No. 22-6640

IN THE

Supreme Court of the United States

EUGENE JACKSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

The Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), mandates fifteen years in prison where the defendant is convicted of illegal possession of a firearm and has three prior "violent felonies" or "serious drug offenses."

The question presented is whether the "serious drug offense" definition in ACCA, 18 U.S.C. § 924(e)(2)(A)(ii), incorporates the federal drug schedules that were in effect at the time of the federal firearm offense, or the federal drug schedules that were in effect at the time of the prior state drug offense.

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BRIEF FOR PETITIONER

Petitioner Eugene Jackson respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's (second and final) opinion is published at 55 F.4th 846 and reproduced at Pet. App. 1a–35a. The Eleventh Circuit's (first and superseded) opinion is published at 36 F.4th 1294 and reproduced at Pet. App. 120a–42a. The district court did not issue a written opinion.

JURISDICTION

The judgment of the court of appeals was entered on December 13, 2022. Pet. App. 1a. The petition for a writ of certiorari was filed on January 24, 2023, and granted on May 15, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant provisions of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), and the Controlled Substances Act (CSA), 21 U.S.C. §§ 802, 811–12, are reproduced in the Appendix to this brief.

INTRODUCTION

As the Government recognized in the court of appeals: "courts generally apply the federal law in effect when a defendant commits his federal crime." Pet. App. 99a. This rule is "uncontroversial." *Id.*

Applied here, both parties agree this default rule requires courts to use the version of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), in place when a person commits the federal firearm offense

exposing him to ACCA. *Id.* For example, if Congress amended ACCA to exclude burglary convictions from its reach, and a person later committed a federal firearm offense, a prior burglary conviction would not qualify as an ACCA predicate—even if ACCA had covered burglary at the time of that prior conviction.

This case presents a similar question of timing. A state conviction is not a "serious drug offense" under ACCA where its elements covered a substance not controlled under the federal Controlled Substances Act (CSA), 21 U.S.C. § 802(6). When petitioner Eugene Jackson committed the federal firearm offense subjecting him to ACCA, the elements of his prior state drug offenses covered a substance that was *not* federally controlled. But when those prior state offenses occurred, their elements *did* cover only federally controlled substances. The question thus arises: Do courts compare the elements of a state drug offense against the federal CSA schedules in effect at the time of the ACCA-triggering federal firearm offense, or the superseded schedules that were in effect at the time of the prior state drug offense?

It is the former. Because courts must use the version of ACCA in place when a defendant commits the instant federal firearm offense, courts must also use the same version of the federal CSA schedules that ACCA expressly incorporates—*i.e.*, the one in place when the federal firearm offense is committed.

As this brief explains, this straightforward conclusion comports with every available tool of statutory interpretation: statutory text and structure; this Court's ACCA precedent; several foundational principles of law; and anomalous consequences that the Government's contrary rule would produce.

STATEMENT OF THE CASE

1. Based on an offense committed in 2017, petitioner Eugene Jackson pleaded guilty in the Southern District of Florida to one count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). Violations of Section 922(g)(1) then carried a statutory maximum penalty of ten years (120 months) of imprisonment.[1] Mr. Jackson's advisory guideline range under the federal Sentencing Guidelines was even lower: 92–115 months. *See* Pet. 6.

The pre-sentence report, however, recommended that Mr. Jackson be sentenced under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e). ACCA requires a prison sentence of at least *fifteen* years if the defendant has three previous convictions for "serious drug offenses" or "violent felonies." 18 U.S.C. § 924(e)(1). Mr. Jackson did not dispute that he had two prior qualifying convictions (both violent felonies). But he argued that his 1998 and 2004 cocaine-related convictions under Fla. Stat. § 893.13 did not qualify as "serious drug offenses."

As relevant here, ACCA defines "serious drug offense" as an offense that involves "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))." 18 U.S.C. § 924(e)(2)(A)(ii). A "controlled substance" under the Controlled Substances Act (CSA), in turn, is a substance listed on

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[1] Congress later raised the statutory maximum from ten to fifteen years. *See* Bipartisan Safer Communities Act, Pub. L. No. 117-159, 136 Stat. 1313, 1329 § 1204(c) (2022) (codified at 18 U.S.C. § 924(a)(8)). That amendment does not affect this case.

federal "schedules" that are regularly revised by the Attorney General and published annually in the Code of Federal Regulations. 21 U.S.C. § 802(6); *see also id.* §§ 811–12.

To determine whether a prior state drug conviction falls within this ACCA definition, courts apply a version of the "categorical approach." *Shular v. United States*, 140 S. Ct. 779, 783–84 (2020). This inquiry has two steps. At step one, courts ascertain the elements of the prior state conviction (as well as its maximum punishment). *See id.* at 783–85. At step two, courts then compare those state-law elements to the federal criteria specified in Section 924(e)(2)(A)(ii), including "manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance." *See id.* If the elements of the state conviction were broader than the federal criteria in Section 924(e)(2)(A)(ii), then the conviction does not qualify as an ACCA predicate. Thus, a state conviction is not a "serious drug offense" where its elements covered a substance not controlled by the federal CSA schedules.

At the time of Mr. Jackson's prior drug convictions, Florida law covered a cocaine derivative called ioflupane (^{123}I) ("ioflupane"). Pet. App. 6a & n.3. But when Mr. Jackson committed the federal firearm offense in 2017, the CSA schedules did *not* control that substance. Two years earlier, the Attorney General (via the Drug Enforcement Administrator) had legalized that substance due to its use in diagnosing Parkinson's disease. *Id.* 7a; *see* Schedules of Controlled Substances: Removal of [123 I] Ioflupane from Schedule II of the Controlled Substances Act,

80 Fed. Reg. 54715 (Sept. 11, 2015) (codified at 21 C.F.R. § 1308.12(b)(4)(ii)).

Because the Florida statute under which Mr. Jackson had been convicted covered a substance that was not controlled by the federal CSA schedules at the time he committed the federal firearm offense, he argued that his prior offenses did not qualify as "serious drug offenses." Despite this mismatch between Florida and federal law, the district court "reluctantly" imposed the ACCA enhancement. Dist. Ct. No. 19-cr-20546, ECF No. 73 at 25–26. Although it believed that Mr. Jackson's overbreadth argument was "compelling," and that his Florida convictions neither "would [n]or should survive" as ACCA predicates, the court nonetheless believed it was required by circuit precedent to reject Mr. Jackson's position. *Id.* at 24–26. Accordingly, the court sentenced him to ACCA's fifteen-year mandatory minimum. Pet. App. 144a.

2. On appeal, Mr. Jackson renewed his argument that his prior Florida drug offenses did not qualify as ACCA "serious drug offenses." After oral argument, the Eleventh Circuit issued a decision unanimously vacating the ACCA sentence.

The court of appeals first made clear that the timing question was not controlled by existing circuit precedent. Pet. App. 138a–40a. The Eleventh Circuit then agreed with Mr. Jackson that federal courts must "apply the version of the Controlled Substances Act Schedules in place when the defendant committed the federal firearm-possession offense," not those in place when he was convicted of the prior state drug offense. *Id.* 122a. In so holding, the court of appeals aligned itself with every other court of appeals to address the

issue—both before and since. *See* Pet. App. 141a–42a (citing *United States v. Hope*, 28 F.4th 487 (4th Cir. 2022)); *see also United States v. Williams*, 48 F.4th 1125 (10th Cir. 2022); *United States v. Brown*, 47 F.4th 147 (3d Cir. 2022), *cert. granted*, 143 S. Ct. ___, 2023 WL 3440566 (2023) (No. 22-6389); *United States v. Perez*, 46 F.4th 691 (8th Cir. 2022).[2]

The court of appeals also rejected the Government's argument that *McNeill v. United States*, 563 U.S. 816 (2011), required consulting the CSA schedules in place when Mr. Jackson was convicted of the prior state drug offenses. For purposes of ACCA, *McNeill* held that federal courts must consult state law at the time of a prior state drug conviction in order to ascertain the maximum term of imprisonment for that offense. That holding, the Eleventh Circuit explained, "has no application here" because we are not considering "*McNeill*'s 'backward-looking question' of what the defendant's 'previous [state] conviction[]' was." Pet. App. 141a. Rather, the issue here involves the second step of the governing analysis—namely, "the *federal* standard to which we compare" the elements of the state offense. *Id.* And because "that federal standard comes into play only" when determining the sentence for "the federal firearm-possession violation to which it attached," the standard incorporates the CSA schedules when the defendant committed the federal crime, not before. *Id.*

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[2] In the Third Circuit in *Brown*, the Government itself took this same position. *See* Brief for Appellee at 8–9, 16–19, 19 n.3; *United States v. Brown*, 47 F.4th 147 (3d Cir. 2022) (No. 21-1510), 2022 WL 18064016. And the Fourth Circuit went even further, consulting the CSA schedules from the time of federal *sentencing*. *Hope*, 28 F.4th at 504–05.

3. The Government declined to seek rehearing. But over a month after that deadline expired, the Eleventh Circuit *sua sponte* vacated its opinion and requested supplemental briefing. Pet. 9–10. Following that briefing, the same panel reversed itself and upheld Mr. Jackson's ACCA sentence. Pet. App. 2a.

The panel again acknowledged that *McNeill* did not "address" or "answer" the question presented. Pet. App. 8a, 17a–19a. Nonetheless, the panel now believed that "*McNeill*'s reasoning requires us to conclude all the same that the federal controlled-substances schedules in effect at the time of the previous state conviction govern" whether the state conviction constitutes a "serious drug offense." *Id.* 19a. Otherwise, the panel reasoned, the removal of a substance from the federal schedules before the commission of a federal firearm offense could "erase an earlier [state] conviction for ACCA purposes"—something the panel perceived to be an "impermissible result" under *McNeill*. *Id.* 19a, 22a.

The Eleventh Circuit also noted a "second reason" it believed "*McNeill*'s reasoning" controlled here. Pet. App. 22a. "Under *McNeill*," the court of appeals maintained that courts "must read" ACCA's definition of a prior *federal* "serious drug offense" as "incorporating the version of the Controlled Substances Act (and thus the federal controlled-substances schedules) in effect at the time the defendant's prior federal drug offense occurred." *Id.* 23a. Taking that as a given, the Eleventh Circuit reasoned that it could not "simultaneously construe" ACCA's definition of prior *state* "serious drug offenses" to "incorporate the federal drug schedules in effect at

the time the defendant committed the federal firearm offense." *Id.* 24a.

The court of appeals acknowledged that, under its time-of-prior-conviction rule, a state conviction predating the enactment of the CSA could never qualify as an ACCA predicate—even if the state statute criminalized only substances currently on the CSA schedules. Pet. App. 28a. After all, there were no CSA schedules at all before the enactment of the CSA (in 1970). The Eleventh Circuit admitted this "may seem odd." *Id.* (citation omitted). But the court of appeals thought *McNeill* "require[d]" that strange result. *Id.*

In a concurrence, Judge Rosenbaum (who authored both panel opinions) also acknowledged that using the federal drug schedules in effect at the time of the federal offense would be "far more consistent with how we generally construe statutes"—namely, to apply "federal law in place at the time of the federal violation"—and would best respect "Congress's determination to decriminalize certain substances." Pet. App. 33a–34a. Judge Rosenbaum further noted that the panel's interpretation of ACCA raised "deeply concerning" fair-notice problems because it is "a heavy lift for the ordinary citizen" to conduct "historical research of the federal controlled-substance schedules." *Id.* But Judge Rosenbaum believed that *McNeill* tied the court of appeals' hands by "mandat[ing]" a less natural or fair interpretation of ACCA. *Id.* 34a.

4. This Court granted certiorari, 143 S. Ct. ___, 2023 WL 3440568 (2023), and consolidated this case with *Brown v. United States*, No. 22-6389.

SUMMARY OF ARGUMENT

ACCA's "serious drug offense" definition in Section 924(e)(2)(A)(ii) incorporates the federal drug schedules in place when a person commits the federal firearm offense exposing him to ACCA—not superseded schedules in place at the time of the prior state drug conviction.

I. This is the only plausible reading of the text. Section 924(e)(2)(A)(ii) incorporates the "controlled substance" definition from the CSA. And the text of the CSA establishes drug schedules that are constantly "updated" to reflect "current" knowledge. By tethering the "serious drug offense" definition to dynamic schedules, ACCA incorporates the schedules in effect at the time of the instant federal firearm offense.

Statutory structure points in the same direction. Several other provisions in the federal criminal code incorporate the CSA's "controlled substance" definition. And these provisions look to the schedules at the time of the instant federal offense. "Controlled substance" should bear the same meaning in ACCA.

II. This Court's ACCA precedent also requires a time-of-federal-offense rule. To determine whether a state conviction qualifies as a "serious drug offense," a court must first ascertain the elements of the offense under state law. It then compares those elements to the federal criteria in Section 924(e)(2)(A)(ii). *See Shular v. United States*, 140 S. Ct. 779, 783–85 (2020).

At the second step, courts apply the version of ACCA in effect when the federal firearm offense is committed. That is when the statutory penalties are incurred. *Dorsey v. United States*, 567 U.S. 260, 272–73 (2012). So, for example, if ACCA no longer covered

any drug possession offenses at the time a defendant committed a federal firearm offense, a prior state drug conviction for possession with intent to distribute would not qualify as an ACCA predicate.

That logic disposes of this case. By expressly incorporating federal schedules enacted under the CSA, ACCA itself effectively lists the controlled substances it covers. So when a substance is removed from the schedules, it is also removed from ACCA. It follows that when a person commits a federal firearm offense, he cannot be subject to ACCA based on a prior state offense that covered a substance that is no longer listed on any CSA schedule.

Despite this straightforward analysis, the court of appeals thought *McNeill v. United States*, 563 U.S. 816 (2011), dictated a contrary result. But *McNeill* held only that courts must look to state law at the time of a prior state offense to ascertain its elements and maximum punishment. That holding is about step one of the analysis—*i.e.*, the *state-law* attributes of the prior conviction. This case, however, is about step two—*i.e.*, the *federal* criteria against which the state-law attributes should be compared. Nothing in *McNeill*'s holding or reasoning bears on that distinct question.

III. The time-of-federal-offense rule is bolstered by three fundamental legal principles as well.

First, as a recidivist statute, ACCA is designed to incapacitate repeat offenders. People should not be incapacitated based on convictions for conduct that federal law no longer deems dangerous. Doing so would thwart rather than serve ACCA's objective.

Second, a time-of-prior-conviction rule would preclude fair notice of ACCA's penalties. Locating

superseded schedules in place at the time of prior state convictions is extremely difficult even for lawyers. It would be next to impossible for ordinary people.

Third, a time-of-prior-conviction rule is out of joint with the "reference" canon. Because the referent here (*i.e.*, the CSA schedules) is dynamic, the canon directs courts to apply the law in effect when a "question arises" under the referring statute (*i.e.*, ACCA). And such a question arises when one commits the federal firearm offense exposing him to ACCA, not before.

IV. Further, the court of appeals' time-of-prior-conviction rule would create two major anomalies.

First, it would exclude from ACCA's coverage all state convictions predating the CSA's enactment (in 1970). Congress added the "serious drug offense" definition in 1986. It would have made no sense to cover convictions only from the previous sixteen years.

Second, a time-of-prior-conviction rule would exclude state convictions for substances that were *not* federally controlled at the time of the state offense but *were* federally controlled by the time of the federal firearm offense. This would be completely backwards.

The court of appeals nonetheless thought these anomalies were required because it believed that ACCA's "serious drug offense" definition for *federal* convictions looks to old drug schedules. But the court got there by again misapplying *McNeill*. In any event, the text of ACCA's definition for *state* drug convictions is different, making any variation in application "unremarkable." *Shular*, 140 S. Ct. at 786.

V. Finally, to the extent there is any ambiguity in ACCA's coverage, the rule of lenity would require this ambiguity to be resolved in petitioner's favor.

ARGUMENT

Every available tool of statutory interpretation points to the same conclusion: Section 924(e)(2)(A)(ii)'s "serious drug offense" definition incorporates the CSA schedules in effect at the time of the federal firearm offense, not at the time of the prior state drug offense.[3]

I. Statutory text and structure dictate that Section 924(e)(2)(A)(ii) incorporates the CSA schedules at the time of the federal offense.

1. Under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), a person convicted of illegally possessing a firearm must be sentenced to at least fifteen years in federal prison if they have three previous convictions for a "violent felony" or a "serious drug offense." Section 924(e)(2)(A)(ii) of the statute defines "serious drug offense" as "an offense under state law involving . . . a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))." Section 102 of the CSA, in turn, defines "controlled substance" as "a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V." 21 U.S.C. § 802(6).

But the relevant statutory text does not end there. Although the Eleventh Circuit glossed over this fact, the CSA "schedules" listing controlled substances are

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[3] In *Brown*, No. 22-6389, petitioner argues that ACCA requires courts to consult the federal CSA schedules at the time of federal *sentencing*. Because Mr. Brown is laying out this argument, Mr. Jackson will not create duplication here. However, as the Government recognized in response to Mr. Jackson's certiorari petition, Mr. Jackson would be entitled to relief as well were this Court to adopt Mr. Brown's time-of-federal-sentencing rule. U.S. Br. 12–13; *see* Pet. 38–39.

themselves the product of a detailed statutory regime. This regime requires the drug schedules to be "updated and republished on an annual basis." 21 U.S.C. § 812(a). In carrying out this directive, the Attorney General must consider factors such as "[t]he state of *current* scientific knowledge," whether a substance "has a *currently* accepted medical use," "*current* pattern[s] of abuse," and "[w]hat, if any, risk there *is* to the public health." *Id.* §§ 811(c), 812(b)(2)(B) (emphases added). Substances can also be temporarily scheduled in light of "*imminent* hazards to public safety." *Id.* § 811(h) (emphasis added); *see also Touby v. United States*, 500 U.S. 160, 162 (1991). *See generally* Amicus Br. of NACDL.

The upshot is this: ACCA's definition of "serious drug offense" in Section 924(e)(2)(A)(ii) incorporates a constantly evolving list of controlled substances that tracks "current" medical usage and scientific knowledge. ACCA's incorporation of a system so intently focused on present-day understandings strongly suggests that state drug convictions should be compared against the CSA schedules at the time of the federal offense triggering ACCA, not against outdated and superseded schedules. It would make no sense for Congress to peg ACCA's "serious drug offense" definition to dynamic CSA schedules that are uniquely designed to be current, only to have courts compare state convictions against obsolete CSA schedules that are many years or even decades old.

2. This conclusion is reinforced by the "presumption that a given term is used to mean the same thing throughout a statute." *Mohamad v. Palestinian Auth.*, 566 U.S. 449, 456 (2012) (quoting *Brown v. Gardner*, 513 U.S. 115, 118 (1994)).

Under 18 U.S.C. § 924(g)(3), it is unlawful to acquire or transfer a firearm in connection with interstate travel where there is an intent to "violate[] any State law relating to any *controlled substance (as defined in section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6))*." (emphasis added). Section 924(g)(3)'s reference to a "controlled substance (as defined in section 102(6) of the Controlled Substances Act)" must incorporate the CSA schedules at the time of the federal offense; it could not be any other time. And that reference is almost verbatim to the one in Section 924(e)(2)(A)(ii), just a few subsections away in the same statute. The term "controlled substance" should carry the same meaning in both provisions. "After all, 'in all but the most unusual situations, a single use of a statutory term must have a fixed meaning,'" not a "double meaning" or "split personality." *United States v. Davis*, 139 S. Ct. 2319, 2328 (2019) (citation omitted).

The Eleventh Circuit's time-of-prior-conviction rule would transform the term "controlled substance" in 21 U.S.C. § 802(6) into a chameleon in many other ways as well, depending on whether the term appeared in Section 924(e)(2)(A)(ii) or in some other part of the U.S. Code. There are numerous statutes that incorporate the CSA's definition of "controlled substance," including in language virtually identical to ACCA's. *See, e.g.*, 18 U.S.C. § 342 (criminalizing operating a common carrier while under the influence of "any controlled substance (as defined in section 102 of the Controlled Substances Act)"); 18 U.S.C. § 521(c)(1) (imposing heightened penalties for committing a federal felony "involving a controlled substance (as defined in section 102 of the Controlled Substances Act)" in furtherance of gang activity); 21

U.S.C. § 841(a)(1) (making it a crime under the CSA to "manufacture, distribute, or dispense . . . a controlled substance"). Under these statutory provisions, courts plainly must apply the federal schedules at the time of the federal offense.

Courts should read the term "controlled substance" the same way in Section 924(e)(2)(A)(ii). Otherwise, this term would "bear[ ] two different meanings" depending on the context in which it is applied. *Clark v. Martinez*, 543 U.S. 371, 382–83 (2005). In other words, a "controlled substance" would mean one thing for ACCA (a substance listed years before the federal offense), but something different for other provisions in the federal criminal code (a substance listed at the time the federal offense occurred). "The law will not permit such a chameleon-like change." *Fourche River Lumber Co. v. Bryant Lumber Co.*, 230 U.S. 316, 323 (1913).

3. Had Congress wanted ACCA to incorporate the schedules at the time of the prior state offense, it could have easily chosen language to do so. As just one example, Congress could have defined "serious drug offense" as "an offense under State law involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined, *at the time of that offense,* 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." That Congress omitted anything like the italicized language demonstrates that ACCA directs courts to current CSA schedules, not superseded schedules from the time of the prior state drug offense.

Indeed, in contrast to ACCA, the federal "three strikes" statute contains language that arguably does look backwards. Unlike ACCA, the three strikes statute defines a "serious drug offense" as "an offense under State law that, had the offense been prosecuted in a court of the United States, *would have been punishable* under section 401(b)(1)(A) or 408 of the Controlled Substances Act (21 U.S.C. 841(b)(1)(A), 848) or section 1010(b)(1)(A) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)(1)(A))." 18 U.S.C. § 3559(c)(2)(H)(ii) (emphasis added). If Congress ever wished courts to consult CSA schedules from the time of a prior conviction, it was when it enacted the three strikes statute, not when it amended ACCA to cover "serious drug offenses." ACCA is quite clearly "cast from a different mold." *Lora v. United States*, 143 S. Ct. 1713, 1718 (2023).

II. This Court's ACCA precedent confirms that Section 924(e)(2)(A)(ii) incorporates the CSA schedules at the time of the federal offense.

Precedent reinforces what statutory text and structure make clear. The two-step framework applied in *Shular v. United States*, 140 S. Ct. 779 (2020), supports petitioner's time-of-federal-offense rule and precludes the Government's time-of-prior-conviction rule. And, contrary to the Eleventh Circuit's view, nothing in *McNeill v. United States*, 563 U.S. 816 (2011), suggests otherwise.

1. To determine whether a prior state conviction qualifies as an ACCA predicate, this Court has prescribed a two-step analysis. At step one, courts "must define the [state] offense" by ascertaining its elements. *Shular*, 140 S. Ct. at 783. Those elements are a matter of state law to which federal courts defer.

See Curtis Johnson v. United States, 559 U.S. 133, 138 (2010). At step two, courts must then "compare" those state-law elements against the definitional criteria in ACCA. *Shular*, 140 S. Ct. at 783. Those criteria are "a question of federal law, not state law," for the Court to construe. *Curtis Johnson*, 559 U.S. at 138.

With regard to this second step, the Government has already acknowledged that courts must "apply the version of the ACCA in effect at the time the defendant committed his federal offense." Pet. App. 99a. The Government has further recognized that, whenever ACCA's definitional criteria "change[]" before the defendant commits the federal firearm offense, courts must apply "the revised version" of the definition—"not the definition that applied when the defendant committed the prior [state offense]." *Id.*

These recognitions reflect a settled legal principle: Absent an express exception, the law that sets the penalty for a federal crime is the law in place when the crime was committed. *Dorsey v. United States*, 567 U.S. 260, 272–73 (2012). For instance, when a statutory change increases a penalty after an offense occurs, the Ex Post Facto Clause requires courts to apply the law in effect when the defendant "committed" the offense. *Peugh v. United States*, 569 U.S. 530, 533 (2013) (quoting *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798)). And, conversely, when a statutory change ameliorates a penalty after an offense occurs, the federal saving statute in 1 U.S.C. § 109 likewise presumptively requires courts to apply the law in effect when the defendant "commit[ted] the underlying conduct that makes the offender liable." *Dorsey*, 567 U.S. at 272; *see also Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653, 661 (1974)

(federal law "in force at the time of the commission of an offense" establishes the statutory penalty).

This case, of course, does not involve either of the two specific scenarios just described. As relevant here, the CSA drug schedules changed *before* Mr. Jackson committed his federal firearm offense, not after. But the Ex Post Facto Clause and the federal saving statute reflect an "important background principle" that *does* govern this case: Federal statutory penalties are determined by the version of federal law in effect "when the offender becomes subject to" them (*i.e.*, commits the crime). *Dorsey*, 567 U.S. at 272, 274.

A couple of hypothetical examples illustrate this principle. First, imagine that Congress amended Section 924(e)(2)(A)(ii) by deleting "possessing with intent to manufacture or distribute" a controlled substance, such that an ACCA "serious drug offense" was limited to "manufacturing" or "distributing" a controlled substance. Were someone to commit a federal firearm offense after this change, no one would argue that he would be subject to ACCA based on a prior state conviction for possessing with intent to distribute a controlled substance. The defendant's state drug offense would not match the current federal definition. And this would be true even if, at the time of the prior state offense, ACCA had still included "possessing with intent to distribute" in its definition of a "serious drug offense." That is because courts must compare state-law convictions against the version of ACCA that exists at the time of the federal firearm offense, not the version at the time of the prior state drug offense.

Second, imagine that Congress went further and amended ACCA by striking the "serious drug offense"

prong entirely. Surely someone committing a federal firearm offense after this change would not be subject to ACCA on the basis of prior state drug convictions. And this would be true even if, at the time of the state convictions, those convictions would have qualified as "serious drug offenses" under that (since deleted) prong of ACCA. At the time of the federal offense in this hypothetical, ACCA simply no longer provides that such state offenses qualify as predicate offenses.

2. To prevail here, then, the Government must "urge[ ] a very narrow" exception to the principle that courts apply ACCA as it exists when that statutory penalty is incurred—an exception "limited just to the definition of 'controlled substance.'" *United States v. Williams*, 48 F.4th 1125, 1141 n.11 (10th Cir. 2022). As just explained, courts must generally look to the version of ACCA and its "serious drug offense" definition in effect at the time of the federal offense. Yet when it comes to the term "controlled substance" within that definition, the Government would have courts look to federal law in effect at the time of the prior state drug offense. The Eleventh Circuit accepted this carve-out. But there is no legal basis to "read into the ACCA an exception solely for the definition of 'controlled substances.'" *Id.*

Recall that Section 924(e)(2)(A)(ii) defines "serious drug offense" as "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))*." (emphasis added). And Section 102 of the CSA defines "controlled substance" as one listed on the federal schedules issued annually by the Attorney General. 21 U.S.C.

§ 802(6); *see id.* §§ 811–12. Thus, on any given day on which a federal firearm offense might be committed, ACCA *itself* effectively lists all of the CSA "controlled substances" in its "serious drug offense" definition. This statutory criterion is no different than any other criterion in ACCA's "serious drug offense" definition.

To apply this analysis to the case at hand: When Mr. Jackson's prior state drug offenses occurred (in 1998 and 2004), ACCA effectively included ioflupane within its definition of "controlled substance." But when he later committed the instant federal firearm offense in 2017, ACCA no longer listed that substance. For all the reasons set forth above, that absence of coverage is determinative. The list of substances ACCA covered at the time of Mr. Jackson's federal firearm offense—not the list of substances ACCA covered at the time of his state drug convictions—controls whether his prior state convictions are ACCA "serious drug offenses."

The only possible distinction between our hypothetical amendments to Section 924(e)(2)(A)(ii) itself and the changes to the CSA schedules here is that the former would have been passed by Congress, whereas the latter were promulgated by the Attorney General. But that is a distinction without difference. ACCA, by way of its reference to the CSA, directly incorporates the drug schedules. And it has long been settled that, where a regulation is validly enacted pursuant to a statute, "it has the same force as though prescribed in terms by the statute" itself. *Atchison, T. & S.F. Ry. Co. v. Scarlett*, 300 U.S. 471, 474 (1937).

A case decided under the predecessor to the CSA demonstrates the point. In *Archambault v. United States*, 224 F.2d 925 (10th Cir. 1955), the defendant

was convicted of dispensing a mislabeled "habit forming" drug. The Secretary of Health, Education, and Welfare had designated the drug at issue as "habit forming." *Id.* at 928. "[H]aving been promulgated by the Secretary in conformity with the statute," the regulation had "the force and effect of law *to the same extent as though written into the statute*." *Id.* (emphasis added).

In short, when the Attorney General removed ioflupane from the CSA schedules before Mr. Jackson's federal firearm offense, ACCA's definition was amended to no longer cover ioflupane. At that point, any state offense that involved ioflupane ceased to qualify as an ACCA predicate. It does not matter that the version of ACCA in force when Mr. Jackson committed his state offenses covered ioflupane. After all, he was not subject to ACCA at that earlier time.

3. The Eleventh Circuit did not dispute that courts must generally apply federal law in effect when the penalty is incurred. Nevertheless, it believed this Court's decision in *McNeill* "require[d it] to read ACCA's definition of a 'serious drug offense' . . . to incorporate the version of the federal controlled-substances schedules in effect when Mr. Jackson was convicted of his prior state drug offenses." Pet. App. 16a. The court of appeals badly overread *McNeill*.

a. *McNeill* addressed how to ascertain the statutory maximum punishment for a prior state drug conviction. To qualify as a "serious drug offense" under Section 924(e)(2)(A)(ii), a state conviction must be punishable by ten years or more. In *McNeill*, state law had prescribed a ten-year statutory maximum at the time of the prior state drug convictions but not at the time of the federal firearm offense. *McNeill*, 563 U.S.

at 818. This Court held that courts must look to state law at the time of the prior state drug conviction to ascertain the statutory maximum. *Id.* at 817–18, 825.

McNeill's holding has no bearing on this case because it concerned only step one of *Shular*'s two-step analysis. Unlike in *McNeill*, there is no dispute here about the state-law elements or statutory maximum of the prior state drug offenses. Rather, the only dispute here is about what version of *federal* law those elements should be compared *against*. *McNeill* simply had nothing to say about that step-two question.

Moreover, *Shular*'s two steps involve fundamentally different inquiries. Step one is essentially historical, "focus[ing] on the *fact* of the [prior state] conviction." *Custis v. United States*, 511 U.S. 485, 490–91 (1994) (emphasis in original). After all, to determine whether a prior state conviction satisfies a corresponding federal definition, a court "must have some idea what his *actual* offense of conviction was in the first place." *Pereida v. Wilkinson*, 141 S. Ct. 754, 762 (2021) (emphasis in original). In the context of Section 924(e)(2)(A)(ii), that requires courts to ascertain both the elements and maximum punishment at the time of the state conviction. In doing so, federal courts have no interpretive authority; they simply defer to state law as previously construed by state courts. *See Curtis Johnson*, 559 U.S. at 138.

By contrast, step two of *Shular*'s framework is a legal inquiry, not a historical one. It turns on the meaning of ACCA and its definition of "serious drug offense." In *Shular*, for example, this Court held that Section 924(e)(2)(A)(ii) covers certain drug trafficking conduct rather than generic drug trafficking offenses. 140 S. Ct. at 782. Here, the question is about the

meaning of "controlled substance" in Section 924(e)(2)(A)(ii). This too is a question of federal law for this Court to interpret. In doing so, it must look to federal law at the time of the federal firearm offense.

b. The Eleventh Circuit recognized that *McNeill*'s holding does not govern this case. Pet. App. 8a, 17a–19a. It nevertheless thought that *McNeill*'s "reasoning" required it to measure Mr. Jackson's Florida drug convictions against superseded CSA schedules from the time of those prior convictions. *Id.* 20a. In particular, the court of appeals was gripped by *McNeill*'s statement that ACCA "require[s] a 'backward-looking' inquiry" into the defendant's prior conviction. *Id.* 20a (quoting *McNeill*, 563 U.S. at 819–20). But, read in context, this statement does not require comparing the state conviction to a superseded version of the federal schedules. *McNeill* merely explained that ACCA looks to "the version of *state* law" at the time of the prior conviction in order to conduct step one of *Shular*'s two-step analysis—*i.e.*, to ascertain the attributes of the prior state conviction. *Id.* at 820 (emphasis added). By contrast, this case asks what version of *federal* law will determine whether a defendant is subject to ACCA.

To further illustrate the distinction, consider the very issue in *McNeill*—ACCA's requirement that the prior state offense be punishable by "a maximum term of imprisonment of ten years or more." 18 U.S.C. § 924(e)(2)(A)(ii). Imagine that Congress amended this definition by raising the statutory maximum threshold from ten to twenty years. Under *McNeill*, courts would still look to state law from the time of the prior conviction to determine what the statutory maximum actually was. But if that maximum was,

say, twelve years, then the offense would not qualify as a "serious drug offense" under ACCA's amended definition. It would not satisfy the federal criteria.

The Eleventh Circuit also asserted *McNeill*'s reasoning meant that changes in federal law after a state drug conviction could not cause such a conviction to "be 'erase[d]' or 'disappear[]'" as an ACCA predicate. Pet. App. 22a (quoting *McNeill*, 563 U.S. at 823). But *McNeill*'s anti-erasure point was expressly limited to "subsequent changes in *state* law." 563 U.S. at 823 (emphasis added). Subsequent changes in *federal* law at step two can plainly remove a state-law conviction from ACCA's scope. Otherwise, Congress could *never* amend ACCA to exclude past convictions from its reach—not even by striking the "serious drug offense" prong entirely from ACCA. That cannot be correct.

III. The time-of-federal-offense rule accords with foundational legal principles.

Consulting the CSA schedules in effect at the time of the ACCA-triggering federal firearm offense also comports with three foundational principles: (1) the purpose and design of recidivist statutes; (2) the requirement of fair notice; and (3) the reference canon.

1. The time-of-federal-offense rule aligns with the purposes of recidivism statutes, especially incapacitation. The "primary goals" of recidivist enhancements are "to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time." *Rummel v. Estelle*, 445 U.S. 263, 284 (1980); *see also United States v. Rodriquez*, 553 U.S. 377, 385 (2008).

ACCA is no different. In passing the statute, Congress sought "to improve public safety and reduce violent crime by incapacitating career criminals, through lengthy incarceration." S. Rep. No. 97-585, at 8 (1982); *see also* H.R. Rep. No. 98-1073, at 2 (1984). This Court has accordingly recognized that ACCA focuses on the "special danger" posed by a "habitual offender or career criminal." *Wooden v. United States*, 142 S. Ct. 1063, 1074 (2022) (citation omitted); *accord Begay v. United States*, 553 U.S. 137, 146 (2008). Indeed, the entire "theory of the statute is that 'those who commit a large number of fairly serious crimes as their means of livelihood' are especially likely to inflict grave harm when in possession of a firearm." *Wooden*, 142 S. Ct. at 1074 (quoting *Taylor v. United States*, 495 U.S. 575, 587–88 (1990)).

But Congress did not deem every prior conviction—or even every prior conviction for a "fairly serious crime"—sufficiently threatening to warrant the extra incapacitation that ACCA requires. Instead, Congress targeted certain convictions deemed to evince special threats to public safety. As pertinent here, Congress sought in 1986 to respond to a specific problem: the rise of drug trafficking and its perceived connection to violent crime. Seeking to curb that threat, Congress added the "serious drug offense" to ACCA's compilation of qualifying predicate convictions.

ACCA can sensibly pursue this objective of targeted incapacitation only where *current* federal law deems a prior state offense to be dangerous. Indeed, it would be downright "illogical to conclude that federal sentencing law attaches culpability and dangerousness to an act that" Congress has

subsequently determined "is *not* culpable and dangerous." *United States v. Bautista*, 989 F.3d 698, 703 (9th Cir. 2021) (emphasis in original) (internal quotation marks omitted). A prior state drug offense can hardly be deemed "serious" for ACCA purposes where the conduct underlying the offense is not even *illegal* under current federal law. *Cf. Curtis Johnson*, 559 U.S. at 140 ("[W]e cannot forget that we ultimately are determining the meaning of the term 'crime of violence.'") (quotation marks omitted).

To be sure, a prior state drug conviction shows that someone violated the law as it existed at that time. But that alone cannot support a recidivist enhancement. The Double Jeopardy Clause forbids punishing someone twice for the same offense. So one cannot be punished for their mere "status as a recidivist." *Rodriquez*, 553 U.S. at 386. It follows that, when a court imposes the ACCA enhancement, "100% of the punishment is for the *offense of conviction*. None is for the prior convictions or the defendant's status as a recidivist." *Id.* (emphasis added) (internal quotation marks omitted); *see also Gryger v. Burke*, 334 U.S. 728, 732 (1948) (recidivist sentence is not an "additional penalty for the earlier crimes. It is a stiffened penalty for the latest crime."); *Ex parte White*, 31 Mass. 90, 92 (Mass. 1833) ("The increased punishment is not regarded as an additional punishment for the prior offence, which would be unjust; but the prior conviction is regarded as giving a character of increased aggravation to the subsequent offence.").

Given this established conception of recidivist statutes, courts must consult federal law (including the CSA schedules) when "the offense of conviction" occurred. Here, that is the federal firearm offense.

Consulting the CSA schedules from the time of the prior conviction would not only verge on re-punishing a person for that offense; it would also permit ACCA enhancements based on past convictions for conduct that the federal government no longer considers dangerous, such as manufacturing hemp. *See* Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 12619, 132 Stat. 4490, 5018 (removing "hemp" from the definition of "marihuana" for purposes of the CSA). The Eleventh Circuit's time-of-prior-conviction rule would thus require incapacitating people based on prior convictions for conduct that federal law does not deem threatening to public safety. That would thwart ACCA's design and unjustly deprive people of liberty.

2. The Eleventh Circuit's time-of-prior-conviction rule would also deprive people of fair notice. Federal criminal law must "give ordinary people fair notice of the conduct it punishes." *Samuel Johnson v. United States,* 576 U.S. 591, 595 (2015) (citing *Kolender v. Lawson*, 461 U.S. 352, 357–58 (1983)). And this requirement applies not just to elements of crimes but also "to statutes fixing sentences." *Id.* at 596. In the ACCA context, therefore, courts should construe the statute to ensure it is "knowable in advance" of committing any federal firearm offense whether a prior state conviction would qualify as an ACCA predicate. *Percoco v. United States*, 143 S. Ct. 1130, 1142 (2023) (Gorsuch, J., concurring in the judgment); *see also, e.g.*, *Dubin v. United States*, 143 S. Ct. 1557, 1572 (2023).

This fair-notice tenet is irreconcilable with the Eleventh Circuit's time-of-prior-conviction rule. It is extremely difficult, if not functionally impossible, for ordinary people to access the federal schedules that

were in effect at the time of their prior state drug offenses. The task is a daunting one even for lawyers.

Superseded federal drug schedules from years ago—much less decades ago—are very difficult to find. The U.S. Code includes only the "initial schedules" of controlled substances that existed in 1970, when the CSA was enacted. 21 U.S.C. § 812(c). Subsequent schedules are published in the Code of Federal Regulations at 21 C.F.R. pt. 1308. But in between publications, those schedules are regularly updated and superseded by congressional amendments and regulations promulgated by the Attorney General. *See* 21 U.S.C. § 812(a). So a person cannot simply pull the current Code—or even a past version of the Code—off the shelf and know for sure whether a given substance was scheduled at some specific point in the past.

Take the drug "euphoria," which was temporarily scheduled on October 15, 1987. *See* Schedules of Controlled Substances; Temporary Placement of 3,4-methylenedioxy-N-ethylamphetamine, N-hydroxy-3,4-methylenedioxyamphetamine and 4-methylaminorex into Schedule I, 52 Fed. Reg. 38225 (Oct. 15, 1987). Under the Eleventh Circuit's rule, a state conviction for selling euphoria on October 14, 1987, would not be an ACCA predicate. But a conviction for the exact same conduct two days later, on October 16, 1987, would be an ACCA predicate. Therefore, asking a lawyer or law librarian to obtain the CSA schedules from 1987—or even October 1987—would not suffice.

There are also certain electronic sources that now contain historical information about the federal schedules. But none of these electronic resources even existed when ACCA was enacted. Indeed, the Federal

Register was not digitized until 2018. *See* Press Release, U.S. Government Publishing Office, GPO Completes Digitizing All Issues of the Federal Register (Apr. 11, 2018), https://perma.cc/HJ3T-E3B3. The notion—in the 1986, pre-digital universe—that Congress would have expected people to track down hard copies of superseded versions of the Code of Federal Regulations is unlikely in the extreme. Even today, the various electronic databases that exist are—to put it mildly—incomplete and unwieldy. *See* Amicus Br. of Clause 40 Foundation.

The situation here brings to mind this Court's past consideration of whether statements in legislative history can provide the fair notice required to inflict criminal punishment. Justice Scalia believed that holding the public responsible for such hard-to-find information was a bridge too far: "It may well be true that in most cases the proposition that the words of the United States Code or the Statutes at Large give adequate notice to the citizen is something of a fiction, albeit one required in any system of law; but necessary fiction descends to needless farce when the public is charged even with knowledge of Committee Reports." *United States v. R.L.C.*, 503 U.S. 291, 309 (1992) (Scalia, J., concurring in part and concurring in the judgment) (citing *McBoyle v. United States*, 283 U.S. 25, 27 (1931)). The notion that members of the public should—or even could—locate past versions of the CSA schedules to know whether ACCA covers prior convictions makes even more of a "farce" of the principle of fair notice.

The Eleventh Circuit nevertheless shrugged off this problem with its time-of-prior-conviction rule. It believed there was no real problem because, "when [a

person] is convicted of a [state] drug offense," he can figure out *at that time* whether the substance involved in his offense is on the CSA schedules. Pet. App. 27a–28a. But fair notice of ACCA's coverage must be afforded when a person becomes subject to ACCA. As explained above, that occurs when someone commits the federal firearm offense. *See supra* at 17–18. Unless and until that offense occurs, an earlier state conviction has no federal-law implications. Indeed, prior convictions typically have "no significance under federal law for years to come." *Robert Johnson v. United States*, 544 U.S. 295, 305 (2005). Thus, those convicted of a state drug offense have no reason to scour federal schedules with an eye toward a hypothetical, future ACCA enhancement.

Nor is there any legal basis for presuming that a state drug offender will, at some point in the future, commit an ACCA-triggering federal firearm offense. *Cf. City of Los Angeles v. Lyons*, 461 U.S. 95, 108 (1983) (refusing to assume that an individual would be "arrested in the future" or even commit another traffic violation). What's more, that person would still need two more ACCA predicates—offenses that also may not have occurred yet. The law cannot presume that state drug offenders will be convicted of future crimes.

In certain cases, the Eleventh Circuit's reasoning would also have required omniscience of future legislation. Take a defendant convicted of a state drug offense after 1970 (when the CSA was enacted) but before 1984 (when ACCA was first enacted). On the Eleventh Circuit's view, that person should have carefully consulted the federal schedules at the time of their state conviction, even though ACCA did not exist yet. The notion that a state drug offender would have

to predict future congressional action in order to receive notice of ACCA's penalty—before Congress itself had contemplated it—defies all reason.

Finally, the Eleventh Circuit's approach to fair notice is at odds with the obligations of criminal defense counsel. The consensus in the lower courts has long been that the Sixth Amendment imposes no duty on counsel to advise a state drug offender that his conviction would later subject him to a recidivist enhancement like ACCA. *See, e.g.*, *United States v. Reeves*, 695 F.3d 637, 640 (7th Cir. 2012); *United States v. Robinson*, 2019 WL 4409462, at *5 (D.S.C. Sept. 16, 2019) (Childs, J.); *State v. Dickey*, 928 So. 2d 1193, 1198 (Fla. 2006). This consensus would be hard to justify if the Eleventh Circuit's conception of fair notice were correct.

3. The "reference" canon further cuts against the Eleventh Circuit's time-of-prior-conviction rule. "According to the 'reference' canon, when a statute refers to a general subject, the statute adopts the law on that subject whenever a question under the statute arises. . . . In contrast, a statute that refers to another statute by specific title or section number in effect cuts and pastes the referenced statute as it existed when the referring statute was enacted." *Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759, 769 (2019).

At first blush, the reference canon might seem to suggest that ACCA locks in the version of the CSA (and its schedules) that existed in 1986, when Congress amended ACCA to cover "serious drug offenses." But ACCA's reference to the CSA is unquestionably dynamic. As explained *supra* at 12–13, the drug schedules are specifically designed to evolve over time. And a static reference would exempt

from ACCA state drug convictions for the hundreds of substances added to the federal CSA schedules after 1986—including substances added directly through acts of Congress. Take, for example, the so-called "date rape" drug, gamma-hydroxybutyric acid (GHB). That drug was not added to the CSA schedules until 2000. *See* Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000, Pub. L. No. 106-172, § 3, 114 Stat. 7, 8–9. It would make no sense to exempt from ACCA all state convictions for GHB just because GHB was not on the federal CSA schedules in 1986.

Given that ACCA's reference to the CSA must be dynamic, the reference canon dictates that ACCA incorporates the CSA (including its federal drug schedules) "as it exists whenever a question under the [referring] statute arises." *Jam*, 139 S. Ct. at 769. Here, ACCA is the referring statute. And the first time a "question arises" under ACCA is when a person commits the federal firearm offense. Again, *that* is what subjects someone to statutory penalties. *See Dorsey*, 567 U.S. at 272 (explaining that statutory "penalties are 'incurred'" under federal law "when an offender becomes subject to them, *i.e.*, commits the underlying conduct that makes the offender liable").

The Eleventh Circuit instead charted a novel course. It did not look to the CSA schedules at the time of the federal firearm offense (when the ACCA "question arises"). It did not even look to the schedules from 1986 (when the referring statute was enacted). Instead, it looked to the schedules at an intermediate historical moment: the time of the prior state drug conviction. But there is no support in the reference canon for this view. *See* Pet. App. 33a (Rosenbaum, J., concurring) (acknowledging that the temporal rule the

Eleventh Circuit adopted "may be unique"). Nor is there any basis for this Court to break new ground here. To the contrary, by incorporating ever-evolving CSA schedules, Congress wanted courts to apply the definition of "controlled substance" at the time of the federal offense—*i.e.*, when the ACCA question arises.

IV. The Eleventh Circuit's time-of-prior-conviction rule would create anomalies.

1. Federal sentencing statutes should be construed to avoid "anomalies." *Dorsey*, 567 U.S. at 278. But the Eleventh Circuit's time-of-prior-conviction rule would produce at least two anomalies in terms of ACCA's coverage.

First, the Eleventh Circuit's rule would exclude from ACCA's reach all state drug convictions from before 1970. That is because the CSA, including its "[i]nitial schedule of controlled substances," 21 U.S.C. § 812(c), was not enacted until 1970. Thus, for example, in 1987 (the year after ACCA was amended to cover "serious drug offenses"), the Eleventh Circuit's rule would have excluded a 35-year-old firearm offender's pre-1970 state conviction for distributing heroin.

Congress could not have possibly intended that result. ACCA was enacted to incapacitate "career" offenders—those who have committed numerous offenses over long spans of time. *Wooden*, 142 S. Ct. at 1074; *Begay*, 553 U.S. at 146; *see also supra* at 25. ACCA can thus be based not only on predicate convictions from after its enactment but also on predicate convictions "that occurred prior to the ACCA's passage." *United States v. Springfield*, 337 F.3d 1175, 1178–79 (10th Cir. 2003) (collecting cases). Neither the statute nor common sense suggests that,

when Congress amended ACCA to cover prior "serious drug offenses," it wished to limit the backward reach to convictions within only the past sixteen years. Indeed, while some other federal recidivist provisions do have backward limits, ACCA has no such limit at all. *Compare* 21 U.S.C. § 802(57) (limiting the definition of "serious drug felony" to prior convictions for which the defendant was released within fifteen years of the instant federal drug offense).

Even the Eleventh Circuit acknowledged the "oddity" of its rule excluding pre-1970 drug convictions from the reach of ACCA. Pet. App. 28a. But the court of appeals did not fully come to grips with just how bizarre this consequence would be. The core purpose of ACCA—once more—is to incapacitate "career" offenders. That being so, it would have made no sense whatsoever when ACCA was enacted to exclude pre-1970 state drug offenses from its coverage.

Second, the Eleventh Circuit's rule would prevent ACCA from reaching prior state drug convictions for substances now listed on the federal schedules where the state controlled the substance before the federal government, and the state drug offense occurred before the substance was federally scheduled. As a result, the Eleventh Circuit's reading would not only *mandate* fifteen-year prison sentences for substances that federal law does *not* now deem dangerous, *see supra* at 25–26; it would also *preclude* ACCA enhancements for substances that federal law now *does* deem dangerous.

The designer drug "bath salts" exemplifies this anomaly. In response to reports of a "gruesome and bizarre incident in which one man chewed off most of another man's face in Miami," Daniel Newhauser,

Miami Attack May Push Action on 'Bath Salts' Ban, Roll Call (June 2, 2012), https://perma.cc/4XGY-UA8H, Florida quickly criminalized bath salts in January 2011, *Florida Bans 'Bath Salt' Drugs after Violent Outbursts*, Sun Sentinel (Jan. 27, 2011), https://perma.cc/HU9G-YY7N. But the federal government did not do so until October 2011—some ten months later. Press Release, Drug Enf't Admin., *Chemicals Used in 'Bath Salts' Now under Federal Control and Regulation* (Oct. 21, 2011), https://perma.cc/J4SY-9JQQ. Thus, under the Eleventh Circuit's rule, a Florida bath salts conviction from most of 2011 would not be an ACCA predicate because, at the time of the state conviction, the federal CSA schedules did not yet cover these designer drugs.

Bath salts are not an isolated example. States commonly criminalize drugs before the CSA schedules do. As noted *supra* at 32, the federal government first controlled GHB, the date-rape drug, in 2000. But Florida controlled it three years earlier. *See* 1997 Fla. Sess. Law Serv. Ch. 97-1 (C.S.H.B. 91). Other examples abound—with even longer gaps in time between the state and federal regulation. *See, e.g.*, 2013 Utah Laws Ch. 88 (H.B. 52) (criminalizing Methoxetamine, effective May 14, 2013); Schedules of Controlled Substances: Placement of Methoxetamine (MXE) in Schedule I, 87 Fed. Reg. 34166 (adding Methoxetamine to federal schedules, effective July 6, 2022). Can it really be that state convictions for manufacturing or distributing these substances, before they were federally scheduled, cannot constitute predicate offenses under ACCA? It is hard to understand why that would be so, and the Eleventh Circuit did not even try to justify that result.

2. The Eleventh Circuit thought a different disjuncture supported its time-of-prior-conviction rule. Specifically, it believed that, as to prior *federal* drug convictions, ACCA requires consulting the federal schedules from the time of the prior offense. Taking that premise as a given, the Eleventh Circuit then asserted that ACCA's coverage of state drug convictions must do the same. *See* Pet. App. 22a–25a. But the Eleventh Circuit was mistaken on both points.

First, the Eleventh Circuit reasoned that ACCA looks to past schedules for federal offenses because *McNeill* "requir[es] a backward-looking inquiry." Pet. App. 23a. But, as explained above, the Eleventh Circuit overread this aspect of *McNeill*. *McNeill* requires a backward-looking inquiry only to ascertain the elements of the state offense at step one of *Shular*'s two-step framework. *See supra* at 21–24.

Nothing in *McNeill* or ACCA's text demands looking to old law at step two of the analysis. As pertinent here, ACCA defines a federal "serious drug offense" as "an offense under the Controlled Substances Act . . . 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). After ascertaining the elements of a prior federal conviction, a court could then ask at step two whether those elements constituted "an offense under the Controlled Substance Act" at the time the defendant committed the federal firearm offense allegedly triggering ACCA.

Second, even if ACCA requires courts to assess prior federal drug offenses according to superseded CSA schedules, differences in ACCA's plain text would still support assessing prior state offenses differently. Section 924(e)(2)(A)(i) (the federal prong) speaks

simply in terms of prior offenses, whereas Section 924(e)(2)(A)(ii) (the state prong) speaks in terms of conduct. Thus, this Court has already recognized that "'the divergent text of the two provisions' of the serious-drug-offense definition . . . 'makes any divergence in their application unremarkable.'" *Shular*, 140 S. Ct. at 786 (quoting the Government's brief in that case).

Similarly, in *Carr v. United States*, 560 U.S. 438, (2010), the Court found "nothing anomalous" about assessing federal and state prior convictions differently for purposes of SORNA's registration requirement. *Id.* at 452 (brackets omitted). The text, the Court explained, indicated that Congress wished to "handle federal and state sex offenders differently." *Id.* at 451–52. So too here. Even if ACCA pegged prior federal convictions to the CSA schedules at the time of the prior federal conviction, ACCA's text would still require a different result for prior state convictions.

V. If any doubt remains, the rule of lenity precludes ACCA's coverage here.

The rule of lenity provides that, "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before [choosing] the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States v. Bass*, 404 U.S. 336, 347 (1971) (citation omitted); *accord Davis*, 139 S. Ct. at 2333. This rule "applies not only to interpretation of the substantive ambit of criminal prohibitions, but also to the penalties they impose." *Bifulco v. United States*, 447 U.S. 381, 387 (1980); *see also Wooden*, 142 S. Ct. at 1082 (Gorsuch, J., concurring).

Accordingly, any ambiguity in ACCA must be resolved in favor of Mr. Jackson. Put another way, if, after exhausting all traditional tools of statutory interpretation, it still is unclear whether ACCA covers Mr. Jackson's prior state drug convictions, "the tie must go to the defendant." *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality opinion).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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STATUTORY APPENDIX

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18 U.S.C. § 924(e) – Penalties.

(e)(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;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by

imprisonment for such term if committed by an adult, that--

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

21 U.S.C. § 802(6) – Definitions.

As used in this subchapter:

*   *   *

(6) The term "controlled substance" means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter. The term does not include distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in subtitle E of the Internal Revenue Code of 1986.

21 U.S.C. § 811 –

Authority and criteria for classification of substances.

(a) Rules and regulations of Attorney General; hearing

The Attorney General shall apply the provisions of this subchapter to the controlled substances listed in the schedules established by section 812 of this title and to any other drug or other substance added to such schedules under this subchapter. Except as provided in subsections (d) and (e), the Attorney General may by rule--

(1) add to such a schedule or transfer between such schedules any drug or other substance if he--

(A) finds that such drug or other substance has a potential for abuse, and

(B) makes with respect to such drug or other substance the findings prescribed by subsection (b) of section 812 of this title for the schedule in which such drug is to be placed; or

(2) remove any drug or other substance from the schedules if he finds that the drug or other substance does not meet the requirements for inclusion in any schedule.

Rules of the Attorney General under this subsection shall be made on the record after opportunity for a hearing pursuant to the rulemaking procedures prescribed by subchapter II of chapter 5 of Title 5. Proceedings for the issuance, amendment, or repeal of such rules may be initiated by the Attorney General (1) on his own motion, (2) at the request of the

Secretary, or (3) on the petition of any interested party.

(b) Evaluation of drugs and other substances

The Attorney General shall, before initiating proceedings under subsection (a) to control a drug or other substance or to remove a drug or other substance entirely from the schedules, and after gathering the necessary data, request from the Secretary a scientific and medical evaluation, and his recommendations, as to whether such drug or other substance should be so controlled or removed as a controlled substance. In making such evaluation and recommendations, the Secretary shall consider the factors listed in paragraphs (2), (3), (6), (7), and (8) of subsection (c) and any scientific or medical considerations involved in paragraphs (1), (4), and (5) of such subsection. The recommendations of the Secretary shall include recommendations with respect to the appropriate schedule, if any, under which such drug or other substance should be listed. The evaluation and the recommendations of the Secretary shall be made in writing and submitted to the Attorney General within a reasonable time. The recommendations of the Secretary to the Attorney General shall be binding on the Attorney General as to such scientific and medical matters, and if the Secretary recommends that a drug or other substance not be controlled, the Attorney General shall not control the drug or other substance. If the Attorney General determines that these facts and all other relevant data constitute substantial evidence of potential for abuse such as to warrant control or substantial evidence that the drug or other substance should be removed entirely from the schedules, he shall initiate proceedings for control or removal, as the case may be, under subsection (a).

(c) Factors determinative of control or removal from schedules

In making any finding under subsection (a) of this section or under subsection (b) of section 812 of this title, the Attorney General shall consider the following factors with respect to each drug or other substance proposed to be controlled or removed from the schedules:

(1) Its actual or relative potential for abuse.

(2) Scientific evidence of its pharmacological effect, if known.

(3) The state of current scientific knowledge regarding the drug or other substance.

(4) Its history and current pattern of abuse.

(5) The scope, duration, and significance of abuse.

(6) What, if any, risk there is to the public health.

(7) Its psychic or physiological dependence liability.

(8) Whether the substance is an immediate precursor of a substance already controlled under this subchapter.

(d) International treaties, conventions, and protocols requiring control; procedures respecting changes in drug schedules of Convention on Psychotropic Substances

(1) If control is required by United States obligations under international treaties, conventions, or protocols in effect on October 27, 1970, the Attorney General shall issue an order controlling such drug under the schedule he deems most appropriate to carry out such obligations, without regard to the findings required by

subsection (a) of this section or section 812(b) of this title and without regard to the procedures prescribed by subsections (a) and (b) of this section.

(2)(A) Whenever the Secretary of State receives notification from the Secretary-General of the United Nations that information has been transmitted by or to the World Health Organization, pursuant to article 2 of the Convention on Psychotropic Substances, which may justify adding a drug or other substance to one of the schedules of the Convention, transferring a drug or substance from one schedule to another, or deleting it from the schedules, the Secretary of State shall immediately transmit the notice to the Secretary of Health and Human Services who shall publish it in the Federal Register and provide opportunity to interested persons to submit to him comments respecting the scientific and medical evaluations which he is to prepare respecting such drug or substance. The Secretary of Health and Human Services shall prepare for transmission through the Secretary of State to the World Health Organization such medical and scientific evaluations as may be appropriate regarding the possible action that could be proposed by the World Health Organization respecting the drug or substance with respect to which a notice was transmitted under this subparagraph.

(B) Whenever the Secretary of State receives information that the Commission on Narcotic Drugs of the United Nations proposes to decide whether to add a drug or other substance to one of the schedules of the Convention, transfer a drug or substance from one schedule to another, or delete it from the schedules, the Secretary of

State shall transmit timely notice to the Secretary of Health and Human Services of such information who shall publish a summary of such information in the Federal Register and provide opportunity to interested persons to submit to him comments respecting the recommendation which he is to furnish, pursuant to this subparagraph, respecting such proposal. The Secretary of Health and Human Services shall evaluate the proposal and furnish a recommendation to the Secretary of State which shall be binding on the representative of the United States in discussions and negotiations relating to the proposal.

(3) When the United States receives notification of a scheduling decision pursuant to article 2 of the Convention on Psychotropic Substances that a drug or other substance has been added or transferred to a schedule specified in the notification or receives notification (referred to in this subsection as a "schedule notice") that existing legal controls applicable under this subchapter to a drug or substance and the controls required by the Federal Food, Drug, and Cosmetic Act do not meet the requirements of the schedule of the Convention in which such drug or substance has been placed, the Secretary of Health and Human Services after consultation with the Attorney General, shall first determine whether existing legal controls under this subchapter applicable to the drug or substance and the controls required by the Federal Food, Drug, and Cosmetic Act, meet the requirements of the schedule specified in the notification or schedule notice and shall take the following action:

(A) If such requirements are met by such existing controls but the Secretary of Health and Human Services nonetheless believes that more stringent controls should be applied to the drug or substance, the Secretary shall recommend to the Attorney General that he initiate proceedings for scheduling the drug or substance, pursuant to subsections (a) and (b) of this section, to apply to such controls.

(B) If such requirements are not met by such existing controls and the Secretary of Health and Human Services concurs in the scheduling decision or schedule notice transmitted by the notification, the Secretary shall recommend to the Attorney General that he initiate proceedings for scheduling the drug or substance under the appropriate schedule pursuant to subsections (a) and (b) of this section.

(C) If such requirements are not met by such existing controls and the Secretary of Health and Human Services does not concur in the scheduling decision or schedule notice transmitted by the notification, the Secretary shall--

> **(i)** if he deems that additional controls are necessary to protect the public health and safety, recommend to the Attorney General that he initiate proceedings for scheduling the drug or substance pursuant to subsections (a) and (b) of this section, to apply such additional controls;
>
> **(ii)** request the Secretary of State to transmit a notice of qualified acceptance, within the period specified in the Convention, pursuant

to paragraph 7 of article 2 of the Convention, to the Secretary-General of the United Nations;

(iii) request the Secretary of State to transmit a notice of qualified acceptance as prescribed in clause (ii) and request the Secretary of State to ask for a review by the Economic and Social Council of the United Nations, in accordance with paragraph 8 of article 2 of the Convention, of the scheduling decision; or **(iv)** in the case of a schedule notice, request the Secretary of State to take appropriate action under the Convention to initiate proceedings to remove the drug or substance from the schedules under the Convention or to transfer the drug or substance to a schedule under the Convention different from the one specified in the schedule notice.

(4)(A) If the Attorney General determines, after consultation with the Secretary of Health and Human Services, that proceedings initiated under recommendations made under paragraph 1 (B) or (C)(i) of paragraph (3) will not be completed within the time period required by paragraph 7 of article 2 of the Convention, the Attorney General, after consultation with the Secretary and after providing interested persons opportunity to submit comments respecting the requirements of the temporary order to be issued under this sentence, shall issue a temporary order controlling the drug or substance under schedule IV or V, whichever is most appropriate to carry out the minimum United States obligations under paragraph 7 of article 2 of the Convention. As a part of such order, the Attorney General shall, after consultation with the

Secretary, except such drug or substance from the application of any provision of part C of this subchapter which he finds is not required to carry out the United States obligations under paragraph 7 of article 2 of the Convention. In the case of proceedings initiated under subparagraph (B) of paragraph (3), the Attorney General, concurrently with the issuance of such order, shall request the Secretary of State to transmit a notice of qualified acceptance to the Secretary-General of the United Nations pursuant to paragraph 7 of article 2 of the Convention. A temporary order issued under this subparagraph controlling a drug or other substance subject to proceedings initiated under subsections (a) and (b) of this section shall expire upon the effective date of the application to the drug or substance of the controls resulting from such proceedings.

(B) After a notice of qualified acceptance of a scheduling decision with respect to a drug or other substance is transmitted to the Secretary-General of the United Nations in accordance with clause (ii) or (iii) of paragraph (3)(C) or after a request has been made under clause (iv) of such paragraph with respect to a drug or substance described in a schedule notice, the Attorney General, after consultation with the Secretary of Health and Human Services and after providing interested persons opportunity to submit comments respecting the requirements of the order to be issued under this sentence, shall issue an order controlling the drug or substance under schedule IV or V, whichever is most appropriate to carry out the minimum United States obligations under paragraph 7 of article 2 of the

Convention in the case of a drug or substance for which a notice of qualified acceptance was transmitted or whichever the Attorney General determines is appropriate in the case of a drug or substance described in a schedule notice. As a part of such order, the Attorney General shall, after consultation with the Secretary, except such drug or substance from the application of any provision of part C of this subchapter which he finds is not required to carry out the United States obligations under paragraph 7 of article 2 of the Convention. If, as a result of a review under paragraph 8 of article 2 of the Convention of the scheduling decision with respect to which a notice of qualified acceptance was transmitted in accordance with clause (ii) or (iii) of paragraph (3)(C)--

(i) the decision is reversed, and

(ii) the drug or substance subject to such decision is not required to be controlled under schedule IV or V to carry out the minimum United States obligations under paragraph 7 of article 2 of the Convention, the order issued under this subparagraph with respect to such drug or substance shall expire upon receipt by the United States of the review decision. If, as a result of action taken pursuant to action initiated under a request transmitted under clause (iv) of paragraph (3)(C), the drug or substance with respect to which such action was taken is not required to be controlled under schedule IV or V, the order issued under this paragraph with respect to such drug or substance shall expire upon receipt by the United States of a notice of the action taken

with respect to such drug or substance under the Convention.

(C) An order issued under subparagraph (A) or (B) may be issued without regard to the findings required by subsection (a) of this section or by section 812(b) of this title and without regard to the procedures prescribed by subsection (a) or (b) of this section.

(5) Nothing in the amendments made by the Psychotropic Substances Act of 1978 or the regulations or orders promulgated thereunder shall be construed to preclude requests by the Secretary of Health and Human Services or the Attorney General through the Secretary of State, pursuant to article 2 or other applicable provisions of the Convention, for review of scheduling decisions under such Convention, based on new or additional information.

(e) Immediate precursors

The Attorney General may, without regard to the findings required by subsection (a) of this section or section 812(b) of this title and without regard to the procedures prescribed by subsections (a) and (b) of this section, place an immediate precursor in the same schedule in which the controlled substance of which it is an immediate precursor is placed or in any other schedule with a higher numerical designation. If the Attorney General designates a substance as an immediate precursor and places it in a schedule, other substances shall not be placed in a schedule solely because they are its precursors.

(f) Abuse potential

If, at the time a new-drug application is submitted to the Secretary for any drug having a stimulant, depressant, or hallucinogenic effect on the central nervous system, it appears that such drug has an abuse potential, such information shall be forwarded by the Secretary to the Attorney General.

(g) Exclusion of non-narcotic substances sold over the counter without a prescription; dextromethorphan; exemption of substances lacking abuse potential

(1) The Attorney General shall by regulation exclude any non-narcotic drug which contains a controlled substance from the application of this subchapter and subchapter II of this chapter if such drug may, under the Federal Food, Drug, and Cosmetic Act, be lawfully sold over the counter without a prescription.

(2) Dextromethorphan shall not be deemed to be included in any schedule by reason of enactment of this subchapter unless controlled after October 27, 1970 pursuant to the foregoing provisions of this section.

(3) The Attorney General may, by regulation, exempt any compound, mixture, or preparation containing a controlled substance from the application of all or any part of this subchapter if he finds such compound, mixture, or preparation meets the requirements of one of the following categories:

(A) A mixture, or preparation containing a nonnarcotic controlled substance, which mixture or preparation is approved for prescription use,

and which contains one or more other active ingredients which are not listed in any schedule and which are included therein in such combinations, quantity, proportion, or concentration as to vitiate the potential for abuse.

(B) A compound, mixture, or preparation which contains any controlled substance, which is not for administration to a human being or animal, and which is packaged in such form or concentration, or with adulterants or denaturants, so that as packaged it does not present any significant potential for abuse.

(C) Upon the recommendation of the Secretary of Health and Human Services, a compound, mixture, or preparation which contains any anabolic steroid, which is intended for administration to a human being or an animal, and which, because of its concentration, preparation, formulation or delivery system, does not present any significant potential for abuse.

(h) Temporary scheduling to avoid imminent hazards to public safety

(1) If the Attorney General finds that the scheduling of a substance in schedule I on a temporary basis is necessary to avoid an imminent hazard to the public safety, he may, by order and without regard to the requirements of subsection (b) relating to the Secretary of Health and Human Services, schedule such substance in schedule I if the substance is not listed in any other schedule in section 812 of this title or if no exemption or approval is in effect for the substance under section 505 of the Federal Food, Drug, and Cosmetic Act.

Such an order may not be issued before the expiration of thirty days from--

(A) the date of the publication by the Attorney General of a notice in the Federal Register of the intention to issue such order and the grounds upon which such order is to be issued, and

(B) the date the Attorney General has transmitted the notice required by paragraph (4).

(2) The scheduling of a substance under this subsection shall expire at the end of 2 years from the date of the issuance of the order scheduling such substance, except that the Attorney General may, during the pendency of proceedings under subsection (a)(1) with respect to the substance, extend the temporary scheduling for up to 1 year.

(3) When issuing an order under paragraph (1), the Attorney General shall be required to consider, with respect to the finding of an imminent hazard to the public safety, only those factors set forth in paragraphs (4), (5), and (6) of subsection (c), including actual abuse, diversion from legitimate channels, and clandestine importation, manufacture, or distribution.

(4) The Attorney General shall transmit notice of an order proposed to be issued under paragraph (1) to the Secretary of Health and Human Services. In issuing an order under paragraph (1), the Attorney General shall take into consideration any comments submitted by the Secretary in response to a notice transmitted pursuant to this paragraph.

(5) An order issued under paragraph (1) with respect to a substance shall be vacated upon the conclusion of a subsequent rulemaking proceeding

initiated under subsection (a) with respect to such substance.

(6) An order issued under paragraph (1) is not subject to judicial review.

(i) Temporary and permanent scheduling of recently emerged anabolic steroids

(1) The Attorney General may issue a temporary order adding a drug or other substance to the definition of anabolic steroids if the Attorney General finds that--

(A) the drug or other substance satisfies the criteria for being considered an anabolic steroid under section 802(41) of this title but is not listed in that section or by regulation of the Attorney General as being an anabolic steroid; and **(B)** adding such drug or other substance to the definition of anabolic steroids will assist in preventing abuse or misuse of the drug or other substance.

(2) An order issued under paragraph (1) shall not take effect until 30 days after the date of the publication by the Attorney General of a notice in the Federal Register of the intention to issue such order and the grounds upon which such order is to be issued. The order shall expire not later than 24 months after the date it becomes effective, except that the Attorney General may, during the pendency of proceedings under paragraph (6), extend the temporary scheduling order for up to 6 months.

(3) The Attorney General shall transmit notice of an order proposed to be issued under paragraph (1) to the Secretary of Health and Human Services. In

issuing an order under paragraph (1), the Attorney General shall take into consideration any comments submitted by the Secretary in response to a notice transmitted pursuant to this paragraph.

(4) A temporary scheduling order issued under paragraph (1) shall be vacated upon the issuance of a permanent scheduling order under paragraph (6).

(5) An order issued under paragraph (1) is not subject to judicial review.

(6) The Attorney General may, by rule, issue a permanent order adding a drug or other substance to the definition of anabolic steroids if such drug or other substance satisfies the criteria for being considered an anabolic steroid under section 802(41) of this title. Such rulemaking may be commenced simultaneously with the issuance of the temporary order issued under paragraph (1).

(j) Interim final rule; date of issuance; procedure for final rule

(1) With respect to a drug referred to in subsection (f), if the Secretary of Health and Human Services recommends that the Attorney General control the drug in schedule II, III, IV, or V pursuant to subsections (a) and (b), the Attorney General shall, not later than 90 days after the date described in paragraph (2), issue an interim final rule controlling the drug in accordance with such subsections and section 812(b) of this title using the procedures described in paragraph (3).

(2) The date described in this paragraph shall be the later of--

(A) the date on which the Attorney General receives the scientific and medical evaluation

and the scheduling recommendation from the Secretary of Health and Human Services in accordance with subsection (b); or

(B) the date on which the Attorney General receives notification from the Secretary of Health and Human Services that the Secretary has approved an application under section 505(c), 512, or 571 of the Federal Food, Drug, and Cosmetic Act or section 262(a) of Title 42, or indexed a drug under section 572 of the Federal Food, Drug, and Cosmetic Act, with respect to the drug described in paragraph (1).

(3) A rule issued by the Attorney General under paragraph (1) shall become immediately effective as an interim final rule without requiring the Attorney General to demonstrate good cause therefor. The interim final rule shall give interested persons the opportunity to comment and to request a hearing. After the conclusion of such proceedings, the Attorney General shall issue a final rule in accordance with the scheduling criteria of subsections (b), (c), and (d) of this section and section 812(b) of this title.

21 U.S.C. § 812 –

Schedules of controlled substances.

(a) Establishment

There are established five schedules of controlled substances, to be known as schedules I, II, III, IV, and V. Such schedules shall initially consist of the substances listed in this section. The schedules established by this section shall be updated and republished on a semiannual basis during the two-year period beginning one year after October 27, 1970, and shall be updated and republished on an annual basis thereafter.

(b) Placement on schedules; findings required

Except where control is required by United States obligations under an international treaty, convention, or protocol, in effect on October 27, 1970, and except in the case of an immediate precursor, a drug or other substance may not be placed in any schedule unless the findings required for such schedule are made with respect to such drug or other substance. The findings required for each of the schedules are as follows:

(1) Schedule I--

(A) The drug or other substance has a high potential for abuse.

(B) The drug or other substance has no currently accepted medical use in treatment in the United States.

(C) There is a lack of accepted safety for use of the drug or other substance under medical supervision.

(2) Schedule II--

(A) The drug or other substance has a high potential for abuse.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions.

(C) Abuse of the drug or other substances may lead to severe psychological or physical dependence.

(3) Schedule III--

(A) The drug or other substance has a potential for abuse less than the drugs or other substances in schedules I and II.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States.

(C) Abuse of the drug or other substance may lead to moderate or low physical dependence or high psychological dependence.

(4) Schedule IV--

(A) The drug or other substance has a low potential for abuse relative to the drugs or other substances in schedule III.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States.

(C) Abuse of the drug or other substance may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in schedule III.

(5) Schedule V--

(A) The drug or other substance has a low potential for abuse relative to the drugs or other substances in schedule IV.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States.

(C) Abuse of the drug or other substance may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in schedule IV.

(c) Initial schedules of controlled substances

Schedules I, II, III, IV, and V shall, unless and until amended 1 pursuant to section 811 of this title, consist of the following drugs or other substances, by whatever official name, common or usual name, chemical name, or brand name designated:

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