No. 24-6410

IN THE

Supreme Court of the United States

ANTOINE WIGGINS,

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Three years ago, Justice Sotomayor and Justice Barrett called on the Sentencing Commission to resolve a six-circuit split over whether the term "controlled substance" in the Sentencing Guidelines refers to substances controlled under federal law only (the federal-law approach), or whether it also extends to substances controlled by state law (the state-law approach). *See Guerrant* v. *United States*, 142 S. Ct. 640 (2022) (statement of Sotomayor, J., joined by Barrett, J.). Since then, the split has grown to ten circuits, with an eleventh circuit indicating that it would join the minority approach. This circuit split matters: In circuits that follow the state-law approach, defendants may be sentenced to months or years more in prison. Petitioner is a prime example: His sentence was *five years* longer because he happened to be sentenced in a circuit on the wrong side of the split.

The government asks the Court to deny certiorari on the faint hope that the Commission will resolve the split. But the Commission has steadfastly refused to do so, despite acknowledging the circuit split, and despite Justice Sotomayor's and Justice Barrett's call to address this crucial issue three years ago. More than enough time has passed, and this Court's intervention is plainly warranted. The government attempts to dispute the depth of the split, but the Fifth Circuit expressly acknowledged a 3-7 circuit split last year, and the First Circuit has suggested it would join the minority side of the split. *See, e.g.*, *United States* v. *Minor*, 121 F.4th 1085, 1090 (5th Cir. 2024); *United States* v. *Crocco*, 15 F.4th 20 (1st Cir. 2021). That brings

the count to *eleven circuits* that have indicated their position on the question presented. Further percolation is unnecessary.

The government's other arguments against certiorari are unpersuasive. The government does not dispute that this case is a clean vehicle to address the question presented, or that the question presented is vitally important to criminal defendants nationwide. The government's arguments in favor of its preferred resolution of the question presented, moreover, are not a reason to deny review; they are a reason to grant certiorari so that the Court can address the merits.

If Petitioner had been sentenced under the minority rule, he would be out of jail. Whether a defendant remains in prison should not depend solely on the circuit in which he is sentenced. The Court should grant certiorari.

ARGUMENT

I. THERE IS A DEEP, PERVASIVE, AND ACKNOWLEDGED SPLIT.

There is a deep, entrenched split over whether the term "controlled substance" in the Guidelines includes substances controlled only under the federal Controlled Substances Act (CSA), or also includes substances controlled under state law. The Second, Fifth, and Ninth Circuits hold that term encompasses only substances controlled under federal law. Pet. 5-6.[1] The Third, Fourth, Sixth, Seventh, Eighth,

[1] *See also, e.g.*, *United States* v. *Gibson*, 55 F.4th 153 (2d Cir. 2022), *adhered to on reh'g*, 60 F.4th 720 (2d Cir. 2023) (rejecting government's rehearing request); *United States* v. *House*, 31 F.4th 745, 753 (9th Cir. 2022) (per curiam).

Tenth, and Eleventh Circuits hold that a controlled substance also includes a substance regulated under only state law. Pet. 6.[2]

The government quibbles with the precise lineup of the split, but it cannot and does not dispute that the circuits have been deeply divided for years. The government attempts (at 13-14) to distinguish the Fifth Circuit's decision in *United States* v. *Gomez-Alvarez*, 781 F.3d 787 (5th Cir. 2015), because it involved § 2L1.2 of the Guidelines, rather than § 4B1.2(b). But both provisions define the offense in question as "an offense under federal or state law" that "prohibits" certain actions involving "a controlled substance." U.S.S.G. § 4B1.2(b); *see id.* § 2L1.2 cmt. n.2 (1987). And the Fifth Circuit has expressly acknowledged that "cases discussing" these provisions are "interchangeabl[e]." *Minor*, 121 F.4th at 1089-90 (quotation marks omitted). Indeed, the Fifth Circuit recently applied *Gomez-Alvarez* to a sentencing enhancement imposed under § 4B1.2(b), completely undermining the government's position that the Fifth Circuit treats these two Guidelines provisions differently. *See id.*

The government (at 13) also attempts to discount the First Circuit's position, but that court has repeatedly signaled that it would join the minority side of the split. *See Crocco*, 15 F.4th at 23 (explaining the state-law approach is "fraught with peril"); *United States* v. *Abdulaziz*, 998 F.3d 519, 523 & n.2 (1st Cir. 2021) (defining controlled substance by reference to the CSA in effect when federal consequences

[2] This Court vacated and remanded the Eleventh Circuit's decision in *United States* v. *Dubois*, 94 F.4th 1284, 1296 (11th Cir. 2024), on other grounds, 145 S. Ct. 1041 (2025). On remand, the Eleventh Circuit has not indicated any intent to revisit its resolution of the question presented here. *See* Order, *United States* v. *Dubois*, No. 22-10829 (Feb. 21, 2025).

attach, rather than by reference to state law, and explaining the government did not timely raise the argument in favor of the state-law approach). Other circuits put the First Circuit on the minority side of the split. *See Minor*, 121 F.4th at 1090; *United States* v. *Harbin*, 56 F.4th 843, 846-847 (10th Cir. 2022). The First Circuit recently confronted this issue again but was unable to issue a precedential decision on the question presented because the government refused to contest it—presumably because it knows the First Circuit is opposed to the government's position. *See United States* v. *Moran-Stenson*, 115 F.4th 11, 19 (1st Cir. 2024) (explaining the government "d[id] not refute" that a state-law offense involving hemp was "not a categorical match for a 'controlled substance offense' under § 2K2.1(a)(4)(A) because [the state-law offense] proscribes trafficking of certain drugs not criminalized by the federal [CSA]"). And regardless of the First Circuit's position, there is still a ten-circuit split.

II. THE COURT SHOULD GRANT CERTIORARI, RATHER THAN WAITING ON THE SENTENCING COMMISSION TO ACT.

The government urges the Court to turn a blind eye to a ten-circuit split in the hopes that the Commission will someday take action. But the Commission has failed to act for years—deeply impacting defendants such as Petitioner, who remains in prison when an identical defendant sentenced in the Second, Fifth, or Ninth Circuit would have been released.

This Court generally allows the Commission "the opportunity to address [an] issue in the first instance" before granting certiorari. *Longoria* v. *United States*, 141 S. Ct. 978 (2021) (statement of Sotomayor, J., joined by Gorsuch, J.). That makes sense if the Commission has never had the chance to weigh in due to a lack of a

quorum, *see id.*, or if the Commission is actively considering an issue when the case is pending, *see McClinton* v. *United States*, 143 S. Ct. 2400, 2403 (2023) (statement of Kavanaugh, J., joined by Gorsuch and Barrett, JJ.); *id.* (statement of Sotomayor, J.); *Braxton* v. *United States*, 500 U.S. 344 (1991). The Commission resolved the question from *Longoria* as soon as it had a quorum.[3] And when *McClinton* and *Braxton* issued, the Commission had already announced its intent to resolve the relevant issues during the ongoing amendment cycle.[4]

That is not the case here. Instead, the Commission has failed to act for *three years* after Justice Sotomayor and Justice Barrett called upon the Commission to resolve this issue, and during that time the split has only deepened. *See Guerrant*, 142 S. Ct. 640 (statement of Sotomayor, J., joined by Barrett, J.); *supra* pp. 2-4; Pet. 5-6.

In the 2022-2023 amendment cycle, the Commission cited Justice Sotomayor's and Justice Barrett's statement and claimed that resolving this "circuit conflict" was a "priority." 87 Fed. Reg. 60438, 60439 (Oct. 5, 2022). The Commission proposed two possible solutions: the federal-law approach and the state-law approach. 88 Fed. Reg. 7180, 7200-7201 (Feb. 2, 2023). But the Commission did not adopt either proposal, and instead simply ignored the issue in its final amendments. *See* 88 Fed. Reg. 28254 (May 3, 2023).

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[3] U.S.S.C., Amendment 820 (effective Nov. 1, 2023).

[4] U.S.S.C., Amendment 826 (effective Nov. 1, 2024); U.S.S.C., Amendment 438 (effective Nov. 1, 1992).

The Commission did not prioritize or resolve this issue during the 2023-2024 cycle. *See* 88 Fed. Reg. 60536 (Sept. 1, 2023); 89 Fed. Reg. 36853 (May 3, 2024). Nor did it address this issue in the 2024-2025 cycle. *See* 89 Fed. Reg. 66176 (Aug. 14, 2024).

During the 2024-2025 cycle, the Commission did propose amending the definition of "controlled substance offense" in § 4B1.2(b) as part of a long-running effort to eliminate the use of the categorical approach in the career-offender provision. *See* 90 Fed. Reg. 128, 129-130 (Jan. 2, 2025). But the Commission did not make that change, either. *See* 90 Fed. Reg. 19798 (May 9, 2025). And contrary to the government's contention (at 8), even if the Commission had amended § 4B1.2(b) as proposed, that would not have "resolve[d]" the split. That proposed change would not have applied to seven other Guidelines provisions that contain controlled-substance offense enhancements—§§ 2K1.3, 2K2.1, 2S1.1, 4A1.2, 4B1.4, 5K2.17, and 7B1.1—and thus would not have resolved the circuit conflict over the interpretation of these provisions. *See* 90 Fed. Reg. at 139 (proposing to "maintain the status quo" with respect to these provisions by expressly incorporating the existing definition of "controlled substance offense" into each of the seven Guidelines). Indeed, the government recognized as much in its comments to the Commission's proposal. *See* DOJ Comment at 14 (Feb. 3, 2025), https://perma.cc/UVN9-Q2HS. Moreover, Petitioner was sentenced under § 2K2.1, so he would not have benefitted from this proposed amendment to the Guidelines even if it had been adopted.

These are not the actions of a body that (in the government's words) is "proactively looking for ways to resolve" the circuit conflict. BIO 8. The Commission has instead repeatedly refused to act, "reflect[ing] a conscious decision" to let this issue fester, NAPD Br. 8, despite its "responsibility * * * to address" the division among circuits "to ensure fair and uniform application of the Guidelines." *Guerrant*, 142 S. Ct. at 640-641 (statement of Sotomayor, J., joined by Barrett, J.).

The Court should step in now. The Commission can take decades to resolve outstanding issues, if it deigns to address them at all. *See, e.g.*, *United States* v. *Jones*, 980 F.3d 1098, 1104 (6th Cir. 2020) (noting Commission took 22 years to adhere to Congress's instruction to issue a compassionate-release policy statement); Diana Murphy, *The Murphy Commission's First Oversight Hearing*, 13 Fed. Sent'g Rep. 98, 103 (2000) (noting Commission only planned to resolve 16 of 40 outstanding circuit splits); *see also, e.g.*, U.S.S.C., *Report to the Congress: Federal Child Pornography Offenses* 14 n.73 (2012) (noting split involving child pornography Guidelines, which Commission still has not resolved 13 years later).

The government contends that this Court should never review decisions "involv[ing] the interpretation of the Sentencing Guidelines," no matter how persistent or divisive the split, because the Commission could always theoretically "eliminate [the] conflict." BIO 5-6. But that approach is fundamentally unfair to criminal defendants in situations like this one, where the Commission repeatedly fails to act. Petitioner is in prison today *solely* because of the circuit in which he was sentenced. That is precisely the kind of situation this Court should address.

This "Court plays a unique role in the judiciary and in the development of the criminal justice system." Dawinder S. Sidhu, *Sentencing Guidelines Abstention*, 60 Am. Crim. L. Rev. 405, 423 (2023). Categorically denying all cases presenting important "circuit conflicts" simply because they involve the Guidelines "is inconsistent with the Court's own identified criteria for * * * review, further[s] disparities," and deprives "lower courts of [] clarity and predictability." *Id.* at 423-425. Given the Commission's limited resources, it also "makes little practical sense for the Court" to defer all decisions to the Commission—particularly when the Commission has repeatedly shown it is unable or unwilling to act. *Id.* at 425.

Nor is there any sound reason to treat the Commission differently from other decisionmakers. The Court does not abstain from resolving conflicts that Congress could address through new legislation. *See, e.g.*, *Hewitt* v. *United States*, No. 23-1002 (granting certiorari to address 2-2 split over First Step Act's sentencing reduction provisions). And just last Term, the Court made clear that "courts, not agencies, will decide all relevant questions of law arising on review of agency action." *Loper Bright Enterprises* v. *Raimondo*, 603 U.S. 369, 392 (2024) (citation omitted). Nothing in the text or history of the Sentencing Reform Act, which created the Commission, suggests that Congress intended to vest the Commission with the exclusive discretion to resolve circuit conflicts over the interpretation of the Guidelines. *See Sentencing Guidelines Abstention*, 60 Am. Crim. L. Rev. at 432.

The government's contention that this Court's review is unwarranted because "the Guidelines [are] advisory only" is meritless. BIO 6. The Guidelines provide "the

essential framework * * * for sentencing proceedings." *Molina-Martinez* v. *United States*, 578 U.S. 189, 198 (2016). "Federal courts * * * *must* begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process." *Id.* (quotation marks omitted). Even if the sentencing judge adopts a variance, the Guidelines still "anchor the district court's discretion" by providing "the beginning point" for the initial sentencing range. *Id.* at 198-199 (quotation marks and ellipses omitted); *see also, e.g.*, Jed S. Rakoff, *Why the Federal Sentencing Guidelines Should Be Scrapped*, 26 Fed. Sent'g Rep. 6, 8 (2013) ("[T]he very first thing a judge is still required to do at sentencing is to calculate the Guidelines range, [which] creates a kind of psychological presumption from which most judges are hesitant to deviate too far."); *United States* v. *Ingram*, 721 F.3d 35, 40 (2d Cir. 2013) (Calabresi, J., concurring) (similar).

III. THE DECISION BELOW IS WRONG.

Unable to dispute the split, the government takes aim at the merits. The government's arguments merely demonstrate that this Court's review is warranted.

The government contends that § 4B1.2(b) refers to both state and federal controlled substances because it does not cross-reference the CSA or otherwise "indicat[e] that it is limited in scope to federally prohibited conduct." BIO 9-11. That "has it backwards." *United States* v. *Townsend*, 897 F.3d 66, 70 (2d Cir. 2018). Nearly a century ago, this Court 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* v. *United States*, 318 U.S. 101, 104 (1943). This Court's

categorical-approach precedent is based on the same fundamental assumption: A state predicate offense counts for purposes of a federal sentencing enhancement *only* when the state offense matches a "uniform, categorical" comparator. *See Taylor* v. *United States*, 495 U.S. 575, 590 (1990). Looking to federal law to define "controlled substance" supplies such a comparator; looking to 50 unique state definitions does not.

The government also points out that the Guidelines define a "controlled substance *offense*" as "an *offense* under federal or state law." BIO 10 (emphases added). But that is irrelevant to the question presented, which is whether the term "controlled substance" refers to substances controlled under federal or state law. *See Townsend*, 897 F.3d at 70.

The government's arguments about the 1987 amendment to the Guidelines, which likewise concerned the definition of "controlled substance *offense*," are similarly irrelevant. BIO 11-12. From the beginning, the Commission has defined a "controlled substance offense" by reference to state and federal law. U.S.S.G. § 4B1.2(b) & cmt. n.2 (1987). The 1987 amendment merely replaced a specific list of federal laws with more general language. *See* U.S.S.C., Amendment 268 (effective Nov. 1, 1989) (explaining amendment made no substantive changes). That clean-up exercise says nothing about the meaning of "controlled substance." To the extent there is any ambiguity, moreover, the rule of lenity counsels in favor of the federal-law approach. NAPD Br. 12-13.

The government's policy arguments similarly miss the mark. BIO 12. The "chief concern" driving the categorical approach is "ensur[ing] 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). To do so, the categorical approach compares state predicate offenses against a "uniform federal definition," even if the end result is at times underinclusive. *Id.* (quotation marks omitted). The federal-law approach furthers those goals. The state-law approach undermines them.

As the government's brief demonstrates, the question presented involves important questions of law that require resolution. That is a reason to grant certiorari—not deny it.

IV. THIS IS AN IDEAL VEHICLE TO RESOLVE THIS EXTREMELY IMPORTANT ISSUE.

This petition is an excellent vehicle to resolve the question presented. The government does not argue otherwise, nor could it. There are no preservation concerns. The issue was outcome-determinative; neither the District Court nor the government identified another conviction that could substitute for the controlled-substance offense in question. *See* Pet. App. 1a-4a. The District Court's decision to apply the state-law approach, consistent with Third Circuit precedent, increased Petitioner's Guidelines range by five years—from 37-46 months to 100-125 months. *See id.* at 3a-4a.

The question presented is vitally important and recurring. Federal courts impose thousands of controlled-substance offense enhancements each year. *See id.*

at 22a; NAPD Br. 13-14. But as a result of the split, courts in the Third, Fourth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits routinely impose sentences that are months, years, or even *decades* longer than they would have been in other jurisdictions. Because federal drug definitions are updated annually and do not always track state law, these problems will only worsen with time. Allowing the split to persist also undermines the Guidelines' fundamental goal: "to achieve uniformity in sentencing imposed by different federal courts," in "federal sentencing proceedings," consistent with "federal sentencing objectives," "in principle and in practice." *Molina-Martinez*, 578 U.S. at 192-193 (quotation marks omitted).

This Court should intervene to resolve a deep, acknowledged, and longstanding split that critically impacts criminal defendants across the nation every day.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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