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 OF FAMM AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus FAMM, previously known as "Families Against Mandatory Minimums," is a national, non-profit, nonpartisan organization whose primary mission is to promote fair and rational criminal justice policies and to challenge inflexible and excessive penalties required by mandatory sentencing laws. Founded in 1991, FAMM currently has more than 75,000 members around the country. By mobilizing currently and formerly incarcerated people and their families who have been adversely affected by unjust sentences, FAMM illuminates the human face of sentencing as it advocates for state and federal sentencing reform. FAMM advances its charitable purposes in part through education of the general public and through selected *amicus* filings in important cases.

The interpretation of 18 U.S.C. § 924(e)(1) and the application of the principles that govern all mandatory minimum sentencing statutes are of paramount importance to FAMM. The court of appeals and the government have adopted an interpretation of § 924(e)(1) that treats prior offenses as having been "committed on occasions different from one another" if there is any separation in time – even just a few moments – between those offenses. That interpretation has led in many cases, including this one, to mandatory 15-year prison terms for so-called career criminals where offenses making up the criminal

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for *amicus* also represent that all parties have consented to the filing of this brief.

"career" occurred in the space of a single day, a single hour, or even just a few minutes.

This case offers the Court the opportunity to correct that harmful misinterpretation of the law and an excellent vehicle to reaffirm the important role of the rule of lenity in constraining a particularly extreme mandatory minimum statute. As FAMM's members are keenly aware, interpretation of language that triggers a mandatory minimum sentence often matters more to individual defendants' lives and liberty than interpretation of the elements for offenses sentenced through the exercise of judicial discretion. Where, as here, the government advances an expansive interpretation of a mandatory minimum that would impose arbitrary, harsh sentences in a way lacking foundation in any legislative judgment, FAMM has a strong interest in advocating for rigorous judicial scrutiny.

INTRODUCTION AND SUMMARY

I. The rule of lenity has an important role to play in the interpretation of mandatory minimum sentencing statutes and should be given special force in cases that involve them. Mandatory minimum sentencing statutes pose special threats to individual liberty and the separation of powers. Experience teaches that such statutes lead to severe and disproportionate sentences, reallocate power from legislators and judges to prosecutors, and often ultimately fail to achieve their ostensible goal of sentencing uniformity. Experience also teaches that such statutes are poorly drafted and difficult to apply. Because the costs of overreading harsh sentencing statutes are high, lenity counsels in favor of narrower reading.

A. The most obvious cost of error in overreading a mandatory minimum sentencing statute is the lost liberty of individuals who receive a far longer prison term than the legislature actually intended. Lenity embodies the courts' "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). A mandatory 15-year sentence based on less-than-certain evidence of legislative intent is indeed distasteful. Mandatory minimum statutes like the one here also reflect moral condemnation for a special subgroup of criminals – as shown by Congress's decision to pass an "Armed Career Criminal Act" ("ACCA") – that should follow only from a genuine legislative decision.

Mandatory minimum sentencing statutes also impair courts' efforts to achieve the important goals of fairness and proportionate punishment. Although Congress has the power (within constitutional bounds) to sacrifice fairness and proportionality to a perceived greater good, courts should not conclude that Congress has done so based on guesswork or speculation about the meaning of an unclear statute. Often, mandatory minimum sentencing statutes fail to achieve the goal of sentencing uniformity because they place great power in the hands of prosecutors, thus inviting inconsistent and arbitrary application. Applying the rule of lenity rigorously to such statutes lessens those costs to the system and ensures that they are imposed only when Congress has truly found them justified.

By contrast, erring on the side of narrow constructions for mandatory minimum statutes is less risky. Most importantly, judges always retain power to sentence up to the statutory maximum or to

run sentences for multiple offenses consecutively. They do not need mandatory minimums to determine appropriate sentences based on the nature of an offense or the history and characteristics of an offender. Moreover, the government is well situated to press for new legislation if dissatisfied with the courts' interpretation. There is no reason to doubt that prosecutors will call for stronger criminal penalties in response to any true threat to public safety or that legislators will fail to answer such calls.

B. The risk of error is particularly acute when courts interpret mandatory minimum sentencing statutes. As this Court knows all too well, Congress often writes such statutes in a confusing way. The statutory provision here resulted from a rare confession of error by the Solicitor General that, in essence, Congress had left needed language out of a 15-year sentencing statute and so had inflicted a harsher and broader penalty than anyone involved in the statute's creation (the Justice Department included) had anticipated. This Court's recent cases have invalidated other parts of § 924 as unconstitutionally vague, and over the years the Court has remarked on similar problems with other mandatory minimum sentencing statutes. When Congress enacts mandatory minimum sentencing statutes with enormous effects on future defendants, but gives little consideration to statutory details, the rule of lenity provides a much-needed safeguard for individual liberty.

II. The rule of lenity confirms that this Court should reverse the judgment of the court of appeals. Petitioner Wooden correctly argues that 18 U.S.C. § 924(e) should be read in his favor even without the rule of lenity. If any doubt remains, lenity should dispose of it. That conclusion is further supported

by examining judicial experience with cases under § 924(e)(1). The standard endorsed by the court of appeals – under which even a moment's separation between two prior offenses qualifies them as occurring on different occasions – has led to inconsistent results, arbitrary distinctions, and repeated judicial observations about confusion and uncertainty in the statutory scheme.

A. One recurring type of situation involves burglaries of related or adjacent structures or dwellings. Examples include the mini-warehouses at issue here; a group of adjacent storage units at the same street address in *United States v. Carr*, 592 F.3d 636 (4th Cir. 2010); and three businesses in a single strip mall in *United States v. Hudspeth*, 42 F.3d 1015 (7th Cir. 1994) (en banc), *abrogated on other grounds by Shepard v. United States*, 544 U.S. 13 (2005). Whether assessed against the constitutional right to fair warning or the legislature's sole responsibility under the Constitution to define crimes, the statute does not clearly classify several break-ins in the course of a day or an hour as prior offenses on "occasions different from one another." Accordingly, the statute should not be construed to mandate 15 years in prison by treating such offenses as separate violent felonies.

B. Another situation that repeatedly arises under § 924(e) is an offense committed while the defendant evades or resists arrest for another offense. Examples include pushing a police officer after committing a robbery, *United States v. Schieman*, 894 F.2d 909 (7th Cir. 1990); fleeing a police officer after a traffic stop that interrupted a domestic assault, *United States v. Davidson*, 527 F.3d 703 (8th Cir. 2008), *vacated in part on other grounds*, 551 F.3d 807 (8th Cir. 2008) (per curiam); and

committing two assaults in the course of a single high-speed chase, *Levering v. United States*, 890 F.3d 738 (8th Cir. 2018). The decisions applying § 924(e) to these situations acknowledge confusion and judicial disagreement, with some courts ruling that *any* separation of time between the onset of two offenses supports a finding that they occurred on different occasions. No such rule can be clearly derived from the present statute using ordinary rules of statutory construction. The courts of appeals should instead have followed the tradition of lenity to answer the difficult questions posed by this statute.

ARGUMENT

I. THE RULE OF LENITY SHOULD BE APPLIED RIGOROUSLY TO MANDATORY MINIMUM SENTENCING STATUTES

"[T]he rule of lenity[] teach[es] that ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor." *United States v. Davis*, 139 S. Ct. 2319, 2333 (2019). That rule has famously been described as "'perhaps not much less old than' the task of statutory 'construction itself.'" *Id.* (quoting *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.)).

At its core the rule of lenity is an understanding that "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed," and that, "[t]o make the warning fair, so far as possible the line should be clear." *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (Holmes, J.). In addition, judicial adherence to the rule of lenity also "places the weight of inertia upon the party" – that is, the executive branch – "that can best induce Congress to speak more clearly and keeps courts

from making criminal law in Congress's stead." *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality); *see Bell v. United States*, 349 U.S. 81, 83 (1955) (Frankfurter, J.) ("When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity.").

In several cases involving mandatory minimum sentencing provisions, the Court has recognized and applied the "presupposition . . . [that] doubts in the enforcement of a penal code" should be "resolve[d] . . . against the imposition of a harsher punishment." *Bell*, 349 U.S. at 83. Examples include *Davis*, which invoked lenity to reject a broader saving construction of a different provision of the same mandatory minimum statute at issue here, *see* 139 S. Ct. at 2333; *Burrage v. United States*, 571 U.S. 204 (2014), which described a 15-year mandatory minimum statute as "a criminal statute subject to the rule of lenity," and lenity as a reason the Court "[e]specially" could not depart from the "ordinary, accepted meaning" of "the [statutory] text," *id.* at 216; and *United States v. Granderson*, 511 U.S. 39 (1994), which "appl[ied] the rule of lenity" to "resolve [an] ambiguity" in a "mandatory minimum sentence of imprisonment" after revocation of probation, *id.* at 56-57. Those decisions cohere with others explaining that the rule of lenity assists "not only to resolve issues about the substantive scope of criminal statutes, but to answer questions about the severity of sentencing." *United States v. R.L.C.*, 503 U.S. 291, 306 (1992) (plurality) (citing *Bifulco v. United States*, 447 U.S. 381, 387 (1980) (collecting cases)).

Indeed, especially good reasons warrant applying the rule of lenity rigorously to statutes that, like the ACCA, create aggravated offenses with mandatory

minimum sentences. A broad construction bars judges from tailoring the sentence to the offense and the offender, leading to particularly harsh consequences that only Congress can correct. A narrower construction, by contrast, does not prevent judges from imposing longer sentences where necessary. "These interpretive asymmetries give the rule of lenity special force in the context of mandatory minimum provisions." *Dean v. United States*, 556 U.S. 568, 585 (2009) (Breyer, J., dissenting).

Further, experience shows that mandatory minimum statutes frequently present difficult problems of statutory construction, creating a heightened risk that courts will read them to impose sentences that Congress never intended. Where, as here, an unclear statute presents a palpable risk of error, courts properly refuse to "condemn a man to a minimum of 15 years in prison on the basis of . . . speculation," *Begay v. United States*, 553 U.S. 137, 154 (2008) (Scalia, J., concurring in the judgment), about what Congress meant to say.

A. The Rule of Lenity Helps Avoid the Particularly High Costs of Reading Mandatory Minimums Too Broadly

1. The costs of erroneously construing mandatory minimum sentencing provisions too broadly are especially high, and the costs of construing them too narrowly are especially low. The greatest cost of reading a mandatory minimum too broadly is that individual defendants lose their liberty. Mandatory minimum provisions are, by design, severe. They often tie an additional prison sentence of years or decades (here, a decade and a half) to a single factual determination. Such provisions therefore speak to the core concern that has motivated courts to apply the rule of lenity for centuries: the "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), *quoted in United States v. Bass*, 404 U.S. 336, 348 (1971). Because of that concern, this Court "will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Ladner v. United States*, 358 U.S. 169, 178 (1958).

Further, mandatory minimum provisions often are said to reflect (at least in theory) the moral judgment of the community that particular conduct deserves harsher punishment. In our system of government, that judgment is reserved to the legislature. The rule of lenity ensures that criminal sentences actually reflect legislative judgment, rather than guesswork by the courts about what the legislature meant. *See Granderson*, 511 U.S. at 69 (Kennedy, J., concurring in the judgment) ("'[B]ecause criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity,' and set the punishments therefor.") (quoting *Bass*, 404 U.S. at 348) (citation omitted); *R.L.C.*, 503 U.S. at 309 (Scalia, J., concurring in part and concurring in the judgment) (describing one of "the rule of lenity's . . . purpose[s]" as "assuring that the society, through its representatives, has genuinely called for the punishment to be meted out"); *Wiltberger*, 18 U.S. (5 Wheat.) at 95 (explaining that "[t]he rule that penal laws are to be construed strictly" is founded not merely on "tenderness of the law for the rights of individuals" but also on the "plain principle that the power of

punishment is vested in the legislative, not in the judicial department").

Any criminal statute presents these concerns, but mandatory minimum provisions make them particularly weighty. Unlike other criminal laws, mandatory minimums are exceptions to the principle that courts should "impose a sentence sufficient, but not greater than necessary," to accomplish the goals of criminal punishment after considering "the nature and circumstances of the offense and the history and characteristics of the defendant." 18 U.S.C. § 3553(a)(1). A mandatory minimum is a congressional directive to subordinate justice in individual cases to a perceived need for greater deterrence or incapacitation generally. Congress may choose to make that tradeoff (within constitutional bounds), but the courts should ensure that Congress has actually made that choice before imposing needlessly harsh punishments. *Cf. Busic v. United States*, 446 U.S. 398, 408-09 (1980) (interpreting a sentencing enhancement; rejecting the "assumption that . . . Congress' sole objective was to increase the penalties . . . to the maximum extent possible").

2. The adverse consequences of erroneously expanding mandatory sentencing beyond the limits of congressional intent affect more than just individual defendants. Such errors strike at the foundations of the sentencing system by undermining "sentencing proportionality – a key element of sentencing fairness." *Harris v. United States*, 536 U.S. 545, 570-71 (2002) (Breyer, J., concurring in part and concurring in the judgment), *overruled by Alleyne v. United States*, 570 U.S. 99 (2013). As the Sentencing Commission – quoted with approval by this Court – has explained: "'The "cliffs" that result

from mandatory minimums compromise proportionality, a fundamental premise for just punishment, and a primary goal of the Sentencing Reform Act.'" *Neal v. United States*, 516 U.S. 284, 291-92 (1996) (quoting United States Sentencing Comm'n, *Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* iii (Aug. 1991)).

Further, the rule of lenity historically has been justified in part based on the "principle of legality": conduct can be criminalized, and penalties authorized, only by legislative action, so "that the amount of discretion entrusted to those who enforce the law does not exceed tolerable limits." Herbert L. Packer, *The Limits of the Criminal Sanction* 93 (1968). As the Court put it in *Marinello v. United States*, 138 S. Ct. 1101 (2018), "prosecutorial discretion" to enforce a statute with "wide-ranging scope . . . places great power in the hands of the prosecutor," creating risks of "nonuniform execution" and "arbitary prosecution." *Id.* at 1108-09. That concern is one reason for the Court's "'traditional[] exercise[]'" of "'restraint in assessing the reach of a federal criminal statute.'" *Id.* at 1109 (quoting *United States v. Aguilar*, 515 U.S. 593, 600 (1995)). And it is a special problem with mandatory minimums that effectively transfer sentencing discretion from the trial judge, "the one actor in the system most experienced with exercising discretion," to "an assistant prosecutor not trained in the exercise of discretion." An Address by Anthony M. Kennedy, Associate Justice, Supreme Court of the United States, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003), *available at* https://www.supremecourt.gov/publicinfo/speeches/sp_08-09-03.html.

Inconsistently exercised discretion means that, in practice, mandatory minimums fail to yield even uniformity in sentencing – the benefit they are supposed to obtain at the cost of individual justice and proportionality. Over decades, the Sentencing Commission has repeatedly reported "inconsisten[cy]" and "wide geographic variations" in the use of mandatory minimum sentences. *E.g.*, United States Sentencing Comm'n, *Application and Impact of 21 U.S.C. § 851: Enhanced Penalties for Federal Drug Trafficking Offenders* 6 (July 2018) (finding "significant variation in the extent to which . . . enhanced penalties were sought against eligible offenders"); *see also United States v. Angelos*, 345 F. Supp. 2d 1227, 1252 (D. Utah 2004) (discussing "the potential for tremendous sentencing disparity if federal prosecutors across the country do not uniformly charge . . . violations" of 18 U.S.C. § 924(c)), *aff'd*, 433 F.3d 738 (10th Cir. 2006).[2]

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[2] *See also* United States Sentencing Comm'n, *Mandatory Minimum Penalties for Sex Offenses in the Federal Criminal Justice System* 56 (Jan. 2019) (finding that, "[i]n fiscal year 2016, the mandatory minimum penalty for receipt [of child pornography] [wa]s inconsistently applied," leading to "substantial" differences in sentences where "the conduct involved in the offenses was not meaningfully distinguishable"); United States Sentencing Comm'n, *Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* 345 (Oct. 2011) ("2011 Report") (finding "inconsistencies in application of certain mandatory minimum penalties, as shown by . . . data analyses and confirmed by interviews of prosecutors and defense attorneys"); United States Sentencing Comm'n, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 89 (Nov. 2004) ("Research over the past fifteen years has consistently found that mandatory penalty statutes are used inconsistently in cases in which they appear to apply.").

Indeed, over the last two decades, different Attorneys General have instructed federal prosecutors differently on how to use mandatory minimum statutes, switching between more- and less-aggressive approaches.[3] In adopting such policies, the executive branch takes into its own hands the tradeoff between sentencing uniformity, on the one hand, and individual justice and proportionality, on the other. Whatever the wisdom of the competing approaches, that practice emphasizes how mandatory minimum statutes transfer power over individual liberty from lawmakers and judges to prosecutors. In our adversarial system, moreover, prosecutors can and do use that power strategically in ways that undermine structural protections for individual liberties, such as by using the threat of a mandatory minimum to obtain a guilty plea. *See United States v. Kupa*, 976 F. Supp. 2d 417, 420 (E.D.N.Y. 2013) (condemning the practice of "coerc[ing] guilty pleas, and sometimes . . . coerc[ing] cooperation as well, [by] routinely threaten[ing] ultra-harsh, enhanced mandatory sentences that *no one* – not even the prosecutors themselves – thinks are appropriate") (footnote omitted), *aff'd,* 616 F. App'x 33 (2d Cir. 2015).

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[3] *See Angelos*, 345 F. Supp. 2d at 1253 & n.120 (discussing a 2003 memorandum intended "to reduce charging disparities stemming from § 924(c)"); United States Sentencing Comm'n, *An Overview of Mandatory Minimum Penalties in the Federal Criminal Justice System* 24-25 (July 2017) (comparing the 2013 "Smart on Crime" initiative, which outlined circumstances in which prosecutors should "'decline to charge'" mandatory minimum sentences, to "revised guidance" in 2017 directing prosecutors generally to "'charge and pursue the most serious, readily provable offense,'" with seriousness measured by the greatest sentence, "'including mandatory minimum sentences'").

Nor does the expansion of prosecutorial power through mandatory minimum statutes stop at the charging stage. Even after conviction, the prosecutor holds an important key to lessening the effect of a mandatory minimum sentence. A district court is freed from restrictions on its sentencing discretion "[u]pon motion of the Government . . . so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person," 18 U.S.C. § 3553(e), or it can similarly reduce the sentence later, again with the government's approval, under Federal Rule of Criminal Procedure 35(b)(4).[4] Such discretionary motions have large effects on sentences, often reducing them by many years.[5] Research has found "enormous differences in how prosecutors exercise that discretion, with substantial variation by district."[6] Again, within broad constitutional bounds, Congress has the power to create such a system. But the Court need not and should not broaden more than Congress's language requires

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[4] In certain cases involving non-violent drug offenders, a district judge may invoke 18 U.S.C. § 3553(f), often called a judicial "safety valve," but the safety valve is "narrow" and still requires prosecutorial approval in substance if not in form. Rachel E. Barkow, *Categorical Mistakes: The Flawed Framework of the Armed Career Criminal Act and Mandatory Minimum Sentencing*, 133 Harv. L. Rev. 200, 218 (2019).

[5] *See* United States Sentencing Comm'n, *Mandatory Minimum Penalties for Firearms Offenses in the Federal Criminal Justice System* 42 (Mar. 2018) ("In fiscal year 2016, the average sentence for offenders who remained subject to the mandatory minimum penalty [under § 924(e)] at sentencing was 200 months, significantly longer than the average sentence for offenders relieved of this mandatory minimum penalty (112 months).").

[6] Barkow, *Categorical Mistakes*, 133 Harv. L. Rev. at 224 & n.183, 236 & n.281 (discussing the 2011 and 1991 Reports).

statutes that give prosecutors powers over individual lives traditionally reserved for independent judges.

3. By contrast, the costs of erroneously construing a mandatory minimum provision too narrowly are relatively low, both for individual cases and for the criminal justice system as a whole. In cases that fall outside the scope of a mandatory minimum, but that nevertheless feature aggravating circumstances similar to those that moved Congress to impose the minimum, a sentencing judge still has discretion (guided by § 3553(a) and the sentencing guidelines) to impose a more severe sentence. As Justice Breyer explained in *Dean*, "an interpretive error on the side of leniency[] still *permits* the sentencing judge to impose a sentence similar to, perhaps close to, the statutory sentence even if that sentence . . . is not legislatively *required*." 556 U.S. at 584 (Breyer, J., dissenting).

Moreover, "an error that excludes (erroneously) a set of instances Congress meant to include . . . could lead the Sentencing Commission to focus on those cases . . . [and] make available to Congress a body of evidence and analysis that will help it reconsider the statute." *Id.* at 585. Those who bring actions under the criminal laws (the executive branch) have far greater access to those who create them (the legislative branch) than do those who defend against such actions (potential criminal defendants). In light of this practical reality, the rule of lenity "places the weight of inertia upon the party that can best induce Congress to speak more clearly." *Santos*, 553 U.S. at 514 (plurality).

B. The Risk of Reading Mandatory Minimums Too Broadly Is Also Particularly High

The risk of mistaking congressional intent is also unusually high in the case of mandatory minimum provisions. Those provisions often do not originate from a careful and considered drafting process. The history of the "occasions different from one another" language of § 924(e)(1) is a good example: as petitioner shows in detail, that language stemmed from then-Solicitor-General Fried's confession of error to this Court in *Petty v. United States*, 481 U.S. 1034 (1987) (No. 86-6263). In that case, the United States candidly admitted that the different-occasions language, present in "other enhanced penalty provisions," was omitted from the predecessor to § 924(e)(1), even though the legislative history showed "that both Congress and those supporting the legislation, including the Department of Justice, did not intend that the penalty provision would apply more broadly than in the case of the other federal enhanced penalty statutes." Pet. Br. App. 25a-26a; *see id.* at 26a-31a.

Had the United States not taken the unusual step of confessing error in *Petty*, the courts might well have concluded – as the Eighth Circuit already had – that Congress had intentionally left the different-occasions language out of the statute. After all, as the Solicitor General's brief pointed out, courts construing statutes often draw a "negative implication" from the omission of language in one statute that is present in another, similar statute. *Id.* at 26a (citing *Rodriguez v. United States*, 480 U.S. 522, 525 (1987) (per curiam)). And courts reaching that conclusion would have imposed minimum 15-year sentences, not based on a "genuine[] call[] for th[at]

punishment" by "society['s] . . . representatives," *R.L.C.*, 503 U.S. at 309 (Scalia, J., concurrring in part and concurring in the judgment), but based on a slip of the legislative pen.

There are other examples. Indeed, § 924(e) presents one: its "residual clause" defined a "violent felony" to include any felony that "involves conduct that presents a serious potential risk of physical injury." 18 U.S.C. § 924(e)(2)(B)(ii). This Court struck that clause down as unconstitutionally vague in *Johnson v. United States*, 576 U.S. 591 (2015), relying in part on "[n]ine years' experience trying to derive meaning from the residual clause" as evidence that the courts had "embarked upon a failed enterprise." *Id.* at 601-02. And the Court reached the same conclusion in *Davis* as to § 924(e)'s cousin § 924(c), striking down a similarly vague clause that triggered mandatory minimum sentences of 5, 7, 10, and 25 years. *See* 139 S. Ct. at 2325, 2336.

In *United States v. O'Brien*, 560 U.S. 218 (2010), the Court described as "unclear" yet another provision of § 924(c) that imposed a 30-year mandatory minimum sentence for possessing a machinegun while committing certain crimes. *Id.* at 227, 229. Facing that lack of clarity, the Court applied a five-factor test to determine whether machinegun possession was intended to be an offense element or as a sentencing factor. *See id.* at 227-32. In *Granderson*, the Court diplomatically observed that 18 U.S.C. § 3565(a), imposing a mandatory minimum sentence for certain revocations of parole, did not "appear[] . . . to have received Congress' careful attention." 511 U.S. at 42. Justice Scalia less diplomatically called § 3565(a) "wretchedly drafted." *Id.* at 60 (Scalia, J., concurring in the judgment).

The Court's repeated struggles with opaque text and structure in mandatory minimum provisions are the kind of "experience" that is "the life of the law." *Johnson*, 576 U.S. at 601. That experience teaches that mandatory minimum sentencing statutes, including the one at issue here, commonly use "sweeping and imprecise language" that "set[s] up a host of vexing constitutional and statutory interpretation questions for the courts." Barkow, *Categorical Mistakes*, 133 Harv. L. Rev. at 202. The rule of lenity, "as a sort of 'junior version of the vagueness doctrine,'" *United States v. Lanier*, 520 U.S. 259, 266 (1997) (quoting Packer, *Criminal Sanction* at 95), is a useful doctrinal approach to answering those questions. If the Court finds the statute now before it ambiguous, lenity can help – and an emphasis on lenity in the context of mandatory minimum statutes can help guide the lower courts to solve future, similar problems that will inevitably arrive.[7]

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[7] Some have stated that "a court must find not just ambiguity but 'grievous ambiguity' before resorting to the rule of lenity." *Shular v. United States*, 140 S. Ct. 779, 788 & n.2 (2020) (Kavanaugh, J., concurring) (collecting examples). Other recent decisions, drawing on a long line of authority, have applied principles of lenity without the adjective "grievous." *See*, *e.g.*, *Davis*, 139 S. Ct. at 2333 (invoking lenity where "a criminal statute . . . d[id] not clearly proscribe" conduct and stating that "ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor"). The notion that lenity applies only in cases of "grievous ambiguity" appeared in this Court's cases relatively recently. *See Chapman v. United States*, 500 U.S. 453, 463 (1991) (quoting *Huddleston v. United States*, 415 U.S. 814, 831 (1974), which had stated that the Court "perceive[d] no grievous ambiguity or uncertainty in" a statute before it, *id.*, but did not suggest that "grievous ambiguity" was a threshold requirement for any reliance on lenity). The rule of lenity itself goes back for centuries. In any event,

II. JUDICIAL EXPERIENCE WITH 18 U.S.C. § 924(e)(1) SUPPORTS APPLYING THE RULE OF LENITY

Petitioner's brief ably sets forth why the Sixth Circuit's analysis finds no support in the ACCA's text, history, or purpose. FAMM agrees that this Court can and should reverse the judgment of the Sixth Circuit without resort to the rule of lenity or the principles that underlie it. If the Court finds the question close, however, it may help to consider judicial experience applying the same standard that the Sixth Circuit applied here. Examining that experience counsels in favor of lenity.

That experience shows that the approach of the court of appeals – asking whether "it [is] possible to discern the point at which the first offense is completed and the subsequent point at which the second offense begins," JA22 – does not satisfy this Court's teaching that "so far as possible the line should be clear." *McBoyle*, 283 U.S. at 27. Nor does that test align, in any way "the common world will understand," *id.*, with Congress's effort to classify as an armed career criminal someone who has "three previous convictions . . . for a violent felony or a serious drug offense, or both, committed on occasions different from one another," 18 U.S.C. § 924(e)(1). Instead, the temporal-sequencing test is at best "no more than a guess as to what Congress intended," *Ladner*, 358 U.S. at 178 – a guess that produces arbitrary and unpredictable results.

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where all the tools of statutory construction fail to resolve genuine ambiguity as to whether Congress has demanded a mandatory prison term, that ambiguity can fairly be called "grievous."

A. Entries of Separate Structures on a Single Day or Night Are Not Clearly Multiple Different "Occasions"

1. The decision under review is a useful starting point. According to the Sixth Circuit, all 10 of Wooden's 1997 convictions for burglary, which took place on a single night, were "separate ACCA predicate offenses" that occurred on "'occasions different from one another.'" JA21 (quoting 18 U.S.C. § 924(e)(1)). To support that conclusion, the court of appeals reasoned that, "[w]hatever the contours of a 'mini' warehouse, Wooden could not be in two (let alone ten) of them at once"; that he "could have ceased his criminal conduct" after entering the first warehouse without entering nine more; and that, although "one could characterize th[e] cluster of warehouses as being adjoined 'at the same business location,'" they were "different locations" because their owners had "distinct sets of property rights." JA23-24.

Wooden argues persuasively (at 30) that the "textual foundations" for the court of appeals' "test . . . are essentially nonexistent." Even if the statute does not wholly foreclose that test, it certainly gives no fair warning that unlawfully entering 10 small warehouses within the same building on a single evening triggers a harsh 15-year penalty for later owning a gun, while spending the same amount of time in a single warehouse would not. The court of appeals' analysis thus "mak[es] criminal law in Congress's stead." *Santos*, 553 U.S. at 514 (plurality). At best it is judicial doctrine built up to cover the lack of clarity in the statute, rather than anything that can claim to be an application of the statute itself. Those who agree with Justice Scalia that "it is not consistent with the rule of lenity

to construe a textually ambiguous penal statute against a criminal defendant on the basis of legislative history," *R.L.C.*, 503 U.S. at 307 (Scalia, J., concurring in part and concurring in the judgment), can stop there, because the statute is at least textually ambiguous.

Those who look to legislative history as an interpretive guide should reach the same ultimate conclusion. As Wooden persuasively shows (at 21-25), that history ranges from an Assistant Attorney General's 1984 testimony that the statute was meant to catch "people who have demonstrated . . . that locking them up and letting them go doesn't do any good," Pet. Br. Add. 29a; to the Solicitor General's 1987 concession in *Petty* that the statute was "intended" to cover "multiple criminal episodes," *id.* at 26a; to then-Senator Biden's 1988 statement that the statute was meant to "express[] [a] concept of what is meant by a 'career criminal,'" 134 Cong. Rec. S17,370 (daily ed. Nov. 10, 1988). None of this suggests an intent – let alone a clear one – to consider multiple offenses on a single night to be a career in crime because it took a few seconds to move from one mini-warehouse to another within a cluster of such warehouses.

2. The Fourth Circuit's decision in *United States v. Carr*, 592 F.3d 636 (4th Cir. 2010), illustrates the same point. That case involved Daryl Carr, who possessed a firearm after previously pleading guilty to 13 state-law charges of "felony breaking or entering." *Id.* at 638. Those 13 offenses all took place on a single day in 2006 during which Carr broke into each of 13 "different storage unit[s]" at the same street address ("N.C. 32 South"). *Id.* The court of appeals conceded that the offenses were "substantively the same and arguably had the same

criminal objective," but it nevertheless found them to be "separate and distinct criminal episodes." *Id.* at 645. It reasoned that the storage units were "different locations"; that most, though not all, of the offenses had "different victims"; and that Carr "had the opportunity . . . to cease and desist his criminal behavior" between one storage unit and the next, adding in a footnote that "Carr simply could not have broken into or entered the 13 separate storage units simultaneously." *Id.* at 645 & n.8 (citation omitted).[8]

In that analysis, the Fourth Circuit asserted that the statutory "'definition may be clear'" but conceded that "'the factual permutations surrounding the ACCA tend to create havoc'"; that "'courts have applied a multiplicity of factors'" in cases involving § 924(e); and that the "analysis" has a "fluid nature." *Id.* at 640 (quoting *United States v. Letterlough*, 63 F.3d 332, 335 (4th Cir. 1995)). That sort of assessment ought to be a warning sign in construing a criminal statute: it calls to mind this Court's observation in *Johnson* that "pervasive disagreement about the nature of the inquiry one is supposed to conduct and the kinds of factors one is supposed to consider" is a sign of unacceptable vagueness. 576 U.S. at 601. The present case, to be sure, is not a vagueness challenge. But the rule of lenity – and the "constitutional principles underlying th[at] rule," *Davis*, 139 S. Ct. at 2333 n.8 – counsels against adopting a line of authority whose own proponents report fluidity at best and havoc at worst.

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[8] In another footnote, the Fourth Circuit noted that Carr had other "state convictions" on different dates, at least one of which involved "assault by pointing a gun," *Carr*, 592 F.3d at 639 n.3, but did not analyze whether they constituted ACCA predicates or rely on them for its holding.

3. The Seventh Circuit's decision in *United States v. Hudspeth*, 42 F.3d 1015 (7th Cir. 1994) (en banc), involved Thomas Hudspeth, who on one day in 1983 broke into three businesses – "a doughnut shop, a dry cleaners, and an insurance company." *Id.* at 1018-19. The businesses were in the same "strip mall," *id.*, where the burglars made "a hole through [a] shared wall" and "forced open the door" connecting two of the businesses, *id.* at 1022. The whole affair took "approximately thirty-five minutes." *Id.* at 1018-19. A majority of the Seventh Circuit held that, because Hudspeth's three offenses were "committed sequentially, against different victims, at different times, and at different locations," they were "clearly crimes 'committed on occasions different from one another.'" *Id.* at 1021.

One concurrence reasoned that Hudspeth was "appropriately sentenced because . . . the record shows three separate crimes against separate victims and not a single crime or criminal occasion (whatever that is)." *Id.* at 1025 (Bauer, J., concurring). One partial dissent noted that past decisions had "grappl[ed] with the ambiguity of the ACCA" and noted "the malleability of the relevant terms," including the different-occasions language. *Id.* at 1025-26 (Flaum, J., concurring in part and dissenting in part). Another, joined by five of the 11 judges who heard the case, agreed that the "cold print of the statute books" did not answer the question before the court and argued for interpreting § 924(e) as a "congressional mandate . . . to identify the true recidivist." *Id.* at 1034, 1037 (Ripple, J., concurring in part and dissenting in part).

None of the opinions in *Hudspeth* suggested applying the rule of lenity. Yet at least six members

of the en banc court – counting Judge Bauer, whose concurrence expressed marked frustration with the statutory language – appear to have found no answer to the question before them in § 924(e).[9] As judicial experience goes, that is further evidence that "Congress le[ft] to the Judiciary the task of imputing to Congress an undeclared will," *Bell*, 349 U.S. at 83, concerning prior offenses that occur over a short period of time in several adjacent structures.

B. Evading or Resisting Arrest Does Not Clearly Involve Multiple Different "Occasions"

Another situation that repeatedly arises under § 924(e) is an offense after which the defendant evades or resists arrest. A rule that focuses on sequence in time treats evasion or resistance as a different "occasion," because it is possible to imagine a point at which the defendant stops the first offense and starts running. But an ordinary person trying to figure out the meaning of the statute from its words would not likely reach that conclusion. Nor do the tools of statutory construction suggest that Congress meant to treat such an offender as a career criminal deserving 15 years in prison.

1. In *United States v. Schieman*, 894 F.2d 909 (7th Cir. 1990), David Schieman received a 15-year sentence based in part on prior convictions of burglary and aggravated battery of a police officer. *Id.* at 910. As a partial dissent explained:

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[9] *Hudspeth* relied on police reports to determine the circumstances of prior offenses; *Shepard v. United States*, 544 U.S. 13, 16 (2005), later barred courts from considering police reports in applying § 924(e). The Seventh Circuit has since cited *Hudspeth* as "abrogated" at least in part by *Shepard*. *See*, *e.g.*, *United States v. Elliott*, 703 F.3d 378, 384 n.3 (7th Cir. 2012).

> Schieman committed a robbery, walked three blocks away to make a telephone call [at a phone booth] to arrange transportation away from the scene, and, in an attempt to evade apprehension, pushed a police officer at the phone booth. The pushing incident occurred approximately five minutes after the robbery.

Id. at 913 (Ripple, J., concurring in part and dissenting in part). The majority reasoned that, "[o]nce the original crime is complete, there is no principled way to distinguish" between a battery "within ten minutes of the burglary" and one "a day after the burglary." *Id.* at 913 (majority).

One giving the words "different" and "occasion" their ordinary meaning might well think that both Schieman's burglary and his attempt to escape five minutes later occurred on the same occasion. One thinking of the statute as an attempt to identify career criminals would reach the same result. And the *Schieman* court's reasoning only emphasizes how traditional principles of lenity support that conclusion. The court took a case it thought clear (escape a day later) and used it to resolve a case it thought unclear (escape five minutes later) by arguing the lack of a "principled . . . distin[ction]" between the two. But the felt need to invoke the day-after hypothetical itself shows that the statute does not speak clearly to the five-minute case. The court's role was therefore to limit the 15-year sanction to the case where it was unambiguously intended.

2. In *United States v. Davidson*, 527 F.3d 703 (8th Cir. 2008), *vacated in part on other grounds*, 551 F.3d 807 (8th Cir. 2008) (per curiam), Mark Davidson was sentenced under § 924(e) based on prior convictions that included an attempted domestic assault

and fleeing from a police officer who interrupted that attempt with a traffic stop. *Id.* at 707. The Seventh Circuit conceded that the "pause between the two offenses was brief" and that the crimes were committed in "rapid succession," but reasoned that a "moment of relative calm" had occurred when the officer stopped Davidson, creating "a point of demarcation between episodes" that justified treating Davidson's prior convictions as separate. *Id.* at 710.

The *Davidson* court candidly acknowledged that the circuits had "struggled with th[e] problem" of applying § 924(e) to resistance or evasion offenses, "reaching arguably inconsistent results," *id.* at 709, discussing *Schieman* and other examples. Considered as an exercise in the common-law method, the "point of demarcation" analysis that *Davidson* derived might not be exceptional. But it has been settled since *United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812), that "federal crimes . . . are solely creatures of statute," *Liparota v. United States*, 471 U.S. 419, 424 (1985), a principle that lenity helps protect, *see id.* at 427-28. And the distinction that *Davidson* and cases like it draw – if it can even be squared with the statute at all – is clearly a rule made by the courts rather than one set down by statute.

3. In *Levering v. United States*, 890 F.3d 738 (8th Cir. 2018), Merwyn Levering was sentenced under § 924(e) based on prior convictions that included at least two assaults in the course of a high-speed flight from police officers in a stolen automobile. *Id.* at 739. Levering argued that the assaults were not committed on different occasions because the flight was a "'continuous course of conduct.'" *Id.* at 741. The Eighth Circuit acknowledged that "the phrase 'continuous course of conduct' appears in our cases on

this subject," but rejected it as "unhelpful to the analysis." *Id.* at 742. Instead, the court relied on the fact that the assaults were committed "at different times in different counties against different victims." *Id.* The Eighth Circuit acknowledged that several unpublished decisions from the Sixth Circuit pointed to a different result, but "respectfully differ[ed]" with them. *Id.*

Like the Fourth Circuit's acknowledgment of "havoc" in *Carr*, the vigorous disagreement among members of the Seventh Circuit in *Hudspeth*, and the Eighth Circuit's own earlier acknowledgment of "arguabl[e] inconsisten[cy]" in *Davidson*, the reasoning of *Levering* points to the type of pervasive uncertainty about statutory application that suggests courts have gone beyond the guidance that an unclear statute can offer. It is especially telling that – as the Eighth Circuit's criticism of the Sixth Circuit shows – courts theoretically applying the same sequential test reach different results as to similarly situated defendants.

4. None of this is to deny that fleeing from arrest and assaulting someone while doing so is not serious misconduct that state and sometimes federal law properly criminalize. The police officer in *Schieman* could have been hurt, as could the bystanders to the high-speed chases in *Davidson* and *Levering*. Nor is there any doubt that after their prior convictions the various defendants were prohibited from possessing guns, *see* 18 U.S.C. § 922(g), and could be punished for breaking that law. The function of § 924(e), however – as its text, structure, and history all show – is to carve out a special set of repeat offenders, labeled as "armed career criminals," for special condemnation and harsh mandatory punishment. It is impossible to read the cases struggling with these

issues and conclude that the legislature has "clearly said" that those defendants should "languish[] in prison," *Bass*, 404 U.S. at 348 (citation omitted), for at least 15 years.

CONCLUSION

The court of appeals' judgment should be reversed.

Respectfully submitted,

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