No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ROMONE RAPHAEL JACKSON,
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 A WRIT OF CERTIORARI

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QUESTION PRESENTED

Romone Jackson pled guilty to possessing more than fifty grams of methamphetamine with the intent to deliver. The district court applied the career offender enhancement based on Jackson's prior state court drug convictions in Iowa and Nebraska. As a result, Jackson had a total adjusted offense level of 31 with a criminal history category VI for an advisory Guidelines range of 188 to 235 months. Without the career offender enhancement, his base offense level would have been a level 29 with a criminal history category IV for an advisory Guidelines range of 121-151 months.

Iowa's criminal statute defines marijuana and cocaine to include substances that are not similarly regulated under the federal Controlled Substances Act ("CSA"). As this Court previously acknowledged, the circuits are divided on whether to apply state or federal law in deciding whether a prior conviction qualifies as a "controlled substance offense" under the career offender guideline. *See Guerrant v. United States*, 142 S. Ct. 640 (2022) (Sotomayor, J., concurring) (identifying circuit split). The time to resolve the circuit split is now. The question presented is:

> Whether a state conviction for distributing a drug that includes substances not regulated under the federal Controlled Substances Act qualifies as a "controlled substance offense" for purposes of the career offender guideline.

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

RELATED PROCEEDINGS

This case arises from the following proceedings:

United States v. Jackson, No. 23-1556 (8th Cir. Mar. 7, 2024)

United States v. Jackson, No. 22-cr-00170 (S.D. Iowa Mar. 21, 2023)

There are no other proceedings related to this case under Rule 14.1(b)(iii).

TABLE OF CONTENTS

Page

QUESTION PRESENTED ii

PARTIES TO THE PROCEEDINGS iii

RELATED PROCEEDINGS iii

TABLE OF AUTHORITIES vi

PETITION FOR A WRIT OF CERTIORARI 1

DECISIONS BELOW 1

JURISDICTION 1

STATUTORY AND GUIDELINES PROVISIONS INVOLVED 1

INTRODUCTION 5

STATEMENT OF THE CASE 6

A. Legal Background 6

B. Proceedings Below 7

REASONS FOR GRANTING THE PETITION 8

I. The courts of appeals are deeply split on whether a controlled substance offense under the career offender guideline includes convictions for substances prohibited by state law but not regulated under the CSA 8

A. The Second and Ninth Circuits limit the career offender enhancement to prior convictions involving substances regulated under the CSA 9

B. The First and Fifth Circuits have signaled that the CSA schedules control the analysis 10

C. The Third, Fourth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits apply the career offender enhancement to prior convictions for controlled substances under either state or federal law 11

II. The decision below is wrong 12

III. The question presented is important, recurring, and unlikely to be resolved without this Court's intervention 14

IV. This case is a suitable vehicle to resolve the circuit split 15

CONCLUSION 15

TABLE OF APPENDICES

APPENDIX A
Opinion, *United States v. Jackson*, No. 23-1556 (8th Cir. Mar. 7, 2024) 1a

APPENDIX B
Judgment, *United States v. Jackson*, 22-cr-00170 (S.D. Iowa Mar. 21, 2023) 5a

TABLE OF AUTHORITIES

CASES PAGE

Beckles v. United States,
580 U.S. 256 (2017) 14

Esquivel-Quintana v. Sessions,
581 U.S. 385 (2017) 12

Guerrant v. United States,
142 S. Ct. 640 (2022) 5, 14

Jerome v. United States,
318 U.S. 101 (1943) 9, 10, 13

Mathis v. United States,
579 U.S. 500 (2016) 7

Molina-Martinez v. United States,
578 U.S. 189 (2015) 14

Moncrieffe v. Holder,
569 U.S. 184 (2013) 13

Rita v. United States,
551 U.S. 338 (2007) 5

Taylor v. United States,
495 U.S. 575 (1990) 6, 13

United States v. Arayatanon,
980 F.3d 444 (5th Cir. 2020) 11

United States v. Bautista,
989 F.3d 698 (9th Cir. 2021) 5, 10, 13

United States v. Boleyn,
929 F.3d 932 (8th Cir. 2019) 6

United States v. Booker,
543 U.S. 220 (2005) 13

United States v. Crocco,
15 F.4th 20 (1st Cir. 2018) 5, 10, 11

United States v. Dubois,
94 F.4th 1284 (11th Cir. 2024) 6, 12

United States v. Gibson,
55 F.4th 153 (2d Cir. 2022) 15

United States v. Gomez-Alvarez,
781 F.3d 787 (5th Cir. 2015) 5, 11

United States v. Henderson,
11 F.4th 713 (8th Cir. 2021) 8, 11, 12

United States v. Jackson,
2024 U.S. App. LEXIS 5488, 2024 WL 991877 (8th Cir. Mar. 7, 2024) 1

United States v. Jones,
15 F.4th 1288 (10th Cir. 2021) 12

United States v. Lewis,
58 F.4th 764 (3d Cir. 2023) 6, 12

United States v. Perez,
46 F.4th 691 (8th Cir. 2022) 12

United States v. Ruth,
966 F.3d 642 (7th Cir. 2020) 12

United States v. Steele,
2024 U.S. Dist. LEXIS 80644 (E.D. La. Apr. 23, 2024) 11

United States v. Townsend,
897 F.3d 66 (2d Cir. 2018) 5, 9, 10, 12

United States v. Ward,
972 F.3d 364 (4th Cir. 2020) 12. 13

STATUTES

Pub. L. No. 115-334, 132 Stat. 4490 (2018) 7

REGULATIONS

80 Fed. Reg. 54715 (Sept. 11, 2015) 7

U.S. SENTENCING GUIDELINES

U.S.S.G
§ 4B1.1 6
§ 4B1.2 6

PETITION FOR A WRIT OF CERTIORARI

Petitioner Romone Jackson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

DECISIONS BELOW

The panel decision of the court of appeals appears at Appendix A to the petition and is unpublished, *United States v. Jackson*, 2024 U.S. App. LEXIS 5488, 2024 WL 991877 (8th Cir. Mar. 7, 2024). Pet. App. p. 1a

The judgment of the United States District Court for the Southern District of Iowa appears at Appendix B and is unpublished. Pet. App. p. 5a.

JURISDICTION

A panel of the Eighth Circuit Court of Appeals entered final judgment on March 7, 2024. This is Court has jurisdiction under 28 U.S.C. section 1254(1).

STATUTORY AND GUIDELINES PROVISIONS INVOLVED

The federal Controlled Substances Act, at, defines "marihuana" (a Schedule I "controlled substance") as:

§ 802. Definitions

As used in this subchapter:

* * *

> (16)(A) Subject to subparagraph (B), the term "marihuana" means all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin.
>
> (B) The term "marihuana" does not include—
>
> (i) hemp, as defined in section 16390 of title 7; or

(ii) the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

21 U.S.C. § 802(16).

The Code of Federal Regulations Scheule II list of controlled substances states, in pertinent part:

§ 1308.12 Schedule II

(a) Schedule II shall consist of the drugs and other substances, by whatever official name, common or usual name, chemical name, or brand name designated, listed in this section. Each drug or substance has been assigned the Controlled Substances Code Number set forth opposite it.

* * *

(4) Coca leaves (9040) and any salt, compound, derivative or preparation of coca leaves (including cocaine (9041) and ecgonine (9180) and their salts, isomers, derivatives and salts of isomers and derivatives), and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, except that the substances shall not include:

(i) Decocainized coca leaves or extraction of coca leaves, which extractions do not contain cocaine or ecgonine;

(ii) [^{123}I]ioflupane; or

(iii) [^{18}F]FP-CIT.

21 C.F.R. § 1308.12(a), (b)(4)(2022).

United States Sentencing Guideline 4B1.1 states, in pertinent part:

§ 4B1.1. <u>Career Offender</u>

(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.

Offense Statutory Maximum		Offense Level*
(A)	Life	37
(B)	25 years or more	34
(C)	20 years or more, but less than 25 years	32
(D)	15 years or more, but less than 20 years	29
(E)	10 years or more, but less than 15 years	24
(F)	5 years or more, but less than 10 years	17
(G)	More than one year, but less than 5 years	12.

*If an adjustment from § 3E1.1 (Acceptance of Responsibility) applies, decrease the offense level by the number of levels corresponding to that adjustment.

United States Sentencing Guideline 4B1.2 states, in pertinent part:

§ 4B1.2. Definitions of Terms Used in Section 4B1.1

* * *

(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).

The 2016 Code of Iowa states, in pertinent part:

124.101 Definitions

As used in this chapter:

* * *

19. "Marijuana" means all parts of the plants of the genus Cannabis, whether growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture or preparation of the plant, its seeds or resin, including tetrahydrocannabinols. It does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil or cake or the sterilized seed of the plant which is incapable of germination.

Iowa Code § 124.401(19) (2016).

124.206 Schedule II – substances included.

1. Schedule II consists of drugs and other substances, by whatever official name, common or usual name, chemical name, or brand name designated, listed in this section.

2. Substances, vegetable origin or chemical synthesis. Unless specifically excepted or unless listed in another schedule, any of the following substances whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

* * *

d. Coca leaves and any salt, compound, derivative, or preparation of coca leaves. Decocainized coca leaves or extractions of coca leaves, which extractions do not contain cocaine or ecgonine, are excluded from this paragraph. The following substances and their salts, optical and geometric isomers, derivatives, and salts of derivatives and optical and geometric isomers, and any salt, compound, derivative, or preparation thereof that is chemically equivalent or identical to any of such substances, are included in this paragraph:

(1) Cocaine.

(2) Ecgonine.

Iowa Code § 124.206(2)(d) (2016).

INTRODUCTION

Had Romone Jackson been convicted of his state marijuana and cocaine trafficking offenses in the First, Second, Fifth, or Ninth circuits, he would not have been a career offender, and his Guidelines range would have been 100 to 125 months. But, because he was convicted in the Eight Circuit, his Guidelines range was 188 to 235 months. This inconsistent result undermines a central tenet of the Guidelines, which is to ensure "*uniformity* in sentencing . . . imposed by different federal courts for similar criminal conduct as well as *proportionality* in sentencing through a system that imposes appropriately different sentences for criminal conduct of different severity." *Rita v. United States*, 551 U.S. 338, 349 (2007) (quotations omitted).

As Justice Sotomayor acknowledged in *Guerrant v. United States*, the courts of appeals are split on whether state or federal law determines if a prior state conviction qualifies as a "controlled substance offense" under the career offender guideline. 142 S. Ct. 640 (2022) (Sotomayor, J., concurring). In the Second and Ninth Circuits, a prior state conviction qualifies only if it involved a substance regulated by the federal Controlled Substances Act ("CSA"). *Id.* (citing *United States v. Bautista*, 989 F.3d 698, 702-704 (9th Cir. 2021); *United States v. Townsend*, 897 F.3d 66, 68 (2d Cir. 2018)). The First and Fifth Circuits have indicated agreement with this approach without squarely deciding the issue. *Id.* (citing *United States v. Crocco*, 15 F.4th 20, 23-25 (1st Cir. 2018); *United States v. Gomez-Alvarez*, 781 F.3d 787, 792-94 (5th Cir. 2015)). In contrast, the Third, Fourth, Seventh, Sixth, Eighth, Tenth, and Eleventh Circuits define what qualifies as a controlled substance based on the relevant state

law. *Id.* (cataloguing cases); s*ee also United States v. Dubois*, 94 F.4th 1284, 1300 (11th Cir. 2024); *United States v. Lewis*, 58 F.4th 764, 771 (3d Cir. 2023).

This circuit conflict warrants the Court's prompt attention. The question presented is important because state drug offenses frequently serve as career offender predicates and substantially increase corresponding federal sentences. And, this case presents a suitable vehicle for resolving the issue.

STATEMENT OF THE CASE

A. Legal Background

Under the career offender guideline, certain defendants with "at least two prior felony convictions of either a crime of violence or a controlled substance offense" are subject to enhanced penalties. U.S.S.G § 4B1.1(a). The United States 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.

Id. § 4B1.2(b). Yet, the Guidelines provide no definition of "controlled substance."

Generally, sentencing courts employ the "categorical approach" to determine whether a prior conviction qualifies as a controlled substance offense. *United States v. Boleyn*, 929 F.3d 932, 936 (8th Cir. 2019) (citing *Taylor v. United States*, 495 U.S. 575, 600-02 (1990)). Under that approach, the sentencing court asks whether the elements of the state crime "match the elements" of the corresponding federal crime.

Mathis v. United States, 579 U.S. 500, 504 (2016). If the federal offense is narrower than the state offense, the prior state conviction does not count. *Id.* at 519.

In 2015, the Federal Government removed a cocaine derivative called [^{123}I]ioflupane from the definition of cocaine in the federal Controlled Substances Act ("CSA"). *See* 80 Fed. Reg. 54715 (Sept. 11, 2015). Similarly, in 2018, Congress modified the CSA to remove hemp with a delta-9 tetrahydrocannabinol concentration of not more than .03 from the definition of marijuana. *See* Pub. L. No. 115-334, 132 Stat. 4490 (2018). Consequently, the federal CSA is now categorically narrower than the several state laws criminalizing all parts and derivatives of coca leaves and cannabis plants.

B. Proceedings Below

On November 16, 2022, the Government filed a one-count information charging Romone Jackson with possession with the intent to distribute fifty grams or more of a mixture and substance containing methamphetamines in violation of 21 U.S.C. sections 841(a)(1) and 841(b)(1(B). R. Doc. 21. That same day, Jackson waived indictment and entered a guilty plea to the information pursuant to a plea agreement. R. Docs. 25, 27. The United States Probation Office prepared a presentence investigation report, which applied the career offender enhancement based on Jackson's 2016 conviction in Iowa for possession with intent to deliver cocaine and marijuana. R. Doc. 38 at ¶¶36, 48, 51. The career offender designation increased his offense level from 32 to 34 and his criminal history category from IV to VI. R. Doc. 38 at ¶35, 36, 55, 56. After a three-level reduction for acceptance of responsibility,

Jackson's total offense level was 31 with a criminal history category of VI for a Guidelines range of 188 to 235 months. R. Doc. 38 at ¶¶ 37-39, 56, 141.

Jackson objected to the application of the career offender enhancement. R. Doc. 37 at 1-2. He argued that his prior state conviction did not qualify as a "controlled substance offense" because Iowa's statute categorically defined cocaine and marijuana more broadly than the definitions in the CSA. R. Doc. 42 at 2-6, Sent. Tr. at 10:2 to 11:17. The district court summarily denied Jackson's objections and held that the career offender enhancement was supported by the record. Sent. Tr. at 12:17 to 13:3.

Jackson appealed, maintaining his challenge to the application of the career offender enhancement. A panel of the Eighth Circuit rejected Jackson's argument. Pet. App. p. 2a-4a. Citing circuit precedent, the panel held that the definition of a controlled substance offense under the career offender guideline "includes state-law offenses even if the state statute sweeps more broadly than the CSA." *Id.* (citing *United States v. Henderson*, 11 F.4th 713, 718 (8th Cir. 2021)). Due to this, the court affirmed Jackson's sentence. *Id.*

REASONS FOR GRANTING THE PETITION

I. The courts of appeals are deeply split on whether a controlled substance offense under the career offender guideline includes convictions for substances prohibited by state law but not regulated under the CSA

Eleven circuits are split three ways on the question presented. In the Second and Ninth Circuits, a defendant has committed a controlled substance offense only if it involved a substance listed in the federal CSA. The First and Fifth Circuits have

indicated agreement with this approach. In contrast, the Third, Fourth, Sixth, Seventh, Eighth, Tenth and Eleventh Circuits define what qualifies as a controlled substance offense based on the relevant state law at the time of the prior conviction. For this reason, this Court's review is urgently needed.

A. The Second and Ninth Circuits limit the career offender enhancement to prior convictions involving substances regulated under the CSA

In the Second Circuit, a "controlled substance" as contemplated by the career offender guideline "refers exclusively to a substance controlled by the CSA." *United States v. Townsend*, 897 F.3d 66, 71 (2d Cir. 2018). In *Townsend*, the defendant pled guilty to one count of possessing alprazolam with intent to distribute it and one count of being a felon in possession of a firearm. *Id.* at 68. He argued that his prior New York conviction did not fall within the career offender guideline's definition of a controlled substance because the drug for which he was convicted of selling – human chorionic gonadotropin – was not proscribed under the CSA. *Id.* at 68-69. On appeal, the Second Circuit agreed. Looking first to the text, the court noted that a "controlled substance offense" includes an *offense* under federal or state law. *Id.* at 70. That does not mean, however, "that the *substance* at issue may be controlled under federal or state law." *Id.* "To include substances controlled under only state law, the definition should read '. . . a controlled substance *under federal or state law*. But it does not." *Id.* The court buttressed its textual analysis with the well-recognized *Jerome* presumption that application of federal law does not depend on state law unless Congress indicates otherwise. *Id.* (citing *Jerome v. United States*, 318 U.S. 101, 104

(1943)). As the court explained, "federal law is the interpretive anchor to resolve the ambiguity at issue." *Id.* at 71. Any other outcome, according to the court, would mark "a clear departure from *Jerome* and its progeny." *Id.*

The Ninth Circuit reached the same conclusion in *United States v. Bautista*, 989 F.3d 698, 702 (9th Cir. 2021). Citing "the goal of uniformity in federal sentencing law," the court held that "'controlled substance' in § 4B1.2(b) refers to a 'controlled substance' as defined in the CSA." *Id.* From there, the court determined that Bautista's prior state marijuana conviction was not a qualifying controlled substance offense because in 2017, Arizona law criminalized all cannabis plants whereas the CSA excluded "plants of a low THC concentration." *Id.* at 705. Accordingly, the court remanded for resentencing. *Id.*

B. The First and Fifth Circuits have signaled that the CSA schedules control the analysis

In *United States v. Crocco*, the First Circuit reviewed for plain error a defendant's challenge to the use of his state court marijuana conviction as a predicate offense and resulting career offender designation. 15 F.4th 20, 21 (1st Cir. 2021). Reserving the question for another day, the court found "appealing" the Second and Ninth Circuits' view that the federal drug schedules govern. *Id.* at 23. It also criticized the competing approach endorsed by the other circuits as "fraught with peril." *Id.* From its perspective, federal "courts cannot blindly accept anything that a state names or treats as a controlled substance." *Id.* Otherwise, the analysis 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).

Likewise, Fifth Circuit determines whether a drug is a "controlled substance" for Guidelines enhancements by referencing the CSA. This rule arises from the decision in *United States v. Gomez-Alvarez*, in which Fifth Circuit held that "[f]or a prior conviction to qualify as a 'drug trafficking offense' [under U.S.S.G. section 2L1.2], the government must establish that the substance underlying that conviction is covered by the CSA." 781 F.3d 787, 793-94 (5th Cir. 2015). This holding suggests the Fifth Circuit would resort to the CSA in applying the career offender enhancement for state convictions because cases discussing sections 2L1.2 and 4B1.2(b) "are cited interchangeably." *United States v. Arayatanon*, 980 F.3d 444, 453 n.8 (5th Cir. 2020); *see also United States v. Steele*, 2024 U.S. Dist. LEXIS 80644 (E.D. La. Apr. 23, 2024).

C. The Third, Fourth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits apply the career offender enhancement to prior convictions for controlled substances under either state or federal law

In the decision below, the panel identified the *Henderson* decision as binding circuit precedent holding that a "controlled substance offense" includes a state conviction even where the state statute sweeps more broadly than the CSA. Pet. App. p. 2a-3a (citing *Henderson*, 11 F.4th at 718). In *Henderson,* the Eighth Circuit emphasized the Guidelines' textual reference to an *offense* under federal *or state law* as well as the lack of any cross-reference to the CSA. *Henderson*, 11 F.4th at 718. Surveying the approach of other circuits, the court was not persuaded by the Second

Circuit's reliance on the *Jerome* presumption. *Id.* at 719 (citing *Townsend*, 897 F.3d at 71). Nor did it find the goal of uniformity particularly persuasive. *Id.* Six other circuits have reached the same conclusion. *United States v. Dubois*, 94 F.4th 1284, 1296 (11th Cir. 2024); *United States v. Jones*, 81 F.3d 591 (6th Cir. 2023), *United States v. Lewis*, 58 F.4th 764, 771 (3d Cir. 2023), *United States v. Jones*, 15 F.4th 1288, 1291-96 (10th Cir. 2021); *United States v. Ward*, 972 F.3d 364, 371-74 (4th Cir. 2020); *United States v. Ruth*, 966 F.3d 642, 651-54 (7th Cir. 2020).

II. The decision below is wrong

Under Eighth Circuit precedent, Jackson's 2016 marijuana and cocaine convictions would not qualify as predicate offenses under the Armed Career Criminal Act's categorical analysis because Iowa's drug statute is "overbroad on its face." *United States v. Perez*, 46 F.4th 691, 701 (8th Cir. 2022). Yet, when the same categorical analysis is applied under the career offender guideline, Jackson's convictions do qualify. This conclusion is wrong for all the reasons explained by the Second Circuit in *Townsend* and the Ninth Circuit in *Bautista*.

First, it is contrary to the career offender guideline's text. The phrase "an *offense* 'under federal or state'" refers to the jurisdiction under which the conviction was obtained. It "does not also mean that the *substance* at issue may be controlled under federal or state law." *Townsend*, 897 F.3d at 70. The latter interpretation "turns the categorical approach on its head" by defining "whatever is illegal under the particular law of the State where the defendant was convicted." *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1570 (2017). Indeed, it would effectively end

categorical analysis as it relates to the type of drug because a sentencing court would always be comparing state law to itself. This overinclusive result "is little more than an attack on the categorical approach itself." *Moncrieffe v. Holder*, 569 U.S. 184, 205 (2013).

Second, the Eighth Circuit's approach undermines uniformity in sentencing. "[C]onstruing 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." *Bautista*, 989 F.3d at 702. As this Court has explained, "the application of federal legislation is nationwide and . . . the federal program would be impaired if state law were to control." *Jerome*, 318 U.S. at 104.

Third, the result in the court below sets the stage for absurd results. Take Virginia law, for example, which "may contain as many as 52 substances not found on federal schedules." *Ward*, 972 F.3d at 384 (Gregory, Chief J, concurring). A "person imprudent enough to manufacture, possess, or distribute these drugs in Virginia would be found, under the [Eighth Circuit's view], to have committed a "controlled substance offense for enhancement purposes – yet a person who did so in Michigan might not." *Id.* (citing *Taylor*, 495 U.S. at 591)(cleaned up). Perhaps this result may be morally tolerable for highly lethal narcotics such as heroin or fentanyl. It is not consistent, however, with Congress's expressed intent that the Guidelines system achieve "greater uniformity in sentencing." *United States v. Booker*, 543 U.S. 220, 355 (2005).

III. The question presented is important, recurring, and unlikely to be resolved without this Court's intervention

The question presented is outcome determinative to many federal sentences. The Guidelines "provide the framework for tens of thousands of federal sentencing proceedings that occur each year." *Molina-Martinez v. United States*, 578 U.S. 189, 192 (2015). Jackson's sentence is a case in point. Had he committed his offense two states over in Montana, his Guidelines range would have been 121 to 151 months. Instead, his range as a career offender was 188 to 235 months. This difference is far from harmless. Although no longer binding on federal courts, the Guidelines are "not only the starting point for most federal sentencing proceedings but also the lodestar." *Id.* at 200. "It is therefore no exaggeration to say that the Guidelines are, in a real sense, a basis for the sentence imposed by the district court." *Beckles v. United States*, 580 U.S. 256, 276 (2017) (Sotomayor, J., concurring).

Just as important, the circuit split is unlikely to resolve itself. Both sides cite to the text as the basis for their interpretations. On top of that, the cannons of construction that one side sees as supporting its textual analysis are deemed by the other to be insufficient to overcome its reading of the text. In this way, the circuit split is hopelessly entrenched without this Court's intervention.

In 2022, this Court denied certiorari on the same question presented. *See Guerrant*, 142 S. Ct. at 640. Concurring in the decision, Justice Sotomayor expressed hope that the United States Sentencing Commission would address the issue, which has "direct and severe consequences for defendants' sentences." *Id.* at 641. Unfortunately, the Commission has not done so. Because federal drug definitions

"are updated every year" the problem will only continue to fester. *United States v. Gibson*, 55 F.4th 153, 165 (2d Cir. 2022). Waiting for Superman simply is no longer tolerable considering the high stakes involved in the question presented.

IV. This case is a suitable vehicle to resolve the circuit split

This is an ideal case to decide the question presented. It is a direct appeal, and there are no jurisdictional issues. Error has been preserved, and the record is not voluminous. Because Jackson does not have any other convictions that could substitute as a predicate offense, if his 2016 Iowa conviction is not a predicate offense, then he is not a career offender.

CONCLUSION

For the foregoing reasons, Jackson's petition for a writ of certiorari should be granted.

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