No. 20-5279

In the Supreme Court of the United States

WILLIAM DALE WOODEN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether petitioner's previous convictions for burglarizing ten different, separately occupied storage units at distinct points in time are for offenses "committed on occasions different from one another" for purposes of the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(1).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Cases—Continued: Page

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes, and guidelines: Page

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OPINIONS BELOW

The opinion of the court of appeals (J.A. 12-25) is reported at 945 F.3d 498. The opinion and order of the district court is not published in the Federal Supplement but is available at 2015 WL 7459970.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 2019. A petition for rehearing was denied on February 26, 2020. (Pet. App. B1.) The petition for a writ of certiorari was filed on July 24, 2020, and granted on February 22, 2021. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 924(e)(1) of Title 18 of the United States Code provides:

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Tennessee, petitioner was convicted of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e)(1). Judgment 1. The district court sentenced him to 188 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. J.A. 12-25.

1. In November 2014, police officers in Monroe County, Tennessee, were looking for a fugitive whose vehicle had previously been seen parked outside a residence that petitioner shared with his wife. J.A. 13-14. At the time, petitioner was on parole in connection with a 2010 Georgia conviction for burglary. Presentence Investigation Report, D. Ct. Doc. 83, at ¶ 36 (Dec. 11, 2018) (2018 PSR). A plainclothes officer, Corporal Mason, knocked on the front door of the residence. J.A. 14. When petitioner answered, Corporal Mason asked if he could speak to petitioner's wife, and if he could wait inside to stay warm. *Ibid.* Petitioner responded, "Yes. That's okay." *Ibid.* Corporal Mason and a second officer came inside. *Ibid.*

Shortly after they entered the home, the officers saw petitioner pick up a rifle. J.A. 14. Corporal Mason ordered petitioner to put the gun down, and petitioner complied. *Ibid.* Corporal Mason knew that petitioner was a felon, so the officers handcuffed petitioner, secured the rifle, and searched petitioner, discovering a loaded revolver holstered on him. *Ibid.* Petitioner's wife then gave the officers consent to search the residence, where they found another rifle. *Ibid.* Petitioner later confirmed that all three guns belonged to him. *Ibid.*

2. A federal grand jury indicted petitioner on one count of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e). Indictment 1.

a. Under 18 U.S.C. 924(a)(2), the default term of imprisonment for the offense of possessing a firearm as a felon is zero to 120 months. The Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), prescribes a penalty of 15 years to life imprisonment if the defendant has at least "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).

The ACCA defines a "violent felony" as an offense punishable by more than one year in prison that "has as an element the use, attempted use, or threatened use of physical force against the person of another" (the elements clause); "is burglary, arson, or extortion, [or] involves use of explosives" (the enumerated-offenses clause); or "otherwise involves conduct that presents a serious potential risk of physical injury to another" (the residual clause). 18 U.S.C. 924(e)(2)(B). This Court has held that the residual clause is unconstitutionally vague.

See *Welch* v. *United States*, 136 S. Ct. 1257, 1260-1261 (2016).

Although the ACCA does not define "burglary" as it appears in the enumerated-offenses clause, this Court in *Taylor* v. *United States*, 495 U.S. 575 (1990), construed the term to include "any crime, regardless of its exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Id.* at 599. *Taylor* instructed courts to employ a "categorical approach" to determine whether a prior conviction is for an offense that "substantially corresponds" to the "generic" form of burglary referenced in the ACCA. *Id.* at 600, 602. If the state burglary statute does not substantially correspond to the ACCA definition, the defendant's prior conviction does not qualify as ACCA "burglary" unless—under what is known as the "modified categorical approach"—(1) the statute is "'divisible'" into multiple crimes with different elements, and (2) the government can show, using a limited set of record documents, that the jury necessarily found, or the defendant necessarily admitted, the elements of generic burglary. *Mathis* v. *United States*, 136 S. Ct. 2243, 2249 (2016) (citation omitted); see *Descamps* v. *United States*, 570 U.S. 254, 262-264 (2013); *Shepard* v. *United States*, 544 U.S. 13, 26 (2005).

b. Petitioner initially pleaded guilty to possessing a firearm as a felon. D. Ct. Doc. 35 (Aug. 2, 2016). In the factual basis submitted in connection with his plea, petitioner acknowledged that if he "is determined to be an Armed Career Criminal, as defined in Title 18, United States Code, Section 924(e), he faces a minimum mandatory term of imprisonment of at least fifteen (15) years and up to life." D. Ct. Doc. 34, at 2 (July 21, 2016).

The Probation Office prepared a presentence investigation report. See D. Ct. Doc. 36 (Nov. 3, 2016) (2016 PSR). The report documented a criminal history dating back to 1984 (when petitioner was 21), encompassing more than 30 offenses, with petitioner having spent most of his adult life either in prison, on parole, or on probation. See *id.* ¶¶ 24-36. Petitioner's criminal history included a 1989 Georgia conviction for aggravated assault with intent to rape; ten 1997 Georgia convictions for burglary; and a 2010 Georgia conviction for burglary. *Id.* ¶¶ 26, 32, 36. The report did not classify petitioner as an ACCA offender.

A few weeks later, the Eleventh Circuit issued a decision interpreting the Georgia burglary statute and clarifying how the ACCA applies to convictions under it. See *United States* v. *Gundy*, 842 F.3d 1156, 1166-1169 & n.6 (2016), cert. denied, 138 S. Ct. 66 (2017). Based on that decision, the government contended that petitioner's criminal history triggered sentencing under the ACCA, because his 1989 Georgia aggravated assault conviction, 1997 Georgia burglary convictions, and 2010 Georgia burglary conviction were all violent felonies. D. Ct. Doc. 42, at 1 (Dec. 6, 2016). The Probation Office took the view that the government's objection to the presentence report was "a legal matter and is best left to the determination of the Court." *Ibid.*

Petitioner moved to withdraw his guilty plea, and the district court granted the motion. D. Ct. Docs. 50 & 51 (June 21, 2017); J.A. 37-45. The court observed that although petitioner had been "advised multiple times of the possibility that he could be designated as an armed career criminal," petitioner's prior counsel had informed him "before he pleaded guilty" that it was "highly unlikely" under then-governing law that he

would be so designated. J.A. 38; see J.A. 42. And the court reasoned that because, under the subsequent case law, petitioner's "criminal history dictates that he be designated as an armed career criminal" under the ACCA, J.A. 39, he should be allowed to withdraw his plea, J.A. 45.

c. A jury thereafter found petitioner guilty of possessing a firearm as a felon. D. Ct. Doc. 69 (May 30, 2018); see J.A. 14. In preparation for sentencing, the Probation Office prepared a revised presentence report, in which it determined that petitioner qualified for sentencing under the ACCA based on his 1989 aggravated assault conviction, his ten 1997 burglary convictions, and his 2010 burglary conviction. 2018 PSR ¶ 18; see *id.* ¶¶ 26, 32, 36, 68. The Probation Office calculated petitioner's advisory guidelines range as 188 to 235 months of imprisonment. *Id.* ¶ 69.

Petitioner challenged the Probation Office's determination that he qualified for sentencing under the ACCA. Among other things, petitioner contended that his ten 1997 convictions for "enter[ing] * * * a building" "without authority and with the intent to commit a felony or theft therein," Ga. Code Ann. § 16-7-1(a) (1996), were not for crimes "committed on occasions different from one another," 18 U.S.C. 924(e)(1), but instead "should be considered as one prior conviction." D. Ct. Doc. 84, at 6 (Jan. 31, 2019); see *id.* at 6-9. Those convictions were based on guilty pleas pursuant to a charging document with ten separate burglary counts, each identifying a separate "mini-warehouse" at "100 Williams Road" that petitioner and others had burglarized "between the 24th and 25th days of March, 1997." J.A. 26-31. As summarized in the following chart, each count listed a different "building," identified by the unit

number of the mini warehouse, and a specific "lawful occupant":

Count	Mini Warehouse No.	Lawful Occupant
1	Unit #17	Robert Holt
2	Unit #19	Robert Holt
3	Unit #18	John Davis
4	Unit #14	John Davis
5	Unit #15	John Davis
6	Unit #16	Vicky & Phil Elder
7	Unit #2	James & Joan Pearce
8	Unit #20	Paula Adcock
9	Unit #1	Bud McCollough
10	Unit #13	Bud McCollough

J.A. 26-31.

The district court rejected petitioner's argument that he did not qualify for an ACCA sentence. J.A. 58-59. The court observed, *inter alia*, that "the 1997 indictment demonstrates that [petitioner] burglarized ten separately numbered mini warehouses belonging to different victims"; that "[e]ach separate mini warehouse provides a discrete point at which the first offense was completed and the second began and so on"; and that "it

was possible for the defendant to stop at any point between the mini warehouses." *Ibid.* Because the 1997 burglary convictions and the 2010 burglary conviction were themselves enough to qualify petitioner for an enhanced sentence, the court "decline[d] to make a ruling" on petitioner's contention that his 1989 aggravated assault conviction was not a violent felony. J.A. 59.

The district court adopted the Probation Office's calculation of petitioner's offense level and criminal history category, as well as the resulting advisory guidelines range of 188 to 235 months of imprisonment. J.A. 60. The court sentenced petitioner to 188 months of imprisonment, to be followed by three years of supervised release. J.A. 60-62.

3. The court of appeals affirmed. J.A. 12-25. The court identified three reasons why petitioner's ten 1997 burglaries were "committed on occasions different from one another." 18 U.S.C. 924(e)(1). First, the court observed that it was "possible to discern the point at which the first offense [wa]s completed and the subsequent point at which the second offense beg[an]," because the charging document showed that petitioner "was accused of, and pleaded guilty to, 'entering' ten different mini warehouses." J.A. 22-23 (citation omitted); see J.A. 26-34. The court rejected petitioner's contention that a more robust record was necessary to assess that separateness, emphasizing that "the indictment to which [petitioner] pleaded guilty provide[d] all the record [the court] need[ed]." J.A. 23.

Second, the court of appeals observed that petitioner "could have ceased his criminal conduct after the first offense and withdrawn without committing the second offense" and further offenses, seeing "no reason why it would have been impossible for [petitioner] to call it a

night after the first burglary, without burglarizing nine more warehouses." J.A. 24. And third, the court observed that petitioner's burglaries "were committed in different locations," because "[e]ach warehouse" had "its own building number and storage space." *Ibid.* The court further noted that the "many different lawful occupants of those warehouses" meant that each burglary "infringed upon a different bundle of property rights for ACCA purposes." *Ibid.* "By any measure," the court explained, petitioner's "burglary offenses were separate offenses for purposes of the ACCA." *Ibid.*; see J.A. 22.

SUMMARY OF ARGUMENT

The text, context, and history of the ACCA demonstrate that temporally distinct crimes are "committed on occasions different from one another" for purposes of 18 U.S.C. 924(e)(1). Petitioner's suggestion to displace that relatively simple deterministic test in favor of a "holistic and circumstance-dependent" inquiry into "the criminal opportunities that give rise to each offense," Br. 17, lacks meaningful support, provides sentencing courts with little guidance, and defies ready or consistent application.

A. As this Court explained in *Coleman* v. *Tollefson*, 575 U.S. 532 (2015), and as contemporaneous dictionaries confirm, an "occasion" is an occurrence, happening, or incident that takes place at a particular point in time. Here, the ACCA provides that the relevant "occasion" is the "commi[ssion]" of an offense, 18 U.S.C. 924(e)(1), which occurs when its elements are established. That "occasion" is "different" from the "occasion" on which another offense is committed at a different time. This Court's decisions interpreting the ACCA have accordingly often described the commission of an offense as its

own "occasion," and a temporal-distinctness test harmonizes with the categorical approach's focus on the elements, rather than the details, of a defendant's prior crimes.

Section 924(e)(1)'s history confirms that temporally distinct offenses are "committed on occasions different from one another." 18 U.S.C. 924(e)(1). Congress enacted the different-occasions clause in response to the Eighth Circuit's decision, and the government's confession of error, in *United States* v. *Petty*, 798 F.2d 1157 (1986) (per curiam), vacated, 481 U.S. 1034 (1987). As the Eighth Circuit, the Solicitor General, and members of Congress all recognized, the defendant in *Petty* had received an ACCA sentence based on six prior convictions for the "simultaneous" robberies of six victims in the same place, at the same time, through the same acts. Congress accordingly amended the ACCA to expressly preclude the statute's application to intertwined simultaneous offenses. Congress did not, however, require an amorphous all-facts-and-circumstances evaluation of prior offenses.

In accord with the clear text and history, most courts of appeals have employed a readily administrable test under which temporally distinct offenses are separate ACCA predicates. Under that test, petitioner's sequential burglaries of separately owned storage units walled off from one another were "committed on occasions different from one another." 18 U.S.C. 924(e)(1). Indeed, the three decades of circuit precedent applying the test include a number of cases quite similar to this one, in which the courts have recognized that offenses committed sequentially, but close in time, occurred on different "occasions" for purposes of the ACCA.

B. Petitioner's contrasting approach would require an inquiry unmoored from the statutory text and would inject great uncertainty and variability into what should be a relatively straightforward analysis. Petitioner urges an inquiry into whether offenses "arise from a common criminal opportunity," Br. 12, under which "occasion" is defined as "a juncture of circumstances providing conditions that are favorable for related activities or events," Br. 14. But that definition was not the most common meaning of "occasion" when the different-occasions clause was enacted and is not the definition that this Court endorsed in *Coleman*. Petitioner's proposed interpretation also fails to account for the surrounding statutory language—in particular, Section 924(e)(1)'s tethering of the word "occasion" to the "commit[ing]" of an offense. And petitioner's interpretation is inherently unsound in the ACCA context, because the statute provides no indication as to what types of changes in circumstances might distinguish one "criminal opportunity" from another.

Petitioner's totality-of-the-circumstances approach would also be at odds with the ACCA's focus on the elements of prior offenses and its overarching goal of nationwide sentencing uniformity. Petitioner would displace a straightforward temporal-distinctness test and instead require a freeform inquiry into what constitutes a "criminal opportunity" that assumes a level of detail in judicial records of prior convictions that they may often not include and that would produce arbitrary and inconsistent results. This Court should reject that construction and affirm the judgment below.

ARGUMENT

PETITIONER'S 1997 BURGLARY CONVICTIONS ARE FOR OFFENSES "COMMITTED ON OCCASIONS DIFFERENT FROM ONE ANOTHER" UNDER THE ACCA

Under the plain text of 18 U.S.C. 924(e)(1), petitioner's 1997 convictions for burglarizing multiple separate buildings with multiple different victims are for offenses "committed on occasions different from one another." The standard definition of "occasion" is a particular "occurrence," "happening," or "incident" at a particular point in time, which in the context of Section 924(e)(1) is the "commit[ting]" of a criminal offense. As the statutory history confirms, the different-occasions clause thus requires that prior convictions supporting an ACCA sentence reflect discrete criminal conduct. That requirement can be satisfied, as it is here, by reference to temporal distinctness inherent in the elements of an offense—it is physically impossible to "enter" two separate buildings at once—or else reflected in the judicial records of the predicate crimes. The different-occasions clause does not, however, invite what petitioner proposes—an amorphous, wide-ranging, and unpredictable inquiry into the facts and circumstances of prior crimes, in an effort to discern whether they arise from the same "criminal opportunity." Such an approach lacks sound footing in the statutory text, context, or history; raises a host of confounding questions; and would preclude consistency in sentencing.

A. Offenses That Involve Temporally Distinct Criminal Conduct Are "Committed On Occasions Different From One Another"

1. Offenses occur on different "occasions" when the criminal conduct necessary to satisfy the offense elements occurs at different times

When Congress added the different-occasions clause to the ACCA in 1988, dictionaries defined "occasion" to mean "[a]n event or happening" or the "time at which an event or happening occurs." *The American Heritage Dictionary of the English Language* 908 (1970) (*The American Heritage Dictionary*); see, *e.g.*, *The Random House Dictionary of the English Language* 1339 (2d ed. unabridged 1987) (*The Random House Dictionary*) (defining occasion as "a particular time, esp[ecially] as marked by certain circumstances or occurrences"); 10 *The Oxford English Dictionary* 676 (2d ed. 1989) (*OED*) (defining "occasion" as, *inter alia*, "a case of something happening; the time, or one of the times, at which something happens"). Temporally distinct crimes, like petitioner's prior burglaries, thus occur on "occasions different from one another."

a. This Court's recent application of the plain meaning of "occasion" in *Coleman* v. *Tollefson*, 575 U.S. 532 (2015), demonstrates as much. There, the Court considered the "three strikes" provision of 28 U.S.C. 1915(g), enacted in 1995, which precludes *in forma pauperis* status for a prisoner who "has, on 3 or more prior occasions, while incarcerated * * * brought an action or appeal in a court of the United States that was dismissed" as "frivolous, malicious, or fail[ing] to state a claim." *Ibid.* The Court held that a district court's dismissal constitutes an "occasion" (and thus a strike), distinct

from a pending appeal of that dismissal (which could itself give rise to a further strike). *Coleman*, 575 U.S. at 534.

The Court rejected the prisoner's argument that "the phrase 'prior occasions' creates ambiguity" because it "'may refer to a single moment'" (the dismissal) "'or to a continuing event'" ("both a dismissal * * * and any subsequent appeal"). *Coleman*, 575 U.S. at 538 (citations omitted). The Court explained that an "occasion" is "'a particular occurrence,' a 'happening,' or an 'incident.'" *Ibid.* (quoting *Webster's Third New International Dictionary* 1560 (1993)). And the Court observed that Section 1915(g) itself "provide[d] the content of that occurrence, happening, or incident"—namely, "an instance in which a 'prisoner has . . . brought an action or appeal in a court of the United States that was dismissed on' statutorily enumerated grounds." *Ibid.* (quoting 28 U.S.C. 1915(g)).

A similar application of the "literal" meaning of the word "occasion," *Coleman*, 575 U.S. at 539, compels the conclusion that temporally distinct prior offenses occur on "occasions different from one another" under Section 924(e)(1). As in *Coleman*, the "statute provides the content of th[e] occurrence, happening, or incident." *Id.* at 538. Section 924(e)(1)'s sentence enhancement applies where the defendant "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) (emphasis added). The relevant event is thus the "commit[ting]" of a "violent felony" or "serious drug offense," *ibid.*, which occurs when the offense conduct is completed.

In common legal parlance, an offense is generally "committed" when "all elements of the offense are established, regardless of whether the defendant continues to engage in criminal conduct." *United States* v. *Yashar*, 166 F.3d 873, 879-880 (7th Cir. 1996) (construing the five-year statute of limitations in 18 U.S.C. 3282(a), which runs from the date on which the "offense shall have been committed"); see *Toussie* v. *United States*, 397 U.S. 112, 114-115 (1970) (same; noting "limited" exception for "continuing offenses"); see also *Black's Law Dictionary* 248 (5th ed. 1979) (defining "[c]ommit" as "[t]o perpetrate, as a crime"). Just as the dismissal of a prisoner's appeal on an enumerated ground is a new "occasion" under Section 1915(g), see *Coleman*, 575 U.S. at 538; see also, *e.g.*, *Akassy* v. *Hardy*, 887 F.3d 91, 96 (2d Cir. 2018), the commission of a later crime is a new "occasion" under the ACCA. Even if the later crime is closely related to the earlier crime in some way, as an appeal is to an underlying dismissal, the "occasion" of its "commi[ssion]" is distinct. 18 U.S.C. 924(e)(1).

b. The plain meaning of the word "occasion" is equally as natural in the ACCA context as it is in the prisoner-litigation context. Indeed, although this Court's prior ACCA decisions have not addressed the different-occasions clause directly, they have repeatedly described the commission of a discrete offense as an "occasion." Those decisions have focused on various aspects of Section 924(e)(1)'s separate requirement that a prior conviction be "for a violent felony or a serious drug offense," 18 U.S.C. 924(e)(1), in order to qualify as a sentence-enhancing predicate. That requirement, the Court has explained, employs a categorical approach that turns on "how the law defines the offense," rather

than "how an individual offender might have *committed* it on a particular *occasion*." *United States* v. *Stitt*, 139 S. Ct. 399, 405 (2018) (quoting *Begay* v. *United States*, 553 U.S. 137, 141 (2008)) (emphasis added).

The Court's commission-specific view of an "occasion" reinforces the plain meaning of the statutory text, under which crimes committed at different times occur on "occasions different from one another." 18 U.S.C. 924(e)(1). The Court has described the commission of a single offense, framed largely in temporal terms, as its own "occasion." In *United States* v. *Stitt*, for instance, the Court provided "on January 25, Jones committed a burglary on Oak Street in South San Francisco" as an illustrative example of an "individual offender act[ing] on a particular occasion." 139 S. Ct. at 405. And in *Chambers* v. *United States*, 555 U.S. 122 (2009), the Court provided an even more generic, temporally focused, example of "a specific act committed on a particular occasion"—namely, "*the* burglary that the defendant engaged in last month." *Id.* at 125.

A focus on *when* a prior offense was committed allows for straightforward application of the different-occasions clause without the need to conduct the very inquiry, into the details of "how" the offense was committed, that the categorical approach avoids. In many circumstances, the offense elements alone will allow for a determination that the "occasions" were "different." A defendant who has been convicted of multiple burglaries under a statute that requires entering a discrete building with criminal intent, see *Taylor* v. *United States*, 495 U.S. 575, 599 (1990), has necessarily committed those crimes on different occasions, because it is physically impossible to enter two different buildings

simultaneously. And if a defendant claims that a particular state burglary law might have allowed conviction for simultaneous burglaries, any such claim can generally be easily resolved by reference to state law and the charging document for the prior offenses.

Because the primary function of charging documents is to "fairly inform[] a defendant of the charge against which he must defend," *Hamling* v. *United States*, 418 U.S. 87, 117 (1974), they will typically contain precisely the sort of information that this Court has viewed as sufficient to delineate an "occasion" of the commission of an offense—*e.g.*, a charge that Jones committed a burglary on Oak Street in San Francisco on January 25, see *Stitt*, 139 S. Ct. at 405. See, *e.g.*, 1 Nancy Hollander et al., *Wharton's Criminal Procedure* § 5.11 (14th ed. 2017 & Supp. 2021); *id.* § 5.4 n.5; see also 42 C.J.S. *Indictments* § 147 (2021). The charging document for petitioner's burglaries provides just that type of information, making clear that petitioner's crimes could not have occurred at the same time. See J.A. 26-31. Even if he had preserved in this Court his belated assertion (Pet. Br. 42-43 & n.7) that accomplice liability might have allowed multiple convictions for temporally indistinct crimes, it still would be physically impossible for the four charged individuals to have burglarized ten different buildings at once. See J.A. 26-31.

In some cases, neither the offense elements nor the charging document will be enough to establish that prior offenses occurred on separate occasions. Robberies of multiple victims might, for example, occur simultaneously, see, *e.g.*, *United States* v. *Petty*, 798 F.2d 1157, 1159-1160 (8th Cir. 1986) (per curiam), vacated, 481 U.S. 1034 (1987), and a short charging document that charges a defendant with multiple robberies at the

same location on the same date may not in itself resolve a dispute about a particular defendant's prior robbery convictions. But even in a case of that sort, other judicial records of a prior conviction available under *Shepard* v. *United States*, 544 U.S. 13 (2005)—such as the "written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented," *id.* at 16—could show that the theory of the prosecution rested on temporally or otherwise distinct offense conduct.

c. In accord with the plain text of the statute, the courts of appeals have long recognized, with a "virtually unanimous voice," that "the 'successful' completion of one crime plus a subsequent conscious decision to commit another crime makes that second crime distinct from the first for the purposes of the ACCA." *United States* v. *Pope*, 132 F.3d 684, 692 (11th Cir. 1998). Although they sometimes cite additional factors, most of the circuits thus apply a "rule" under which "offenses that are temporally distinct constitute separate predicate offenses." *United States* v. *Maxey*, 989 F.2d 303, 306 (9th Cir. 1993); see, *e.g.*, *United States* v. *Torres*, 961 F.3d 618, 625 (3d Cir.) ("To decide whether convictions were committed on different occasions, we apply the separate episode test and analyze whether the offenses were 'distinct in time.'") (citation omitted), cert. denied, 141 S. Ct. 936 (2020); *United States* v. *Fuller*, 453 F.3d 274, 279 (5th Cir. 2006) ("The critical inquiry when deciding whether separate offenses occurred on 'occasions different from one another' for purposes of the ACCA is whether the offenses occurred sequentially."); *United States* v. *Hudspeth*, 42 F.3d 1015, 1021 (7th Cir. 1994) (en banc) ("Under the ACCA, the rele-

vant inquiry as to the timing of multiple crimes is simple: were the crimes *simultaneous* or were they *sequential?*"), cert. denied, 515 U.S. 1105 (1995); *United States* v. *Abbott*, 794 F.3d 896, 898 (8th Cir. 2015) (per curiam) ("[T]o prove that two offenses are sufficiently separate and distinct for ACCA purposes, it is *sufficient* * * * to show that some time elapsed between [them].") (citation omitted); *United States* v. *Johnson*, 130 F.3d 1420, 1430 (10th Cir. 1997) ("[W]e have * * * adopted the view, which is shared by most other circuits, that the" different-occasions clause "'was intended to reach multiple criminal episodes distinct in time.'") (citation omitted), cert. denied, 525 U.S. 829 (1998); *Pope*, 132 F.3d at 692 (explaining that "so long as predicate crimes are successive rather than simultaneous, they constitute separate" ACCA predicates); see also *United States* v. *Leeson*, 453 F.3d 631, 640 (4th Cir. 2006) (explaining that "'occasions' are 'those predicate offenses that can be isolated with a beginning and an end—ones that constitute an occurrence unto themselves'") (citation omitted), cert. denied, 549 U.S. 1306 (2007); J.A. 22.

In many cases, the distinctness of prior offenses is sufficiently clear that the issue is not litigated at all. In cases where the different-occasions issue has arisen, the three decades of experience with the temporal-distinction rule demonstrates that it is simple, manageable, and furthers the ACCA's goal of ensuring similar punishment for similarly situated offenders, see *e.g.*, *Quarles* v. *United States*, 139 S. Ct. 1872, 1878-1879 (2019); *Taylor*, 495 U.S. at 590-592, 599. The rule yields a clear result in this case, just as it does in many others. As the court of appeals recognized, "the indictment to which [petitioner] pleaded guilty provides all the record [a court] need[s]," because it establishes that petitioner

"was accused of, and pleaded guilty to, 'entering' ten different mini warehouses." J.A. 23. Petitioner cannot, and does not, claim that he did so simultaneously.

Indeed, petitioner acknowledges (Br. 9) that his cohort of "burglars breached the exterior of the ministorage facility * * * and then broke through the drywall between units." Those are quintessentially sequential, rather than simultaneous, crimes. Petitioner identifies no "reason why it would have been impossible" for him and his accomplices "to call it a night after the first burglary, without burglarizing nine more warehouses." J.A. 24. The burglars instead chose to unlawfully enter ten different buildings with the intent to divest the (multiple) rightful owners of the contents. The decision of when to stop committing additional temporally distinct offenses was completely within their control; nothing required them to continue until they hit double digits.

Other courts of appeals have reached similar results for analogous ACCA defendants. For example, in a case very much like this one, the Fourth Circuit recognized that the defendant's burglaries of 13 storage units in a single night constituted separate occasions under the ACCA. See *United States* v. *Carr*, 592 F.3d 636, 644-645, cert. denied, 562 U.S. 844 (2010); see also *id.* at 642-643 (discussing analogous cases). The Seventh Circuit has similarly recognized that the burglaries of three adjoining businesses in a strip mall were committed on occasions different from one another. *Hudspeth*, 42 F.3d at 1022. The Ninth Circuit has likewise upheld an ACCA sentence based on predicate burglaries of multiple "adjacent" businesses in one night. *United States* v. *Phillips*, 149 F.3d 1026, 1030-1033 (1998), cert. denied, 526 U.S. 1052 (1999). And the Tenth Circuit has ex-

plained that the different-occasions clause does not preclude an ACCA sentence for a defendant who broke into an indoor shopping mall and burglarized two businesses and a post office therein simply because each victimized business was "inside one enclosed structure." *United States* v. *Tisdale*, 921 F.2d 1095, 1099 (1990), cert. denied, 502 U.S. 986 (1991).

2. The history of Section 924(e)(1) confirms that temporally distinct crimes are "committed on occasions different from one another"

The consistent and predictable results reached by the courts of appeals are well supported by the circumstances surrounding Congress's enactment of the different-occasions clause. The clause was a directed solution targeted at an identified problem of multiple convictions for "simultaneous" intertwined offenses, not an invitation for courts to engage in a freeform factual inquiry into the subjective relatedness of different crimes.

a. As originally enacted, the ACCA did not include any requirement regarding the timing of predicate offenses. Instead, the statute simply prescribed an enhanced sentence for any person convicted of possessing a firearm as a felon following three prior convictions "for robbery or burglary." ACCA, Pub. L. No. 98-473, Tit. II, ch. 18, 98 Stat. 2185 (18 U.S.C. App. 1202(a) (Supp. III 1985)) (repealed in 1986 by Firearms Owners' Protection Act, Pub. L. No. 99-308, § 104(b), 100 Stat. 459). In 1986, Congress amended the ACCA to "expand[] the predicate offenses triggering the sentence enhancement from 'robbery or burglary' to 'a violent felony or serious drug offense,'" but it again did not include any specific requirement regarding the timing of prior offenses. *Taylor*, 495 U.S. at 582; see Career

Criminals Amendment Act of 1986, Pub. L. No. 99-570, Tit. I, Subtit. I, § 1402, 100 Stat. 3207-39; see also 18 U.S.C. 924(e)(1) (Supp. V 1987).

Nonetheless, the courts of appeals generally "required that the criminal episodes be distinct in time" to qualify as separate predicate offenses under the ACCA. *United States* v. *Towne*, 870 F.2d 880, 889-890 (2d Cir.) (quoting U.S. Br. at 5, *United States* v. *Wicks*, 488 U.S. 831 (1988) (No. 87-6807)), cert. denied, 490 U.S. 1101 (1989). In *United States* v. *Petty*, however, the Eighth Circuit reached a different result. As the Eighth Circuit's opinion recounted, the defendant had received an ACCA sentence based on having previously been "convicted in a single indictment of six counts of robbery stemming from an incident during which he robbed six different people in a restaurant simultaneously." 798 F.2d at 1159-1160.

Specifically, as the State's brief in the robbery prosecution explained, the "gunmen" ordered the employees and customers to the floor and then "deployed themselves around the barroom." Pet. Br. Addendum 12a, 14a. "Once they had established control of the bar, the gunmen" instructed the employees and customers to remove their valuables. *Id.* at 15a. While one of the gunmen remained at the front of the room, two others gathered the victims' belongings, and another secured money from the cash registers. *Ibid.*; see *id.* at 16a-17a (noting that several victims "did not see the person who took their belongings").

The Eighth Circuit rejected the defendant's argument that his six robbery convictions—one for each victim—should constitute one conviction for purposes of the ACCA. *Petty*, 798 F.2d at 1160. Observing that the ACCA required only that the defendant have "three

previous convictions * * * for robbery or burglary," *id.* at 1159 (quoting 18 U.S.C. App. 1202(a)(1) (Supp. II 1984)), the court considered it irrelevant that the defendant was charged under one indictment and received concurrent sentences "for several crimes arising out of the same act." *Id.* at 1160.

In response to the defendant's subsequent petition for a writ of certiorari, the Solicitor General "agree[d] that the court of appeals [had] erred by applying the enhanced sentencing provisions" based on the defendant's "participation in a robbery at a restaurant during which six different people were robbed at the same time." Pet. Br. Addendum 23a-24a. The government recognized that the ACCA "did not explicitly require * * * that the defendant have 'previously been convicted . . . for two or more offenses committed on occasions different from one another,'" as two other enhanced-penalty statutes did, but took the view that "[i]n this case, * * * the legislative history of the [ACCA] makes it appear" that "legislators intended that prior convictions would be based on multiple criminal episodes that were distinct in time." *Id.* at 25a-26a (citations omitted). The government accordingly agreed that the court of appeals had erred by "construing the statute to reach multiple felony convictions arising out of a single criminal episode." *Id.* at 30a-31a. And consistent with the government's suggestion, see *id.* at 24a, 32a, this Court granted the petition in relevant part, vacated the judgment, and remanded the case to the Eighth Circuit "for further consideration in light of the position presently asserted by the Solicitor General." *Petty* v. *United States*, 481 U.S. 1034, 1035 (1987).

A few months later, Congress amended the ACCA by adding the different-occasions clause, which requires

that a defendant's prior violent felonies or serious drug offenses have been "committed on occasions different from one another." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7056, 102 Stat. 4402. When the amended language was introduced in the Senate, Senator Byrd introduced a section-by-section analysis explaining that the "proposed amendment would clarify the armed career criminal statute to reflect the Solicitor General's construction and to bring the statute in conformity with the other enhanced penalty provisions." 134 Cong. Rec. 13,783 (1988); see *id.* at 13,782.

The analysis emphasized that under the language of the new clause, "a single multi-count conviction could still qualify where the counts related to crimes committed on different occasions, but a robbery of multiple victims simultaneously (as in *Petty*) would count as only one conviction." 134 Cong. Rec. at 13,783; see *id.* at 13,782 (describing *Petty* as a case in which "the defendant was convicted for having robbed six different people at a restaurant at the same time"). It further stated that "[t]his interpretation plainly expresses the concept of what is meant by a 'career criminal,' that is, a person who over the course of time commits three or more of the enumerated kinds of felonies and is convicted therefor." *Ibid.*; see *ibid.* ("It is appropriate to clarify the statute in this regard, both to avoid future litigation and to insure that its rigorous sentencing provisions apply only as intended in cases meriting such strict punishment."); *United States* v. *McElyea*, 158 F.3d 1016, 1019 (9th Cir. 1998) (noting that no Senate or House Report was submitted for this amendment).

b. The different-occasions clause's origins as a tailored response to *Petty* reinforce the plain import of the

statutory text: temporally distinct crimes occur "on occasions different from one another," 18 U.S.C. 924(e)(1). The Eighth Circuit described *Petty* as involving "simultaneous[]" crimes that resulted in multiple convictions "arising out of the same act." 798 F.2d at 1160. The government took the view that the court of appeals had erred by "construing the statute to reach multiple felony convictions arising out of a single criminal episode," as opposed to convictions for offenses "distinct in time." Pet. Br. Addendum 26a, 30a-31a; see *id.* at 23a (describing convictions as "based on [the petitioner's] participation in a robbery at a restaurant during which six different people were robbed at the same time"). And Congress responded with an amendment designed to preclude an ACCA sentence in a circumstance, as in *Petty*, where the defendant "robbe[d] * * * multiple victims simultaneously." 134 Cong. Rec. at 13,783.

The temporal indistinguishability, and factual congruence, of the robberies in *Petty* differentiates them from burglaries of the sort at issue here, which the courts of appeals have generally treated as occurring on different occasions. The circumstances of *Petty* did not establish a dividing line between the different robbery offenses. Instead, the defendants ordered all the victims to turn over their belongings at once, under a continuous show of force, and multiple gunmen gathered the victims' items simultaneously. Nothing in *Petty*, or Congress's reaction to it, suggests that Congress would have viewed the robberies of two different victims in sequence—let alone the burglary of ten different structures separated by walls—as occurring on the same "occasion."

B. Petitioner's Interpretation Of Section 924(e)(1) Is Inconsistent With The Provision's Text, Context, And History, And It Would Create Significant Uncertainty

In contrast to a clear, text-based temporal-distinction rule, petitioner urges an amorphous approach that "focuses on the circumstances of [the crimes'] commission: Did the admittedly separate criminal acts arise from a juncture of the same favorable conditions, or in exploitation of a common opportunity?" Pet. Br. 16. Petitioner's amici posit different formulations, including whether crimes were "separated by a substantial interlude of non-criminal activity," Professors of Criminal Law Amicus Br. 4, or were punctuated by "an intervening event of significance comparable to an arrest," National Ass'n of Fed. Defenders (NAFD) Amicus Br. 19; see also, *e.g.*, Pet. Br. 3 (arguing that "an intervening event (*e.g.*, an arrest)" is one way to distinguish "criminal opportunities"). As their variety illustrates, all of the proposed alternatives lack a sound basis in the text or history of the statute, would be incapable of consistent application, and would impermissibly "inject arbitrariness into the assessment of criminal" punishments, *Van Buren* v. *United States*, No. 19-783, 2021 WL 2229206, at *12 (June 3, 2021).

1. Petitioner's interpretation is inconsistent with the statutory text and context

As discussed above, the plain text of Section 924(e)(1) makes clear that crimes that are committed at distinct points in time are "committed on occasions different from one another." 18 U.S.C. 924(e)(1). That is because the word "occasion" most naturally refers to a particular occurrence, and the relevant "occasion" for ACCA purposes is the point in time when each offense

is "committed." *Ibid.*; see pp. 13-21, *supra.* Petitioner fails to show otherwise.

a. Rather than give "occasion" its most common temporal meaning, petitioner contends that "an 'occasion' encompasses the events arising from a particular juncture of circumstances or common opportunity," Br. 12, or "a juncture of circumstances providing conditions that are favorable for related activities or events," Br. 14. But while such indefinite formulations may accord with early definitions of "occasion," sometimes still used today, see pp. 27-28, *infra*, they are not the best fit for Section 924(e)(1), which instead requires a more deterministic definition that is consistent with the ACCA's focus on the "occasion" on which each crime was "committed." See, *e.g.*, *Borden* v. *United States*, No. 19-5410, 2021 WL 2367312, at *6 (June 10, 2021) (plurality opinion) (observing that where "[d]ictionaries offer definitions" of a word "consistent with both parties' view," the surrounding words may be decisive).

Petitioner acknowledges (Br. 30) that the word "occasion" may refer to the time at which an event occurs, but resists that definition here, asserting that it is "a subsidiary" one. But he offers no valid reason why a "subsidiary" definition should be disregarded, even when it is the most appropriate in context. In any event, petitioner's characterization of the definition as "subsidiary" is difficult to square with this Court's recent decision in *Coleman*—which petitioner does not address—and the corresponding primacy of the point-in-time definition in several contemporaneous dictionaries. See, *e.g.*, *The Random House Dictionary* 1339 (first definition); *The American Heritage Dictionary* 908 (definitions 1.a and 1.b). While petitioner observes (Br. 30) that the point-in-time definition appears late in

the *Oxford English Dictionary*'s entry for "occasion," that dictionary orders definitions chronologically, based on first-known uses, rather than on current frequency or primacy of use. See 1 *OED*, *General Explanations* xxix ("[T]hat sense is placed first which was actually the earliest in the language: the others follow in the order in which they appear to have arisen.").

In contrast, in *The Random House Dictionary*, "the most frequently encountered meanings generally come before less common ones." *The Random House Dictionary*, *How to Use the Random House Dictionary* xxxii. And in *The American Heritage Dictionary*, "[t]he first definition is the central meaning about which the other senses may be most logically organized." *The American Heritage Dictionary*, *Guide to the Dictionary* XLVII. Those dictionaries give primacy to the point-in-time definition that this Court embraced in *Coleman*. See pp. 13-14, *supra*. Particularly in light of the "'fundamental canon of statutory construction' that, 'unless otherwise defined, words will be interpreted as taking their ordinary, *contemporary*, common meaning,'" *Sandifer* v. *United States Steel Corp.*, 571 U.S. 220, 227 (2014) (quoting *Perrin* v. *United States*, 444 U.S. 37, 42 (1979)) (emphasis added), it would make little sense to elevate the earlier definition of "occasion" over the more common ones in use when the statutory text was enacted.

Petitioner also suggests (Br. 30-31) that "[e]ven when 'occasion' is used" to mean a particular time, it must refer to "an occasion *for* something particular to occur." But as discussed above, the statute expressly identifies that "something"—namely, the defendant's "commi[ssion]" of a specific violent felony or serious drug offense. 18 U.S.C. 924(e)(1); see *Coleman*, 575 U.S.

at 538. And although "by definition, all times are different from one another," Pet. Br. 32, not all *crimes* are necessarily committed at different times—as illustrated by *Petty* or a case where a defendant "rob[s] six players at a poker game, committing at least six crimes with the same 'stick 'em up,'" *United States* v. *Godinez*, 998 F.2d 471, 472 (7th Cir. 1993) (citing *Ashe* v. *Swenson*, 397 U.S. 436 (1970)). The phrase "committed on occasions different from one another" thus "distinguishes different criminal episodes"—even those committed "close in time" or "hard on the heels of" each other—from "the multiple crimes that may occur in a flash." *Ibid.* (emphases omitted).

Petitioner's reliance on colloquial examples of statements that include the word "occasion" do not suggest otherwise, but instead simply assume his conclusion. He asserts (Br. 13), for instance, that "various shopping activities—trying on shoes at the shoe store, browsing a furniture sale, stopping for ice cream, purchasing clothing at a department store—would naturally be described * * * as having taken place on 'the same occasion'" if encompassed by one overarching trip to the mall. But that would be true only *if* the relevant "occurrence, happening, or incident," *Coleman*, 575 U.S. at 539, is the entire shopping expedition. Here, the ACCA's use of the word "occasion" refers to the "commi[ssion]" of an offense, not an umbrella grouping of multiple sequential events. A more analogous example would therefore be asking a "proficient English speaker," Pet. Br. 13, on how many "occasions" the shopper made a purchase, and the answer is two—the purchase of ice cream and the purchase of clothes at the department store. Nor would the answer change to "one" if the stores were next door to each other, or if

both purchases were of clothing. Instead, each purchase would constitute a different purchasing occasion, even though the conduct was similar and occurred close in time.

The statutes that petitioner cites likewise do not justify abandoning the principle that "context determines meaning." *Borden*, 2021 WL 2367312, at *9 (plurality opinion) (quoting *Johnson* v. *United States*, 559 U.S. 133, 139 (2010)). Petitioner observes (Br. 15), for example, that under 40 U.S.C. 6136, "[t]o allow for the observance of authorized ceremonies * * * the Marshal of [this] Court may suspend for those occasions" certain restrictions "as may be necessary for the occasion." Petitioner is no doubt correct (Br. 15) that "[t]he Marshal's authority thus extends throughout the entire ceremony, including any downtime in between activities." But that is because, in context, the statute identifies the relevant "occasion" as the "ceremon[y]." 40 U.S.C. 6136. If the statute instead permitted the suspension of restrictions to allow for a specific authorized activity (such as a champagne toast), then the "occasion" would be that activity. Similarly, the word "occasion" in Section 924(e)(1) "does not stand alone," *Van Buren*, 2021 WL 2229206, at *7, but instead refers to "commit[ing]" an offense, 18 U.S.C. 924(e)(1).

Instances in which this Court has used the word "occasion" in non-ACCA decisions, see Pet. Br. 15-16, are similarly inapposite. The reference to the "one occasion" on which the defendant in *United States* v. *Bryant*, 136 S. Ct. 1954 (2016), "hit his live-in girlfriend on the head with a beer bottle and attempted to strangle her" appears to be a description of the events underlying a single misdemeanor conviction. *Id.* at 1963; see U.S. Br. at 7, *Bryant*, *supra* (No. 15-420) (citing PSR

¶ 81). In *Turner* v. *Arkansas*, 407 U.S. 366 (1972) (per curiam), the Court described the defendant's robbery and murder charges as arising "out of 'the same set of facts, circumstances, and the same occasion,'" *id.* at 368-369, where a charging document stated that "*while perpetrating [the] crime of robbery*," the defendant "kill[ed] and murder[ed]" the victim, *id.* at 366 (emphasis added; citation omitted). And in *Kelly* v. *United States*, 140 S. Ct. 1565 (2020), the Court's reference to a four-day sham traffic study as a "singular occasion," *id.* at 1570, does not suggest that all occasions are multiday affairs, or that the "occasion" on which a crime is "committed" refers to something broader than the time of its commission.

In any event, petitioner's "juncture of circumstances" approach, Br. 12, is difficult to harmonize with this Court's more pertinent decision in *Coleman*. As discussed above, see pp. 13-14, *supra*, the Court there explained that "[l]inguistically speaking, * * * nothing about the phrase 'prior occasions' * * * transform[s]" a discrete event—there, dismissal of a complaint—"into a" "'continuing'" one—there, "dismissal-plus-appellate-review." *Coleman*, 575 U.S. at 538 (citation omitted). That was so even though a dismissal and its review on appeal undoubtedly arise from the same "juncture of circumstances"—namely, the inmate's lawsuit. Application of the same logic here forecloses the contention that further criminal activity, beyond the commission of an offense, extends a preexisting occasion, as opposed to starting a new one.

b. Petitioner makes no attempt to tie his interpretation of "occasion" to the "commit[ing]" of an offense or anything else in the surrounding language of the different-

occasions clause. 18 U.S.C. 924(e)(1). Instead, his suggestions of the types of changed circumstances that might divide one "occasion" from the next are largely indeterminate and entirely divorced from the statutory text. The only event that petitioner clearly identifies as a separator is a defendant's "arrest[]" and "release[]" between two offenses. Pet. Br. 8; see *id.* at 3, 17, 26, 31. But the text of Section 924(e)(1) includes no such arrest-and-release requirement. Moreover, potential model statutes for the different-occasions clause in Section 924(e)(1) included additional language, which Congress did not incorporate into the ACCA, requiring intervening prosecutions.

For example, as petitioner observes (Br. 20), the different-occasions clause has its roots in the definition of "dangerous special offender" in the Organized Crime Control Act of 1970, Pub. L. No. 91-452, Tit. X, § 1001(a), 84 Stat. 949 (18 U.S.C. 3575(e)(1) (1982)) (repealed effective Nov. 1, 1987). But a borrowing of the phrase "committed on occasions different from one another" from 18 U.S.C. 3575(e)(1) (1982), see Pet. Br. 24, simply highlights the significance of what Congress left behind. See, *e.g.*, *Sekhar* v. *United States*, 570 U.S. 729, 734-735 & n.3 (2013). To qualify as a "dangerous special offender" under Section 3575(e)(1), the statute required that the defendant have "been imprisoned" for at least one of his prior convictions "prior to the commission of" the instant offense, and that he commit that offense "less than five years" after his release or the "commission" of a further felony. 18 U.S.C. 3575(e)(1) (1982); see 21 U.S.C. 849(e)(1) (1982) (repealed effective Nov. 1, 1987) (similar provision in Controlled Substances Act, Pub. L. No. 91-513, Tit. II, § 409(e)(1), 84 Stat. 1267. Congress thus had a model for separating offenses (in

Section 3575, a predicate offense and the instant offense) by prosecution, imprisonment, and release. A congressional decision not to expressly require such legal intervention between ACCA predicates thus undercuts, rather than supports, petitioner's reading of the term "occasion" to implicitly include such a prerequisite.

Petitioner's comparisons to other statutes are similarly flawed. For example, petitioner relies on (Br. 14) 18 U.S.C. 3559(c)(1), which prescribes a life sentence where a defendant "has been convicted (and those convictions have become final) on separate prior occasions" of two or more "serious violent felonies" or "serious drug offenses," if "each" such offense "other than the first, was committed after the defendant's conviction of the preceding" qualifying offense. Unlike Section 924(e)(1), Section 3559(c)(1) makes the relevant "occasion" the conviction, not the commission of the crime, and it requires that predicate offenses be separated by intervening convictions. Courts applying Section 3559(c)(1) thus treat convictions arising out of the same indictment and entered on the same day as one "conviction." See Pet. Br. 14-15. Even if the court broke for lunch in the midst of entering multiple convictions, *id.* at 15, that would not matter outside the implausible circumstance where the defendant committed a new predicate offense during the short mealtime window.

Contrary to petitioner's suggestion (Br. 31 n.4), the Sentencing Guidelines likewise do not support his intervening-arrest theory. Petitioner asserts that in 28 U.S.C. 994(i)(1), "Congress directed the Sentencing Commission to adopt guidelines that provide 'a substantial term of imprisonment' for defendants with two or more prior felony convictions 'for offenses committed

on different occasions,'" and that the Commission "implement[ed] that directive" by counting "'offenses contained in the same charging document' as a single offense—unless they were 'separated by an intervening arrest.'" Pet. Br. 31 n.4 (quoting 28 U.S.C. 994(i)(1) and Sentencing Guidelines § 4A1.2(a)(2)). But to the extent that he singles out Sentencing Guidelines § 4A1.2(a)(2) as implicitly implementing Section 994(i)(1), that Guideline generally focuses on "prior sentences," *ibid.*, which are inherently separate legal events, as a proxy for the defendant's commission of crimes, see *id.* § 4A1.1 comment. (backg'd). And it allows for an exception to the general methodology in certain cases where a defendant has multiple "convictions for offenses committed *on different occasions*" that were nonetheless treated as a "single prior sentence." *Id.* § 4A1.1 comment. (n.5) (emphasis added).

Petitioner provides little indication of, and no textual grounding for, any other changes in circumstances, aside from arrest and release, that might in his view separate one criminal "occasion" from another. Petitioner states, for example, that "a new occasion may arise through the intervention of non-criminal conduct that is significant enough to change the underlying dynamic." Pet. Br. 16-17 (emphasis omitted). But even assuming that courts might be able to apply such language consistently, the different-occasions clause itself includes none of it. And while petitioner's amici attempt to fill in the gaps—suggesting, for example, that occasions different from one another "could" be marked by "a significant passage of time," "a significantly different type of criminal conduct that is not an outgrowth of the first crime," "or a complete change in participants or methods," NAFD Amicus Br. 19—those possibilities

are likewise untethered from the statutory text, and either indeterminate or arbitrary.

c. Petitioner contends (Br. 31) that the word "career" in the ACCA's title "cut[s] against reading the 'occasions' clause as a mechanism for distinguishing offenses committed simultaneously from those committed sequentially." But a word in a title is a tenuous basis for introducing an otherwise extra-textual and unclear feature into a statute. See, *e.g.*, *Fulton* v. *City of Philadelphia*, No. 19-123, 2021 WL 2459253, at *6 (June 17, 2021) (citing Antonin Scalia & Brian Garner, *Reading Law: The Interpretation of Legal Texts* 222 (2012)). Even if the title had some salience here, the word "career" provides no concrete guidance as to when "occasions" of "commit[ing]" a crime are "different" and cannot override the plain meaning of those terms. And in any event, the ACCA had the same title when initially enacted—without *any* textual requirement that offenses be "committed on occasions different from one another." See pp. 21-22, *supra*.

2. Petitioner's interpretation is not supported by the history of Section 924(e)(1)

A fact-dependent "juncture of circumstances" approach to the term "occasion" is a particularly poor fit in the context of the ACCA, where it would be a complete departure from the elements-based approach that the statute otherwise demands, see, *e.g.*, *Mathis* v. *United States*, 136 S. Ct. 2243, 2249 (2016); see also *Borden*, 2021 WL 2367312, at *3 (plurality opinion). Rather than focusing on the "commi[ssion]" of an offense through the satisfaction of its elements, petitioner and his amici would define "occasion" to require a "holistic" assessment of the "inherently varied and circumstance-dependent" "underlying circumstances that give rise to

a particular criminal opportunity." Pet. Br. 17. But "[i]f Congress had meant to adopt an approach that would require the sentencing court to engage in an elaborate factfinding process regarding the defendant's prior offenses, surely this would have been mentioned somewhere in the legislative history," if not in the language of the statute itself. *Taylor*, 495 U.S. at 601. The history, however, no more supports it than the text does.

a. Petitioner's contrary contention relies largely on a misinterpretation of the court of appeals' decision in *Petty*, the government's confession of error in that case, and Congress's response to those proceedings. See Pet. Br. 21-25, 34-35. Although petitioner asserts (Br. 34) that the defendant in *Petty* "robbed his victims one after another," the court of appeals, the Solicitor General, and members of Congress all understood *Petty* to involve six convictions for the *simultaneous* robbery of six victims. See pp. 24-25, *supra*. In particular, and contrary to petitioner's suggestion (Br. 34-35), it is clear that, in context, the Solicitor General viewed simultaneous offenses as constituting one "criminal episode," and non-simultaneous offenses as constituting "multiple criminal episodes." Pet. Br. Addendum 26a, 30a; see, *e.g.*, *Godinez*, 998 F.2d at 472-473.

Much of petitioner's remaining argument (Br. 20-25, 31-33) relies on legislative history from the ACCA's initial enactment, several years before the adoption of the different-occasions clause, suggesting that Congress was concerned with repeat offenders. But petitioner identifies no concrete support in the legislative history—let alone the statutory text, which in general "accurately expresses the legislative purpose," *Marx* v. *General Revenue Corp.*, 568 U.S. 371, 376 (2013) (citations omitted)—for his conception of repeat offenders

as only those whose multiple prior offenses differed in some unspecified fact-dependent way. Rather, statements regarding the purpose of the ACCA as a whole are consistent with giving the different-occasions clause its plain meaning, which encompasses a defendant who has previously "committed" qualifying offenses that are temporally distinct.

For example, petitioner relies (Br. 23-24) on testimony from then-Assistant Attorney General Stephen S. Trott at the time of the ACCA's initial enactment. While that testimony suggests (as the government argued in *Petty*) that Congress did not intend to count simultaneous offenses as separate ACCA predicates, it does not address the sequential offenses at issue here. Indeed, after Assistant Attorney General Trott went on to become Judge Trott, he explained that "the Tenth Circuit's interpretation * * * of the phrase 'occasions different from one another'" in *United States* v. *Tisdale*—which held that burglaries of three businesses in one mall on one evening constituted distinct occasions, see 921 F.2d at 1099—was "correct." *McElyea*, 158 F.3d at 1021-1022 (Trott, J., concurring and dissenting).

b. At bottom, petitioner's interpretation of the ACCA is grounded not in text or history, but in his view that the statute sweeps too broadly. But the history, like the text, provides little support for petitioner's view that the ACCA reflects an intent only to punish repeat offenders whose crimes took advantage of what he understands to be "distinct criminal opportunities," Pet. Br. 18, or concrete guidance as to how courts might define those nonstatutory terms. Congress began with a broad provision that included no different-occasions clause at all, and its singular amendment to the statute

was a targeted response to the simultaneous-crime issue presented in *Petty*. Congress has left the current language in place for three decades, notwithstanding its presumed awareness, see, *e.g.*, *General Dynamics Land Sys., Inc.* v. *Cline*, 540 U.S. 581, 593-594 (2004), that most courts of appeals have understood the current language as requiring that temporally distinct offenses be treated as separate "occasions."

Even assuming that Congress might have wanted its post-*Petty* amendment to require more, "[i]t is not for [this Court] to rewrite the statute so that it covers only what [the Court] think[s] is necessary to achieve what [it] think[s] Congress really intended." *Little Sisters of the Poor Saints Peter & Paul Home* v. *Pennsylvania*, 140 S. Ct. 2367, 2381 (2020) (citation omitted). If the current Congress, or a future one, agrees with petitioner that the current prevailing approach is too broad, it can narrow the ACCA through further amendment. In doing so, it can assess how much—if at all—the statute's scope should be cabined, and provide a clearer and more workable standard than petitioner's atextual all-facts-and-circumstances inquiry. But petitioner's concerns provide no license for a court to usurp Congress's prerogatives by engrafting such an inquiry onto the ACCA's plain text. See, *e.g.*, *Intel Corp. Inv. Policy Comm.* v. *Sulyma*, 140 S. Ct. 768, 778 (2020) ("If policy considerations suggest that the current scheme should be altered, Congress must be the one to do it.").

3. Petitioner's interpretation would be unworkable

Petitioner acknowledges (Br. 16-17) that applying his "holistic and circumstance-dependent" inquiry "will sometimes be difficult." That is a significant understatement. Unlike the temporal-distinction rule followed by most courts of appeals—which relies on a well-

established understanding of when an offense is "committed," and prior decisions providing examples of temporal separateness—petitioner's proposal would require courts to interpret and apply unfamiliar and undefined variables like "a juncture of circumstances providing conditions that are favorable for related activities or events." Pet. Br. 14, 17. That approach is neither necessary nor workable.

a. Petitioner errs in characterizing (Br. 37-44) the current prevailing interpretation in the lower courts, which treats temporally distinct crimes as occurring on separate occasions, as a "practical nightmare." Many of his posited complications are the result of misperceptions. For example, he suggests (*id.* at 38) that differentiating between temporally distinct crimes "draws arbitrary distinctions based on whether the crime is a so-called 'point-in-time' or 'instantaneous offense' (like battery) * * * or instead is a 'continuing' offense (like kidnapping)." But the labeling of crimes like kidnapping as "continuing" offenses "in order to define the unit of prosecution," or for purposes of a "statute of limitations," is not determinative of the analysis under Section 924(e)(1). *Godinez*, 998 F.2d at 473.

The unit-of-prosecution doctrine treats an offense like kidnapping as "continuing" past the point at which the offense elements are satisfied in order that a singular course of conduct not give rise to a potentially infinite series of charges. See, *e.g.*, *Godinez*, 998 F.2d at 473 (for unit-of-prosecution purposes, "one kidnapping is a single crime, rather than, say, one crime per hour of detention"). A corresponding concept exists in the statute-of-limitations context, where the clock does not begin to run until the criminal conduct ceases, to account for the "renewed threat of the evil Congress

sought to prevent"—*e.g.*, the imprisonment of a kidnapping victim—each day that the offense persists, irrespective of whether its elements were satisfied earlier. *Yashar*, 166 F.3d at 875 (quoting *Toussie*, 397 U.S. at 122); see, *e.g.*, *Toussie*, 397 U.S. at 114-115 (noting "limited" exception for continuing offenses in statute-of-limitations context); see also *United States* v. *Rodriguez-Moreno*, 526 U.S. 275, 281 (1999) (distinguishing between point-in-time and continuing offenses for venue purposes). But neither of those doctrines, or their underlying rationales, applies to the ACCA. Instead, both textually and logically, an "occasion" may be complete when all elements of an offense have been "committed," as when a kidnapping victim remains restrained and the defendant then goes on to commit another crime. See, *e.g.*, *Godinez*, 998 F.2d at 473 (explaining that kidnapping and robbery using victim's car occurred on separate occasions because, *inter alia*, the defendant "could have * * * desisted from the planned robbery").

The same logic belies petitioner's assertion (Br. 43-44) that a temporal-distinction approach produces anomalies when differentiating between the "occasion" of a conspiracy "offense"—which is "committed" upon agreement (plus, if required, an overt act)—and discrete conspiracy-furthering offenses. See *United States* v. *Shabani*, 513 U.S. 10, 11 (1994) (federal drug conspiracy); 2 Wayne R. LaFave, *Substantive Criminal Law* § 12.2 (3d ed. 2018 & Supp. 2020) (elements of conspiracy generally); see also, *e.g.*, *United States* v. *Pham*, 872 F.3d 799, 802-803 (6th Cir. 2017) (rejecting argument that conspiracy conviction "subsumed" discrete convictions for "possession-with-intent-to-distribute offenses from th[e] same year, which [the defendant] committed to further the conspiracy"), cert. denied, 138 S. Ct.

1018 (2018). Nor do aiding-and-abetting offenses "committed by groups," Pet. Br. 40, present any particular difficulties. Although in certain cases cited by petitioner the courts of appeals found that the government was unable to demonstrate that multiple convictions involving accomplice liability were for temporally distinct crimes, see *id.* at 41-42, such results reflect the courts' determination that judicial records indicated that multiple convictions might have been based on simultaneous conduct, like parallel entry into two buildings at once. See, *e.g.*, *United States* v. *Tucker*, 603 F.3d 260, 266 (4th Cir. 2010); *Fuller*, 453 F.3d at 278-280; *United States* v. *Murphy*, 107 F.3d 1199, 1208-1210 (6th Cir. 1997); *McElyea*, 158 F.3d at 1021. Here, as will be true in many cases, no such indication exists. See J.A. 23, 26-31; see p. 17, *supra*.

b. Petitioner would nevertheless discard the prevailing temporal-distinction rule, which is not only workable but working, in favor of an indeterminate standard that would quickly lead to a variety of vexing questions regarding the line between different "criminal opportunities." Petitioner provides little guidance about what it means for multiple offenses to "arise from or exploit the same circumstances," Br. 13, or how to tell "the precise beginning and end points," Br. 39, of a particular "criminal opportunity," *e.g.*, Br. 17. For example, does an "occasion" begin the moment an offender starts his preparation or planning for an offense? Or at some point later? Does *any* change in location, personnel, or methods signify a different set of "circumstances," or are multiple changes, or certain types of changes, required? And what types of intervening events—aside from an arrest and release—are sufficient to "create[] a

new dynamic that severs the continuity" or "qualitatively change[s] the circumstances between" two crimes? Pet. Br. 3, 14.

It is easy to see how those definitional questions would yield a lack of practical clarity and consistency. Petitioner's test leaves unclear, for example, whether a second burglary committed at a different house down the street arises from the same or a different "opportunity." What about one committed across town? What if the second burglary took place an hour later? Three hours later? A day later? A week later? Petitioner appears to rely on *United States* v. *Bordeaux*, 886 F.3d 189 (2d Cir. 2018), as a basis for his approach. But while that decision purported to apply "'occasions' in its broader sense, as the conjuncture of circumstances that provides an opportunity to commit a crime," *id.* at 196, it nevertheless recognized that three armed robberies against different victims, at different locations about a half-mile apart, within the span of one hour occurred on "occasions different from one another" under the ACCA, *id.* at 198. If traveling to a new burglary location a half-mile away constitutes "*non*-criminal conduct that is significant enough to change the underlying dynamic," Pet. Br. 16-17, then why would the same logic fail to apply to a defendant who travels to a different apartment, a separate ward in a nursing home, or a distinct storage unit?

Under the temporal-distinction rule, such cases are easily—and consistently—resolved. See J.A. 23-24; pp. 20-21, *supra* (collecting cases with similar facts); see, *e.g.*, *United States* v. *Weeks*, 711 F.3d 1255, 1261-1262 (11th Cir.) (per curiam) (sequential burglaries of two buildings 56 feet apart were distinct occasions), cert. denied, 571 U.S. 922 (2013); *United States* v. *Carnes*,

309 F.3d 950, 954-956 (6th Cir. 2002) (same for sequential burglaries of adjacent homes), cert. denied, 537 U.S. 1240 (2003); *Pope*, 132 F.3d at 689-692 (same for sequential burglaries of two doctors' offices 200 yards apart); see also, *e.g.*, *United States* v. *Antonie*, 953 F.3d 496, 499 (9th Cir. 1991) (same for robberies of different businesses committed 40 minutes apart), cert. denied, 506 U.S. 846 (1992); *United States* v. *Brady*, 988 F.2d 664, 668-670 (6th Cir.) (en banc) (same for two robberies committed 30 minutes apart at separate business locations), cert. denied, 510 U.S. 857 (1993).

Yet under petitioner's approach, the outcome would largely be subjective and arbitrary. Indeed, it is far from clear why the burglaries *in this case* would not constitute separate occasions under his approach. Each arose from a "distinct" (if similar) "criminal opportunity." Pet. Br. 8. Different victims left unattended different items in different mini warehouses. The separation of the mini warehouses by drywall, rather than some material that might have required even more effort to break through, did not create a singular "opportunity" for criminals to burglarize as many distinct structures as they wished.

Additional examples abound. Consider a defendant who, every Tuesday at 8 p.m., sells drugs on the same street corner to the same buyer (knowing, perhaps, that police officers change shifts at that time). Does he exploit the same set of circumstances, favorable conditions, or criminal opportunity? What if the drug sales occur daily? Or hourly? What if he moves around to service different customers, or solicits new business by approaching strangers? Again, the answer is clear under a temporal-distinction rule, but a mystery under petitioner's interpretation. Compare *Abbott*, 794 F.3d at

897-898 (recognizing that two cocaine sales to an undercover officer for the same price on consecutive days constituted different occasions); *United States* v. *Letterlough*, 63 F.3d 332, 334, 337 (4th Cir.) (same for sales to the same person at the same location separated by an hour and forty minutes), cert. denied, 516 U.S. 955 (1995), with, *e.g.*, Pet. at 28-31, *Lewis* v. *United States*, No. 20-7617 (filed Mar. 27, 2021) (contending that three convictions for distinct drug sales to the same confidential source over a nearly three-week period were not for offenses "committed on occasions different from one another"); NAFD Amicus Br. 19 (stating that "two drug trafficking offenses involving related distributions to the same buyer one day apart" "would not qualify as two ACCA 'occasions[]'").

c. To the extent that the outcomes of particular cases might be predicted, petitioner's interpretation is primed to produce anomalous results. As noted above, the only event that petitioner clearly acknowledges as sufficient to separate offenses into two "occasions" is an intervening arrest and release. *E.g.*, Pet. Br. 3, 8, 17, 31. But under that approach, savvy offenders who avoid detection—and perhaps commit more serious offenses while on the lam—are favored over offenders who are more quickly detected and apprehended. Petitioner provides no basis to conclude that Congress intended less severe punishment for criminals more skilled at evasion.

Petitioner's rule likewise elevates (Br. 9) the happenstance of whether an intervening event "interrupt[s] the continuous criminal activity" into a dispositive distinction between similar offenders. Whether an individual's various crimes are interrupted by an arrest or some

other (undefined) event outside of his control (the passing of a night watchman, perhaps) provides little additional information about his culpability, see, *e.g.*, *Godinez*, 998 F.2d at 473, or whether he is likely to be "'the kind of person who,' when armed, 'might deliberately point the gun and pull the trigger,'" *Borden*, 2021 WL 2367312, at *3 (plurality opinion) (quoting *Begay*, 553 U.S. at 146). Petitioner also asserts (Br. 3) that only in "rare and exceptional" circumstances should three offenses committed on the same day constitute separate predicates under the ACCA. But if that is the case, then petitioner's approach fails to penalize offenders for committing *more* crimes.

Petitioner's approach, while leaving unclear the relevance of circumstances like the distance between the locations of two offenses, at least allows for the possibility that they might matter. But if the need to drive between two locations makes it more likely that distinct crimes constitute separate ACCA predicates, then a defendant is better off burglarizing or robbing adjacent stores, apartments, wards in an assisted-living facility, or storage units than he is targeting homes or businesses that are spread further apart. Nothing in the ACCA's text, history, or purpose suggests that Congress meant to prescribe greater punishment for defendants who (for example) have committed crimes against suburbanites or exurbanites than defendants who victimize urban dwellers or others in close quarters. Cf. *Stitt*, 139 S. Ct. at 406 (declining to distinguish for purposes of ACCA "burglary" between permanent homes and "mobile home[s]," "RV[s]," "camping tent[s]," "vehicle[s]," and other "structure[s] that [are] adapted for or customarily used for lodging").

d. Petitioner's approach is also difficult to implement under this Court's decisions emphasizing the limited scope of the record inquiry allowed by the ACCA. As explained above, see pp. 16-21, *supra*, application of the prevailing temporal-distinction rule is frequently undisputed, and when it is disputed, many cases can be resolved by reference to the offense elements, the charging document if necessary, and, as a last resort, other judicial records allowed under this Court's decision in *Shepard* v. *United States*. Limiting the inquiry to such records, as courts of appeals generally do, is therefore relatively unproblematic. See, *e.g.*, *United States* v. *Dantzler*, 771 F.3d 137, 145 (2d Cir. 2014); *Kirkland* v. *United States*, 687 F.3d 878, 886 (7th Cir. 2012).

But under petitioner's approach, "the question whether different ACCA predicates were 'committed on occasions different from one another'" is a "holistic and circumstance-dependent" inquiry that "must be answered by reference to the criminal opportunities that gave rise to each offense." Pet. Br. 17. The type of information that petitioner's interpretation would require—namely, detailed information concerning the circumstances before and after each offense was committed—may well be absent from *Shepard* materials such as a charging document, written plea agreement, or transcript of plea colloquy. *Shepard*, 544 U.S. at 16. And differentiating between defendants based on the vagaries of state record-keeping is antithetical to the ACCA's goal of nationwide consistency. See, *e.g.*, *Taylor*, 495 U.S. at 590-592, 599.

Interpreting the different-occasions clause in the manner that petitioner proposes also threatens to be a

stalking horse for a constitutional challenge to the statute. Petitioner has apparently now abandoned the vagueness claim that he previously raised, see Pet. i, and he has never raised a Sixth Amendment claim of the sort that his amici mention, see National Ass'n of Criminal Defense Lawyers Amicus Br. 13-19. But such claims would potentially become more viable if this Court were to adopt his approach. To the extent that he might try to avoid such claims by emphasizing further limitations on the application of the ACCA, cf. Cert. Reply Br. 10 (asserting that the statute is vague only if it applies to his prior convictions), he would be arbitrarily restricting the scope of the statute simply to solve a problem that he introduced in the first place. This Court "should not lightly conclude that Congress enacted a self-defeating statute." *Quarles*, 139 S. Ct. at 1879.

4. The Court should not resort to the rule of lenity

As a last resort, petitioner contends (Br. 45-46) that the rule of lenity supports his interpretation of Section 924(e)(1). "But 'the rule of lenity only applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute, such that the Court must simply guess as to what Congress intended.'" *United States* v. *Castleman*, 572 U.S. 157, 172 (2014) (quoting *Barber* v. *Thomas*, 560 U.S. 474, 488 (2010)); see *Shular* v. *United States*, 140 S. Ct. 779, 789 (2020) (Kavanaugh, J., concurring). For the reasons discussed above, no such grievous ambiguity exists here. Rather, because all of the relevant indicia demonstrate that temporally distinct offenses are "committed on occasions different from one another," 18 U.S.C. 924(e)(1), "lenity" is not "in play," *Van Buren*, 2021 WL 2229206, at *11.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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