No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JEROME CURTIS STANCIL,
***Petitioner*,**

v.

UNITED STATES OF AMERICA,
***Respondent*.**

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Armed Career Criminal Act, 18 U.S.C. § 924(e), (ACCA) mandates a 15-year mandatory-minimum term of imprisonment for individuals convicted of violating 18 U.S.C. § 922(g) if they have at least three prior convictions for a "violent felony" or "serious drug offense." 18 U.S.C. § 924(e). A "serious drug offense," in turn, includes "an offense under State law, involving manufacturing, *distributing*, or possessing with intent to manufacture or distribute a controlled substance . . . ." 18 U.S.C. § 924(e)(2)(A)(ii) (emphasis added).

Here, the Eleventh Circuit held that Mr. Stancil's prior Virginia conviction for possessing a controlled substance with intent to give it to another individual as an accommodation under Virginia Code § 18.2-248(D)—an offense that required no more than socially sharing drugs with a friend—required "distribution" of a controlled substance and was thus a "serious drug offense." But at least three other circuits have held that similar conduct is not "distributing" under the Controlled Substances Act (CSA). *See United States v. Semler*, 858 F. App'x 533, 534 (3rd Cir. 2021); *Weldon v. United States*, 840 F.3d 865 (7th Cir. 2016); *United States v. Swiderski*, 548 F.2d 445 (2d Cir. 1977). The ACCA must be understood and read in conjunction with the CSA—indeed, both "serious drug offense" definitions expressly reference the CSA. There is therefore tension in the circuits on whether socially sharing drugs with another qualifies as "distribution."

The questions presented are:

1. Whether socially sharing drugs with a friend qualifies as "distribution" under the ACCA's "serious drug offense" definition.

2. Whether the ACCA's requirement that prior offenses be "committed on occasions different from one another," 18 U.S.C. § 924(e), is unconstitutional.

3. Whether Congress may criminalize intrastate possession of a firearm and ammunition on the sole basis that the firearm and ammunition once moved, before the defendant's possession, through foreign or interstate commerce.

LIST OF PARTIES

Petitioner, Jerome Curtis Stancil, was the defendant in the district court and the appellant in the court of appeals. Respondent, the United States of America, was the plaintiff in the district court and the appellee in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Jerome Curtis Stancil, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION AND ORDER BELOW

The Eleventh Circuit's published opinion affirming Mr. Stancil's conviction and sentence is reported at 4 F.4th 1193 and provided in Appendix A-1.

STATEMENT OF JURISDICTION

The Eleventh Circuit issued its opinion on July 13, 2021. *See* Appendix A-1. This petition is timely filed under Supreme Court Rule 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides, in relevant part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Section 922(g) of Title 18, United States Code, provides, in relevant part:

> It shall be unlawful for any person—
>
> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
> . . .
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

The Armed Career Criminal Act, Section 924(e) of Title 18, United States Code, provides in relevant part:

> (1) 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).
>
> (2) As used in this subsection—
>
> (A) the term "serious drug offense" means—
>
> (i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act

> (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or
>
> (ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;
>
> . . . .

Section 18.2-248 of the Virginia Code (1995) provides, in relevant part:

> § 18.2–248. Manufacturing, selling, giving, distributing or possessing with intent to manufacture, sell, give or distribute a controlled substance or an imitation controlled substance prohibited; penalties.
>
> A. Except as authorized in the Drug Control Act (§ 54.1–3400 et seq.), it shall be unlawful for any person to manufacture, sell, give, distribute, or possess with intent to manufacture, sell, give or distribute a controlled substance or an imitation controlled substance.
>
> B. In determining whether any person intends to manufacture, sell, give or distribute an imitation controlled substance, the court may consider, in addition to all other relevant evidence, whether any distribution or attempted distribution of such pill, capsule or tablet included an exchange of or a demand for money or other property as consideration, and, if so, whether the amount of such consideration was substantially greater than the reasonable value of such pill, capsule or tablet, considering the actual chemical composition of such pill, capsule or tablet and, where applicable, the price at which over-the-counter substances of like chemical composition sell.
>
> C. Any person who violates this section with respect to a controlled substance classified in Schedule I or II shall upon conviction be imprisoned for not less than five nor

> more than forty years and fined not more than $500,000. Upon a second or subsequent conviction of such a violation, any such person may, in the discretion of the court or jury imposing the sentence, be sentenced to imprisonment for life or for any period not less than five years and be fined not more than $500,000.
>
> D. If such person proves that he gave, distributed or possessed with intent to give or distribute a controlled substance classified in Schedule I or II only as an accommodation to another individual who is not an inmate in a community correctional facility, local correctional facility or state correctional facility as defined in § 53.1–1 or in the custody of an employee thereof, and not with intent to profit thereby from any consideration received or expected nor to induce the recipient or intended recipient of the controlled substance to use or become addicted to or dependent upon such controlled substance, he shall be guilty of a Class 5 felony. . . .

STATEMENT OF THE CASE

Following a bench trial on stipulated facts, the district court convicted Mr. Stancil of possession of a firearm by a felon, in violation of 18 U.S.C. § 922(g)(1). The court sentenced him under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e) to 180 months of imprisonment, followed by five years of supervised release. The court of appeals affirmed.

1. On January 26, 2018, the Jacksonville Sheriff's Office conducted a traffic stop on Mr. Stancil's vehicle for speeding. Three officers attended the traffic stop. Two officers testified that they smelled the odor of burnt marijuana on Mr. Stancil's person, and one of those officers testified that he smelled fresh marijuana in the car. Based on the odor of marijuana, the Jacksonville Sheriff's Office searched Mr. Stancil's vehicle and found a firearm and ten rounds of ammunition. Mr. Stancil

was a convicted felon. The State of Florida charged Mr. Stancil with the state crime of being a felon in possession of a firearm and detained him in state custody for almost three months before declining to prosecute the case and transferring it to federal court.

2. A federal grand jury indicted Mr. Stancil for possession of a firearm and ammunition by a convicted felon, in violation of § 922(g). The indictment alleged that Mr. Stancil had been convicted of a crime punishable by imprisonment for a term exceeding one year. It further alleged that Mr. Stancil knowingly possessed, in and affecting interstate and foreign commerce, a named firearm and ammunition.

Mr. Stancil moved to suppress the firearm, ammunition, and any other resulting physical evidence or statements based on an unlawful search and seizure in violation of the Fourth Amendment. After an evidentiary hearing, the court denied the motion to suppress.

Mr. Stancil waived his right to a jury trial and agreed to a bench trial based on stipulated facts. He stipulated that he knowingly possessed a Taurus .40 millimeter caliber pistol, loaded with .40 caliber ammunition, and that the pistol was a firearm as defined in federal law. The firearm was manufactured in Brazil, and the ammunition was manufactured at a facility outside the State of Florida. He also stipulated that prior to January 26, 2018, he had been convicted of a felony offense, that is, a crime punishable by imprisonment for a term exceeding one year. The district court found that the government had proven the sole count of the indictment beyond a reasonable doubt and adjudicated Mr. Stancil guilty.

Mr. Stancil moved to dismiss the indictment pursuant to Federal Rule of Criminal Procedure 12(b)(2), asserting that § 922(g) is unconstitutional, facially and as applied, because it exceeds Congress's constitutional authority under the Commerce Clause. The district court denied the motion.

3. At sentencing, the government sought a 15-year minimum mandatory sentence under ACCA. It presented three Virginia judgments reflecting drug convictions under Virginia Code § 18.2-248 in 1996, 1997, and 2004. Over Mr. Stancil's objections, the district court found that all three Virginia convictions qualified as serious drug offenses under § 924(e)(2)(A)(ii) and applied the 15-year minimum-mandatory sentence. The district court also expressed that applying the 15-year minimum-mandatory sentence to Mr. Stancil was excessive and that it would likely sentence Mr. Stancil to less than 15 years if it could. The district court also observed that some of Mr. Stancil's offenses were remote in time, but the ACCA has no sunset provision on predicate offenses. The district court sentenced Mr. Stancil to the minimum mandatory 15 years' imprisonment under the ACCA.

4. On appeal, Mr. Stancil challenged the denial of his motion to suppress and his motion to dismiss the indictment. He also challenged his ACCA sentence on two grounds: (1) his prior convictions under Virginia Code § 18.2-248—particularly his 1996 conviction for possession with intent to distribute as an accommodation under Virginia Code § 18.2-248(D)—are not "serious drug offense[s]" under § 924(e)(2)(A)(ii); (2) the government's failure to charge in the indictment and prove beyond a reasonable doubt "three prior convictions" for serious drug offenses

"committed on occasions different from one another" violated his Fifth and Sixth Amendment rights. In a published opinion, the Eleventh Circuit rejected all of Mr. Stancil's arguments and affirmed his conviction and sentence. *United States v. Stancil*, 4 F.4th 1193 (11th Cir. 2021).

REASONS FOR GRANTING THE WRIT

I. The Eleventh Circuit's expansive interpretation of "distributing" in § 924(e)(2)(A)(ii) is wrong and in tension with the Second, Third, and Seventh Circuit's interpretations of "distribute" in the Controlled Substances Act.

ACCA mandates a 15-year minimum sentence for a defendant convicted under § 922(g) who has three prior convictions for "serious drug offense[s]." 18 U.S.C. § 924(e)(1). ACCA provides two definitions of "serious drug offense," depending on whether the conviction is federal or state. 18 U.S.C. § 924(e)(2)(A). Federal "serious drug offense[s]" include "offense[s] under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. § 924(e)(2)(A)(i). State "serious drug offense[s]" include "offense[s] under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. § 924(e)(2)(A)(ii). The courts below found that Mr. Stancil had three prior state convictions for "serious drug offense[s]" under § 924(e)(2)(A)(ii).

A. If a person socially shares drugs with a friend as an accommodation, he can be convicted of violating Virginia Code § 18.2-248.

The least culpable means of violating Virginia Code § 18.2-248 is reflected in subsection (D), which provides a lesser penalty for possessing a controlled substance with intent to give it to another individual as an accommodation, without intent to profit or induce addiction. *See* Va. Code § 18.2-248(D). The least culpable conduct punishable by the Virginia offense covers possession of drugs by friends—*not* dealers, pushers, or those normally engaged in the drug traffic—who have the intent to accommodate a fellow friend by giving the drugs away, without the intent to profit or encourage the use of drugs. *See Stillwell v. Virginia*, 247 S.E. 2d 360, 364 (Va. 1978). The Virginia offense prohibits giving a personal-use amount of drugs to a friend as an accommodation.[1] It applies broadly, not only to dealers, pushers, or traffickers, but also to addicts and end-users who share a personal-use amount of drugs. The Eleventh Circuit considers this conduct "distributing" and an ACCA predicate "serious drug offense."

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[1] The bulk of Virginia case law on the accommodation provision demonstrates that the mitigator is not available as a matter of law to drug dealers, drug suppliers, or those who are "normally engaged in the drug traffic." *Stillwell*, 247 S.E.2d at 364; *see also Porter v. Virginia*, 785 S.E.2d 224, 228 (Va. App. 2016) (rejecting a distribution-for-accommodation instruction where the relationship consisted of drug supplier and drug user, not friends); *Heacock v. Virginia*, 323 S.E.2d 90, 95-96 (Va. 1984) (rejecting accommodation defense where defendant was a drug dealer who distributed free samples to several guests at a party with the expectation of promoting profits from future sales). The accommodation defense is also not available if the transaction was commercial or involved any consideration, received or expected; the defendant does not need to make any money off of the transaction. *See Barlow v. Virginia*, 494 S.E.2d 901, 905-06 (Va. App. 1998); *Hudspith v. Virginia*, 435 S.E.2d 588 (Va. App. 1993); *Heacock*, 323 S.E.2d at 96.

B. There is tension among the circuits about whether socially sharing drugs with a friend is "distributing."

Congress did not define "distributing" in § 924(e)(2)(A)(ii). But here, the Eleventh Circuit interpreted "distributing" in § 924(e)(2)(A)(ii) broadly to include giving drugs away to a friend without a profit motive—what could be described generically as social sharing. *See Stancil*, 4 F.4th at 1197-98. To reach this conclusion, the Eleventh Circuit relied on two of its prior precedents holding that "distributing" does not require an exchange for value, *see Hollis v. United States,* 958 F.3d 1120, 1122 (11th Cir. 2020), and that possessing for "other than personal use" qualifies as possessing with the intent to distribute. *United States v. Robinson*, 583 F.3d 1292, 1296 (11th Cir. 2009).

Using this expansive interpretation of "distributing," the Eleventh Circuit held that Mr. Stancil's three prior convictions under Virginia Code § 18.2-248—including his 1996 accommodation conviction under subsection (D)—are "serious drug offense[s]" under § 924(e)(2)(A)(ii).

But at least three other circuits have held that similar conduct does not constitute "distribution" under the federal Controlled Substances Act (CSA), 21 U.S.C. § 841.[2] *See United States v. Semler*, 858 F. App'x 533, 534 (3rd Cir. 2021); *Weldon v. United States*, 840 F.3d 865 (7th Cir. 2016); *United States v. Swiderski*, 548

[2] Congress defined "distribute" in the CSA as "to deliver," *see* 21 U.S.C. § 802(11), and "deliver" as "the actual, constructive, or attempted transfer of a controlled substance . . . whether or not there exists an agency relationship." 21 U.S.C. § 802(8). Congress did not define "transfer." *See Semler*, 858 F. App'x at 536.

F.2d 445 (2d Cir. 1977).[3] In *Semler*, the Third Circuit held that "the definition of 'distribute' under the Controlled Substances Act does not cover individuals who jointly and simultaneously acquire possession of a small amount of a controlled substance solely for their personal use." *Semler*, 858 F. App'x at 534. The Third Circuit reasoned that no provision of the CSA indicated that every instance of shared drug use constitutes felony distribution. *Id.* at 537. Such a construction, *Semler* explained, would be "hyperliteral" and contrary to the ordinary usage of the terms "transfer" and "distribute." *Id.* It would also lead to consequences that Congress could not have intended by "divert[ing] punishment from traffickers to addicts, who contribute to the drug trade only as end users and who already suffer disproportionally from its dangerous effects." *Id.* at 538. Accordingly, *Semler* "decline[d] to find that every physical divvying up of a small quantity of jointly purchased and shared drugs must constitute a distribution." *Id.* at 539.

In *Swiderski*, the Second Circuit vacated the defendant's conviction for possession with intent to distribute. The *Swiderski* court found that "[w]here two individuals simultaneously and jointly acquire possession of a drug for their own use, intending only to share it together, their only crime is [ ] simple joint possession[.]"[4] 548 F.2d at 450.

And in *Weldon*, the Seventh Circuit refused to hold that the defendant

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[3] *But see United States v. Wallace*, 532 F.3d 126, 129 (2d Cir. 2008) (citing cases).

[4] *Swiderski's* holding was "limited to the passing of a drug between joint possessors who simultaneously acquired possession at the outset for their own use"; it does not apply when an individual was in "sole possession" of the drugs and served as a "link in the chain" of distribution to a third person. 548 F.2d at 450-51.

necessarily distributed heroin to his girlfriend and their companion. 840 F.3d at 866. Writing for the court, Judge Posner considered the ordinary usage of the terms "transfer" and "distribute" and explained:

> Suppose you have lunch with a friend, order two hamburgers, and when your hamburgers are ready you pick them up at the food counter and bring them back to the table and he eats one and you eat the other. It would be very odd to describe what you had done as 'distributing' the food to him. It is similarly odd to describe what [the codefendants] did as distribution.

Id. Thus, these three courts have recognized that conduct involving social sharing of drugs—like the least culpable conduct punishable under Virginia Code § 18.2-248(D)—does not necessarily involve distribution.[5]

Mr. Stancil recognizes that his case involves the interpretation of the undefined term "distributing" in the ACCA and not the CSA. But the "serious drug offense" definition in the ACCA must be understood by reference to the CSA. Indeed, both "serious drug offense" definitions expressly refer to the CSA. If Mr. Stancil were convicted in the Second, Third, or Seventh Circuits, he likely would not be subject to a 15-year mandatory minimum. But here, the Eleventh Circuit found that socially sharing drugs with another person is "distributing" and thus sentenced Mr. Stancil under the ACCA. As such, there is tension among these circuits as to

[5] Mr. Stancil recognizes that some instances of "social sharing" might constitute distribution, but the Virginia statute—which prohibits sharing between friends as an accommodation—encompasses conduct more like the joint possession in *Swiderski* than the hypothetical transfer discussed as dicta in *Semler*, in which an individual transfers drugs to another user for that person to re-share with others. *Semler*, 858 F. App'x at 539.

the conduct that qualifies as "distributing" under the ACCA, and therefore whether a conviction under Virginia Code § 18.2-248(D) is a "serious drug offense."

C. The Eleventh Circuit's interpretation of "distributing" is wrong.

The Eleventh Circuit's expansive interpretation of "distributing" in § 924(e)(2)(A)(ii) is wrong. As Mr. Stancil argued below, the ordinary meaning of the undefined term "distributing" in § 924(e)(2)(A)(ii) does not include the least culpable conduct prohibited by Virginia Code § 18.2-248, as reflected in subsection (D).

"When a term is undefined, we give it its ordinary meaning." *United States v. Santos*, 553 U.S. 507, 511 (2008); *accord Taniguchi v. Kan Pacific Saipan, Ltd.*, 566 U.S. 560, 566 (2012); *Curtis Johnson v. United States*, 559 U.S. 133, 138 (2010); *see also Lopez v. Gonzales*, 549 U.S. 47, 53 (2006) ("The everyday understanding . . . should count for a lot here, for the statutes in play do not define the term, and so remit us to regular usage to see what Congress probably meant." (citing *FDIC v. Meyer*, 510 U.S. 471, 476 (1994)). As such, legal interpretation "starts with a search for the 'ordinary communicative content' of the words of the law." Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 Yale L.J. 788, 792 (2018). To determine the ordinary or common meaning of a term, this Court has looked for how a term is "normally understood" and for the most "natural" sense of the word. *Taniguchi*, 566 U.S. at 569; *see also Shular v. United States*, 140 S. Ct. 779, 785 (2020). "Ultimately, context determines meaning." *Curtis Johnson*, 559 U.S. at 139.

When used contextually in connection with "drugs," "distribute" communicates commercial dealing to many other persons within a network, from manufacturer to wholesaler to retailer to customer. The natural use of the term "distributing drugs" connotes manufacturers, importers, kingpins, organized crime networks, wholesale dealers, as well as street-level dealers and suppliers. But the natural use of the term does *not* include friends who jointly possess and socially share a drug for personal use. Like Judge Posner's hamburger example in *Weldon*, it would be odd and unnatural to describe a user who passes a marijuana joint to a friend or shares a personal-use amount of drugs with a fellow user as an accommodation as "distributing."

In addition, the broader context of § 924(e) matters. "Distributing" must be interpreted as used in defining the statutory category of "serious drug offense[s]." *See Curtis Johnson*, 559 U.S. at 140. When interpreting the undefined term "distributing," the connotation of the adjective "serious" is relevant. *See id.* (interpreting "physical force" as used in defining the statutory category of "violent felon[ies]" in § 924(e)).

This Court has also recognized that the background of § 924(e) is helpful when interpreting the statute. *Taylor v. United States*, 495 U.S. 575, 581 (1990). To the extent the legislative history aids the interpretation of the statute, Congress sought "to curb armed, habitual drug traffickers." H.R. Rep. No. 99-849, p.1 (1986). At a May 21, 1986, hearing on the bill, "a consensus developed in support of an expansion of the predicate offenses to include serious drug trafficking offenses under both State

and Federal law." *Id.* at 3. The following day, the bill was amended to add "major State . . . drug trafficking felonies as predicate offenses." *Id.* at 4. Accordingly, the "concept was encompassed" in the final legislation by "adding as predicate offenses State and Federal laws for which a maximum term of imprisonment of 10 years of more is prescribed for manufacturing, distributing or possessing with intent to manufacture or distribute controlled substances . . . ." *Id.* at 3. Overall, the ACCA seeks to incapacitate and deter violent, career criminals and those who self-identify as potentially violent people by intentionally entering the highly dangerous drug marketplace. *See United States v. Bynum*, 669 F.3d 880, 887 (8th Cir. 2012). The simple possessor who socially shares drugs with his friend, who is also a user, is not normally associated with an armed habitual drug trafficker or a violent career criminal.

Finally, before choosing the government's harsher reading of the statute, courts must require that Congress spoke in language that is clear and definite. *Yates v. United States*, 574 U.S. 528, 548 (2015). When the statute is ambiguous, the rule of lenity requires this Court to resolve the ambiguity in favor of Mr. Stancil. *See, e.g., United States v. Davis*, 139 S. Ct. 2319, 2333 (2019); *Yates*, 574 U.S. at 547; *United States v. Bass*, 404 U.S. 336, 347, 348 (1971); *see also United States v. R.L.C.*, 503 U.S. 291, 305 (1992) (holding that the rule of lenity applies to answer questions about the severity of sentencing). The rule of lenity is founded on providing fair notice of the law to would-be violators and the principle that the power of punishment is vested in the legislative branch. *Davis*, 139 S. Ct. at 2333. It also serves to strike

the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability and punishment. *See Yates*, 574 U.S. at 548 (citing *Liporata v. United States*, 471 U.S. 419, 427 (1985)).

In sum, this Court should grant the petition for certiorari to resolve the tension among circuits about whether socially sharing drugs with another person is "distributing."

II. This Court should review the constitutionality of ACCA's different-occasions provision in § 924(e)(1).

The ACCA's different-occasions provision is incapable of interpretation and thus void for vagueness under the Fifth Amendment. Also, the government's failure to charge in the indictment and prove beyond a reasonable doubt three prior convictions for serious drug offenses "committed on occasions different from one another" violated his Fifth and Sixth Amendment rights. This term, this Court will decide *Wooden v. United States*, 141 S. Ct. 1370 (2021), which calls on this Court to interpret the requirement that a defendant's prior offenses be "committed on occasions different from one another." *See* 141 S. Ct. 1370; 18 U.S.C. § 924(e)(1).

The different-occasions provision in § 924(e) is unconstitutionally vague because it "fails to give ordinary people fair notice of the conduct it punishes" and is "so standardless that it invites arbitrary enforcement" by judges. *Samuel Johnson v. United States*, 576 U.S. 591, 595-96 (2015). This standard applies as well to statutes fixing criminal sentences. *Id.* at 596; *see also Sessions v. Dimaya*, 138 S. Ct. 1204, 1225 (2018) (Gorsuch, J., concurring in part and concurring in the

judgment). Like the residual clause struck down as constitutionally infirm in *Samuel Johnson*, the different-occasions clause is "hopelessly indetermina[te]." 576 U.S. at 598. The "sweeping and imprecise language" used in the different-occasions provision has "set up a host of vexing constitutional and statutory interpretation questions for the courts." Rachel E. Barkow, *Categorical Mistakes: The Flawed Framework of the Armed Career Criminal Act and Mandatory Minimum Sentencing,* 133 Harv. L. Rev. 200, 202 (2019). The overly broad different-occasions inquiry adopted by the Eleventh Circuit has effectively invited judges to decide what the law is, in contravention of both legislative intent and separation-of-powers principles. *See Dimaya*, 138 S. Ct. at 1227-28 (Gorsuch, J., concurring in part and concurring in the judgment). "Invoking so shapeless a provision to condemn someone to prison for fifteen years to life does not comport with the Constitution's guarantee of due process." *Samuel Johnson*, 576 U.S. at 602.

During oral argument in *Wooden*, members of this Court questioned whether the ACCA's different-occasions provision is incapable of interpretation and thus void for vagueness. *See* Oral Argument Tr. at 24, 70, *Wooden v. United States*, No. 20-5279 (Oct. 4, 2021).[6] Should the Court determine that the ACCA's different-occasions provision is void-for-vagueness, that decision may apply in Mr. Stancil's direct appeal. *See Samuel Johnson*, 576 U.S. at 602-03 (deciding that ACCA's

[6] This Court granted certiorari on the question presented in the *pro se* petition, which asked whether the appellate court erred "by expanding the scope of 18 U.S.C. § 924(e)(1) in the absence of clear statutory definition with regard to the vague term 'committed on occasions different from one another.'" Petition for a Writ of Certiorari, *Wooden v. United States*, No. 20-5279, at 2 (July 24, 2020).

residual clause was unconstitutionally vague); *see also Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980) (deciding issue not raised below). Mr. Stancil accordingly requests that this Court hold his petition pending the Court's decision in *Wooden*.

In addition, as Mr. Stancil argued in the court below, the district court's reliance on non-elemental facts of the prior, predicate offenses to make the "different occasions" determination (i.e., the date and time of the prior serious drug offenses) violated his Fifth and Sixth Amendment rights. Circumstance-specific facts, like those required under the ACCA's different-occasions inquiry, may not support sentencing enhancements unless they are alleged in an indictment and proven to a jury beyond a reasonable doubt. *See Nijhawan v. Holder*, 557 U.S. 29, 40 (2009) (recognizing potential constitutional problems in a criminal prosecution); *Ovalles v. United States*, 905 F.3d 1231, 1250 (11th Cir. 2018), *abrogated on other grounds by United States v. Davis*, 139 S. Ct. 2319 (2019) (acknowledging and addressing the constitutional concerns). The Eleventh Circuit rejected this argument by reiterating its holding that "district courts may look to a limited set of evidence, called *Shepard* documents, to determine whether crimes were committed on different occasions."[7] *Stancil*, 4 F.4th at 1200 (citing *United States v. Longoria*, 874 F.3d 1278, 1281 (11th Cir. 2017)). The Eleventh Circuit also relied on *Almendarez-Torres v. United States*, 523 U.S. 224, 226-27 (1998), to reject his argument that the district court lacked the

[7] Mr. Stancil submits that the sentencing court may rely on "*Shepard*-approved documents" only for the elements of the prior convictions when using the modified categorical approach. *See Descamps v. United States*, 133 S. Ct. 2276 (2013); *see also Mathis v. United States*, 136 S. Ct. 2243 (2016).

authority to impose an enhanced sentence under the ACCA because he did not stipulate to the existence of his predicate offenses being serious drug offenses committed on occasions different from one another during his bench trial on the felon-in-possession charge. *See Alleyne v. United States*, 133 S. Ct. 2151, 2155 (2013); *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Mr. Stancil asks this Court to reconsider *Almendarez-Torres* in this case and evaluate ACCA's different-occasions requirement in light of the Fifth and Sixth Amendments.

III. This Court should review the constitutionality of 18 U.S.C. § 922(g).

Mr. Stancil's offense was purely local. He possessed a firearm and ammunition in his vehicle, which local law enforcement found during a search incident to a traffic stop. The State of Florida charged Mr. Stancil for possessing the firearm as a felon and held him in state custody for almost three months. The State dropped the charge when the federal government prosecuted Mr. Stancil under § 922(g) and sought a 15-year minimum mandatory sentence under ACCA, 18 U.S.C. § 924(e).

In *United States v. Lopez*, 514 U.S. 549 (1995), this Court struck down the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q)(1)(A), concluding that it exceeded Congress's power under the Commerce Clause. The same four considerations that led to this Court's decision in *Lopez* demonstrate that § 922(g), like § 922(q), does not pass constitutional muster.

First, § 922(g) prohibits possession—a non-economic activity. *Lopez*, 514 U.S. at 561, 567; *see United States v. Morrison*, 529 U.S. 598, 610 (2000). Second, the

jurisdictional element set forth in § 922(g) does not ensure on a case-by-case basis that the activity being regulated—possession—affects interstate commerce. *Lopez*, 514 U.S. at 559, 561-62; *Morrison*, 529 U.S. at 611-12. Third, the legislative history does not contain "express congressional findings regarding the effects [of possession by felons] upon interstate commerce." *Lopez*, 514 U.S. at 562. In earlier legislation predating the current version of § 922(g), Congress made the conclusory findings "that there is widespread traffic in firearms moving in or otherwise affecting interstate or foreign commerce" and "that the ease with which any person can acquire firearms . . .is a significant factor in the prevalence of lawlessness and violent crime in the United States." Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90-351, § 901, 82 Stat. 197, 225. Such findings rely on reasoning this Court has "rejected as unworkable if we are to maintain the Constitution's enumeration of powers." *Morrison*, 529 U.S. at 615; *see Lopez*, 514 U.S. at 563-64. Finally, the link between possession by a convicted felon and interstate or foreign commerce is attenuated. *See Lopez*, 514 U.S. at 563-68; *Morrison*, 529 U.S. at 612-13.

The *Lopez* framework is the obvious place to start when analyzing the constitutionality of federal gun possession statutes. But many circuits (including the Eleventh Circuit) have affirmed § 922(g) under *Scarborough v. United States*, 431 U.S. 563 (1977), a much older precedent that construed § 922(g)'s predecessor.[8] The

[8] *See, e.g., United States v. Smith*, 101 F.3d 202, 215 (1st Cir. 1996); *United States v. Santiago*, 238 F.3d 213, 216-17 (2d Cir. 2001); *United States v. Gateward*, 84 F.3d 670, 671-72 (3d Cir. 1996); *United States v. Rawls*, 85 F.3d 240, 242-43 (5th Cir. 1996); *United States v. Lemons*, 302 F.3d 769, 772-73 (7th Cir. 2002); *United States v. Shelton*, 66 F.3d 991, 992-93 (8th Cir. 1995); *United States v. Hanna*, 55 F.3d

Court in *Scarborough* decided, as a matter of statutory interpretation, that Congress did not intend "to require any more than the minimal nexus that the firearm have been, at some time, in interstate commerce"—a standard well below *Lopez*'s *substantially* affects test. *Compare Scarborough*, 431 U.S. at 575 (emphasis added); *id*. at 564, 577; *with Lopez*, 514 U.S. at 559. Given its incompatibility with *Lopez*, *Scarborough* is no longer good law.

Mr. Stancil presents an issue only this Court can resolve—how to reconcile the statutory interpretation decision in *Scarborough* with the constitutional decision in *Lopez*. *See Alderman v. United States*, 562 U.S. 1163, 1168 (2011) (Thomas, Scalia, JJ., dissenting from the denial of certiorari) ("If the *Lopez* [constitutional] framework is to have any ongoing vitality, it is up to this Court to prevent it from being undermined by a 1977 precedent [*Scarborough*] that does not squarely address the constitutional issue."). Because the courts of appeals cannot overrule this Court's precedent, the *Lopez* test will disappear for intrastate possession crimes without this Court's intervention. *See Gamble v. United States*, 139 S. Ct. 1960, 1980 n.1 (2019) (Thomas, J., concurring); *see also Rawls*, 85 F.3d at 243 (Garwood, J., concurring) (explaining lower court determined it was bound by *Scarborough* but suggesting that "one might well wonder how it could rationally be concluded that mere possession of a firearm in any meaningful way concerns interstate commerce simply because the firearm had, perhaps decades previously before the charged possessor was even born,

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1456, 1461-62 & n.2 (9th Cir.1995); *United States v. Dorris*, 236 F.3d 582, 584-86 (10th Cir. 2000); *United States v. Wright*, 607 F.3d 708, 715 (11th Cir. 2010).

fortuitously traveled in interstate commerce").

Thousands of defendants are convicted under § 922(g) every year.[9] The question presented is thus important and recurring. Mr. Stancil accordingly seeks this Court's review to resolve whether Congress may criminalize his purely local conduct.

CONCLUSION

For the foregoing reasons, Mr. Stancil asks this Court to grant his petition for writ of certiorari.

Respectfully submitted,

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[9] The Sentencing Commission reports that there were 6,782 cases involving § 922(g) convictions in fiscal year 2020. *See* U.S. Sentencing Comm'n, *Quick Facts: Felon in Possession of a Firearm* (May 2021), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_In_Possession_FY20.pdf.