Nos. 22-6389 and 22-6640

In the Supreme Court of the United States

JUSTIN RASHAAD BROWN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

EUGENE JACKSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writs of Certiorari to the United States Courts of Appeals for the Third and Eleventh Circuits

BRIEF OF FAMM AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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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 felon[ies]" or "serious drug offense[s]."

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

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INTEREST OF AMICUS CURIAE*

FAMM, previously known as Families Against Mandatory Minimums, is a national nonprofit, nonpartisan organization of over 77,500 members, founded in 1991. FAMM's mission is to promote fair and proportionate sentencing policies and to challenge inflexible and excessive penalties required by mandatory sentencing laws. By mobilizing prisoners and families who have been affected by unjust sentences, FAMM illuminates the human face of sentencing as it encourages state and federal sentencing reform. FAMM advances its charitable purpose in part through education of the general public and through *amicus* filings in important cases.

FAMM has a strong interest in the resolution of this case because the Eleventh Circuit's outlier interpretation of ACCA wrongly subjects defendants to 15-year mandatory minimum sentences based on predicate drug offenses that may no longer be criminal under current federal law—generating harsh, disparate, and unjust sentences that do not further ACCA's express purpose of preventing recidivism.

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* Pursuant to Supreme Court Rule 37, amicus affirms that no counsel for a party authored this brief in whole or in part, and no one other than amicus or its counsel made a monetary contribution intended to fund the preparation or submission of the brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

ACCA punishes only one crime: a current federal firearms offense. The statute's theory is that some federal firearms defendants, based on their commission of certain prior crimes, pose such a severe danger that they must be imprisoned for at least 15 years—even if general principles of federal sentencing, accounting for individualized criminal history, would warrant a less severe punishment. That extreme outcome should be reserved for cases where Congress clearly dictated it. Congress did not do so here.

A natural reading of ACCA's text forecloses application of a mandatory minimum in these cases. Congress expressly limited the "serious drug offense" convictions that trigger an ACCA sentence to state drug convictions "involving . . . a controlled substance (*as defined in … the [federal] Controlled Substances Act* . . .)." 18 U.S.C. § 924(e)(2)(A)(ii) (emphasis added). Where, as here, a defendant's state drug offense could have involved a substance *no longer controlled by federal law*, it cannot provide a basis for an ACCA sentence. As a matter of text, logic, and common sense, a state drug offense can hardly be considered a "serious drug offense" under federal law if federal law does not even treat the same conduct as a crime. *Id.*

The government resists that straightforward conclusion based almost entirely on this Court's decision in *McNeill v. United States*, 563 U.S. 816 (2011). But *McNeill* held only that a *state's* redefinition of a crime cannot change its status under federal law. *Id.* at 820–23. That holding has no application here, where

the question arises from the *federal government's own changes* to federal criminal law. Indeed, the animating principle of *McNeill*—the supremacy of the federal government on questions of federal criminal law—only reinforces that state convictions involving substances no longer criminalized by federal law cannot support a federal mandatory minimum sentence.

As elaborated further below, three additional indicia of statutory meaning reinforce that conclusion. *First*, the link between predicate drug convictions and future dangerousness is tenuous, and the list of federally controlled substances is subject to relatively frequent change based on evolving scientific and policy judgments. Reading ACCA's definition of a "serious drug offense" to incorporate current federal drug law accounts for that context; reading it to preserve obsolete federal policy judgments, by contrast, makes no sense. *Second*, the rule of lenity weighs heavily in favor of construing any ambiguity in ACCA's definition of a "serious drug offense" against imposition of a rigid mandatory minimum, particularly given the serious notice concerns arising from the byzantine and shifting nature of federal drug law. *Third*, the strong federal policy in favor of reducing unwarranted sentencing disparities supports consulting current federal drug law, which is less likely to perpetuate racial disparities.

Those principles have more than just theoretical importance; they make a profound difference in the real world. For example, Tyrell Curry was convicted of violating federal firearms law after he removed a

gun from a parked car in 2016.[1] The gun was later discovered in a blue container. There was no evidence that Mr. Curry took the gun out of the container, let alone that he used it to commit a crime. Nor did he have any history of violent offenses; indeed, he had never been sentenced to more than two years in prison. His prior convictions were for "very small amounts"—$20 sales—of crack cocaine.[2] The Federal Sentencing Guidelines accordingly recommended a sentence well below the mandatory minimum, and the district court indicated a willingness to depart even below that.[3] But because Mr. Curry had three prior drug offenses from his youth—imposed at a time when state drug law criminalized substances that federal law now does not—he was sentenced to a mandatory 15 years for the federal gun possession offense.

Raheem Slone's battle with drug addiction began at age 15 after he witnessed his brother commit suicide.[4] His addiction set the foundation for four lower-level drug offenses, all occurring prior to 2008.[5] Yet

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[1] Transcript of Sentencing Proceedings at 10, *United States v. Curry*, No. 19-CR.-80087 (S.D. Fla. Sept. 16, 2019), ECF No. 37.

[2] *Id.*

[3] *Id.* at 17.

[4] Transcript of Continuing Sentencing Hearing at 40–43, *United States v. Slone*, No. 16-CR-00400 (E.D. Pa. July 21, 2017), ECF No. 64.

[5] Government's Supplemental Sentencing Memorandum at 7 –11, *United States v. Slone*, No. 16-CR-00400 (E.D. Pa. July 12, 2017), ECF No. 52.

despite this, Mr. Slone was able to move his life forward. He built a family, earned vocational degrees in fiber optics and international computer driving, and, when his youngest daughter was diagnosed with autism, he self-published a novel and donated a portion of the proceeds to Autism Awareness.[6] Nearly a decade later, in 2016, he was charged with possession of a firearm by a felon and subjected to ACCA's mandatory minimum by virtue of three of his prior drug offenses, two of which stipulated to maximum sentences of less than two years in his guilty pleas.[7] The district court imposed a mandatory minimum sentence of 15 years despite serious concern with relying on such remote predicates to justify the mandatory minimums, particularly in light of the evolving federal drug schedule that no longer criminalized the drug at issue: "[T]here's something inconsistent with the aims of justice there."[8] As a result, Mr. Slone's children—whom he loves and continues to support—will be without their father for critical years in their lives.

Like the Eleventh Circuit decision below, neither of these results makes sense as a matter of statutory language and purpose—or justice and fairness. This Court should reject the Eleventh Circuit's position and hold that defendants in Petitioners' posture

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[6] Sentencing Hearing at 7, 34, *Slone* No. 16-CR-00400.

[7] Government's Supplemental Sentencing Memorandum at 1, *Slone*, No. 16-CR-00400; Government's Sentencing Memorandum, *United States v. Raheem Slone*, No. 16-CR-00400 (E.D. Pa. June 26, 2017), ECF No. 46.

[8] Sentencing Hearing at 40–41, *Slone*, No. 16-CR-00400.

should be sentenced in accordance with general federal sentencing principles, which amply account for prior convictions.[9]

ARGUMENT

I. ACCA's Text And Purpose Require Comparing A Defendant's Prior Conviction To Current Federal Drug Law

The Eleventh Circuit interpreted ACCA to require the imposition of harsh mandatory minimum sentences on federal firearms defendants even where their relevant predicate state drug convictions involve substances that are *no longer illegal under federal law*. That counterintuitive result conflicts with ACCA's text and purpose, as well as this Court's precedent. At bottom, ACCA punishes only a current federal firearms offense. *See United States v. Rodriquez*, 553 U.S. 377, 386 (2008). Prior state drug convictions are therefore relevant only to the extent they demonstrate whether the firearms defendant is, as a matter of federal law, so dangerous that a 15-year minimum sentence is warranted. As a matter of both text and purpose, that inquiry necessarily requires consulting current federal drug law: *i.e.*, whether the drug involved in the state offense is "a controlled substance . . . *as defined in . . . the Controlled Substances Act*." 18 U.S.C. § 924(e)(2)(A)(ii) (emphasis added). That

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[9] FAMM focuses in this amicus brief on the erroneous Eleventh Circuit decision in Petitioner Eugene Jackson's case. FAMM agrees with Petitioner Justin Brown that the United States' position in his case should be rejected for the same reasons.

reading is only underscored by the tenuous link between drug offenses and recidivism, the evolving nature of federal drug law, and this Court's longstanding recognition that ACCA extends only to the most dangerous firearms defendants. *See, e.g.*, *Taylor v. United States*, 495 U.S. 575, 581 (1990).

Mr. Slone and Mr. Curry's cases exemplify the core inconsistency in the Eleventh Circuit's ruling. Both men committed low-level drug offenses in the distant past.[10] Yet when they subsequently violated federal law by possessing a firearm as a felon, both received severe mandatory minimum sentences on the illogical premise that their prior convictions were for "serious drug offenses"—even though federal law does not even criminalize all the substances that underlie those state offenses.[11]

Mr. Curry had three cocaine-related controlled substance offenses under the same Florida Statute § 893.13(1) (1998), that served as the basis for Petitioner Jackson's predicates. These offenses occurred when Mr. Curry was only 19 and 20 years old, totaling 0.5 grams, 0.1 grams, and again 0.1 grams of crack cocaine respectively, resulting in less than 48 months of imprisonment apiece.[12] Mr. Curry subsequently enjoyed stability working with his father as a horse

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[10] Addendum to the Presentence Investigation Report at 1, *United States v. Tyrell Donte Curry*, No. 19-CR-80087 (S.D. Fla. Sep. 9, 2019), ECF No. 19-1.

[11] *See infra* at 14.

[12] Presentence Investigation Report at 9–11, *United States v. Curry*, No. 19-CR-80087 (S.D. Fla. Sept. 9, 2019), ECF No. 19.

breeder.[13] But he then experienced the tragic loss of his father, whom he found deceased, shortly followed by his mother's death.[14] The sentencing court "f[ound] the sentence is high" and that the "Guideline range is much lower, and . . . your attorney would have arguments to make why even there should be a variance . . . [and] the fact that the prior offenses did involve relatively small quantities."[15] The court nevertheless felt bound to impose a 15-year mandatory minimum.[16]

Mr. Slone likewise had a history of nonviolent drug addiction from a young age. In the course of this addiction, Mr. Slone accumulated three prior drug offenses from 2002 and 2008,[17] two of which concern a Pennsylvania definition of cocaine that, much as with the Florida statute, criminalized Ioflupane.[18] Mr.

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[13] *Id.* at 15.

[14] *Id.*

[15] Transcript of Sentencing Proceedings at 17, *Curry*, No. 19-CR-80087.

[16] *Id.* at 16.

[17] Government's Supplemental Sentencing Memorandum at 6–11, *Slone*, No. 16-CR. 400.

[18] *See* 35 PA. CONS. STAT. § 780-104(2)(i)(4); *see also United States v. Baskerville*, No. 1:19-CR-0033, 2022 WL 4536126, at *4–5 (M.D. Pa. Sept. 28, 2022) (finding that prior offenses for possession with intent to distribute cocaine cannot qualify as ACCA predicates because the Pennsylvania statute does not carve out Ioflupane and is, therefore, not a categorical match); *United States v. Myrick*, No. CR 19-354, 2023 WL 2351693, at *2 (E.D. Pa. Mar. 2, 2023) (same).

Slone expressed his desire to change his future: to participate in vocational programs, continue publishing books, work with the homeless and contribute to his community, and study to receive his Associates and Bachelor's degrees.[19] He emphasized that he had no intention of continuing to "conflict with the law" but rather wanted to "move forward and change [his] life completely along the way."[20] At sentencing, the court lamented that, although the predicate offenses were "ancient" and occurred under a now-defunct statute, "there is no room in this statute, unfortunately, for redemption" even for someone who does not "present as someone, who is a dangerous person out on the streets."[21] The court emphasized the "loss" the community would feel from his incarceration.[22] Yet despite its misgivings over the lack of any recidivist possibility here, the court imposed the ACCA mandatory minimum.[23]

A. The Link Between Drug Offenses And Recidivism Is Tenuous And Federal Drug Policy Continues To Evolve

The presumed link between drug offenses and recidivism has been thoroughly examined, and studies overwhelmingly reveal that prior serious drug offenses are ineffective proxies for recidivism. Two such

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[19] Sentencing Hearing at 38–39, *Slone*, No. 16-CR-00400.

[20] *Id.* at 39.

[21] *Id.* at 40.

[22] *Id.* at 41.

[23] *See generally id.*

reports from the United States Sentencing Commission (USSC) observed that approximately 64% of individuals convicted of violent crimes released over the last decade recidivated,[24] whereas only approximately 47.9% of individuals convicted of drug trafficking offenses were rearrested.[25]

A recent independent review of USSC and Federal Bureau of Prisons data for individuals released in 2005, 2010, and 2011 following ACCA convictions corroborates that finding. The report investigated recidivism among three groups: (1) individuals with three or more violent predicates ("violent group"); (2) individuals with only serious-drug offense predicates ("drug-only group"); and (3) individuals with at least one violent felony predicate but fewer than three

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[24] *See* USSC, RECIDIVISM OF FEDERAL VIOLENT OFFENDERS RELEASED IN 2010 5, 20 (Feb. 2022) (comparing recidivism rates for violent offenders to individuals with only non-violent prior convictions); USSC, RECIDIVISM AMONG FEDERAL VIOLENT OFFENDERS 3 (Jan. 2019) (same).

[25] *See* USSC, RECIDIVISM OF FEDERAL DRUG TRAFFICKING OFFENDERS RELEASED IN 2010 5, 23 (Jan. 2022) (comparing recidivism rates for violent offenders to individuals with only non-violent prior convictions). The report defines "drug trafficking offenses" with reference to chapter 13 (Drug Abuse Prevention and Control) of title 21 of the United States Code which generally prohibits the distribution, manufacture, importation, and exportation of controlled substances. *Id.* at 11.

("mixed group").[26] The drug-only group recidivated at by far the lowest rate—only approximately 36%.[27] The violent group, in contrast, had nearly a 62% rate of recidivism, and the mixed-group recidivated at an approximately 49% rate.[28]

Consistent with those results, so-called "career" drug offenders recidivate at lower rates than the general federal prison population. On the whole, approximately 46.3% of individuals released from federal prison in 2005, and 45.1% released in 2010, were rearrested over an eight-year period.[29] Those rates are nearly identical to the rate for ACCA defendants from the "mixed group" (those with one or two violent offenses, as opposed to three)—and nearly 10 percentage points higher than those for ACCA defendants with only serious-drug priors.

Individuals convicted of drug-trafficking crimes are also less likely to commit violent crimes when they recidivate, which further demonstrates the lack of future dangerousness from those with serious drug predicates. Approximately 27.6% of individuals with prior drug-trafficking offenses were rearrested for vi-

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[26] Jennifer Lee Barrow, *Recidivism Reformation: Eliminating Drug Predicates*, 135 HARV. L. REV. F. 418, 441 (2022).

[27] *Id.*

[28] *Id.*

[29] *Id.* at 439.

olent offenses, compared to 38.9% of individuals convicted of prior violent offenses.[30] When individuals with prior drug-trafficking offenses are rearrested for violent offenses, the offense itself is also comparatively less severe. Approximately 19.9 of those percentage points are attributable to assault; only 1.9 percentage points for homicide, 1.2 percentage points for sexual assault, 2.3 percentage points for robbery, and 2.3 percentage points for other violent offenses.[31] On the other hand, individuals convicted of violent offenses are rearrested for violent offenses at rate that nearly double or triples those metrics: 24.9% were rearrested for assault; 3% for homicide, 2.1% for rape, and 6.3% for robbery, and 2.6% for other violent offenses.[32]

The Sentencing Commission properly concluded that, based on these trends, drug-only career offenders "are not meaningfully different than other federal drug trafficking offenders and therefore do not categorically warrant the significant increase in penalties provided for under" career offender enhancement

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[30] *Compare* USSC, RECIDIVISM OF FEDERAL DRUG TRAFFICKING OFFENDERS *supra* note 25, at 26–27, *with* USSC, RECIDIVISM OF FEDERAL VIOLENT OFFENDERS *supra* note 24, at 25.

[31] USSC, RECIDIVISM OF FEDERAL DRUG TRAFFICKING OFFENDERS *supra* note 25, at 26–27.

[32] USSC RECIDIVISM OF FEDERAL VIOLENT OFFENDERS, *supra* note 24, at 25.

statutes and Sentencing Guidelines.[33] Academic commentators studying the recidivism rates among ACCA defendants in light of the Act's stated purpose concur.[34] Put simply, the serious-drug-offense predicates bear limited correlation to ACCA's stated end, which only heightens the need to enforce them carefully rather than overly broadly.

Indeed, Congress has demonstrated a commitment to reducing the application of mandatory minimums to drug offenses.[35] Two years following the Commission's report, a bipartisan group of legislators passed the First Step Act, which reduced certain mandatory minimums for drug offenses and increased the

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[33] USSC, REPORT TO THE CONGRESS: CAREER OFFENDER SENTENCING ENHANCEMENTS 27 (Aug. 2016) (noting that because violent offenders recidivate at a higher rate than drug trafficking only career offenders, the career offender directive is best focused on offenders who have committed at least one crime of violence).

[34] Barrow, *supra* note 26, at 447–48 (calling on Congress to remove serious drug offenses as ACCA predicates entirely following an empirical analysis of recidivism rates).

[35] USSC, 2011 REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 355-56, 364 (Oct. 2011); *see also* USSC, MANDATORY MINIMUM PENALTIES FOR DRUG OFFENSES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 5, 46–48 (Oct. 2017) (observing that an analysis of the effect of drug-mandatory minimum penalties and legislative history suggests that such mandatory minimums apply more broadly than Congress intended).

availability of safety valve relief for reducing mandatory minimum enhancements for cooperative drug defendants.[36] And for good reason: mandatory minimum sentencing makes little sense when unmoored from the recidivism risk it is designed to guard against. *See, e.g.*, *Begay v. United States*, 553 U.S. 137, 146 (2008) (ACCA "looks to past crimes" to determine "the kind or degree of danger the offender would pose were he to possess a gun").

B. ACCA's Structure Reflects The Evolving Federal Drug Schedule

Congress structured ACCA to define prior serious drug offenses based on the evolving list of federal drugs found in the Controlled Substances Act's (CSA) federal drug schedules. 18 U.S.C. § 924(e)(2)(A)(ii) (citing 21 U.S.C. § 802). That conscious choice ensures that a defendant whose prior state drug convictions involve substances that federal authorities have determined *not to be illegal* will not be subjected to a federal mandatory minimum sentence.

Descheduling a federally controlled substance is not easy. It generally requires congressional action or that multiple federal agencies submit a scheduling decision for public notice and comment after evaluating eight mandatory factors balancing the abuse and public health risks against pharmacological benefits.[37] Completion of this lengthy process represents

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[36] Pub. L. No. 115-391, 132 Stat. 5194 (2018).

[37] JOANNA R. LAMPE, CONG. RESEARCH SERV., THE CONTROLLED SUBSTANCES ACT (CSA): A LEGAL OVERVIEW FOR THE 118TH CONGRESS 9–11 (2023).

a careful determination by the federal government not to ascribe further culpability to such conduct.

Modifications to the federal drug schedules are nevertheless far from a mere theoretical possibility. Since 1970, Congress has entirely descheduled 15 substances, half of which it descheduled before enacting ACCA.[38] In addition, Congress has made numerous decisions to move a substance from one schedule to another. These adjustments track social policy as well as developing pharmacological and medical understanding of the physical and psychological impact and benefits of certain drugs.

Petitioner Brown's case is instructive on this point. Brown was convicted between 2009 and 2014 under a Pennsylvania statute that included hemp in its definition of marijuana. From the 1970 passage of the CSA until the Agricultural Improvement Act of 2018, the CSA definition of "marijuana" also included hemp.[39] Lawmakers removed hemp in 2018 in accordance with developing medical literature establishing that hemp did not have similar cognitive effects to marijuana or create dependence. Congress's cross reference to the evolving CSA list in ACCA's definition

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[38] DEA, Scheduling Actions: Chronological Order 1-16 (TMFPP, naltrexol, apomorphine, thebaine-derived butorphanol, dextrorphan, fenfluramine, loperamide, nalbuphine, nalmefene, naloexgol, naloxone, naloxone hydrochloride, naltrexone, propylhexedrine, samidorphan).

[39] Hemp, like marijuana, sources from the plant Cannabis sativa L; however, hemp contains less than 0.3% of delta-9 tetrahydrocannabinol. 7 U.S.C. § 1639o(1).

of "serious drug offense" ensures that ACCA's penalties track the federal government's own evolving understanding of the value and effect of certain drugs and related culpable conduct.

Aligning ACCA with present understandings of culpability is consistent with longstanding precedent that enhancement statutes are designed to focus punishment on the present offense conduct—not underlying, potentially decades-old convictions. Here, that means a federal firearm conviction under 18 U.S.C. § 922(g), not the prior offenses. This Court repeatedly has upheld ACCA and other enhancement statutes against ex-post-facto challenges precisely because "100% of the punishment is for the offense of conviction. None is for the prior convictions or the defendant's 'status as a recidivist'." *Rodriquez*, 553 U.S. at 386; *cf. Nichols v. United States*, 511 U.S. 738, 747 (1994) ("Enhancement statutes . . . do not change the penalty imposed for the earlier conviction."); *Gryger v. Burke*, 334 U.S. 728, 732 (1948) (similar). The Eleventh Circuit's focus on the status of federal law at an earlier time—often years before the relevant federal offense—departs from those precedents and fails to accord proper respect to the judgments of the federal policymaking branches.

C. Looking To Current Federal Law In Measuring The Severity Of Prior Drug Convictions Upholds ACCA's Design

Unlike the Eleventh Circuit, all other circuits to address this question have concluded that applying the drug schedules in effect at the time of the federal firearm offense—and thereby preventing application

of the ACCA to state drug offenses involving conduct that federal law no longer criminalizes—is in keeping with Congress's intent in passing ACCA. *See United States v. Hope*, 28 F.4th 487, 501 (4th Cir. 2022) ("[I]t would be illogical to conclude that federal sentencing laws attach 'culpability and dangerousness' to an act that, at the time of sentencing, Congress has concluded is *not* culpable and dangerous." (quoting *United States v. Bautista*, 989 F.3d 598, 703 (9th Cir. 2021))); *United States v. Perez*, 46 F.4th 691, 700 (8th Cir. 2022) ("Contrary to the government's position that later changes in federal law would likewise 'erase' prior state convictions for ACCA purposes, relying on current federal definitions effectuates Congress's intent to remove certain substances from classification as federal drug offenses."); *United States v. Williams*, 48 F.4th 1125, 1144 (10th Cir. 2022) ("[I]f Congress has decided [a substance] should not be criminalized, then surely Congress would not intend for it to continue to be included within the narrow class of serious crimes that contributes to a 15-year mandatory minimum prison sentence.").

That consensus is correct. This Court should embrace the logically and textually supported rule unanimously articulated by the other circuits that have considered this issue. The Eleventh Circuit's reading is antithetical to Congress's purpose in enacting ACCA, the factual reality of recidivism rates among nonviolent drug defendants, and federal policymakers' modifications to the federal drug schedules according to evolving knowledge on the physiological effects of certain drugs and culpability of conduct related to them. Congress did not call for this untenable outcome.

Tellingly, the lead argument advanced by the government—and accepted by the Eleventh Circuit—relies not on the text of ACCA's "serious drug offense" provision but instead on this Court's construction of a different provision in *McNeill*. There, the Court held that ACCA's reference to a prior state drug conviction with "a maximum term of imprisonment of ten years or more . . . prescribed by law" must be measured by state law in force at the time of the conviction. *McNeill*, 563 U.S. at 820. A central part of the Court's reasoning was that states could otherwise thwart federal law (intentionally or unintentionally) by "reformulat[ing]" their criminal codes. *Id.* at 822. But no such risk of subversion is presented here, because the relevant change is in *federal* law. To the contrary, applying the more recent federal law is necessary to vindicate the principle of federal supremacy that animated the Court's reasoning in *McNeill*.

Of course, the fact that a state drug offense does not count as an ACCA predicate does not mean that it is irrelevant to a defendant's sentence. An offense that does not amount to a "serious drug offense" triggering a severe mandatory minimum sentence, 18 U.S.C. § 924(e)(2)(A)(ii), will likely still count as a prior offense affecting the defendant's advisory sentencing range under the Sentencing Guidelines, *see* U.S. SENTENCING GUIDELINES MANUAL § 4A1.1 (U.S.S.C. 2021), and the district court's assessment of "the history and characteristics of the defendant," 18 U.S.C. § 3553(a)(1). Considering the offense on those terms is consistent with Congress's overall approach to recidivism as a relevant factor in federal

sentencing—and its judgment that only a "serious drug crime" should trigger the harsh consequences of ACCA. 18 U.S.C. § 924(e)(2)(A)(i).

II. Principles of Lenity And Fair Notice Further Support Petitioners' Interpretation

If reasonable doubt remains about the proper construction of Section 924(e)(2)(A)(ii), the rule of lenity and related principles of fair notice dictate that Petitioners' time-of-federal-offense interpretation should prevail.[40] The rule of lenity "first appeared in English courts, justified in part on the assumption that when Parliament intended to inflict severe punishments it would do so clearly." *Wooden v. United States*, 142 S. Ct. 1063, 1079 (2022) (Gorsuch, J., concurring in judgment). And this Court has relied on principles of lenity and fair notice in interpreting the scope of the severe punishments prescribed by ACCA and similar statutes in the past. *See, e.g.*, *United States v. Davis*, 139 S. Ct. 2319, 2333 (2019); *Johnson v. United States*, 576 U.S. 591, 597 (2015); *see also Wooden*, 142 S. Ct. at 1079 (Gorsuch, J., concurring in judgment);

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[40] At times, the Court has required that a criminal statute be "grievously" ambiguous before turning to the rule of lenity to assist in construction. *Wooden*, 142 S. Ct. at 1084 (Gorsuch, J., concurring in the judgment) (citing examples). However, this more recent approach "does not derive from any well-considered theory about lenity or the mainstream of this Court's opinions." *Id.* Regardless, Section 924(e)(2)(A)(ii) satisfies either construction. For if a statute leaves a citizen to guess whether a panel of judges will consider her conduct proscribed by law, as Section 924(e)(2)(A)(ii) does, the statute must be grievously ambiguous.

United States v. Bass, 404 U.S. 336, 347–48 (1971) (interpreting predecessor statute). If necessary, the Court should rely on those principles again here. Indeed, lenity is particularly appropriate in this case because "[s]tatutes imposing harsh mandatory sentences present a particularly compelling need for invocation of the rule of lenity." *United States v. Scott*, 990 F.3d 94, 137 (2d Cir. 2021) (en banc) (Leval, J., dissenting). "The 15-year mandatory sentence required by ACCA" is a paradigmatic example. *Id.*; *see Wooden*, 142 S. Ct. at 1081–82 (2022) (Gorsuch, J., concurring in judgment).

The example cases cited earlier reinforce why that is true. When Mr. Curry rummaged through a parked car that did not belong to him, and stole a firearm from that car, he likely knew that he had committed a crime. But he almost surely did not know—and could not reasonably have known—that he was subjecting himself to a 15-year mandatory minimum sentence based on state convictions for "small quantities" of drugs dating to his years as a Florida teenager, when the state criminalized drugs that federal law did not criminalize at the time of his federal firearm offense and sentencing.[41] The district court, with some trepidation, ultimately concluded that it had "no discretion" to avoid imposing the mandatory minimum sentence based on federal drug law as it existed years earlier, even though those outdated laws had played no role in Mr. Curry's state offense.[42] The

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[41] Transcript of Sentencing Proceedings at 17, *Curry*, No. 19-CR-80087.

[42] *Id.*

court's reluctance was amplified by Mr. Curry's remorse, his acceptance of responsibility for his actions, his desire to "learn from [his] mistakes and better [himself]," and the "very, very difficult circumstances to deal with" as he lost both of his parents in tragic circumstances.[43]

Likewise, Mr. Slone could not reasonably have expected that his prior sentences would later justify a 15-year mandatory minimum sentence. During his sentencing hearing, Mr. Slone took ownership and expressed remorse for his actions, and he regretted most of all the effect his absence would have on his family.[44] He informed the court that he intended to participate in the Bureau of Prisons' drug abuse program as well as additional vocational programs available through the federal prison.[45] Mr. Slone has also helped in the rehabilitation of his BOP cellmates—so much so that one wrote an "impressive letter" supporting him before his ACCA sentencing.[46] The court considered his story "compelling" and continually referred to his "great love" for his children during the sentencing.[47] Mr. Slone expressed his "hope" that his prior offenses would not define him.[48] He discussed with the court his plans for his future release: "to work with the

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[43] Sentencing Hearing at 37, *Slone*, No. 16-CR-00400.

[44] *Id.* at 11–12, 14.

[45] *See id.* at 36, 45–46.

[46] *Id.* at 42.

[47] *Id.*

[48] *Id.* at 37–38.

homeless weekly" and share his story "about the dangerous consequence and the harsh reality that comes with gun violence and carrying illegal guns."[49] To the court, the sentence was "in [Mr. Slone's] context not to the aims of justice and that's wrong."[50]

A. ACCA Is At Least Ambiguous About Which Federal Drug Schedule Applies, Thereby Triggering The Rule Of Lenity

The rule of lenity "teach[es] that ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor." *Davis*, 139 S. Ct. at 2333; *see, e.g.*, *United States v. Santos*, 553 U.S. 507, 514 (2008); *McBoyle v. United States*, 283 U.S. 25, 27 (1931); *United States v. Wiltberger*, 18 U.S. 76, 105 (1820). If traditional tools of statutory construction do not resolve these cases in Petitioners' favor, it is at least true that Section 924(e)(2)(A)(ii) does not contain "clear and definite" language that would inform ordinary citizens about the scope of ACCA's 15-year mandatory minimum. *Bass*, 404 U.S. at 347-48 (citation omitted).

Section 924(e)(2)(A)(ii) does not explicitly define which federal drug schedule controls the mandatory minimum trigger. And the two conflicting judicial interpretations that have emerged—one emanating from the statutory text, and the other from this Court's interpretation of a different text at issue in *McNeill*—demonstrate at least a "reasonable doubt about the application of a penal law." *Wooden*, 142 S.

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[49] *Id.* at 38.

[50] *Id.* at 41.

Ct. at 1081 (Gorsuch, J., concurring in judgment). In such cases, the proper result is the one that weighs toward liberty. *Id.* Absent clear instruction from Congress—and facing the possibility of sentences that impose an additional 15-year penalty—this Court should not countenance the "harsher alternative." *Bass*, 404 U.S. at 347-48; *see Wiltberger*, 18 U.S. at 105 (reasoning that the Court should not construe a penal statute so as to "enlarge" it).

B. Considerations Of Fair Notice Further Support Applying Current Federal Drug Law

More broadly, lenity seeks to uphold "the Constitution's commitments to due process and the separation of powers." *Wooden*, 142 S. Ct. at 1082 (Gorsuch, J., concurring in the judgment). The approach adopted by the Eleventh Circuit and defended by the government would upend these commitments in two ways. First, it would deny citizens fair warning by placing them in the untenable position of having to divine whether their past conduct would have violated now-superseded federal laws that played no role in their initial convictions. Second, it would require courts to override the considered judgments of federal authorities in the policymaking branches of government.

1. By emphasizing fair notice, lenity "protect[s] 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*, 142 S. Ct. at 1083 (Gorsuch, J., concurring in the judgment).

Fair notice requires sufficient clarity about both prohibited conduct and the applicable penalties. *See Bifulco v. United States*, 447 U.S. 381, 387 (1980) ("[The rule of lenity] applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose."); *see also BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574 (1996). The reading of Section 924(e)(2)(A)(ii) adopted by the Eleventh Circuit and the government fails to provide such notice.

Under that interpretation, an ordinary criminal defendant in Petitioners' position would have to follow a byzantine legal path to discover exposure to a mandatory minimum sentence. The process would begin when the defendant was convicted of the state drug offense. At that time, federal law would have no role to play, so the defendant would likely have no reason to consult it. The defendant would then have to be convicted of two more ACCA predicate offenses, either additional state drug offenses or "violent felon[ies]," 18 U.S.C. § 924(e)(2)(B)—a separate branch of the ACCA doctrine that has spawned its own baffling jurisprudence. *See, e.g.*, *Stokeling v. United States*, 139 S. Ct. 544 (2019); *Mathis v. United States*, 579 U.S. 500 (2016). Again, federal law would play no role in such state convictions, so the defendant would again have no reason to consult it.

After those state convictions, the defendant would commit the federal firearms offense, bringing federal law into play for the first time. Under the position adopted by the Eleventh Circuit and the government, at that time the defendant would have to determine

the range of conduct prohibited by the state drug laws under which he was convicted years earlier and compare it to the federal CSA list that was in force at the time of the state offense. Finding that information, which is frequently buried in the fine print of Code of Federal Regulations tables, can be challenging enough for trained lawyers; it is beyond daunting for ordinary citizens. And the undertaking is all the more difficult given that the CSA list frequently changes and is not easily searchable by date.[51]

Whatever else might be said of that approach, leaving ordinary citizens to untangle this mess does not give "fair warning" "in a language that the common world will understand." *McBoyle*, 283 U.S. at 27; *cf. United States v. Hayes*, 555 U.S. 415, 437 (2009) (Roberts, C.J., dissenting) ("If the rule of lenity means anything, it is that an individual should not go to jail for failing to conduct a 50-state survey or comb through obscure legislative history. Ten years in jail is too much to hinge on the will-o'-the-wisp of statutory meaning pursued by the majority."). Surely Mr. Curry and Mr. Slone had no warning of their fates.

2. Indeed, the paradoxical result of the position adopted by the government and the Eleventh Circuit is that, in cases like these, federal drug law becomes relevant to the ACCA analysis *only* at a time when it

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[51] *See* Office of Federal Register, *21 CFR § 1308,* Timeline Tab, FederalRegister.gov (July 14, 2023, 4:02 PM), https://www.ecfr.gov/current/title-21/chapter-II/part-1308/subject-group-ECFRf62f8e189108c4d (reflecting that federal schedule has been updated 99 times since January 9, 2017, but nothing earlier).

does not criminalize the substance underlying the state conviction. That unusual outcome defies the general rule that the federal law applicable at the time of a federal offense governs. *See, e.g.*, *Dorsey v. United States*, 567 U.S. 260, 272 (2012). And it leaves federal courts to impose some of the harshest mandatory sentences in the federal code despite the fact that the legislative and executive officials responsible for creating and enforcing that code have determined that the relevant conduct *should not even be criminal*—let alone punished severely.

That dynamic undermines "the proper balance between Congress, prosecutors, and courts." *United States v. Kozminski*, 487 U.S. 931, 952 (1988). Assigning penalties for criminal conduct is a power that unquestionably belongs in the legislative branch. *See, e.g.*, *Bass*, 404 U.S. at 348. That is especially true when it comes to mandatory minimum sentences, which by definition remove the discretion typically afforded to courts in sentencing. *See Wooden*, 142 S. Ct. at 1083 (Gorsuch, J., concurring in judgment); *cf. Scott*, 990 F.3d at 135 (Leval, J., dissenting) ("Every criminal case presents a unique circumstance, and what is appropriate for most can nonetheless be extraordinarily unjust for others. This is precisely why harsh *mandatory* sentences inevitably become engines of needless injustice."). Applying the rule of lenity is accordingly appropriate to ensure that courts do note impose "extraordinarily disproportionate severity" in the face of Congress's failure to define the clear penalty. *United States v. Granderson*, 511 U.S. 39, 53 (1994); *see, e.g.*, *United States v. R.L.C.*, 503 U.S. 291,

309 (1992) (Scalia, J., concurring in part and concurring in the judgment) (describing one of "the rule of lenity's . . . purpose[s]" as "assuring that the society, through its representatives, has genuinely called for the punishment to be meted out").[52]

III. The Position Adopted By The Eleventh Circuit And The Government Exacerbates Unwarranted Racial Disparities In Sentencing

As a general matter, Congress has directed federal courts to impose sentences in a manner that "avoid[s] unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). The need for consistent sentences has driven recent sentencing reform and has been a central focus of this

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[52] Moreover, mandatory minimum sentences carry consequences far beyond the prison sentence. Individuals sentenced to lengthy prison terms have a more difficult time reentering society due to access to fewer resources and a weaker support network following release. *See* Andrew D. Leipold, *Is Mass Incarceration Inevitable?*, 56 AM. CRIM. L. REV. 1579, 1586 (2019). Some studies have suggested that this also contributes to recidivism rates. *See* Daniel S. Nagin et al., *Imprisonment and Reoffending*, 38 CRIME & JUST. 115, 121 (2009); RACHEL E. BARKOW, PRISONERS OF POLITICS 44–47 (2019). Mandatory minimums also drain government resources because of the high cost of incarceration. *See* Barbara S. Vincent & Paul J. Hofer, *The Consequences of Mandatory Minimum Prison Terms: A Summary of Recent Findings*, 7 Fed. Sent'g Rep. 33, 36–37 (1994); JONATHAN P. CAULKINS ET AL., RAND DRUG POLICY RESEARCH CTR., ARE MANDATORY MINIMUM DRUG SENTENCES COST-EFFECTIVE? 1 (1997).

Court's analysis when it has considered challenges to the federal sentencing regime. *See Freeman v. United States*, 564 U.S. 522, 533 (2011) ("The [Sentencing Reform] Act aims to create a comprehensive sentencing scheme in which those who commit crimes of similar severity under similar conditions receive similar sentences."); *United States v. Booker*, 543 U.S. 220, 253–54 (2005) ("Congress' basic goal in passing the Sentencing Act was to move the sentencing system in the direction of increased uniformity.").

The "serious drug offense" provision at issue in these cases originated in the Anti-Drug Abuse Act of 1986, in which Congress also created the crack/powder-cocaine disparity that Congress, the Sentencing Commission, and "the public" later "c[a]me to understand . . . as reflecting unjustified race-based differences." *Dorsey*, 567 U.S. at 266–68. The interpretation adopted by the Eleventh Circuit and the government in these cases would exacerbate those disparities.

In particular, it would disproportionately burden Black and Hispanic men, who are statistically more likely to be convicted for predicate offenses involving possessing or distributing federally controlled substances,[53] and who face, on average, sentences 19.1%

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[53] DOJ, FEDERAL JUSTICE STATISTICS, 2021 17 (Dec. 2022); M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1336 (2014) (citing statistics explaining that Black men are more likely to face charges with a mandatory minimum sentence than White men); USSC, MANDATORY MINIMUM PENALTIES FOR FIREARMS OFFENSES IN THE FEDERAL

longer than corresponding offenses for White defendants.[54] Specifically, Black defendants are 20% more likely to be convicted of, and imprisoned for, drug offenses than White defendants.[55] For example, Black individuals are far more likely than White individuals to be arrested and convicted on charges involving crack cocaine[56]—which is (even after recent legislative reforms) punished 18 times more harshly than

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CRIMINAL JUSTICE SYSTEM 6 (Mar. 2018) (citing statistics explaining that Black defendants are convicted of firearms offenses carrying mandatory minimums more "than any other racial group" and "generally received longer average sentences" for those offenses than other racial groups); Joseph J. Palamar, et al., *Powder Cocaine and Crack Use in the United States: An Examination of Risk for Arrest and Socioeconomic Disparities in Use*, 149 DRUG AND ALCOHOL DEPENDENCE 108, 110–11 (2015) (finding that crack users, who are far more likely to be Black, were more likely to be arrested and to be arrested multiple times than cocaine users).

[54] USSC, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 BOOKER REPORT (Nov. 2017).

[55] USSC, FIFTEEN YEARS OF GUIDELINES SENTENCING 122 (Nov. 2004).

[56] *See Terry v. United States*, 141 S. Ct. 1858, 1865 (2021) (Sotomayor, J. concurring) (observing that Black individuals account for 80 to 90 percent of individuals convicted of crack offenses).

powder,[57] despite the identical effects.[58] Moreover, "a Black person is 3.64 times more likely to be arrested for marijuana possession than a [W]hite person, even though Black and [W]hite people use marijuana at similar rates."[59] And Hispanic defendants represent

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[57] For the same recommended sentences to attach, the Fair Sentencing Act of 2010 requires possession of eighteen times more powder cocaine than crack cocaine. Before 2001, an offender needed to carry 100 times more powder cocaine than crack to face the same sentence as a crack offender. Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2, 124 Stat. 2372, 2372 (2010). The sponsors of the Fair Sentencing Act believed the law would decrease racial disparities in sentencing. Letter from Senators Dick Durbin and Patrick J. Leahy to Attorney General Eric Holder (Nov. 17, 2010), https://tinyurl.com/DurbinLeahytoHolder (last accessed July 16, 2023). The USSC identified the prior 100 to 1 crack-to-powder ratio as "a primary cause of the growing disparity between sentences for Black and White federal defendants." USSC, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 163 (Feb. 1995).

[58] USSC, REPORT ON COCAINE AND FEDERAL SENTENCING POLICY: CHAPTER 5 99 (available at https://www.ussc.gov/report-cocaine-and-federal-sentencing-policy-5).

[59] AMERICAN CIVIL LIBERTIES UNION, A TALE OF TWO COUNTRIES: RACIALLY TARGETED ARRESTS IN THE ERA OF MARIJUANA REFORM 5, 7 (Apr. 2020). In this report, the ACLU noted that the ethnicity variables available in Uniform Crime Reporting data codebooks, which ostensibly distinguish between Hispanic and non-Hispanic individuals, are so frequently miscoded that they were unable to employ them for their analysis. *Id.* at 19.

the largest proportion of federal drug convictions (43.8%), followed by Black defendants (27%).[60] All of these convictions can subject a defendant to ACCA's mandatory minimum.

Black and Hispanic defendants represent a proportionately larger share of the drug-only offenses or "mixed" cause (that is, some combination of violent and non-violent behavior) so-called "career offenders."[61] Black defendants make up 57.5% of the drug-only category and 63.2% of the "mixed" category (and the vast majority of "mixed" predicates trigger ACCA enhancements for controlled substance predicates, too).[62] White defendants are comparatively more likely to have violent felonies as predicates, which

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"Because UCR data does not identify Latinx populations as a distinct racial group, potential disparities in arrest rates for Latinx populations cannot be examined. Arrests of Latinx individuals coded as [W]hite in the data likely artificially inflate the number of [W]hite arrests, leading to an underestimate of the disparity between Black and White arrest rates." *Id.* at 9.

[60] USSC, FISCAL YEAR 2020 OVERVIEW OF FEDERAL CRIMINAL CASES 3, 14 (April 2021).

[61] USSC, CAREER OFFENDER SENTENCING ENHANCEMENTS, *supra* note 33, at 29–30.

[62] *Id.* A comprehensive study of the recidivism of ACCA offenders similarly found that, of 884 ACCA offenders released between 2009 and 2011, Black men comprised 76.5% of the drug-only group and 56.9% of the mixed group. Barrow, *supra* note 26, at 437.

"correlate[] with a more serious and extensive criminal history score overall."[63] White defendants make up 26.3% of the violent-only category, but 21.7% of the drug-only category, and 19.9% of the mixed category.[64]

Current and historical federal prison analyses also show the racial disparity for those who are currently serving ACCA sentences. Consider the following statistics: Black men comprised approximately 21% of federal prisoners,[65] but simultaneously accounted for over 73% of defendants sentenced under ACCA.[66] This is an increase of nearly 10 percentage points over the past decade.[67] Black defendants also make up a far greater proportion of ACCA convictions than they do convictions for all offenses carrying a mandatory penalty (35.5% in 2016).[68] The proportion of Hispanic defendants who account for convictions

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[63] USSC, CAREER OFFENDER SENTENCING ENHANCEMENTS, *supra* note 33, at 29–30.

[64] *Id.* Similarly, 17.5% of Hispanic offenders carried a predicate solely based upon controlled substances, while 15.1% carried the mixed category. *Id.*

[65] DOJ, FEDERAL JUSTICE STATISTICS 2020 9 (May 2022). During this period, the numbers of White and Black defendants remained constant. USSC, FEDERAL ARMED CAREER CRIMINALS: PREVALENCE, PATTERNS, AND PATHWAYS 22 (2018).

[66] USSC, FEDERAL ARMED CAREER CRIMINALS: PREVALENCE, PATTERNS, AND PATHWAYS 22 (Mar. 2021).

[67] *Id.*

[68] USSC, MANDATORY MINIMUM PENALTIES FOR FIREARMS OFFENSES, *supra* note 53, 41.

under ACCA also doubled since 2010, from 5.3% to 9.6%.[69] In contrast, the proportion of White defendants decreased *by half* between 2010 and 2019—from 29.4% to 15.7%.[70] This proportion of ACCA convictions is far less than the proportion White defendants represent for all offenses with mandatory minimums (31.1%).[71]

* * *

ACCA "looks to past crimes" to determine "the kind or degree of danger the offender would pose were he to possess a gun." *Begay v. United States*, 553 U.S. 137, 146 (2008). But when the federal government has determined that a past conviction no longer reflects criminal conduct for purposes of federal law, relying on it to determine a defendant's purported dangerousness as a matter of a federal law makes no sense under any principle of statutory interpretation. Doing so also conflicts with settled principles of lenity and notice, exacerbates unwarranted racial disparities in sentencing, and inflicts tremendous and unjustified costs on individual men and women and their families. And as shown by the illustrative cases of Mr. Curry and Mr. Slone, the impact—severe sentences that upend the lives of defendants and their families—is extraordinarily unjust. This Court should follow the majority of courts of appeals that

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[69] USSC, FEDERAL ARMED CAREER CRIMINALS: PREVALENCE, PATTERNS, AND PATHWAYS 2021, *supra* note 65, at 22 n.52.

[70] *Id.*

[71] USSC, MANDATORY MINIMUM PENALTIES FOR FIREARMS OFFENSES *supra* note 33, at 40–41.

have addressed this question, and reject the position of the Eleventh Circuit and the federal government.

CONCLUSION

The Eleventh Circuit's judgment should be reversed. The Third Circuit's judgment should be affirmed on the same basis, or in the alternative on the ground articulated by that court.

Respectfully submitted.

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