Appeal No. 21-2621

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,
Appellant
v.
JAMAR LEWIS,
Appellee.

On appeal from the U.S. District Court for the District of New Jersey
No. 20-583, Chief Judge Freda L. Wolfson

Brief of Amici Curiae National Association of Criminal Defense Lawyers; American Civil Liberties Union Foundation; American Civil Liberties Union Foundations of Delaware, New Jersey, and Pennsylvania, In Support of Defendant-Appellee

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Interest of the Amici Curiae

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. Founded in 1958, NACDL has a nationwide membership of nearly 10,000 direct members, and up to 40,000 with affiliates. NACDL is the only nationwide professional bar association that includes public defenders and private criminal defense lawyers, as well as military defense counsel, law professors, and judges.

NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, assisting courts that are weighing issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

This is one such case. The interpretation of "controlled substance offense" the government urges would amplify unfair sentencing disparities and racial inequities of particular concern to NACDL. Thus NACDL has a particular interest in bringing to the Court's attention the implications of

the government's position, as well as its inconsistency with Supreme Court precedent.

The American Civil Liberties Union Foundation (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly two million members and supporters dedicated to the principles of liberty and equality embodied in our nation's Constitution and civil rights laws. The ACLU's Criminal Law Reform Project (ACLU-CLRP) engages in litigation and advocacy throughout the country to protect the constitutional and civil rights of criminal defendants and to end excessively harsh crime policies that result in mass incarceration and criminalization. The ACLU Foundations of Delaware, New Jersey, and Pennsylvania are the ACLU's state affiliates and likewise engage in litigation and advocacy to protect the rights of criminal defendants and combat mass incarceration in New Jersey, Pennsylvania, and Delaware. Amici have a strong interest in the outcome of this litigation and respectfully submit that their perspective will aid this court's deliberations.[1]

[1] No counsel for a party authored any portion of this Brief; no party nor party counsel contributed money toward preparing or submitting this

Both parties have consented to the filing of this memorandum.

Brief; and no person other than counsel to the amicus curiae contributed money toward funding or preparing this Brief.

Corporate Disclosure Statement

Amici Curiae the National Association of Criminal Defense Lawyers, the American Civil Liberties Union-Criminal Law Reform Project, and the ACLU of Delaware, New Jersey, and Pennsylvania Foundations are non-profit entities that do not have parent corporations. No publicly held corporation owns 10 percent of more of any stake or stock in *amici curiae*.

/s/ *Davina T. Chen*
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Introduction

The government frames the issue on appeal as whether federal or state law should govern the definition of "controlled substance" under USSG § 4B1.2. Jamar Lewis's brief persuasively explains that federal law provides the only consistent standard, that this standard is required by the Guidelines text, and that adopting this standard makes good sense. Mr. Lewis's brief further explains why, even if the standard were defined by state law, he would still prevail.

Amici write to unpack just how radical the government's position is—it would require this Court to abandon the categorical approach—and to explain the negative impacts that would have. Merely rejecting the federal definition would not resolve this appeal because, as the government acknowledges, New Jersey does not criminalize hemp now and it did not criminalize hemp when Mr. Lewis was sentenced in this case. Moreover, changes in New Jersey law mean that the government would not prevail under a strict state-law definition. And choosing a dictionary definition—even one defining "controlled substance" as broadly as any "drug regulated by law"—would not resolve anything. We would

still have to define "drug," what it means to be "regulated," and what "law" we are talking about.

The problem for the government is that low-THC marijuana—hemp—would not qualify under any uniform definition of "controlled substance." To win, the government needs this Court to adopt no uniform definition at all, but rather to accept that any substance a jurisdiction controlled when a person was convicted of violating precisely that control is a "controlled substance."

That is untenable. This case calls for application of the categorical approach, which requires comparison to "some uniform definition independent of the labels employed by the various States' criminal codes." *Taylor v. United States*, 495 U.S. 575, 592 (1990). Under the government's approach, the only thing the Court would compare a conviction to would be the very law under which the conviction was obtained. That is, the only way the government wins is for this Court to abandon the categorical approach altogether. This Court cannot do that. Even if it were permissible, it would not be wise: it would extend the reach of the most problematic and racially disparate Guidelines enhancements to people with prior convictions for conduct that is now legal.

I. The Government's Position Abandons the Categorical Approach.

The government expressly argued to the district court that it should not apply the categorical approach because that would needlessly complicate the Court's inquiry. JA7 at n.4; Appellee Br. 6, 33. In this Court, the government has changed tack. Now, it purports to accept that the issue "no doubt requires application of the much-maligned categorical approach." Gov. Br. 10. But really, the government's position has not changed at all. It is proposing the same non-test it proposed below: a state conviction is for a "controlled substance offense" if the state controlled the substance at the time of the prior conviction—which of course it did, since otherwise there would not be a conviction. The only difference is that, now, the government does not acknowledge that this approach is not actually the categorical approach. None of the cases the government cites as support for its position, Gov. Br. 14-17, goes this far. This Court must not, either.

A. The government's position is incompatible with the categorical approach.

It is well-established that the categorical approach governs this Court's analysis of whether a conviction is for a "controlled substance

offense" in USSG §§ 2K2.1(a), 4B1.2(b). *See, e.g.*, *United States v. Williams*, 898 F.3d 323, 333 (3d Cir. 2018).[2]

The categorical approach is a means of determining whether a prior conviction fits within a particular recidivist (or immigration) category with reference to statutory elements, rather than facts. It has two building blocks: a category with uniform, ascertainable parameters that serves as the standard; and a comparison between that standard and the elements of a prior conviction. This is true whether the standard is a generic offense, *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016) (burglary); an element that a statutory crime must contain, *Stokeling v. United States*, 139 S. Ct. 544, 550 (2019) (the force clause); or some "other criterion" that the elements of a statutory crime must "necessarily entail," *Shular*, 140 S. Ct. at 784

[2] *Accord United States v. Abdulaziz*, 998 F.3d 519, 522 (1st Cir. 2021); *United States v. Townsend*, 897 F.3d 66, 72-73 (2d Cir. 2018); *United States v. Campbell*, 22 F.4th 438, 441 (4th Cir. 2022); *United States v. Hinkle*, 832 F.3d 569, 572 (5th Cir. 2016); *United States v. Havis*, 927 F.3d 382, 384-85 (6th Cir. 2019) (en banc); *United States v. Smith*, 921 F.3d 708, 713 (7th Cir. 2019); *United States v. Henderson*, 11 F.4th 713, 716 (8th Cir. 2021); *United States v. Bautista*, 989 F.3d 698, 705 (9th Cir. 2021); *United States v. Madkins*, 866 F.3d 1136, 1144-45 (10th Cir. 2017); *United States v. Shannon*¸ 631 F.3d 1187 (11th Cir. 2011); *cf. Shular v. United States*, 140 S. Ct. 779, 783 (2020) (categorical approach applies to "serious drug offense" enhancement).

(manufacturing, distributing, or possessing with intent to manufacture or distribute). With every iteration of the categorical approach, the Court explains that a state's label does not suffice. *Mathis*, 136 S. Ct. at 2251; *Stokeling*, 139 S. Ct. at 550-55; *Shular*, 140 S. Ct. at 783, 784.

The government's approach lacks either building block: it does not define a uniform category, and it does not conduct any sort of comparison. The government's position is: "anything goes"—that is, everything that a state has ever prosecuted as a controlled substance *is* a "controlled substance," without the need for any analysis at all.

As Mr. Lewis discusses in his principal brief at 21–22, this is utterly incompatible with the Supreme Court's (and this Court's) articulation of the categorical approach. In the Supreme Court's myriad burglary-related ACCA cases, the fact that a state called an offense "burglary" was just the start of the analysis.[3] And contrary to the government's suggestion, *see* Gov. Br. 12, this is not unique to the enumerated-offenses context. The

[3] *Quarles v. United States*, 139 S. Ct. 1872, 1875 (2019); *United States v. Stitt*, 139 S. Ct. 399, 404 (2018); *Mathis*, 136 S. Ct. at 2248, *Descamps v. United States*, 570 U.S. 254, 258 (2013); *Shepard v. United States*, 544 U.S. 13, 17 (2005); *Taylor*, 495 U.S. at 599.

Supreme Court has held that the force clause (relevant to ACCA, § 4B1.2(a)(1), and § 924(c) cases, among others) does not encompass everything a state labels "force." *Stokeling*, 139 S. Ct. at 550-55. And in the context of ACCA's reference to "manufacturing, distributing, or possessing with intent to manufacture or distribute" a controlled substance, the statutory offense must "necessarily entail" one of these actions. *Shular*, 140 S. Ct. at 784–85. Although the Court has not yet defined the parameters of those actions, the notion that an offense must "necessarily entail" particular conduct confirms that in this context, as in the burglary and force-clause context, there *are* parameters. *See id.*

Again, with the categorical approach, there is always a uniform standard (a category), and there is always an elements-based comparison of the conviction in question against that standard. It is never true that whatever the state calls [fill in the blank] qualifies—much less whatever a state *previously called* [fill in the blank].

B. Under any iteration of the categorical approach, the government loses.

The government's failure to propose a uniform standard or to conduct any comparison is understandable: under any reasonable articulation of the categorical approach, Mr. Lewis wins.

In the district court, the government expressly conceded that, if the court used federal law as the comparator, it must look to the law at the time of the federal sentencing. JA20 & n.11; Appellee Br. 7, 38, 42, 45, 51. It could hardly argue otherwise: the federal schedules are updated continually—with substances frequently added and rarely removed[4]—and choosing any other timeframe as the comparator would mean that substances the federal government was late to control would not be considered "controlled substances" under the federal sentencing guidelines. The government also conceded that, if the Court compares the "controlled substance" element of Mr. Lewis's prior conviction to the

[4] *DEA List of Scheduling Actions, Chronological Order* (November 18, 2021), https://www.deadiversion.usdoj.gov/schedules/orangebook/b_sched_chron.pdf. The continually changing federal controls also explain why no one is arguing that the schedules that apply are those that were in effect in 1987, the year § 4B1.3 was promulgated.

current federal definition of "controlled substance," the conviction is overbroad.

But the same is also true for any other comparison on the table: under any reasonable articulation of the categorical approach, a conviction that encompassed low-THC marijuana is not a "controlled substance offense."

State law comparator. If the comparator is state (rather than federal) law, that just raises a question: state law *when*? And in answering this question, there is no reason the timing issue would work differently with state law versus federal law. Although the government appears to assume that the state schedules from the time of the prior conviction would control, Gov. Br. 33-34, it makes no argument—textual, logical, or otherwise—why that would be the case.

None of the cases the government cites as having used state law for the "controlled substance" comparator, Gov. Br. 14-15 (collecting cases from Fourth, Seventh, Eighth, and Tenth Circuits), has looked to state law *as it existed at the time of the prior conviction*. Each of those cases arose in the context of substances that were always controlled by the state (including at the time of the federal sentencing). And, when confronted with the question whether state marijuana convictions that could have been for

hemp were still "controlled substance offenses" where the state schedules and definitions in effect at the time of the federal sentencing had removed hemp, at least two district courts within the government's preferred circuits have held they were not.. *See United States v. Hawkins*, No. 20-CR-92 (D. Md. Mar. 16, 2021); *United States v. Walton*, No. 20-CR-265 (N.D. Ill. Dec. 22, 2021).[5]

These decisions follow from the fact that, with § 4B1.2, what matters is the law as of the date of sentencing. This is set by Congress, 18 U.S.C. § 3553(a)(4)(ii), and by the Guidelines, USSG § 1B1.11. Thus, the First, Sixth, and Ninth Circuits have held that the comparator for § 4B1.2 purposes is defined as of the date of sentencing. *Abdulaziz*, 998 F.3d at 530-31 & n.7; *United States v. Williams*, 850 F. App'x 393, 400-01 (6th Cir. 2021); *Bautista*, 989 F.3d at 703. Those circuits looked to federal law as the comparator—as this Court should do here—but their rulings on timing were not based on the jurisdiction of the comparator; they were based on the law governing

[5] These are bench rulings. Because the government did not appeal these adverse rulings, no transcript is available.

application of the Guidelines.[6] And beyond § 3553(a)(4)(ii) and § 1B1.11, applying the law that exists at the time of sentencing is sensible. As Mr. Lewis's brief explains, it is only by applying current law that this Court can *include* substances now deemed dangerous, and *exclude* substances now deemed harmless.

So in sum, even if state law were the comparator, the result would be the same as when federal law is the comparator: a prior conviction is a "controlled substance" offense only if it involved a substance that the relevant state or federal law controlled at the time of the federal sentencing. The government acknowledges that both the United States and New Jersey

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[6] Other courts have likewise held that current law—federal or state—precludes convictions that could have been for low-THC hemp from constituting "controlled substance offenses." For example, although the government suggests the Eleventh Circuit has sided with its position on the state-versus-federal question, Gov. Br. 15-16, in one case in the Northern District of Georgia, the government conceded that a prior Georgia marijuana conviction should *not* be considered a "controlled substance offense," "given the ambiguity in these complex legal issues and the authority from other courts (albeit non-binding authority) that exists at this time." *United States v. Williams*, No. 20-CR-85, ECF 63 (N.D. Ga. Dec. 8, 2021). In additional cases in that district, judges have reached the same result over the government's objections. *See, e.g.*, *United States v. Leonard*, No. 20-cr-99, ECF 148 (N.D. Ga. Oct. 7, 2021); *United States v. Spears*, No. 20-cr-20 (N.D. Ga. Feb. 22, 2022). There are no transcripts for these bench rulings, from which the government did not appeal.

redefined marijuana to exclude low-THC marijuana by the time of Mr. Lewis's federal sentencing. *See* Gov. Br. 33–34. Thus, as Mr. Lewis's brief explains, no matter whether federal or state law is the comparator, Mr. Lewis's prior conviction is overbroad.

Dictionary comparator. To be precise, the government does not argue that "controlled substance" is defined by state law per se. Rather, it argues that the phrase is defined according to dictionaries. Gov. Br. 16–18. The dictionary definitions of "controlled substance" refer to "law" in a general sense, it says and that is what gets the government looking not just to federal but also to state law. *See id.* But this just circles back to the problem of timing that the government ignores altogether.

Interestingly, the government is not advocating using a dictionary definition as an independent comparator in a categorical approach. Indeed, the government does not even really settle on a single dictionary definition. It just looks at various definitions to show how broadly "controlled substance" might be interpreted, and from that concludes that no comparison is needed. *See* Gov. Br. 17–18. Perhaps the government recognizes that any definition with parameters—any definition that serves as a category that is reasonably related to § 4B1.2—would not include

hemp. The Seventh Circuit, for example, relies on a dictionary definition: "'any of a category of behavior-altering or addictive drugs, as heroin or cocaine, whose possession and use are restricted by law.'" *United States v. Ruth*, 966 F.3d 642, 654 (7th Cir. 2020) (quoting *The Random House Dictionary of the English Language* (2d ed. 1987)). But low-THC marijuana is neither "behavior-altering" nor "addictive," and its possession and use are no longer "restricted by law." And that is why, as noted above at p. 13, a district court within the Seventh Circuit has held that marijuana offenses that lacked a low-THC exception are not "controlled substance offenses."

The government avoids this snag by advocating a definition that has no parameters: a "controlled substance" is any "drug" that is "regulated by law." Gov. Br. 8, 18. This just creates a definitional loop, because now we need to define "drug"—and should we do that with reference to federal law, state law, or another dictionary? Under federal and New Jersey law, "drug" has a sweeping definition that includes veterinary drugs and dietary supplements. 21 U.S.C. § 321(g)(1); N.J. St. 24:1-1(e). Some dictionary definitions go even farther, such that aspirin, alcohol, or cigarettes would suffice. *See Webster's Third New International Dictionary* (1986) (defining drug as "a substance used as a medicine or in making

medicines for internal or external use" or "a substance other than food intended to affect the structure or function of the body of man or other animal"). Also, the phrase "regulated by law" is sweeping in its breadth; aspirin, alcohol, and cigarettes are all perfectly legal but very strictly regulated. And for both parts of the government's non-definition—"drug" and "regulated by law"—we again have to deal with timing. What timeframe are we pegging these terms to?

The government does not answer any of these questions because it is not proposing that this Court actually define a category with reference to a dictionary any more than with reference to state law or anything else. It just wants this Court to find that dictionary definitions—at least, its preferred definitions—are so broad that they include anything that any state has ever controlled, such that there is no need for any assessment at all: we can just look at the state's label. But again, this is not the categorical approach.

C. The government's discussion of "absurd" results is not about federal law—it is about the categorical approach.

The government devotes the last section of its brief to the notion that defining "controlled substance" with reference to substances controlled

under federal law is absurd, and it trots out a parade of horribles that would follow if this Court sides with Mr. Lewis. But as Mr. Lewis notes at page 34 of his brief, the government's concerns are not about a federal law comparator; they are about the categorical approach writ large.

The government suggests that neither Congress nor the Commission would have intended a rule in which "the drug actually involved and its [actual] quantity wouldn't matter." Gov. Br. 31. But it is always true with the categorical approach that the historical facts do not matter. Indeed, to a large extent, it is *the point* of the categorical approach. Although the approach is not always popular, it plays an important role. Its emphasis on uniformity serves a "principal purpose of the Sentencing Guidelines," which "is to promote uniformity in sentencing imposed by different federal courts for similar criminal conduct." *Hughes v. United States*, 138 S. Ct. 1765, 1774 (2018) (internal quotations omitted). Its exclusive reliance on the elements of the prior conviction, rather than underlying facts, avoids rewriting negotiated pleas and holding time-consuming mini-trials. *Descamps*, 570 U.S. at 259, 270-71. While focusing on the elements results in more people avoiding sentencing enhancements, the categorical "approach is underinclusive by design." *Borden v. United States,* 141 S.Ct. 1817, 1833

(2021). And this under-inclusiveness poses no serious concern in the Guidelines context. If the court concludes based on sufficiently reliable evidence that the conduct at issue was sufficiently serious to warrant it, it could depart or vary upward, as the district court did in this case.

Perhaps the government's absurdity argument is limited to the application of the categorical approach to drug offenses. It decries the notion of finding a state statute overbroad based on differences between the state's drug schedule and the federal schedule by "even the slightest chemical compound." Gov. Br. 31. Indeed, the government complains that, under Mr. Lewis's argument, a statute might be overbroad based on differences between the *definitions* of compounds. Gov. Br. 31.

But we are talking about statutes that criminalize certain chemical compounds and not others. Indeed, they criminalize certain chemical compounds *as statutorily defined*, and not otherwise. To be sure, a comparison of chemical compounds would be absurd if we were assessing burglary. But the categorical approach as to statutes that criminalize specific, defined chemical compounds requires an assessment of *which* compounds the statute criminalizes—just as, with burglary statutes, we have to examine which "structures" the statute includes. With burglary, the

location element is definitional. Just the same, with marijuana, under both state and federal law, the presence of a certain quantity of THC defines the substance.

This Court's opinion in *United States v. Aviles*, 938 F.3d 503 (3d Cir. 2019), which addressed whether certain state convictions were "felony drug offenses" under 21 U.S.C. § 802(44), is instructive. There, this Court compared the defendant's prior Maryland and New Jersey drug convictions against the federal schedules and found that both were overbroad because they included substances that were not federally controlled. *Id.* at 512. Because the documents regarding the Maryland conviction identified no substance, the overbreadth was clear. *Id.* at 515. As to the New Jersey conviction, it made no difference that the drug "actually involved"—heroin—*was* federally controlled. *Id.* at 507. What mattered was that, looking only at the crime's essential elements, the conviction could have been for a non-federally-controlled substance. *Id.* at 512-14.

Aviles illustrates that, unsurprisingly, the categorical approach applies in the controlled-substance context the same way it always does: as an elements-based comparison. *See, e.g., Mathis*, 141 S. Ct. at 2256 (in which it did not matter whether Mr. Mathis had not actually burgled a boat since

the statutory definition of "occupied structure" included boats and other vehicles); *Moncrieffe v. Holder*, 569 U.S. 184, 194 (2013) (in which it did not matter that Mr. Moncrieffe had not actually sold merely a small amount of marijuana for no remuneration because the statute plainly permitted such a prosecution).

So the government's complaints are with the categorical approach itself, not the notion that the category is defined with reference to federal law. If the comparator were state law, we would still be assessing substances (*i.e.* chemical compounds). That comparison would just not be uniform; it would change from state to state. The only way this Court avoids assessing chemical compounds in the context of statutes that criminalize chemical compounds is if it both begins and ends its analysis with the state's decision to label something a "controlled substance" at some point int time. I, the only way the government wins this case is if the Court takes the impermissible step of abandoning the categorical approach altogether.

II. Given the severe, unjustified, and racially disparate consequences of a determination that a prior conviction is a "controlled substance offense" this Court must not interpret § 4B1.2(b) any more broadly than its text requires.

The government's attempt to expand the reach of "controlled substance offense" under § 4B1.2(b) to reach convictions for substances not currently criminalized by either Federal or State law would extend the reach of enhancements that are already among the most problematic in the Guidelines system. Increasing sentences based on prior convictions for "controlled substance offense" is so flawed that the Sentencing Commission itself has called for Congress to remove them from the reach of the career-offender guideline.

No doubt, it is important to interpret all Guidelines terms properly. But the importance of interpreting *this* Guidelines term no more broadly than its text requires is heightened by its severe, unjustified, and racially disparate consequences.

A. Enhancements for prior "controlled substance offenses" have severe, unjustified consequences.

As the government recognizes in its brief, interpreting § 4B1.2(b)'s definition of "controlled substance" to include any substance that any state regulated at any time would expand the reach of the career-offender

guideline (even though Mr. Lewis was not sentenced under it). Gov. Br. 1, 31. This is because the career-offender guideline, § 4B1.1, applies to certain people convicted of a "controlled substance offense" (or crime of violence), who have at least two prior convictions for "controlled substance offenses" (or crimes of violence), as defined in § 4B1.2 . Indeed, the primary purpose of § 4B1.2 is to define the terms of § 4B1.1.

The career offender guideline creates a "category of offender subject to particularly severe punishment." *Buford v. United States*, 532 U.S. 59, 60 (2001). Those deemed "career offenders" receive a special offense level, tied to the statutory maximum for the offense, and are automatically placed in the highest Criminal History Category (CHC): VI. In addition, whereas mitigating role reductions alleviate some of the outsized influence of drug quantity on sentencing, USSG §§ 3B1.2, 2D1.1(a)(5), those categorized as career offenders are excluded from such reductions, § 4B1.1(a)-(b).

As a result, the career offender designation drastically increases guideline ranges: the average sentence imposed on career offenders—150

months[7]—is more than twice the average sentence imposed on non-career offenders: 72 months.[8] Because of the extreme impact of the career-offender guideline, those deemed career offenders comprised over 11% of the federal prison population, even though they are only about 3% of defendants.[9]

This drastic increase is unwarranted. The Commission created the career offender guideline to implement a Congressional directive, 28 U.S.C. § 994(h), that those convicted of a third crime of violence or serious *federal* drug-trafficking offense face severe punishment. But the Commission went far beyond § 994(h), which does not include *any* state drug trafficking offenses.

Expanding the reach of the guideline beyond the select, serious federal drug-trafficking offenses enumerated in the directive to include

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[7] USSC, *Quick Facts: Career Offenders* 2 (May 2020) ("*QF: Career Offenders*")

[8] USSC, Individual Datafiles FY2020 (across the eight major offense types found among career offenders: murder, sexual abuse, assault, robbery, arson, drug trafficking, firearms racketeering/extortion).

[9] USSC, *Report to Congress: Career Offender Sentencing Enhancements* 2 (2016) ("*Career Offender Report*")

state drug offenses (however defined) was not justified by any empirical data. To the contrary, Commission research over several decades has documented that the offenses included in the career offender guideline do a poor job of identifying people at the greatest risk of recidivism.[10] As early as 2004, the Commission explained that the "recidivism rates for career offenders more closely resembles the rates for individuals in the lower criminal history categories in which they *would be* placed under the normal criminal history scoring rules."[11]

This mismatch is even worse for people classified as career offenders based solely on "controlled substance offenses." The Commission has long reported that the recidivism rate for these people falls well below even other career offenders.[12] Its most recent data for those sentenced as armed

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[10] *See, e.g.*, USSC, *Recidivism of Federal Violent Offenders Released in 2010* 29, fig. 14 (2022) ("*2022 Recidivism Report-Violent*"); USSC, *Recidivism* of Federal Offenders Released in 2010 26, fig. 13 & 29, fig. 16 (2021) ("*2021 Recidivism Report*"); *Career Offender Report* 2-3, 38-41, 44; USSC, *Recidivism Among Federal Offenders: A Comprehensive Overview* 19, figs. 7A & 7B (2016); USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 134 (2004) ("*Fifteen-Year Assessment*").

[11] *Fifteen-Year Assessment* 134.

[12] *Fifteen-Year Assessment 134*; *Career Offender Report* 8, 39-41.

career criminals and career offenders based on controlled substance offenses shows a recidivism rate *below* the recidivism rate for all people in CHC III.[13] Partly as a result of these findings, the Commission has called for Congressional action that it believes necessary to reform the guideline. As recently as 2016, the Commission recommended Congress remove from § 994(h) those who qualify as career offenders based solely on controlled substance offenses.[14]

Just as the career-offender guideline is not justified by Commission data, neither are the increased base offense levels (BOL) in USSG § 2K2.1, the firearms guideline under which Mr. Lewis was sentenced. The BOL for a "prohibited person" in possession of a firearm is 14. § 2K2.1(a)(6)(A). But if that prohibited person possesses a firearm after sustaining a prior conviction for a "controlled substance offense" (or a crime of violence), the BOL goes up to 20; and if he does so after sustaining two such prior convictions, the BOL goes up to 24. § 2K2.1(a)(2), (a)(4)(A). This increase in

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[13] *2021 Recidivism Report* 29, fig. 16; *2022 Recidivism Report-Violent* 73, fig. 44.

[14] *Career Offender Report* 43-44.

base-offense level is *in addition* to the application of criminal history points for the same prior convictions. *Id.*, comment. (n. 10).

Although more difficult to measure than the impact of the career-offender guideline, adding 10 levels to a BOL for the determination that two prior convictions are for "controlled substance offenses" undoubtedly also greatly increases sentences. Without controlling for criminal history category or specific offense characteristics, in FY2020, the average sentence length for people convicted of being a felon in a possession of a firearm with a BOL 24 was 82 months, whereas the average sentence length for those with a BOL 14 was 28 months.[15]

Amici are aware of no data that suggest that § 2K2.1's increased BOLs for prior "controlled substance offenses" convictions predict recidivism any better than the career-offender guideline does. The Commission has consistently reported that the existence of such prior convictions does not predict greater recidivism than is already accounted for by counting criminal history points.[16] In its reports on the *Recidivism of*

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[15] USSC, Individual Datafiles FY2020.

[16] *2021 Recidivism Report* 26, fig. 13; *2022 Recidivism Report-Violent* 73, fig. 44; USSC, *Federal Armed Career Criminals: Prevalence, Patterns, and*

Federal Firearms Offenders, the Commission indicates that higher BOLs "correlate" with higher recidivism rates.[17] But these reports do not disaggregate those assigned an increased BOL for prior "controlled substance offense" convictions from those assigned increased BOL for prior crime of violence convictions. Nor do they disaggregate the recidivism rates at each BOL for each CHC. To the contrary, the Commission notes that the increased recidivism rates for increased BOL are likely due to criminal history. *Id.* The increased recidivism rates by BOL, therefore, do not suggest that prior convictions for "controlled substance offenses" correlate with, much less predict, increased recidivism.

Perhaps this is not surprising, since these increased BOLs were not designed to predict recidivism rates or otherwise correlate with prevailing judicial sentencing practices. Promulgated in 1991, they were recommended by the Commission's Firearms and Explosive Materials Working Group, who were charged with examining the operation of the

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Pathways 57, 59 (2021) ("ACC Report"); *Career Offender Report* 8, 41-42; *Fifteen-Year Assessment* 133-34.

[17] USSC, *Recidivism Among Federal Firearms Offenders* 31 (2019); USSC, *Recidivism of Federal Firearms Offenders Released in 2010* 41 (2021)("2021 Recidivism Report-Firearms").

firearms guideline and proposing revisions.[18] In reviewing sentencing data for firearm offenses, the Working Group noted that the existence of prior convictions for firearms, drug, or crime of violence convictions did *not* strongly correlate to the lengths of sentence judges imposed.[19] Nevertheless, the Working Group proposed increasing the BOL for prohibited persons from 12 to 14, to 20 for those with one prior controlled substance offense or crime of violence convictions, and to 24 for those with two.[20] That proposal was adopted in 1991 and remains in place today. § 2K2.1(a)(2).

The Working Group's explanation for recommending these increases was the "need for improved proportionality" between people sentenced under the firearms guidelines, and those sentenced under ACCA, 18 U.S.C. § 924(e).[21] The Working Group did not consider whether ACCA itself may

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[18] USSC, *Firearms and Explosive Materials Working Group Report* 1, 18-19 (December 11, 1990).

[19] *Id.*, Appendix D at 8, 10.

[20] *Id.* at 18-19.

[21] *Id.* at 19-20.

not be calibrated to provide just punishment.[22] Nor did it explain why the Guidelines would attempt to achieve "proportionality" between those subject to a 10-year maximum sentence and the select few subject to a 15-year minimum. In short, like the career offender guideline, the increased BOLs for prior controlled substance offense convictions in § 2K2.1(a), do not reflect special Commission expertise in federal sentencing.

B. These enhancements have a grossly disparate impact on Black people.

In the late 1980s, a wide and enduring gap opened between the federal sentences of Black people and those of other races.[23] Some of that

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[22] The Commission's recent reports suggest it is not, particularly for those classified as ACC on the basis of drug priors. Although age at time of release may be a confounding factor, for those released in 2009-2011, the recidivism rate of ACC approximated the recidivism rate, for those released in 2010, of all persons in CHC III, and persons convicted of firearm offenses in CHC II. *ACC Report* 43; *2021 Recidivism Report* 26, fig. 13; *2021 Recidivism Report-Firearms* 21, fig. 4. For those classified as ACC on the basis of drug priors, the recidivism rate was lower than the recidivism rate of all persons in CHC I. *ACC Report* 57; *2021 Recidivism Report* 26, fig. 13; *2021 Recidivism Report-Firearms* 21, fig. 4. Although the Commission cautioned that the number of these people (33) was insufficient to conduct a meaningful analysis, the report nevertheless reiterated that the data reflected that recidivism rates differed depending on the nature of the ACC's offenses. *ACC Report* 57, 59.

[23] *Fifteen-Year Assessment* 115.

gap resulted from new statutes and guidelines, including the career-offender guideline, "that have a disproportionate impact on" Black people but "serve no clear sentencing purpose."[24] In its *Fifteen-Year Assessment*, the Commission identified the career-offender guideline—along with the since-discarded 100-to-1-quantity ratio between powder and crack cocaine—as a source of significant and unwarranted adverse impact on Black people.[25] In FY2020, 60.8% of people classified as career offenders were Black—more than three times their share of the overall federal defendant population.[26]

Application of increased BOLs under § 2K2.1 likewise has a significant and unwarranted adverse impact on Black people. Federal firearms prosecutions have long been disparately aimed at minority, and especially, Black communities.[27] In FY2020, 55.8% of people sentenced for being a felon in possession of a firearm were Black, although they make up

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[24] *Id.* at 131.

[25] *Id.* at 131-34.

[26] *QF: Career Offenders* 1; FY2020 *Sourcebook of Federal Sentencing Statistics*, Table 5.

[27] *See, e.g.*, Bonita R. Gardner, *Separate and Unequal: Federal Tough-on Guns Program Targets Minority Communities for Selective Enforcement*, 12 Mich. J. Race & L. 305, 316 (2007).

only 13.4% of the U.S. population.[28] And the increased BOLs apply disproportionately to Black people. In FY2020, Black people comprised 70.6% of those convicted of felon-in-possession to whom BOL 24 applied, a substantially higher percentage even than their disproportionate 55.8% share of these cases.[29]

The disproportionate impact of these Guidelines enhancements on Black people arises in large part from disparate state and local policing practices. Nationwide, "more than one in four people arrested for drug law violations in 2015 was Black, although drug use rates do not differ substantially by race and ethnicity and drug users generally purchase

[28] United States Census Bureau, *Quick Facts*, https://www. census. gov/quickfacts/fact/table/US/PST045221.

[29] In FY2019, Black people comprised 73.7% of those classified as ACC. *ACC Report* 22.

drugs from people of the same race or ethnicity."[30] Amicus ACLU-CLRP has reported that, nationwide, Black people are 3.64 times more likely than white people to be arrested for marijuana possession, despite comparable usage rates.[31]

Jurisdictions in the Third Circuit are no exception. In Delaware, Black people are 4.2 times more likely than white people to be arrested for marijuana possession, a disparity that *increased* after marijuana possession was decriminalized.[32]

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[30] The Sentencing Project, *Report of The Sentencing Project to the United Nations Special Rapporteur, Regarding Racial Disparities in the United States Criminal Justice System* n. 15(2018) (citing FBI Uniform Crime Reporting Program. *Crime in the United States 2015*. Table 43A; Johnston, L. D., O'Malley, P. M., Bachman, J. G., & Schulenberg, J. E. (2012). *Monitoring the Future: National Survey Results on Drug Use, 1975-2012*. Ann Arbor, MI: The University of Michigan Institute for Social Research (Tbls. 4-5, 4-6, and 4-7); Beckett, K., Nyrop, K., & Pfingst, L. (2006). *Race, Drugs, and Policing: Understanding Disparities in Drug Delivery Arrests.* Criminology, 44(1), 105–37 (pp. 16–7); Riley, K. J. (1997). *Crack, Powder Cocaine, and Heroin: Drug Purchase and Use Patterns in Six Major U.S. Cities.* National Institute of Justice)); *see also* Human Rights Watch, *Punishment and Prejudice: Racial Disparities in the War on Drugs* VII (2000) (explaining that, while Blacks and whites both use and sell drugs at the same rate, Blacks have a much higher arrest rate for both offenses).

[31] ACLU, *A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform* 7, 29 (2020).

[32] *Id.* at 31 Fig. 13; Delaware state profile.

In New Jersey, Black people are incarcerated at a rate 12 times higher than white people.[33] As Amicus ACLU-NJ has reported, racial disparities permeate the enforcement of low-level offenses throughout New Jersey.[34] And those disparities are particularly acute in the enforcement of marijuana offenses, where in 2017 the ACLU-NJ reported that Black New Jerseyans were arrested at three times the rate of white New Jerseyans.[35] The New Jersey legislature cited this data in passing the "New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act."2021 NJ Sess. Law Serv. Ch. 16 (Assembly 21).

Likewise, in Pennsylvania, a 2015 University of Pittsburgh report found that, despite similar using and selling rates, police arrested Black adults at four times the rate of white adults for drug violations in the city of Pittsburgh, five times the rate in Allegheny County, and seven times the

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[33] See Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, The Sentencing Project 10 (June 14, 2016).

[34] ACLU-NJ, *Selective Policing: Racially Disparate Enforcement of Low-Level Offenses in New Jersey* (Dec. 2015).

[35]ACLU-NJ, *Unequal and Unfair: New Jersey's War on Marijuana Users* (May 2017).

rate in Pittsburgh Metropolitan Statistical Area.[36] In Philadelphia, data collected as part of a lawsuit filed by amicus ACLU-Pennsylvania reflects that, from January to June 2020, more than 71% of pedestrian stops and 82% of frisks were of Black people, who constitute just 44% of the city's population. Black people were over 50% more likely to be stopped without reasonable suspicion than white people.[37]

* * *

Accepting the government's interpretation of "controlled substance" to include any substance any state ever controlled would be wrong, legally. It would also extend the reach of Guidelines enhancements that already call for overly and unjustifiably severe sentences, imposed disproportionately on Black people. Indeed, the government's position would permit these enhancements to be imposed based on substances that,

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[36] *Pittsburgh's Racial Demographics 2015: Differences and Disparities*, University of Pittsburgh, Center on Race & Social Problems, 2015, at 6.

[37] Plaintiffs' Tenth Report to Court on Stop and Frisk Practices: Fourteenth Amendment Issues, *Bailey, et al. v. City of Philadelphia*, No. 10-cv-05952, ECF 106 at 4, 5, 10 (E.D. Pa. April 24, 2020).

by the time of sentencing, both federal and state governments have determined are not dangerous. This Court should reject it.

Respectfully submitted,

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Required Certifications

A. Type-Volume. Pursuant to Rule 29(a)(4) of the Federal Rules of Appellate Procedure, and Third Circuit L.A.R. 29.1(b), I certify that, according to the word-counting function of my word processing system (Word 365), this Brief contains 6,208 words, including footnotes, and employs 14-Point Book Antiqua font.

B. Bar Membership. Pursuant to Rules 28.3(d) & 46.1(e) of the Local Appellate Rules, I certify that counsel of record, Davina T. Chen, is a federal government attorney with filing privileges in the United States Court of Appeals for the Third Circuit.

C. Electronic Filing. Pursuant to Rule 31.1(c) of the Local Appellate Rules, I certify that the text of the electronically filed Brief is identical to the text in the paper copies of this Brief as filed with the Clerk. The electronic (PDF) version of this Brief has been checked for viruses using Trend Micro Apex One Antivirus, an antivirus program, with all current updates, and no virus was detected.

March 18, 2022 */s/ Davina T. Chen*

Certificate of Service

I certify that on this date, I served the foregoing via this Court's CM/ECF system upon all parties of record.

March 18, 2022 /s/ Davina T. Chen