No. 22-6640

IN THE

Supreme Court of the United States

EUGENE JACKSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF *AMICUS CURIAE* CLAUSE 40 FOUNDATION IN SUPPORT OF PETITIONER EUGENE JACKSON

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QUESTION PRESENTED

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

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

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INTEREST OF THE *AMICUS CURIAE*[1]

Clause 40 Foundation is a non-partisan nonprofit organization whose mission is to honor, preserve, and promote due process rights guaranteed by the U.S. Constitution. It has a particular interest in ensuring procedural fairness in the criminal system and ensuring accountability of government actors in that system. The Eleventh Circuit's interpretation of 18 U.S.C. § 924(e)(2)(A)(ii) would leave criminal defendants vulnerable to fifteen-year mandatory minimum sentences because of the application of superseded federal drug schedules of which they had no fair notice, in violation of the Fifth Amendment's Due Process Clause. *Amicus Curiae* writes to protect those individuals' constitutional rights.

SUMMARY OF ARGUMENT

According to the Eleventh Circuit's outlier rule, whether a prior state drug conviction qualifies as a "serious drug offense" under the Armed Career Criminal Act turns on the content of old, superseded, federal drug schedules that existed at the time of the prior state drug offense—not the current schedules that exist when the federal penalty is incurred nor those in existence when the federal penalty is imposed. This interpretation is in opposition to the approach taken by other circuit courts

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[1] Under Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amicus*, its members, or its counsel, make a monetary contribution to the preparation or submission of this brief.

and creates dire fair notice concerns for federal criminal defendants.

Fair notice is a fundamental principle of due process. It requires that a person of ordinary intelligence be given the reasonable opportunity to understand what the law prohibits and what punishment will result from its violation.

The Eleventh Circuit's interpretation poses enormous practical challenges for people with prior state drug convictions to understand what punishment awaits them if they commit a federal gun crime. To learn what punishment is in store under the Armed Career Criminal Act, people with prior state drug convictions would need clairvoyance at the time of the earlier state convictions to predict that they may be convicted of a federal gun crime some day in the future and to research then-applicable federal law that they otherwise had no reason to consider at that time. These circumstances fail to provide anyone a reasonable opportunity to understand what punishment the law mandates. Moreover, by applying outdated federal law, the Eleventh Circuit's rule would enhance federal sentences for federal gun crimes based upon state convictions for conduct no longer illegal under federal law.

As explained below, the Eleventh Circuit's interpretation takes a wrecking ball to the three pillars of fair notice: (1) it abandons a commonsense, accessible reading of legal text in favor of an illogical construction; (2) it creates avoidable problems with the Ex Post Facto Clause; and (3) it fails to apply the rule of lenity to ambiguity in a criminal statute. The result is a statutory in-

terpretation that unnecessarily creates fair notice problems where an alternative approach could easily avoid them.

ARGUMENT

I. Fair Notice Is A Foundational Principle Of Due Process.

The Fifth Amendment's Due Process Clause requires the law to provide fair notice of what it prohibits and what punishment it prescribes for violations. The law must provide "fair warning . . . in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." *McBoyle v. United States*, 283 U.S. 25, 27 (1931); *see also Bouie v. City of Columbia*, 378 U.S. 347, 350–51 (1964) (stating that a criminal statute must give fair warning of the conduct that makes it a crime and cannot require people of "common intelligence" to "guess at its meaning" (citation omitted)). Fair notice empowers individuals either to shape their actions according to the law or to accept the known consequences of failing to comply.

Fair notice applies both to what conduct the law prohibits as well as what consequences apply to violations. *See, e.g.*, *Beckles v. United States*, 580 U.S. 256, 276 (2017) (stating that vague Sentencing Guidelines do not provide fair notice of the consequences of a person's actions); *United States v. Batchelder*, 442 U.S. 114, 123 (1979) (explaining how sentencing provisions "may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given crimi-

nal statute."). This Court repeatedly has applied fair notice principles to statutes governing federal sentencing. *See, e.g.*, *Johnson v. United States*, 576 U.S. 591 595–96 (2015) (vagueness); *Bifulco v. United States*, 447 U.S. 381, 387 (1980) (Lenity "applies not only to interpretation of the substantive ambit of criminal prohibitions, but also to the penalties they impose."); *Peugh v. United States*, 569 U.S. 530, 532–33, 538 (2013) (*Ex post facto* laws "change[] the punishment, and inflict[] a greater punishment, than the law annexed to the crime, when committed." (citation omitted)).

Foundational to the rule of law that shaped our nation's criminal legal system, fair notice shields us all from unfair and arbitrary punishment. Given the government's extraordinary ability to deprive a person of liberty, fair notice demands that our laws be understandable *and* knowable regarding what actions are criminalized as well as what punishment can result. As the Framers understood, subjecting people to punishment for actions that, when they were committed, breached no law, "ha[s] been, in all ages, the favorite and most formidable instrumen[t] of tyranny." *The Federalist No. 84* at 511–12 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

Fair notice does not assume universal knowledge of statutory law, but it does require that statutes be sufficiently comprehensible. Even though "most ordinary people today don't spend their leisure time reading statutes," the principle of "fair notice isn't about indulging a fantasy. It is about protecting an indispensable part of the rule of law—the promise that, whether or not individuals happen to read the law, they can suffer penalties

only for violating standing rules announced in advance." *Wooden v. United States*, 142 S. Ct. 1063, 1083 (2022) (Gorsuch, J., concurring in the judgment). "Although it is not likely that a criminal will carefully consider the text of the law . . . fair warning should be given to the world in language that the common world will understand." *McBoyle*, 283 U.S. at 27.

Three principles undergird the constitutional requirement of fair notice: the prohibition of vague or unknowable requirements, the prohibition of *ex post facto* laws, and the rule of lenity. *United States v. Lanier*, 520 U.S. 259, 266–67 (1997). *First*, the law may not be so inaccessible that ordinary citizens are unable to understand what the law prohibits or what punishment is prescribed. *Second*, the law must be interpreted in a way consistent with the Ex Post Facto Clause. And *third*, to the extent a criminal law is ambiguous, the rule of lenity requires courts to interpret the law most favorably to the accused.

The Eleventh Circuit's interpretation of the Armed Career Criminal Act ("ACCA") violates all three pillars of fair notice. Its interpretation of the definition of "serious drug offense" within the ACCA muddles an otherwise clear and easily understood definition and creates dire fair notice concerns in the process. And far from a purely theoretical problem, this approach, which the Government is supporting, imposes sharp increases in mandatory minimum prison sentences on criminal defendants who lacked fair notice of how their prior state drug offenses would affect their punishment for a future federal gun crime.

This Court must adopt the construction of the ACCA's definition of "serious drug offense" that would avoid due process and fair notice problems. *See Clark v. Martinez*, 543 U.S. 371, 380–81 (2005) ("In other words, when deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court.").

II. The Eleventh Circuit's Interpretation Of § 924(e)(2)(A)(ii) Violates The Three Pillars Of Fair Notice.

The Eleventh Circuit's illogical interpretation renders the statute inaccessible and unknowable, violates the Ex Post Facto Clause, and fails to apply the rule of lenity. *See United States v. Jackson*, 55 F.4th 846 (11th Cir. 2022).

A. The Eleventh Circuit's Interpretation Of The Statute Is Illogical.

1. A Plain Reading Of § 924(e)(2)(A)(ii) Leads To A Commonsense Interpretation: The Applicable Federal Drug Schedules Are Those In Effect No Earlier Than When The Federal Penalty Is Incurred (Or Imposed).

Fair notice requires that the law clearly communicate what conduct violates it and what penalties will result from a violation. *See Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) ("[B]ecause we assume that man

is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.").

To achieve this end, fair notice requires the law to be interpreted in a way that a person with ordinary intelligence will understand it, meaning that the interpretation comports with the text's plain meaning. *See id.*; *see also Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020) ("When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit."); *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004) ("[W]hen the statute's language is plain, the sole function of the courts . . . is to enforce it according to its terms" (citation omitted)). The Eleventh Circuit's interpretation of this ACCA provision creates an unnecessary and unintuitive reference to antiquated federal law not readily understandable by people of common intelligence.

The ACCA, codified at 18 U.S.C. § 924(e), requires imposition of a mandatory minimum fifteen-year term of imprisonment for recidivists convicted of prohibited possession of a firearm under 18 U.S.C. § 922(g). Following a conviction for being a felon in possession of a firearm, a defendant may be subject to the ACCA's fifteen-year mandatory minimum if he has "three previous convictions . . . for a violent felony or a serious drug offense, or both." 18 U.S.C. § 924(e)(1). The definition of which prior state drug offenses qualify is set forth in § 924(e)(2)(A)(ii), which provides:

> (e)(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[.]

18 U.S.C. § 924(e)(2) (emphasis added).

According to the statute's text, to qualify as a "serious drug offense," the offense must have involved a "controlled substance." *Id.* To determine what qualifies as a "controlled substance," the reader follows § 924(e)(2)(A)(ii)'s reference to "section 102 of the Controlled Substances Act (21 U.S.C. 802)." *Id.* That section, in turn, provides that "[t]he 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." 21 U.S.C. § 802(6). Finally, part B, codified at 21 U.S.C. § 812, provides the drug schedules and states that those schedules "shall be updated and republished on an annual basis." 21 U.S.C. § 812(a). Thus, the text of § 924(e)(2)(A)(ii) and its referenced statutes ultimately refer the reader to federal drug schedules that are updated annually.

So the question becomes: which version of these annually updated schedules applies to a prior state offense under § 924(e)(2)(A)(ii)—an outdated and superseded version that was in effect at the time of the prior state

offense or the current version in effect at the time of either the federal offense or the federal sentencing? The correct approach is the one that "give[s] the person of ordinary intelligence a reasonable opportunity" to understand what conduct subjects him to enhanced punishment. *Grayned*, 408 U.S. at 108. In this case, the choice of which interpretation meets this standard is straightforward.

Common sense dictates that a person of ordinary intelligence would understand the law to mean that a penalty under § 924(e) is not incurred until, *at the earliest*, the commission of a gun offense in violation of § 922(g). Penalties are "incurred . . . when an offender becomes subject to them." *Dorsey v. United States*, 567 U.S. 260, 272 (2012). An offender cannot possibly "become[] subject to" penalties under the ACCA, *id.*, any sooner than the commission of the federal gun offense that violates § 922(g) or, perhaps more prudently, not until they are sentenced for the § 922(g) offense. A person of ordinary intelligence reading § 924(e)(2)(A)(ii) would certainly, sensibly conclude that the applicable schedules are those in effect no sooner than the time the statute's penalty is, in fact, incurred (or imposed).

Judicial gloss on the statute further supports this conclusion. *See Lanier*, 520 U.S. at 266 ("[C]larity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute . . . ."). Five courts of appeals have considered the timing question of § 924(e)(2)(A)(ii), and all but the Eleventh Circuit (in a

rare *sua sponte* reversal of its prior decision)[2] have determined the statute to mean that courts look to the federal schedules in effect no earlier than the commission of the federal offense. *See United States v. Williams*, 48 F.4th 1125, 1142 (10th Cir. 2022); *United States v. Perez*, 46 F.4th 691, 699 (8th Cir. 2022); *United States v. Hope*, 28 F.4th 487, 504–05 (4th Cir. 2022); *United States v. Brown*, 47 F.4th 147, 151 (3d Cir. 2022), *petition for cert. granted*, No. 22-6389 (U.S. Dec. 23, 2022).

When examining similar language in the Sentencing Guidelines context, courts have explained that it is "illogical" to "ignore current federal law and turn to a superseded version of the United States Code." *United States v. Bautista*, 989 F.3d 698, 703 (9th Cir. 2021). Such an approach would be at odds with § 924(e)(2)(A)(ii)'s reference to annually updated drug schedules, and it "would prevent amendments to federal criminal law from affecting federal sentencing and would hamper Congress' ability to revise federal criminal law." *Id.*; *see also Williams*, 48 F.4th at 1141 n.11. Accordingly, for the person of ordinary intelligence seeking to understand what punishment this statute provides, there is no contest between the Eleventh Circuit's illogical interpretation and an alternative, commonsense, judicially

[2] The Eleventh Circuit originally sided with the other four circuits to have weighed in on this issue, but in a *sua sponte* reversal of its prior decision, it ruled that § 924(e)(2)(A)(ii)'s "serious drug offense" definition somehow incorporates federal drug schedules at the time the defendant was convicted of his prior state drug offense rather than at the time of the federal firearm offense, thus creating a four-to-one circuit split.

embraced reading that aligns with the text's plain meaning.

2. The Government's False Analogy To An Immigration Statute Provides No Reason To Depart From A Commonsense Interpretation Of The ACCA.

The Government, in its supplemental brief before the Eleventh Circuit, argued that court interpretations of an immigration statute, 8 U.S.C. § 1227(a)(2)(B)(i), support its interpretation of the ACCA. *See* Suppl. Brief for the United States at 16–17, *United States v. Jackson*, No. 21-13963 (11th Cir. Oct. 6, 2022), ECF No. 57, *reprinted at* Jackson Pet. App. 108a–109a. "In the immigration context, when courts determine whether a noncitizen's prior conviction qualifies as an 'aggravated felony'" for purposes of § 1227(a)(2)(B)(i), "they apply the federal drug schedules at the time of his prior conviction." *Id.* at 16, *reprinted at* Jackson Pet. App. 108a. The Government argued that this same approach should apply to determine whether a state conviction is a "serious drug offense" under the ACCA. *Id.* at 15–17, *reprinted at* Jackson Pet. App. 107a–109a.

But the Government's argument misses a key timing distinction between the ACCA and the relevant immigration statute. The ACCA contemplates several hypothetical separate crimes over time eventually being pieced together to trigger enhanced punishment for the "career criminal" who ultimately commits and is sentenced for a federal gun crime. The immigration statute, by contrast, imposes immigration consequences immediately following a single state drug conviction. *See* 8

U.S.C. § 1227(a)(2)(B)(i); *see also Mellouli v. Lynch*, 575 U.S. 798, 801 (2015); *Padilla v. Kentucky*, 559 U.S. 356, 368 (2010) (Section 1227 "specifically commands removal for all controlled substances convictions."). Under the immigration statute, whether a state drug offense is considered an aggravated felony has *immediate* consequences for the non-citizen defendant. The moment a non-citizen is convicted of a drug offense, he becomes categorized as removable and the Government is statutorily empowered to deport him. *See* 8 U.S.C. § 1227(a)(2)(B)(i). The federal consequence is incurred simultaneously with when the state conviction is entered. In fact, it is for this very reason that the Court has held that defense counsel for a non-citizen state criminal drug defendant *must* advise her client of the impending immigration consequences of pleading guilty. *Padilla*, 559 U.S. at 368.

By contrast, in the ACCA context, state criminal drug convictions have no immediate consequences and, in fact, may never have any consequences under federal sentencing law. Unlike the non-citizen who is convicted of a state drug offense and then immediately is subject to deportation, the ACCA remains inapplicable to the criminal defendant with a state drug offense conviction until several additional circumstances are met. To incur federal penalties under the ACCA, a person must be convicted of two more qualifying criminal offenses and *then* be convicted of a federal firearm offense. Because the ACCA does not impose a time-bar on qualifying offenses, these other convictions could occur many years—even decades—into the future. Moreover, by the time

the qualifying federal conviction is incurred (or imposed), a prior state drug law violation may no longer be illegal under federal law. Consequently, in the ACCA context, fair notice clearly requires consulting the federal drug schedules in effect no sooner than when the federal penalty is incurred (or imposed), not those that were in effect years, possibly decades, earlier.

In addition to fair notice concerns, the Government's immigration argument, taken to its logical conclusion, would create another constitutional challenge: whether the Sixth Amendment's effective-assistance-of-counsel requirement would apply in the ACCA context. In *Padilla*, the Court held that, to render effective assistance to a non-citizen criminal defendant, defense counsel must advise her client of the immigration consequences of a guilty plea. 559 U.S. at 366–69. If, as the Government claims, courts must apply the earlier federal drug schedules in the ACCA context, defendants correctly will push to expand *Padilla*'s holding under claims of ineffective assistance of counsel if they were not adequately informed of the potential federal sentencing consequences of each state drug conviction. Decades of judicial and public defender resources spent addressing such claims can be more efficiently apportioned if this Court rejects the Government's constitutionally erroneous interpretation.

3. The Eleventh Circuit's Interpretation Creates Enormous Challenges For A Person Seeking To Understand What Punishment To Expect Under The ACCA.

In practical terms, applying drug schedules in effect no sooner than when the ACCA penalty is incurred (or imposed) affords the defendant fair notice of how federal law applies to his earlier state conviction. The Eleventh Circuit's approach, by contrast, deprives a defendant of that fair notice.

Imagine an ACCA defendant with three prior state drug convictions. She commits and is convicted of a federal gun crime in 2023; she has one state drug conviction from 2013, another from 2003, and another from 1993. When she was defending against her state criminal charges ten, twenty, and thirty years ago, she was charged and convicted under state drug laws, not federal ones. She and her previous defense attorneys *never* had reason to compare her offenses or state drug statutes to then-existing (now-superseded) federal drug schedules. She received no notice of those federal schedules or how they might affect future federal sentencing for a gun crime.

Under a commonsense interpretation of § 924(e)(2)(A)(ii), there is only one version of the federal drug schedules that this hypothetical defendant would need to consult: the version effective in 2023. By contrast, the Eleventh Circuit seemingly thinks it reasonable for this defendant (not to mention courts, prosecutors, defense attorneys, and probation officers) to dredge up long-superseded federal drug schedules to

find three different versions and compare them to then-effective state drug statutes and schedules.

Granted, had the hypothetical defendant been convicted under *federal* drug laws for any of her prior drug crimes, she could not have defended on the grounds that she did not know the federal drug schedules effective in 1993, 2003, or 2013. After all, "ignorance of the law . . . is no defense to criminal prosecution." *Cheek v. United States*, 498 U.S. 192, 199 (1991). But here, her earlier convictions were all under state law. The first time federal drug laws became involved in relation to her state drug convictions is when the penalties under the ACCA were incurred (or imposed)—in 2023. Although ignorance of *current* law may be no excuse, ignorance of laws that were superseded decades ago and, importantly, were never applied in one's prior proceedings is not only forgivable, but the only practical outcome. The Court need not force a nonsensical outcome when a more reasonable interpretation of the statute is available.

The problems with the Eleventh Circuit's interpretation of § 924(e)(2)(A)(ii) are not merely hypothetical. Under the Eleventh Circuit's approach, it will often be extremely difficult, if not impossible, for people of ordinary intelligence to find now-superseded federal drug schedules that were in effect when they were convicted of state-law crimes.

As Petitioner's brief explains, the challenge of accessing superseded federal drug schedules in effect on the exact same day of the prior state conviction is not only arduous but nearly insurmountable. *See* Jackson Br. at 27–31. The U.S. Code includes only the "[i]nitial schedules" of controlled substances that existed in 1970,

when the Controlled Substances Act was enacted. 21 U.S.C. § 812(c). Subsequent schedules are published in the Code of Federal Regulations at 21 C.F.R. pt. 1308. The information necessary for the analysis cannot be found simply by accessing hard copies of the most recent U.S. Code or the Code of Federal Regulation. The Code of Federal Regulations consists of approximately 200 physical volumes and is revised yearly. U.S. Gov't Bookstore, U.S. Gov't Publ'g Off., *Code of Federal Regulations (CFRs) in Print*, https://bookstore.gpo.gov/catalog/code-federal-regulations-cfrs-print (last visited July 17, 2023). In the pre-digital world of the mid-1980s when Congress enacted this law, Congress could not have intended for people to have the ability to access hard copies of each previous version of the Code of Federal Regulations.

Unfortunately, unlike some other research inquiries, this challenge is not overcome with access to modern digital tools. Some electronic resources do contain information about past federal drug schedules, although none of these electronic resources existed when the ACCA was enacted in 1984 or amended in 1986. Further, the various free and publicly accessible electronic resources that do exist today are incomplete and unwieldy.

- *First*, the National Archives maintains an "Electronic Code of Federal Regulations" with a "Point-in-Time System." National Archives, *Using the eCFR Point-in-Time System*, Code of Federal Regulations, https://www.ecfr.gov/reader-aids/using-ecfr (last visited July 17, 2023). While this system appears to allow a person to search for drug

schedules that were in effect on any given day, that database reaches back only as far as January 2017. *Id.* A defendant seeking the schedule from the year of his state conviction before 2017—likely the vast number of prior convictions today and for some time to come—would thus be out of luck.

- *Second*, the Government Publishing Office maintains an online version of the Code of Federal Regulations. *See* U.S. Gov't Publ'g Off., *Code of Federal Regulations (Annual Edition)*, https://www.govinfo.gov/app/collection/cfr (last visited July 17, 2023). But this database goes back only as far as 1996 and provides an incomplete picture of the federal drug schedules. *Id.* The database houses only the annually issued versions of the federal schedules and lacks access to the precise timing of the changes to the federal schedules, which, as Petitioner's brief explains, would not be adequate. (*See* Jackson Br. at 27–31.)

- *Third*, the Government Publishing Office also maintains an online version of the Federal Register. U.S. Gov't Publ'g Off., Federal Register, https://www.govinfo.gov/app/collection/FR/ (last visited July 17, 2023). Although this database extends far back in time, a person cannot search this database for the complete drug schedules of any given year (say, the year he was convicted of a state

drug offense). Instead, this database contains only raw daily issuances of proposals, amendments, and the like. *Id.*

- *Fourth*, the National Archives publishes electronic versions of notices and rules that appeared in past issues of the Federal Register. National Archives, Federal Register, https://www.federalregister.gov/documents/current (last visited July 17, 2023). But this database is equally insufficient because it goes back only as far as 1994 and because it captures individual changes to the federal schedules (as opposed to displaying the schedules in their entirety). *Id.*

- *Fifth* and finally, the Drug Enforcement Administration (DEA) publishes sorted lists of controlled substances with dates of past scheduling actions. *See* Drug Enf't Admin., *Lists of: Scheduling Actions Controlled Substances Regulated Chemicals* (2023), https://www.deadiversion.usdoj.gov/schedules/orangebook/orangebook.pdf. But this resource does not notify the reader of whether any previously scheduled substances were removed from the drug schedules and which substances those are. Further, the DEA cautions those who find these lists from relying on them. The document states, in bold, that "[t]hese lists are intended as general references and are not comprehensive listings of all controlled substances and regulated chemicals." *Id.* at 2 of PDF. The

> lists include large omissions; for example, they do not cover the "salts, isomers, salts of isomers, esters, ethers, and derivatives which may be controlled substances" or controlled substance analogues. *Id.* The DEA's disclaimer advises readers, in bold and underlined font, that if they "want to ensure that a compound is not considered a scheduled substance or listed chemical, they should write the DEA . . . for an official determination." *Id.*

These incomplete digital resources do not satisfy the Constitution's requirement of fair notice. Uncovering whether a particular drug was scheduled at a particular time in history remains a difficult task for even the most skilled and determined researcher—let alone a person of ordinary intelligence seeking a reasonable opportunity to know what penalty the law provides.

Here, Petitioner never had any reason to consider whether then-existing (but now superseded) federal drug schedules applied to the state drug statutes under which he was convicted. No one—neither he nor his defense lawyers in his state proceedings—rationally could have presumed at the times of his prior state convictions that he would be convicted of additional drug offenses as well as a federal gun crime in the future. To have a reasonable opportunity to understand what future punishment federal law held in store for him, Petitioner and his previous defense lawyers would have needed clairvoyance at the time of Petitioner's first and second state drug prosecutions to predict that he would be prosecuted for a third, and further that he would eventually

be convicted of a federal firearm offense. Each time, Petitioner and his defense teams should have been given an opportunity to research the state drug statutes he was convicted under and compare those statutes to the then-existing federal drug schedules at the time of each prosecution. And then he should have had access to those comparative results and an equally informed and effective defense counsel when he eventually decided to commit a federal firearm offense.

Such unrealistic requirements do not "give the person of ordinary intelligence a reasonable opportunity" to understand what conduct subjects him to enhanced punishment. *Grayned*, 408 U.S. at 108. The Eleventh Circuit asks too much of people of ordinary intelligence to accord its approach with fair notice principles. Its rule renders the law inaccessible, illogical, and out of step with more practical and fair-minded reading that other circuits employ.

B. The Eleventh Circuit's Interpretation Creates Avoidable Problems With The Ex Post Facto Clause.

The Ex Post Facto Clause in Article I, Section 9, bars Congress "from making substantive criminal offenses retroactive." *Lanier*, 520 U.S. at 266–67; *see also* U.S. Const. art. I, § 9, cl. 3. This clause forbids *ex post facto* laws, defined generally as "[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." *Peugh*, 569 U.S. at 538 (citation omitted).

As the Court has held, sentence-enhancement laws, like the ACCA, do not violate the Ex Post Facto

Clause—even where that law imposes enhanced punishment based on convictions that pre-date the law's enactment—on the grounds that a recidivist enhancement is not a punishment for the earlier crime but rather a "stiffened penalty for the latest crime" that occurred after the enhancement law was passed. *Gryger v. Burke*, 334 U.S. 728, 732 (1948). When circuit courts were faced with early ACCA cases, they embraced that understanding of the relationship between federal sentence enhancements and the Ex Post Facto Clause. The ACCA was enacted in 1984, and it was amended in 1986 to provide, for the first time, that drug-related offenses could be predicate offenses. Soon after, circuit courts were faced with *ex post facto* challenges to reliance on drug convictions that pre-dated the ACCA's enactment or the 1986 amendment as predicate offenses for enhancement. Following the Court's guidance in *Gryger*, the circuits uniformly held that the ACCA could apply based on these earlier convictions and that doing so did not violate the Ex Post Facto Clause. *E.g.*, *United States v. Springfield*, 337 F.3d 1175, 1178–79 (10th Cir. 2003); *United States v. Reynolds*, 215 F.3d 1210, 1212–13 (11th Cir. 2000); *United States v. Stuart*, 81 F.3d 162, 1996 WL 145857, at *2 (6th Cir. 1996) (unpublished table decision); *United States v. Presley*, 52 F.3d 64, 68 (4th Cir. 1995), *abrogated on other grounds by Johnson v. United States*, 559 U.S. 133 (2010).

These cases confirm that, for ACCA purposes, notice is evaluated no sooner than when the federal penalty is incurred, not at the time of the prior state offense, because "a prior conviction is an ACCA predicate [only] if it meets the definition of 'violent felony' or 'serious drug

offense' at the time of the instant federal offense." *Williams*, 48 F.4th at 1141 n.11 (discussing *Springfield*). "[W]ere it otherwise, then no convictions predating the passage of the ACCA could qualify as predicates." *Id.*

In these cases, applying the federal law in effect no sooner than when the federal penalty is incurred avoided the *ex post facto* problems with applying the ACCA to convictions that pre-dated the ACCA.[3] The only interpretation of § 924(e)(2)(A)(ii) that comports with the Ex Post Facto Clause is the one that likewise applies the federal law in effect no sooner than when the federal penalty is incurred, not at the time of the prior state conviction serving as the predicate offense. The rule announced by this Court must comport with the Ex Post Facto Clause.

C. The Eleventh Circuit's Interpretation Fails To Apply The Rule Of Lenity.

Lastly, the rule of lenity requires courts to read ambiguous penal statutes strictly in favor of the defendant. *See Wooden*, 142 S. Ct. at 1082–83 (Gorsuch, J., concurring in the judgment). If there is ambiguity in a penal

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[3] If this Court rejects the Eleventh Circuit's rule in favor of a "time of sentencing" rule (as argued by Petitioner Brown in case no. 22-6389), as opposed to a "time of offense" approach (as argued by Petitioner Jackson here), then there would need to be an *ex post facto* exception in cases where a substance is added to the schedule after the commission of the offense. For example, in the Sentencing Guidelines' use of the "time of sentencing" approach, there is an express exception to address *ex post facto* problems. U.S.S.G. § 1B1.11, commission commentary.

statute that leaves reasonable doubt of its meaning, a court's duty is not to inflict the penalty. *Id.*

Lenity is foundational to due process and the separation of powers. Under our Constitution, "[a]ll" of the federal government's "legislative Powers" are vested in Congress. U.S. Const. art. I, § 1. The onus is on Congress to amend and clarify a statute if its language is unclear and its purpose underenforced.

Perhaps the most important consequence of this assignment concerns the power to punish. Congress, as the people's representative body, drafts and passes legislation to punish harmful acts against society. The rule of lenity safeguards this design by preventing unelected and unaccountable judges from intentionally or inadvertently exploiting "doubtful" statutory "expressions" to enforce their own sensibilities and override the will of the people. *United States v. Mann*, 26 F. Cas. 1153, 1157 (No. 15,718) (C.C.D.N.H. 1812). Lenity "places the weight of inertia upon the party that can best induce Congress to speak more clearly," forcing the Government to seek clarifications through legislation rather than impose the costs of ambiguity on presumptively free persons. *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality opinion).

Lenity enforces the constitutional requirement of fair notice by ensuring that an individual's liberty always prevails over laws that fail to provide adequate notice. *See Wooden*, 142 S. Ct. at 1082–83 ("[T]he connection between lenity and fair notice [is] clear: If the law inflicting punishment does not speak 'plainly' to the defendant's conduct, liberty must prevail.").

Here, as explained above and as evidenced by the circuit split, lenity requires that this Court interpret the law in the way most favorably to Petitioners. The Eleventh Circuit's approach transforms what would otherwise be a ten-year statutory maximum into a fifteen-year mandatory minimum prison sentence. (Jackson Br. at 3.) Lenity requires avoiding the interpretation that would drastically increase the length of prison sentences for Petitioner and many other federal defendants.[4] (*See* Jackson Cert. Pet. at 28–29, 29 n.7.)

CONCLUSION

The Eleventh Circuit's interpretation violates all three pillars of fair notice and creates dire due process concerns. If this Court adopts the Eleventh Circuit's approach, it will lead to far longer prison sentences than those for which defendants were given fair notice. Accordingly, this Court should reverse the Eleventh Circuit's decision below.

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[4] This Court has expressed disagreement about whether lenity applies in cases of "mere[]" or "grievous" ambiguity. *Compare Wooden*, 142 S. Ct. at 1075 (Kavanaugh, J., concurring) ("If a federal criminal statute is grievously ambiguous, then the statute should be interpreted in the criminal defendant's favor."), *with Wooden*, 142 S. Ct. at 1084 (Gorsuch, J., concurring in the judgment) ("If a judge sentenced you to decades in prison for conduct that no law clearly proscribed, would it matter to you that the judge considered the law 'merely'—not 'grievously'—ambiguous?"). Under either standard, the Eleventh Circuit's approach triggers the rule of lenity.

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Respectfully submitted,

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