Nos. 22-6389, 22-6640

IN THE
Supreme Court of the United States

JUSTIN RASHAAD BROWN,
Petitioner,

v.

UNITED STATES,
Respondent.

EUGENE JACKSON,
Petitioner,

v.

UNITED STATES,
Respondent.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURTS OF APPEALS FOR THE
THIRD AND ELEVENTH CIRCUITS

Brief of National Association of Federal Defenders as *Amicus Curiae* in Support of Petitioners

KEITH M. DONOGHUE
JUDITH H. MIZNER
DANIEL HABIB
Members, Amicus Committee
NATIONAL ASSOCIATION OF
FEDERAL DEFENDERS
601 Walnut Street Suite 540-W
Philadelphia, PA 19106
(215) 928-1100

GINGER D. ANDERS
Counsel of Record
STEPHANY REAVES
MUNGER, TOLLES & OLSON LLP
601 Massachusetts Ave. NW
Suite 500E
Washington, DC 20001
(202) 220-1100
Ginger.Anders@mto.com

Counsel for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Federal Defenders (NAFD), formed in 1995, is a nationwide, volunteer organization made up of attorneys who work for federal public defender offices and community defender organizations authorized under the Criminal Justice Act, 18 U.S.C. § 3006A. Each year, federal defenders represent tens of thousands of indigent criminal defendants in federal court. That includes numerous defendants whom prosecutors charge (and threaten to charge) with violations of 18 U.S.C. § 924(e), the Armed Career Criminal Act enhancement at issue here. Moreover, federal defenders routinely advise their clients about the impact of prior convictions on sentencing for federal offenses, advocate for their clients at sentencing within the framework of statutory minimums and maximums set out by Congress, and litigate legal questions that arise regarding which recidivist laws apply. Accordingly, NAFD members have particular expertise and interest in the subject matter of this litigation.

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[1] Pursuant to Rule 37, counsel for *amicus curiae* affirm that no part of this brief was authored by any party's counsel, and no person or entity other than *amicus curiae* funded its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case concerns whether, in determining whether a previous state conviction should be counted for purposes of the recidivist enhancement provision contained in Section 924(e)(2)(A)(ii) of the Armed Career Criminal Act (ACCA), sentencing courts should compare the previous conviction to *current* federal-law definitions of the enhancement-warranting offenses, or should instead examine the superseded, historical federal definitions that governed at the time of the defendant's prior state offense. The Eleventh Circuit held in No. 22-6640 that sentencing courts must apply the historical version of federal law. This Court should reject that approach.[2]

The Eleventh Circuit's historical approach is based on *McNeill* v. *United States*, 563 U.S. 816 (2011). There, this Court considered a different portion of Section 924(e)(2)(A)(ii)—its requirement that a "previous"

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[2] The courts below reached different conclusions about what version of federal law should apply. In No. 22-6389, the Third Circuit held that the sentencing court should apply the version of federal law that governed at the time of the federal offense, and petitioner in that case argues that instead the sentencing court should look to the version that governs at the time of the federal sentencing. Petitioner in No. 22-6640 argues primarily that courts should apply the version of federal law governing the time of commission of the federal offense or, in the alternative, the version that governs at the time of the federal sentencing. Amicus does not take a position on which of those approaches is correct, but instead contends that the Eleventh Circuit's historical time-of-previous-conviction approach is unworkable and contrary to congressional intent. This brief uses the phrase "current version of federal law" to refer inclusively to using the version of federal law controlling either at the time of the federal offense or the time of sentencing—as opposed to the version of federal law that existed at the time of the prior offense.

state conviction must have had a term of imprisonment of at least 10 years—and held that the provision's focus on "previous" convictions indicated that the sentencing court should consult the state law "that applied at the time of" the prior conviction to determine the state-law term of imprisonment. 563 U.S. at 820. Although the question presented here is quite distinct—*McNeill* concerned how to discern what penalties the defendant faced for his previous conviction, while the question here is what version of *federal* law governs for purposes of the present federal sentencing, see 22-6640 Pet. Br. 21-23—the Eleventh Circuit nonetheless viewed *McNeill* as controlling. In other words, the Eleventh Circuit concluded that *McNeill* requires that sentencing courts consult the federal law governing at the time of the state offense to determine whether that offense qualifies as a predicate conviction for recidivist-enhancement purposes.

Adopting the Eleventh Circuit's approach would have sweeping and perverse consequences for federal recidivist sentencing. Recidivist enhancement statutes throughout the U.S. Code share the textual and structural features of Section 924(e)(2)(A)(ii) that led the Eleventh Circuit to believe *McNeill* required a historical approach. Specifically, such statutes direct sentencing courts to examine a defendant's "prior" or "previous" state or federal convictions to determine whether each conviction satisfies a federal definition or list of offenses that subjects the defendant to a sentence enhancement for recidivism. This Court's construction of Section 924(e)(2)(A)(ii) therefore would seem to apply to a range of other recidivist statutes as well.

The Eleventh Circuit's historical approach cannot sensibly be applied to other recidivist sentencing stat-

utes without causing intractable interpretive difficulties and significant confusion. That is because Congress routinely amends the definitions of qualifying prior state and federal offenses for purposes of recidivist sentencing. As a result, a sentencing court attempting to apply the historical definitions that governed at the time of a defendant's prior offense may sometimes find that no such historical definition exists. The court will then be faced with a choice between ignoring the prior offense for enhancement purposes, or jury-rigging the historical approach to permit consideration of the offense. Neither course makes sense—and both will lead to confusion and uncertainty.

In addition to that statutory-construction problem, the Eleventh Circuit's historical approach is contrary to Congress's evident intent in updating recidivism statutes and amending the definitions of federal offenses. When Congress broadens the definition of a federal offense to capture new conduct (such as distribution of new controlled substances), or adds to the list of offenses that warrant recidivism enhancements, those actions reflect Congress's present judgment that such offenses are of serious concern. Yet under the historical approach, sentencing courts would presumably have to ignore those newly expanded definitions and instead follow superseded federal law that did not count the prior offense for recidivist purposes. Conversely, when Congress decriminalizes distribution of certain substances or deletes offenses from those warranting recidivism enhancements, that reflects Congress's present judgment that the relevant conduct and offenses are no longer of serious concern. Yet the now-deleted offenses would still warrant recidivist treatment under the historical approach. That approach thus ignores Congress's current judgments and

requires courts to sentence defendants pursuant to superseded law that is no longer the governing law of the United States and that no longer reflects Congress's policy judgments.

Finally, the historical approach undermines the ability of defense attorneys and defendants to assess a defendant's sentencing exposure at the outset of the case. Rather than simply examining current federal law, the defense will have to undertake a burdensome inquiry into now-superseded versions of federal offense definitions. Defendants themselves, moreover, are hardly equipped to undertake that complex analysis. The Eleventh Circuit's historical approach therefore undermines fair notice principles and cannot be squared with this Court's repeated admonition that criminal statutes should not be construed in ways that are completely counterintuitive to the people governed by them. See *Dubin* v. *United States*, 143 S. Ct. 1557, 1572 (2023). This Court should reject the Eleventh Circuit's backward-looking approach.

ARGUMENT

THIS COURT SHOULD REJECT THE ELEVENTH CIRCUIT'S HISTORICAL APPROACH BECAUSE IT IS UNWORKABLE AND CONTRARY TO CONGRESSIONAL INTENT

A. This Court's construction of Section 924(e)(2)(A)(ii) will have significant implications for other recidivism statutes.

1. This case concerns the proper construction of Section 924(e)(2)(A)(ii) of ACCA. ACCA imposes an enhanced prison sentence of at least fifteen years if the defendant has "three previous convictions" for predicate "serious drug offense[s]" or "violent felon[ies]." 18 U.S.C. § 924(e)(1). Section 924(e)(2)(A)(ii) defines a

"serious drug offense" as an offense that involves, inter alia, manufacturing or distributing "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) is in turn a substance listed on federal CSA schedules that are updated regularly. 21 U.S.C. § 802(6). In assessing whether a defendant's prior conviction counts as a "serious drug offense," therefore, the sentencing court must determine whether the conviction involves a substance listed on the CSA schedule. The question before the Court is whether the sentencing court should consult the current version of the schedules (i.e., the version controlling at the time of the federal offense or at the time of the federal sentencing), or the version of federal law that existed at the time of the state offense.

In No. 22-6640, the Eleventh Circuit chose the latter option, holding that the sentencing court must consult the CSA schedules in place at the time of the prior state offense. The court of appeals relied almost exclusively on this Court's decision in *McNeill*. There, this Court considered a different part of Section 924(e)(2)(A)(ii), namely, its requirement that "a serious drug offense" must be one for which the maximum prescribed term of imprisonment is at least 10 years. This Court held that the nature of that inquiry—what penalty the defendant faced under state law when he was sentenced for a "previous conviction"—was "backward-looking" and therefore the sentencing court should consult the state law "that applied at the time of" the prior conviction. 563 U.S. at 820. The Section 924(e)(2)(A)(ii) inquiry at issue here—whether the prior state conviction should be characterized as a "serious drug offense" under federal law for purposes of the federal sentencing at hand—is, of course, not

"backward-looking" in the same way. It looks instead at how that conviction should be treated for purposes of the defendant's present federal sentencing. Nonetheless, the Eleventh Circuit believed that *McNeill* "requires" the conclusion "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." 22-6640 Pet. App. 19a. In the Eleventh Circuit's view, under *McNeill*, "the 'previous conviction' inquiry" is necessarily "a backward-looking one." *Id*. at 22a.

Under the approach adopted by the government and the Eleventh Circuit, then, when a sentencing court evaluates whether a defendant is subject to a sentencing enhancement under ACCA, the court begins with the current version of ACCA. That version of ACCA supplies the governing rule concerning recidivist sentencing: an enhancement applies to defendants with qualifying "previous convictions" for a "violent felony" or a "serious drug offense." 18 U.S.C. § 924(e); Gov't C.A. 11 Supp. Br. 7. Because ACCA directs the court to examine whether the defendant has "three *previous* convictions," 18 U.S.C. § 924(e) (emphasis added), the court must then look to the past and determine whether a prior conviction counts as a "serious drug offense" by applying the version of federal drug schedules in existence at the time of the previous offense. In other words, under the Eleventh Circuit's and the government's approach, the statute's reference to "previous convictions" slingshots the sentencing court back into the past and requires consulting a historical version of the U.S. Code to determine how to characterize the previous offense for present sentencing purposes.

2. Congress has enacted numerous recidivist sentencing statutes that, like ACCA, direct the sentencing

court to examine whether the defendant has "previous" or "prior" convictions that meet a federal definition. See, *e.g.*, 21 U.S.C. § 841(b); 21 U.S.C. § 960(b); 18 U.S.C. § 3559(c). If the Eleventh Circuit is correct that under *McNeill*, ACCA's reference to "previous" convictions requires the sentencing court to consult the version of federal law governing at the time of the previous conviction, it is difficult to understand why that conclusion would not apply equally to other recidivist sentencing statutes that use similar language. The Court's decision in this case therefore could have significant implications for the construction of numerous other recidivist sentencing statutes. Specifically, applying the Eleventh Circuit's historical approach to other statutes would create substantial confusion and result in outcomes that Congress could not possibly have intended.

B. The historical approach will cause significant confusion when applied to a range of recidivist enhancement statutes

The Eleventh Circuit's historical approach cannot sensibly be applied to other recidivist sentencing statutes without causing considerable confusion and uncertainty. One need look no further than the recidivism enhancements built into one of the most commonly charged statutes, 21 U.S.C. § 841, relating to drug trafficking. A court attempting to apply the historical approach to Section 841 would immediately encounter a seemingly intractable obstacle: because the federal statutory definitions of predicate offenses triggering the enhancement did not exist before December

2018, no offense before that date would count for enhancement purposes.[3] That cannot be what Congress intended—and no doubt the government would strenuously resist any such conclusion. But attempting to construe the statute to avoid that result would only cause even more confusion.

1. Section 841 makes various acts related to controlled substances and counterfeit substances unlawful, including manufacturing, distributing, and possessing with intent to distribute a controlled substance. The penalties for a violation of the most serious drug offenses are set out in 21 U.S.C. § 841(b)(1)(A), with a statutory sentencing range of 10 years to life.

The statute also includes a recidivist enhancement:

> "If any person commits such a violation after a **prior conviction** for a **serious drug felony** or **serious violent felony** has become final, such person shall be sentenced to a term of imprisonment of not less than 15 years . . . If any person commits a violation . . . after 2 or more prior convictions for a **serious drug felony** or **serious violent felony** have become final, such person shall be sentenced to a term of imprisonment of not less than 25 years[.]"

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[3] In 2018, Congress enacted significant sentencing reform under the First Step Act (FSA). Pub. L. No. 115-391, 132 Stat. 5194 (Dec. 21, 2018). Among other things, the FSA amended 21 U.S.C. § 802 by adding definitions of "serious drug felony" and "serious violent felony," in order to accommodate a narrowing of recidivist enhancements previously triggered by a "felony drug offense." Tit. IV, Sec. 401, No. Pub. L. 115-391, 132 Stat. 5220. This landmark legislation is one example of Congress's periodic reassessment of the structure and breadth of recidivist penalties for drug offenses.

18 U.S.C. § 841(b)(1)(A) (emphasis added).

Section 841 thus provides for an enhancement if a defendant has prior convictions that count as a "serious drug felony" or "serious violent felony" under federal law. The definitions of those qualifying prior offenses—"serious drug felony" and "serious violent felony"—are contained in Sections 802(57) and 802(58), respectively. 21 U.S.C. § 802(57); § 802(58).

Those definitions each cross-reference other federal-law provisions. For instance, Section 802(57) defines "serious drug felony" as:

> an offense **described in section 924(e)(2) of title 18** for which (A) the offender served a term of imprisonment of more than 12 months; and (B) the offender's release from any term of imprisonment was within 15 years of the commencement of the instant offense.

21 U.S.C. § 802(57). Section 924(e)(2)(A) defines a "serious drug offense" (the same term at issue in petitioners' cases) by reference to the CSA drug schedules. 18 U.S.C. § 924(e)(2)(A). Determining whether a prior conviction counts for purposes of Section 841's recidivist enhancement therefore requires following a chain of definitional cross-references.

2. Similar to Section 924(e)—the recidivist provision at issue in these cases—Section 841(b) directs courts to examine "prior" convictions in deciding whether an enhancement should apply. Also like Section 924(e), Section 841(b) defines the state convictions that warrant the enhancement based on whether they fit with a defined category of particularly serious offenses. As a matter of statutory construction, therefore, there is no evident basis on which a court could distinguish between Section 924(e) and Section 841(b)

in order to apply the Eleventh Circuit's historical approach to the former but not the latter. Attempting to apply historical approach to Section 841's statutory definitions and cross-references throws the problematic consequences of that approach into sharp relief.

Serious drug felony. Section 841(b) directs the court to determine whether the defendant has a "prior" conviction for a "serious drug felony." Under the Eleventh Circuit's understanding of *McNeill*, Section 841's reference to "*prior* conviction[s]" would presumably require the sentencing court to consult the historical version of federal law to determine whether a previous conviction counts as a "serious drug felony" or "serious violent felony" triggering the recidivist enhancement.

→ Historical version of Section 802(57)? A court following the Eleventh Circuit's approach would presumably shift back to the past at the first link in the chain of definitional cross-references: that is, the court would consult the historical version of Section 802(57).

At that point in the analysis, however, the sentencing court would hit a roadblock: Section 802(57) did not exist before December 2018. At that time, Congress added the definitions of "serious drug felony" and "serious violent felony" as amendments to Section 802 in an effort under the First Step Act to *narrow* the types of offenses that would qualify as predicates. Compare 21 U.S.C. § 802 (effective Dec. 21, 2018), with 21 U.S.C. § 802 (effective Jul. 22, 2016). A court that shifts back to the past to consult Section 802(57) would therefore find no governing definitions—suggesting that *no prior conviction before December 2018 would count for purposes of the recidivist enhancement*.

That result, however, is both counterintuitive and highly unlikely to reflect Congress' intent in adding

Section 802(57) to Title 21. And the government presumably would vigorously resist any construction that renders Section 841(b)(1)(A)'s sentence enhancement available only for defendants with prior convictions within the past five years. To avoid that result, the sentencing court might consider consulting the *current*, post-December 2018 version of Sections 802(57). But that approach causes problems too.

Most obviously, consulting the current version of Sections 802(57) would seem contrary to the understanding of *McNeill* that, on the Eleventh Circuit's view, requires consulting the historical definition of triggering offenses in the first place. To address that problem, the court might attempt to shift to the historical definition at a later link in the chain of definitional cross-references. Recall that Section 802(57) defines "serious drug felony" as "an offense described in section 924(e)(2) of title 18." So the sentencing court might decide to consult the current version of Section 802(57), but then shift to the past and consult the historical version of Section 924(e)(2).

→ ***Historical version of Section 924(e)(2)?*** That approach would avoid excluding all pre-December 2018 offenses from the sentencing. But as a matter of statutory construction, there is no principled justification for applying the current version of Section 802(57) and the historical version of Section 924(e)(2): if the backward-looking approach were required, the language of the statute does not indicate that the shift to the past should occur at the second link in the chain of definitional cross-references (Section 924(e)(2)) rather than at the first link in the chain (Section 802(57)).

In addition, this jury-rigged approach does not avoid practical problems. Section 924(e)(2) did not exist before 1986. See 18 U.S.C. § 924 (1986 Amendments). That means that for defendants with pre-1986

convictions, the sentencing court would be presented with the same question it tried to avoid by using the current version of Section 802(57): should it disregard the conviction or arbitrarily apply a more current definition of "serious drug felony?"

Serious violent felony. Turning to the other category of Section 841(b) predicates—"serious violent felon[ies]"—the historical approach would be even more confusing. Section 802(58) defines "serious violent felony" as:

> (A) an offense described in **section 3559(c)(2) of title 18** for which the offender served a term of imprisonment of more than 12 months; and
>
> (B) any offense that would be a felony violation of **section 113 of title 18**, if the offense were committed in the special maritime and territorial jurisdiction of the United States, for which the offender served a term of imprisonment of more than 12 months.

21 U.S.C. § 802(58). Consequently, a court determining whether a person has a qualifying prior conviction for the purpose of 21 U.S.C. § 841(b) has to follow two different branches of the statute, and along the way, again decide what to do under the Eleventh Circuit's historical approach.

→Historical version of Section 802(58)? As with "serious drug offense," a court applying the historical approach would most naturally jump to the past at the first link in the chain, consulting the historical version of Section 802(58)'s definition of "serious violent felony." But like Section 802(57), that definition did not exist before December 2018.

Once again, to avoid that result, the court might apply the current version of Section 802(58), despite the seeming inconsistency with *McNeill*, and shift to the past only at the next link in the definitional chain—when looking to Section 3559(c)(2) or Section 113.

→ Historical version of Section 3559(c)(1)? Taking Section 3559 first: that provision provides for mandatory life imprisonment where a person has two or more "serious violent felonies" or one or more "serious violent felonies" and one or more "serious drug offenses." 18 U.S.C. § 3559(c)(1). For purposes of Section 802(58), Section 3559(c)(2) defines "serious violent felony" to include assault with intent to commit rape, arson, extortion, firearms use, kidnapping, murder, voluntary manslaughter, sexual abuse, robbery, and a variety of other assaultive offenses.

Section 3559(c) did not exist, however, until 1994. See Pub. L. No. 103-322, 108 Stat. 1796 (Sept. 13, 1994). So if the court shifts to the past at the point of Section 3559(c), any pre-1994 conviction for the serious violent crimes listed in Section 3559(c) would not count for purposes of a recidivist enhancement, even for individuals who spent decades in prison only to reoffend in more recent years.

Other anomalies abound. Congress has expanded Section 3559(c)(2) multiple times since its enactment. In November 1998, for instance, Congress added "firearms possession (as described in section 924(c))" (that is, during and in relation to any crime of violence or drug trafficking crime) to Section 3559. 18 U.S.C. § 3559(c)(2)(F) (Nov. 13, 1998 version). So if the court applies the historical version of Section 3559, pre-1998 convictions for possession of firearms during a prior drug or violent crime will not count for enhancement purposes.

Moreover, some of the offenses enumerated in Section 3559 have been added to federal law in recent years. Only last year Congress added "engag[ing] in a sexual act with another person without that other person's consent" to the federal definition of "sexual abuse" that is a "serious violent felony" under Section 3559. 18 U.S.C. § 2242 (amended Oct. 1, 2022). So pre-2022 state convictions for engaging in non-consensual sexual acts will not trigger the enhancement. Similarly, before October 1992, carjacking was not defined as a "serious violent felony" either—because it was not a federal offense at all. 18 U.S.C. § 2119.

→Historical version of Section 113? Turning to the other prong of Section 802(58)—which defines a "serious violent felony" as "any offense that would be a felony violation of section 113 of title 18," the difficulties are even more pronounced. Section 113 defines a variety of serious assault crimes. In March 2013, Congress expanded 113 to cover serious felony domestic violence by adding:

- "assault resulting in substantial bodily injury to a spouse or intimate partner [or] a dating partner" to 18 U.S.C. § 113(a)(7); and
- "assault of a spouse, intimate partner, or dating partner by strangling, suffocating, or attempting to strangle or suffocate," 18 U.S.C. § 113(a)(8).

See 18 U.S.C. § 113(a)(7),(8), Pub. L. 113-4, Title IX, § 906(a), 127 Stat. 54, 124 (Mar. 7, 2013).

A hypothetical case of defendant D illustrates the difficulties that a sentencing court would have in applying the historical approach. Assume that D, who is being sentenced for distributing large quantities of currently-controlled substances under 21 U.S.C. § 841,

was convicted of domestic abuse, including under California Penal Code Section 273.5, for strangling his wife.[4] Such a conviction would potentially constitute "assault of a spouse * * * by strangling" under Section 113(a)(8). Suppose further that D has a separate state conviction for causing substantial bodily injury to his wife. *See* 18 U.S.C. § 43(d)(5) (defining injuries that constitute "substantial bodily injury"). Such a conviction would potentially constitute "assault resulting in substantial bodily injury to a spouse" under Section 113(a)(7). Assume that these convictions occurred before 2018.

A court applying the Eleventh Circuit's historical approach at D's sentencing would face the following questions:

- To determine whether D has convictions for "serious violent felon[ies]" under 18 U.S.C. § 841(b), the court would presumably first attempt to consult the version of Section 802(58)—the definition of "serious violent felony"—that existed at the time of D's prior convictions. But Section 802(58) did not exist before 2018. So if the historical approach applies, D's convictions for strangling his wife and causing her substantial bodily injury do not count as "serious violent felonies" and D does not receive any enhancement—despite his violent history.
- To avoid that result, the court might nevertheless consult the current definition of "serious violent felony" in Section 802(58). That provision defines

[4] Although this is a felony under California law that has as an element the use, attempted use, or threatened use of force against the person of another, it would not qualify as a "serious violent felony" under 18 U.S.C. § 3559(c)(2) because the maximum penalty is less than 10 years.

"serious violent felony" by reference to 18 U.S.C. § 113. To implement the historical approach, therefore, the court might shift to the past at that point and consult the version of Section 113 that applied at the time of the prior convictions.

- Here again, shifting to the historical version of Section 113 leads to arbitrary results. If D's prior convictions occurred after 2013, when Section 113 was expanded to include strangling and substantial bodily injury convictions, then those convictions will count for enhancement purposes. But if D's prior convictions occurred before 2013, they would not count, because Section 113 did not encompass the strangling and substantial bodily injury convictions before 2013.

The historical approach thus results in significant anomalies when it is applied to Section 841(b)—one of the most commonly charged federal statutes.

C. The historical approach is contrary to Congress's evident intent in enacting and amending recidivism statutes

1. The examples discussed above illustrate a major consequence of the Eleventh Circuit's historical approach: prior convictions that Congress currently views as sufficiently serious to trigger recidivism enhancements will in fact not trigger those enhancements. In other words, the historical approach cannot be reconciled with Congress's evident intent in enacting and amending recidivism statutes.

Congress routinely amends recidivism statutes to reflect its evolving judgment as to the types of offenses

that are sufficiently serious to warrant enhanced punishment for re-offenders.[5] Taking the Section 113 example discussed above, Congress's addition of strangling and substantial-bodily-injury offenses to the list of federal assaults in 2013 effectively expanded the list of enhancement-triggering offenses, reflecting Congress's evident conclusion that those prior offenses are sufficiently serious to warrant a longer sentence for defendants who reoffend after being convicted of those offenses. That is a conclusion about what should happen in *current* sentencing: when Congress expands a list of prior offenses triggering an enhancement, it necessarily intends that sentencing courts will apply that expanded statute in subsequent sentencings. The Eleventh Circuit's approach undermines that intent. A court applying the historical approach in sentencing a defendant in 2023 under Section 841's recidivist provisions would be prevented from counting the defendant's pre-2013 strangling convictions for enhancement purposes because of Congress's previous view that such convictions should not count—notwithstanding Congress's *current* view that those convictions *are* serious enough to warrant recidivist sentencing.

That cannot be what Congress intends when it expands recidivism statutes. The Eleventh Circuit adopted its historical approach in large part based on its conclusion that the historical approach best comported with congressional intent. Presented with a situation in which Congress had subsequently *narrowed* the category of offenses covered by federal law, such that a prior state conviction that previously would have triggered a recidivism enhancement no longer triggered any enhancement by the time of sentencing,

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[5] Congress also delegates authority to the Attorney General to periodically update federal drug schedules. See 21 U.S.C. § 811.

the Eleventh Circuit asserted that Congress "could not have expected courts to treat [prior] convictions as if they had simply disappeared." 22-6640 Pet. App. 22a.

In fact, the outcome that the Eleventh Circuit endeavored to avoid is far more consistent with congressional intent than the outcomes of the historical approach discussed above. Just like Congress's decision to *expand* categories of enhancement-triggering offenses, Congress's decision to *narrow* the offenses that trigger a recidivism enhancement—for instance, by removing a drug from the CSA schedules, or by deleting a category of offense from a recidivist provision like Section 3559(c)—reflects a judgment that the deleted offense is no longer serious enough to warrant an enhancement. So while it is true that petitioners' state controlled substance convictions would have counted for purposes of the ACCA recidivism enhancement at the time they committed the offense, it is also true that by the time each was sentenced for a subsequent federal offense, Congress had changed its mind about the seriousness of their priors. Congress effectuated that updated judgment by removing ioflupane and hemp/low-THC marijuana from the CSA schedules. Disregarding the petitioners' prior convictions for purposes of ACCA sentencing therefore reflects Congress's *present* judgment that a cocaine derivative and low-THC marijuana offenses should no longer warrant enhanced sentencing. Continuing to count those convictions as triggering the enhancement, by contrast, would elevate the intent of a *previous* Congress over that of the current Congress, thereby freezing Congress's sentencing judgments in amber.

2. The historical approach also hinders Congress's ability to respond to developments in state-level criminal codes and changes in the controlled substances

that present the most pressing concerns. State legislatures are often the first to respond to new controlled substances of concern by expanding their criminal codes, and often the first to reflect changing conceptions of the seriousness of particular conduct by narrowing their criminal codes. Each time the States move more quickly than Congress in adding or removing controlled substances and other offenses from their criminal codes, applying the historical approach to subsequent federal amendments will cause the anomalies described above—that because a historical version of the relevant federal statute may not have existed at the time of the previous state conviction, either a potential predicate will disappear or courts will face confusion as to which alternative version of the federal statute to consult.

Several drugs currently making headlines in the United States—marijuana, xylazine, and other synthetic substances—illustrate the point. Marijuana is, of course, still a controlled substance under federal law (with the exemption of hemp, as at issue in No. 22-6389). See 21 U.S.C. § 812, Schedule I(c)(17). But the position of state legislatures regarding whether marijuana should remain illegal, particularly when possessed in small quantities, varies widely across the country. On one end of the spectrum, by May 2022 twenty-seven States and the District of Columbia had legalized, or at least decriminalized, possession of small amounts of marijuana (even if in some of those states it would still qualify as a civil infraction). *See* Cannabis Overview, National Conference of State Legislatures, https://www.ncsl.org/civil-and-criminal-justice/cannabis-overview (May 31, 2022). In other States, possession of marijuana remains illegal.

Congress, for its part, has considered removing marijuana from the federal list of controlled substances

and eliminating criminal penalties for its manufacture, distribution, and possession. In 2022, the U.S. House of Representatives passed legislation to that effect, and Congress debated similar legislation again this year. See H.R. 3617, 117th Cong. (as passed by house, April 1, 2022); Dario Sabaghi, *U.S. Lawmakers File Bipartisan Bill to Prepare for Federal Marijuana Legalization*, Forbes (Apr. 20, 2023).[6] If Congress eventually decides that marijuana should be removed from the federal schedule of controlled substances altogether, that decision will reflect a changed understanding—one that originated at the state level—as to whether marijuana possession should be considered dangerous or illegal. But the historical approach would continue to apply recidivist enhancements to people who were convicted while legislators engaged in this debate.

Meanwhile, the historical approach would *not* permit recidivist enhancements for drugs that are undeniably much more dangerous than marijuana but that happen to have become public-health concerns more recently. Bath salts, for example, made headlines in 2012 when a man "chewed off most of another man's face" while allegedly under the influence of the synthetic drug. Daniel Newhauser, *Miami Attack May Push Action on 'Bath Salts' Ban*, Roll Call (Jun. 2, 2012).[7] By the time Congress added bath salts to the

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[6] https://www.forbes.com/sites/dariosabaghi/2023/04/20/us-lawmakers-file-bipartisan-bill-to-prepare-for-federal-marijuana-legalization/?sh=76e3c93e145b

[7] https://rollcall.com/2012/06/02/miami-attack-may-push-action-on-bath-salts-ban/. Although the individual may have, in fact, been under the influence of a different substance, the story nonetheless reflected and fostered widespread concern about the dangers of bath salts and the gaps in legislation addressing those concerns.

federal drug schedules, more than 30 States had already banned it. *Ibid*.; see also Synthetic Drug Abuse Prevention Act of 2012, Pub. L. No. 112-144 §§ 1151–52, 126 Stat. 993, 995-996. Under the historical approach, many prior state convictions for bath salts would not qualify for recidivist enhancements simply because the States moved more quickly than Congress.

The historical approach could give rise to the same issue with respect to convictions for xylazine, a deeply concerning drug that is currently the subject of public debate. Also known as the "zombie drug," xylazine is an animal tranquilizer that has found its way into illicit substances consumed by people. See Janelle Chavez, *Congress moves to make xylazine a controlled substance*, CNN, (Mar. 31, 2023).[8] It is a heavy sedative that does not respond to typical overdose antidotes, and it can cause "severe soft-tissue wounds and necrosis," i.e., rotting skin. *Ibid*. While Congress is considering adding xylazine to the list of federally scheduled controlled substances, multiple states have already moved to ban it. See *State and Federal Actions to Respond to Xylazine*, National Governors Association (May, 9, 2023).[9] If Congress does add the "zombie drug" to the federal schedule, however, prior state convictions for this drug would not count for recidivist enhancement purposes under the Eleventh Circuit's historical approach.

Similarly, synthetic cannabinoids "affect the brain much more powerfully than marijuana" with "unpredictable" effects that can be "more dangerous or even life-threatening." See National Institute on Drug

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[8] https://www.cnn.com/2023/03/29/health/xylazine-tranq-controlled-substance/index.html

[9] https://www.nga.org/news/commentary/state-and-federal-actions-to-respond-to-xylazine/

Abuse, *Synthetic Cannabinoids (K2/Spice) Drug Facts*.[10] And because it can be made from a diverse set of compounds, often new versions of synthetic marijuana emerge that may or may not be covered by controlled substances law. As a result, there are some types of synthetic marijuana that are illegal under state law, but not federal law. For example, Florida's drug schedules list a number of synthetic cannabinoids that are not federally controlled. *Compare*, *e.g.*, Fla. Stat. 893-03(1)(c) ¶¶ 190a(I)–(X) to 190*o*(I)–(III) (effective June 28, 2019) *with* 21 U.S.C. § 812(d); 21 C.F.R. § 1308.11(d)(31), (48)–(54), (58), (69)–(79); *id.* at (g)(1)–(15); *and id.* at (h)(31)–(41). For any variants of synthetic marijuana where federal law lags behind state law, the historical approach complicates the process of identifying which variants count as predicates, and will often mean that a previous conviction does not qualify at all.

These examples demonstrate that, contrary to the Eleventh Circuit's apparent belief, applying the current version of federal prior-offense definitions is just as party-neutral as applying the historical version. Regardless of which timing approach is adopted, some prior convictions will not count for purposes of federal sentencing enhancements. Under the historical approach, a prior conviction will not count when Congress has subsequently expanded federal recidivist definitions to encompass that offense. Instead, Congress's previous intent controls. Under the current approach, a prior conviction will not count when Congress has subsequently narrowed federal recidivist definitions to exclude that offense. While the offense

[10] https://nida.nih.gov/publications/drugfacts/synthetic-cannabinoids-k2spice

would have counted under previous federal law, Congress's current intent controls. Given the choice between those two outcomes, there is no evident reason that Congress would have wanted to preclude recidivist enhancements for convictions involving controlled substances that are of current, pressing public concern, while applying such enhancements for convictions involving substances no longer viewed as dangerous.

D. The historical approach will create confusion and unfairness

Every day, federal defenders, prosecutors, and courts have to assess whether a person's prior conviction qualifies as a predicate for a federal statutory sentencing enhancement. Predictability and fairness in recidivist sentencing are therefore critically important to federal defenders, and also to prosecutors and courts that must apply federal recidivist provisions. And from the perspective of defendants themselves, principles of fair notice are best furthered by a rule that permits defendants to assess whether they might be subject to recidivist enhancements for their prior convictions. The Eleventh Circuit's approach is neither predictable nor fair.

1. Because the historical approach requires parties to assess and apply outdated versions of the law at various points in time—that is, for multiple previous offenses that may have occurred years apart—the approach will create significant complexity and confusion.

When a defense attorney first meets her client, one of the first things the client needs to know to make decisions about his case—e.g., what arguments can be made at a detention hearing or preliminary hearing, the impact of waiting for an indictment versus early

plea negotiations, and ultimately whether to stand on his constitutional rights at trial instead of pleading guilty—is the client's minimum and maximum exposure at sentencing. Statutory recidivist enhancements can increase sentencing exposure from a *maximum* of fifteen years (where probation is a realistic possibility) to a *minimum* of fifteen or more years (where probation is prohibited). See*, e.g.*, 18 U.S.C. § 924(e). On day one, upon receiving a new client's file, defense attorneys have to counsel their clients about the minimum and maximum consequences of a conviction—often, in the context of that first meeting, based largely on the attorney's own knowledge of federal sentencing provisions. But if the historical approach becomes universal, defense attorneys will be forced to operate from a position of much less information, pending potentially extensive research on the precise state of federal law for each definitional statute at the time of a client's prior state conviction.

That uncertainty might not be alleviated until subsequent judicial rulings in the case resolve disputes between the parties concerning some of the questions described above, such as when in a series of federal definitional cross-references to shift to examining historical law. How can parties negotiate a potential resolution of the case without knowing how a judge will deal with, for instance, the non-existence of a necessary federal definition at the time of a prior state conviction? Can a client make a truly informed decision about whether to waive their right to trial without knowing with clarity whether they face a maximum sentence of fifteen years, or instead a mandatory minimum of fifteen years and a maximum of life? As a practical matter, such uncertainty may lead defense attorneys to advise clients with considerable focus on the worst case scenario, and risk-averse clients will face (even

more) pressure to accept pleas in cases where the government otherwise would not, and should not, prevail. Although numerous considerations may make pleading guilty a rational strategic choice for many defendants, confusion surrounding how a court will count prior state convictions should not be one of them.

2. Finally, the historical approach is inconsistent with principles of fair notice. Criminal statutes should be construed so that "fair warning" is "given to the world in language that the common world will understan[d] of what the law intends to do if a certain line is passed." *Dubin* v. *United States*, 143 S. Ct. 1557, 1572 (2023) (citation omitted). This Court accordingly has resisted construing criminal statutes, including enhancement provisions, in a counterintuitive manner that is divorced from what ordinary people might anticipate. *Ibid*. The historical approach does just that. Given that the prior offenses qualifying for recidivism enhancements are defined in federal law, common sense would lead people to assume that *current* federal law governs the consequences of repeat offending, such that offenses involving controlled substances that are no longer treated as a matter of criminal concern under federal law would not warrant significant sentencing enhancements. The historical approach turns that logic on its head. Moreover, it is unrealistic to expect that ordinary people could and would access superseded versions of federal controlled substance schedules, or trace federal prior-offense definitions back through multiple historical amendments. Although the presumption that ordinary people know the law is often out of step with reality, the Court has made clear that criminal statutes should not be construed in a manner that makes it nearly impossible for the people affected to discern the potential consequences of their actions.

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Common sense, respect for congressional intent, fairness, and practicability all compel the conclusion that, consistent with precedent, courts should apply current federal prior-offense definitions when assessing the application of current federal recidivist statutes.

CONCLUSION

For the foregoing reasons, the Court should reject the Eleventh Circuit's historical approach.

Respectfully submitted,

KEITH M. DONOGHUE
JUDITH H. MIZNER
DANIEL HABIB
Members, Amicus Committee
NATIONAL ASSOCIATION OF FEDERAL DEFENDERS
601 Walnut Street Suite 540-W
Philadelphia, PA 19106
(215) 928-1100

GINGER D. ANDERS
Counsel of Record
STEPHANY REAVES
MUNGER, TOLLES & OLSON LLP
601 Massachusetts Ave. NW
Suite 500E
Washington, DC 20001
(202) 220-1100
Ginger.Anders@mto.com

Counsel for Amicus Curiae

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