No. 20-5279

In the Supreme Court of the United States

WILLIAM DALE WOODEN, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR PROFESSORS OF CRIMINAL LAW AS AMICI CURIAE SUPPORTING PETITIONER

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INTEREST OF AMICI CURIAE

Amici curiae are professors of law who have expertise that bears directly on the question presented in this case.[1]

Professor Douglas A. Berman holds the Newton D. Baker-Baker & Hostetler Chair in Law at The Ohio State University Moritz College of Law, where he also serves as the Executive Director of the Drug Enforcement and Policy Center. Professor Berman's teaching and research primarily focus on issues of criminal law and criminal sentencing. Professor Berman has published numerous articles about

[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than amicus curiae or his counsel, has made a monetary contribution to this brief's preparation or submission. The institutional affiliations of the amici are for identification only.

criminal sentencing, is the co-managing editor of the *Federal Sentencing Reporter*, and is the co-author of *Sentencing Law and Policy: Cases, Statutes and Guidelines*. He is also the creator and author of the Sentencing Law & Policy blog. Professor Berman thus has expertise that bears directly on the question presented in this case.

Professor Shon Hopwood is an Associate Professor of Law at Georgetown University Law Center and the author of *Law Man: My Story of Robbing Banks, Winning Supreme Court Cases, and Finding Redemption*. Before attending law school, receiving a law license, serving as a judicial law clerk, and joining the legal academy, Professor Hopwood pleaded guilty to bank robberies and the use of a firearm during those robberies, and served nearly eleven years in federal prison. Professor Hopwood now studies and teaches criminal law, criminal procedure, and prisoner-rights law.

Professor Zachary Price is a Professor of Law at the University of California Hastings College of the Law. Professor Price's research interests include issues of criminal law and justice, and Professor Price has published scholarship regarding the rule of lenity.

Professor Intisar A. Rabb is a Professor of Law, a Professor of History, and the faculty director of the Program in Islamic Law at Harvard Law School. Professor Rabb's teaching and research interests include criminal law and procedure, with a particular focus on the rule of lenity.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), imposes a fifteen-year, mandatory-minimum

sentence on certain recidivist offenders who illegally possess a firearm. It reserves that considerable sentencing enhancement, however, for those cases in which the government proves that the felon-in-possession was previously convicted of three violent felonies or serious drug offenses that were "committed on occasions different from one another." *Ibid.* The statute thus punishes "only a particular subset of offender, namely, career criminals," who habitually exploit criminal opportunities. *Begay* v. *United States*, 553 U.S. 137, 146-147 (2008).

In this case, the court of appeals concluded that petitioner had built a criminal "career" in just one night. It held that petitioner's burglaries of ten mini-storage units at a single facility on a single evening had each taken place on "occasions different from one another" because they occurred in a tight but discernible sequence and involved distinct property rights. By those lights, petitioner had established crime to be his life's work over the span of mere minutes.

That is the wrong way to read a recidivism statute designed to target only "career" criminals. It contradicts the plain and ordinary meaning of "occasions different from one another," ignores the statutory context of that provision and the rest of the ACCA, invites unpredictable applications of the statute that preclude fair notice of its reach, and fails to comport with lenity principles that obligate Congress to speak clearly when personal liberty is at stake.

This case provides an opportunity for this Court to align application of the ACCA with what Congress actually wrote and intended. It should hold that petitioner's ten burglaries occurred on the same

occasion because they took place during a single criminal episode uninterrupted by any substantial interlude of non-criminal conduct. Doing so would clarify that the ACCA's different-occasions provision meaningfully limits the statute to the offenders whom Congress had in mind: repeat, revolving-door, *career* violent felons and drug traffickers.

ARGUMENT

PETITIONER'S BURGLARY OFFENSES WERE NOT "COMMITTED ON OCCASIONS DIFFERENT FROM ONE ANOTHER" BECAUSE THEY WERE PART OF THE SAME CRIMINAL EPISODE

Offenses take place on "occasions different from one another," under the ACCA, only when they occur during different criminal episodes that are separated by a substantial interlude of non-criminal activity. Here, petitioner's ten-burglary night at one mini-storage facility was a single "occasion" of criminal conduct, not ten different occasions. That conclusion is dictated by the plain and ordinary meaning of the ACCA's text, as well as by the statute's history and evident purpose. Moreover, that common-sense reading of the different-occasions provision gives clear guidance to courts, prevents inconsistent and arbitrary results, and resolves any ambiguity in defendants' favor consistent with the rule of lenity.

The court of appeals nonetheless held that criminal offenses occur on different occasions so long as one offense has ended before another offense begins, or they involve distinct victims or property. See J.A. 22. That unnatural, counterintuitive interpretation of "occasions" is unsupported by ordinary usage and demonstrably out of step with the purpose of a recidivism statute aimed at criminals who have

made a *career* out of committing violent felonies or serious drug offenses. The judgment of the court of appeals should therefore be reversed.

A. Offenses That Are Not Separated By A Substantial Interlude Of Non-Criminal Conduct Are Not "Committed On Occasions Different From One Another"

Congress expressly restricted the ACCA's fifteen-year mandatory-minimum sentence to defendants who have been convicted of three predicate offenses that they "committed on occasions different from one another." 18 U.S.C. § 924(e). That text refers to distinct episodes of criminal activity that are separated by substantial interludes of non-criminal conduct.

1. a. As petitioner correctly explains (Br. 12-17) the ordinary meaning of "occasions" encompasses the events arising from common and related circumstances or a common opportunity. That understanding follows directly from dictionary definitions of the word: The *Oxford English Dictionary*, for example, defines an "occasion" to be "a juncture of circumstances" or "opportunities." *Oxford English Dictionary* (2d ed. 1989). Another dictionary likewise defines an "occasion" to include "a set of circumstances favorable to a particular purpose or development." *Webster's New Third International Dictionary* (1976). Different occasions, therefore, are distinguished by their respective sets of circumstances and opportunities, with each individual occasion organized around common purposes or developments.

Ordinary use of the word "occasion" conforms to those dictionary definitions. Consider, for example, a newlywed who writes ten thank-you notes to his

wedding guests on three consecutive Saturdays. If someone were to ask that newlywed "on how many different occasions did you write thank-you notes," he would understandably respond "three," not "thirty." And that response would be unchanged even if he had always finished one note before beginning the next one, or if he sometimes had paused between notes to get a snack. Nor does it make any difference that the newlywed could have elected to put down his pen and call it a day after the eighth or ninth note on any given note-writing occasion.

b. Petitioner is also correct (Br. 18-25) that other indicia of statutory meaning confirm that criminal offenses are "committed on occasions different from one another" within the meaning of Section 924(e) only when they are not part of the same criminal opportunity or episode.

i. Most obviously, Congress added the different-occasions clause to Section 924(e) in direct response to an early decision under the ACCA, *United States* v. *Petty*, 798 F.2d 1157 (8th Cir. 1986) (per curiam). As petitioner explains (Br. 21-25), the Eighth Circuit in *Petty* upheld application of the recidivist enhancement after holding that Petty's six convictions for robbing six people during the same restaurant stick-up each qualified as a predicate offense. See 798 F.2d at 1159-1160. On Petty's petition for certiorari, however, the Solicitor General confessed error. See Pet. Add. 21a-32a (reprinting government's response to Petty's petition). The court of appeals had erred, the government explained, "in construing the statute to reach multiple felony convictions arising out of a single criminal episode." *Id.* at 30a-31a. Although the ACCA's text did not, at the time, expressly require predicate convictions committed on distinct occasions,

the Solicitor General explained that Congress had intended for the ACCA to count only "prior convictions [that were] *based on multiple criminal episodes that were distinct in time*." *Id.* at 26a (emphasis added). This Court vacated the Eighth Circuit's decision, 481 U.S. 1034 (1987) (mem.), and on remand the court of appeals reversed Petty's ACCA-enhanced sentence, 828 F.2d 2 (1987) (per curiam).

The *Petty* case nevertheless spurred Congress to clarify its intent in the statute's text. It amended the ACCA to expressly limit the "convictions" that count under the statute to those for offenses that were "committed on occasions different from one another." Minor and Technical Criminal Law Amendments Act of 1988, Pub. L. No. 100-690, § 7056, 102 Stat. 4181, 4395, 4402 (1988). The new, different-occasions qualifier was added to "reflect the Solicitor General's construction" in *Petty* that the ACCA applies only to convictions arising from multiple criminal episodes. 134 Cong. Rec. S17,370 (daily ed. Nov. 10, 1988) (statement of Sen. Biden). The clarification was meant "to insure that [ACCA's] rigorous sentencing provisions apply only as intended in cases meriting such strict punishment." *Ibid.*

ii. The same conclusion is evident from ACCA's title, which provides an available tool for statutory construction. See *Almendarez-Torres* v. *United States*, 523 U.S. 224, 234 (1998). Congress called the law codified as Section 924(e) the "Armed Career Criminal Act," and in doing so it expressly and intentionally focused on the kind of recidivist offenders who are considered to be *career* criminals because they return to illegal activity time and time again. That title resolves any doubt that Congress meant for qualifying criminal offenses taking place "on occasions different

from one another" to require distinct criminal episodes. See Pet. Br. 31.

Nor does the ACCA's title "reflect careless, or mistaken, drafting, for the title is reinforced by a legislative history that speaks about, and only about," focusing severe, mandatory-minimum penalties solely on recidivist career criminals. *Almendarez-Torres*, 523 U.S. at 234. This Court has acknowledged that "throughout the history of the enhancement provision, Congress focused its efforts on career offenders—those who commit a large number of fairly serious crimes as their means of livelihood, and who, because they possess weapons, present at least a potential threat of harm to persons." *Taylor* v. *United States*, 495 U.S. 575, 587-588 (1990); see also *Begay* v. *United States*, 553 U.S. 137, 147 (2008) (recognizing Congress's concern with the "particular subset" of serious, repeat offenders).

iii. Even more generally, the legislative history surrounding the ACCA's original enactment likewise reflects Congress's focus on true recidivist, career offenders. Indeed, the Solicitor General's confession of error in *Petty* was based largely on the government's reading of that legislative history (in combination with the ACCA's title). As petitioner recounts (Br. 20-21), the ACCA's legislative history is replete with references to "repeat offenders," "chronic offenders," "habitual offenders," "recidivists," "revolving door offenders," and "parole violators" as ACCA's target. See, *e.g.*, *Armed Career Criminal Act: Hearing on H.R. 1627 and S. 52 Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 98th Cong. 44 (1984); 130 Cong. Rec. S1560 (daily ed. Feb. 23, 1984). The statute was intended to cover "a very small percentage of repeat offenders," those who "have no lawful

employment," whose "full-time occupation is crime for profit," and many of whom "commit crimes on a daily basis." H.R. Rep. No. 1073, 98th Cong., 2nd Sess. 1, 3 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3661, 3661, 3663.

2. As petitioner convincingly demonstrates (Br. 25-29), petitioner's ten mini-storage burglaries all arose from the same criminal opportunity and thus were not "committed on occasions different from one another." 18 U.S.C. § 924(e). Indeed, all indications point in the same direction: The offenses occurred within a single structure; they were committed on the same evening in no discernible order; they involved the same personnel; they executed a single plan; and there was no intervening event that would have changed the relevant opportunity. Pet. Br. 26. In light of these circumstances, it would be not only unnatural, but surpassingly odd to say that petitioner committed burglary on ten distinct "occasions" during that single evening.

The court of appeals nonetheless reached the opposite conclusion by holding that criminal offenses are committed on different occasions whenever they do not occur simultaneously or whenever they implicate different property rights. See J.A. 22. It reached that result largely by asking the wrong questions: Rather than focusing on what makes *occasions* of criminal conduct "different from one another," the court fixated on "indicia that *offenses* are separate from each other." *Ibid.* (emphasis added).

It looked, in particular, at whether (i) it was "possible to discern the point at which the first offense is completed and the subsequent point at which the second offense begins," (ii) it would have been possible for petitioner "to cease his criminal conduct after the

first offense and withdraw without committing the second offense," and (iii) the offenses involved different property rights, such as "different residences or business locations." J.A. 22. The court then concluded that petitioner had entered each storage unit only after he had exited another, that he could have left the storage facility before any given storage-unit entry, and that he had violated different property rights with each burglary. *Id.* at 23-24. On those grounds, the court of appeals held that each burglary took place on an occasion different from each of the others. *Ibid.*

But whatever the merit of those indicia for distinguishing among separate offenses, they offer little help in applying the common understanding of what makes one occasion of illegal activity different from another occasion. They do not assess, that is, whether two or more separate offenses responded to the same "juncture of circumstances" or "opportunities." *Oxford English Dictionary* (2d ed. 1989). Just as a newlywed may write ten thank-you notes on a single "occasion" of note-writing, see pp. 5-6, *supra*, one "occasion" of criminal offenses does not end, and another begin, at each moment when it "is possible to discern the point at which" any given offense has been completed. J.A. 23.

3. The court of appeals' error in this case may derive less from a failure to appreciate that offenses committed as part of the same criminal episode are not committed on separate occasions than from a failure to distinguish appropriately between separate criminal episodes. In prior published opinions, the court of appeals has expressly acknowledged that offenses are not separate ACCA predicates if they "are part of a single criminal episode." *United States* v.

Hill, 440 F.3d 292, 295 (6th Cir. 2006); see also, *e.g.*, *United States* v. *Jenkins*, 770 F.3d 507, 510 (6th Cir. 2014); *United States* v. *Brady*, 988 F.2d 664, 669 (6th Cir. 1993) (en banc). The decision below does not signal any intentional departure from those precedents; indeed, the court of appeals relied heavily on its prior decision in *Hill*. See J.A. 21-22. The court of appeals' mistaken focus on sequence, ability to stop, and property rights nonetheless led it to conclude that petitioner's ten storage-unit robberies were committed on ten distinct occasions—even though ordinary speakers of the English language would regard the commission of those offenses over one night at one location to be a single episode.

As petitioner explains (*e.g.*, Br. 3, 13-14), criminal "occasions" are properly understood to be distinct from one another when they are marked by qualitatively different circumstances. Although petitioner is correct that this inquiry may be informed by a variety of contextual indications in appropriate cases, the most reliable way to distinguish among distinct criminal episodes—that is, among different occasions on which criminal offenses were committed—is to identify substantial interludes of non-criminal activity between them. At a minimum, if there is no substantial period of non-criminal conduct separating a person's criminal offenses, they are properly thought of as being part of the same criminal episode.

For starters, that understanding follows from the ordinary meaning of "occasions." A substantial interlude of non-criminal conduct is a reliable marker of qualitatively different circumstances because it marks a meaningful period during which criminal conduct was not the focus of the defendant's activity or motivation. By contrast, if the defendant's criminal

activity remains his or her focus without interruption, it is natural to speak of that criminal activity as having been committed on a single occasion—even if it is composed of distinct criminal offenses.

Return again to the example of the newlywed writing thank-you notes to his wedding guests: As explained above, ordinary English usage would treat a single evening's note writing as a single "occasion," even if the newlywed wrote ten different notes—to different recipients—over the course of that evening. That conclusion would hold, moreover, even if his new spouse joined him to assist with a few of the thank-you notes before returning to her own pursuits. It would hold if the newlywed stopped to get a glass of water midway through the project, or if he wrote the first five notes at home before walking to a local coffee shop to finish the rest. It would be natural to speak of different "occasions" of note writing only if they were separated by a substantial intervening period during which the newlywed was engaged in *other* tasks.

The same is true with respect to criminal conduct. A defendant who proceeds from one offense to the next without any substantial interruption by a period of non-criminal conduct is naturally understood to have committed those offenses on a single "occasion." The offenses may involve different victims (just as the newlywed's notes were written to different recipients); they may involve different accomplices (just as the newlywed was joined by his new spouse without commencing a new occasion of note writing); they may occur at separate locations (just as the newlywed's occasion of note writing occurred at his residence and a local coffee shop); and there may be lulls in the action during which the defendant is not literally engaged in a crime (just as a water break did not make

a new occasion of note writing for our newlywed). But if offenses are not separated by a substantial interlude of non-criminal conduct, it would be unnatural to describe them as having occurred on different occasions.

That understanding is also consistent with the ACCA's animating purposes. As we have explained, Congress enacted the ACCA's recidivist enhancement to punish the class of habitual or recidivist offenders that was understood to pose a special danger to society. See *Begay*, 553 U.S. at 145-146. But a defendant whose prior offenses are not separated by any substantial interlude of non-criminal conduct does not fall within that narrow class of particularly dangerous offenders. Critically, he has not completed one episode of criminal behavior before then later choosing to *return*—under different circumstances—to a life of crime. The person who commits multiple offenses in one fell swoop thus falls outside of the class of "career criminals" whom Congress enacted the ACCA to punish. See *ibid*.

Nonetheless, in case after case, lower-court decisions have transformed defendants into "career criminals" based on offenses that they committed as part of the same criminal episode or opportunity without any substantial, intervening period of non-criminal conduct.[2] For the reasons just explained,

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[2] See, *e.g.*, *United States* v. *Hudspeth*, 42 F.3d 1015, 1018-1019 (7th Cir. 1994) (en banc) (burglaries of three adjoining stores in the same building within 36 minutes); *United States* v. *Schieman*, 894 F.2d 909, 913 (7th Cir. 1990) (offenses separated by a few minutes); *United States* v. *Cardenas*, 217 F.3d 491, 492 (7th Cir. 2000) (drug sales separated by 45 minutes); *United States* v. *Letterlough*, 63 F.3d 332, 337 (4th Cir. 1995) (two drug sales over the course of an hour and a half); *Hill*, 440 F.3d at 294

these instances of "one day criminal careers" are demonstrably inconsistent with the ACCA's text and purpose. See Jenny W.L. Osborne, *One Day Criminal Careers: The Armed Career Criminal Act's Different Occasions Provision*, 44 J. Marshall L. Rev. 963 (2011). This Court should decidedly reject the misguided approach that has led the lower courts to reach that erroneous result.

B. Recognizing That Different "Occasions" Of Criminal Offenses Must Be Separated By Substantial Interludes Of Non-Criminal Conduct Avoids Absurd And Arbitrary Results While Affording Fair Notice To Defendants

The court of appeals' decision to exclude from the ACCA's different-occasions provision only strictly *simultaneous* criminal conduct leads to absurd results, inconsistent decisions, and a resulting lack of fair notice to defendants. By contrast, requiring ACCA-predicate offenses to be separated by substantial interludes of non-criminal activity provides a clear and administrable rule that accords with the statute's plain and ordinary meaning.

1. A number of the lower courts have reached counterintuitive (even absurd) and conflicting results by mistakenly focusing on whether offenses can be said to have been separate from one another, rather than on whether the occasions on which those offenses occurred were meaningfully different. In some of those cases, as in the decision below, that result follows from treating *any* discernible sequence in the defendant's prior convictions as a basis to conclude that they were committed on different occasions. In other cases,

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(defendant completed one burglary and then walked directly across the street to burglarize another building).

however, courts have reached essentially the same result despite citing a broader range of factors in support of a conclusion that offenses were committed on separate occasions.

The Seventh Circuit's en banc decision in *United States* v. *Hudspeth*, 42 F.3d 101 (1994), is illustrative. In that case, the felon-in-possession defendant had three prior convictions for burglarizing three stores in one shopping center. *Id.* at 1018-1019. He had broken into the shopping center and pried open the rear door of a dry cleaners. *Id.* at 1022. He then cut through the dry cleaners' adjoining wall with a doughnut shop, and finally forced open a door connecting the doughnut shop to an insurance company. *Ibid.* From start to finish, the whole burglary spree lasted just over half an hour. *Id.* at 1018.

The Seventh Circuit nevertheless affirmed the imposition of the ACCA's mandatory minimum, holding that each of the three burglaries happened on "occasions different from one another." The court conceded that all three burglaries had been part of the same "spree," *id.* at 1022, and yet focused on the existence of different victims and store locations as compelling the conclusion that each offense took place on a different occasion. See *id.* at 1021 (stressing that the defendant's burglary offenses "were committed sequentially, against different victims, at different times, and at different locations"). As the court saw it, the defendant fell into the category of "criminals who make a career out of criminal activity," *ibid.*, because each of his offenses was a "distinct aggression," as evidenced by the fact that, "[a]t any given point in time during his crime spree, [he] was free to cease and desist from further criminal activity," *id.* at 1022.

As petitioner correctly explains (Br. 35-36), this focus on a defendant's opportunity to cease between offenses has no basis in the ACCA's text or animating purpose. It might assist courts in determining whether *offenses* are separate from one another, but that does not answer the question that the ACCA actually poses—*i.e.*, whether those separate offenses were committed on *different occasions*.

An inquiry focused on the defendant's opportunity to cease between offenses quickly collapses into an inquiry into whether the defendant's prior offenses were sequential or simultaneous, even if the court purports to rely on additional factors, such as a change in location or different victims. After all, so long as the defendant's prior offenses were committed in sequence, it can be said that the defendant at least *could* have chosen to stop after completing one and before beginning the next. Thus, there is little practical daylight between a test that asks whether the defendant had an opportunity to stop and one that asks simply whether the defendant's prior offenses were committed in sequence.[3]

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[3] A misguided focus on whether the defendant could have stopped between offenses can lead courts astray even when they have concluded, correctly, that the ACCA employs the word "occasion" in "its broader sense, as the conjuncture of circumstances that provides an opportunity to commit a crime." *United States* v. *Bordeaux*, 886 F.3d 189, 196 (2d Cir. 2018). In *Bordeaux*, the Second Circuit upheld the defendant's ACCA-enhanced sentence based on his prior convictions for burglaries that occurred within a single hour and were separated from one another by roughly one mile. *Id.* at 196-197. In reaching that conclusion, the court "consider[ed] whether the defendant had a realistic opportunity for substantial reflection between offenses 'during which time he could have chosen to end his criminal activity.'" *Ibid.* (quoting *United States* v. *Rideout*, 3 F.3d 32, 35 (2d Cir. 1993)). As the court saw it, it was appropriate to treat

2. The lower courts' failure to ask whether a defendant's prior offenses were committed on occasions that were meaningfully different from one another has produced inconsistent and arbitrary results that are untethered to defendants' culpability or any plausible account of what it means to be a "career criminal."

a. *United States* v. *Letterlough*, 63 F.3d 332 (4th Cir. 1995), involved a defendant who, when he was 17 years old, sold a $20 drug dose to an undercover police officer at 8:35 p.m. one evening, and then sold another dose to the same officer from the same location at 10:15 p.m. the same night. *Id.* at 334. Over the government's and defendant's shared objection to applying the ACCA to those circumstances, the district court held that the two drug-sale offenses had occurred on "occasions different from one another." *Ibid*. The Fourth Circuit affirmed, holding that the offenses took place as part of "two separate and distinct episodes" because they involved "two complete and discrete commercial transactions." *Id.* at 337. That focus on whether the *offenses* were distinct and not simultaneous resulted in the imposition of the ACCA's mandatory-minimum sentence based on the

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the defendant as a career criminal because he "had to go to a degree of effort to get from one site to the next," and "the time lapse and the distances provided [the defendant] an opportunity to reflect and change course, if he had wanted to do so." *Id.* at 197. That erroneous result illustrates the importance of requiring a substantial interlude of non-criminal conduct before concluding that offenses were committed on separate occasions: A defendant who *could* have decided to stop his criminal activity, such as the one in *Bordeaux*, differs from one who *actually* stopped, and only then *returned* to a life of crime. A substantial interlude of non-criminal activity between predicate offenses distinguishes the latter category of offenders from the former.

arbitrary happenstance that the undercover officer had elected to make two drug purchases, instead of just one, from the same seller, at the same spot, on the same night.

The result was different in *United States* v. *Willoughby*, 653 F.3d 738 (8th Cir. 2011), which also involved a defendant's two prior convictions for two drug sales that took place the same night. In that case, an undercover officer and his confidential informant had each purchased small bags of marijuana from the defendant—for $50 and $25 respectively—during the same interaction with him at his house. *Id.* at 740-741. Because the second of those transactions almost immediately followed the first, however, the court of appeals held that they were part of the same criminal episode and had not taken place on occasions different from one another. *Id.* at 744.

Letterlough and *Willoughby* both involved what would commonly be understood to be single occasions of drug-selling. Each defendant conducted more than one transaction from the same location, during the same course of conduct, and without any substantial interlude of non-criminal activity between them. There is certainly no reason to think of either of those two defendants as being more or less a "career criminal" than the other, let alone any reason to believe that Congress intended such divergent results.

These inconsistent holdings are explained by the courts' mistaken fixation on whether the drug sales in each case were discernibly sequential or essentially simultaneous. The *Letterlough* court believed it significant that more than 90 minutes passed between the undercover officer's two purchases, and speculated that, "as far as we know," the defendant

had not made other drug sales in the meantime. 63 F.3d at 337. By contrast, the court in *Willoughby* believed the two drug transactions to be close enough together in time as to have been "nearly simultaneous[]." 653 F.3d at 739. That focus on the precise number of minutes between substantially similar offenses committed on the same night and from the same location misses the point; it is nonsensical to call someone a "career criminal" once he sells drugs to three people from the same location over the course of an hour or two.

b. Other examples of arbitrary and inconsistent results in ACCA cases are found in cases involving shopping-center burglary sprees. As noted above, the Seventh Circuit's decision in *Hudspeth* upheld imposition of the ACCA's mandatory minimum based on the defendant's prior convictions for burglarizing adjoining three stores in one shopping center over just more than half an hour. 42 F.3d at 1018-1019, 1022; see also *United States* v. *Tisdale*, 921 F.2d 1095 (10th Cir. 1990) (similar). If, however, one were to recite the facts of *Hudspeth* to someone on the street and then ask, "did the defendant commit his three burglaries on three different occasions or on one occasion," there is hardly any doubt that the response would be "one occasion—they all happened at the same shopping center on the same night."

Perhaps for that reason, courts have reached different results in seemingly indistinguishable store-burglary cases. The facts in *United States* v. *McElyea*, 158 F.3d 1016 (9th Cir. 1998), for instance, were strikingly similar to the facts in *Hudspeth*. In *McElyea*, the defendant had prior convictions for breaking into one store at a strip mall, and then cutting a hole in a wall to burglarize the adjacent

store. *Id.* at 1018. Contrary to the decision in *Hudspeth*, however, the court of appeals held that those two burglaries had taken place on the same occasion. *Id.* at 1021. The defendant had, the court reasoned, "committed two identical crimes in basically the same location within a short time period. He does not meet the profile of a career criminal envisioned by Congress." *Ibid.*

c. Cases involving offenses that arose during immediate flight from the scene of another offense provide additional examples of the arbitrary and unpredictable results involved in one-night criminal "careers." In *United States* v. *Lee*, 208 F.3d 1306 (11th Cir. 2000) (per curiam), the defendant had prior convictions for robbing a credit union and then burglarizing a backyard shed while trying to evade police. During the defendant's getaway from the credit union, he had been spotted by a police officer "[w]ithin a few minutes" and "about two miles" away. *Id.* at 1307. He was located hiding in a shed he had broken into, and was charged with the shed burglary in addition to the credit-union robbery. The Eleventh Circuit held that those two offenses had taken place on "occasions different from one another" because the few minutes between them had ostensibly afforded the defendant an "opportunity to avoid his second crime." *Ibid.*

The result was different—in the same court and on similar facts—in *United States* v. *Sweeting*, 933 F.2d 962 (11th Cir. 1991). In *Sweeting*, the defendant had two burglary convictions for breaking into one home, and then breaking into a second home while trying to flee the scene of the first burglary. *Id.* at 967. The Eleventh Circuit held that those two burglaries took

place during "a single episode even though there were separate punishable acts." *Ibid.*

The Eleventh Circuit's attempt to square these seemingly conflicting results demonstrates the nub of the problem with focusing on degrees of separation between related offenses instead of adhering to the common understanding of what makes occasions of related activity different from one another. The court of appeals affirmed the application of the ACCA's recidivism enhancement in *Lee* notwithstanding its conclusion that the credit-union robbery and backyard-shed burglary "represent[ed] one course of criminal conduct." *Lee*, 208 F.3d at 1308. The difference between the result in that case and for the fleeing defendant who had burglarized a second home in *Sweeting* came down to a "judgment" call about "the degree of break" between the separate offenses. *Id.* at 1307. That notion of offenses arising from the same criminal episode being just separate enough to have occurred during "occasions different from one another" lacks any basis in the ACCA or common understanding of what makes someone a "career criminal."[4]

d. Petitioner's own case can be compared to other cases that involved prior convictions for multiple burglaries but that came out differently. For example, in *United States* v. *Murphy*, 107 F.3d 1199 (6th Cir. 1997), the defendant and two others had robbed the occupants of two separate residences in a duplex. All three persons participated in the first robbery. *Id.* at

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[4] See also, *e.g.*, *United States* v. *Graves*, 60 F.3d 1183, 1187 (6th Cir. 1995) (concluding that burglary and assault on police officer in an effort to evade arrest were committed on a single occasion); *Schieman*, 894 F.2d at 913 (treating burglary and assault on police officer in effort to evade arrest as two distinct occasions).

1208. The defendant, although he was convicted of both robberies, had remained in the first unit to guard the first victim to facilitate his accomplices' robbery of that victim's neighbor. *Ibid.* The court of appeals concluded that defendants' two robberies took place on the same occasion because there was "no principled way of distinguishing between the end of the first burglary and the beginning of the second." *Id.* at 1210. Similarly, in *United States* v. *Barbour*, 750 F.3d 535 (6th Cir. 2014), the defendant and his compatriots had robbed one victim outside a convenience store and then entered the store to rob an additional victim. *Id.* at 537. The court of appeals held that the defendants' robberies outside the convenience store and then inside the store had each happened during the same occasion because the record allowed for the possibility that the defendant stayed outside to guard the first victim the whole time, making it impossible to discern whether, as far as he was concerned, one robbery ended before the next one began. *Id.* at 541.

Yet petitioner received the ACCA's sentencing enhancement on a similar record. Petitioner's indictment for the 1997 burglaries states that four men were charged with all ten counts of burglary. See Sentencing Memorandum at A4-A7, *United States* v. *Wooden*, No. 3:15-cr-00012 (E.D. Tenn. Dec. 1, 2016). Petitioner pled guilty to all ten counts. *Id.* at A8-A9. Consistent with the facts in *Murphy* and *Barbour*, petitioner argued at his federal sentencing that the record does not establish that he entered each of the ten mini-storage units himself, as opposed to keeping watch or unloading the first unit while his three accomplices burglarized the others. See Pet. Br. 42 n.7. These factual nuances of sequence and simultaneity should be beside the point, however, and

not make the difference between who gets a 15-year mandatory-minimum sentence and who does not. Under the plain and ordinary meaning of the ACCA, each episode of burglaries or robberies in all of these cases were each one occasion of multiple offenses, not different occasions, because there was no substantial period of non-criminal activity between them.

3. The perplexing and inconsistent results generated by cases focusing on whether offenses were separate deprive firearm-possession defendants of fair notice. Criminal laws must "give ordinary people fair warning about what the law demands of them." *United States* v. *Davis*, 139 S. Ct. 2319, 2323 (2019). That requires courts to treat like cases alike. As prior efforts have demonstrated, the use of a narrow and unnatural interpretation of "occasion" under the ACCA has made the statute's application unpredictable. Many cases end up turning on seemingly insignificant difference in the number of minutes between related offenses, measured against individual judges' differing intuitions about whether those minutes afforded the briefest of opportunities for the perpetrator to change the trajectory of his conduct. Other cases appear to turn on which factor of a multi-factor test the court chooses to emphasize in a given case.[5]

By contrast, adopting the common-sense understanding that different occasions of criminal conduct

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[5] See, *e.g.*, *United States* v. *Towne*, 870 F.2d 880, 888-891 (2d Cir. 1989) (treating kidnapping and rape of the same victim as a single occasion, although the offenses occurred at different locations); *United States* v. *Godinez*, 998 F.2d 471, 473 (7th Cir. 1993) (treating kidnapping and robbery offenses 75 minutes apart as different occasions because the offenses involved different victims).

are separated from one another by substantial interludes of non-criminal conduct provides predictability and affords fair notice to defendants. A felon who stashes a firearm in his sock drawer can reasonably be expected to know that his three distinct episodes of criminal offenses separated by substantial non-criminal breaks make him a career criminal eligible for a very substantial sentence if he is caught with the gun. But the felon whose prior offenses were committed in response to one criminal opportunity has no good reason to appreciate that he, too, might be labeled a "career criminal" eligible for the same mandatory-minimum sentence.

C. Any Ambiguity In The Different-Occasions Provision Should Be Resolved In Petitioner's Favor Under The Rule Of Lenity

The statutory text, along with the context in which it was enacted, foreclose the court of appeals' holding that criminal offenses occur on "occasions different from one another" whenever they take place in any discernible sequence—no matter how tightly bunched or closely related. But if the statutory text is deemed to be capacious enough to allow for that interpretation in addition to the one that Congress intended in response to the *Petty* case, see pp. 6-7, *supra*, then the rule of lenity requires resolving that grievous ambiguity in defendants' favor. *Davis*, 139 S. Ct. at 2333.

The rule is premised on the idea that, before imposing the "harsher alternative" interpretation of a penal statute, "it is appropriate * * * to require that Congress should have spoken in language that is clear and definite." *Yates* v. *United States*, 574 U.S. 528, 548 (2015) (quoting *Cleveland* v. *United States*, 531 U.S. 12, 25 (2000)). That principle reflects the law's

"instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should." Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, *in* Benchmarks 196, 209 (1967).

As Chief Justice John Marshall observed two centuries ago, the rule of lenity is "not much less old than construction itself." *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820); see also *Johnson* v. *United States*, 576 U.S. 591, 613 (2015) (Thomas, J., concurring in the judgment) (observing that the rule "first emerged in 16th-century England"). It has been said to be "so deeply ingrained" that it "must be known to both drafter and reader alike" and thus "inseparable from the meaning of the text." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 31 (2012); see also Shon Hopwood, *Restoring the Historical Rule of Lenity as a Canon*, 95 N.Y.U. L. Rev. 918, 924-931 (2020) (discussing lenity's historical roots); Amy Coney Barrett, *Substantive Canons and Faithful Agency*, B.U. L. Rev. 109, 128-134 (2010) (same); Zachary S. Price, *The Rule of Lenity as a Rule of Structure*, 72 Fordham. L. Rev. 885, 896-899 (2004) (same).

The rule of lenity applies to criminal-penalty statutes, like the ACCA, just as it applies to statutes that define prohibited conduct. See *Bifulco* v. *United States*, 447 U.S. 381, 387 (1980); see also Intisar Rabb, *The Appellate Rule of Lenity*, 131 Harv. L. Rev. 179, 187 (2018) (contrasting appellate courts' "limited application" of the rule of lenity with "a more historically grounded and constitutionally mandated approach"). Indeed, the significance of misapplying the ACCA's mandatory minimum exacerbates the effect of any ambiguity. The rule of lenity is most

powerful when the resolution of textual ambiguity could trigger a severe penalty. 3A *Sutherland Statutes and Statutory Construction* § 59:4 (8th ed. 2020). In this case, but for the application of the ACCA, petitioner's statutory maximum would have been ten years in prison and his guideline range would have been 21 to 26 months. Pet. Cert. Reply 1 (relying on petitioner's presentencing report). In a case like this one, where—at a minimum—"a reasonable doubt about [the] statute's intended scope" persists, *Moskal* v. *United States*, 498 U.S. 103, 108 (1990), a fifteen-year sentencing enhancement "is too much to hinge on the will-o'-the-wisp of statutory meaning pursued by the [government]." *United States* v. *Hayes*, 555 U.S. 415, 437 (2009) (Roberts, C.J., dissenting).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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