No. 25-6756

IN THE

Supreme Court of the United States

JACKLIN CHERAMY,

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

This federal sentencing case presents a familiar question of timing: to determine whether a defendant's prior drug conviction qualifies as a "controlled substance offense" under the Sentencing Guidelines, should federal courts compare the elements of the prior conviction against the drug schedules in effect at the time of the prior conviction or the schedules in effect at the time of the federal sentencing?

This Court addressed a nearly identical question in *Brown v. United States*, 602 U.S. 101 (2024). *Brown* adopted a time-of-prior-conviction rule, but it did so only for cases under the Armed Career Criminal Act (ACCA). In footnote 7, the Court reserved on whether the same rule would apply in cases under the Guidelines. And the Court suggested that it would not, stating that "[t]here is reason to doubt that the Guidelines practice is relevant here . . . because Congress has expressly directed courts to apply the Guidelines 'in effect on the date the defendant is sentenced.' ACCA contains no similar instruction." *Id*. at 120 n.7 (quoting 18 U.S.C. § 3553(a)(4)(A)(ii)).

As the government concedes, the circuits are now divided 5–4 over how the timing question should be resolved under the Guidelines. That well-acknowledged circuit conflict emerged in the years leading up to *Brown*, and it has only deepened after *Brown.* As a result of this circuit conflict, geography alone dictates whether common drug convictions qualify as a "controlled substance offense" under the Guidelines. That, in turn, determines whether criminal defendants are subject to major enhancements to their guideline ranges. And that, in turn, determines whether they receive longer sentences, since the guideline range is the lodestar of sentencing.

The government does not dispute that such arbitrary sentencing disparities are untenable. Nor does it dispute that this important timing question arises with great frequency. Instead, the government offers only one basis for opposing review: the Sentencing Commission should be the one to resolve the circuit conflict. The problem, however, is that the Commission refuses to do so. Indeed, the Commission has had the opportunity to resolve the circuit split during the past four amendment cycles, and it has declined each time. And despite expressly considering the timing issue during the most recent cycle, the Commission again inexplicably failed to act.

Continuing to wait indefinitely on the Commission is particularly unwarranted for several additional reasons. First, the recalcitrant Commission has declined to act despite calls by members of this Court and lower courts. Second, because the circuits have split over how to apply *Brown*, this Court is best suited to clarify its own precedent. And, finally, this Court's recent jurisprudence emphasizes that it is the exclusive role of the courts to interpret federal law, which includes the Guidelines. Given the Commission's abdication of responsibility, this Court should intervene to restore uniformity on this important and recurring issue of federal sentencing law.

This case is an ideal one in which to do so. The government identifies no vehicle problems. Petitioner preserved his timing objection below, and the court of appeals affirmed on that basis alone. And although there are related petitions pending in *Nelson v. United States* (No. 25-6622) and *White v. United States* (No. 25-6906), this case alone offers a clean vehicle for the Court to efficiently resolve not only the timing split but a second, subsidiary split that the Commission has also refused to resolve.

I. The government concedes that the circuits are deeply divided.

The government concedes that the courts of appeals are divided 5–4 on the timing question presented. *See* BIO 8; *Nelson*, BIO 12–13 (acknowledging the split).

A brief, chronological summary of the split demonstrates how intractable it is:

- In 2021, the **First** and **Ninth Circuits** both adopted a time-of-sentencing rule. *See United States v. Abdulaziz*, 998 F.3d 519, 523 (1st Cir. 2021); *United States v. Bautista*, 989 F.3d 698, 703 (9th Cir. 2021).

- The split quickly emerged in 2022 when the **Sixth Circuit** rejected the First and Ninth Circuit holdings and adopted a time-of-prior-conviction rule. *See United States v. Clark*, 46 F.4th 404, 412–13 (6th Cir. 2022).

- Also in 2022, the **Eighth Circuit** adopted a time-of-prior conviction rule for the Guidelines (despite adopting a time-of-federal-offense rule for ACCA). *See United States v. Perez*, 46 F.4th 691, 699–701 (8th Cir. 2022) (citing *United States v. Bailey*, 37 F.4th 467, 469–70 (8th Cir. 2022)).

- Later that same year, **Second Circuit** rejected a time-of-prior-conviction rule (though it did so without deciding whether to adopt a time-of-federal-offense rule or a time-of-federal-sentencing rule). *See United States v. Gibson*, 55 F.4th 153, 165–66 (2d Cir. 2022), *denying gov't pet. for panel rehearing*, 60 F.4th 720 (2d Cir. 2023).

- In 2023, the **Third Circuit** adopted a time-of-prior-conviction rule, following the Sixth and Eighth Circuits and "respectfully disagree[ing]" with the time-of-sentencing rule adopted by the First and Ninth Circuits. *See United States v. Lewis*, 58 F.4th 764, 771–73 (3d Cir. 2023).

- In March 2024, the **Eleventh Circuit** likewise adopted a time-of-prior conviction rule and rejected a time-of-sentencing rule. *See United States v. Dubois*, 94 F.4th 1284, 1298–1300 (11th Cir. 2024), *vacated* 145 S. Ct. 1041 (2025), *reinstated* 139 F.4th 887, 889 (11th Cir. 2025).

Then came this Court's May 2024 decision in *Brown*, which both solidified and deepened the circuit split. *Brown* solidified the split because footnote 7 did not resolve the timing question under the Guidelines. So absent any "directive from the Supreme

Court" on that question, *United States v. Nelson*, 151 F.4th 577, 584 (4th Cir. 2025), *Brown* did not disturb any of the pre-existing circuit precedents. *See, e.g.*, *United States v. Drake*, 126 F.4th 1242, 1245–46 (6th Cir. 2025) (reaffirming *Clark* post-*Brown*); *United States v. Gordon*, 111 F.4th 899, 901 & n.4 (8th Cir. 2025) (reaffirming *Bailey*); Pet. App. A-1 at 3, 7–8 (CA11) (reaffirming *Dubois*; decision below); *United States v. Waiters*, 2024 WL 2797919, at *5–6 (11th Cir. 2024) (same); *United States v. Moran-Stenson*, 115 F.4th 11, 19, 22 (1st Cir. 2024) (reaffirming *Abdulaziz*).

Brown also deepened the split because two additional courts of appeals have since reached opposite conclusions post-*Brown*. Adopting a time-of-prior-conviction rule, the **Fourth Circuit** has held that, notwithstanding footnote 7, *Brown* did not required a time-of-sentencing rule for the Guidelines. *See Nelson*, 151 F.4th at 582–84. By contrast, the **Fifth Circuit** has held that, notwithstanding *Brown*'s adoption of a time-of-prior-conviction rule for ACCA, *Brown* did not bar a time-of-sentencing rule for the Guidelines, and the court squarely adopted that rule over Judge Duncan's dissent. *See United States v. Minor*, 121 F.4th 1085, 1091–93 (5th Cir. 2024).[1]

The courts of appeals have widely acknowledged this conflict. *See, e.g.*, *Gordon*, 111 F.4th at 901 ("There is a circuit split on this Guidelines issue . . . , but the Supreme Court has not addressed" it); *Dubois*, 94 F.4th at 1298 ("Our sister circuits are split on this timing question."); *Lewis*, 58 F.4th at 711 ("This question too has divided the courts of appeals."). And Judge Duncan has urged this Court to resolve it

[1] The Fifth Circuit has since repeatedly reaffirmed and applied *Minor*. *E.g.*, *United States v. Garza*, 2025 WL 586824 (5th Cir. 2025); *United States v. Ramirez*, 2025 WL 548263 (5th Cir. 2025); *United States v. Newton*, 2025 WL 1618971 (5th Cir. 2025).

post-*Brown*. *See Minor*, 121 F.4th at 1095 (Duncan, J., dissenting) ("As the majority points out, the circuits are deeply split over whether the correct approach . . . is time-of-conviction or time-of sentencing. Our court has now picked a side. Hopefully, the Supreme Court will soon settle the matter."). The Court should accept that invitation.

II. The question presented is important and recurring.

The government does not dispute that this deep and acknowledged circuit split must be resolved. Indeed, the timing issue is no less important and recurring than it was in the ACCA context, where the government acquiesced to review of a shallower split. *See Jackson v. United States*, Br. for U.S. 9, 11–12 (No. 22-6640) (Mar. 24, 2023).

The meaning of a "controlled substance offense" under the Guidelines has a major impact on federal criminal sentences. That definition is an integral part of the career-offender Guideline. U.S.S.G. § 4B1.2(b). And that Guideline implements an express statutory directive to sentence certain repeat offenders "to a term of imprisonment at or near the maximum term authorized" by law. 28 U.S.C. § 994(h).

The Commission has accordingly specified that career offenders are generally subject to higher base offense levels and are automatically placed in the highest criminal history category of VI. *See* U.S.S.G. § 4B1.1(b). As a result, this Court has previously recognized that career offenders are "subject to particularly severe punishment." *Buford v. United States*, 532 U.S. 59, 60 (2001). Indeed, according to the data for FY 2024, over half of all career offenders received a sentence of at least 10 years, the average sentence was over 12 years, and over 15% received a sentence of over 20 years. U.S. Sentencing Comm'n, 2024 Quick Facts on Career Offenders.

The "controlled substance offense" definition is also incorporated into the primary firearm Guideline, subjecting gun offenders with prior "controlled substance offenses" to enhanced base offense levels. *See* U.S.S.G. § 2K2.1(a)(1)–(4) & cmt. n.1.[2]

These enhancements result in longer sentences given the centrality of the guideline range to the sentencing process. As this Court has repeatedly explained, the guideline range, although advisory, serves as "the lodestone of sentencing." *Peugh v. United States*, 569 U.S. 530, 544 (2013). "District courts *must* begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process." *Rosales-Mireles v. United States*, 585 U.S. 129, 133 (2018) (quotations omitted). "In the usual case, then, the systemic function of the selected Guidelines range will affect the sentence." *Molina-Martinez v. United States*, 578 U.S. 189, 200 (2016). Indeed, the "Commission's statistics demonstrate the real and pervasive effect the Guidelines have on sentencing," reflecting that "when a Guidelines range moves up or down, offenders' sentences tend to move with it." *Id*. at 199–200 (cleaned up).

That gravitational pull matters here given how often "controlled substance offense" enhancements are implicated. During FY 2025, over 1,200 federal criminal defendants were sentenced as career offenders (with over 80% of them sentenced for drug offenses). U.S. Sentencing Comm'n, 2025 Sourcebook of Federal Sentencing

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[2] The definition is also incorporated in other Guidelines and policy statements as well. *See, e.g.*, U.S.S.G. §§ 2K1.3(a)(1)–(2) & cmt. n.2 (enhanced base offense levels for explosive material offenses); 7B1.1(a)(1) & cmt. n.3 (classification of probation violations); 7C1.1(a)(1) & cmt. n.3 (classification of supervised release violations).

Statistics, at 53 tbl. 23, 56 tbl. 26. And, during that same period, a whopping 7,700 defendants were sentenced under the firearm Guideline in § 2K2.1. *Id*. at 47 tbl. 20.

While current data does not capture the exact number of cases involving a "controlled substance offense," the reported cases reflect that they are numerous. And the number of reported cases over just the past five years confirms that the timing question in particular recurs frequently. Nearly every circuit has addressed it—most doing so multiple times. And, as the government notes, this Court has repeatedly declined to resolve it. BIO 5; *see Nelson*, BIO 13 & n.1. This dynamic reflects that the timing question regularly determines whether common drug offenses qualify as a "controlled substance offense," which increases the guideline range and the overall sentence. That is why defendants have repeatedly appealed the issue and asked this Court to review it. And as long as the split persists, defendants will continue to do so.

The upshot is that federal criminal defendants with prior drug convictions are receiving dramatically different guideline ranges based entirely on the happenstance of geography. This arbitrary disparity is untenable. It is incompatible with the fair administration of justice. And it is contrary to the Sentencing Reform Act itself, the "basic goal" of which was "to move the sentencing system in the direction of increased uniformity." *United States v. Booker*, 543 U.S. 220, 253 (2005) (citing provisions).

III. The Commission has repeatedly declined to resolve the split.

The government does not deny that the circuit conflict on this important question of federal sentencing law must be resolved by someone. Rather, the government's only real basis for opposing review is that the Court should follow its

ordinary practice of allowing the Sentencing Commission to resolve the conflict. However, the Court should decline to follow that practice here—for several reasons.

1. Most importantly, the Commission has repeatedly failed to take action.

Although the circuit split first emerged in 2022, and the Commission regained a quorum that same year, the Commission has failed to restore uniformity. In the 2023, 2024, and 2025 amendment cycles, the Commission considered various proposed amendments addressing the career-offender guideline, circuit conflicts (including a related § 4B1.2(b) split discussed below), and other drug issues.[3] Yet the Commission did not consider, let alone resolve, the circuit split on the timing issue.

The Commission finally considered the timing issue in its most recent cycle. The Commission proposed amending § 4B1.2(b) to resolve the split on both the timing issue and on the related issue whether "controlled substance" includes substances controlled only by federal law or whether it also includes substances controlled by state law. *See* U.S. Sentencing Comm'n, Proposed Amendments to the Sentencing Guidelines, at 43–50 (Jan. 30, 2026); *White*, BIO 15–16 (documenting latter 7–3 split).

As revealed last month, however, the Commission declined to act, leaving both circuit conflicts fully intact. And, notably, the Commission did so without offering any explanation as to why. *See* U.S. Sentencing Comm'n, Amendments to the Sentencing Guidelines (Preliminary) (Apr. 16, 2026). This most recent development alone

[3] *See* U.S. Sentencing Comm'n, Proposed Amendments to the Sentencing Guidelines, at 55–59 (Jan. 24, 2025) (drug quantity table and safety valve); *id*. at 1–4, 47–56 (Dec. 19, 2024) (career offender and circuit conflicts); *id*. at 49–58 (Dec. 26, 2023) (circuit conflicts); *id*. at 60–70, 144–76 (Feb. 2, 2023) (circuit conflicts and career offender).

distinguishes all of this Court's previous cert. denials, which came before the Commission expressly considered both circuit splits and still failed to resolve them.

In short, while the "Sentencing Commission should have the opportunity to address this issue in the first instance," *Longoria v. United States*, 141 S. Ct. 979, 979 (2021) (Sotomayor, J., joined by Gorsuch, J., respecting the denial of certiorari) (citing *Braxton v. United States*, 500 U.S. 344, 348 (1991)), the Commission has already had many opportunities to do so—four full amendment cycles to be exact, and even more cycles for the federal-state schedule issue. Counsel is unaware of any prior example of the Commission repeatedly declining to resolve circuit splits of such magnitude. And it has not expressed any intention to revisit those issues in the 2027 cycle either.

2. The Commission's unprecedented abdication of responsibility is striking because several members of this Court have recently urged the Commission to resolve circuit splits, including on the federal-state schedule issue in § 4B1.2(b). *See Wiggins v. United States*, 145 S. Ct. 2621, 2621–22 (2025) (Sotomayor, J., joined by Barrett, J., respecting the denial of certiorari); *Guerrant v. United States*, 142 S. Ct. 640, 640–41 (2022) (Sotomayor, J., joined by Barrett, J., respecting the denial of certiorari); *see also Longoria*, 141 S. Ct. at 979 (Sotomayor, J., joined by Gorsuch, J., respecting the denial of certiorari). And other members of the Judiciary have urged the Commission to resolve the timing issue in particular. *See, e.g.*, *Dubois*, 94 F.4th at 1306–07 (Rosenbaum, J., joined by Abudu, J., concurring). These calls have all gone unheeded.

3. Moreover, this Court's intervention is especially warranted because of the confusion over how to apply *Brown* to the Guidelines. As explained above, the

Fourth Circuit has adopted a time-of-prior-conviction rule post-*Brown* while the Fifth Circuit has adopted a time-of-sentencing rule post-*Brown*. Only this Court can resolve the confusion surrounding its own precedent. *See* Stephen M. Shapiro et al., Supreme Court Practice § 4.5 pp. 4-23–24 (11th ed. 2019) (explaining that this Court often grants review where an issue's resolution depends on "a prior Supreme Court opinion whose implications are in need of clarification"). And the Court should do so here because it deliberately left the Guidelines timing question open in *Brown* footnote 7.[4]

4. Finally, indefinitely waiting for the Commission to resolve the circuit split would be in significant tension with *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), where the Court recently emphasized that it is the exclusive role of the Judiciary to interpret federal law. The Guidelines constitute federal law no less than federal statutes. And this Court has never declined to resolve a split about a federal statute just because Congress might get around to resolving it one day. The Court should not afford the Commission such boundless latitude after *Loper Bright*.

IV. This case is an excellent vehicle.

This case alone offers the Court a timely and optimal vehicle to restore sentencing uniformity on *both* the timing issue *and* the federal-state schedule issue.

[4] Undersigned counsel represented one of the two petitioners in *Brown* (a consolidated case), and counsel highlighted the distinction between ACCA and the Guidelines. *See, e.g.*, *Brown*, Oral Arg. Tr. 33–34 (explaining that ACCA and the Guidelines were governed by different default principles); *Brown*, 602 U.S. at 127 n.1 (Jackson, J., dissenting) (recognizing this distinction). Counsel also specifically advised the Court at the cert. stage that the circuits had split on the timing question in the Guidelines context. *See Jackson v. United States*, Pet. for Cert. 21–26 (U.S. No. 22-6640) (Jan. 24, 2023). So *Brown*'s reservation was presumably deliberate. This case is the sequel.

1. The government does not dispute that this case cleanly presents the timing question. Petitioner thoroughly preserved his drug overbreadth arguments in the district court and the court of appeals, relying in part on the circuit decisions adopting a time-of-sentencing rule. *See* C.A. Pet. Br. 5–18; C.A. Pet. Reply Br. 1–13; Dist. Ct. ECF No. 25 at 1–9. The district court overruled his objection on the merits. Dist. Ct. ECF No. 42 at 11–12. And, applying *de novo*, the Eleventh Circuit affirmed based solely on its precedent in *Dubois*, which squarely adopted a time-of-prior-conviction rule. Pet. App-1 at 3, 7–8. Thus, petitioner fully preserved the timing question below, and the court of appeals disposed of the appeal on that basis alone.

There is otherwise no dispute that the timing question is dispositive of whether petitioner's 2006 Florida marijuana and cocaine convictions qualify as "controlled substance offenses." As the Eleventh Circuit recognized below, at the time of those prior convictions, both Florida and federal law controlled hemp and ioflupane (a cocaine derivative); but, by the time of petitioner's federal sentencing in 2022, they did not. *See* Pet. App. A-1 at 5–6. Thus, had the lower courts consulted the drug schedules in effect at the time of sentencing, his prior convictions would have been categorically overbroad vis-à-vis § 4B1.2(b)'s "controlled substance offense" definition.

Prevailing on that issue would substantially reduce petitioner's guideline range. Classifying his prior convictions as "controlled substance offenses" increased petitioner's base offense level by 10 levels—from 14 to 24. Pet. App. A-1 at 4. That produced an enhanced guideline range of 84–105 months (plus a mandatory, consecutive term of 24 months for another count) rather than 30–37 months (plus the

24 months). Petitioner ultimately received a low-end sentence of 108 months (84+24 months) or 9 years—which is twice as long as the low end of the unenhanced guideline range (54 months or 4.5 years). *See* Dist. Ct. ECF No. 42 at 66; PSR ¶¶ 24–35, 81.

2. This case would also enable the Court to resolve the related split over whether § 4B1.2(b) covers substances controlled *only* by federal law, or whether it cover substances controlled by federal *or* state law. As explained, the Commission has repeatedly declined to resolve that split too, despite calls from members of this Court.

That federal-state schedule issue is not dispositive here because the federal and Florida drug schedules were aligned at the relevant times: they both controlled hemp and ioflupane at the time of petitioner's 2006 state drug convictions; and they both excluded hemp and ioflupane by the time of petitioner's 2022 federal sentencing.

Nonetheless, and as the government's brief in opposition reflects, that issue is fully presented for review here. The parties briefed the issue below. *See* Pet. C.A. Br. 8–9; U.S. C.A. Br. 16–26. And, as the government recognizes (BIO 4–6), the decision below expressly incorporated the Eleventh Circuit's adverse resolution of that issue in *Dubois*. *See* Pet. App. A-1 at 7 (reiterating that a prior drug offense qualifies "even if [the drug] is not federally regulated") (quoting *Dubois*); *id.* at 8 (repeating same).

Moreover, that issue is "subsidiary" to the timing question presented. Sup. Ct. R. 14.1(a); *see Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 173 n.1 (2009); BIO i. In *Dubois*, the Eleventh Circuit explained that the federal-state schedule issue informed its resolution of the timing issue. 94 F.4th at 1300. Indeed, *Dubois* rejected the timing holdings of the First, Second, and Ninth Circuits precisely because they "all applied

the federal-law-only approach for defining which drugs are controlled substances under the guidelines." *Id.*; *see also Minor*, 121 F.4th at 1090 (observing similarly that the "textual analysis" for the timing issue was informed by the federal-state schedule issue). Because the federal-state schedule issue formed an essential part of *Dubois*' reasoning and the decision below, and it is otherwise essential to the timing analysis, petitioner would be required to brief that issue at the merits stage. That presentation would cover the waterfront and thus facilitate the Court's resolution of both issues.

3. *Nelson* also presents the timing question, but it is an inferior vehicle.

First, in addition to the timing question, *Nelson* also presents an unrelated question about "distribution" under § 4B1.2(b). The petitioner there presses that argument heavily, calling it "outcome-determinative." *Nelson*, Cert. Reply 2. And he seeks a GVR on it, which would "eliminate the need for this Court's review" on the timing question. *Nelson*, Pet. Supp. Br. 6. This petition, by contrast, cleanly presents the timing question without unrelated § 4B1.2(b) issues. And petitioner here does not present any alternative basis for a remand that would obviate the timing question.

Second, as to the timing issue, the only prior drug conviction at issue in *Nelson* is a *federal* conviction under 21 U.S.C. § 841(a)(1), (b)(1)(C). Yet the vast majority of drug convictions that implicate § 4B1.2(b) are *state* convictions. The reason is that federal drug convictions are far less numerous than state convictions and carry far longer periods of incarceration. That renders *Nelson* an atypical vehicle rather than a paradigmatic or representative one. *See Doggett v. United States*, 505 U.S. 647, 659 (1992) (Thomas, J., dissenting) ("Just as 'bad facts make bad law,' so too odd facts

make odd law."); Frederick Schauer, Do Cases Make Bad Law?, 73 U. Chi. L. Rev. 883, 893–905 (2006) (explaining that, where the instant case is not representative, cognitive biases distort judicial decision-making and generate sub-optimal rules).

Third, as the Fourth Circuit recognized, *Nelson* "raises a number of complex issues concerning, *e.g.*, the respective roles of § 841(a)(1) and § 841(b)(1)(C) in the 'controlled substance offense' analysis and their divisibility by drug type." 151 F.4th at 582. Indeed, the government's main argument on appeal was not about timing at all; it was that the federal drug statute was divisible by drug type, and the drug at issue there (crack cocaine) was controlled at all relevant times. *See Nelson*, C.A. U.S. Br. 10, 12–26. Petitioner disagreed. *See Nelson*, C.A. Reply Br. 4–14. While the Fourth Circuit did not resolve that "complex" dispute, this Court might be required to do so were the Court to find that divisibility must be addressed as a threshold analytical matter, or were the government to renew that basis for affirmance at the merits stage.

No such complications exist here. First, this case involves only prior state convictions. So there is no risk of this Court broadly or unnecessarily opining on the elements of the federal drug statutes. Second, the Eleventh Circuit has squarely held that Florida's drug statute is "divisible as to drug type," *United States v. Miller*, 157 F.4th 1365, 1370–71 (11th Cir. 2025), a proposition that the government has never disputed. So there is no threshold dispute about divisibility here. Finally, and as a result, there is also no dispute that marijuana and cocaine are indeed the substances at issue in petitioner's overbreadth challenges (which, conveniently, are identical to the two overbreadth challenges considered in *Brown*). *See* Pet. App. A-1 at 2, 5–6, 8.

Finally, because the timing issue in *Nelson* arises only in the context of a prior *federal* conviction, the Court could not resolve whether § 4B1.2(b) covers substances controlled by *state* law in the course of resolving the timing issue there. And even as to the *Nelson* petitioner's prior state drug conviction, which does not implicate the timing issue, he does not dispute that the federal-state schedule issue was neither pressed nor passed on below. *See Nelson*, BIO 14–15; *Nelson*, Cert. Reply 7–8 & n.11.

4. The petition in *White* presents the federal-state schedule issue but not the timing issue. While resolving the latter issue here would enable the Court to resolve the former, resolving the former would not resolve the latter. So the Court would still need to grant review in this case to ensure resolution of both circuit splits. In any event, *White* is on plain-error review (*see White*, BIO 6–7, 16–17), which could prevent the Court from reaching the federal-state schedule issue at all. *See Puckett v. United States*, 556 U.S. 129, 134–35 (2009). Thus, the optimal course is to grant review in this case alone and resolve both circuit splits here. Two birds, one stone.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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