No. ____

IN THE
Supreme Court of the United States

EUGENE JACKSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Armed Career Criminal Act mandates fifteen years in prison for federal firearm offenses where the defendant has three prior "violent felonies" or "serious drug offenses." The ACCA defines a "serious drug offense" as "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, *a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))*, for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. § 924(e)(2)(A)(ii) (emphasis added).

Four circuits have unanimously held that § 924(e)(2)(A)(ii) incorporates the federal drug schedules in effect at the time of the federal firearm offense to which the ACCA applies. In the decision below, however, the Eleventh Circuit accepted the government's express invitation to reject those circuit decisions. In doing so, the Eleventh Circuit held that § 924(e)(2)(A)(ii) instead incorporates the federal drug schedules that were in effect at the time of the defendant's prior state drug offense.

The question presented is:

Whether the "serious drug offense" definition in the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(A)(ii), incorporates the federal drug schedules that were in effect at the time of the federal firearm offense (as the Third, Fourth, Eighth, and Tenth Circuits have held), or the federal drug schedules that were in effect at the time of the prior state drug offense (as the Eleventh Circuit held below).[1]

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[1] A related question is presented in *Altman, et al. v. United States* (No. 22-5877) (response requested Nov. 16, 2022) and *Brown v. United States* (No. 22-6389) (docketed Dec. 23, 2022).

RELATED PROCEEDINGS

This case arises from the following proceedings:

- *United States v. Jackson*, No. 21-113963 (11th Cir. Dec. 13, 2022);
- *United States v. Jackson*, No. 19-cr-20546 (S.D. Fla. Oct. 21, 2021).

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

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

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Eugene Jackson, respectfully seeks a writ of certiorari to review a judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's (second and final) opinion affirming Petitioner's ACCA sentence is published at 55 F.4th 846, and is reproduced as Appendix ("App.") A, 1a–35a. The Eleventh Circuit's (first and superseded) opinion vacating Petitioner's ACCA sentence is published at 36 F.4th 1294, and is reproduced as App. D, 120a–142a. The district court did not issue a written opinion in this case.

JURISDICTION

The Eleventh Circuit issued its final decision on December 13, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(A)(ii),

(A) the term "serious drug offense" means—

* * *

> **(ii)** an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law.

INTRODUCTION

The Armed Career Criminal Act mandates fifteen years in federal prison for certain federal firearm offenses where the defendant has three prior "violent felonies" or "serious drug offenses." Boiled down, the question here is whether a "*serious* drug offense" includes state offenses for substances that have become fully *legal* under federal law by the time of the federal firearm offense to which the ACCA applies.

In the published decision below, the Eleventh Circuit answered that question affirmatively. That was so, it held, because the ACCA's "serious drug offense" definition in 18 U.S.C. § 924(e)(2)(A)(ii) incorporates the federal drug schedules that were in effect at the time of the prior state drug offense, not at the time of the federal firearm offense. Although four circuits had reached the opposite conclusion, the government urged the Eleventh Circuit to reject them. App. 110a–111a. The court did so, and the author of the decision acknowledged the resulting 4–1 circuit split. App. 32a (Rosenbaum, J., concurring). That split, moreover, derives from confusion

about this Court's decision in *McNeill v. United States*, 563 U.S. 816 (2011). And that confusion affects cases arising under the Guidelines too, creating more disparities.

This Court's review is urgently needed. The 4–1 split means that countless defendants in the Eleventh Circuit and Florida in particular—ACCA's ground zero—will receive a mandatory fifteen-year sentence based on geography alone. And the government told this Court that review was warranted in *Shular v. United States*, 140 S. Ct. 779 (2020) because, despite only a 1–1 split there, the interpretation of § 924(e)(2)(A)(ii) was "important" and "recurring." Br. for U.S. 13 (No. 18-6662) (Feb. 13, 2019). Review is warranted even more here: the split here is deeper; it stems from confusion about a precedent that only this Court can clarify; and the timing question is central to drug over-breadth arguments that defendants are routinely advancing and *winning* nationwide. Those arguments arise in various legal contexts, they affect numerous state drug offenses, and they determine decades of federal prison time.

The government cannot deny the very split that it successfully urged the Eleventh Circuit to create. And the government cannot deny that the question presented here is no less "important" and "recurring" than the one in *Shular*. Thus, the only real question here is whether this case is a suitable vehicle. It is more than suitable; it is ideal. Petitioner preserved his arguments in the courts below; the question presented was dispositive; all of the competing arguments were fully aired; and the Eleventh Circuit had the benefit of nine other published circuit decisions.

Finally, and although the circuit conflict should be resolved whichever side is correct, the decision below is also wrong. Petitioner's ACCA sentence is unlawful.

STATEMENT

A. Legal Background

1. The Armed Career Criminal Act (ACCA) mandates a fifteen-year federal prison sentence for being a felon in possession of a firearm where the defendant has three prior "violent felonies" or "serious drug offenses." 18 U.S.C. § 924(e). As relevant here, the ACCA defines a "serious drug offense" as "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, *a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))*, for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. § 924(e)(2)(A)(ii) (emphasis added).

To determine whether a prior state offense qualifies as a "serious drug offense," federal sentencing courts apply the "categorical approach." *Shular v. United States*, 140 S. Ct. 779, 784–85 (2020). Under that familiar approach, "[a] court must look only to the state offense's elements, not the facts of the case or labels pinned to the state conviction." *Id*. at 784. Given that focus on the elements, courts "examine what the state conviction necessarily involved," and therefore courts "must presume that the conviction rested upon nothing more than the least of the acts criminalized, and then determine whether even those acts are encompassed by the" federal definition. *Moncrieffe v. Holder*, 569 U.S. 184, 190–91 (2013) (brackets and quotation omitted).

Thus, for a state drug offense to satisfy the definition in § 924(e)(2)(A)(ii), it must necessarily involve a "controlled substance," which is defined as a substance on the federal drug schedules. 21 U.S.C. § 802(6). If the elements do not include such a

controlled substance, then the offense is categorically overbroad and does not qualify. But the federal schedules are not static; they are "updated" on an "annual basis," 21 U.S.C. § 812(a), and so the "list of controlled substances changes from time to time," App. 2a. As relevant here, the federal government will sometimes de-schedule a substance that had been federally illegal at the time of the defendant's prior state drug offense. So the question arises: does § 924(e)(2)(A)(ii) refer to the federal drug schedules that were in effect at the time of the instant federal firearm offense, or the federal drug schedules that were in effect at the time of the prior state drug offense?

2. That timing question arises here in the context of Florida's drug statute. In Florida, it is a second-degree felony, punishable by up to fifteen years in prison, to sell or possess with intent to sell a Schedule II "controlled substance." *See* Fla. Stat. § 893.13(1)(a)1 (offense); *id.* § 775.082(3)(d) (penalty). For many years, including at the time of Petitioner's drug offenses, those "controlled substances" in Florida included "cocaine or ecgonine, including any of their stereoisomers, and any salt, compound, *derivative*, or preparation of cocaine or ecgonine." Fla. Stat. § 893.03(2)(a)4 (emphasis added). One cocaine-related derivative is ioflupane I^{123}.

In 2015, the federal government removed ioflupane I^{123} from the federal drug schedules. Exercising statutory authority under the Controlled Substances Act, *see* 21 U.S.C. §§ 811–12, the Attorney General (via the DEA Administrator) legalized that substance because it could be used to help diagnose Parkinson's disease. Schedules of Controlled Substances: Removal of [123 I] Ioflupane from Schedule II of the Controlled Substances Act, 80 Fed. Reg. 54,715 (Sept. 11, 2015); *see* 21 C.F.R.

§ 1308.12(b)(4)(ii) (listing cocaine and its derivatives under Schedule II but "except[ing]" ioflupane I^{123}). In 2017, Florida followed the federal government's lead, expressly removing ioflupane I^{123} from the state's drug schedules. *See* Fla. Sess. Law Serv. Ch. 2017-110 (C.S.H.B. 505); Fla. Stat. § 893.03(2)(a)4 (listing cocaine and its derivatives, "except that these substances shall not include ioflupane I^{123}"). That express removal made clear that, before that time, Fla. Stat. § 893.13 had indeed criminalized selling and possessing with intent to sell ioflupane I^{123}. App. 6a–7a n.3.

B. Proceedings Below

1. Based on offense conduct occurring in 2017, Petitioner pleaded guilty in 2021 in the Southern District of Florida to one count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). *See* Dist. Ct. ECF Nos. 1, 54, 55.

In the pre-sentence investigation report (PSR), the probation officer determined that Petitioner was subject to the ACCA, transforming what was otherwise a ten-year statutory maximum into a fifteen-year mandatory minimum. *See* 18 U.S.C. §§ 924(a)(2), 924(e).[2] The ACCA also increased Petitioner's guideline range from 92–115 to 180–210 months. *See* PSR ¶¶ 19–22, 52, 111; U.S.S.G. § 4B1.4.

The probation officer believed that Petitioner was subject to the ACCA based on five prior Florida convictions (PSR ¶ 19): (1) a 1998 conviction for battery on a law enforcement officer, PSR ¶ 25; (2) a 1998 conviction for the sale of cocaine, PSR ¶ 25; (3) a 2003 conviction for armed robbery, PSR ¶ 26; (4) a 2004 conviction for possession

[2] Congress has recently raised the statutory maximum from ten to fifteen years. Bipartisan Safer Communities Act, Pub. L. No. 117-159, 136 Stat. 1313, 1329 § 1204(c) (2022).

with intent to sell cocaine, PSR ¶ 39; and (5) a 2012 conviction for aggravated assault with a deadly weapon/aggravated battery with a deadly weapon, PSR ¶ 48. The two Florida drug convictions arose under Fla. Stat. § 893.13. *See* Dist. Ct. ECF No. 60-3.

In the district court, Petitioner conceded that the armed robbery conviction and the aggravated assault/aggravated battery conviction each qualified as an ACCA "violent felony." Dist. Ct. ECF No. 60 at 2–4. But that was only two. And the government conceded, and the district court agreed, that the 1998 battery conviction did not qualify. Dist. Ct. ECF No. 62 at 2; ECF No. 72 at 4–6. Thus, Petitioner's ACCA status turned on whether his drug convictions qualified as "serious drug offenses."

Petitioner argued that they did not. In a thorough written objection to the PSR, he explained that, at the time of those convictions in 1998 and 2004, the offense elements included ioflupane I^{123}. However, at the time of Petitioner's federal firearm offense, ioflupane I^{123} was not a federally controlled substance. That was so because, as explained above, the federal government had de-scheduled that substance in 2015. The upshot, Petitioner argued, was that his two prior drug offenses were categorically overbroad vis-à-vis § 924(e)(2)(A)(ii)'s "serious drug offense" definition: their offense elements encompassed ioflupane I^{123}, but that substance was not federally controlled at the time of his federal firearm offense. *See* Dist. Ct. ECF No. 60 at 6–14.

The government did not respond to Petitioner's over-breadth argument on the merits. Instead, the government argued only that it was foreclosed by circuit precedent—namely, *United States v. Smith*, 775 F.3d 1262 (11th Cir. 2014) and its progeny—as well as this Court's decision in *Shular*. Dist. Ct. ECF No. 62 at 4–5.

At sentencing, the district court opined that Petitioner's argument was "extremely compelling." Dist. Ct. ECF No. 73 at 26. The court did "not believe that the 2004 and 1998 convictions under the case law cited by Mr. Jackson in other circuits would or should survive" as ACCA predicates. *Id*. at 25. But although the district court did not believe that the Eleventh Circuit had yet decided this "important question," the court "reluctantly" concluded that it was "bound" by circuit precedent. *Id*. at 24, 26. Accordingly, and despite believing that a ten-year sentence "would have been quite enough," the court had no choice but to sentence Petitioner to the ACCA's fifteen-year mandatory minimum. *Id*. at 25–26; *see* App. 144a (judgment).

2. On appeal, Petitioner reiterated his drug over-breadth argument, and he further argued that no precedent foreclosed it. *See* Pet. C.A. Br. 10–26. In response, the government reiterated its view that circuit precedent foreclosed his argument; but, again, it did not address that argument on the merits. *See* U.S. C.A. Br. 3–9.

Before oral argument, the Eleventh Circuit panel *sua sponte* told counsel to be prepared to address whether the court should compare the elements of the state drug offenses to federal law in effect at the time of the federal offense, or at the time of the prior state drug offenses. C.A. ECF No. 31. The parties submitted several Rule 28(j) letters and responses addressing that issue. *See* C.A. ECF Nos. 32–36, 38–44.

After oral argument, a unanimous Eleventh Circuit panel issued a published opinion accepting Petitioner's argument and vacating his ACCA sentence. App. D. The panel "h[e]ld that due-process fair-notice considerations require us to apply the version of the Controlled Substances Act Schedules in place when the defendant

committed the federal firearm-possession offense," not those in place when he was convicted of the prior state drug offenses. App. 122a; *see* App. 121a–122a, 127a–129a. "That way," the panel explained, "Jackson had notice at the time of his firearm-possession offense not only that his conduct violated federal law, but also of his potential minimum and maximum penalty for his violation and whether his prior felony convictions could affect those penalties." App. 129a. That holding resolved the appeal. The panel explained: at the time of Petitioner's prior state drug offenses, the elements included ioflupane I^{123}; but that was not a federally controlled substance at the time he committed the instant federal firearm offense in 2017. App. 129a–137a. Rejecting the government's arguments, the panel found that neither circuit precedent nor *Shular* foreclosed Petitioner's drug over-breadth argument. App. 138a–141a. As for this Court's decision in *McNeill*, the panel found that the federal-law question "was not before the Court in *McNeill*," and its "reasoning . . . ha[d] no application here," citing decisions from the First, Fourth, and Ninth Circuits. App. 141a–142a.

3. The next business day, an Eleventh Circuit Judge withheld issuance of the mandate. C.A. ECF No. 48. A few weeks later, the State of Alabama submitted an amicus brief in support of rehearing on behalf of itself, Florida, and Georgia. C.A. ECF No. 52. The United States sought an extension of time to decide whether to petition for rehearing, but it ultimately declined to do so. *See* C.A. ECF No. 49–50.

Over a month after the expiration of the government's rehearing deadline (and on the day its certiorari petition would have been due), the panel *sua sponte* vacated its opinion. It ordered the parties to "file supplemental briefs addressing the specific

question of whether *McNeill*'s past-tense interpretation of 'serious drug offense' requires that we assess whether a prior state conviction qualifies as a 'serious drug offense' under federal law at the time of the state conviction rather than at the time of the federal offense. The parties may also address other relevant authorities on the question of which version of the Controlled Substances Act § 924(e)(2)(A)(ii) incorporates." C.A. ECF No. 54; 2022 WL 4959314, at *1 (11th Cir. Sept. 8, 2022).

a. In his supplemental brief (App. B), Petitioner first argued that *McNeill* addressed only a state-law question about the attributes of the prior drug offense, but it did not address the version of federal law to which those attributes should be compared. He emphasized that, in addition to the panel, six other circuits—three in the ACCA context and three in the Guidelines context—had unanimously reached that same conclusion and rejected the government's reliance on *McNeill*. App. 45a–51a. Petitioner explained that the lone exception—a Sixth Circuit decision in the Guidelines context—had misread *McNeill* and was unpersuasive. App. 51a–55a.

Petitioner then argued that courts must consult the federal drug schedules in effect at the time of the federal offense. He again emphasized that, with the exception of the Sixth Circuit decision, six other circuits had unanimously reached that conclusion. Synthesizing the reasoning of those decisions, he argued, *inter alia*, that: (1) constitutional fair-notice principles required using the federal drug schedules in effect at the time of the federal offense, App. 56a–65a; (2) the statutory text supported that conclusion because: (a) Congress deliberately keyed the "serious drug offense" definition to evolving drug schedules; (b) courts have always looked to current federal

law to interpret the neighboring "violent felony" definitions, App. 65a–69a; and (c) given the constitutional fair-notice problems the contrary conclusion would raise, the canon of constitutional avoidance and the rule of lenity compelled Petitioner's time-of-federal-offense interpretation, App. 71a–72a; and, finally, (3) the contrary sentencing regime would subject defendants to the ACCA's mandatory minimum for substances that are no longer unlawful yet dispense with the ACCA for substances that have since been made unlawful, which would be an absurd result, App. 74a–80a.

b. In its supplemental brief (App. C), the government advocated for that regime, relying almost entirely on *McNeill*. Although the government acknowledged that "*McNeill* is not directly on point," the government argued that it "strongly suggests" that courts must use the federal schedules in effect at the time of the prior drug offense. *See* App. 93a–104a. In response to Petitioner, the government argued that: its approach did not give rise to absurd results or unwarranted disparities, App. 104a–107a; it provided adequate notice and complied with due process, App. 107a–110a; and, although "six other circuits have considered the timing issue presented in this appeal, and only one has adopted the government's position," the government "urge[d] this Court to reject the reasoning of its five sister circuits and join the Sixth Circuit in its more faithful application of *McNeill*'s reasoning," App. 110a–117a.

4. The panel did just what the government urged. The panel issued a new published opinion reversing itself and affirming Petitioner's ACCA sentence. App. A.

a. After reaffirming that neither circuit precedent nor *Shular* foreclosed Petitioner's drug over-breadth argument, App. 8a–13a, the panel explained its new

"bottom-line conclusion: ACCA's definition of a state 'serious drug offense' incorporates the version of the federal controlled-substances schedules in effect when the defendant was convicted of the prior state drug offense." App. 14a; *see* App. 16a (repeating this "conclu[sion]"). Although the panel acknowledged that *McNeill*'s holding did "not address" and thus did "not answer" or "determine" the question presented here, App. 8a, 17a–18a,[3] the panel nonetheless "h[e]ld that the Supreme Court's reasoning in *McNeill* . . . requires us to conclude that ACCA's 'serious drug offense' definition incorporates the version of the controlled-substances list in effect when the defendant was convicted of his prior state drug offense," App. 2a; *see* App. 19a (repeating this "conclu[sion]"); App. 29a (repeating this "hold[ing]").

The panel gave two reasons for that holding. First, "using the federal controlled-substances schedules in effect at the time the defendant committed the federal firearm offense would erase an earlier state conviction for ACCA purposes, in violation of *McNeill*'s reasoning." App. 19a (quotation and brackets omitted); *see* App. 22a. Second, the neighboring "serious drug offense" definition for prior *federal* convictions in § 924(e)(2)(A)(i) incorporated the schedules in effect at the time of the prior conviction, so the ACCA's "structure" meant the same must be true for prior

[3] For that proposition, the panel cited decisions from the Third, Fourth, Eighth, and Tenth Circuits. App. 18a. But the panel did not mention that those circuits reached the opposite bottom-line conclusion—namely, that § 924(e)(2)(A)(ii) incorporated the federal drug schedules in effect at the time of the federal offense. The panel also noted that four additional circuits had addressed the *McNeill* issue under the Guidelines, but the panel declined to rely on them because they did not arise under the ACCA. App. 18a n.7. Again, however, the panel did not mention that three of those four circuit decisions reached the opposite conclusion.

state drug convictions in § 924(e)(2)(A)(ii). App. 19a, 22a–26a. Otherwise, the panel reasoned, "equivalent" federal and state priors would be treated differently. App. 25a.

Although Petitioner and six other circuits had advanced numerous contrary arguments (as well as counter-arguments), the panel briefly addressed only two. While the panel found those arguments "thoughtful," it expressly "reject[ed]" them. App. 26a–27a. First, the panel rejected the very fair-notice argument that it had first pioneered and that three of its sister circuits had since embraced. It opined that, when a defendant commits the prior state drug offense, he is on notice that it may qualify as an ACCA predicate were he to later violate § 922(g). App. 27a–28a. Second, while its position would exclude convictions pre-dating enactment of the federal schedules in 1970, this "odd" result was not "absurd" enough to overcome "what the Supreme Court [in *McNeill*] has found is the plain meaning of ACCA's text." App. 28a.

Applying its holding to the facts of the case, the panel concluded that Petitioner's Florida drug convictions were "serious drug offenses." App. 29a–31a. There was no dispute that "the federal drug schedules included ioflupane in 1998 and 2004, when Jackson was convicted of his prior state drug offenses. And *McNeill*'s reasoning requires us to conclude that the 1998 and 2004 versions of the federal drug schedules are what govern. So Section 893.13(1) did not reach more conduct with respect to cocaine than does ACCA's 'serious drug offense' definition." App. 30a.

b. Judge Rosenbaum—who authored both panel opinions—also authored a concurring opinion. She began by acknowledging the resulting circuit split: "today's decision tallies the score at one circuit that concludes that we look to the federal

controlled-substances schedules in effect at the time of the prior state conviction and four that reach the opposite conclusion and instead look to the federal controlled-substances schedules in effect at the time of the federal firearm offense." App. 32a (citing Third, Fourth, Eighth, and Tenth Circuit decisions). "And," she continued, "it's even more confusing than that, as we previously agreed with those four circuits." *Id*.

While she believed that *McNeill*'s reasoning compelled the majority's holding, she was concerned, and found it "quite remarkable," that the decision would "expect the ordinary citizen . . . to understand the ins and outs of ACCA—especially when, as today's decision demands, they require historical research of the federal controlled-substance schedules." App. 32a–33. In her view, "that's a heavy lift for the ordinary citizen." App. 33a. For that reason, she was "deeply concerned" about the majority's decision. App. 34a. She believed that looking to the federal drug schedules in effect at the time of the federal offense "would be far more consistent with how we generally construe statutes" and "would also provide the ordinary citizen with more accessible and realistic notice." *Id*. "And finally," she concluded, "as our sister circuits have observed incorporating the federal drug schedules in effect at the time of the federal firearm offense would be far more consistent with Congress's determination to decriminalize certain substances." *Id*. (citing Eighth and Tenth Circuit decisions).

REASONS FOR GRANTING THE PETITION

The Eleventh Circuit's decision below creates a square conflict of authority with four other circuits on an important and recurring question of federal sentencing

law. This case is an excellent vehicle to resolve that conflict. And the Eleventh Circuit's outlier decision is wrong. The standard criteria for certiorari are satisfied.

I. The Circuits Are Squarely Divided and Deeply Confused

A. The Circuits are Divided 4–1 on the ACCA Question Presented

1. The Third, Fourth, Eighth, and Tenth Circuits have unanimously held in published opinions that the ACCA's "serious drug definition" in § 924(e)(2)(A)(ii) incorporates the federal drug schedules in effect at the time of the defendant's federal firearm offense, not the schedules in effect at the time of the prior state drug offense.

a. Starting with the most recent of those decisions, the Tenth Circuit reached that conclusion in *United States v. Williams*, 48 F.4th 1125 (10th Cir. 2022). It acknowledged that "[s]ix of our sister circuits have recently considered this same timing issue and all but one have resolved it" in that manner. *Id*. at 1138 (citing cases). "Consistent with the First, Fourth, Eighth, Ninth, and Eleventh Circuits,[4] we hold a defendant's prior state conviction is not categorically a 'serious drug offense' under the ACCA if the prior offense included substances not federally controlled at the time of the instant federal offense. We thus reject the government's time-of-prior-state-conviction rule and adopt a time-of-instant-federal-offense comparison." *Id*.

In doing so, the Tenth Circuit reviewed the other circuit decisions on that issue, both in the ACCA and Guidelines context. It explained that "[t]he overwhelming majority of circuits to have considered the issue agree the correct point of comparison

[4] At the time of the Tenth Circuit's decision, the panel's initial opinion in this case was still in effect and had not yet been vacated. The Tenth Circuit also noted separately that the Third Circuit had recently reached this same conclusion as well. *Williams*, 48 F.4th at 1138 n.8.

is the time of the instant federal offense—not the prior state offense." *Id.* at 1139; *see id.* at 1139–41. The court agreed with that conclusion based on "[t]he plain language" of the statute, *id.* at 1141–42, how the "violent felony" definitions are construed, *id.* at 1141 n.11, and "fundamental principles of due process" and "fair notice," *id.* at 1142.

Meanwhile, the Tenth Circuit rejected the government's reliance on *McNeill* as "unpersuasive," for it was "discussing a subsequent change in the prior offense of conviction—and not the federal definition to which it is compared." *Id.* at 1142–43. On that point, the Tenth Circuit noted that five other circuits had agreed that *McNeill* had "no bearing on what version of *federal law* serves as the point of comparison for the prior state offense." *Id.* at 1143. It noted that the Sixth Circuit had reached the contrary conclusion in a Guidelines case, but "[t]he First, Fourth, Eighth, Ninth, and Eleventh Circuits meaningfully considered *McNeill* and correctly recognized, as we do, that *McNeill* did not contemplate what version of federal law to apply." *Id.* at 1143 n.12. Finally, after distinguishing immigration cases upon which the government relied, *id.* at 1143–44 & n.13, the court emphasized that, where "Congress has decided [a substance] should not be criminalized, then surely Congress would not intend for it to continue to be included within the narrow class of serious crimes that contributes to a 15-year mandatory minimum prison sentence," *id.* at 1144.

b. The Eighth Circuit reached the same conclusion in *United States v. Perez*, 46 F.4th 691 (8th Cir. 2022). Addressing "which version" of the federal drug schedules it should use, the court "conclude[d] that the relevant federal definition for

ACCA purposes is the definition in effect at the time of the federal offense—for Perez, 2019" when he committed his federal firearm offense. *Id.* at 699; *see id.* at 696.

Relying on the Eleventh Circuit's first panel opinion below, the Eighth Circuit emphasized that "due process and fair notice considerations compel that a sentencing court consult the federal drug schedule in force at the time of the federal offense." *Id.* Citing Fourth and Ninth Circuits decisions, the Eighth Circuit further explained that "[a]pplying now-superseded federal drug definitions would also undermine Congress's ability to revise federal criminal law as it deemed appropriate." *Id.*

Meanwhile, the Eighth Circuit found that *McNeill* was "not to the contrary." *Id.* Citing decisions from four other circuits, the court explained that "*McNeill* did not address" the question presented here: "Do we apply the version of the *federal* statute in force at the time Perez's instant federal offense." *Id.* Nor did "the reasoning in *McNeill* regarding state law . . . translate to this issue." *Id.* at 700.

Notably, the Eighth Circuit found the law to be so clear that it granted relief on plain-error review. *Id.* at 701–02. It emphasized that "at least four of our sister circuits have addressed the same or a closely related question, all concluding that the categorical comparison is between the state law at the time of prior conviction and the federal law at the time of federal offense." *Id.* at 701. That "conclusion flows easily from the text and purpose" of the ACCA, "as well as from constitutional due process and fair notice concerns," thereby rendering the defendant's ACCA sentence in that case "plainly contrary to the current state of the law." *Id.* at 701–02.

c. Like the Eighth Circuit in *Perez*, the Fourth Circuit had previously granted relief on plain error in *United States v. Hope*, 28 F.4th 487 (4th Cir. 2022).

Once again, the Fourth Circuit concluded that "the Government incorrectly relies on *McNeill*," which concerned a "subsequent change in *state* law," whereas the "instant matter concerns changes to federal law." *Id.* at 505. Quoting the Ninth Circuit's decision in a Guidelines case (discussed below), the Fourth Circuit agreed that the contrary regime would be "illogical." *Id.* Judge Thacker agreed that courts should consult the federal drug schedules from the time of the federal offense, and that *McNeill* was not to the contrary; she dissented only because she believed that "the district court's error was not plain." *Id.* at 512 (Thacker, J., dissenting).

Although the Fourth Circuit declined to look to the federal schedules in effect at the time of the prior state drug offense, it notably looked to those in effect at the time of federal *sentencing* rather than the time the federal offense was *committed. Id.* at 504–05. That distinction made no difference in *Williams*, so the Tenth Circuit would later decline to address it. 48 F.4th at 1138 n.8. And although it also made no difference in *Perez* or in this case, the Eighth Circuit and the initial panel decision here would later look to the time the federal offense was committed. In adopting a time-of-federal-sentencing approach, the Fourth Circuit emphasized that courts use the Guidelines that are in effect at the time of sentencing. *Hope*, 28 F.4th at 505.

d. In *United States v. Brown*, 47 F.4th 147 (3d Cir. 2022), *pet. for cert. filed* (U.S. No. 22-6389) (docketed Dec. 23, 2022), the Third Circuit addressed one of the few cases where the above distinction made a difference. The defendant committed

the federal firearm offense before Congress legalized hemp in December 2018, but he was sentenced after. *Id*. at 150–51. Oddly, the government on appeal did not make its usual *McNeill* argument that the court should look to the federal schedules in effect at the time of the prior state drug offense. Instead, it argued that the saving statute in 1 U.S.C. § 109 required the court to look, at the very least, to the federal schedules at the time the defendant committed the federal offense, not when he was later sentenced for it. *Id*. at 151 n.3. The Third Circuit agreed, "hold[ing] that, absent contrary statutory language, we look to federal law in effect at the time of commission of the federal offense when employing the categorical approach." *Id*. at 148, 155.

Based on that default rule from the saving statute, the Third Circuit "appl[ied] the penalties in effect at the time the defendant committed the federal offense," and thus "look[ed] to the federal schedule in effect when Brown violated § 922(g)." *Id*. at 153. In doing so, the court expressly "part[ed] ways with the Fourth Circuit" in *Hope*, which "held that courts must look to federal law in effect when the defendant is sentenced federally." *Id*. Instead, the Third Circuit followed the Eleventh Circuit's initial panel decision in this case, which "also held that courts must look to the federal law in effect when the defendant the federal offense." *Id*. In doing so, the court stated that "the Eleventh Circuit sensibly reasoned" that "this rule gives a defendant notice" of the statutory penalties he would face were he to later violate federal law. *Id*.

As the government had not pressed its *McNeill* argument on appeal, the Third Circuit only briefly considered the possibility that courts should look to the federal drug schedules that were in effect at the time of the prior drug conviction. *See id*.

at 151 n.3. On that point, it simply stated that "*McNeill* . . . present[ed] no barrier" to its holding because *McNeill* "concerned an intervening to state sentencing law." *Id*. at 154. The court further noted that "[o]ther circuits . . . have uniformly understood *McNeill* to prescribe only the time for analyzing the elements of the state offense." *Id*. (citing decisions from the First, Fourth, Ninth, and Eleventh Circuits).

2. By contrast, in the decision below, the Eleventh Circuit reversed itself and accepted the government's express invitation to break with all of the above circuits. App. 110a–111a (U.S. Supp. Brief). In doing so, the court repeatedly "h[e]ld" and "conclu[ded]" that the ACCA's "serious drug offense" definition in § 924(e)(2)(A)(ii) incorporated the federal schedules in effect at the time of the prior state drug offense, not those in effect at the time of the federal firearm offense. Although the Eleventh Circuit acknowledged that *McNeill* was not directly on point, the court believed that *McNeill*'s "reasoning" compelled that conclusion. *See* App. 2a (stating its "holding"); App. 8a (acknowledging that no precedent "answer[ed] the question"); App. 14a (stating its "bottom-line conclusion"); App. 16a (restating its "conclu[sion]"); App. 17a–18a (acknowledging that *McNeill* did not control); App. 18a–26a (purporting to apply *McNeill*'s reasoning); App. 29a (restating its "hold[ing]").

In acknowledging that *McNeill* was not directly on point, the Eleventh Circuit cited the decisions summarized above from the Third, Fourth, Eighth, and Tenth Circuits. App. 18a. Curiously, however, the majority opinion did not expressly acknowledge that those decisions reached the opposite conclusion about the question presented. Nor did it say that its holding was creating a conflict with those decisions.

However, later in the opinion, the Eleventh Circuit recognized that "[s]ome of our sister circuits . . . have identified" "thoughtful" arguments supporting the contrary position, and the Eleventh Circuit expressly "reject[ed] them." App. 24a–26a.

Moreover, the author of the decision issued a concurring opinion expressly acknowledging that the court's decision created a 4–1 circuit conflict. In addition to expressing support for the reasoning employed by "our sister circuits," particularly on the fair-notice point, *see* App. 32a–35a & n.1 (Rosenbaum, J., concurring), she recognized that "today's decision tallies the score at one circuit that concludes that we look to the federal controlled-substances schedules in effect at the time of the prior state conviction and four that reach the opposite conclusion and instead look to the federal controlled-substances schedules in effect at the time of the federal firearm offense," App. 32a (citing cases). "And," she continued, "it's even more confusing than that, as we previously agreed with those four circuits." *Id*. In, short, the government urged the Eleventh Circuit to create a 4–1 split, and the Eleventh Circuit obliged.

B. The Circuits Are Confused About *McNeill*

But the landscape is even more confusing that Judge Rosenbaum recognized when one considers cases arising under the Guidelines. In that context, three more circuits have unanimously rejected the view, embraced by the Eleventh Circuit below, that *McNeill* requires courts to use the federal drug schedules in effect at the time of the prior state drug offense. However, two circuits *have* adopted that minority view. As to *McNeill*, then, the confusion is widespread. That confusion is the source of the conflict; the lower courts need guidance; and only this Court can clarify its precedent.

1. The First, Second, and Ninth Circuits have held that, notwithstanding *McNeill,* courts look to the federal schedules in effect at the time of federal sentencing.

a. The Ninth Circuit was the first to reject the government's reliance on *McNeill* in *United States v. Bautista*, 989 F.3d 698 (9th Cir. 2021). That court explained: "Bautista's argument bears little resemblance to the argument in *McNeill*. Unlike in *McNeill*, the state law in our case has not changed. Rather, federal law has changed." *Id*. at 703. In the Ninth Circuit's view, "*McNeill* nowhere implies that the court must ignore current federal law and turn to a superseded version of the United States Code." *Id*. "Indeed," it continued, "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. Such a view would prevent amendments to federal criminal from affecting federal sentencing and would hamper Congress' ability to revise federal criminal law." *Id*.

b. The First Circuit followed the Ninth Circuit in *United States v. Abdulaziz*, 998 F.3d 519 (1st Cir. 2021). Citing *Bautista*, as well as an unpublished Sixth Circuit decision, the First Circuit agreed that "*McNeill* simply had no occasion to address" or "answer" the federal-law question "because there had no relevant change in that case to [that] criteria" in *McNeill*. *Id*. at 526 & n.3. While *McNeill* "plainly required a backwards-looking inquiry into the elements of and penalties attached to the prior offense at the time of its commission," that inquiry "simply does not bear on the answer to the interpretive question that we confront here." *Id*. at 527; *see id*. at 530. The First Circuit further observed that a recidivist sentencing

"enhancement for a defendant's past criminal conduct . . . is reasonably understood to be based in no small part on a judgment about how problematic that past conduct is when reviewed as of the time of the [federal] sentencing itself." *Id.* at 528.

c. Finally, and most recently, in *United States v. Gibson*, 55 F.4th 153 (2d Cir. 2022), the Second Circuit likewise rejected the government's reliance on *McNeill*. It explained that *McNeill* "did not present the same question" because there "the change was one in state law, not, as here, a change of federal law." *Id.* at 162. The court also observed that the state-law change in *McNeill* "only lessened the severity of the punishment," but "it did not make a substantive change as to what acts were lawful or unlawful." *Id.* And "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 under federal law." *Id.* Finally, the court emphasized, "in enacting the CSA, Congress launched a panorama of controlled substances that it plainly envisioned would be ever-evolving, not an unchanged array engraved in stone." *Id.* And those schedules "had no relevance to [the] state-law crime. There was no suggestion of any relevance of the CSA to Gibson until he was to be sentenced in 2020 for his present federal" offenses. *Id.* at 165. Adopting a time-of-prior-conviction rule would thus effectively "punish Gibson for the crime he committed in 2002," even though it "is no longer a federal crime." *Id.*

2. By contrast, the Sixth and Eighth Circuits have held that *McNeill* requires courts to use the federal schedules from the time of the prior drug offense.

a. In *United States v. Clark*, 46 F.4th 404 (6th Cir. 2022), the Sixth Circuit expressly "adopt[ed] a time-of-[prior-]conviction rule." *Id.* at 408. Although the court relied in part on the text of the Guidelines, that court relied most heavily on *McNeill*. It acknowledged that, "[a]lthough *McNeill* interpreted the ACCA and here the panel interprets the Guidelines, the cases are remarkably similar," and "*McNeill* definitively held that the time of [of the state drug] conviction is the proper reference under the ACCA." *Id.* at 409. According to the Sixth Circuit: "Under *McNeill*'s logic, courts must define the term ['controlled substance offense'] as it exists in the Guidelines at the time of federal sentencing by looking backward to what was considered a 'controlled substance' at the time the defendant received the prior conviction that triggers the enhancement." *Id.* at 411. "This approach," the court continued, "tracks the purpose of recidivism enhancements," which is "to deter future crime by punishing those futures crimes more harshly if the defendant has committed certain prior felonies." *Id.* Although the defendant relied on contrary decisions from the First, Fourth, Ninth, and Eleventh Circuits, as well as an earlier unpublished Sixth Circuit opinion, *Clark* declined to follow them because they "did not adequately engage with *McNeill*'s reasoning." *Id.*; *see id.* at 412–415. The court reiterated that *McNeill* "determined that the proper way to define that term ['serious drug offense'] is by referencing state law at the time of conviction." *Id.* at 414.

Other Judges on the Sixth Circuit have since disagreed with *Clark*. In a recent concurrence, two Judges opined that, "[i]n the absence of controlling precedent" in *Clark*, they would follow "the decisions of the five other circuits that have determined

that the time-of-prior-conviction rule is not appropriate." *United States v. Baker*, 2022 WL 17581659, at *2 (6th Cir. Dec. 12, 2012) (Moore, J., concurring, joined by Stranch, J.). After summarizing the decisions of the First, Third, Fourth, Ninth, and Eleventh Circuits, they concluded that "[t]he collective judgment of other circuits that the time-of-prior-conviction rule is incorrect further convinces [us] that *Clark* was wrongly decided" and should reconsidered en banc. *Id*. Notably, however, rehearing in *Clark* had already been denied. *See Clark*, No. 21-6038, ECF No. 39 (6th Cir. Oct. 28, 2022)

b. In *United States v. Bailey*, 37 F.4th 467, 469–70 (8th Cir. 2022) (adopting *United States v. Jackson*, 2022 WL 303231, at *2 (8th Cir. Feb. 2, 2022)), *pet. for cert. filed sub. nom. Altman, et al. v. United States* (No. 22-5877) (response requested Nov. 16, 2022), the Eighth Circuit adopted a time-of-prior-conviction rule. In that circuit (and others), and unlike in the First/Second/Ninth Circuits, the substance need only be controlled under state (not federal) law. *See Guerrant v. United States*, 142 S. Ct. 640, 640–41 (2022) (Sotomayor, J., respecting the denial of certiorari) (urging the Commission to resolve this split). Given that state-law focus, the Eighth Circuit thought *McNeill* required a time-of-prior-conviction rule. Yet that Circuit has held that *McNeill* applies differently in the ACCA context. *Perez*, 46 F.4th at 703 & n.4.[5]

* * *

In sum, the Eleventh Circuit below accepted the government's express invitation to create a 4–1 conflict on the ACCA question presented. App. 110a–111a.

[5] The Tenth Circuit most recently drew a similar distinction, but it held only that adopting a time-of-prior-conviction rule in the Guidelines context did not rise to the level of "plain error." *United States v. Harbin*, 56 F.4th 843, 844, 846, 849–51 (10th Cir. 2022).

And there is additional confusion *within* that split. Of the four circuits adopting a time-of-federal-offense approach, two of them (the Third and Eighth) look to the schedules in effect at the time the defendant committed the offense. But one of them (the Fourth) looks to the schedules in effect at the time of sentencing. In addition to that sub-split, the Third Circuit employed a different rationale than all of the other circuits. Meanwhile, the one circuit to adopt a time-of-prior-conviction approach in the ACCA context (the Eleventh Circuit) did so after *sua sponte* reversing itself.

The Guidelines cases exacerbate the confusion. Adopting a time-of-federal-sentencing rule, the First, Second, and Ninth Circuits have held that *McNeill* does not require a time-of-prior-conviction rule. Like the Eleventh Circuit in the ACCA context, the Sixth and Eighth Circuits have held that *McNeill does* require that rule. In so holding, the Sixth Circuit declined to follow an earlier unpublished opinion, and two Judges now openly disagree with their court's precedent. The Eighth Circuit also believed that *McNeill* required a time-of-prior-conviction rule, yet it has reached the opposite conclusion in the ACCA context. Thus, including the Guidelines cases, the confusion about *McNeill* is widespread. *McNeill* is why three circuits have adopted a time-of-prior-conviction rule. And only this Court can clarify its own precedent.

II. The Question Presented Is Important and Recurring

The government told the Eleventh Circuit below that "[t]his is a significant case about the definition of 'serious drug offense' in the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(A)(ii)." C.A. ECF No. 49 at 2. And, in agreeing that review was warranted in *Shular*, the government told this Court that the interpretation of

§ 924(e)(2)(A)(ii) "is important because state drug offenses are frequently recurring ACCA predicates." *Shular*, Br. for U.S. 13 (No. 18-6662) (Feb. 13. 2019). The government was correct. And review is warranted here more than it was in *Shular*.

1. This Court should grant certiorari primarily to resolve the 4–1 circuit conflict on the ACCA question presented. In light of that conflict, geography alone now determines whether federal firearm defendants will face the ACCA's fifteen-year mandatory minimum penalty. This Court has never allowed the arbitrariness of geography to determine whether someone is subject to the ACCA's harsh penalty. That explains why ACCA cases have become a fixture of the Court's docket. Indeed, resolving circuit splits over the ACCA has become an annual event. *See, e.g.*, *Wooden v. United States*, 142 S. Ct. 1063, 1068 & nn.1–2 (2022); *Borden v. United States*, 141 S. Ct. 1817, 1823 & nn.1–2 (2021); *Shular v. United States*, 140 S. Ct. 779, 784 (2020); *Quarles v. United States*, 139 S. Ct. 1872, 1876 (2019); *Stokeling v. United States*, 139 S. Ct. 544 (2019); *United States v. Stitt*, 139 S. Ct. 399, 404–05 (2018).

Moreover, the Court grants review to resolve ACCA splits that are far shallower than the one here. For example, the last two ACCA cases that this Court granted out of Florida were both 1–1 splits. *See Shular*, 140 S. Ct. at 784 (resolving split between the Ninth and Eleventh Circuits); *Stokeling*, U.S. Br. in Opp. 14, 16–17 (No. 17-5554) (Dec. 13. 2017) (arguing—unsuccessfully—that an admitted 1–1 split between the Ninth and Eleventh Circuits was too "shallow" to warrant review). And not only does this case involve the same ACCA provision as *Shular*; it involves the

same ACCA predicate: Florida cocaine. Yet there was only a 1–1 split there. So if *Shular* warranted review, as this Court determined, then this case should as well.

Resolving such splits out of the Eleventh Circuit, and Florida in particular, is especially important because it is the national epicenter for ACCA cases. According to recent data from the Sentencing Commission, the Eleventh Circuit accounted for nearly a quarter (24.4%) of all ACCA cases in 2019. And the three federal districts in Florida accounted for 14.8% of all such cases—with the Middle and Southern Districts of Florida both in the top five. U.S. Sentencing Comm'n, Federal Armed Career Criminals: Prevalence, Patterns, and Pathways 20 (Mar. 2021). Given that the Eleventh Circuit and Florida account for such a large swath of ACCA cases, it is critical to resolve splits where the Eleventh Circuit has taken a side in the debate, especially where it has adopted an outlier view expansively applying the ACCA.

That is especially true here because Florida cocaine offenses are perhaps the most common ACCA predicate of all in the Eleventh Circuit. After all, § 893.13 is the flagship drug statute in Florida, a state with over 20 million people where drug offenses are routinely enforced. *See* Fla. Dep't Law Enforcement, Florida Drug Offense Arrests (reporting over 100,000 drug arrests every year between 1998 and 2019).[6] Since the Eleventh Circuit first held in *United States v. Smith*, 775 F.3d 1262 (11th Cir. 2014) that Florida cocaine offenses qualified under the ACCA and the Guidelines, that court has upheld enhancements based on § 893.13 in well over 100 reported decisions (which are under-representative). *See Curry v. United States*, Pet.

[6] https://www.fdle.state.fl.us/CJAB/UCR/Individual-Crime/Arrests/Society.aspx (page 2 of 9).

App. F 72a–80a (U.S. No. 20-7284) (Feb. 24, 2021) (cataloguing 129 such decisions through January 2021, including 74 ACCA cases). And there are numerous appeals *currently* in the Eleventh Circuit that were awaiting a decision in this case.[7] These appeals demonstrate that, in Florida alone, the question presented is recurring and implicates decades if not centuries of additional prison time. Leaving the split intact would thus subject countless defendants in the Eleventh Circuit—and Florida in particular—to lengthy prison sentences that they would not receive anywhere else.

2. Answering the question presented will also provide much-needed clarity outside of the ACCA context. In agreeing that review was warranted in *Shular*, the government observed that Section 401 of "the First Step Act of 2018 . . . incorporated the definition of 'serious drug offense' at issue here into the Controlled Substances Act for purposes of identifying prior convictions that will trigger recidivism enhancements for various drug crimes." Br. for U.S. 13; *see* 21 U.S.C. §§ 802(57) (defining "serious drug felony" by reference to the ACCA), 841(b)(1)(A)–(B) (requiring *enhanced* mandatory minimums where the defendant has one or more "serious drug felonies"). And, as the discussion above reflects, the question presented also arises in the context of the "controlled substance offense" definition in the career-offender

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[7] *See, e.g.*, *United States v. Cheramy*, No. 22-13841 (Guidelines); *United States v. Farmer*, No. 22-13304 (Guidelines); *United States v. Storey*, No. 22-11841 (ACCA); *United States v. Beach*, No. 22-11720 (Guidelines); *United States v. Jenkins*, No. 22-11564 (ACCA); *United States v. Wilson*, No. 21-14460 (ACCA); *United States v. Moore*, No. 21-14210 (Guidelines); *United States v. Gardner*, No. 21-14082 (ACCA); *United States v. Gilbert*, No. 21-12010 (ACCA); *United States v. Hall*, No. 21-11641 (ACCA); *United States v. Frazier*, No. 21-10145 (ACCA); *United States v. Harvin*, No. 20-14497 (ACCA); *United States v. Williams*, No. 20-13184 (ACCA); *United States v. Williams*, No. 20-12742 (ACCA); *United States v. Harris*, No. 20-12457 (ACCA); *United States v. McCobb*, No. 20-12263 (ACCA); *United States v. Hameen*, No. 19-14279 (ACCA); *United States v. Hampton*, No. 17-15276 (ACCA).

Guideline, U.S.S.G. § 4B1.2(b), which implements a congressional directive to sentence repeat offenders near the statutory maximum, 28 U.S.C. § 994(h), resulting in "particularly severe punishment," *Buford v. United States*, 532 U.S. 59, 60 (2001).

In that regard, resolving the question presented will clarify the widespread confusion about this Court's decision in *McNeill*. As explained above, *McNeill* is the principal reason why the Eleventh Circuit (in the ACCA context) and the Sixth/Eighth Circuits (in the Guidelines context) have imposed a time-of-prior-conviction rule. Including the Guidelines cases, the circuits have broken down 7–3 (with the Eighth Circuit falling on both sides) over whether *McNeill* requires a time-of-prior-conviction rule. Thus, granting review here would not only resolve the 4–1 ACCA split; it would have the added bonus of clarifying *McNeill*, which has produced disparate sentencing outcomes in both ACCA and Guidelines cases around the country. And this Court often grants review "where the decision below is premised upon a prior Supreme Court opinion whose implications are in need of clarification." Stephen M. Shapiro et al., Supreme Court Practice § 4.5 pp. 4-23–24 (11th ed. 2019).

3. Finally, the need for this Court's review is especially pressing because the question presented now recurs with great frequency in these various legal contexts. Over the last few years, defendants have routinely argued that their prior state drug offenses are categorically overbroad vis-à-vis the relevant federal definition because they encompass a substance that is no longer federally controlled at the time of the federal offense. As recounted above, nine different circuits have issued (at least one) published opinion addressing such a challenge since only 2021.

That is so because the timing question here is central to over-breadth challenges relating to numerous state drug offenses. Take the ioflupane-based over-breadth challenge here. That is not limited to prior Florida cocaine offenses. Far from it: the same over-breadth challenge will be viable any time a state criminalized ioflpuane at the time of the prior state cocaine offense, and any time the federal offense occurs after 2015 (when the federal government de-scheduled ioflupane). That is a common scenario. Indeed, the same over-breadth argument made here has not only been made but has been *accepted* in lower courts in the context of various state cocaine offenses. *See, e.g.*, *Perez*, 46 F.4th at 701 (Iowa cocaine; ACCA); *United States v. Holliday*, 853 F. App'x 53, 53–55 (9th Cir. 2021) (Montana cocaine; Guidelines); *United States v. Rise*, No. 17-cr-10146 (D. Mass. Oct. 3, 2022) (Massachusetts cocaine; ACCA); *United States v. Baskerville,* 2022 WL 4536126 (M.D. Pa. Sept. 28, 2022) (Pennsylvania cocaine; ACCA & Guidelines)*; United States v. Scott*, 2021 WL 6805797, at *10–11 (D. N.J. Dec. 6, 2021) (New Jersey cocaine; Guidelines).

A similar over-breadth argument has also been made and accepted in lower courts in the context of marijuana, since hemp was federally de-scheduled in 2018. *See, e.g.*, *Williams*, 48 F.4th at 1137–45 (Oklahoma marijuana; ACCA); *Hope*, 28 F.4th at 504–07 (South Carolina marijuana; ACCA); *Abdulaziz*, 998 F.3d at 531 (Massachusetts marijuana; Guidelines); *Bautista*, 989 F.3d at 704–05 (Arizona marijuana; Guidelines). So too with other substances that have been federally de-scheduled. *See, e.g.*, *Gibson*, 55 F.4th at 167 (holding that a New York drug offense was not a "controlled substance offense" because it included naloxegol, an opium

derivative that was federally de-scheduled in 2015). Thus, the question presented here will determine the viability of drug over-breadth challenges to federal sentencing enhancements involving numerous prior state drug offenses.

In sum, the reported decisions alone demonstrate that the question presented has been recurring nationwide for the last few years. It determines whether numerous state drug offenses will qualify as predicates for major federal sentencing enhancements. And given the success that defendants have enjoyed thus far, and the amount of prison time that those legal challenges can save, they will only continue to proliferate. Thus, the Court should grant certiorari now to provide much-needed guidance on this recurring and consequential question of federal sentencing law.

III. This Case Is an Excellent Vehicle

1. Factually, this case cleanly implicates the 4–1 ACCA split. Had Petitioner been sentenced in Philadelphia, Baltimore, St. Louis, or Denver, he would have been subject to a ten-year statutory maximum sentence. After all, the federal drug schedules did not include ioflupane either at the time he committed his federal firearm offense in 2017 or at the time he was sentenced in 2021. So Petitioner would have prevailed had he been sentenced in the Third, Fourth, Eighth, or Tenth Circuits. But instead he was sentenced in Miami, which is now governed by the Eleventh Circuit's time-of-prior-conviction rule. Based solely on that arbitrariness of geography, Petitioner is now subject to the ACCA's fifteen-year mandatory minimum.

2. Procedurally, Petitioner thoroughly advanced his drug over-breadth argument in both the district court and in the Eleventh Circuit. Dist. Ct. ECF No. 60

at 6–14; Pet. C.A. Br. 10–28. Accordingly, that argument was subject to *de novo* review on appeal (not plain error). App. 4a, 125a. So there is no preservation problem.

In addition, this case arises under the ACCA, not the Guidelines. For that reason, it implicates the *statutory* question dividing the circuits. Meanwhile, this Court typically declines to grant review in Guidelines cases, since the Commission (which now finally has a quorum) could resolve any split. *See Braxton v. United States*, 500 U.S. 344, 348–49 (1991); *Guerrant*, 142 S. Ct. at 640–41 (Sotomayor, J., respecting the denial of certiorari). And because this is an ACCA case, not a case about advisory Guidelines, Petitioner would be *guaranteed* relief were he to prevail here: without the ACCA, he would be subject to a ten-year statutory maximum.

3. In that regard, the question presented was dispositive below. The Eleventh Circuit recognized that, without the prior drug offenses, Petitioner would not have three ACCA predicates. App. 3a–4a, 123a–125a; *see supra* pp. 6–7. And, as to those prior drug offenses, the Eleventh Circuit recognized that his over-breadth "argument works if ACCA's definition incorporates the version of the controlled-substances schedules in effect when a defendant commits the firearm offense rather than version in effect when he was convicted of his prior state drug offense." App. 8a.

Thus, to resolve Petitioner's appeal, the Eleventh Circuit recognized that it "must decide which version of the controlled-substances list ACCA's definition of 'serious drug offenses' incorporates: the one in effect when the defendant violated 18 U.S.C. § 922(g)(1) (the 'firearm offense') or the one in effect when the defendant was convicted of his prior state drug offense." App. 2a; *see* App. 16a (repeating that it

"must decide" that question). Accordingly, the Eleventh Circuit repeatedly framed its "holding" and "conclusion" solely in terms of the question presented here. *See* App. 2a, 14a, 16a, 29a. And neither the lower courts nor the government identified any alternative basis on which reject Petitioner's drug over-breadth argument.

4. With respect to the timing/*McNeill* question, moreover, the competing arguments were all fully aired below. Before oral argument, the Eleventh Circuit directed counsel to be prepared to address that legal issue. C.A. ECF No. 31. The parties thereafter filed numerous Rule 28(j) letters addressing it. C.A. ECF Nos. 32–36, 38–44, 62. And after the panel vacated its first opinion, the parties submitted court-ordered supplemental briefs addressing that question. Those briefs thoroughly set out all of the competing arguments on both sides, and they discussed *McNeill* and all of the published circuit opinions addressing the issue. *See* App. B & C. Petitioner urged the Eleventh Circuit to follow the six other circuits that had ruled in his favor. The government urged the Eleventh Circuit to break with those circuits and adopt the Sixth Circuit's position in *Clark*. Thus, the Eleventh Circuit was presented with all of the competing arguments, as well as all of the decisions from the other circuits.

This case is an uncommonly good vehicle in that regard because the same Eleventh Circuit panel itself wrote two competing opinions. The panel first held that, notwithstanding *McNeill*, the "serious drug offense" definition in § 924(e)(2)(A)(ii) incorporates the federal drug schedules in effect at the time of the federal offense. Six months later, and after three more circuits had followed its fair-notice reasoning, the panel held that *McNeill* did in fact require it to use the federal schedules in effect at

the time of the prior state drug offense. Thus, not only does this Court now have the benefit of numerous circuit opinions addressing *McNeill*; the Eleventh Circuit did as well, and it *sua sponte* reversed its own earlier opinion in this case to create a conflict.

IV. The Decision Below Is Wrong

This Court's review is warranted whichever side of the circuit split is correct. If the Eleventh Circuit's decision below is correct, then criminal defendants in four other circuits are skirting the ACCA's mandatory minimum when they should receive it (and defendants in three more circuits are skirting the Guidelines career-offender enhancement when they should receive it). But the decision below is wrong. And that means criminal defendants in that circuit alone are receiving fifteen-year mandatory minimum sentences that they should not legally receive and that identically-situated defendants around the country are not receiving. Thus, the need for review is urgent.

1. The "serious drug offense" definition in § 924(e)(2)(A)(ii) incorporates the federal drug schedules in effect at the time of the federal firearm offense.

a. The statutory text supports that conclusion. Congress keyed the "serious drug offense" definition in § 924(e)(2)(A)(ii) to federal drug schedules that, by design, change over time. The Controlled Substances Act authorizes the Attorney General to add and remove substances from the federal schedules based on certain criteria. 21 U.S.C. §§ 811(c), 812(a); *see Touby v. United States*, 500 U.S. 160 (1991). That enables the federal government to update the schedules based on the latest scientific and medical information. By tying the "serious drug offense" definition to ever-evolving

schedules, Congress expressed its desire for courts to use the federal drug schedules in effect at the time of the federal firearm offense to which the ACCA applies.

Meanwhile, "[n]othing in the language of the statute indicates Congress intended 'controlled substance' to incorporate historical versions of the federal drug schedules." *Williams*, 48 F.4th at 1141. Were that the intent, Congress would have used static rather than dynamic criteria. And Congress knew how to do so. Elsewhere, it defined the exact same term ("serious drug offense") to mean "an offense under State law that, had the offense been prosecuted in a court of the United States, would have been punishable" under certain federal statutes. 18 U.S.C. § 3559(c)(2)(H). In asking how the offense "would have been" punishable "had [it] been prosecuted" in federal court, that definition requires courts to look back to the time of the state offense. That clear textual contrast with § 924(e)(2)(A)(ii) must be given meaning.

Were there ambiguity, the rule of lenity would require a time-of-federal-offense rule. *See Wooden*, 142 S. Ct. at 1082–83 (Gorsuch, J., concurring in the judgment).

b. At the very least, courts must use the federal schedules that were in effect at the time that the defendant *committed* the federal firearm offense.

Constitutional fair-notice principles support that conclusion. There are at least "three related manifestations of the fair warning requirement": the due process prohibition on vague criminal laws, the Ex Post Facto prohibition on retroactive criminal laws, and the rule of lenity. *United States v. Lanier*, 520 U.S. 259, 266–67 (1997). Those manifestations "apply not only to statutes defining elements of crimes, but also to statutes fixing sentences" (*e.g.*, the ACCA). *Johnson v. United States*, 576

U.S. 591, 596 (2015) (vagueness); *see Peugh v. United States*, 569 U.S. 530, 532–33, 538 (2013) (Ex Post Facto); *Bifulco v. United States*, 447 U.S. 381, 387 (1980) (lenity).

In the present context, the ACCA does not come into play before a person commits the federal firearm offense. So *that* is the earliest time when a person considers the statutory penalties. And *that* is the earliest time when those penalties may deter him from violating federal law. Conversely, when the person was convicted of the prior state drug offense, had not yet committed—and likely had no plans to ever commit—the future federal firearm offense that would trigger the ACCA. At that time, the federal firearm offense was entirely hypothetical. So he would have had little reason to scour the federal drug schedules. To ensure fair notice, then, courts must look to the federal drug schedules that were in effect no earlier than the time the federal firearm offense was committed. Following the panel's initial decision here, the Third, Eighth, and Tenth Circuits have all endorsed that fair-notice reasoning. *Williams*, 48 F.4th at 1142; *Brown*, 47 F.4th at 153; *Perez*, 46 F.4th at 699, 701.

Moreover, the government conceded below that courts must apply the version of the ACCA in effect at the time the defendant committed the federal firearm offense. App. 93a, 99a. But it would bewildering for courts to apply *that* version of the ACCA, yet simultaneously apply a different and earlier version of the federal drug schedules that the ACCA expressly incorporates. Defendants should expect one temporal version of federal law to determine whether the ACCA applies. Nor is it realistic to expect them to track down superseded federal schedules from the time of their prior drug convictions, which may be numerous and old. It would "quite remarkable" to ask

an ordinary citizen to engage in that laborious task, App. 34a–35a (Rosenbaum, J., concurring), which would be challenging for even the most skilled probation officers, lawyers, and district judges (who would all have to do it too for sentencing).

Plus, if notice were evaluated at the time of the prior conviction, then it would violate the Ex Post Facto Clause to apply the ACCA based on convictions pre-dating the Act. *See Williams*, 48 F.4th at 1141 n.11. Yet every circuit to address the issue, including the Eleventh Circuit, has uniformly rejected such Ex Post Facto challenges. *See United States v. Springfield*, 337 F.3d 1175, 1179 (10th Cir. 2003) (collecting cases). In doing so, the Eleventh Circuit reasoned that notice is evaluated at the time the federal firearm offense is committed, not at the time of the prior conviction. *United States v. Reynolds*, 215 F.3d 1210, 1213 (11th Cir. 2000) (citing *Gryger v. Burke*, 334 U.S. 728, 732 (1948)). The Eleventh Circuit cannot have it both ways.

Were there any doubt, the avoidance canon would apply in light of the serious fair-notice problems above. *See Clark v. Martinez*, 543 U.S. 371, 381–82 (2005).

c. Alternatively, § 924(e)(2)(A)(ii) incorporates the federal schedules that were in effect at an even later date: the time of federal *sentencing*. As explained, the Fourth Circuit has reached that conclusion in the ACCA context, *Hope*, 28 F.4th at 504–05, and the First (*Abdulaziz*), Second (*Gibson*), and Ninth (*Bautista*) Circuits have done so in the Guidelines context. After all, the Sentencing Reform Act requires courts to use the Guidelines in effect at sentencing. 18 U.S.C. § 3553(a)(4)(A)(ii); *see* U.S.S.G. § 1B1.11. The ACCA should be construed in accord with that background federal sentencing principle. *See Dorsey v. United States*, 567 U.S. 260, 275 (2010).

Moreover, where "Congress has decided that [a substance] should not be criminalized, then surely Congress would not intend for it to continue to be included within the narrow class of serious crimes that contributes to a 15-year mandatory minimum." *Williams*, 48 F.4th at 1144. Indeed, 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." *Bautista*, 989 F.3d at 703. Using the federal schedules from the time of the prior drug offense would require courts to apply the ACCA based on substances that the federal government no longer deems dangerous, yet dispense with the ACCA for newly *added* substances that it *does* deem dangerous. That sentencing regime would be backward.

2. In adopting that regime, Eleventh Circuit relied almost entirely on *McNeill*, which held that courts must look to state law in effect at the time of the prior drug offense to determine its statutory maximum. 563 U.S. at 817–18, 825. The same is true when it comes to the offense elements. *Id*. at 821–22. And that makes sense: courts must use state law from the time of the state conviction to ascertain the state-law attributes of the offense for which the defendant was actually convicted. Those attributes are locked in at the time of conviction. But *McNeill* said nothing about the federal criteria (here, the federal drug schedules) to which the state-law attributes (here, the offense elements) are compared. *See Gibson*, 55 F.4th at 162; *Williams*, 48 F.4th at 1142–43 (citing five circuit cases distinguishing *McNeill* on that basis).

The Eleventh Circuit nonetheless seized on *McNeill*'s reasoning that, where "a State reformulates its criminal statutes in a way that prevents precise translation of

the old conviction into the new statutes," consulting the "subsequent changes in state law" would impermissibly "erase an earlier conviction for ACCA purposes." 563 U.S. at 823; *see* App. 19a, 22a, 24a–25a. But, again, this case involves a subsequent change in *federal* law. And there is nothing remarkable, let alone offensive, about allowing a change in *federal* law to affect the scope of a *federal* sentencing enhancement.

Finally, the Eleventh Circuit also reasoned that, because § 924(e)(2)(A)(i)'s "serious drug offense" definition for *federal* priors uses the law from the time of the prior, so too must § 924(e)(2)(A)(ii), or else "equivalent" federal and state priors would be treated differently. App. 22a–26a. But, even accepting the premise, "the divergent text of the two provisions of the serious-drug-offense definition . . . makes any divergence in their application unremarkable." *Shular*, 140 S. Ct. at 786 (quotation omitted). And if Congress wanted perfect overlap between federal and state priors, it would have used the "serious drug offense" definition from § 3559(c)(2)(H). It did not.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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