changed over time. *Id.* at 163 (citation omitted).

In ACCA cases, the Fourth and Tenth Circuits likewise define the comparator using the drug schedule in effect when federal consequences attach.

In *Hope*, the Fourth Circuit cited the Ninth Circuit's decision in *Bautista*, a Guidelines case; it likewise concluded that *McNeill* explained how to define the elements of a predicate, not the comparator; and the Fourth Circuit held that it would be "illogical" to define a controlled substance according to an outdated drug schedule. *United States v. Hope*, 28 F.4th 487, 505 (4th Cir. 2022) (quoting *Bautista*, 989 F.3d at 703).

In *Williams*, the Tenth Circuit agreed with "[t]he overwhelming majority of circuits" that "the correct point of comparison is the time of the instant federal offense—not the prior state offense." *United States v. Williams*, 48 F.4th 1125, 1139 (10th Cir. 2022). The Tenth Circuit likewise declined to rely on *McNeill*, holding that

McNeill involved "a subsequent change in the prior offense of conviction—and not the federal definition to which it is compared." *Id*. at 1142.

2. In contrast to those five Courts of Appeals, the Sixth and Eleventh Circuits read *McNeill* more expansively to support defining the federal comparator based on the law at the time of the predicate offense. This is the "time-of-conviction approach." In *Clark*, the Sixth Circuit defined a "controlled substance" based on drug schedules in effect at the time of conviction. *United States v. Clark*, 46 F.4th 404, 408-09 (6th Cir. 2022). According to the Sixth Circuit, the Guidelines' use of the term "prior" in describing the relevant felony convictions that can trigger an enhancement means a "court should take a backward-looking approach and assess the nature of the predicate offenses at the time [of those] convictions." *Id*. at 408-09 (quoting U.S.S.G. §4B1.2(c)). The Sixth Circuit read *McNeill* to "confirm" the appropriateness of "a time-of-conviction rule." *Id*. at 409. According to that court, both *McNeill* and *Clark* involved "recidivism enhancements" and "an intervening change" in law "that ostensibly shifts the meaning of a provision that enhances [a] sentence." *Id*. The court recognized that other circuits take the opposite approach, but determined that those "courts insufficiently grapple with the Supreme Court's reasoning in *McNeill*." *Id*. at 414.

The Eleventh Circuit adopted a similar approach for ACCA cases in *Jackson*, which this Court is hearing this term. *See United States v. Jackson*, 55 F.4th 846, 855 (11th Cir. 2022), *cert. granted*, 143 S. Ct. 2457 (2023). According to the Eleventh Circuit, *McNeill* "requires" interpreting a "serious drug offense" in ACCA "to

incorporate the version of the federal controlled-substances schedules in effect" at the time of the predicate state conviction. *Id.* The Eleventh Circuit concluded that looking to drug schedules at the time federal consequences attach "would 'erase an earlier state conviction for ACCA purposes,' in violation of *McNeill*." *Id.* at 856 (alterations omitted) (quoting *McNeill*, 563 U.S. at 823). Additionally, the Eleventh Circuit read *McNeill* to mandate "a backward-looking perspective," which it read to support looking to "the federal controlled-substances schedules" "in effect at the time the defendant's prior federal drug conviction occurred." *Id.* at 857-59. But like the Sixth Circuit, the Eleventh Circuit recognized its "sister circuits" had reached the opposite result based on "thoughtful arguments." *Id.* at 860.

3. The Third and Eighth Circuits split the difference. For ACCA cases, these courts define the federal comparator based on drug schedules in existence at the time federal consequences attach. But they adopt the time-of-predicate-conviction approach for Sentencing Guidelines cases.

The Third Circuit adopted the time-of-consequences rule for ACCA in *United States v. Brown*, 47 F.4th 147 (3d Cir. 2022), *cert. granted*, 143 S. Ct. 2458 (2023), which this Court will hear this term. The Third Circuit held that *McNeill* prescribes "only the time for analyzing the elements of the state [predicate] offense." *Id.* at 154 (citing *United States v. Jackson*, 36 F.4th 1294, 1306, *superseded by* 55 F.4th 846 (11th Cir. 2022), *cert granted*, 143 S. Ct. 2457 (2023); *Hope*, 28 F.4th at 505; *Bautista*, 989 F.3d at 703; *Abdulaziz*, 998 F.3d at 526). The Eighth Circuit has similarly held that *McNeill* does not speak to how to determine the comparator under ACCA. *See*

United States v. Perez, 46 F.4th 691, 699 (8th Cir. 2022) (citing *Abdulaziz*, 998 F.3d at 525).

But these courts reverse course for Sentencing Guidelines cases, read *McNeill* expansively, and define "controlled substance" based on drug schedules in effect at the time of the predicate conviction. In *Lewis*, the Third Circuit held that just as "later amendments to state law did not change the classification of the already-adjudicated offense in *McNeill*, deregulation of hemp does not reclassify [a defendant's] prior conviction as something other than possession with intent to distribute a controlled substance." *Lewis*, 58 F.4th at 772. The Third Circuit acknowledged the tension between its holdings in *Lewis* and in *Brown*, which reached the opposite result under ACCA. *Id*. at 772-73. But the Third Circuit reasoned that Brown had taken "no view on the correctness of" the time-of-consequences rule as applied to the Sentencing Guidelines and concluded that the result in *Brown* stemmed from other factors not present in Guidelines cases. *Id*. (citation omitted); *see also United States v. Bailey*, 37 F.4th 467, 469-70 (8th Cir. 2022) (per curiam) (adopting time-of-predicate-conviction approach under the Guidelines).

4. This question "has divided the courts of appeals." *Lewis*, 58 F.4th at 771. Indeed, just looking at Guidelines cases, the circuits are split 3-3. *Compare Abdulaziz*, 998 F.3d at 531 (time-of-consequences), *Gibson*, 55 F.4th at 162-167 (same), and *Bautista*, 989 F.3d at 703-705 (same), *with Clark*, 46 F.4th at 406 (time-of-predicate-conviction), *Lewis*, 58 F.4th at 771 (same), *and Bailey*, 37 F.4th at 469-470 (same). This Court has already granted review of this question in the ACCA

context. Hearing this case would allow the Court to expressly resolve this question in the Guidelines context as well.

At minimum, this Court should hold this petition pending its resolution of *Brown* and *Jackson*. As the *Jackson* petition explained, resolving "the question presented" in those cases "will clarify the widespread confusion about this Court's decision in *McNeill*," thereby providing important guidance for both ACCA and "Guidelines cases around the country." Pet. for Cert. at 30, *Jackson*, No. 22-6389 (Jan. 24, 2023). Indeed, this Court has long recognized that precedent and principles from statutory cases can inform the Guidelines, and vice versa. *See, e.g.*, *Dorsey v. United States*, 567 U.S. 260, 276 (2010) (applying background principle from the Guidelines to interpret Fair Sentencing Act); *United States v. Rodriquez*, 553 U.S. 377, 392 (2008) (using Sentencing Reform Act to interpret ACCA). *See also, e.g.*, *United States v. Ramos-Gonzalez*, 775 F.3d 483, 504 n.24 (1st Cir. 2015) ("Much of the case law developing the [categorical approach] has arisen in the context of the Armed Career Criminal Act[.] *** We have long recognized the applicability of this precedent to the career offender inquiry.").

B. The decision below is wrong.

Federal law generally applies "the Guidelines that are 'in effect on the date the defendant is sentenced.'" *Dorsey*, 567 U.S. at 275 (quoting 18 U.S.C. §3553(a)(4)(A)(ii)) (emphasis omitted). This principle requires defining "a controlled substance offense" based on the drug schedule "at the time of a defendant's federal sentencing." *Abdulaziz*, 998 F.3d at 527.

Defining sentencing enhancements based on current law makes intuitive sense. Sentencing enhancements reflect "how problematic [a defendant's] past conduct is when viewed as of the time of the sentencing itself." *Abdulaziz*, 998 F.3d at 528; *accord Bautista*, 989 F.3d at 703. They do not "punish" someone for having committed a prior offense in the past. *Gibson*, 55 F.4th at 165. Instead, they constitute a "judgment" in the present about the need to incarcerate a person for the future. *Abdulaziz*, 998 F.3d at 528. But imposing an enhancement based on outdated drug schedules would mandate an additional and often extremely harsh penalty for conduct that "is no longer a…crime." *Gibson*, 55 F.4th at 165. It "would be illogical to conclude that federal sentencing law attaches 'culpability and dangerousness' to an act that, at the time of sentencing," the legislature "has concluded is not culpable and dangerous." *Bautista*, 989 F.3d at 703.

Moreover, defining a controlled substance at the time federal consequences attach "serves the goal of uniformity in federal sentencing law." *Id*. The time-of-consequences approach ensures that two similarly-situated "individuals" who "were sentenced at the same time" do not "receive radically different sentences." *Dorsey*, 567 U.S. at 277 (emphasis added). By contrast, varying the definition of a controlled substance depending on the date of a predicate conviction could mean two individuals sentenced on the same day would receive different penalties for "an identical state crime" "depending on when in the past" each "defendant committed" the offense. *Bautista*, 989 F.3d at 703.

The Third Circuit's contrary time-of-predicate-conviction approach does not withstand scrutiny.

First, the Third Circuit erred by relying on *McNeill*. *McNeill* asked only how to define a predicate offense. "*McNeill* simply had no occasion to address" or "answer" the question of when to define the comparator. *Abdulaziz*, 998 F.3d at 526 & n.3.

Second, the Third Circuit's policy arguments do not hold up. The Third Circuit worried that under the time-of-consequences approach, some defendants will not receive enhanced sentences because of a change in state law. *Lewis*, 58 F.4th at 772. But that argument has little to do with defining a "controlled substance"; it is an objection to the categorical approach. The categorical approach assumes the defendant committed the least culpable conduct and asks whether that least culpable conduct meets the measure of a uniform comparator, precisely to avoid leaving federal sentencing "to the vagaries of state law." *Taylor*, 495 U.S. at 588. In other words, the categorical approach is underinclusive by design. *Moncrieffe*, 569 U.S. at 205 & n.11. That a state may change its law—and a state offense may no longer constitute a federal predicate—is already baked into the categorical approach.

Third, the Third Circuit's divergent approach to ACCA and the Guidelines does not pass muster. According to the Third Circuit, because ACCA expressly defines controlled substance by reference to the federal CSA, "it makes sense" to rely on the current version of the CSA. *Lewis*, 58 F.4th at 773. But sentencing courts must likewise use the current version of the Guidelines, and the current definition of any terms they contain. And given the fundamental similarity between ACCA

enhancements and Guidelines enhancements and the analytical framework underlying them, it makes little sense to adopt different approaches for ACCA and the Guidelines. *See, supra*, at 18-19 (discussing overlapping precedent for ACCA and Sentencing Guidelines).

II. The Circuits are split over whether "controlled substance" includes substances controlled only by state law.

The Court should also grant this petition to address a second deep and acknowledged circuit split. The Courts of Appeals disagree 3-6 over whether "controlled substance" includes substances controlled under federal law only or also includes substances controlled under state law. As two Justices of this Court have recognized, this split erodes national uniformity in federal sentencing. Given the Sentencing Commission's longstanding inability to address this question, this Court should grant this petition to resolve this split.

A. The Circuits are deeply divided over this federal-or-state-law question.

1. In the Second, Fifth, and Ninth Circuits, a criminal defendant will only face an enhanced federal sentence based on a substance controlled under federal law.

In *United States v. Townsend*, 897 F.3d 66 (2d Cir. 2018), the Second Circuit held that the phrase "controlled substance" in the Guidelines refers only to substances controlled under the CSA. The Second Circuit explained that as "a general rule, commonly called the *Jerome* presumption, the application of a federal law does not depend on state law unless" the drafter "indicates otherwise." *Id.* at 71 (citing *Jerome v. United States*, 318 U.S. 101, 104 (1943)). As the Second Circuit

recognized, this Court's categorical-approach precedent represents a specialized application of *Jerome*. *See id.* (citing *Taylor*, 495 U.S. at 579; *Esquivel-Quintana v. Sessions*, 581 U.S. 385, 393 (2017)). Combined, these precedents confirm that when it comes to the Guidelines, "federal law is the interpretive anchor." *Id.*

Relying on these principles, the Second Circuit made short work of the question presented. Absent contrary evidence, a "federal sentencing enhancement under the Guidelines requires something more than a conviction based on a state's determination that a given substance should be controlled." *Id.* "[I]f the Sentencing Commission wanted 'controlled substance' to include substances controlled under only state law to qualify, then it should have" defined that term to "read '* * * a controlled substance under federal or state law.' But it [did] not." *Id.* at 70 (ellipsis and emphasis in original). Thus, the words "controlled substance" "must refer exclusively to those drugs listed under federal law—that is, the CSA." *Id.* at 71.

The Ninth Circuit has similarly held that a "controlled substance" refers to only substances controlled under federal law.[5] *United States v. Leal-Vega*, 680 F.3d 1160, 1165 (9th Cir. 2012). Applying "a national definition" of "controlled substance" promotes the "uniform application of the Sentencing Guidelines." *Id.* at 1167; *see Bautista*, 989 F.3d at 702 (reiterating that defining "controlled substance" based on federal law "furthers uniform application of federal sentencing law").

[5] *Leal-Vega* involved U.S.S.G. §2L1.2(b)(1)(A)'s sentencing enhancement for a prior "drug trafficking offense," which is defined as an offense involving "a controlled substance." The Ninth Circuit later extended *Leal-Vega*'s holding to U.S.S.G. §4B1.2(b)'s "identical" "text." *Bautista*, 989 F.3d at 702.

The Fifth Circuit followed the same approach in *United States v. Gomez-Alvarez*, 781 F.3d 787, 794 (5th Cir. 2015). There, the Fifth Circuit expressly "adopt[ed] the reasoning of the Ninth Circuit" and held that for a prior state conviction to qualify as a predicate conviction, "the government must establish that the substance underlying that conviction is covered by the CSA." *Id.*[6]

Finally, the First Circuit has noted the clear circuit split and signaled its agreement with the Second, Fifth, and Ninth Circuits. *United States v. Crocco*, 15 F.4th 20, 22 (1st Cir. 2021). Although it has yet to squarely confront the question, the First Circuit has explained that defining controlled substances based on federal law "is appealing," while the contrary approach is "fraught with peril." *Id.* at 23. Federal "courts cannot blindly accept anything that a state names or treats as a controlled substance." *Id.* Otherwise, the courts would "turn the categorical approach on its head by defining a controlled substance offense as whatever is illegal under the particular law of the State where the defendant was convicted." *Id.* (cleaned up).

2. In contrast, the Third, Fourth, Sixth, Seventh, Eighth, and Tenth Circuits define "controlled substance" by reference to federal and state law.

The Third Circuit recently rejected the reasoning of the Second, Fifth, and Ninth Circuits, and held that a substance regulated by state law is a "controlled substance" even if it is not regulated by federal law. *Lewis*, 58 F.4th at 768-69. The court recognized that the ordinary meaning of "controlled substance"—"a drug

[6] Like *Leal-Vega*, *Gomez-Alvarez* involved U.S.S.G. §2L1.2.

regulated by law"—does not shed light on "*which* law must regulate the drug." *Id.* at 769. According to the court, the Guidelines answer that question because the definition of a controlled substance offense "explicitly includes offenses 'under federal *or state* law.'" *Id.* (quoting U.S.S.G. §4B1.2(b), emphasis in *Lewis*). The Third Circuit faulted the circuits on the other side of the split for "read[ing] into" the definition of a controlled substance offense "a cross-reference to the CSA that isn't there" and for "rely[ing] too heavily on the rebuttable presumption that federal law does not turn on the vagaries of state law." *Id.* at 769-70 (citing *Jerome*, 318 U.S. at 104).

The Seventh Circuit reached the same conclusion in *United States v. Ruth*, 966 F.3d 642 (7th Cir. 2020). The defendant argued that his state conviction did not qualify as a predicate controlled substance offense because state law defined cocaine more broadly than the CSA. *Id.* at 644. The Seventh Circuit disagreed. According to that court, the "Sentencing Commission clearly knows how to cross-reference federal statutory definitions when it wants to." *Id.* at 651. Because the definition of a controlled substance "does not incorporate, cross-reference, or in any way refer to the Controlled Substances Act," the court concluded that the phrase "controlled substance" includes substances regulated by federal or state law. *Id.*

The Fourth Circuit took the same approach in *United States v. Ward*, 972 F.3d 364 (4th Cir. 2020). It too highlighted the lack of an express cross-reference to the CSA on the theory that, if the Commission "intended for the federal definition of 'controlled substance' to apply," it could have said so. *Id.* at 373. The Fourth Circuit also declined to rely on the *Jerome* presumption because, in defining controlled

substance offense, the Guidelines specifically reference offenses under "state law." *Id*. at 373-74 (quoting U.S.S.G. §4B1.2(b)).

The Sixth, Eighth, and Tenth Circuits likewise look to federal or state law in defining a "controlled substance." Those courts similarly emphasize the Guidelines' textual reference to an offense under state law and the lack of an explicit cross-reference to the CSA in the Guidelines. *See United States v. Jones*, 81 F.4th 591, 598-99 (6th Cir. 2023); *United States v. Henderson*, 11 F.4th 713, 718-19 (8th Cir. 2021); *United States v. Jones*, 15 F.4th 1288, 1292 (10th Cir. 2021).

Given this straightforward division in authority on an important and recurring question, the Court should grant certiorari.

B. The decision below is wrong.

This Court's precedent establishes a clear rule: absent an express indication to the contrary, federal sentencing law does not depend on state law. Indeed, the entire purpose of the Sentencing Guidelines and the categorical approach is to ensure national uniformity in federal sentencing law. That leads to a straightforward conclusion here: "controlled substance" means only those substances controlled under federal law.

The principle that federal law—in particular federal criminal law—does not turn on state law is firmly established by this Court's precedent. Eighty years ago, *Jerome* explained that courts "must generally assume, in the absence of a plain indication to the contrary, that" federal law does not "depend[ ] on state law." *Jerome*, 318 U.S. at 104. Among other things, "[t]hat assumption is based on the fact that the application of federal legislation is nationwide." *Id*. Since *Jerome*, this Court has

repeatedly "rejected attempts to impose enhanced federal punishments on criminal defendants in light of a state conviction" without ensuring that the state-law conviction meets "a uniform federal standard." *Townsend*, 897 F.3d at 71 (collecting cases). *See, e.g.*, *Dickerson*, 460 U.S. at 119-120; *United States v. Turley*, 352 U.S. 407, 411 (1957).

Indeed, the categorical approach itself is an application of this principle. In *Taylor*, this Court cited *Jerome*'s progeny and developed the categorical approach to prevent federal sentencing enhancements from varying based on "the vagaries of state law." *Taylor*, 495 U.S. at 588, 591-592 (citing *Dickerson* and *Turley*). In the Court's words, the "chief concern" of the categorical approach is to "ensure[ ] that all defendants whose convictions establish the same facts will be treated consistently, and thus predictably, under federal law." *Moncrieffe*, 569 U.S. at 205 n.11. To secure uniformity, the categorical approach compares state predicate offenses against a "uniform, categorical definition[ ]," *Taylor*, 495 U.S. at 590, even if that uniform comparator is at times underinclusive, *see Moncrieffe*, 569 U.S. at 205 & n.11.

These principles resolve this question presented: Had the Commission wanted the definition of "controlled substance" to include substances controlled under only state law, the Commission could have said so. It did not. Instead, the Guidelines are silent regarding whether a "controlled substance" includes substances controlled under only federal law, or federal and state law. Given that silence, this Court's precedent dictates that federal law alone controls.

Defining controlled substance according to both federal and state law, as the Third Circuit did, undermines the categorical approach's goals. "Whereas the categorical approach was intended to prevent inconsistencies based on state definitions of crimes," defining a "controlled substance" based on state law "creates" inconsistencies. *Ward*, 972 F.3d at 383-384 (Gregory, C.J., concurring in judgment). Under the Third Circuit's approach, it is immaterial whether a drug is "not federally regulated." *Lewis*, 58 F.4th at 773. Indeed, according to *Lewis*'s rationale, a defendant can face an enhanced federal sentence for a state-law offense that is not—and never has been—illegal under federal law, or in any of the other 49 states. That is precisely the "odd result[ ]" the categorical approach seeks to prevent. *See Taylor*, 495 U.S. at 591.

The Third Circuit reached the wrong result for three reasons.

First, the Third Circuit picked the wrong starting point for its analysis. The court acknowledged that neither the text of the Guidelines nor the plain meaning of controlled substance directly answer the question at hand. *See Lewis*, 58 F.4th at 769. But instead of applying the *Jerome* presumption and the corresponding principals underlying the categorical approach, the Third Circuit took silence to imply that the Guidelines incorporate state law. According to the Third Circuit, because "the Guidelines often do cross-reference the United States Code," the absence of a cross-reference means the Guidelines incorporated state law. *Id*.

That fundamental mistake "has it backwards." *Townsend*, 897 F.3d at 70. Silence means the Guidelines incorporate only federal law. As this Court explained

in *Taylor*, "we do not interpret Congress' omission of" certain language to mean "that * * * Congress intended to abandon its general approach of using uniform categorical definitions to identify predicate offenses." 495 U.S. at 591.

Second, the Third Circuit stated that because the Guidelines define a "controlled substance offense" as "an offense under federal or state law," it could disregard the *Jerome* presumption. *Lewis*, 58 F.4th at 769-70 (citation omitted). That butchers the text. The fact that the Commission sought to include "an offense 'under federal or state law' " "does not also mean that the substance at issue may be controlled under federal or state law." *Townsend*, 897 F.3d at 70. That language simply means that if substance X is deemed controlled, a conviction under federal or state law involving substance X qualifies as a "controlled substance offense"—whereas a conviction under foreign law involving substance X does not. It says nothing about what law defines whether the substance is controlled. If anything, the fact that the Sentencing Commission specified that "an offense" includes an offense under federal or state law but did not similarly define a "controlled substance" as a substance controlled under federal or state law supports Petitioner's federal-only approach.

Third, the Third Circuit undervalued this Court's goal of national uniformity in federal sentencing law. The Third Circuit acknowledged that its approach "would treat differently" two "offenders who had previously trafficked hemp—one in a state where it was criminalized and another in a state where it was legal." *Lewis*, 58 F.4th at 770. But the Third Circuit worried that relying on federal law to define a controlled

substance also created dis-uniformity depending on whether an offender was convicted in a state whose state schedule matched the federal schedule. *Id.*

That, however, is an attack on the categorical approach itself. The categorical approach always assumes the defendant committed the least culpable conduct necessary to have committed the predicate offense. If a state law criminalizes less culpable conduct than a federal comparator, the predicate will always fail to categorically match the comparator. Any "objection to that underinclusive result is little more than an attack on the categorical approach itself." *Moncrieffe*, 569 U.S. at 205.

Every federal defendant sentenced at "the same time, [in] the same place, and even [by] the same judge" ought to be treated the same. *Dorsey*, 567 U.S. at 277. This Court should grant this petition to make that goal a reality.

III. The questions presented are important, recurring, and warrant review.

The two questions presented are critically important, impact countless defendants across the country, and are worthy of this Court's review.

These two persistent circuit splits undermine the very purpose of the Sentencing Guidelines. Congress tasked the Sentencing Commission with eliminating "unwarranted sentencing disparities" for those "found guilty of similar criminal conduct." 28 U.S.C. §991(b)(1)(B). Consistent with that goal, the Commission's Guidelines play a "central role in sentencing." *Molina-Martinez v. United States*, 578 U.S. 189, 191 (2016). "[D]istrict courts must begin their analysis

with the Guidelines and remain cognizant of them throughout the sentencing process." *Gall v. United States*, 552 U.S. 38, 50 n.6 (2007).

But allowing these circuit splits to persist creates the very discrepancies the Guidelines seek to avoid. Today, a defendant being federally sentenced in roughly half the circuits could receive a substantially lengthy sentencing increase that he or she would not receive in the other circuits. The Guidelines should not treat a defendant differently "simply because they were lucky enough to commit" their federal offense "on the right side of the border"—or unlucky enough to commit it on the wrong side. *Ward*, 972 F.3d at 381 (Gregory, C.J., concurring in judgment).

This persistent dis-uniformity is all the more troubling because prior convictions involving a controlled substance trigger numerous sentencing enhancements, including the extremely serious career-offender enhancement. *See, e.g.*, U.S.S.G. §4B1.1 (Career Offender adjustment); U.S.S.G. §2K2.1 (possession of a firearm); U.S.S.G. §2K1.3 (explosive materials); U.S.S.G. §5K2.17 (semiautomatic-firearms); U.S.S.G. §2L1.2 (unlawful reentry). Federal courts impose these enhancements thousands of times every year, often leading to years- or even decades-long sentencing increases. *See generally* U.S. Sentencing Comm'n, Quick Facts: Career Offenders 1 (1,356 career offenders in fiscal year 2022)[7]; U.S. Sentencing Comm'n, Use of Guidelines and Specific Offense Characteristics Guideline

[7] *Available at* <www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Career_Offenders_FY22.pdf>.

Calculation Based Fiscal Year 2022, at 129 (§2K2.1 enhancement applied 4,016 times for controlled substances or crimes of violence in fiscal year 2022).[8]

Courts are deeply divided, and the questions presented are not going away. Because federal drug definitions "are updated every year" and do not necessarily track state law, there is every reason to think these problems will only grow worse. *Gibson*, 55 F.4th at 165. Given that the issues and arguments have been fully developed across multiple cases, there is no need to wait for any additional circuits to weigh in.

Indeed, this Court has already signaled that each question presented warrants review. It recently granted certiorari to review the timing question as it pertains to ACCA, confirming that this question is deeply important. Meanwhile, as Justice Sotomayor noted in a statement joined by Justice Barrett, the federal-or-state-law question presented has "direct and severe consequences for defendants' sentences." *Guerrant v. United States*, 142 S. Ct. 640, 641 (2022) (Sotomayor, J., respecting denial of certiorari).

The combination of the questions presented produces a particularly concerning result that requires this Court's intervention. For example, the Third Circuit in *Lewis* defined the controlled substance comparator (1) based on the law in effect at the time of predicate conviction, and (2) based on state law, rather than federal law. In other words, the court defined the comparator as the state law in effect at the time

[8] *Available at* <www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/2022/Ch2_Guideline_FY22.pdf>.

of a defendant's predicate conviction—meaning, in the Third Circuit, §4B1.2(b) compares the defendant's state law predicate against itself. That "turns the categorical approach on its head by defining [a controlled substance] as whatever is illegal under the particular law of the State where the defendant was convicted." *Esquivel-Quintana*, 581 U.S. at 393. As a result, every prior controlled substance conviction will always count as a "controlled substance offense" in the Third Circuit, including Petitioner Manning's. That will produce enhanced sentences in every single case—often meaning defendants receive years or decades more than they should, years after completing their sentence for the predict conviction, even if it was for a substance that federal law no longer deems worthy of regulation. That bizarre result is as wrong as it sounds—and calls out for this Court's review.

This Court should not hesitate to resolve the questions presented because they involve the Sentencing Guidelines. As Justice Sotomayor explained in 2022, the Sentencing Commission has a "responsibility" to address circuit splits, and often gets the first crack at solving them. *Guerrant*, 142 S. Ct. at 640 (Sotomayor, J., respecting denial of certiorari). At that time, the Commission lacked a quorum, and Justice Sotomayor expressed hope that the Commission would resume its duties and resolve the second question presented.

Since Justice Sotomayor's statement, however, the Commission gained a quorum, but has not solved these splits. Indeed, the Commission labeled resolving the second question presented a "priority," requested public comment on that issue, and even amended other aspects of the definition of "controlled substance." *See* Final

Priorities for Amendment Cycle, 87 Fed. Reg. 67756, 67756 (Nov. 9, 2022). Yet the Commission declined to resolve the federal-or-state-law question. *See* Sentencing Guidelines for United States Courts, 88 Fed. Reg. 7180, 7200-7201 (Feb. 2, 2023); Sentencing Guidelines for United States Courts, 88 Fed. Reg. 28254, 28276 (May 3, 2023). Hoping against reason that the Commission might act is not a rational basis for denying review. The Guidelines are federal law, and this Court has an independent "duty" "to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). This Court already permitted the "Commission * * * the opportunity to address" these reoccurring issues "in the first instance," *Longoria v. United States*, 141 S. Ct. 978, 979 (2021) (Sotomayor, J., respecting the denial of certiorari), and was "restrained and circumspect in using * * * certiorari power as the primary means of resolving" these conflicts over the proper interpretation of the Guidelines, *Braxton v. United States*, 500 U.S. 344, 348 (1991). But the Commission has let the first question presented fester and affirmatively chose "not to act" on the second. *McClinton v. United States*, 143 S. Ct. 2400, 2403 (2023) (Sotomayor, J., respecting the denial of certiorari). This Court should "take up" these issues, exercise its own obligation to resolve conflicting approaches among the federal courts, and eliminate these glaring dis-uniformities in federal sentencing law. *Id*. *See also Early v. United States*, 502 U.S. 920, 920 (1991) (White, J., dissenting from denial of certiorari) (urging review where the Commission "has not addressed" a "recurring issue").

IV. This petition is a good vehicle.

This petition is a good vehicle for resolving both questions presented. There are no jurisdictional problems or factual disputes. The record is not voluminous. And the two questions presented are outcome determinative: As a result of the Third Circuit's decision in *Lewis*, Petitioner Manning must be resentenced under a higher Guidelines range. Had the court interpreted "controlled substance" to mean substances listed in the federal CSA or substances controlled when federal consequences attach, Petitioner Manning's existing sentence would stand. Moreover, this case presents both the timing question and the federal-or-state-law question, unlike prior petitions that have presented only one of those two questions.

This case is also a good vehicle because Mr. Manning is on supervised release until November 2026, obviating any risk of mootness if the Court grants review. Further, Mr. Manning does not have any other prior convictions that could substitute as a predicate Career-Offender qualifying offense. If Mr. Manning's prior New Jersey heroin offenses is not a predicate offense, then his current sentence stands.

At a minimum, the Court should hold this petition pending its decision in *Brown* and *Jackson*. That decision will likely clarify *McNeill*. At that point, if appropriate, the Court could grant this petition, vacate the judgment, and remand for consideration in light of *Brown* and *Jackson*. Alternatively, depending on the resolution of *Brown* and *Jackson*, the Court could grant this petition to consider the questions presented.

CONCLUSION

For all these reasons, this Honorable Court should grant the petition for a writ of *certiorari*. Alternatively, the Court should hold this petition pending resolution of *Brown* and *Jackson*, and should dispose of it in light of the decisions in those cases.

Respectfully submitted,

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