No. 22-6389

IN THE

Supreme Court of the United States

JUSTIN RASHAAD BROWN

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

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

BRIEF FOR PETITIONER

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July 12, 2023

QUESTION PRESENTED

Federal law bans felons from possessing a firearm. Standing alone, the felon-in-possession statute carries no minimum sentence. But if an offender already has three convictions for a "serious drug offense," the Armed Career Criminal Act imposes a fifteen-year mandatory minimum.

To decide whether a previous state conviction was a "serious drug offense," 18 U.S.C. § 924(e)(2)(A)(ii) tells sentencing courts to consult the federal schedules of prohibited drugs. If the state conviction involved "a controlled substance (as defined in section 102 of the Controlled Substances Act …)," then it counts as an ACCA predicate. *Id.*

But the federal government amends the drug schedules frequently, as here, where Congress determined that hemp should no longer be scheduled. The question presented in Mr. Brown's case is which version of the drug schedules a sentencing court should consult: (a) the schedules in effect at the time of sentencing or (b) superseded schedules that were in effect on some previous date.

PARTIES TO THE PROCEEDING

Petitioner is Justin Rashaad Brown, an inmate at the Federal Correctional Institution Schuylkill in Minersville, Pennsylvania. Mr. Brown was the defendant in the district court and the appellant below. Respondent is the United States.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – continued

TABLE OF AUTHORITIES – continued

TABLE OF AUTHORITIES – continued

STATUTES AND REGULATIONS

TABLE OF AUTHORITIES – continued

INTRODUCTION

Text, structure, and context require district courts to consult the current federal drug schedules at the time of sentencing to determine whether a prior state drug conviction counts as a "serious drug offense" under the Armed Career Criminal Act. As Congress knew well, the federal drug schedules reflect evolving judgments about which drugs are dangerous. So when Congress adds a new substance to that list—or removes one, as it did here—sentencing courts should give effect to that policy judgment. That is so not only because such changes reflect the political branches' judgment, but also because ACCA looks forward, not backward. In other words, ACCA imposes significant additional incarceration for those whose prior drug crimes present the gravest risk of future gun violence. If those prior drug crimes no longer involve scheduled drugs, then ACCA's core concerns are obviated, and a fifteen-year mandatory minimum sentence is unwarranted.

The government's contrary approach would require sentencing courts to apply defunct drug schedules, often from many years ago. That reading of the statute neglects Congress's judgment, ignores background rules of statutory interpretation, and will result in significant unwarranted disparities among individuals whose criminal records are the same, save for slight differences in timing. The government's rule also creates administrability problems—forcing sentencing courts, prosecutors, probation officers, and defense counsel to track down and cross-reference sometimes decades-old Federal Register publications. With those problems comes a greater risk of confusion, mistake, and yet more ACCA cases for this Court and others.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at *United States* v. *Brown*, 47 F.4th 147 (3d Cir. 2022), and reproduced at J.A. 1. The judgment of the United States District Court for the Middle District of Pennsylvania is reproduced at J.A. 18.

JURISDICTION

The court of appeals entered final judgment on August 29, 2022. On November 22, 2022, Justice Alito extended the time to petition for a writ of certiorari to December 28, 2022. The petition was filed on December 21, 2022 and granted on May 15, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 922(g) of Title 18, U.S. Code, provides:

It shall be unlawful for any person—

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year …

> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Section 924(e) of Title 18, U.S. Code, provides:

(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 ….

(2) As used in this subsection—

(A) the term "serious drug offense" means— …

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

Section 802 of Title 21, U.S. Code, provides:

(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.

Section 109 of Title 1, U.S. Code, provides:

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

STATEMENT

A. Legal background

1. Congress enacted ACCA after finding that a "large percentage" of crimes are "committed by a very small percentage of repeat offenders." *Taylor* v. *United States*, 495 U.S. 575, 581 (1990) (quoting H.R. Rep.

No. 98-1073, at 1). To keep these "career criminals" behind bars, 18 U.S.C. § 924(e) imposes a mandatory fifteen-year minimum sentence on 922(g) violators with three previous convictions for a "violent felony" or a "serious drug offense." As relevant here, a "serious drug offense" is "an offense under State law, involving … a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. § 924(e)(2)(A)(ii).

2. The Controlled Substances Act regulates or forbids the manufacture, possession, and distribution of dangerous drugs. See *Touby* v. *United States*, 500 U.S. 160, 162 (1991). Section 102 of the Act defines a "controlled substance" by reference to the five drug schedules established in 21 U.S.C. § 812.

Congress designed these schedules to classify a drug's current medical value and risk for abuse. See 21 U.S.C. § 811(b)(1)–(8). Drugs listed in Schedule I have no medical value and high risk, while Schedule II–V drugs have some medical value and progressively less abuse potential. *Id.* § 812(b)(1)–(5). The schedules "initially consist[ed] of the substances listed in [the Act]," *id.* § 812(a), but Congress "plainly envisioned" that they would be "ever-evolving, not an unchanging array engraved in stone," *United States* v. *Gibson*, 55 F.4th 153, 162 (2d Cir. 2022). To ensure that the schedules reflect the latest science, law-enforcement experience, and public-health policy, Congress ordered the Attorney General to "update[] and republish[]" them "on an annual basis." 21 U.S.C. § 812(a). The Attorney General has delegated that responsibility to the Drug Enforcement Administration. 28 C.F.R. § 0.100(b).

Since the Controlled Substances Act took effect in 1971, "over 200 substances have been added, removed,

or transferred from one schedule to another." DEA, *List of Controlled Substances and Regulated Chemicals* (2023). The Drug Enforcement Administration has made many of these changes through notice-and-comment rulemaking, based on the Food and Drug Administration's "scientific and medical evaluation." Joanna R. Lampe, Cong. Rsch. Serv., R45948, *The Controlled Substances Act: A Legal Overview for the 118th Congress* 10–11 (2023). In other cases, Congress itself has added drugs or removed them from the schedules. See *id.* at 9.

3. To determine whether a state drug conviction counts as a "serious drug offense" under ACCA, federal courts apply the categorical approach. See *Taylor*, 495 U.S. at 582. For present purposes, that means asking whether a state drug conviction "necessarily involves" a substance listed on one of the federal drug schedules. *Borden* v. *United States*, 141 S. Ct. 1817, 1822 (2021) (plurality opinion). "If any—even the least culpable—of the acts criminalized" do not involve such a substance, "the statute of conviction does not categorically match the federal standard, and so cannot serve as an ACCA predicate." *Id.* Put another way: if a state statute bans a substance that is not listed on the federal drug schedules, a conviction under that statute does not count as an ACCA predicate.

When Congress enacted section 924(e), it "intended the sentencing court to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions." *Taylor*, 495 U.S. at 600. As a result, courts "focus solely" on "the elements of the crime of conviction … ignoring the particular facts of the case." *Mathis* v. *United States*, 579 U.S. 500, 504 (2016). "That approach is under-inclusive by design." *Borden*, 141 S. Ct. at 1832 (plurality opinion). "It *expects* that

some [drug offenses], because charged under a law applying to [non-controlled substances], will not trigger enhanced sentences." *Id.*

B. Factual background

Police officers arrested Petitioner Justin Brown in 2016 during a search related to controlled drug buys. In addition to drugs and cash, officers also found a revolver in Mr. Brown's apartment. Mr. Brown was later indicted for unlawfully possessing a firearm in violation of 18 U.S.C. § 922(g). J.A. 2–3.

Meanwhile, Congress passed the Agriculture Improvement Act of 2018 (the Farm Bill). The Farm Bill amended the Controlled Substances Act by removing hemp from the federal definition of marijuana. See Pub. L. No. 115-334, § 12619(a)(2), 132 Stat. 4490, 5018 (2018). "Marijuana and hemp are varieties of the cannabis plant." Mary Celeste, *Cannabis Conundrum*, 46 Seton Hall Legis. J. 489, 490 (2022). The key difference is that hemp has lower concentrations of the psychoactive compound THC. See *id.* The relevant effect of the Farm Bill is that "federal law now distinguishes between illegal marijuana and legal hemp." J.A. 6.

In 2019, Mr. Brown pleaded guilty to the 922(g) firearm offense, along with one charge of cocaine possession and distribution. Mr. Brown reserved his ability to appeal any ACCA enhancement. J.A. 3. When the district court sentenced him in 2021, Mr. Brown had five previous Pennsylvania drug convictions: a 2008 conviction involving cocaine and four convictions from 2009 through 2014 under Pennsylvania's law prohibiting cannabis possession and distribution. See *id.* The district court determined that ACCA applied because these prior convictions were "serious drug offense[s]" under section 924(e)(2)(A)(ii). It thus sentenced him to

mandatory, concurrent terms of 180 months (fifteen years) on both charges. See *id.*

Mr. Brown argued on appeal that his Pennsylvania cannabis convictions were not ACCA predicates because he was convicted under a state statute that criminalized hemp. See 35 Pa. Cons. Stat. § 780-102. Because the Pennsylvania statute "sweeps more broadly" than federal law, Mr. Brown's four cannabis convictions "cannot count" for ACCA purposes. *Descamps* v. *United States,* 570 U.S. 254, 261 (2013). If Mr. Brown's prior cannabis convictions are not eligible predicates, Mr. Brown would have only one ACCA predicate—two short of triggering a sentence enhancement.

The Third Circuit disagreed. The court acknowledged that "Pennsylvania's definition of marijuana is now broader than its federal counterpart." J.A. 7. So under current federal drug law, Mr. Brown's cannabis convictions would not be ACCA predicates. But instead of applying current law, the court held that the federal saving statute, 1 U.S.C. § 109, required it to consult the old drug schedules—the version in effect when Mr. Brown unlawfully possessed a firearm. At that time (2016), the federal schedules included hemp, so Pennsylvania law and federal law were a categorical match. The Third Circuit thus affirmed.

SUMMARY OF ARGUMENT

Text, structure, and context confirm that Mr. Brown's time-of-sentencing rule is the best reading of section 924(e)(2)(A)(ii). A plain reading of section 924(e)(2)(A)(ii) requires sentencing courts to apply federal drug law as it currently stands because that subsection instructs sentencing courts that a "serious drug offense" means "an offense under State law, involving … a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C.

802))." The reference canon supports this conclusion. When a statute like this one expressly references an "external body" of "evolving law"—the federal drug schedules—it adopts the current version of those external rules, not a trapped-in-amber version. *Jam* v. *Int'l Fin. Corp.*, 139 S. Ct. 759, 769 (2019). Statutory structure and context point to the same result. Elsewhere in Title 18, Congress included a time-of-state-conviction rule—but that is not what it did with ACCA. Read as a whole, section 924(e)(2)(A)(ii) requires sentencing courts to gather historical facts about a state conviction and then determine their here-and-now import to decide whether a defendant presents such a serious risk of gun violence that a fifteen-year mandatory minimum sentence is needed to protect the public.

The government's contrary reading creates loopholes for career criminals. One consequence of the government's approach is that no state conviction predating the Controlled Substances Act's 1971 effective date could serve as an ACCA predicate. Because Congress enacted section 924(e)(2)(A)(ii) in 1986, that would mean that Congress did not care about state convictions from just 15 years prior—no matter the drugs involved. Likewise, a time-of-state-conviction approach gives criminals a windfall when they traffic in substances that are banned at the state level but are not federally scheduled until later. There is no evidence that Congress envisioned these implausible consequences or adopted them as a legislative compromise.

If ACCA's language leaves any doubt, background presumptions tip the scales in favor of Mr. Brown's reading. For more than two centuries, federal courts have followed the "general rule" that "an appellate court must apply the law in effect at the time it renders its decision." *Thorpe* v. *Hous. Auth. of Durham*, 393 U.S. 268, 281 (1969). When (as here) there are no

finality or retroactivity concerns, that means consulting the federal drug schedules in effect at the time of sentencing. Familiar criminal-law principles point to the same conclusion. By longstanding tradition, sentencing courts consider all relevant information—including current law. *Concepcion* v. *United States*, 142 S. Ct. 2389, 2395, 2398 (2022). And Mr. Brown's rule is already the "background sentencing principle" in the Guidelines context, where courts apply the manuals in effect at the time of sentencing. *Dorsey* v. *United States*, 567 U.S. 260, 275 (2012).

A time-of-sentencing approach also furthers ACCA's purposes. Congress enacted ACCA to incapacitate dangerous recidivists and to reduce sentencing disparities. Mr. Brown's rule responds to those concerns—respecting Congress's current policy judgments and ensuring that offenders sentenced on the same day, with the same underlying convictions, receive the same sentence. The government's rule does not. Here, a time-of-state-conviction approach would require sentencing courts to ignore the determination of the 115th Congress that hemp is not a dangerous drug, in favor of the obsolescent view of the 91st Congress that there is no difference between hemp and marijuana. Beyond that, the government's rule also creates sentencing disparities for otherwise-identical offenders who committed their state drug crimes only days apart.

Mr. Brown's rule is more administrable too. Under a time-of-sentencing approach, it is easy to tell whether a previous state conviction counts as an ACCA predicate because the current drug schedules are readily available. The government's rule, in contrast, would require courts, prosecutors, probation officers, and defense counsel to track down and cross-reference outdated Federal Register publications to verify that a

given drug was scheduled on a given date. The last thing that ACCA needs is another layer of complexity.

Finally, the rule of lenity resolves any lingering ambiguity in Mr. Brown's favor.

After pressing a time-of-federal-offense rule below, the government now reads *McNeill* v. *United States*, 563 U.S. 816 (2011), to require sentencing courts to consult the federal drug schedules in effect at the time of the underlying state drug conviction. But *McNeill* did not address the language at issue here, and it said nothing about intervening changes in federal law. Instead, *McNeill* dealt only with the maximum penalty for a prior state crime—not whether the elements of prior state crimes matched current or past federal law.

The Third Circuit erred in holding that the saving statute applies, and the Solicitor General does not defend that holding. The saving statute says that when a new law amends an older law, penalties "incurred under" the first law remain in place unless Congress says otherwise. 1 U.S.C. § 109. But the saving statute was never triggered here because the Farm Bill did not repeal or amend any statute under which Mr. Brown incurred penalties. And in all events, this Court has never stretched the statute to cover an after-the-fact sentence enhancement like the one at issue here.

ARGUMENT

I. Section 924(e)(2)(A)(ii) requires sentencing courts to consult the current drug schedules.

Every interpretive tool—text, structure, context, background presumptions, and statutory purposes—favors a time-of-sentencing rule. Meanwhile, the government's rule defies common sense and adds yet another layer of complexity to the ACCA analysis.

A. The plain language of section 924(e)(2)(A)(ii) calls for a here-and-now inquiry.

As relevant here, a "serious drug offense" means "an offense under State law, involving … 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). On its face, the phrase "as defined in" suggests a here-and-now inquiry. If a biographer says that President Lincoln experienced "depression (as defined in the psychiatric manual)," an ordinary English speaker would understand that the author had consulted the modern Diagnostic and Statistical Manual—not an antebellum precursor. By the same token, "controlled substance (as defined in section 102 of the Controlled Substances Act …)" refers most naturally to the current drug schedules—not a "superseded version" of federal law. *United States* v. *Bautista*, 989 F.3d 698, 703 (9th Cir. 2021). "Congress could have phrased its requirement in language that looked to the past," *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Found., Inc.*, 484 U.S. 49, 57 (1987), by, say, referring to a "controlled substance (*as then defined* in section 102)." "But Congress didn't choose those other words. And respect for Congress's prerogatives as policymaker means carefully attending to the words it chose rather than replacing them with others …." *Murphy* v. *Smith*, 138 S. Ct. 784, 787–88 (2018).

By cross-referencing the federal drug schedules, section 924(e)(2)(A)(ii) also invokes the reference canon: "[W]hen a statute refers to a general subject, the statute adopts the law on that subject as it exists whenever a question under the statute arises." *Jam*, 139 S. Ct. at 769 (citing 2 J. Sutherland, *Statutory Construction* §§ 5207–5208 (3d ed. 1942)). Put another way, the canon "suggests that a reader may look to the

[referenced law] as [it is] found on any given day, today included." *El Encanto, Inc.* v. *Hatch Chile Co.*, 825 F.3d 1161, 1164 (10th Cir. 2016) (Gorsuch, J.).

This Court's decision in *Jam* v. *International Finance Corp.* illustrates the point. *Jam* involved a 1945 statute under which "international organizations 'shall enjoy the same immunity from suit … as is enjoyed by foreign governments.'" 139 S. Ct. at 765 (quoting 22 U.S.C. § 288a(b)). Invoking the reference canon, the Court explained that the statute refers to "an external body of potentially evolving law"—not to a rule trapped in amber in 1945. *Id.* at 769.

The reference canon applies with equal force here. Section 924(e)(2)(A)(ii) defines "controlled substance" by referencing the Controlled Substances Act's "Definitions" provision, 21 U.S.C. § 802(6). Section 802(6), in turn, defines "controlled substance" by general reference to the federal drug schedules—a "panorama of controlled substances that [Congress] plainly envisioned would be ever-evolving." *Gibson*, 55 F.4th at 162. In short: section 924(e)(2)(A)(ii) invokes an "external body" of "evolving law," so it "adopts the law on that subject as it exists whenever a question under the statute arises." *Jam*, 139 S. Ct. at 769.

Read as a whole, section 924(e)(2)(A)(ii) requires sentencing courts to gather historical facts and then determine their here-and-now import. See *Shular* v. *United States*, 140 S. Ct. 779, 783 (2020) (outlining two-step analysis). *First*, a court must determine the elements "involv[ed]" and the "maximum term of imprisonment" attached to a "previous … offense under State law." As this Court explained in *McNeill*, those questions "can only be answered by reference to the law under which the defendant was convicted." 563 U.S. at 820. In other words: "the elements of and penalties attached to a 'conviction' are locked in as of the

time of that 'conviction.'" *United States* v. *Abdulaziz*, 998 F.3d 519, 526 n.4 (1st Cir. 2021).

Second, the court must decide whether that conviction meets ACCA's criteria. For example, a conviction only counts as an ACCA predicate if it is still of record. See 18 U.S.C. § 921(a)(20) ("Any conviction which has been expunged … shall not be considered a conviction for purposes of this chapter."). So too, the "maximum term of imprisonment" must meet the penalty threshold set by Congress. See *id.* § 924(e)(2)(A)(ii) ("ten years or more"). Finally, the sentencing court must decide whether the prior conviction was for a "controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))." *Id.*

These are all here-and-now questions. To find out whether a conviction has been expunged, a sentencing court asks whether it is on the books *today*. Likewise—as the government concedes—courts must apply the "current version of the ACCA." See U.S. Supp. Br. at 21, *United States* v. *Jackson*, No. 21-13963 (11th Cir. Oct. 6, 2022). So if Congress raised the penalty threshold from ten to twenty years, a sentencing court would apply that new twenty-year threshold. By the same token, the question whether a state conviction is one involving a "controlled substance" is a here-and-now question about which drugs are federally scheduled.

Early ACCA cases support this reading. After Congress enacted the "serious drug offense" clause in 1986, sentencing courts consulted *then-current* federal law—not the law from some earlier time. *E.g.*, *United States* v. *Johnson*, 704 F. Supp. 1403, 1407 (E.D. Mich. 1989) (1978 conviction was ACCA predicate because "[b]oth federal law and Michigan law *define* heroin as a Schedule I" drug (emphasis added)); *United States* v. *Roach*, 958 F.2d 679, 683 (6th Cir. 1992) ("[T]he drug appellant sold … *is* a Schedule II" drug. (emphasis added)).

1. The broader statutory scheme and context confirm that sentencing courts must consult the current drug schedules.

Section 924(e)(2)(A)(ii)'s express reference to the federal drug schedules makes it different in kind from its next-door neighbor, ACCA's "violent felony" clause. 18 U.S.C. § 924(e)(2)(B)(ii). When this Court defined "burglary" for purposes of the violent-felony clause, it adopted a *static* reading—looking to "the ordinary understanding of burglary as of 1986." *Quarles* v. *United States*, 139 S. Ct. 1872, 1879 (2019). That approach makes sense as a matter of statutory interpretation because ACCA references no definition of "burglary." See *Food Mktg. Inst.* v. *Argus Leader Media*, 139 S. Ct. 2356, 2362 (2019) (undefined terms are given their "ordinary, contemporary, common meaning" at the time of enactment (citation omitted)). And burglary today looks much like burglary in 1986.

The "serious drug offense" clause is different by design. When Congress enacted section 924(e)(2)(A)(ii), it legislated in the context of evolving federal drug law. Hemp, for example, was legal throughout most of the nation's history, and Congress had carved it out expressly when it first defined marijuana in the 1937 "Marihuana Tax Act." See *N.H. Hemp Council, Inc.* v. *Marshall*, 203 F.3d 1, 7 (1st Cir. 2000); *United States* v. *White Plume*, 447 F.3d 1067, 1071–72 (8th Cir. 2006). But that changed in 1971, when the Controlled Substances Act took effect. Because the Act "d[id] not distinguish between marijuana and hemp," *White Plume*, 447 F.3d at 1073, hemp was lumped together with marijuana as a Schedule I drug. Then, in 2018, Congress reverted to its earlier judgment when the Farm Bill distinguished hemp from marijuana. Congress drafted section 924(e)(2)(A)(ii) with changes like

these in mind—keying the definition of "controlled substance" to the ever-evolving schedules to ensure that ACCA and drug law move in tandem.

More broadly, Congress knows how to draft a time-of-state-conviction rule—and it did not do so here. See *Wis. Cent. Ltd.* v. *United States*, 138 S. Ct. 2067, 2072 (2018) (considering language from the "same title"). Elsewhere in Title 18, Congress defined the phrase "serious drug offense" using backward-looking, counterfactual language: "an offense under State law that, *had the offense been prosecuted* in a court of the United States, *would have been punishable* under [the Controlled Substances Act]." 18 U.S.C. § 3559(c)(2)(H)(ii) (emphases added).

Congress's reference to earlier versions of the Controlled Substances Act in section 3559(c)(2)(H)(ii) stands in marked contrast to the language it used in ACCA. Section 924(e)(2)(A)(ii) does not say "would have been punishable." Instead, it defines a "serious drug offense" as one "*involving* … a controlled substance (*as defined in* [the Controlled Substances Act])." 18 U.S.C. § 924(e)(2)(A)(ii) (emphasis added). "When Congress includes particular language in one section of a statute but omits it from a neighbor, we normally understand that difference in language to convey a difference in meaning …." *Bittner* v. *United States*, 143 S. Ct. 713, 720 (2023). And while these are two statutes and not two sections of the same statute, the inference that the Court drew in *Bittner* can be drawn here as well because these provisions were sponsored by the same representatives and enacted only a few years apart, by "many of the same" members of Congress. *United States* v. *Vermont*, 317 F.2d 446, 449–50 (2d. Cir. 1963) (Friendly, J.).

2. The Court should not lightly conclude that Congress enacted a self-defeating statute.

Mr. Brown's rule also "avoids the absurd results that would follow" from a time-of-state-conviction approach. *McNeill*, 563 U.S. at 822. These anomalies—which could not have been the product of legislative compromise—"underscore the implausibility of the [government's] statutory interpretation." *Borden*, 141 S. Ct. at 1855 (Kavanaugh, J., dissenting).

Read the government's way, section 924(e)(2)(A)(ii) creates a loophole for career criminals who were convicted in state court before 1971—just 15 years before ACCA passed. Because section 924(e)(2)(A)(ii) ties the definition of "serious drug offense" to "section 102 of the Controlled Substances Act," and because there *was no* Controlled Substances Act before May 1, 1971, a pre-1971 state crime could not serve as a predicate offense under the government's time-of-state-conviction rule. In other words, the government's reading turns section 924(e)(2)(A)(ii) into a statute of repose for pre-1971 offenders. To put things in historical perspective, that would be like the 2023 Congress disregarding state drug convictions from 2008.

ACCA's legislative history is directly to the contrary. "Congress enacted ACCA … to address the 'special danger' associated with 'armed career criminals.'" *Borden*, 141 S. Ct. at 1822 (plurality opinion) (citation omitted). One of the bill's cosponsors noted that "[t]he [drug] epidemic has been with us for *several decades*," adding that the bill "mak[es] it very clear that Congress has declared war on drugs, and that [it] will do everything humanly possible to fight … one of the biggest epidemics that this country has." 132 Cong. Rec. 32707, 32725 (1986) (emphasis added) (statement of Rep. Robert Garcia). Nothing in ACCA's text or

legislative history suggests that Congress thought an offender convicted before May 1, 1971 would be less dangerous than one convicted after. Nor is there any evidence that Congress anticipated the government's loophole or adopted it as a compromise measure.

The government's reading also gives career criminals a "haphazard windfall" whenever a state bans a drug before the federal government does. *Concepcion*, 142 S. Ct. at 2406 (Kavanaugh, J., dissenting) (citation omitted). States often respond to new drugs faster than the federal government. *Cf. Oregon* v. *Ice*, 555 U.S. 160, 171 (2009) (recognizing "the role of the States as laboratories for devising solutions to difficult [penal] problems"). At present, for example, manufacturing or distributing the hallucinogen salvia divinorum (also known as "magic mint") carries a maximum penalty of ten years or more in Alabama, Hawaii, and Rhode Island (among other states). See Ala. Code §§ 20-2-23, 13A-12-211(b, d), 217(b), 218(b) (offenses); Ala. Code. § 13A-5-6(a) (penalties); Haw. Rev. Stat. §§ 329-14(d), 712-1240, 1241(2) (offense); Haw. Rev. Stat. § 706-659 (penalty); R.I. Gen. Laws §§ 21-28-2.08(d), 21-28-4.01.1(a) (offense); R.I. Gen. Laws § 21-28-4.01.1(b) (penalty). Meanwhile, the Drug Enforcement Administration lists salvia as a drug of concern, but the agency has not yet scheduled it.

Under Mr. Brown's rule, a state conviction for distributing a drug like salvia could count as an ACCA predicate if Congress later determined that the substance was dangerous and added it to the federal schedules. That approach is consistent with ACCA's language and purposes, and it also respects Congress's policymaking role. See *Azar* v. *Allina Health Servs.*, 139 S. Ct. 1804, 1816 (2019) (Congress—"unlike the courts—is both qualified and constitutionally entitled

to weigh the costs and benefits of different approaches and make the necessary policy judgment.").

By contrast, the government's rule would require sentencing courts to ignore the conviction for ACCA purposes—effectively "overrid[ing] Congress's judgment about the danger posed" by a new drug. *Borden*, 141 S. Ct. at 1838 (Kavanaugh, J., dissenting). There is no evidence that Congress contemplated that approach, adopted it as a legislative compromise, or worried less about career criminals who get ahead of the federal government. If anything, the opposite is probably true: Congress could reasonably have found that those at the vanguard of drug crime pose *greater* risk than their less-enterprising peers.

B. If ACCA's language leaves any doubt, background presumptions resolve it in favor of Mr. Brown's rule.

For more than two centuries, this Court has followed the "general rule" that "an appellate court must apply the law in effect at the time it renders its decision." *Thorpe*, 393 U.S. at 281. "Even absent specific legislative authorization, application of new statutes passed after the events in suit is unquestionably proper in many situations." *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 273 (1994). Indeed, "it is the obligation of the last court in the hierarchy that rules on the case to give effect to Congress's latest enactment … since each court, at every level, must 'decide according to existing laws.'" *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 227 (1995) (quoting *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801) (Marshall, C.J.)).

In some cases, that general rule runs into competing rules governing finality. See, *e.g.*, *United States* v. *Frady*, 456 U.S. 152, 165 (1982) ("[A] final judgment commands respect."); *Pepper* v. *United States*, 562 U.S.

476, 501 n.14 (2011) ("Once imposed, a sentence may be modified only in very limited circumstances."). But Mr. Brown's position would create no finality issues because the Farm Bill—and its new definition of marijuana—was already law when Mr. Brown pleaded guilty in 2019, was sentenced in 2021, and appealed his sentence on direct review.

Nor does this case trigger the presumption against retroactivity. See *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("Retroactivity is not favored ...."). "A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment …." *Landgraf*, 511 U.S. at 269. For example, when Congress authorized federal courts to award attorney's fees in school-desegregation cases, this Court applied that statute in cases then pending. See *Bradley* v. *Sch. Bd. of Richmond*, 416 U.S. 696, 711–16 (1974). Doing so raised no retroactivity concerns because fee determinations are "separable from the cause of action to be proved at trial." *Landgraf*, 511 U.S. at 277 (citation omitted); see also *id.* at 289 (Scalia, J., concurring in the judgments) ("[A]pplication of an attorney's fees provision to ongoing litigation is arguably not retroactive.").

Like the fees in *Bradley*, the sentence enhancement here was "separable from the cause of action to be proved at trial"—the 922(g) firearm offense. Had Mr. Brown gone to trial and prevailed, there would be no enhancement question in the first place, just as there would have been no fee determination in *Bradley* if the plaintiffs had lost. In a case like this, the drug schedules merely give the sentencing court a list of substances to use when determining whether a decade-old "conviction[] … under State law" counts as a "serious drug offense." 18 U.S.C. § 924(e)(2)(A)(ii). It raises no retroactivity concerns to apply the current

definition of marijuana (as amended by the Farm Bill), rather than a superseded definition.

Thus, if ACCA's text could support both Mr. Brown's rule and a time-of-state-conviction rule, the presumption in favor of applying current law tips the scales. When (as here) there are no finality or retroactivity concerns, sentencing courts should heed Chief Justice Marshall's admonition and "decide according to existing laws." *Schooner Peggy*, 5 U.S. at 110.

Congress also "'legislates against the backdrop' of certain unexpressed presumptions." *Bond* v. *United States*, 572 U.S. 844, 857 (2014) (quoting *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)). Among these is the "longstanding tradition" that federal courts exercise "broad discretion to consider all relevant information at an initial sentencing hearing." *Concepcion*, 142 S. Ct. at 2395, 2398. And under that tradition, "[w]hen a defendant appears for sentencing, the sentencing court considers the defendant on that day, not on the date of his offense or the date of his conviction." *Id.* at 2396 (citing *Pepper*, 562 U.S. at 492).

The "only limitations" on a sentencing court's ability to consider current facts and law "are those set forth by Congress in a statute or by the Constitution." *Id.* at 2400. Of course, "Congress is not shy" about creating such limits. *Id.* Here, however, nothing in the language of ACCA suggests that sentencing courts must ignore intervening changes in federal drug law. That is yet another reason to think that section 924(e)(2)(A)(ii) adopts a time-of-sentencing rule.

Finally, a time-of-sentencing rule is already the "background sentencing principle" in the Guidelines context. *Dorsey*, 567 U.S. at 275. There, the Sentencing Reform Act tells courts to consider the "sentencing range" established by the Guidelines "in effect on the

date the defendant is sentenced." 18 U.S.C. § 3553(a)(4)(A)(ii). "The Sentencing Commission has consequently instructed sentencing judges to 'use the Guidelines Manual in effect [at sentencing],' regardless of when the defendant committed the offense, unless doing so 'would violate the *ex post facto* clause.'" *Dorsey*, 567 U.S. at 275 (quoting U.S.S.G. § 1B1.11).

The same approach is appropriate here given that both ACCA and the Sentencing Reform Act address sentencing enhancements for recidivist drug offenders. See *Wachovia Bank, Nat'l Ass'n* v. *Schmidt*, 546 U.S. 303, 305 (2006) ("[S]tatutes addressing the same subject matter generally should be read 'as if they were one law.'" (quoting *Erlenbaugh* v. *United States*, 409 U.S. 239, 243 (1972))); see also Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 252 (2012). And this Court's opinions in ACCA cases have sometimes found support in the Guidelines context. See *United States* v. *Rodriguez*, 553 U.S. 377, 386, 390–92 (2008) (case interpreting the Sentencing Reform Act "supports our interpretation of ACCA"); *cf. James* v. *United States*, 550 U.S. 192, 207 (2007) ("While we are not bound by the Sentencing Commission's conclusion," it is "further evidence …."), *overruled on other grounds by Johnson* v. *United States*, 576 U.S. 591 (2015).

C. ACCA's purposes are best served by a time-of-sentencing approach.

Congress enacted ACCA to incapacitate dangerous recidivists who have now been convicted of unlawfully possessing a firearm. Section 924(e)(2)(A)(ii) uses the drug schedules as a proxy to identify those who present an increased likelihood of "deliberately point[ing] a gun and pull[ing] the trigger." *Begay* v. *United States*, 553 U.S. 137, 138 (2008). The statute thus measures a defendant's past conduct against current

drug law to predict future gun violence and, where appropriate, impose a heightened sentence.

A time-of-sentencing approach responds to those concerns. When federal policymakers add a new drug to the federal schedules, Mr. Brown's rule ensures that sentencing courts apply that up-to-date judgment about which substances are the most dangerous and thus, which offenders might be dangerous recidivists warranting substantial, additional incarceration. By the same token, when Congress changes its mind and removes a substance like hemp, Mr. Brown's rule respects that judgment too.

The government's rule, by contrast, would require a sentencing court to ignore the policy judgment of the 115th Congress—which distinguished hemp from marijuana—and instead listen to the 91st Congress, which lumped together all forms of "the plant Cannabis sativa L" on the federal drug schedules. Pub. L. No. 91-513, § 102(15), 84 Stat. 1236, 1244 (1970). So a 922(g) offender with a prior state conviction for growing hemp could receive an ACCA enhancement.

Granted, any state conviction involving a then-controlled substance "could suggest a reason to be concerned that the defendant is especially defiant of law"—regardless of the drug's current status. *Abdulaziz*, 998 F.3d at 528. But ACCA is not the only tool for addressing defiant recidivists, and Mr. Brown's position does not preclude additional punishment for an offender with prior hemp convictions. Sentencing courts are required to consider "the history and characteristics of the defendant," 18 U.S.C. § 3553(a)(1), and can vary a sentence upward as a result of previous convictions. See, *e.g.*, *United States* v. *James*, 846 F. App'x 395, 399 (6th Cir. 2021) (affirming upward variance based on "prior … drug dealing").

Congress also enacted ACCA to "ensure, to the extent that it is consistent with the prerogatives of the States in defining their own offenses, that the same type of conduct is punishable on the Federal level in all cases." *Taylor*, 495 U.S. at 582 (quoting S. Rep. No. 98-190, at 20 (1983)). Mr. Brown's rule furthers that aim too. Under a time-of-sentencing approach, two offenders who are sentenced on the same day for "the same type of conduct" would receive the same sentence. Meanwhile, those offenders might receive disparate sentences under the government's rule—based purely on an outdated drug schedule that happened to be in effect at the time of a previous state conviction.

D. Mr. Brown's rule promotes judicial economy and avoids needless complexity.

Many drugs have complex histories. Trifluoromethylphenylpiperazine (TFMPP) (an ecstasy alternative) became a Schedule I drug in 2002, see Schedules of Controlled Substances: Temporary Placement of Benzylpiperazine and Trifluoromethylphenylpiperazine Into Schedule I, 67 Fed. Reg. 59,161 (Sept. 20, 2002), but it was then descheduled in 2004, see Schedules of Controlled Substances; Placement of 2,5-Dimethoxy-4-(n)-propylthiophenethylamine and N-Benzylpiperazine Into Schedule I of the Controlled Substances Act, 69 Fed. Reg. 12,794 (Mar. 18, 2004). But it has long been a scheduled drug in many states. GHB, sometimes called "the date-rape" drug, was not federally scheduled until March 13, 2000, see Schedules of Controlled Substances: Addition of Gamma-Hydroxybutyric Acid to Schedule I, 65 Fed. Reg. 13,235 (Mar. 13, 2000), although some states had banned it much earlier. And the same is true of "bath salts," which states like Florida outlawed before the drug was federally scheduled on October 21, 2011. See

Schedules of Controlled Substances: Temporary Placement of Three Synthetic Cathinones Into Schedule I, 76 Fed. Reg. 65,371 (Oct. 21, 2011).

These changes not only complicate a criminal history assessment, they would also create significant anomalies under the government's rule. For example, under a time-of-state-conviction approach, a 922(g) offender convicted of TFMPP distribution in 2003 would have an ACCA predicate, even though that drug has been descheduled for nearly twenty years. At the same time, an offender with a GHB conviction from February 2000 or a bath salts conviction from September 2011 might evade ACCA—even though both drugs are currently Schedule I controlled substances.

But such anomalies are not the only problem created by the government's rule. To verify what was federally scheduled at the time of a state conviction, sentencing courts, prosecutors, probation officers, and defense counsel would all need to consult older—and sometimes much older—Federal Registers. The government would require such an exercise when "[t]he dockets of … all federal courts are now clogged with [ACCA] cases,' and perhaps 'no other area of law has demanded more of [the courts'] resources.'" *Ovalles* v. *United States*, 905 F.3d 1231, 1256 (11th Cir. 2018) (en banc) (citation omitted). And as the necessary steps multiply, so does the risk of sentencing error. *Cf. Rosales-Mireles* v. *United States*, 138 S. Ct. 1897 (2018) (addressing whether a Guidelines miscalculation is plain error under Federal Rule of Criminal Procedure 52(b)).

The rule that this Court announces will apply in every ACCA case involving a state drug conviction. That rule will not change the outcome in the mine-run of cases—those with no intervening change in federal law. But any burden this Court imposes *will* make a difference to "lower court judges, who must regularly

grapple" with ACCA enhancements. *Mathis*, 579 U.S. at 538 (Alito, J., dissenting); see also *United States* v. *Aguila-Montes de Oca*, 655 F.3d 915, 917 (9th Cir. 2011) (Bybee, J.) ("[O]ver the past decade, perhaps no other area of the law has demanded more of our resources."). The last thing that the lower courts need is another complicated ACCA analysis.

E. At a minimum, the rule of lenity precludes a sentence enhancement.

Under the rule of lenity, "the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Bifulco* v. *United States,* 447 U.S. 381, 387 (1980) (citation omitted). In other words, if the ordinary tools of statutory interpretation "fail to establish that the Government's position is unambiguously correct," the Court will "apply the rule of lenity and resolve the ambiguity" in Mr. Brown's favor. *United States* v. *Granderson*, 511 U.S. 39, 54 (1994).

People should not "languish[] in prison unless the lawmaker has clearly said they should." *United States* v. *Bass*, 404 U.S. 336, 348 (1971) (quoting H. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, *Benchmarks* 196, 209 (1967)). Without the ACCA enhancement, Mr. Brown would have faced a Guidelines range of 92 to 115 months (roughly seven-and-a-half to nine-and-a-half years) because his prior crimes were nonviolent drug offenses. Instead, he is serving fifteen years in full. If those five-plus extra years rest on nothing more than a choice among viable options as to the meaning of section 924(e)(2)(A)(ii), then "[t]his is a textbook case for application of the rule of lenity." *United States* v. *Hayes*, 555 U.S. 415, 436 (2009) (Roberts, C.J., dissenting).

II. Sentencing courts are not required to apply drug schedules that no longer exist.

A. *McNeill* does not require sentencing courts to apply obsolete drug law.

The Solicitor General now relies principally upon *McNeill* v. *United States*, 563 U.S. 816 (2011). See U.S. Br. in Opp. at 9–10, *United States* v. *Jackson*, No. 22-6640 (U.S. Mar. 24, 2022). Yet the government did not even cite *McNeill* before the Third Circuit in Mr. Brown's case, arguing instead that the court should impose "the penalties that applied at the time of Brown's [firearm] offense." U.S. Br. at 8, *United States* v. *Brown*, No. 21-1510 (3d Cir. Jan. 18, 2022). Regardless, *McNeill* did not address the meaning of "controlled substance (as defined in [the Controlled Substances Act])."

Instead, the very different question presented in *McNeill* was how to "determine the maximum sentence for a prior state drug offense." 563 U.S. at 817. The petitioner, Clifton McNeill, had six North Carolina cocaine convictions, each of which "carried a 10-year maximum sentence, and McNeill in fact received 10-year sentences." *Id.* at 818. He later pleaded guilty to unlawfully possessing a firearm, and the district court "applied ACCA's sentencing enhancement." *Id.* at 819. On appeal, McNeill argued that his convictions were not ACCA predicates because North Carolina had since "reduced the maximum sentence for selling cocaine to 38 months." *Id.* at 818. This Court affirmed, holding that section 924(e)(2)(A)(ii) requires courts to determine the "'maximum term of imprisonment' applicable to a defendant's previous drug offense at the time of the defendant's state conviction …." *Id.* at 825.

But *McNeill* did not tell sentencing courts which version of *federal* law to consult when determining the

here-and-now import of those historical facts. Nor did it address intervening changes in the ever-evolving federal drug schedules. On the questions that are dispositive here, *McNeill* is silent.

McNeill noted that state legislatures sometimes "reformulate[]" their criminal codes "in a way that prevents precise translation of [an] old conviction into [a] new statute[]." *Id.* at 823. In such cases, a prior drug conviction could "'disappear' entirely for ACCA purposes" unless a federal sentencing court looked to the state statute at the time of conviction. *Id.* at 822. But changes in the federal drug schedules raise none of those "translation" concerns. And unlike a state statutory overhaul, a change in federal drug policy *does* bear on a defendant's "culpability and dangerousness." *Id.* at 823. If a conviction "disappears" for ACCA purposes because federal policymakers have legalized a given drug, that is "not a problem in need of a judicial solution—it is evidence of Congress' design …." *Guerrero-Lasprilla* v. *Barr*, 140 S. Ct. 1062, 1078 (2020) (Thomas, J., dissenting) (citation omitted).

McNeill also cautioned that state legislators could create federal sentencing disparities if ACCA looked to after-the-fact changes in state law. For instance, defendants who "violated § 922(g) on the same day" and had "identical criminal histories" might receive "dramatically different federal sentences" if one were sentenced "after the state legislature amended the punishment for one of the shared prior offenses." 563 U.S. at 823; *cf. Taylor*, 495 U.S. at 591 ("[A]bsent plain indication to the contrary, federal laws are not to be construed so that their application is dependent on state law …." (citing *Dickerson* v. *New Banner Inst., Inc.*, 460 U.S. 103, 119–20 (1983))).

Under Mr. Brown's rule, Congress—not state legislators—would decide what *federal* consequences

attach to previous drug crimes committed by a *federal* defendant convicted of a *federal* firearm offense. And while some disparities may arise based on when a defendant is sentenced, that is part and parcel of the background rule that federal courts apply current law. See *supra* I.B; *Dorsey*, 567 U.S. at 280 (disparities "will exist whenever Congress enacts a new law"). In all events, a time-of-state-conviction approach would create far more serious disparities. Under the government's rule, defendants who violated section 922(g) on the same day, were sentenced on the same day, and committed identical state crimes involving bath salts or the date-rape drug could receive significantly different penalties—based solely on whether they violated state law before or after the Drug Enforcement Administration published a rule in the Federal Register.

B. The saving statute does not apply.

It is no surprise that the Solicitor General left untouched Mr. Brown's saving-statute arguments in its Opposition. Mr. Brown's petition argued at length that the Third Circuit's saving statute rationale was fatally flawed. See Pet. 14–20. If the United States "perceived [any] misstatement" in Mr. Brown's arguments, it was required to say so "in the brief in opposition, and not later." Sup. Ct. R. 15.2. As a result, any argument that the saving statute applies "is properly 'deemed waived.'" *Granite Rock Co.* v. *Int'l Bhd. of Teamsters*, 561 U.S. 287, 306 (2010).

Waiver aside, the saving statute does not apply. The saving statute has a single trigger and a single effect. The statute is triggered when a *penalty* is "incurred under" a statute and Congress later amends or repeals "such statute." But the saving statute was never triggered here because the Farm Bill did not amend any statute under which Mr. Brown incurred federal penalties. Mr. Brown's federal penalties came from the

felon-in-possession statute, see 18 U.S.C. § 922(g)(1), and ACCA, see 18 U.S.C. § 924(e)(1). The Farm Bill amended only the Controlled Substances Act. See Pub. L. No. 115-334, § 12619(a), 132 Stat. at 5018.

It is no answer that the Controlled Substances Act is cross-referenced in section 924(e)(A)(2)(ii). The saving statute says nothing about cross-references, and its plain text precludes such a leap: "[t]he repeal of any statute shall not … extinguish any penalty … incurred under *such statute*"—here, the Controlled Substances Act. 1 U.S.C. § 109 (emphasis added).

Nor has this Court ever extended the saving statute to after-the-fact sentence enhancements—and it should not do so now. When Congress enacted the saving statute, the verb "incur" was commonly understood to mean "cast upon … by act or operation of law." *Black's Law Dictionary* 613 (1st ed. 1891). And "penalty" meant "[p]unishment; censure; judicial infliction." John Craig, *The Universal English Dictionary* 329 (1869). But an ACCA enhancement is not "cast upon" a criminal defendant "by act or operation of law" until he has pleaded guilty or been convicted.

After all, section 924(e) "simply authorizes an enhanced sentence when an offender also has an earlier conviction," so it is "not an element" of the 922(g) offense. *Almendarez-Torres* v. *United States*, 523 U.S. 224, 226 (1998). Thus, whether Mr. Brown had qualifying ACCA predicates is determined at sentencing, *after* conviction or plea. Even if a section 922(g) offender has three qualifying convictions at the time he unlawfully possesses a firearm, there can be no ACCA enhancement if one of those convictions is "expunged" or "set aside." 18 U.S.C. § 921(a)(20); *cf. Hampton* v. *United States*, 191 F.3d 695, 702–03 (6th Cir. 1999) (because "key rights were restored," prior state offense was no longer a "conviction").

CONCLUSION

The Court should reverse the judgment below and remand for resentencing.

Respectfully submitted,

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July 12, 2023

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