No. _____

In the

Supreme Court of the United States

_____

Willie Ray Valentine,

Petitioner,

v.

United States of America,

Respondent.

_____

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

_____

PETITION FOR A WRIT OF CERTIORARI

_____

Assistant Federal Public Defender
Taylor Wills Edwards "T.W." Brown
Federal Public Defender's Office
Northern District of Texas
819 Taylor Street, Room 9A10
Fort Worth, TX 76102
(817) 978-2753
Taylor_W_Brown@fd.org
Texas Bar No. 24087225

QUESTIONS PRESENTED

I. Whether state offenses that may be committed by trafficking a positional isomer of cocaine constitute "serious drug offenses" within the meaning of the Armed Career Criminal Act.

II. Whether this Court should hold the instant Petition pending the Fifth Circuit's en banc decision in *United States v. Squire*, 182 F.4th 481, 482 (5th Cir. 2026).

PARTIES TO THE PROCEEDING

Petitioner is Willie Ray Valentine, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

INDEX TO APPENDICES iv

TABLE OF AUTHORITIES v

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT STATUTES AND REGULATIONS 2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE PETITION 10

I. The courts of appeals are divided on the application of ACCA to a significant group of state drug trafficking statutes. 10

II. In the event that it does not grant certiorari on the first question presented, this Court should hold the instant Petition pending the Fifth Circuit's en banc decision in *United States v. Squire*, 182 F.4th 481, 482 (5th Cir. 2026). 34

CONCLUSION 37

INDEX TO APPENDICES

Appendix A Order of the Fifth Circuit Denying Panel Rehearing

Appendix B Opinion of Fifth Circuit

Appendix C Judgment and Sentence of the United States District Court for the Northern District of Texas

Appendix D Defendant's First Motion to Strike or Dismiss Allegations in Indictment

TABLE OF AUTHORITIES

Page(s)

Federal Cases

(Arthur) Taylor v. United States,
495 U.S. 575 (1990) 9, 11, 15, 16, 17, 18, 19, 24, 25, 28, 29, 30, 31, 33

(Curtis) Johnson v. United States,
559 U.S. 133 (2010) 11, 12

(Justin) Taylor v. United States,
596 U.S. 845 (2022) 9, 13, 15, 16, 17, 18, 19, 24, 25, 28, 29, 30, 31, 33

(*Samuel) Johnson v. United States*,
576 U.S. 591 (2015) 11, 12

A.L.A. Schechter Poultry Corp. v. United States,
295 U.S. 495 (1935) 34

Alexis v. Barr,
960 F.3d 722 (5th Cir. 2020) 5

Alleyne v. United States,
570 U.S. 99 (2013) 14

Apprendi v. New Jersey,
530 U.S. 466 (2000) 14

Borden v. United States,
593 U.S. 420 (2021) 12

Brown v. United States,
602 U.S. 101 (2024) 12

Chambers v. United States,
555 U.S. 122 (2009) 11

Descamps v. United States,
570 U.S. 254 (2013) 11

Erlinger v. United States,
602 U.S. 821 (2024) 7, 14, 24

Gonzales v. Duenas-Alvarez,
549 U.S. 183 (2007) 9, 13, 15, 16, 17, 18, 24, 28, 29, 30, 31

Kerstetter v. United States,
145 S. Ct. 121 (October 7, 2024) 24

Lawrence on Behalf of Lawrence v. Chater,
516 U.S. 163 (1996) 35

Leocal v. Ashcroft,
543 U.S. 1 (2004) 16

Mathis v. United States,
579 U.S. 500 (2016) 12, 14, 15, 28

McNeill v. United States,
563 U.S. 816 (2011) 11

Ponce v. Garland,
70 F.4th 296 (5th Cir. 2023) 33

Scarborough v. United States,
431 U.S. 564 (1977) 34

Shepard v. United States,
544 U.S. 13 (2005) 11

Shular v. United States,
589 U.S. 154 (2020) 12, 13, 14, 22, 27, 28, 31

Spears v. United States,
555 U.S. 261 (2009) 31

Sykes v. United States,
564 U.S. 1 (2011) 11

United States v. Castillo-Rivera,
853 F.3d 218 (5th Cir. 2017)(en banc) 24

United States v. Coil,
442 F.3d 912 (5th Cir. 2006) 35

United States v. Dorsey,
No. 07-CR-0404-ABA, 2026 WL 2069857 (D. Md. July 17, 2026) 5

United States v. Herrold,
941 F.3d 173 (5th Cir. 2019) (*en banc*) 24

United States v. Kerstetter,
82 F.4th 437 (5th Cir. 2023), *cert. granted, judgment vacated*, 145 S. Ct. 121, 220 L. Ed. 2d 1 (2024) 4, 12, 23, 24, 25

United States v. Kerstetter,
No. 22-10253, 2025 WL 1079071 (5th Cir. Apr. 10, 2025) (unpublished), *cert. denied*, No. 25-6432, 2026 WL 490809 (U.S. Feb. 23, 2026) 4, 7, 9, 13, 19, 24, 25, 28, 31, 32, 33

United States v. Minor,
121 F.4th 1085 (5th Cir. 2024) 25, 31, 33

United States v. Minter,
80 F.4th 406 (2d Cir. 2023) 4, 5, 9, 12, 13, 19, 22, 32

United States v. Myers,
56 F.4th 595 (8th Cir. 2022) 5, 9, 23

United States v. Owen,
51 F.4th 292 (8th Cir. 2022) 4, 5, 9, 12, 13, 19, 22, 32

United States v. Rawls,
85 F.3d 240 (5th Cir. 1996) 34

United States v. Ruth,
966 F.3d 642 (7th Cir. 2020) 5

United States v. Squire,
182 F.4th 481 (5th Cir. July 20, 2026) 10, 33, 34, 35, 36

United States v. Starling,
184 F.4th 795 (6th Cir. 2026) 5, 13, 19, 26, 27, 32

United States v. Valentine,
No. 25-11183, 2026 WL 2244202 (5th Cir. Aug. 4, 2026) 5, 10, 13, 26

United States v. Valentine,
No. 25-11186, 2026 WL 1135451 (5th Cir. Apr. 27, 2026)(unpublished) 8

Welch v. United States,
578 U.S. 120 (2016) 12

Wooden v. United States,
595 U.S. 360 (2022) 12, 15, 28

Federal Statutes

8 U.S.C. § 1101(a)(43)(G) 16

18 U.S.C. 922(g)(1) 34

18 U.S.C. § 922(g)(1) 6, 10, 34, 36

18 U.S.C. § 924(a) 10

18 U.S.C. § 924(c) 16

18 U.S.C. § 924(c)(3)(A) 16, 17, 18, 19

18 U.S.C. § 924(c)(3)(A)(i) 17

18 U.S.C. § 924(e) 6, 11

18 U.S.C. § 924(e)(2)(i) 7

18 U.S.C. § 924(e)(2)(A) 2

18 U.S.C. § 924(e)(2)(A)(ii) 20, 27, 30

18 U.S.C. § 924(e)(2)(B) 13

18 U.S.C. § 924(e)(2)(B)(i) 30

18 U.S.C. § 924(e)(2)(B)(ii) 29

21 U.S.C. § 802 ..... 20, 27

21 U.S.C. § 802(6) 2

28 U.S.C. § 1254(1) 1

Armed Career Criminal Act 4-15, 20, 21, 22, 23, 26, 27, 29, 32

Controlled Substances Act, 21 U.S.C. § 841, Schedule II (a)(4) 7, 20, 22, 27

Controlled Substances Act § 102 (21 U.S.C. 802) 13, 20, 21

Hobbs Act, 18 U.S.C. § 1951(a) 16

USSG § 4B1.2(a)(2) 29

State Statutes

720 ILCS 570/206(b)(4) 5, 21

Minn. Stat. § 152.01, subd.3 21

Minn. Stat. § 152.01, subd.3a 5

N.Y. Pub. Health Law § 3306, Schedule II(b)(4) 5, 21, 33

Texas Health & Safety Code § 481.102(3)(D) 3, 5, 6, 21, 27, 33

Texas Health & Safety Code § 481.112(a) 4, 9, 21, 23, 26

Va. Code § 54.1-3448.1 ..... 5, 21

Rules

Sup. Ct. R. 10(c) 27, 31

Regulations

21 C.F.R. § 13.001 ..... 20, 21, 27

21 C.F.R § 1300.001 2

21 C.F.R § 1308.12(b)(4) 3, 20, 27

19 C.S.R. 30-1.002(1)(B)1 (2000) 5, 21

Constitutional Provisions

U.S. Const. amend. VI 7

U.S Const. art. I, § 8 10

U.S. Const. art. I, § 8, cl. 3 34

Other Authorities

Appellant's Brief, *United States v. Valentine*, No. 25-11183, 2026 WL 811809 (5th Cir. Filed March 23, 2026) 5, 8, 9, 25, 26, 33

Appellee's Brief, *United States v. Valentine*, No. 25-11183, 2026 WL 1399460 (5th Cir. May 18, 2026) 9, 26

Petition for Reh'g ECF No. 75, *United States v. Squire*, 25-30324 (5th Cir. June 16, 2026) 10, 34, 35

U.S. Sent'g Comm'n, *Quick Facts: Mandatory Minimum Penalties* (FY2021)..... 32

PETITION FOR WRIT OF CERTIORARI

Petitioner Willie Ray Valentine seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished opinion of the court of appeals is available at *United States v. Valentine*, No. 25-11183, 2026 WL 2244202 (5th Cir. August 4, 2026) (unpublished). It is reprinted in Appendix B to this Petition. Petitioner filed a timely Petition for Panel Rehearing, which the court below denied on August 25, 2026. That order is reprinted as Appendix A to this Petition. The district court's judgment and sentence entered in *United States v. Willie Ray Valentine*, No. 3:24-CR-476 (October 23, 2025), is attached as Appendix C.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on August 4, 2026. The order denying a timely petition for rehearing issued August 25, 2026. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTES AND REGULATIONS

18 U.S.C. §924(e)(2)(A) provides:

(2) As used in this subsection—

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

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(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…

21 U.S.C. §802(6) provides:

The term "controlled substance" means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter. The term does not include distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in subtitle E of the Internal Revenue Code of 1986.

21 C.F.R §1300.001 provides in relevant part:

Isomer means:

(1) The optical isomer, except as used in § 1308.11(d) and § 1308.12(b)(4) of this chapter. As used in § 1308.11(d) of this chapter, the term "isomer" means any optical, positional, or geometric isomer. As used in § 1308.12(b)(4) of this chapter, the term "isomer" means any optical or geometric isomer;

(2) As used in § 1308.11(d) of this chapter, the term "positional isomer" means any substance possessing the same molecular formula and core structure and having the same functional group(s) and/or substituent(s) as those found in the respective Schedule I hallucinogen, attached at any position(s) on the core structure, but in such manner that no new chemical functionalities are created and no existing chemical

> functionalities are destroyed relative to the respective Schedule I hallucinogen. Rearrangements of alkyl moieties within or between functional group(s) or substituent(s), or divisions or combinations of alkyl moieties, that do not create new chemical functionalities or destroy existing chemical functionalities, are allowed i.e., result in compounds which are positional isomers. For purposes of this definition, the "core structure" is the parent molecule that is the common basis for the class; for example, tryptamine, phenethylamine, or ergoline. Examples of rearrangements resulting in creation and/or destruction of chemical functionalities (and therefore resulting in compounds which are not positional isomers) include, but are not limited to: Ethoxy to alpha-hydroxyethyl, hydroxy and methyl to methoxy, or the repositioning of a phenolic or alcoholic hydroxy group to create a hydroxyamine. Examples of rearrangements resulting in compounds which would be positional isomers include: Tert-butyl to sec-butyl, methoxy and ethyl to isopropoxy, N,N-diethyl to N-methyl-N-propyl, or alpha-methylamino to N-methylamino.

21 C.F.R §1308.12(b)(4) provides:

> (4) Coca leaves (9040) and any salt, compound, derivative or preparation of coca leaves (including cocaine (9041) and ecgonine (9180) and their salts, isomers, derivatives and salts of isomers and derivatives), and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, except that the substances shall not include:
>
> > (i) Decocainized coca leaves or extraction of coca leaves, which extractions do not contain cocaine or ecgonine;
> >
> > (ii) [123I]ioflupane; or
> >
> > (iii) [18F]FP-CIT.

Texas Health & Safety Code §481.102(3)(D) provides:

> Penalty Group 1 consists of:
>
> ***
>
> (D) Cocaine, including:
>
> > (i) its salts, its optical, position, and geometric isomers, and the salts of those isomers;

> (ii) coca leaves and a salt, compound, derivative, or preparation of coca leaves; and
>
> (iii) a salt, compound, derivative, or preparation of a salt, compound, or derivative that is chemically equivalent or identical to a substance described by Subparagraph (i) or (ii), other than decocainized coca leaves or extractions of coca leaves that do not contain cocaine or ecgonine; and

Texas Health & Safety Code §481.112(a) provides:

> (a) Except as authorized by this chapter, a person commits an offense if the person knowingly manufactures, delivers, or possesses with intent to deliver a controlled substance listed in Penalty Group 1.

STATEMENT OF THE CASE

I. Overview

In the Second and Eighth Circuits, a defendant cannot receive an enhanced sentence under the Armed Career Criminal Act (ACCA) on the basis of a statute that criminalizes the trafficking of all of cocaine's positional isomers.[1] *See United States v. Minter*, 80 F.4th 406, 412-13 (2d Cir. 2023); *United States v. Owen*, 51 F.4th 292, 296 (8th Cir. 2022). By contrast, the court below and the Sixth Circuit have rejected this as a basis to avoid ACCA liability. *See United States v. Kerstetter*, 82 F.4th 437, 441 (5th Cir. 2023), *cert. granted, judgment vacated*, 145 S. Ct. 121, 220 L. Ed. 2d 1 (2024), *on remand United States v. Kerstetter*, No. 22-10253, 2025 WL 1079071, at *3–4 (5th Cir. Apr. 10, 2025) (unpublished), *cert. denied*, No. 25-6432, 2026 WL 490809 (U.S.

[1] Isomers are chemicals that have the same molecular formulae (i.e. the same number of each atom), but in different arrangements. Positional or position isomers are chemicals that have the same molecular formulae and differ from each other in that some atom or group appears in a different location on the chemical chain. These contrast with optical isomers, which have exactly the same layout save a rotation over an axis, and with geometric isomers, which place an atom or group at a different location in three-dimensional space.

Feb. 23, 2026); *United States v. Valentine*, No. 25-11183, 2026 WL 2244202, at *1 (5th Cir. Aug. 4, 2026); *United States v. Starling*, 184 F.4th 795, 806–07 (6th Cir. 2026). These courts have found that there is no "reasonable probability" of a prosecution for trafficking cocaine's positional isomers.

This circuit split merits review. For one thing, it implicates drug-trafficking laws in some of our Nation's most populous states. Those include New York,[2] Texas,[3] Illinois,[4] Minnesota,[5] Missouri,[6] and Virginia.[7] This means that the cocaine isomers issues will frequently recur in ACCA cases. For another, a defendant's exposure to ACCA's profoundly harsh sentences – a 15-year mandatory minimum and a potential life sentence – should not depend on accidents of geography.

Petitioner's case is an ideal vehicle. He has preserved the issue in detail in every forum. *See* (ROA.45-54); Appellant's Brief in *United States v. Valentine*, No. 25-11183, 2026 WL 811809, at **18-31 (5th Cir. Filed March 23, 2026). Most importantly, he incurred his prior cocaine conviction in Texas, a state that expressly criminalizes all "position isomers" of cocaine in terms. *See* Tex. Health & Safety Code §481.102 (3)(D). As such, this Court's review of the core issue – whether a state statute that

[2] *See* N.Y. Pub. Health Law § 3306, Schedule II(b)(4); *Minter*, 80 F.4th at 411-12.
[3] *See* Tex. Health & Safety Code §481.102 (3)(D); *Alexis v. Barr*, 960 F.3d 722, 726–27 (5th Cir. 2020) (recognizing that Texas criminalizes the trafficking of all of the positional isomers of cocaine);
[4] S*ee* 720 ILCS 570/206(b)(4); *United States v. Ruth*, 966 F.3d 642, 647 (7th Cir. 2020) (recognizing that Illinois criminalizes all positional isomers of cocaine).
[5] *See* Minn. Stat. § 152.01, subd. 3a; *United States v. Owen*, 51 F.4th 292, 296 (8th Cir. 2022) (concluding that Minnesota's definition of cocaine criminalizes all positional isomers of cocaine).
[6] *See* 19 C.S.R. 30-1.002(1)(B)1 (2000); *United States v. Myers*, 56 F.4th 595, 598 (8th Cir. 2022) (concluding, over dissent, that "Missouri's definition, then, swept in all isomers, including positional, optical, and geometric isomers.").
[7] *See* Va. Code § 54.1-3448.1; *United States v. Dorsey*, No. 07-CR-0404-ABA, 2026 WL 2069857 (D. Md. July 17, 2026) (concluding that Virginia criminalizes all positional isomers of cocaine).

criminalizes trafficking every positional isomer of cocaine constitutes an ACCA predicate – cannot be derailed by any question about the statute's scope.

II. Offense and District Court Proceedings

On two occasions in 2024, police stopped Petitioner Willie Ray Valentine in his car and found a gun. *See* (Presentence Report ("PSR"), at ¶¶6-7). On the second of these occasions, they also executed a warrant in his home for a domestic violence offense and found a third gun. *See* (Presentence Report, at ¶8). The record contains no indication that he used any of these guns in commerce and no evidence about how he got them.

Because Petitioner had been previously convicted of three prior offenses related to drug trafficking, the government indicted him for possessing a firearm after a felony conviction under 18 U.S.C. §922(g)(1). *See* (ROA.8-12). The indictment further alleged that he had previously sustained three "serious drug offenses" conviction for offenses committed on occasions different from one another. *See* (ROA.8-12). This allegation triggered an enhanced mandatory-minimum penalty under 18 U.S.C. §924(e).

Petitioner filed two partial motions to dismiss, and in both, specifically targeted the allegations concerning ACCA. First, he contended that two of his prior drug convictions – Texas state convictions for possessing cocaine with intent to deliver it – did not qualify as "serious drug offenses" because they could be committed by trafficking positional isomers of cocaine. *See* (ROA.45-76); [Appendix D]. This form of cocaine is illegal under Texas law, Tex. Health & Safety Code §481.102 (3)(D), but

not under the Controlled Substances Act (CSA), 21 U.S.C. §841, Schedule II (a)(4). And the CSA is incorporated into ACCA's definition of a "serious drug offense." 18 U.S.C. §924(e)(2)(i). He appended to the motion judicial records from a Texas state-level prosecution for possession of a controlled substance. *See* (ROA.65-76); [Appendix D]. The indictment in that case alleged that the defendant possessed "position isomers" of cocaine, *see* (ROA.67); [Appendix D], the plea agreement reflected a plea to the possession of "position isomers" of cocaine, *see* (ROA.68); [Appendix D], the judicial confession admitted possessing "position isomers" of cocaine, *see* (ROA.71, 74); [Appendix D]. The government responded, contending that Petitioner's "objections are foreclosed by *United States v. Kerstetter*, No. 22-10253, 2025 WL 1079071, (5th Cir. Apr. 10, 2025)." (ROA.87).

Petitioner's second motion to dismiss argued that ACCA required the judge, not a jury, to decide whether his prior convictions occurred on separate occasions. *See* (ROA.77-78). But, it pointed out the holding of *Erlinger v. United States*, 602 U.S. 821 (2024): that the Sixth Amendment prohibits the application of ACCA's enhanced sentencing range on the basis of a judge's finding that the defendant's convictions occurred on different occasions. *See* (ROA.78-79). And, the motion contended, Article III does not permit a court to rewrite ACCA and provide the defendant a jury trial. *See* (ROA.79-84).

The district court denied both motions, *see* (ROA.95-101), and Petitioner pleaded guilty without a plea agreement, *see* (ROA.102-107). In the factual resume, Petitioner said that he disagreed with the conclusion that ACCA applied to his case

and contended that the proper sentencing range was zero to 15 years. *See* (ROA.103-104). In turn, he explicitly refused to concede that the prior convictions qualified him for ACCA. *See* (ROA.106). The same document admitted that both guns "had previously been transported in interstate commerce" but made no additional admissions concerning how he came to possess either firearm on the dates alleged. *See* (ROA.105).

A Presentence Report (PSR) found that ACCA did apply to the defendant, and stated that applicable sentencing range as 15 years to life imprisonment. *See* (PSR, ¶91). Petitioner filed Objections to the PSR, one of which reiterated the earlier motions to dismiss the indictment's ACCA allegations. *See* (Defendant's Objections and Clarifications to the PSR, at 3). He thus argued again that the proper sentencing range was zero to 15 years imprisonment. *See* (Defendant's Objections and Clarifications to the PSR, at 3). The district court overruled the objections, *see* (ROA.168), and sentenced him to 15 years, which it ordered to run consecutively to a related revocation of supervised release[8], *see* (ROA.121, 190).

III. Appellate Proceedings

Petitioner appealed, renewing both arguments he made in his motions to dismiss the ACCA allegations. *See* Appellant's Brief in *United States v. Valentine*, No. 25-11183, 2026 WL 811809, at **4-7 (5th Cir. March 23, 2026) ("Appellant's Brief"). As respects the definition of a "serious drug offense," he called the Fifth Circuit's attention to opinions from the Second and Eighth Circuits. *See* (Appellant's

[8] An appeal of the revocation was dismissed after counsel filed an *Anders* brief. *See* *United States v. Valentine*, No. 25-11186, 2026 WL 1135451, at *1 (5th Cir. Apr. 27, 2026)(unpublished).

Brief, at *5) (citing *United States v. Minter*, 80 F.4th 406, 412 (2d Cir. 2023); *United States v. Myers*, 56 F.4th 595, 599 (8th Cir. 2022); *United States v. Owen*, 51 F.4th at 292 (8th Cir. 2022)). These opinions agreed that a state statute criminalizing positional isomers of cocaine cannot qualify a defendant for ACCA. *See Minter*, 80 F.4th at 412-13 (2d Cir. 2023); *Myers*, 56 F.4th at 599; *Owen*, 51 F.4th at 296. He also pointed to this Court's opinion in *(Justin) Taylor v. United States*, 596 U.S. 845 (2022), which modified or rejected its holding in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). *See* (Appellant's Brief, at **5-6). *(Justin) Taylor*, he noted, rejected any requirement that the defendant show an actual prosecution under an overbroad statute when seeking relief under categorical approach. *See id.* at **18-25.

The government contended that his argument regarding "positional isomers" was foreclosed by binding precedent, Appellee's Brief, in *United States v. Valentine*, No. 25-11183, 2026 WL 1399460, at *10 (5th Cir. May 18, 2026) ("[I]t is 'foreclosed' under this Court's caselaw that Texas Health and Safety Code § 481.112(a) constitutes a 'serious drug offense' under the ACCA[.]") (quoting *United States v. Kerstetter*, No. 22-10253, 2025 WL 1079071, at *3–4 (5th Cir. Apr. 10, 2025) (unpublished), *cert. denied*, No. 25-6432, 2026 WL 490809 (U.S. Feb. 23, 2026)).

The court of appeals affirmed in an unpublished opinion. It said only this about the isomers claim:

> His challenge to the classification of his prior Texas convictions for possession of cocaine with intent to deliver as ACCA qualifying offenses fails under our jurisprudence.

United States v. Valentine, No. 25-11183, 2026 WL 2244202, at *1 (5th Cir. Aug. 4, 2026) (unpublished) (citing *United States v. Clark*, 49 F.4th 889, 891 (5th Cir. 2022); *United States v. Vickers*, 540 F.3d 356, 366 (5th Cir. 2008)); [Appendix B].

Petitioner timely sought rehearing, noting the court's decision to grant rehearing *en banc* in *United States v. Squire*, 182 F.4th 481 (5th Cir. July 20, 2026), *granting reh'g en banc*. The defendant's successful petition for rehearing in *Squire* asked the Fifth Circuit to decide whether 18 U.S.C. §922(g)(1) exceeds Congressional authority under the Commerce Clause of Article I, Section 8. *See* Petition for Rehearing in *United States v. Squire*, 25-30324 (5th Cir. June 16, 2026). Petitioner asked the court to take no action on his Petition until the resolution of *Squire*, but a two Judge quorum denied the petition without comment. *See* [Appendix A].

REASONS FOR GRANTING THE PETITION

I. The courts of appeals are divided on the application of ACCA to a significant group of state drug trafficking statutes.

A. The courts of appeals are divided.

1. Legal Background

The Armed Career Criminal Act works a momentous change in the term of imprisonment for federal gun possession offenses. A person previously convicted of a felony can receive from zero to 15 years imprisonment for the simple possession of a firearm. *See* 18 U.S.C. §§ 922(g)(1), 924(a). And the median firearms sentence, even for defendants who occupy the most serious criminal history category (VI) is six years. *See* U.S. Sentencing Commission, Federal Sentencing Sourcebook, SENTENCE LENGTH IN EACH CRIMINAL HISTORY CATEGORY BY TYPE OF CRIME, Fiscal

Year 2025, Table 27 (2026), *available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2025/Table27.pdf*. But under ACCA, a person previously convicted of three "violent felonies" and/or "serious drug offenses" can receive no less than 15 years and might receive up to life imprisonment. *See* 18 U.S.C. §924(e). The ceiling, in other words, becomes a floor, and the new ceiling is life, the single most severe punishment available in the United States Code other than the death penalty.

Given ACCA's profound impact at sentencing, this Court has been loath to let circuit splits fester in this area of the law. *See (Arthur) Taylor v. United States*, 495 U.S. 575 (1990) (resolving circuit split regarding the definition of burglary under ACCA); *Shepard v. United States*, 544 U.S. 13 (2005) (resolving circuit split regarding documents available to narrow defendant's prior offense statute); *Chambers v. United States*, 555 U.S. 122 (2009) (resolving circuit split regarding application of ACCA to certain escape offenses); *(Curtis) Johnson v. United States*, 559 U.S. 133 (2010) (resolving circuit split regarding application of ACCA to simple battery); *McNeill v. United States*, 563 U.S. 816 (2011) (resolving circuit split about application of ACCA to state drug statutes whose maximum punishments have changed); *Sykes v. United States*, 564 U.S. 1 (2011) (resolving circuit split regarding application of ACCA to evading arrest); *Descamps v. United States*, 570 U.S. 254 (2013) (resolving circuit split regarding application of ACCA to statutes that may be violated by means that do and do not satisfy the definition of a "violent felony"); (*Samuel) Johnson v. United States*, 576 U.S. 591 (2015) (having granted certiorari to resolve circuit split regarding

application of ACCA to prior convictions for possession of sawed-off shotguns, finding a portion of ACCA unconstitutional); *Welch v. United States*, 578 U.S. 120 (2016) (resolving circuit split regarding retroactivity of rule announced in *(Samuel) Johnson*); *Mathis v. United States*, 579 U.S. 500 (2016) (same); *Shular v. United States*, 589 U.S. 154 (2020) (resolving circuit split regarding application of ACCA to certain drug trafficking offenses); *Borden v. United States*, 593 U.S. 420 (2021) (resolving circuit split regarding application of ACCA to offenses involving reckless conduct); *Wooden v. United States*, 595 U.S. 360 (2022) (resolving circuit split regarding application of ACCA's requirement that prior offenses have occurred on separate occasions); *Brown v. United States*, 602 U.S. 101 (2024) (resolving circuit split regarding application of ACCA's "serious drug offense" definition to state statutes that criminalize trafficking of substances that are no longer controlled under federal law, but that were criminalized by federal law at the time of the prior offense).

The federal circuits have divided on an issue regarding ACCA and prior convictions for cocaine trafficking. Specifically, and as noted above, the Second and Eighth Circuits have held that a state statute does not give rise to convictions for a "serious drug offense" if it can be violated by trafficking in any of cocaine's position isomers. *See United States v. Minter*, 80 F.4th 406, 412-13 (2d Cir. 2023); *United States v. Owen*, 51 F.4th 292, 296 (8th Cir. 2022). Barring evidence that someone has actually been prosecuted for trafficking cocaine's positional isomers, the court below and the Sixth Circuit have reached the opposite conclusion. *See United States v. Kerstetter*, 82 F.4th 437, 441 (5th Cir. 2023), *cert. granted, judgment vacated*, 145 S.

Ct. 121, 220 L. Ed. 2d 1 (2024), *on remand United States v. Kerstetter*, No. 22-10253, 2025 WL 1079071, at *3–4 (5th Cir. Apr. 10, 2025) (unpublished), *cert. denied*, No. 25-6432, 2026 WL 490809 (U.S. Feb. 23, 2026); *United States v. Valentine*, No. 25-11183, 2026 WL 2244202, at *1 (5th Cir. Aug. 4, 2026) (unpublished); *United States v. Starling*, 184 F.4th 795, 806–07 (6th Cir. 2026). This division of authority results from conflicting views about the "realistic probability" or "actual case" requirement to the categorical approach. *See Minter*, 80 F.4th at 412-13; *Owen*, 51 F.4th at 296; *Kerstetter*, 2025 WL 1079071, at *3–4; *Starling*, 184 F.4th at 806–07; *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007); *(Justin) Taylor v. United States*, 596 U.S. 845, 858-9 (2022).

ACCA defines "serious drug offenses" as:

> (i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or
>
> (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…

18 U.S.C. §924(e)(2)(B).

This Court has held that a state offense "involving" the acts of trafficking enumerated in Subsection (ii) is one that "necessarily requires" that conduct. *Shular v. United States*, 589 U.S. 154, 162 (2020). As such, a state statute that may be violated without "manufacturing, distributing, or possessing with intent to manufacture or distribute … a controlled substance (as defined in section 102 of the

Controlled Substances Act" does not qualify. *See Shular*, 589 U.S. at 160. This is so whether the defendant actually engaged in that conduct or not. *See id.* What matters is the scope of the defendant's prior statute of conviction, not his past. *See id.*

This "categorical approach," which is also applied when deciding whether an offense constitutes a "violent felony" under ACCA, has three purposes. First, it simply follows the text of ACCA. *See Mathis*, 579 U.S. at 510-11. The definition of "violent felony" asks whether an offense has the use of force "as an element," or asks whether a defendant's "conviction" is for one of a few enumerated offenses. *See Mathis*, 579 U.S. at 510-11. Similarly, the definition of "serious drug offense" asks whether an offense is one "involving" certain conduct, which is to say that it asks whether the offense "necessarily requires" that conduct. *See Shular*, 589 U.S. at 162. These terms thus focus the sentencing court's attention on the scope of a statute, not an individual's conduct.

Second, the categorical approach protects ACCA from constitutional challenge under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and related cases. *See Mathis*, 579 U.S. at 511-12. *Apprendi* holds that any fact other than the fact of a prior conviction that increases the statutory maximum[9] must be proven to a jury beyond a reasonable doubt. *See Apprendi*, 530 U.S. at 490. And while "the fact of a prior conviction" may be decided by a judge, even if it increases the sentencing range, a fact "about a prior conviction" may not be. *See Erlinger v. United States*, 602 U.S. 821, 837 (2024). By carefully limiting the relevant facts to the elements of the prior offense –

[9] Or its minimum. *See Alleyne v. United States*, 570 U.S. 99, 103 (2013).

which were either found by a jury or admitted by the defendant in the past case – the categorical approach avoids this constitutional issue. That is, the categorical approach polices the boundary between "the fact of a prior conviction," which may be found by a judge, and "facts about a prior conviction," which must be found by a jury. *See Mathis*, 579 U.S. at 511-12; *(Arthur) Taylor*, 595 U.S. at 601.

Third, the categorical approach promotes fairness to the defendant. *See Mathis*, 579 U.S. at 512; *(Arthur) Taylor*, 495 U.S. at 601–02. It ensures that all facts that affect the defendant's maximum sentence have been reliably determined in the prior case. *See Mathis*, 579 U.S. at 512. And in cases where the defendant has pleaded guilty pursuant to a plea agreement, it provides him the benefit of that bargain. *See (Arthur) Taylor*, 495 U.S. at 601–02. When a defendant agrees to plead guilty to an offense pursuant to a plea agreement, he reasonably understands that he has admitted its elements. He does not accept the risk that his plea will be treated as a finding or admission of conduct outside those elements. *See id.* ("[I]f a guilty plea to a lesser, nonburglary offense was the result of a plea bargain, it would seem unfair to impose a sentence enhancement as if the defendant had pleaded guilty to burglary.").

The upshot is obvious. Because ACCA employs the categorical approach, a defendant previously convicted of a statute broader than the definition of a "violent felony" or "serious drug offense" can avoid ACCA's enhanced ranges. *See Mathis*, 579 U.S. at 509. However, this Court considered an exception or limitation to the categorical approach in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007). That case

considered the definition of "aggravated felony" for the purposes of immigration and removal cases, specifically the portion of the definition referring to "a theft offense." 8 U.S.C. §1101(a)(43)(G); *see Duenas-Alvarez*, 549 U.S. at 185. This Court has also used the categorical approach when construing parts of this definition. *See Leocal v. Ashcroft*, 543 U.S. 1 (2004).

Duenas-Alvarez employed the categorical approach in construing the term "theft offense," but it cautioned that an overbroad statute would not exempt an alien from the consequences of an "aggravated felony" if the overbreadth was merely "theoretical" or an exercise of "legal imagination." *Id*. at 193. Rather, it insisted on a "realistic probability" of prosecution for conduct falling outside the definition of an "aggravated felony," as shown by a prior reported case. *Id.* Mr. Duenas-Alvarez argued that his prior California conviction for vehicular theft fell outside the definition of a "theft offense," and for support, relied on state-court opinions that broadly defined aiding and abetting liability under the statute. *See id*. at 193-94. This Court rejected the argument, finding that prosecution for conduct falling outside the "generic" definition of "theft" was merely theoretical, and unsubstantiated by a reported case. *See id.*

But subsequent caselaw has limited the actual case requirement of *Duenas-Alvarez*. In *(Justin) Taylor*, 596 U.S. 845 (2022), this Court held that attempted robbery under the Hobbs Act, 18 U.S.C. §1951(a), does not amount to a "crime of violence" under 18 U.S.C. §924(c)(3)(A). Section 924(c) provides a five-year minimum term of imprisonment when the defendant uses or possesses a firearm in connection

with a "crime of violence." And it defines a "crime of violence" to include, *inter alia*, all crimes that have the threatened use of force "as an element." 18 U.S.C. §924(c)(3)(A)(i). The government argued that attempted robbery ought to qualify as a "crime of violence," relying on *Duenas-Alvarez* and the actual case requirement. *See (Justin) Taylor*, 596 U.S. at 857. Mr. Taylor, the government argued, pointed to no actual Hobbs Act attempted robbery prosecutions lacking a threat of physical force. *See id*. This Court disagreed with that assessment, but it also offered five separate reasons that the defendant should not have to offer an actual case to show that the relevant statute lacks the threatened use of force as an element. *See id.* at 857-860.

First, this Court noted "the oddity of placing a burden on the defendant to present empirical evidence about the government's own prosecutorial habits." *Id.* at 857.

Second, this Court observed that an actual case requirement would create "practical challenges . . . in a world where most cases end in plea agreements, and not all of those cases make their way into easily accessible commercial databases." *Id.* (citing J. Turner, *Transparency in Plea Bargaining*, 96 Notre Dame L. Rev. 973, 974, 978–981 (2021)).

Third, this Court thought that the language of § 924(c)(3)(A) was simply inconsistent with an actual-case requirement. *See id.* at 857-858. Section 924(c)(3)(A), it noted, requires force "as an element," which means that force (actual, attempted, or threatened) must be proven in every case, not just in every realistically probable or reported case. *See id.* The Court explained:

> [a]n even more fundamental and by now familiar problem lurks here. The government's theory cannot be squared with the statute's terms. To determine whether a federal felony qualifies as a crime of violence, § 924(c)(3)(A) doesn't ask whether the crime is ***sometimes*** or even ***usually*** associated with communicated threats of force (or, for that matter, with the actual or attempted use of force). It asks whether the government must prove, as an ***element*** of its case, the use, attempted use, or threatened use of force.

Id. (italics in original, bold added).

Fourth, this Court noted that *Duenas-Alvarez* involved the comparison of a state statute to a federal definition. *See id.* at 858-859; *Duenas-Alvarez*, 549 U.S. at 185. Again, *Duenas-Alvarez* involved an alien seeking relief from an aggravated-felony designation, which extended to those convicted of a "theft offense." *See Duenas-Alvarez*, 549 U.S. at 190-191. The *(Justin) Taylor* court distinguished *Duenas-Alvarez* because it involved a comparison between a state statute and a federal definition of "aggravated felony," whereas *(Justin) Taylor* involved a comparison of a federal statute to a federal definition. *(Justin) Taylor*, 596 U.S. at 858-859. In this circumstance, the *(Justin) Taylor* court explained, "it made sense to consult how a state court would interpret its own State's laws," in order to give the "the respect due state courts as the final arbiters of state law in our federal system." *Id.* at 859. But it saw no comparable federalism concerns at play when a federal court compared a federal definition to a federal statute. *See id.*

Fifth and finally, the *(Justin) Taylor* opinion noted another basic difference between the case before it and *Duenas-Alvarez*. *See id.* at 859. In *Duenas-Alvarez*, the statute appeared facially to fall within the relevant definition and was only theoretically overbroad. *See id.* By contrast, the plain language of the Hobbs Act

defined attempted robbery in a way that fell outside the definition of a "crime of violence" in §924(c)(3)(A). *See id.* The *(Justin) Taylor* court said:

> In *Duenas-Alvarez* the elements of the relevant state and federal offenses clearly overlapped and the only question the Court faced was whether state courts *also* "appl[ied] the statute in [a] special (nongeneric) manner." 549 U.S. at 193, Here, we do not reach that question because there is no overlap to begin with. Attempted Hobbs Act robbery does not require proof of *any* of the elements § 924(c)(3)(A) demands. That ends the inquiry, and nothing in *Duenas-Alvarez* suggests otherwise.

Id. (partial internal citation omitted).

> Summing up, the *(Justin) Taylor* court concluded that:
>
> In § 924(c)(3)(A), Congress did not . . . mandate an empirical inquiry into how crimes are usually committed, let alone impose a burden on the defendant to present proof about the government's own prosecutorial habits.
>
> Congress tasked the courts with a much more straightforward job: Look at the elements of the underlying crime and ask whether they require the government to prove the use, attempted use, or threatened use of force.

Id. at 860.

Notwithstanding this clarifying guidance, the courts of appeals have applied the actual-case requirement differently. *See Minter*, 80 F.4th at 412-13; *Owen*, 51 F.4th at 296; *Kerstetter*, 2025 WL 1079071, at *3–4; *Starling*, 184 F.4th at 806–07. As will be seen, this has resulted in conflicting answers to the question presented.

2. The conflict in the circuits over the question presented

Subsection (ii) of the definition of "serious drug offense" speaks clearly about the substances a prior state offense must "involve" in order to qualify a defendant for ACCA. *See* 18 U.S.C. §924(e)(2)(A)(ii). Specifically, the offense must involve "a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))." *Id.* And the referenced Section of the CSA defines a "controlled substance" as a substance "in schedule I, II, III, IV, or V of part B of this subchapter." 21 U.S.C. §802. In turn, Schedule II includes:

> Coca leaves (9040) and any salt, compound, derivative or preparation of coca leaves (including cocaine (9041) and ecgonine (9180) and their salts, isomers, derivatives and salts of isomers and derivatives), and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, except that the substances shall not include:
>
> (i) Decocainized coca leaves or extraction of coca leaves, which extractions do not contain cocaine or ecgonine;
>
> (ii) [123I]ioflupane; or
>
> (iii) [18F]FP-CIT.

21 C.F.R. §1308.12(b)(4).

Section 13.001 of the same regulations defines the term "isomers" as it is used in the regulation that refers to cocaine. It says that "[a]s used in § 1308.12(b)(4) of this chapter, the term 'isomer' means any **optical or geometric isomer**." 21 C.F.R. § 13.001, "*isomer*" (emphasis added). This is contrasted with the definition of "isomer" used for other parts of the drug schedules (that do not apply to cocaine). Subsection 13.001 says that "[a]s used in § 1308.11(d) a portion of the regulations governing

hallucinogens "of this chapter, the term 'isomer' means any **optical, positional, or geometric isomer**." *Id*. (emphasis added). The contrast between the definition of "isomer" applied to hallucinogens and the definition applied to cocaine demonstrates conclusively that the omission of "positional isomers" from the schedules referring to cocaine is not an accident. A positional isomer of cocaine is not "a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))."

Petitioner suffered conviction under Texas Health and Safety Code 481.112(a), which criminalizes trafficking substances in "Penalty Group I," among them:

> (D) Cocaine, including:
>
> > (i) its salts, its **optical, position, and geometric isomers**, and the salts of those isomers.

Tex. Health & Safety Code §481.102(3)(D) (emphasis added). In other words, Petitioner's prior offense statute explicitly authorizes (and authorized, at the time of the prior offense, *see* Tex. Health & Safety Code §481.102(3)(D)(2001, 2002, 2003)) conviction for trafficking in "position" or "positional" isomers of cocaine. As discussed above, this means that Petitioner's prior statute authorized conviction for trafficking something is not "a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))."

Texas is not alone in criminalizing positional isomers of cocaine. *See* N.Y. Pub. Health Law § 3306, Schedule II(b)(4); 720 ILCS 570/206(b)(4); 19 C.S.R. 30-1.002(1)(B)1 (2000); Minn. Stat. § 152.01, subd. 3; Va. Code § 54.1-3448.1. The federal courts of appeals have divided on the proper application of ACCA to statutes that reach all of cocaine's positional isomers, reflecting their different approaches to the

"actual case" or "realistic probability" requirement. The Second and Eighth Circuits have undertaken a straightforward application of *Shular* and held that such statutes do not trigger ACCA. In *United States v. Minter*, 80 F.4th 406 (2d Cir. 2023), the Second Circuit held that a New York cocaine trafficking statute did not qualify the defendant for ACCA because it reached all of cocaine's positional isomers and was therefore broader than the definition of a "serious drug offense." *See Minter*, 80 F.4th at 412-23. The government sought affirmance, relying on the "realistic probability" test. *Id.* at 412-13. To meet this test, argued the government, the defendant should have to point to an actual case in which the state prosecuted someone for such conduct. *See id.* The Second Circuit disagreed, concluding that if the plain terms of the statute demonstrate overbreadth, an actual case is not necessary. *See id.* at 413.

Likewise, the Eighth Circuit excluded a Minnesota cocaine trafficking from the scope of ACCA. In *United States v. Owen*, 51 F.4th 292 (8th Cir. 2022), that circuit construed Minnesota's definition of cocaine, which included isomers without restriction and accordingly reached a substance not criminalized by the CSA. *See Owen*, 51 F.4th at 295-96. Here too, the government argued that this overbreadth did not show "a realistic probability" of prosecution for non-qualifying conduct; here too, the court rejected the argument, finding that facial overbreadth sufficed. *See id.* at 296. In the Eighth Circuit's view, "[t]he realistic-probability test is about resolving ambiguities." *Id.* And when a statute's plain text demonstrates its overbreadth, there is no ambiguity to resolve. *See id.* A divided panel of the Eighth Circuit reached the

same conclusion with respect to the Missouri statute. *See United States v. Myers*, 56 F.4th 595, 598–99 (8th Cir. 2022).

It is accordingly clear that in two circuits a defendant cannot receive an ACCA sentence by virtue of a state drug statute that criminalizes all of cocaine's positional isomers. This is so whether anyone has actually been prosecuted for trafficking this form of the substance or not. By contrast, the court below has held that the Texas cocaine statute qualifies for ACCA, even though it expressly reaches all of cocaine's "position isomers." *United States v. Kerstetter*, 82 F.4th 437 (5th Cir. 2023), *cert. granted, judgment vacated*, 145 S. Ct. 121 (Oct. 7, 2024), *aff'd on remand* No. 22-10253, 2025 WL 1079071, at *4 (5th Cir. April 10, 2025) (unpublished), *cert. denied* 146 S.Ct. 1662 (Feb. 23, 2026). In *Kerstetter*, an ACCA defendant challenged his sentence on the ground that Texas cocaine trafficking can be committed by trafficking any of cocaine's positional isomers. *See Kerstetter*, 82 F.4th at 441. A panel of the court "recognized . . . that Section 481.102" – the portion of the Texas statute that makes it a crime to traffic illegal drugs in "Penalty Group 1" – "sweeps more broadly than its federal counterpart by defining the term cocaine to include the position isomers of cocaine." *Id.* (citing *Alexis v. Barr*, 960 F.3d 722, 726–27 (5th Cir. 2020)).

Under Fifth Circuit law, however, the *Kerstetter* panel was constrained to affirm because "Kerstetter . . . did not identify any actual cases where Texas brought charges against someone under Section 481.112(a) for delivery of position isomers of cocaine." *Id.* (citing *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007); *United States v. Herrold*, 941 F.3d 173, 182 (5th Cir. 2019) (*en banc*)). Indeed, the *en banc*

Fifth Circuit has repeatedly held that a defendant must always point to an actual case in which someone suffered conviction for conduct that does not satisfy the definition of a qualifying offense, with no exception for cases involving facially overbroad statutes of conviction. *See United States v. Castillo-Rivera*, 853 F.3d 218, 223 (5th Cir. 2017)(en banc) ("There is no exception to the actual case requirement articulated in *Duenas-Alvarez* where a court concludes a state statute is broader on its face."); *accord Herrold*, 941 F.3d at 179.

This Court vacated *Kerstetter* on other grounds. *See Kerstetter v. United States*, 145 S. Ct. 121 (October 7, 2024) (remanding in light of *Erlinger, supra*). But on remand, the Fifth Circuit affirmed Kerstetter's sentence a second time. *See Kerstetter*, 2025 WL 1079071, at *4. It cited a published Fifth Circuit case holding that Texas cocaine trafficking constitutes a serious drug offense and rejected Kerstetter's argument that *(Justin) Taylor* alters the realistic-probability/actual-case requirement. *See id.* at **3-4 (citing *United States v. Clark*, 49 F.4th 889, 892 (5th Cir. 2022)). In its view, *(Justin) Taylor* frees the defendant from the actual case requirement only when the court compares a federal definition to a federal offense statute, but when a court compares a federal definition to a prior state conviction, the requirement persists. *See id.* at *4 (distinguishing *(Justin) Taylor*). Indeed, it pointed to Fifth Circuit caselaw applying the requirement to a state statute after *(Justin) Taylor*. *See id.* (citing *Ponce v. Garland*, 70 F.4th 296 (5th Cir. 2023)). It said:

> Unlike *Taylor*, we do not need to compare two federal statutes; this case involves a state statute and a federal statute, where "federalism concern[s] are in play." Moreover, even after *Taylor*, we have applied the realistic-probability test that stems from *Duenas-Alvarez*.

Id. (quoting *(Justin) Taylor* and citing *Ponce*) (internal citation omitted). And a subsequent published opinion issued in the Guideline context confirmed that the Fifth Circuit "continue(s) to apply that realistic probability test to state court convictions, but application to federal statutes should no longer apply as made clear by the Supreme Court and referenced by us." *United States v. Minor*, 121 F.4th 1085, 1093, n.9 (5th Cir. 2024) (citing *Kerstetter*, 82 F.4th at 440-41).

In the present case, Petitioner argued that *Kerstetter* was wrongly decided, pointing out that this Court's decision in *Justin (Taylor)* rested on much more than a federalism rationale. *See*

Appellant's Brief in *United States v. Valentine*, No. 25-11183, 2026 WL 811809, at **6, 18-21 (5th Cir. Mar. 23, 2026) ("Appellant's Brief"). *Justin (Taylor)*, he noted, rejected the actual case requirement on multiple additional grounds unrelated to federalism: (1) "the oddity of placing a burden on the defendant to present empirical evidence about the government's own prosecutorial habits," Appellant's Brief, at *18 (citing *(Justin) Taylor*, 596 U.S. at 857); (2) the difficulty of proving what cases are actually charged given the ubiquity of plea bargaining, *see id*. at *19 (citing *(Justin) Taylor*, 596 U.S. at 857); (3) the language of definitions that require specified conduct in every case, *see id*. (citing *(Justin) Taylor*, 596 U.S. at 857); and (4) the tendency of facially overbroad statutes to show a realistic probability of prosecution by their plain text, *see id*. at **20-21 (citing *(Justin) Taylor*, 596 U.S. at 859). He noted the view of the Second, Seventh and Eighth Circuits, *see id*. at **14-15 (citing *Minter*, *supra*; *Myers*, *supra*; *Owen*, *supra*, and *Ruth*, *supra*), and pointed to documents presented in

district court showing that some defendants had pleaded guilty to possessing positional isomers of cocaine, *see id*. at *****28.

In response, the Fifth Circuit simply cited one of its own published cases holding that the Texas statute constitutes a "serious drug offense." *See United States v. Valentine*, No. 25-11183, 2026 WL 2244202, at *1 (5th Cir. Aug. 4, 2026) (unpublished) (citing *Clark*, 49 F.4th at 891). It thus accepted the government's representation that the issue was "foreclosed." Appellee's Brief, in *United States v. Valentine*, No. 25-11183, 2026 WL 1399460, at *10 (5th Cir. Filed May 18, 2026)("[I]t is 'foreclosed' under this Court's caselaw that Texas Health and Safety Code § 481.112(a) constitutes a 'serious drug offense' under the ACCA.") (quoting *Kerstetter*, 2025 WL 1079071, at *3-4).

The Sixth Circuit recently took the same position as the Fifth, dealing with a case involving a prior Tennessee conviction. In *United States v. Starling*, 184 F.4th 795 (6th Cir. 2026), the defendant challenged his ACCA sentence on the ground that Tennessee criminalized trafficking in all of cocaine's positional isomers. *See Starling*, 184 F.4th at 802. The Sixth Circuit did not read the Tennessee statute that way and accordingly rejected the argument. *See id*. at 805. Alternatively, however, it pointed to the realistic-probability test, stating that "[a] defendant can show a realistic probability by pointing to his own convictions, or by citing other state cases in which the state prosecuted the conduct at hand." *Id.* at 806. It did not think that Tennessee plainly encompassed cocaine's positional isomers but said that "even if we deemed the question a closer call than that, the realistic-probability test would apply, and

Starling disclaimed any effort to meet it here." *Id*. at 806-07. It is accordingly clear that the Sixth Circuit would reject any reliance on positional isomers to defeat a cocaine trafficking predicate absent evidence of an actual positional isomers prosecution.

In short, the Second and Eighth Circuits have taken the opposite position from the Fifth and Sixth Circuits. There is a clear and irreconcilable division of authority, squarely implicating Supreme Court Rule 10.

B. The decision below is wrong on the merits.

As this Court has construed ACCA's definition of a "serious drug offense," a violation of a qualifying state statute must necessarily entail or require the trafficking of a controlled substance as defined by the CSA. *See Shular*, 589 U.S. at 162. The CSA defines cocaine and its optical and geometric isomers as a controlled substance – it does not reach all of cocaine's positional isomers. *See* 21 U.S.C. §802; 21 C.F.R. §§13.001, 1308.12(b)(4). It follows, therefore, that statutes like Texas's – which expressly criminalize trafficking in all "position isomers" of cocaine, *see* Tex. Health & Saf. Code §481.102(3)(D) – do not "necessarily require" or entail the trafficking of a "controlled substance" as defined by the CSA.

The rationales behind the categorical approach plainly support exclusion of the Texas offense. First, it is mandated by the language of §924(e)(2)(A)(ii), the portion of ACCA which defines "serious drug offenses." As this Court has construed that definition, it captures only those statutes that "necessarily require" trafficking in a

federal controlled substance. *Shular*, 589 U.S. at 162. The Texas statute does not meet this test.

Second, Petitioner has never been offered a right to a jury trial on the question of whether he trafficked in cocaine as defined by federal law. For a judge to find as much now, however likely it may be in fact, would allow judicial fact-finding to increase the statutory maximum and minimum. *See Mathis*, 579 U.S. at 511-12; *(Arthur) Taylor*, 595 U.S. at 601.

Finally, and relatedly, Petitioner pleaded guilty to this offense on the understanding that he admitted its elements, nothing more. Now, however, that guilty plea has been treated as an admission of a non-elemental fact: his guilt for trafficking a federally controlled substance. That dishonors his plea agreement. *See (Arthur) Taylor*, 495 U.S. at 601–02.

The court below has nonetheless required Petitioner, and Kerstetter before him, to produce an actual case of prosecution for trafficking in the positional isomers of cocaine. *See Kerstetter*, 2025 WL 1079071, at *3–4. This is not consistent with this Court's guidance in *(Justin) Taylor*. Whatever continued validity *Duenas-Alvarez* may have after *(Justin) Taylor*, it has no applicability in cases like this where some portion of the defendant's statute criminalizes *only* non-qualifying conduct. This Court's opinion in *(Justin) Taylor* is perfectly clear on this point. It said:

> [I]n *Duenas-Alvarez* the elements of the relevant state and federal offenses clearly overlapped and the only question the Court faced was whether state courts *also* "appl[ied] the statute in [a] special (nongeneric) manner." Here, we do not reach that question because there is no overlap to begin with.

(Justin) Taylor, 596 U.S. at 859 (quoting *Duenas-Alvarez*, 549 U.S. at 193) (internal citation omitted). The portion of the Texas statute criminalizing the trafficking of cocaine's positional isomers does not "overlap" with the definition of a "serious drug offense" – *nobody* who traffics a positional isomer of cocaine engages in conduct that would fall within the definition of a "serious drug offense." Under *(Justin) Taylor*, therefore, the statute does not trigger the actual-case requirement.

Further, *(Justin) Taylor* limits the actual case requirement to enhancements involving an enumerated or "generic" offense. *(Justin) Taylor*, 596 U.S. at 857-58. Some enhancements, like the portion of ACCA naming "burglary, arson, or extortion," qualify the defendant for a higher sentence if he has a conviction equivalent to a named offense. 18 U.S.C. §924(e)(2)(B)(ii); *see also* USSG §4B1.2(a)(2). In cases of that sort, this Court has instructed the courts to synthesize a "generic" definition of the named offense from the majority of state codes bearing this name, then to compare it to the defendant's prior statute of conviction. *See (Arthur) Taylor*, 495 U.S. at 589 (requiring courts to synthesize a "generic" enumerated offense from "a majority of the States' criminal codes"). In such cases, courts applying the definition necessarily enjoy some flexibility in deciding whether a defendant's prior statute of conviction will qualify. The equivalence of the statute to the definition may be "rough," and "minor variations in terminology" are tolerated. *See id.* at 589, 599 (requiring only that defendant's prior statute of conviction "roughly correspond" to the generic definition, with room for "minor variations in terminology").

By contrast, a definition that requires the threatened use of force "as an element," 18 U.S.C. §924(e)(2)(B)(i), or that reaches only statutes "involving" a specified act of drug trafficking, §924(e)(2)(A)(ii), do not create such flexibility. They *require* the named acts (using, attempting or threatening physical force, or distributing, manufacturing, or possessing with intent to distribute or manufacture a federally controlled substance) in literally every case. *(Justin) Taylor* is clear on this point as well:

> The government's theory cannot be squared with the statute's terms. To determine whether a federal felony qualifies as a crime of violence, § 924(c)(3)(A) doesn't ask whether the crime is *sometimes* or even *usually* associated with communicated threats of force (or, for that matter, with the actual or attempted use of force). It asks whether the government must prove, as an element of its case, the use, attempted use, or threatened use of force.

(Justin) Taylor, 596 U.S. at 857–58 (emphasis in original).

Duenas-Alvarez involved a portion of the "aggravated felony" definition that captured "a theft offense." *See Duenas-Alvarez*, 549 U.S. at 185. And because the definition of a "theft offense" is not precise, it must be synthesized from numerous state codes. As such, a statute might show some minor or theoretical differences from "generic theft" and still constitute a "theft offense." But *(Justin) Taylor* makes clear that *Duenas-Alvarez* does not extend to other definitions that do not depend on enumerated or generic offenses. When a definition requires threatened force "as an element," that conduct must be present in literally every possible case arising under the statute. *(Justin) Taylor*, 596 U.S. at 857–58. Similarly, the definition of "serious

drug offense" captures only those statutes that "necessarily require" a federally controlled substance in every possible case. *Shular*, 589 U.S. at 162.

Two more parts of *(Justin) Taylor*'s rationale call *Duenas-Alvarez* into question in essentially every case. This Court noted the "oddity" that a defendant should shoulder the burden to demonstrate the prosecution's charging practices. *(Justin) Taylor*, 596 U.S. at 857. And it questioned whether anyone could obtain meaningful information about what kinds of cases state charge when so few cases go to trial. *See id.*

Out of all this, the Fifth Circuit has synthesized a simple rule: the actual-case requirement applies unless the court is comparing a federal definition to a federal criminal statute. *See Kerstetter*, 2025 WL 1079071, at *4; *see also Minor*, 121 F.4th at 1093, n. 9. This is obviously incorrect. To be sure, *(Justin) Taylor* distinguished *Duenas-Alvarez* on the ground that it involved a state statute rather than two federal statutes. *See (Justin) Taylor*, 596 U.S. at 858-59. But this was only one of its many rationales. *See id.* at 857-59. The Fifth Circuit simply ignored most of what this Court said on this case's controlling issue. Even were there no circuit split, this alone would justify certiorari and reversal. *See* Sup. Ct. R. 10(c)(certiorari warranted where "a United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court."); *Spears v. United States*, 555 U.S. 261 (2009).

C. The division of authority merits review.

As discussed at the outset of the Petition, application of ACCA is a life-changing matter for the affected defendants and transforms a maximum sentence of 15 years (and a median sentence of six) into a minimum sentence of 15 years and a maximum of life. The United States uses this statute more than 200 times a year. *See* U.S. Sent'g Comm'n, *Quick Facts: Mandatory Minimum Penalties* (FY2021), *available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Mand_Mins_FY21.pdf*; U.S. Sent'g Comm'n, Quick Facts: *Mandatory Minimum Penalties* (FY2022), *available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Mand_Mins_FY22.pdf*. And the statutes implicated by the question present come from some of the country's most populous states – Texas, New York, Illinois, Virginia, Minnesota, and Missouri – meaning they are likely to arise in a substantial number of ACCA cases.

The simple human stakes of the question presented warrant the resolution of the circuit split. In addition, however, the question presented implicates a broader and more significant jurisprudential question: whether and when to apply the "actual case requirement" in cases involving the categorical approach. The two sides of the circuit split have reached differing conclusions on this point and can be expected to continue doing so. *See Minter*, 80 F.4th at 412-13; *Owen*, 51 F.4th at 296; *Kerstetter*, 2025 WL 1079071, at *3–4; *Starling*, 184 F.4th at 806–07. Certainly, the court below shows absolutely no sign of retreat from the actual-case requirement, save for cases involving a comparison of a federal offense statute to a federal definition. *See*

Kerstetter, 2025 WL 1079071, at *4; *Minor*, 121 F.4th at 1093, n. 9; *Ponce*, 70 F.4th at 301. This Court should correct the court below in its clearly erroneous reading of *(Justin) Taylor*.

D. The present case is an ideal vehicle.

Petitioner has preserved the issue in detail in both district court, *see* (ROA.45-54), and the court of appeals, *see* (Appellant's Brief, at **8-31). He presented the court of appeals with all the rationales overlooked in in *(Justin) Taylor* but to no avail. *See* (Appellant's Brief, at **18-22). He introduced records in district court showing that some defendants have pleaded guilty to simple possession of cocaine's positional isomers. *See* (ROA.65-76). This, too, did not move the court below. It cannot be said that any more detailed or thorough presentation of the issue to the court below could produce a different result.

Nor should the Court await a case involving a prior conviction from a different state. The Texas statute presents the issue with the utmost particularity – it expressly names the "position isomers" of cocaine as an illicit substance. *See* Tex. Health & Safety Code §481.102(3)(D). This makes the present case a superior vehicle to any arising from a statute that refers to "isomers" generally, which potentially implicate underlying arguments about the scope of the state statute. *Compare* N.Y. Pub. Health Law § 3306, Schedule II(b)(4).

II. In the event that it does not grant certiorari on the first question presented, this Court should hold the instant Petition pending the Fifth Circuit's en banc decision in *United States v. Squire*, 182 F.4th 481, 482 (5th Cir. 2026).

The federal government's enumerated powers are "few and defined," while the powers which remain in the state governments are "numerous and indefinite." *Lopez*, 514 U.S. at 552 (citing The Federalist No. 45, pp. 292–293 (C. Rossiter ed. 1961)). One such enumerated power is "[t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. But without limits on federal regulatory power, our nationwide regulation would become "for all practical purposes . . . completely centralized" in a federal government. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 548 (1935).

As the Fifth Circuit has interpreted 18 U.S.C. §922(g)(1), it requires nothing more than possession of a firearm that has once across state or national borders at an unspecified time. *See United States v. Rawls*, 85 F.3d 240, 242 (5th Cir. 1996). It is difficult to see what outer limits could be placed on Congressional authority were this a sufficient nexus to interstate commerce. And, indeed, the Fifth Circuit will shortly decide whether a defendant may be prosecuted under 18 U.S.C. 922(g)(1) if this is all the government need show.

On July 20, 2026, the en banc Fifth Circuit granted a petition for rehearing in *United States v. Squire* to consider whether its precedent "is based on an erroneous reading of *Scarborough v. United States*, 431 U.S. 564 (1977)." Petition for Reh'g, ECF No. 75, *United States v. Squire*, No. 25-30324 (5th Cir. June 16, 2026); *United States v. Squire*, 182 F.4th 481, 482 (5th Cir. 2026), *granting reh'g en banc.*

This Court should hold this Petition to await the Fifth Circuit's en banc ruling in *Squire*. "Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is, we believe, potentially appropriate." *Lawrence on Behalf of Lawrence v. Chater,* 516 U.S. 163, 167 (1996). These intervening events may include "a wide range of developments, including our own decisions, State Supreme Court decisions, new federal statutes, administrative reinterpretations of federal statutes, new state statutes, changed factual circumstances, and confessions of error or other positions newly taken by the Solicitor General, and state attorneys general." *Id.* at 166–67 (cleaned up) (citing *Conner v. Simler*, 367 U.S. 486 (1961); *Schmidt v. Espy*, 513 U.S. 801 (1994); *Sioux Tribe of Indians v. United States*, 329 U.S. 685 (1946); *Louisiana v. Hays*, 512 U.S. 1230 (1994); *NLRB v. Federal Motor Truck Co.*, 325 U.S. 838 (1945); *Wells v. United States*, 511 U.S. 1050 (1994); *Reed v. United States*, 510 U.S. 1188 (1994); *Ramirez v. United States*, 510 U.S. 1103 (1994); *Chappell v. United States*, 494 U.S. 1075 (1990); *Polsky v. Wetherill*, 403 U.S. 916 (1971); *Cuffle v. Avenenti,* 498 U.S. 996 (1990); *Nicholson v. Boles,* 375 U.S. 25 (1963)).

The forthcoming decision in *Squire*, a controlling and likely material decision of a lower court, falls comfortably within this framework. If Mr. Squire prevails in invalidating the statute facially, it will obviously demonstrate plain error here. "A

conviction based upon an unconstitutional statute is both 'plain' and 'error.'" *United States v. Coil*, 442 F.3d 912, 916 (5th Cir. 2006). Even if he prevails only in establishing that the statute may be amenable to as-applied challenge, this will likely establish plain error in the instant case. The record here shows nothing more than bare possession in Petitioner's car and his home with no evidence of a commercial transaction, recent movement in commerce (interstate or otherwise), or possession at a place where commerce occurs. *See* (PSR, at ¶¶6-8); (ROA.105). If there are any limits on §922(g)(1) related to commerce, they would doom this conviction. In the event that it does not grant certiorari on the first question presented, this Court should hold the instant Petition pending the Fifth Circuit's en banc decision in *Squire*. If the Fifth Circuit rules for Mr. Squire, this Court should then grant certiorari, vacate the judgment below, and remand for reconsideration in light of *Squire*.

CONCLUSION

Petitioner asks this Court to grant certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 19th day of November, 2026.

JASON D. HAWKINS
Federal Public Defender
Northern District of Texas

/s/ Taylor Wills Edwards "T.W." Brown
Taylor Wills Edwards "T.W." Brown
Assistant Federal Public Defender
Northern District of Texas
P.O. Box 17743
819 Taylor Street, Room 9A10
Fort Worth, TX 76102
(817) 978-2753
Taylor_W_Brown@fd.org
Texas Bar No. 24087225

Attorney for Petitioner