Nos. 22-6389 and 22-6640

In the Supreme Court of the United States

JUSTIN RASHAAD BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

EUGENE JACKSON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
NICOLE M. ARGENTIERI
Acting Assistant Attorney General
ERIC J. FEIGIN
Deputy Solicitor General
AUSTIN L. RAYNOR
Assistant to the Solicitor General
DAVID M. LIEBERMAN
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the classification of a prior state conviction as a "serious drug offense" under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(A)(ii), depends on the federal controlled-substance schedules in effect at the time of the defendant's prior state crime, the time of the federal offense for which he is being sentenced, or the time of his federal sentencing.

TABLE OF CONTENTS

Page

Opinions below ... 1
Jurisdiction ... 1
Statutory provisions involved ... 2
Statement:
- A. Legal background ... 3
- B. Procedural background ... 6
  - 1. Brown ... 6
  - 2. Jackson ... 10

Summary of argument ... 13
Argument:

The classification of a prior state drug offense as an ACCA predicate depends on the federal controlled-substance schedules in effect at the time of that prior state crime ... 17
- A. The ACCA's text points to the time of the state crime ... 18
- B. The statutory context confirms the text's backward-looking focus ... 22
  - 1. The time-of-state-crime interpretation treats state convictions the same as corresponding federal convictions ... 22
  - 2. The time-of-state-crime interpretation is consistent with the statutory limitations on the declassification of prior convictions ... 25
  - 3. Petitioners' approaches lack contextual support ... 26
- C. This Court's precedents confirm that Section 924(e)(2)(a)(ii) requires a time-of-state-crime approach ... 29
  - 1. The time-of-state-crime interpretation of Section 924(e)(2)(A)(ii) in *McNeill* v. *United States* applies equally here ... 29

Table of Contents—Continued Page

2. The time-of-state-crime interpretation of the similarly-worded immigration provision in *Mellouli* v. *Lynch* further supports a corresponding interpretation here 33
D. A time-of-state-crime interpretation ensures that Section 924(e)(2)(a)(ii) properly accounts for a defendant's culpability and provides adequate notice of the consequences of a state conviction......... 36
E. Petitioners' remaining arguments lack merit............. 40
Conclusion 44
Appendix — Statutory provisions... 1a

TABLE OF AUTHORITIES

Cases: Page

Begay v. *United States*, 553 U.S. 137 (2008), abrogated on other grounds by *Johnson* v. *United States*, 576 U.S. 591 (2015).................................... 36
Borden v. *United States*, 141 S. Ct. 1817 (2021)................. 33
Caraco Pharm. Labs., Ltd. v. *Novo Nordisk A/S*, 566 U.S. 399 (2012).. 21
Custis v. *United States*, 511 U.S. 485 (1994)................. 15, 25
Dahda v. *United States*, 138 S. Ct. 1491 (2018).................. 18
Dorsey v. *United States*, 567 U.S. 260 (2012) 43
INS v. *St. Cyr*, 533 U.S. 289 (2001)...................................... 39
Jam v. *International Fin. Corp.*, 139 S. Ct. 759 (2019) 41, 42
Johnson v. *United States*, 576 U.S. 591 (2015)................... 36
Kawashima v. *Holder*, 565 U.S. 478 (2012) 33
Leocal v. *Ashcroft*, 543 U.S. 1 (2004) 33, 43
Mathis v. *United States*, 579 U.S. 500 (2016) 6

Cases—Continued: Page

McNeill v. *United States*,
563 U.S. 816 (2011)................. 9, 10, 12, 14-16, 18-22, 26, 27, 29-33, 37, 39, 41, 44

Mellouli v. *Lynch*,
575 U.S. 798 (2015)................................15, 16, 29, 34, 35, 37

Moncrieffe v. *Holder*, 569 U.S. 184 (2013) 33

Peugh v. *United States*, 569 U.S. 530 (2013)....................... 39

Quarles v. *United States*, 139 S. Ct. 1872 (2019).................. 6

Robinson v. *Shell Oil Co.*, 519 U.S. 337 (1997) 18

Shular v. *United States*, 140 S. Ct. 779
(2020)...6, 20, 23, 24, 33, 43

Taylor v. *United States*, 495 U.S. 575 (1990).................... 3, 6

United States v. *Abdulaziz*,
998 F.3d 519 (1st Cir. 2021) 34

United States v. *Castleman*, 572 U.S. 157 (2014)............... 43

United States v. *Clark*, 46 F.4th 404 (6th Cir. 2022),
petition for cert. pending, No. 22-6881
(filed Feb. 24, 2023) 37

United States v. *New York Tel. Co.*,
434 U.S. 159 (1977)... 18

United States v. *Rodriquez*, 553 U.S. 377 (2008).......... 39, 40

Village of Hoffman Estates v. *The Flipside,
Hoffman Estates, Inc.*, 455 U.S. 489 (1982) 40

Warden, Lewisburg Penitentiary v. *Marrero*,
417 U.S. 653 (1974)... 41

Statutes and regulations:

Agricultural Improvement Act of 2018, Pub. L. No.
115-334, 132 Stat.:

§ 10113, 132 Stat. 4908 8

§ 12619(a), 132 Stat. 5018.. 8

Statutes and regulations—Continued: Page

Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, Tit. I, 100 Stat. 3207:

Subtit. I, § 1402(b)(A)(ii), 100 Stat. 3207-39 to 3207-40 33

Subtit. M, § 1751(b), 100 Stat. 3207-47 33

Armed Career Criminal Act of 1984, Pub. L. No. 98-473, Tit. II, ch. 18, 98 Stat. 2185 (18 U.S.C. 924(e)) 3

18 U.S.C. 924(e) 4, 2a

18 U.S.C. 924(e)(1) 4, 10, 11, 14, 16, 18-20, 24, 25, 32, 2a

18 U.S.C. 924(e)(2)(A) 2, 5, 22, 24, 25, 32, 3a

18 U.S.C. 924(e)(2)(A)(i) 12-14, 21, 22, 24, 3a

18 U.S.C. 924(e)(2)(A)(i)-(ii) 24, 3a

18 U.S.C. 924(e)(2)(A)(ii) (2012) 40

18 U.S.C. 924(e)(2)(A)(ii) 5, 6, 9, 10, 13-16, 18-20, 22, 24-27, 29-34, 36, 40-42, 3a

Bipartisan Safer Communities Act, Pub. L. No. 117-159, Div. A, Tit. II, § 12004, 136 Stat. 1329 (18 U.S.C. 924(a)(8) (Supp. IV 2022)) 4

Career Criminals Amendment Act of 1986, Pub. L. No. 99-570; Tit. I, Subtit. I, § 1402, 100 Stat. 3207-39:

§ 1402(a), 100 Stat. 3207-39 4

§ 1402(b)(A), 100 Stat. 3207-39 to 3207-40 (1986) 5, 23

§ 1402(b)(A)(i), 100 Stat. 3207-39 28

§ 1402(b)(A)(ii), 100 Stat. 3207-39 to 3207-40 33

Controlled Substances Act, Pub. L. No. 91-513, Tit. II, 84 Stat. 1242 28

Statutes and regulations—Continued: Page

Controlled Substances Import and Export Act,
Pub. L. No. 91-513, Tit. III, 84 Stat. 1285 28

Firearms Owners' Protection Act,
Pub. L. No. 99-308, § 104(a)(4) and (b),
100 Stat. 458-459 4

Immigration and Nationality Act,
8 U.S.C. 1101 *et seq.* 33

8 U.S.C. 1227(a)(2)(B)(i) 16, 34

Maritime Drug Law Enforcement Act,
Pub. L. No. 96-350, §§ 1, 3, 94 Stat. 1159-1160 28

Synthetic Drug Abuse Prevention Act of 2012,
Pub. L. No. 112-144, Tit. XI, Subtit. D, § 1152(a),
126 Stat. 1130 38

1 U.S.C. 109 9

18 U.S.C. 921(a)(20) 15, 22, 25, 26

18 U.S.C. 922(g) 3, 4, 6, 7, 26, 40, 1a

18 U.S.C. 922(g)(1) 10, 1a

18 U.S.C. 922(j) 7

18 U.S.C. 924(a)(2) (2012) 4

18 U.S.C. 924(a)(2) (2018) 26

18 U.S.C. 924(c)(1)(A) 7

18 U.S.C. 924(g)(3) 27

18 U.S.C. App. 1202(a) (Supp. III 1985) 4

18 U.S.C. 3553(a)(4)(A)(ii) 44

18 U.S.C. 3559(c) 26, 27

18 U.S.C. 3559(c)(2)(H)(ii) 26

21 U.S.C. 802 5

21 U.S.C. 811-812 5

21 U.S.C. 811(a) 39, 41, 42

21 U.S.C. 812(a) 42

21 U.S.C. 841(a)(1) 3, 7

21 U.S.C. 841(b)(1)(C) 7

Regulations—Continued: Page

21 C.F.R. Pt. 1308 ... 41

Section 1308.01 ... 39

Miscellaneous:

82 Fed. Reg. 12,171 (Mar. 1, 2017) ... 38

H.R. Rep. No. 1444, 91st Cong., 2d Sess. Pt. 1 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4566 ... 28

H.R. Rep. No. 1073, 98th Cong., 2d Sess. (1984) ... 3

Lisa N. Sacco, Cong. Research Serv., *Drug Enforcement in the United States: History, Policy, and Trends* (2014) ... 28

Schedules of Controlled Substances: Removal of [^{123}I]Ioflupane from Schedule II of the Controlled Substances Act, 80 Fed. Reg. 54,715 (Sept. 11, 2015) ... 11

The American Heritage Dictionary of the English Language (3d ed. 1992) ... 20

The Oxford English Dictionary (2d ed. 1989) ... 20

Webster's Third New International Dictionary (1986) ... 20

In the Supreme Court of the United States

No. 22-6389

JUSTIN RASHAAD BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 22-6640

EUGENE JACKSON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals in *Brown* v. *United States*, No. 22-6389, is reported at 47 F.4th 147 (J.A. 1-17). The opinion of the court of appeals in *Jackson* v. *United States*, No. 22-6640, is reported at 55 F.4th 846 (Pet. App. 1a-35a). A prior, vacated opinion of the court of appeals in *Jackson* is reported at 36 F.4th 1294 (Pet. App. 120a-142a).

JURISDICTION

The judgment of the court of appeals in *Brown* was entered on August 29, 2022. On November 22, 2022,

Justice Alito extended the time within which to file a petition for a writ of certiorari to and including December 28, 2022. The petition was filed on December 21, 2022. The petition for a writ of certiorari was granted on May 15, 2023. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

The judgment of the court of appeals in *Jackson* was entered on December 13, 2022. The petition for a writ of certiorari was filed on January 24, 2023. The petition for a writ of certiorari was granted on May 15, 2023. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Armed Career Criminal Act of 1984 defines a "'serious drug offense'" as:

> (i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or
>
> (ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law.

18 U.S.C. 924(e)(2)(A).

Other pertinent statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-4a.

STATEMENT

Following a guilty plea in the United States District Court for the Middle District of Pennsylvania, petitioner Justin Brown was convicted on one count of distributing and possessing with intent to distribute cocaine base, in violation of 21 U.S.C. 841(a)(1), and one count of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g). J.A. 18. He was sentenced to 180 months of imprisonment, to be followed by six years of supervised release. J.A. 20-21. The court of appeals affirmed. J.A. 1-17.

Following a guilty plea in the United States District Court for the Southern District of Florida, petitioner Eugene Jackson was convicted on one count of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g). Pet. App. 143a. He was sentenced to 180 months of imprisonment, to be followed by three years of supervised release. *Id.* at 144a-145a. The court of appeals initially vacated Jackson's sentence and remanded for resentencing, *id.* at 120a-142a, but subsequently superseded that decision and affirmed, *id.* at 1a-35a.

A. Legal Background

1. Congress enacted the Armed Career Criminal Act of 1984 (ACCA), Pub. L. No. 98-473, Tit. II, ch. 18, 98 Stat. 2185 (18 U.S.C. 924(e)), to "supplement the States' law enforcement efforts against 'career' criminals," *Taylor* v. *United States*, 495 U.S. 575, 581 (1990) (quoting H.R. Rep. No. 1073, 98th Cong., 2d Sess. 1 (1984)). As originally enacted, the ACCA prescribed a 15-year minimum sentence for any person who received, possessed, or transported a firearm in com-

merce and who "ha[d] three previous" felony convictions by any court "for robbery or burglary, or both." 18 U.S.C. App. 1202(a) (Supp. III 1985).

In 1986, Congress amended the ACCA twice. First, Congress moved the ACCA to its current location in 18 U.S.C. 924(e) and replaced the principal firearms offense with a cross-reference to 18 U.S.C. 922(g). Firearms Owners' Protection Act, Pub. L. No. 99-308, § 104(a)(4) and (b), 100 Stat. 458-459. Section 922(g) prohibits certain persons, including felons, from shipping, transporting, possessing, or receiving any firearm or ammunition with a specified connection to interstate commerce. 18 U.S.C. 922(g). Until recently, the default maximum term of imprisonment for a violation of Section 922(g), without an ACCA enhancement, was ten years. See 18 U.S.C. 924(a)(2) (2012).[1] The ACCA, in turn, specified a sentence of at least 15 years of imprisonment for violations of Section 922(g) by defendants with three prior qualifying convictions. See 18 U.S.C. 924(e)(1).

Second, Congress substantially expanded the range of prior convictions that could serve as predicates for an ACCA enhancement. See Career Criminals Amendment Act of 1986 (1986 Act), Pub. L. No. 99-570, Tit. I, Subtit. I, § 1402, 100 Stat. 3207-39. Congress replaced the ACCA's original predicate offenses (robbery and burglary) with "violent felony" and "serious drug offense," which remain the two ACCA predicates today. *Id.* § 1402(a), 100 Stat. 3207-39; 18 U.S.C. 924(e). Con-

---

[1] For Section 922(g) offenses committed after June 25, 2022, the default maximum term of imprisonment is 15 years. See Bipartisan Safer Communities Act, Pub. L. No. 117-159, Div. A, Tit. II, § 12004(c), 136 Stat. 1329 (18 U.S.C. 924(a)(8) (Supp. IV 2022)).

gress also supplied a definition of "'serious drug offense,'" which has not changed in any material respect, that includes:

> (i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or
>
> (ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law.

18 U.S.C. 924(e)(2)(A); see 1986 Act, Tit. I, Subtit. I, § 1402(b)(A), 100 Stat. 3207-39 to 3207-40.

The ACCA's definition of "serious drug offense" as it pertains to state-law offenses—codified in 18 U.S.C. 924(e)(2)(A)(ii)—refers to the definition of "controlled substance" in the Controlled Substances Act (CSA). The CSA, in turn, defines "'controlled substance'" to mean "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. Congress specified the substances included on the original schedules, but delegated authority to the Attorney General to add, remove, and reschedule controlled substances as appropriate. See 21 U.S.C. 811-812.

2. To determine whether a defendant's prior state conviction qualifies as a "serious drug offense," 18

U.S.C. 924(e)(2)(A), courts apply a "'categorical approach,'" examining "whether the state offense's elements 'necessarily entail one of the types of conduct' identified in § 924(e)(2)(A)(ii)." *Shular* v. *United States*, 140 S. Ct. 779, 784 (2020) (citation and emphasis omitted). The inquiry "look[s] 'only to the statutory definitions of the prior offenses,'" *id*. at 783 (quoting *Taylor*, 495 U.S. at 600), not "the particular facts underlying the prior convictions" or "the label a State assigns to the crimes," *ibid*. (quoting *Mathis* v. *United States*, 579 U.S. 500, 509-510 (2016)) (brackets omitted). The prior state offense satisfies the relevant ACCA definition "so long as the state law in question 'substantially corresponds' to (or is narrower than)" the category referenced in the ACCA. *Quarles* v. *United States*, 139 S. Ct. 1872, 1880 (2019) (quoting *Taylor*, 495 U.S. at 602).

B. Procedural Background

Each petitioner pleaded guilty in separate proceedings to possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g). Each district court imposed an ACCA sentence. And each sentence was based, in part, on the court's determination that the relevant petitioner had prior state convictions for "serious drug offense[s]" under Section 924(e)(2)(A)(ii).

1. Brown

a. In 2016, police officers in Pennsylvania conducted a series of controlled cocaine purchases from Brown. J.A. 3. Officers then performed a warrant-authorized search of Brown's apartment, where they discovered cocaine, scales, and money. *Ibid*. Officers also found a loaded .38-caliber revolver tucked under the couch cushion where Brown had been sitting at the time of the search. *Ibid*.

A federal grand jury in the Middle District of Pennsylvania charged Brown with seven counts of distributing cocaine base, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); two counts of distributing and possessing with intent to distribute cocaine base, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); one count of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g); one count of possessing a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A); and one count of possessing a stolen firearm, in violation of 18 U.S.C. 922(j). Indictment 1-12.

Brown agreed to plead guilty to one of the drug counts and the felon-in-possession count, in return for the government dismissing the remaining charges. D. Ct. Doc. 66, at 1-2 (May 10, 2019). The district court accepted Brown's guilty plea. D. Ct. Doc. 72 (July 8, 2019).

b. The Probation Office determined that Brown should be sentenced under the ACCA. Presentence Investigation Report (PSR) ¶ 24. The Probation Office listed five prior Pennsylvania convictions as ACCA predicate offenses: one in 2008 involving cocaine, and four between 2009 and 2014 involving marijuana. *Id.* ¶¶ 29-31, 33, 35; see J.A. 3.

Brown objected to the Probation Office's determination, arguing that the state laws underlying those prior state drug crimes had applied to substances not controlled under the CSA. D. Ct. Doc. 106, at 5-14 (Mar. 5, 2021). Brown did not dispute that the state definition of marijuana was a categorical match with the federal definition both at the time of his prior state crimes and at the time of his federal firearms offense. He noted, however, that after both his state and federal offenses were

committed, but before his federal sentencing occurred, Congress had removed hemp from the federal definition of marijuana. *Id.* at 6-7; see J.A. 6; see also Agricultural Improvement Act of 2018, Pub. L. No. 115-334, §§ 10113, 12619(a), 132 Stat. 4908, 5018. And he urged the sentencing court to refer to those recently modified schedules when classifying his prior state crimes. D. Ct. Doc. 106, at 6-7.

The district court declined to do so. D. Ct. Doc. 120, at 41 (July 27, 2021). It instead imposed a 180-month term of imprisonment under the ACCA for the felon-in-possession count and a concurrent term of 180 months for the drug count. *Ibid.*; J.A. 20.

c. The Third Circuit affirmed. J.A. 1-17.

The Third Circuit observed that "the federal definition" of marijuana "was identical to [Pennsylvania's] in every material respect" until 2018, when Congress revised the federal definition to "distinguish[] between illegal marijuana and legal hemp." J.A. 6.[2] The court also noted the absence of any dispute that, "without the changes to federal law introduced" in 2018, Brown's "prior state convictions would be ACCA predicates." J.A. 7. But it further noted that the parties differed on "the proper comparison time to determine whether state and federal law are a categorical match": Brown "look[ed] to the federal schedule at the time of federal sentencing," whereas the government focused on "the

[2] The Third Circuit suggested in dicta that present Pennsylvania law is broader than present federal law. J.A. 6 & n.2. But the scope of present state law (as opposed to state law at the time of the prior offense) is not relevant to the question presented, and this Court need not address it.

federal schedule at the time of commission of the federal offense." *Ibid.*[3]

Presented with those two options, the Third Circuit chose a time-of-federal-offense approach over a time-of-federal-sentencing approach. J.A. 12, 16-17. The court found Brown's position foreclosed by the federal saving statute, which provides that the "repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide." J.A. 8 (quoting 1 U.S.C. 109). The saving statute "mandates that a court apply the penalties in place at the time the crime was committed unless a new law expressly provides otherwise." *Ibid.* (brackets and citation omitted). The court reasoned that the "saving statute controls here" because Brown had " 'incurred' ACCA penalties" for purposes of the saving statute "at the time he violated § 922(g)." J.A. 8-12. The court criticized the time-of-federal-sentencing rule as inviting "a significant and arbitrary disparity" in penalties based on the date of the defendant's sentencing. J.A. 11.

The Third Circuit additionally observed that this Court's decision in *McNeill* v. *United States*, 563 U.S. 816 (2011), had examined Section 924(e)(2)(A)(ii) and held that, to determine whether " 'a maximum term of imprisonment of ten years or more is prescribed by law' " for a prior state offense, the "plain text of ACCA

---

[3] In the district court, the government had relied principally on the federal schedules in effect at the time of Brown's prior state offenses. See J.A. 7 n.3. In the court of appeals, however, the government saw "no need to address" that particular argument, given that Brown could not prevail even under a time-of-federal-offense approach. Gov't C.A. Br. 19 n.3.

requires a federal sentencing court to consult the maximum sentence applicable to a defendant's previous drug offense at the time of his conviction for that offense." *Id.* at 820 (quoting 18 U.S.C. 924(e)(2)(A)(ii)). *McNeill* had explained that the ACCA "is concerned with convictions that have already occurred" and that the "only way to answer this backward-looking question is to consult the law that applied at the time of that conviction." *Ibid.* In the court of appeals' view, however, *McNeill* did not preclude a time-of-federal-offense approach to the cross-reference to the federal drug schedules. J.A. 14-15.

2. Jackson

a. In September 2017, federal and local law-enforcement officers arrived at a Miami food market to execute a search warrant. PSR ¶ 5. Jackson fled on foot when a marked police vehicle approached. *Ibid.* As officers gave chase, Jackson reached into his waistband, removed a loaded .45-caliber firearm, and dropped it to the ground. *Ibid.* Jackson then jumped over a chain-link fence, dropping a sandal in the process, and escaped. *Ibid.* Following an investigation, Jackson was located and arrested. PSR ¶¶ 6-9.

A federal grand jury in the Southern District of Florida charged Jackson with one count of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(e)(1). Indictment 1. Jackson pleaded guilty pursuant to a plea agreement. D. Ct. Doc. 54, at 1 (July 22, 2021).

b. The Probation Office determined that Jackson should be sentenced under the ACCA. PSR ¶ 19. The Probation Office listed five prior Florida convictions as ACCA predicates: a 1998 conviction for battery of a

law-enforcement officer; a 1998 cocaine-related conviction; a 2003 conviction for armed robbery; a 2004 cocaine-related conviction; and a dual 2012 conviction, for aggravated assault with a deadly weapon and aggravated battery with a deadly weapon, arising out of the same incident. PSR ¶¶ 25, 26, 38, 39, 48; see Pet. App. 123a; see also 18 U.S.C. 924(e)(1) (requiring that ACCA predicates be "committed on occasions different from one another").

The government later conceded that the 1998 battery conviction did not qualify as an ACCA predicate. Pet. App. 125a. Jackson, for his part, acknowledged that the 2003 armed-robbery conviction and the 2012 aggravated-battery conviction qualified as ACCA predicates, but argued that neither of his cocaine-related convictions qualified as the requisite third offense. *Id.* at 123a-124a. He noted that while the Florida and federal drug schedules had both included [^{123}I]ioflupane within the definition of cocaine at the time of his state convictions, it had been removed from the federal schedule by the time of his federal firearm offense. Pet. C.A. Br. 13-14; see Pet. App. 124a, 131a-132a; see also *Schedules of Controlled Substances: Removal of [^{123}I]Ioflupane from Schedule II of the Controlled Substances Act*, 80 Fed. Reg. 54,715 (Sept. 11, 2015).

Jackson argued that the ACCA requires looking to the schedules at that later time, when his federal possession offense occurred, which would render his state cocaine offenses too broad to qualify as serious drug offenses. D. Ct. Doc. 60, at 6-14 (Sept. 22, 2021). The district court rejected Jackson's argument, D. Ct. Doc. 73, at 23-26 (Oct. 28, 2021), and imposed a 180-month term of imprisonment under the ACCA for his felon-in-possession crime, Pet. App. 3a-4a.

c. The Eleventh Circuit panel at first adopted Jackson's approach and remanded for resentencing. Pet. App. 120a-142a. But it subsequently *sua sponte* vacated that initial disposition and directed the parties to file supplemental briefs discussing the significance of this Court's decision in *McNeill*. See 9/8/22 C.A. Order. After considering that supplemental briefing, the court of appeals issued a revised decision affirming the district court's judgment. Pet. App. 1a-35a.

In light of *McNeill*, the Eleventh Circuit "read ACCA's definition of a 'serious drug offense' under state law to incorporate the version of the federal controlled-substances schedules in effect when Jackson was convicted of his prior state drug offenses." Pet. App. 16a. The court observed that "*McNeill* broadly construes the term 'previous convictions' to require a 'backward-looking' inquiry." *Id.* at 20a (quoting *McNeill*, 563 U.S. at 819-820). And the court noted that consulting a drug schedule issued after the time of the state crime would create circumstances where "the state drug convictions would be 'erased' or 'disappear' for ACCA purposes," which it recognized as "an impermissible result" under *McNeill*. *Id.* at 22a (brackets omitted).

The Eleventh Circuit also observed that the definition of "serious drug offense" applicable to prior federal convictions, which is adjacent to the state-conviction definition, includes any federal "offense under the Controlled Substances Act . . . for which a maximum term of imprisonment of ten years or more is prescribed by law." Pet. App. 23a (quoting 18 U.S.C. 924(e)(2)(A)(i)). The court explained that this definition "incorporate[s] the version of the Controlled Substances Act (and thus the federal controlled-substances schedules) in effect at

the time the defendant's prior federal drug conviction occurred." *Ibid.* The court found it unlikely that "Congress would require the counting of prior federal drug convictions as 'serious drug offenses' while at the same time not counting equivalent prior state drug convictions." *Id.* at 25a (brackets omitted). And it explained that its approach does not create fair-notice concerns because it "puts a defendant on notice when he is convicted of a drug offense for conduct involving a controlled substance that at that time appears on the federal drug schedules that his conviction qualifies as a 'serious drug offense' under ACCA." *Id.* at 27a-28a.

Judge Rosenbaum, who authored the court's opinion, also issued a concurring opinion. Pet. App. 32a-35a. In her view, it would be easier for an "ordinary citizen" to consult "the version of the controlled-substances list in effect when [he] commits his federal firearm offense," and she "urge[d] Congress to consider amending the statute to incorporate" that alternative approach. *Id.* at 33a, 35a.

SUMMARY OF ARGUMENT

The ACCA requires courts to consult the federal drug schedules in effect at the time of a defendant's prior state crime to determine whether that crime qualifies as a "serious drug offense," 18 U.S.C. 924(e)(2)(A)(ii). That interpretation is supported by the statutory text, context, this Court's precedent, and considerations of culpability and fair notice. Petitioners' interpretations—which would look to the federal schedules in effect at the time of either the federal offense or federal sentencing—are mistaken.

A. The ACCA's plain text directs courts to consult the schedules at the time of the state predicate. The ACCA prescribes an enhanced sentence for defendants

with "three previous convictions" for a "serious drug offense," 18 U.S.C. 924(e)(1), which the statute defines to include "an offense under State law, involving * * * a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law," 18 U.S.C. 924(e)(2)(A)(ii).

As this Court observed in *McNeill* v. *United States*, 563 U.S. 816 (2011), the ACCA's text "is concerned with convictions that have already occurred." *Id.* at 820. And "[t]he only way to answer th[e] backward-looking question" of "whether a 'previous convictio[n]' was for a serious drug offense" is "to consult the law that applied at the time of that conviction." *Ibid.* (brackets altered). The ACCA's definition of a serious drug offense as a prior offense "involving" certain activities, 18 U.S.C. 924(e)(2)(A)(ii), confirms that the attributes of a prior offense—including whether it involved a substance listed in the CSA—are fixed in time.

B. Two aspects of the statutory context confirm the time-of-state-crime approach.

First, the ACCA encompasses not only state-law predicates, but also "offense[s] under the Controlled Substances Act (21 U.S.C. 801 et seq.)" and other federal statutes. 18 U.S.C. 924(e)(2)(A)(i). By its plain terms, that parallel subclause refers solely to the historical fact of a conviction under the CSA. A federal predicate would thus be unaffected by subsequent amendments to the federal schedules. The subclause addressed to state-law predicates should be interpreted consistently, as it would make little sense to disregard state convictions while counting analogous federal convictions.

Second, a prior conviction will not qualify as an ACCA predicate if it has been expunged, 18 U.S.C. 921(a)(20); the "clear negative implication" is "that courts *may* count a conviction that has *not* been set aside," *Custis* v. *United States*, 511 U.S. 485, 491 (1994). "Congress based ACCA's sentencing enhancement on prior convictions and could not have expected courts to treat those convictions as if they had simply disappeared" based on subsequent changes in the federal schedules. *McNeill*, 563 U.S. at 823.

The contextual cues cited by petitioners do not support their approaches. Petitioners point to unrelated provisions that they claim shed light on the issue, but all are materially different. They also observe that, under the government's reading, no state drug conviction from before 1970, when the CSA was enacted, would qualify as an ACCA predicate. But that result is unsurprising, as the same is true for federal predicates under subclause (A)(i).

C. This Court's decisions in *McNeill* and *Mellouli* v. *Lynch*, 575 U.S. 798 (2015), each adopted a time-of-state-crime approach and support the same rule here.

McNeill held that, in assessing whether "a maximum term of imprisonment of ten years or more is prescribed by law," 18 U.S.C. 924(e)(2)(A)(ii), courts should "consult the maximum sentence applicable to a defendant's previous drug offense at the time of his conviction for that offense," 563 U.S. at 820. The Court described the inquiry as "backward-looking" and further noted that a time-of-state-crime rule avoided the "absurd" outcome that "a prior conviction could 'disappear' entirely for ACCA purposes." *Id.* at 820, 822.

Petitioners contend that *McNeill* is inapposite because it dealt only with changes to state, not federal,

law. But that characterization cannot be squared with *McNeill* itself, which interpreted an umbrella phrase—"previous convictions," 18 U.S.C. 924(e)(1)—that applies equally in this case.

Mellouli, in turn, interpreted an immigration provision authorizing the removal of a noncitizen "convicted of a violation of * * * any law or regulation of a State * * * relating to a controlled substance (as defined in section 802 of Title 21)," 8 U.S.C. 1227(a)(2)(B)(i). See 575 U.S. at 801. As the Court explained, a time-of-state-crime rule there allows noncitizens to predict the collateral consequences of a conviction at the time they enter a guilty plea. *Id.* at 806. Section 924(e)(2)(A)(ii)—which was adopted at the same time as the provision in *Mellouli* and has nearly identical language—should be interpreted the same way.

D. A time-of-state-crime rule appropriately accounts for considerations of culpability and notice.

A defendant's culpability for a state crime is most naturally assessed at the time of that crime, not a later date. *McNeill* explained that later changes to state law have no bearing on the "culpability and dangerousness" signaled by a past crime. 563 U.S. at 823. Similarly, the future addition or subtraction of a substance from the federal schedules has no bearing on a defendant's culpability in trafficking it on an earlier date.

A time-of-state-crime approach also allows a defendant to know the collateral consequences of a conviction at the time of that conviction. Under petitioners' interpretations, in contrast, a prior state crime could *become* an ACCA predicate based on after-the-fact changes to the federal schedules. Petitioners claim that it might be difficult to track down superseded versions of the federal schedules, but they do not allege that obtaining

those schedules would be any harder than locating old state codes—as *McNeill* already requires.

E. In the absence of support in the statute, petitioners turn to background rules. None counsels in their favor.

Jackson notes that the federal criminal law in place at the time of the federal offense governs, but that is beside the point. The government agrees that the version of the ACCA in effect at the time Jackson unlawfully possessed a firearm applies here. The only question is what version of the federal schedules the ACCA incorporates, and Jackson's principle sheds no light on *that* question. Petitioners also cite the reference canon, which in some cases may indicate that when a statute cross-references another statute, it incorporates the version in effect at the time the referring statute was enacted. But that approach—which would suggest that the ACCA incorporates the federal schedules as they existed in 1986, when the cross-reference was adopted—is overcome by context in this case, and no party endorses its result. Petitioners further invoke the rule of lenity, but it is inapposite since no party's interpretation is more lenient than any other. Finally, Brown notes that courts apply the Guidelines in effect at the time of federal sentencing. Congress has established that rule by statute, however, and no similar rule applies here.

ARGUMENT

THE CLASSIFICATION OF A PRIOR STATE DRUG OFFENSE AS AN ACCA PREDICATE DEPENDS ON THE FEDERAL CONTROLLED-SUBSTANCE SCHEDULES IN EFFECT AT THE TIME OF THAT PRIOR STATE CRIME

To determine whether a defendant's prior state-law conviction qualifies as a "serious drug offense" under

the ACCA, 18 U.S.C. 924(e)(2)(A)(ii), courts should consult the federal controlled-substance schedules in effect at the time of that crime. The statutory text and context, this Court's precedent, and policy considerations identified in that precedent all support that interpretation. Petitioners' contrary approaches—which would look to the federal schedules in effect at the time of either the federal firearms offense or federal sentencing—cannot be reconciled with those interpretive guides. And under the correct approach, petitioners' prior state convictions qualify as "serious drug offense[s]," *ibid.*, because the Pennsylvania and Florida drug definitions underlying their offenses undisputedly matched the federal controlled-substance schedules in effect at the time.[4]

A. The ACCA's Text Points To The Time Of The State Crime

"As in all statutory construction cases," a court interpreting the ACCA should "begin with 'the language itself [and] the specific context in which that language is used.'" *McNeill* v. *United States*, 563 U.S. 816, 819 (2011) (quoting *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341 (1997)). The ACCA prescribes an enhanced sentence for defendants with "three previous convictions" for a "serious drug offense." 18 U.S.C. 924(e)(1). And

---

[4] Although the government relied on a time-of-federal-offense approach in the court of appeals in *Brown*, see p. 9 n.3, *supra*, it is well-settled that a "prevailing party may defend a judgment on any ground which the law and the record permit that," as in this case, "would not expand the relief it has been granted." *United States* v. *New York Tel. Co.*, 434 U.S. 159, 166 n.8 (1977); see *Dahda* v. *United States*, 138 S. Ct. 1491, 1498 (2018); see also *Brown* Gov't Br. in Opp. at 9 (explaining that the government "would not continue to advocate in this Court" a time-of-federal-offense rule).

the statute defines a "'serious drug offense'" as "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. 924(e)(2)(A)(ii). Under the plain terms of those provisions, a court analyzing whether a state-law predicate was one involving a controlled substance is required to consult the federal drug schedules in effect at the time of the state crime.

1. As this Court observed in *McNeill* v. *United States*, *supra*, because the ACCA prescribes sentencing enhancements for defendants with "previous convictions," 18 U.S.C. 924(e)(1), the "ACCA is concerned with convictions that have already occurred." 563 U.S. at 820. And as the Court further explained, "[t]he only way to answer th[e] backward-looking question" of "whether a 'previous convictio[n]' was for a serious drug offense" is "to consult the law that applied at the time of that conviction." *Ibid.*

That logic applies with at least as much force to the analysis of whether a prior conviction involved a "controlled substance," at issue here, as to the analysis of whether a prior conviction was for an offense for which "a maximum term of imprisonment of ten years or more is prescribed by law," at issue in *McNeill*, 18 U.S.C. 924(e)(2)(A)(ii); see *McNeill*, 563 U.S. at 817. Both analyses are part of the same overarching inquiry into "whether a 'previous convictio[n]' was for a serious drug offense." *McNeill*, 563 U.S. at 820 (brackets in original). And the ACCA's definition of a qualifying offense as one "involving" certain activities in relation to a federally controlled substance, 18 U.S.C. 924(e)(2)(A)(ii),

confirms its "backward-looking" focus, *McNeill*, 563 U.S. at 820.

To "involve" something is to "contain" or "include" that thing. *Webster's Third New International Dictionary* 1191 (1986) (capitalization omitted); see *The Oxford English Dictionary* (2d ed. 1989) ("To include; to contain, imply"); *The American Heritage Dictionary of the English Language* 950 (3d ed. 1992) ("To contain as a part; include"; and "[t]o have as a necessary feature or consequence; entail"); see also *Shular* v. *United States*, 140 S. Ct. 779, 785 (2020) (discussing the term "involving"). Thus, to say that a historical event was one "involving" certain things is to say that the event included those things as attributes. 18 U.S.C. 924(e)(2)(A)(ii). And the attributes of a particular event are fixed in time.

As a result, whether a prior offense was one "involving" a federally controlled substance is an attribute of that offense that does not change over time. Just as a court would look to the then-contemporaneous definition of the state crime to determine whether it was one "involving manufacturing, distributing, or possessing with intent to manufacture or distribute," it would likewise look to then-contemporaneous definitions to determine whether it was one "involving * * * a controlled substance []as defined in" the CSA. 18 U.S.C. 924(e)(2)(A)(ii).

2. Petitioners do not engage with the terms "previous convictions" or "involving," 18 U.S.C. 924(e)(1) and (2)(A)(ii). And they provide no sound textual arguments for their own positions.

Brown contends (Br. 11) that the statute's use of the phrase "'as defined in' suggests a here-and-now inquiry." But the only support he offers for that claim is a hypothetical: in his view, "[i]f a biographer says that

President Lincoln experienced 'depression (as defined in the psychiatric manual),' an ordinary English speaker would understand that the author had consulted the modern Diagnostic and Statistical Manual—not an antebellum precursor." *Ibid.* That, however, is not an obvious inference; one might instead expect that a biographer would be referring to historical authorities.

In any event, given that the ACCA refers to prior convictions and not merely prior conduct, a more apt hypothetical would be a biographer's observation that "President Lincoln was *diagnosed* with depression (as defined in the psychiatric manual)." That observation would plainly refer to the psychiatric manual in existence at the time of the diagnosis. Cf. *McNeill*, 563 U.S. at 820 (rejecting defendant's reliance on Section 924(e)(2)(A)(ii)'s "[u]se of the present tense" because "ACCA is concerned with convictions that have already occurred").

Both petitioners also suggest that, had Congress intended to direct sentencing courts to the federal drug schedules at the time of the state crime, it could have inserted language along the lines of "a controlled substance (as defined, *at the time of that offense*, in section 102 of the Controlled Substances Act)." Jackson Br. 15; see Brown Br. 11. But "the mere possibility of clearer phrasing cannot defeat the most natural reading of a statute." *Caraco Pharm. Labs., Ltd.* v. *Novo Nordisk A/S*, 566 U.S. 399, 416 (2012).

Furthermore, petitioners' alternative-phrasing argument is one that can easily be "turn[ed] * * * back around on" them. *Caraco Pharm. Labs.*, 566 U.S. at 416. Congress could also alternatively have specified that a substance must appear in the federal schedules

"at the time of the federal offense" or "at the time of federal sentencing." Indeed, had Congress intended to depart from the generally "backward-looking" framework of the ACCA, *McNeill*, 563 U.S. at 820, it presumably would have felt the need to do so explicitly, using language along those lines.

B. The Statutory Context Confirms The Text's Backward-Looking Focus

Two aspects of the statutory context underscore that Section 924(e)(2)(A)(ii) directs courts to consult the federal drug schedules in effect at the time of the state predicate: Section 924(e)(2)(A)(i)'s parallel definition of federal offenses that qualify as "serious drug offense[s]" and Section 921(a)(20)'s rules for the expungement of state convictions.

1. The time-of-state-crime interpretation treats state convictions the same as corresponding federal convictions

The definition of predicate "serious drug offense[s]" in Section 924(e)(2)(A) encompasses not only prior state convictions, see 18 U.S.C. 924(e)(2)(A)(ii), but also prior federal convictions. In particular, the subclause adjacent to the one at issue here covers "an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. 924(e)(2)(A)(i).

By its plain terms, that parallel subclause refers solely to the historical fact of a conviction under the CSA for an offense with a statutory-maximum sentence of ten years or more. Thus, as the Eleventh Circuit ex-

plained in Jackson's case, the federal-predicate subclause directs the sentencing court to consult "the version of the Controlled Substances Act (and thus the federal controlled-substances schedules) in effect at the time the defendant's prior federal drug conviction occurred." Pet. App. 23a. Accordingly, if a defendant has "been convicted of violating the Controlled Substances Act," "his prior convictions would qualify as 'serious drug offense[s]' under ACCA" irrespective of any subsequent amendments to the federal schedules. *Id.* at 25a (brackets in original).

The incorporation of the CSA schedules in effect at the time of the predicate crime for purposes of subclause (A)(i) supports the corresponding incorporation of the CSA schedules in effect at the time of the predicate crime in subclause (A)(ii). Congress enacted both subclauses simultaneously. See 1986 Act § 1402(b)(A), 100 Stat. 3207-39 to 3207-40. Although they need not and do not apply identically in all respects, see *Shular*, 140 S. Ct. at 786, nothing in the language or context suggests that Congress specified divergent timeframes for analyzing prior drug crimes dependent solely on the identity of the prosecuting authority. A defendant who trafficked in a substance then controlled under both the state and federal drug laws could have been charged under either. A federal-descheduling loophole applicable only if the defendant happened to be charged by the State, rather than the federal government, makes little sense.

Petitioners do not identify any sound reason why "Congress would require the counting of prior federal drug convictions as 'serious drug offense[s]' while at the same time not counting equivalent prior state drug convictions." Jackson Pet. App. 25a (brackets in original).

The far more natural inference is that Congress intended to treat analogous state and federal predicates consistently. Jackson effectively acknowledges as much when he principally argues (Br. 36) that the subclauses should be harmonized in the opposite direction—*i.e.*, that a subsequent change in the federal drug schedules would disqualify even a prior *federal* conviction as an ACCA predicate. But that interpretation is untenable. Subclause (A)(i) "refers to fully defined crimes." *Shular*, 140 S. Ct. at 786. A defendant who is convicted of an offense under the CSA has been convicted of "an offense under the Controlled Substances Act," period. 18 U.S.C. 924(e)(2)(A)(i).

To the extent that Jackson does attempt to support a temporal divergence in the analysis of federal and state predicates, his reliance (Br. 37) on *Shular* v. *United States*, *supra*, is misplaced. *Shular* addressed whether subclause (A)(i) requires "a comparison to a generic offense" (such as the offense of drug distribution) or merely to a particular type of conduct (such as distributing drugs). 140 S. Ct. at 784. In that context, the language of subclauses (A)(i) and (A)(ii) *is* distinct: the former refers to offenses under the CSA and other federal statutes, whereas the latter refers to offenses involving certain conduct, like "manufacturing" and "distributing," 18 U.S.C. 924(e)(2)(A)(ii). No similar textual distinction exists here. Subclause (A)(i) covers offenses "under the Controlled Substances Act," while subclause (A)(ii) similarly covers state offenses involving controlled substances "as defined in * * * the Controlled Substances Act." 18 U.S.C. 924(e)(2)(A)(i)-(ii). And both subclauses reference the CSA in the overarching context of defining what qualifies as a "previous conviction[ ]" under the ACCA. 18 U.S.C. 924(e)(1).

2. The time-of-state-crime interpretation is consistent with the statutory limitations on the declassification of prior convictions

Section 924(e)(2)(A)(ii)'s backward-looking focus is likewise consistent with Section 921(a)(20)'s limitations on the ways in which a prior conviction may cease to qualify as a "conviction[ ]" for ACCA purposes. 18 U.S.C. 924(e)(1). Section 921(a)(20) states:

> Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

18 U.S.C. 921(a)(20).

As this Court has explained, "[t]he provision that a court may not count a conviction 'which has been . . . set aside' creates a clear negative implication that courts *may* count a conviction that has *not* been set aside." *Custis* v. *United States*, 511 U.S. 485, 491 (1994). And the Court has accordingly held that "a defendant in a federal sentencing proceeding may" not "collaterally attack the validity of previous state convictions that are used to enhance his sentence under the ACCA * * * (with the sole exception of convictions obtained in violation of the right to counsel)." *Id.* at 487.

Petitioners' previous state drug crimes indisputably qualified as "serious drug offense[s]" under the ACCA at the time of their commission. 18 U.S.C. 924(e)(2)(A). And even though those convictions have "*not* been set aside," *Custis*, 511 U.S. at 491, petitioners' approaches would prevent courts from counting them as ACCA

predicates based on subsequent events. But "Congress based ACCA's sentencing enhancement on prior convictions and could not have expected courts to treat those convictions as if they had simply disappeared." *McNeill*, 563 U.S. at 823; see *ibid.* (discussing 18 U.S.C. 921(a)(20)). Instead, Section 921(a)(20) indicates that the relevance of a prior state conviction under the ACCA is generally fixed at the time of that conviction.

That is particularly so because Section 921(a)(20) governs the definition of "conviction" for purposes of the entire "chapter," 18 U.S.C. 921(a)(20), which includes the underlying prohibition on firearm possession by someone "who has been convicted in any court of[ ] a crime punishable by imprisonment for a term exceeding one year," 18 U.S.C. 922(g); see 18 U.S.C. 924(a)(2) (2018). A prior state drug conviction accordingly qualifies as a predicate for primary conduct for which the ACCA prescribes an enhanced recidivist penalty. It would make little sense for that same drug conviction to nevertheless be disqualified as an ACCA predicate, simply because the controlled substance schedules were modified years after that conviction.

3. Petitioners' approaches lack contextual support

Petitioners' contextual arguments rely on unsound inferences. Petitioners note (Brown Br. 15; Jackson Br. 16), for example, that the definition of "'serious drug offense'" in a separate recidivism statute, 18 U.S.C. 3559(c), includes "an offense under State law that, had the offense been prosecuted in a court of the United States, would have been punishable under" certain listed federal provisions, 18 U.S.C. 3559(c)(2)(H)(ii). But Congress's explicit specification of a time-of-state-crime rule in Section 3559(c) does not imply a similar need to do so in Section 924(e)(2)(A)(ii). The text of Section

3559(c) calls for a purely hypothetical inquiry—namely, whether a state conviction could also, in theory, have been a federal one—whereas Section 924(e)(2)(A)(ii) looks to an actual prior state drug offense and asks whether it was one "involving" certain features. 18 U.S.C. 924(e)(2)(A)(ii).

If anything, Section 3559(c) suggests that federal recidivism laws generally minimize differences between federal and state convictions that show similar criminal histories—which the more straightforward approach to Section 924(e)(2)(A)(ii) would likewise do. And precisely because the ACCA is a recidivism statute, Jackson's attempt (Br. 14-15) to draw inferences from various statutes that cross-reference the CSA in defining the prohibited conduct itself is misplaced. See, *e.g.*, 18 U.S.C. 924(g)(3) (prohibiting travel across state lines and acquiring or transferring a firearm with the intent to "violate[ ] any State law relating to any controlled substance (as defined in section 102(6) of the [CSA])"). As Jackson acknowledges (Br. 14), because those statutes define the elements of the present federal offense—rather than the elements of a predicate offense—it would make no sense to reference the federal controlled-substance schedules from some indeterminate time before the present offense occurred. The same obviously cannot be said of an ACCA enhancement provision that "is concerned with convictions that have already occurred." *McNeill*, 563 U.S. at 820.

Finally, petitioners suggest (Jackson Br. 33; see Brown Br. 16-17) that Section 924(e)(2)(A)(ii) cannot reference the time of the state crime, on the theory that "Congress could not have possibly intended" to exclude crimes that predate the CSA's enactment in 1970. But that theory is unsound because Congress indisputably

excluded *federal* drug convictions predating 1970: all three federal statutes cited in the original version of subclause (A)(i) were enacted in 1970 or later. See 1986 Act, Tit. I, Subtit. I, § 1402(b)(A)(i), 100 Stat. 3207-39 (covering offenses under "the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the first section or section 3 of Public Law 96-350 (21 U.S.C. 955a et seq.)"); see also Controlled Substances Act, Pub. L. No. 91-513, Tit. II, 84 Stat. 1242 (1970); Controlled Substances Import and Export Act, Pub. L. No. 91-513, Tit. III, 84 Stat. 1285 (1970); Maritime Drug Law Enforcement Act, Pub. L. No. 96-350, §§ 1, 3, 94 Stat. 1159-1160 (1980). A corresponding approach for state offenses is therefore not only "possibl[e]," Jackson Br. 33, but quite likely, in furtherance of an effort to treat similar recidivists alike, irrespective of whether state or federal authorities happened to prosecute them for conduct involving a federally controlled substance.

Congress had good reason not to reach back past the CSA's enactment in 1970. The CSA established the federal controlled-substance schedules and reflected Congress's effort "to replace previous federal drug laws with a single comprehensive statute," Lisa N. Sacco, Cong. Research Serv., *Drug Enforcement in the United States: History, Policy, and Trends* 5 (Oct. 2, 2014). Prior to 1970, drugs were regulated by a patchwork of federal laws. See, *e.g.*, H.R. Rep. No. 1444, 91st Cong., 2d Sess. Pt. 1, at 6 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4566, 4571 ("Since 1914 the Congress has enacted more than 50 pieces of legislation relating to control and diversion, from legitimate channels, of those drugs referred to as narcotics and dangerous drugs. This plethora of legislation has necessarily given rise to

a confusing and often duplicative approach to control of the legitimate industry and to enforcement against the illicit drug traffic."). Given the haphazard nature of pre-CSA law, Congress may well have viewed it as ill-advised to try to map state convictions onto federal analogues from that period. It was perfectly sensible for Congress to wipe the slate clean by keying the ACCA's "serious drug offense" definition to the CSA's comprehensive framework and excluding state drug convictions predating that framework.

C. This Court's Precedents Confirm That Section 924(e)(2)(A)(ii) Requires A Time-Of-State-Crime Approach

This Court's previous decisions in *McNeill* and *Mellouli* v. *Lynch*, 575 U.S. 798 (2015), each of which adopts a time-of-state-crime approach, further illustrate why a similar approach is called for in this case.

1. The time-of-state-crime interpretation of Section 924(e)(2)(A)(ii) in **McNeill** *v.* **United States** *applies equally here*

As briefly noted earlier, see p. 19, *supra*, the Court in *McNeill* interpreted the precise ACCA provision at issue here—18 U.S.C. 924(e)(2)(A)(ii)—to require reference to the time of the defendant's state crime. That interpretation carries over to this case.

a. The defendant in *McNeill* had been convicted of North Carolina drug offenses punishable at the time by ten-year sentences. 563 U.S. at 818. But after his state crimes, North Carolina reduced the maximum punishment under the relevant statutes to less than ten years. *Ibid.* The defendant sought to take advantage of that subsequent development, arguing that sentencing courts should look to the amended state law, not the

state law at the time of the state crime, to determine whether "a maximum term of imprisonment of ten years or more is prescribed by law," 18 U.S.C. 924(e)(2)(A)(ii). *McNeill*, 563 U.S. at 818. This Court rejected that argument.

The Court recognized that the "plain text of ACCA" instead "requires a federal sentencing court to consult the maximum sentence applicable to a defendant's previous drug offense at the time of his conviction for that offense." *McNeill*, 563 U.S. at 820. The Court observed that the ACCA "requires the court to determine whether a 'previous convictio[n]' was for a serious drug offense," and "[t]he only way to answer this backward-looking question is to consult the law that applied at the time of that conviction." *Ibid.* (second set of brackets in original). And the Court explained that "[u]se of the present tense in the definition of 'serious drug offense'"—namely, the reference to whether a ten-year statutory maximum "'is prescribed by law'"—"does not suggest otherwise," because the "ACCA is concerned with convictions that have already occurred." *Ibid.*

The Court further observed that a time-of-state-crime rule "avoids the absurd results that would follow from consulting current state law to define a previous offense." *McNeill*, 563 U.S. at 822. Under the defendant's interpretation, "a prior conviction could 'disappear' entirely for ACCA purposes if a State reformulated the offense between the defendant's state conviction and federal sentencing." *Ibid.* The Court emphasized that it "cannot be correct that subsequent changes in state law can erase an earlier conviction for ACCA purposes," because a "defendant's history of criminal activity—and the culpability and dangerousness that such history demonstrates—does not cease to exist

when a State reformulates its criminal statutes in a way that prevents precise translation of the old conviction into the new statutes." *Id.* at 823.

McNeill also singled out a time-of-federal-sentencing rule for special criticism. It pointed out that the defendant could not "explain why two defendants who violated § 922(g) on the same day and who had identical criminal histories—down to the dates on which they committed and were sentenced for their prior offenses—should receive dramatically different federal sentences solely because one's § 922(g) sentencing happened to occur after the state legislature amended the punishment for one of the shared prior offenses." *McNeill*, 563 U.S. at 823. The Court observed that, "[i]n contrast, the [time-of-state-crime] interpretation * * * permits a defendant to know even before he violates § 922(g) whether ACCA would apply." *Ibid.*

b. *McNeill*'s interpretation of Section 924(e)(2)(A)(ii) counsels in favor of a similar interpretation of that same provision here. The textual support for a time-of-state-crime interpretation for CSA schedules is, if anything, stronger than the textual support for the time-of-state-crime interpretation in *McNeill*. Unlike the reference to the state-law statutory maximum (at issue in *McNeill*), the reference to the federal drug schedules does not include a present-tense phrase like "is prescribed by law." It instead employs a participle—"involving"—that most naturally refers to the time of the state crime. See pp. 19-20, *supra*.

Furthermore, a contrary approach would invite results analogous to those that *McNeill* described as "absurd." 563 U.S. at 822. In particular, it would allow subsequent events to "erase an earlier conviction for ACCA purposes" even though the "defendant's history

of criminal activity—and the culpability and dangerousness that such history demonstrates"—would remain unchanged. *Ibid.* Under either a time-of-federal-offense or time-of-federal-sentencing rule, predicates would blink in and out of existence with the expansion and contraction of the federal schedules.

It is no answer to say that such changes reflect updated views of "culpability," *McNeill*, 563 U.S. at 823, that should be reflected in the ACCA. See Jackson Br. 25-26; Brown Br. 27. It could equally have been said in *McNeill* that the lowering of the state statutory maximum—which is likewise a marker of the "serious[ness]" of a prior state offense, 18 U.S.C. 924(e)(2)(A)—reflected similarly updated views. But the Court nonetheless declined to interpret the statute to adopt an inconstant approach to Section 924(e)(2)(A)(ii). There is no sound reason to introduce one in this case.

c. Petitioners contest (Brown Br. 26-28; Jackson Br. 21-24) *McNeill*'s significance on the ground that it involved analysis of state law, rather than the federal definition to which that state law is compared. In their view, the ACCA analysis mandates a strict dichotomy between state and federal law: first, a court must identify the elements of the state offense at the time of that offense, and second, the court must compare those elements to federal law at the time of the federal offense or sentencing. But *McNeill*'s logic does not support such a dichotomy.

McNeill focused principally on the statutory phrase "previous convictions," 18 U.S.C. 924(e)(1). See 563 U.S. at 820 (describing this phrase as mandating a "backward-looking" inquiry); *ibid.* (observing that "ACCA is concerned with convictions that have already occurred"). And that umbrella phrase informs the

meaning of everything that follows, which includes both the requirement of a certain maximum state sentence (at issue in *McNeill*) and the listing of substances on the federal schedules (at issue here). The phrase "'previous convictio[n]'" is thus equally indicative of a "backward-looking" approach to both, *McNeill*, 563 U.S. at 820, without regard to whether the sentencing court is consulting state law (*McNeill*) or federal law (here).

2. The time-of-state-crime interpretation of the similarly-worded immigration provision in* Mellouli *v.* Lynch *further supports a corresponding interpretation here

In *Mellouli*, this Court interpreted a provision of the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, that is worded similarly to Section 924(e)(2)(A)(ii) as incorporating a time-of-state-crime rule. The INA, like the ACCA, attaches collateral consequences to prior convictions, and this Court frequently examines its INA decisions when construing similar provisions in the ACCA. See, *e.g.*, *Borden* v. *United States*, 141 S. Ct. 1817, 1824, 1827-1828, 1832 (2021) (plurality opinion) (relying on *Leocal* v. *Ashcroft*, 543 U.S. 1 (2004), and *Moncrieffe* v. *Holder*, 569 U.S. 184 (2013)); *Shular*, 140 S. Ct. at 779, 783 (discussing *Kawashima* v. *Holder*, 565 U.S. 478 (2012)). There is all the more reason to do so where, as here, the two relevant provisions were adopted in the same piece of legislation. See Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, Tit. I, Subtit. M, § 1751(b), 100 Stat. 3207-47 (INA); *id.* Tit. I, Subtit. I, § 1402(b)(A)(ii), 100 Stat. 3207-39 to 3207-40 (ACCA). And doing so provides yet more support for the time-of-state-crime interpretation.

The INA provision at issue in *Mellouli* authorized the removal of a noncitizen "convicted of a violation of * * * any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21)." 8 U.S.C. 1227(a)(2)(B)(i); see 575 U.S. at 801. The Court's decision in *Mellouli* accordingly explained that "to trigger removal under § 1227(a)(2)(B)(i), the Government must connect an element of the alien's conviction to a drug 'defined in [§ 802].'" 575 U.S. at 813. The Court then applied a "categorical approach" to conclude that Mellouli's prior conviction did not render him removable because "the state law under which he was charged * * * was not limited to substances 'defined in [§ 802].'" *Id.* at 808. And in reaching that conclusion, the Court compared the state and federal controlled-substance schedules "[a]t the time of Mellouli's conviction." *Ibid.*; see *id.* at 802 (same).

The language of Section 924(e)(2)(A)(ii) is nearly identical to the language of the INA provision at issue in *Mellouli*. The INA provision identifies a relevant prior conviction as one "relating to a controlled substance (as defined in section 802 of Title 21)," 8 U.S.C. 1227(a)(2)(B)(i), while Section 924(e)(2)(A)(ii) identifies a relevant prior conviction as one "involving * * * a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))," 18 U.S.C. 924(e)(2)(A)(ii). The two provisions, adopted at the same time, should be interpreted the same way, to require a comparison of federal and state drug schedules "at the time of * * * conviction." *Mellouli*, 575 U.S. at 802, 808.

Contrary to the First Circuit's suggestion, see *United States* v. *Abdulaziz*, 998 F.3d 519, 530 (2021),

Mellouli's explicit consultation of the federal schedules at the time of the state crime was the product of deliberate consideration. The relevant timing issue was directly addressed in *Mellouli*. As the government informed the Court there, of the "nine substances not included in the federal lists" identified by the Court "[a]t the time of Mellouli's conviction," *Mellouli*, 575 U.S. at 802, two had later become subject to federal controls by the time of his removal proceedings, Resp. Br. at 10, *Mellouli*, *supra*, No. 13-1034. Justice Thomas's dissent accordingly noted that under the majority's approach, "whenever a State moves first in subjecting some newly discovered drug to regulation, every alien convicted during the lag between state and federal regulation would be immunized from the immigration consequences of his conduct." *Mellouli*, 575 U.S. at 819-820.

More fundamentally, a time-of-state-crime rule is inherent in *Mellouli*'s logic. The Court there emphasized that the categorical approach "focus[es] on the legal question of what a conviction *necessarily* established," thereby "enabl[ing] aliens to anticipate the immigration consequences of guilty pleas in criminal court, and to enter safe harbor guilty pleas that do not expose the alien defendant to the risk of immigration sanctions." 575 U.S. at 806 (brackets, citation, and internal quotation marks omitted). It would, however, be impossible to predict the consequences of a guilty plea if those consequences were not fixed until the time of a later removal proceeding.

D. A Time-Of-State-Crime Interpretation Ensures That Section 924(e)(2)(A)(ii) Properly Accounts For A Defendant's Culpability And Provides Adequate Notice Of The Consequences Of A State Conviction

As the Court's decisions in *McNeill* and *Mellouli* reflect, Section 924(e)(2)(A)(ii) and similar provisions must be interpreted with an eye toward two important concerns: properly accounting for a defendant's culpability and providing adequate notice of the collateral consequences of a prior conviction. Here, a time-of-state-crime interpretation is the only one that would appropriately address those concerns.

1. Only a time-of-state-crime interpretation is appropriately keyed to the defendant's level of culpability. As *McNeill* illustrates, a defendant's culpability for a state crime is most naturally assessed based on the state of the world at the time of that crime, not some later date. Petitioners accordingly recognize (Jackson Br. 22; Brown Br. 12-13) that, in applying Section 924(e)(2)(A)(ii), the elements of a prior state offense are those that state law prescribed at the time of the state crime. They therefore accept that subsequent changes to the *state* drug schedules are irrelevant, irrespective of what they imply about evolving drug policies. Subsequent changes to the federal schedules are equally irrelevant.

As this Court has explained, the reason that the ACCA "looks to past crimes" is "because an offender's criminal history is relevant to the question whether he is a career criminal, or, more precisely, to 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), abrogated on other grounds by *Johnson* v. *United States*, 576 U.S. 591 (2015). And as petitioners

agree, a substance's inclusion on the federal schedules reflects the contemporaneous understanding of the substance's "culpability and dangerousness." Jackson Br. 25 (citation omitted); see Brown Br. 27 (same). The later removal of a drug from the federal schedules does not retroactively eliminate a defendant's culpability for trafficking that drug at a time when it *was* scheduled.

A defendant who traffics methamphetamine today, when methamphetamine is a federally controlled substance, is committing a culpable and dangerous crime regardless of whether, 20 years from now, methamphetamine is removed from the federal schedules for some reason. And similar logic refutes petitioners' criticisms (Jackson Br. 13, 34; Brown Br. 17-18) of the time-of-state-crime interpretation for disregarding later *additions* to the federal schedules. The future addition of a drug to the controlled substance list would not signal any greater culpability in selling it today.

2. A time-of-state-crime interpretation also has the advantage of providing a defendant with notice of the collateral consequences of a predicate conviction at the time of that conviction. It thus "permits a defendant to know even before he violates § 922(g) whether ACCA would apply," *McNeill*, 563 U.S. at 823, thereby "promot[ing] efficiency, fairness, and predictability" and "enabl[ing]" defendants "'to anticipate'" the collateral "'consequences of guilty pleas in criminal court,'" *Mellouli*, 575 U.S. at 806 (citation omitted).[5]

---

[5] Although fair-notice concerns in the ACCA context may differ to some degree from those in the immigration context at issue in *Mellouli*, see *Jackson* Pet. App. 33a n.1 (Rosenbaum, J., concurring), they are far from absent. See *United States* v. *Clark*, 46 F.4th 404, 410 (6th Cir. 2022) (observing that "citizen criminal defendants, too, deserve the same clarity when they plead guilty to offenses that

Under the approach of either petitioner here, however, a state offense involving substances not controlled by the federal schedules at the time of that crime could subsequently become an ACCA predicate based on the later addition of substances to the federal schedules. See Brown Br. 17 ("Under Mr. Brown's rule, a state conviction for distributing a drug * * * could count as an ACCA predicate if Congress later determined that the substance was dangerous and added it to the federal schedules."); Jackson Br. 34-35 (same); see, *e.g.*, 82 Fed. Reg. 12,171 (Mar. 1, 2017) (ordering placement of ten synthetic cathinones into Schedule I); Synthetic Drug Abuse Prevention Act of 2012, Pub. L. No. 112-144, Tit. XI, Subtit. D, § 1152(a), 126 Stat. 1130 (amending Schedule I to include cannabimimetic agents). Such an approach, under which the ACCA classification of a prior state conviction could change (potentially more than once) is antithetical to traditional notice principles.[6]

---

carry the possibility of future sentencing enhancements if they reoffend"), petition for cert. pending, No. 22-6881 (filed Feb. 24, 2023). As discussed in the text, petitioners' approaches here would allow someone to know the (potentially variable) ACCA sentencing consequences of his prior state drug conviction only if he kept close track of the ebbs and flows of the federal drug schedules. Just as the Court in *Mellouli* avoided an approach under which a noncitizen's awareness of his removability would require similar proactivity, so too should it avoid imposing such a burden here.

[6] The notice problems would be especially severe under Brown's interpretation, which would subject defendants to enhanced sentences based on legal developments occurring even after the defendant's federal offense conduct is complete. *McNeill* specifically criticized a rule that "would make ACCA's applicability depend on the timing of the federal sentencing proceeding," and like petitioner there, Brown "cannot explain why two defendants who violated § 922(g) on the same day and who had identical criminal histories—

Finally, petitioners offer no substantial support for their novel theory (Jackson Br. 27; Brown Br. 23-25) that difficulties accessing prior versions of the federal controlled-substance schedules would create a due process problem. The federal schedules at the time of the state crime—the only ones that are relevant under the time-of-state-crime interpretation—are certainly available at the time of the state crime. And even if a defendant wanted to look them up later, petitioners provide no reason to believe that finding them would be any harder than finding old state codes—as *McNeill* would already require the defendant to do. Cf. *United States* v. *Rodriquez*, 553 U.S. 377, 388 (2008) (concluding that the defendant "greatly exaggerates the problems" of identifying the applicable law from the time of an ACCA predicate). Amendments to the federal controlled-substance schedules may be adopted by published statute as well as by publication in the Federal Register or Code of Federal Regulations. See, *e.g.*, 21 U.S.C. 811(a) ("Rules of the Attorney General under this subsection shall be made on the record."); 21 C.F.R. 1308.01 ("Schedules of controlled substances * * * are set forth in this part.").

Even assuming that the federal schedules at the time of a past state crime may be hard to find in certain

down to the dates on which they committed and were sentenced for their prior offenses—should receive dramatically different federal sentences solely because one's § 922(g) sentencing happened to occur after" a change in the federal schedules. 563 U.S. at 823. Moreover, in the criminal context, an interpretation that adds a predicate after the federal offense concludes could implicate the Ex Post Facto Clause. See, *e.g.*, *Peugh* v. *United States*, 569 U.S. 530, 545 (2013) (Sotomayor, J.). The potential constitutional problems of Brown's interpretation are an additional reason to reject it. See, *e.g.*, *INS* v. *St. Cyr*, 533 U.S. 289, 300 (2001).

cases, that would not show that Section 924(e)(2)(A)(ii) is "impermissibly vague in all of its applications," *Village of Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982). In these very cases, the parties and the courts were well-apprised of the federal schedules at the time of the state crimes. See, *e.g.*, Jackson Pet. C.A. Br. 13; Brown J.A. 7. The application of the ACCA according to the best interpretation of Section 924(e)(2)(A)(ii)'s text therefore raises neither facial nor as-applied due-process concerns, and "[t]he mere possibility that some future cases might present difficulties cannot justify a reading of ACCA that disregards the clear meaning of the statutory language," *Rodriquez*, 553 U.S. at 389.

E. Petitioners' Remaining Arguments Lack Merit

Lacking textual, contextual, or precedential support, petitioners invoke several purported interpretive canons and background rules in support of their respective positions. None is availing.

1. Jackson errs in relying (Br. 17) on the principle that "[a]bsent an express exception, the law that sets the penalty for a federal crime is the law in place when the crime was committed." But nobody disputes that Jackson can be punished only under the version of the ACCA in effect in 2017, when he unlawfully possessed a firearm in violation of Section 922(g). Everyone focuses on the statutory text on that date, when (as today) the ACCA authorized an enhanced penalty if a defendant had three previous convictions for "an offense under State law, involving * * * a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))." 18 U.S.C. 924(e)(2)(A)(ii) (2012).

Every party's position in these cases is an alternative construction of that cross-reference to the CSA

schedules—the question is simply *which* schedules are cross-referenced. Petitioners' assertions that the appropriate schedules are the versions at the time of the federal offense conduct or federal sentencing are not dictated by the principle that Jackson invokes—they are simply question-begging claims. The time-of-state-crime interpretation, no less than any other, is wholly consistent with the version of the ACCA "in force at the time of the commission of" Jackson's federal offense. Jackson Br. 18 (quoting *Warden, Lewisburg Penitentiary* v. *Marrero*, 417 U.S. 653, 661 (1974)).

Petitioners' attempt (Jackson Br. 18; Brown Br. 13) to equate amending the federal drug schedules to amending ACCA itself (say, by deleting state "manufacturing" offenses, 18 U.S.C. 924(e)(2)(A)(ii)) is misguided. The federal controlled-substance schedules are not contained in the ACCA, and amending the federal schedules is not the equivalent of amending the ACCA. To the contrary, Congress allowed the Attorney General to set those schedules by regulation. 21 U.S.C. 811(a); see 21 C.F.R. Pt. 1308. An amendment to those schedules is no more an amendment to the ACCA itself than a modification in the state-law punishment for the defendant's prior offense—a development that *McNeill* directs a sentencing court to disregard, see 563 U.S. at 817.

2. Petitioners also find no support for their approaches in their invocation of the "reference" canon. See Jackson Br. 31-33; Brown Br. 11-12. Petitioners cite *Jam* v. *International Finance Corp.*, 139 S. Ct. 759 (2019), which described the canon as suggesting that "when a statute refers to a general subject, the statute adopts the law on that subject as it exists whenever a question under the statute arises." *Id.* at 769. But

Jam's description emphasized that "[i]n contrast, a statute that refers to another statute by specific title or section number in effect cuts and pastes the referenced statute as it existed when the referring statute was enacted, without any subsequent amendments." *Ibid.*

As Jackson effectively acknowledges (Br. 31), the canon articulated in *Jam* does not support any party's interpretation. Because Section 924(e)(2)(A)(ii) references the CSA by "section number," *Jam*, 139 S. Ct. at 769, the canon (assuming it applied here) would suggest that the ACCA incorporated the schedules as they existed in 1986, when the cross-reference was enacted. And that interpretation would support the imposition of ACCA sentences, because the schedules at that time did not include the later carve-outs that petitioners are trying to leverage here.

Accordingly, even petitioners do not truly urge application of the canon that they nominally invoke. Instead, all parties recognize that because the CSA itself provides for annual amendment and republication of the drug schedules (see 21 U.S.C. 811(a), 812(a)), Congress clearly contemplated that the list of qualifying substances would change over time. And for the many reasons already explained, Congress identified the time of the predicate state crime as the proper reference point in the schedules' evolution.

3. Petitioners' resort (Jackson Br. 37; Brown Br. 25) to the rule of lenity is especially misguided. Lenity does not point in any particular direction here; petitioners' own approaches would be harsher for certain defendants than the time-of-state-crime interpretation.

As noted earlier (pp. 37-38, *supra*), both petitioners highlight their approaches' potential for applying the

ACCA when a substance is *added* to the federal schedules as a putative advantage of those approaches. See Jackson Br. 34-35; Brown Br. 17. But the potential ACCA-qualification of defendants whose prior state crimes did not involve substances that were federally scheduled at the time of those crimes belies any suggestion that petitioners' approaches are more lenient than the time-of-state-crime interpretation.

Rather than mitigating possible harshness, petitioners' approaches would instead simply shift the set of defendants to whom the ACCA would apply—away from them and onto others. The rule of lenity does not allow that; because the relevant statutory text must be interpreted consistently in all cases, see *Leocal* v. *Ashcroft*, 543 U.S. 1, 12 n.8 (2004), it could counsel in favor only of an overarchingly more lenient result.

In any event, the rule of lenity applies only if, "after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute, such that the Court must simply guess as to what Congress intended." *United States* v. *Castleman*, 572 U.S. 157, 172-173 (2014) (citation omitted); see *Shular*, 140 S. Ct. at 789 (Kavanaugh, J., concurring). And for all the reasons above, no such grievous ambiguity exists here. See, *e.g.*, *Shular*, 140 S. Ct. at 787 (opinion for the Court) (finding "no ambiguity for the rule of lenity to resolve" after considering statutory "text and context").

4. Finally, Brown is wrong to suggest that the "time-of-sentencing rule" that provides "the 'background sentencing principle' in the Guidelines context" should equally apply here. Br. 20 (quoting *Dorsey* v. *United States*, 567 U.S. 260, 275 (2012)). Congress has provided by statute for application of the Guidelines in effect at the time of a defendant's federal sentencing. See 18

U.S.C. 3553(a)(4)(A)(ii) (directing sentencing courts to the Guidelines "in effect on the date the defendant is sentenced"). No similar textual mandate exists for the ACCA.

To the contrary, this Court has recognized a different default rule for the ACCA, one that requires a "backward-looking" inquiry into the law at the time of the prior state crime. *McNeill*, 563 U.S. at 820. And that rule, not a time-of-federal-sentencing or time-of-federal-offense approach, is the one that applies here.

CONCLUSION

The judgments of the courts of appeals should be affirmed.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
NICOLE M. ARGENTIERI
Acting Assistant Attorney General
ERIC J. FEIGIN
Deputy Solicitor General
AUSTIN L. RAYNOR
Assistant to the Solicitor General
DAVID M. LIEBERMAN
Attorney

AUGUST 2023

APPENDIX

TABLE OF CONTENTS

Page

Appendix — Statutory provisions:

18 U.S.C. 922(g) 1a

18 U.S.C. 924(e) 2a

21 U.S.C. 802(6) 4a

APPENDIX

1. 18 U.S.C. 922(g) provides:

Unlawful acts

(g) It shall be unlawful for any person—

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

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

(5) who, being an alien—

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));

(6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) who is subject to a court order that—

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

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

2. 18 U.S.C. 924(e) provides:

Penalties

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both,

committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

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

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or

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

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

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

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

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

3. 21 U.S.C. 802(6) provides:

Definitions

As used in this subchapter:

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