No. 22-6640

IN THE

Supreme Court of the United States

EUGENE JACKSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Mr. Jackson began his brief with a simple, default rule: Courts apply the federal statutory penalties that are in effect at the time of the federal offense. *See* Petr. Br. 1–2. The Government now confirms that it *agrees* this rule applies to ACCA. The Government therefore agrees that courts must apply the version of ACCA that is in effect at the time a defendant commits the federal firearm offense that purports to trigger ACCA. So, for example, if Congress were to amend ACCA before the commission of such an offense—by, say, striking "burglary" from ACCA's list of "violent felonies"—a court would have to apply the amended version, even if the defendant had prior burglary convictions and ACCA had covered burglary at the time of those convictions. U.S. Br. 17, 40–41.

The Government nonetheless asserts that ACCA's "controlled substance" criterion requires courts to apply the federal drug schedules that were in effect *not* at the time of the federal firearm offense, but rather at the time of the prior state drug offense. What is the basis for this convenient exception to the default rule? In one conclusory sentence at the end of its brief, the Government asserts that "[t]he federal controlled-substance schedules are not contained in the ACCA," and so "amending the federal schedules is not the equivalent of amending the ACCA." U.S. Br. 41.

Not so fast. ACCA's "controlled substance" criterion expressly incorporates the federal drug schedules. Thus, under elementary rules of statutory construction, ACCA itself effectively lists all of the substances on the schedules. So where, as in this case, a substance is added to or removed from the schedules, it is also added to or removed from ACCA.

The Government's failure to come to grips with the default time-of-federal-offense rule infects the rest of its brief too. The Government interprets ACCA's text through the lens of *McNeill v. United States*, 563 U.S. 816 (2011), but that case addressed a change to *state* law, not to the *federal* criteria in ACCA. The Government compares ACCA to *immigration* law, but it ignores that immigration law is not governed by the same temporal considerations as criminal law. And the Government asserts that subsequent changes in federal law cannot "erase" an ACCA predicate, but the Government itself agrees that this is exactly what happens whenever ACCA itself is amended before a federal firearm offense to exclude a prior conviction that previously qualified as an ACCA predicate.

There is a superior path. The Court should hold that ACCA incorporates the federal drug schedules that were in effect at the time of the federal firearm offense. That holding adheres to the default time-of-federal-offense rule. And every available tool of statutory construction confirms that rule's application here: ACCA's text and structure, this Court's precedent, foundational legal principles, and the need to avoid unjustified sentencing anomalies.

I. ACCA's statutory text and structure support petitioner's time-of-federal-offense rule.

1. The Government has no good answer to petitioner's textual arguments—all confirming that the default time-of-federal-offense rule applies here.

a. The Government acknowledges that the text of the CSA itself demonstrates that "Congress clearly contemplated that the list of qualifying substances would change over time." U.S. Br. 42. But that's not all. The CSA also requires that the Attorney General

regularly update the drug schedules to reflect *current* medical and scientific knowledge. *See* Petr. Br. 12–13; Amicus Br. of NACDL 3–8. And Congress directly incorporated this system into ACCA's "serious drug offense" definition. 18 U.S.C. § 924(e)(2)(A)(ii).

The Government does not even try to explain why Congress would have defined "serious drug offense" according to these ever-evolving CSA schedules had it wanted courts to apply outdated schedules from the time of prior drug convictions—convictions that can be (and often are) many years or even decades old. The Government's silence powerfully confirms that the only sensible explanation is that Congress wanted courts to consult the CSA schedules in effect at the time of the instant federal firearm offense.

b. Nor does the Government offer any meaningful response to petitioner's structural arguments. The Government acknowledges that its time-of-prior-conviction rule would create internal inconsistency within Section 924. Section 924(g)(3)—a nearby provision proscribing certain firearm acquisitions or transfers in interstate travel—also incorporates the CSA's "controlled substance" definition. And because it defines a present offense, the Government agrees it must refer to the schedules in effect at the time of the instant offense. U.S. Br. 27. The same should be true for Section 924(e)(2)(A)(ii).

The Government's rule would also give rise to odd contradictions in individual cases. For example, the primary federal drug statute uses the CSA's "controlled substance" definition *both* to define a present offense, *see* 21 U.S.C. § 841(a)(1), *and* to prescribe an enhanced penalty based on a prior "serious drug felony" conviction, *see id*. §§ 841(b)(1)(A),

802(57) (incorporating ACCA's "serious drug offense" definition). Again, all agree that, as to the former, the statute must refer to the schedules in effect at the time of the instant offense. Thus, under the Government's time-of-prior-conviction rule, the very same drug could simultaneously be a "controlled substance" for the present drug offense and *not* a "controlled substance" for that same offender's prior drug offense(s).

c. Lastly, the Government does not dispute that Congress could have expressly drafted Section 924(e)(2)(A)(ii) to incorporate the schedules from the time of the prior conviction. *See* Petr. Br. 15. The Government counters that Congress could have equally adopted a time-of-federal-offense rule. U.S. Br. 21–22. But this inverts the default rule: As the Government admits, courts ordinarily apply the federal statutory penalties that are in effect at the time of the federal offense. U.S. Br. 17, 40. Far from displacing that default rule, Congress tied Section 924(e)(2)(A)(ii) to *dynamic* federal drug schedules. Meanwhile, and as the Government acknowledges, when Congress wanted to depart from the default rule, as it did in another statute defining the exact same phrase ("serious drug offense"), 18 U.S.C. § 3559(c)(2)(H)(ii), it did so "explicit[ly]," U.S. Br. 26.

2. The Government's textual and contextual arguments are unpersuasive.

a. To start, the Government's "textual" argument principally relies not on ACCA's language, but rather on this Court's decision in *McNeill*. The Government emphasizes *McNeill*'s statement that, because ACCA is concerned with "previous convictions" that "have already occurred," courts must "consult the law that applied at the time of that conviction." U.S. Br. 19

(quoting *McNeill*, 563 U.S. at 820). But as petitioner has explained, *McNeill* is limited to a court's "step-one" obligation to ascertain the *state*-law attributes of a prior conviction. It does not address the criteria in ACCA against which those state-law attributes are compared at "step two." *See* Petr. Br. 10, 16–24.

The Government's only response is that the phrase "previous conviction" is an "umbrella phrase" in Section 924(e)(1) that "informs the meaning of everything that follows" in ACCA's text. U.S. Br. 16, 32–33. But not even the Government truly believes this. For what "follows" is *all* of ACCA's substantive criteria, not just the "controlled substance" criterion at issue here. Thus, the Government's interpretation would require courts to consult *every* aspect of ACCA in effect at the time of the prior conviction—even aspects of ACCA that Congress later deleted. And this would contradict the Government's own position that courts must apply the version of ACCA in effect at the time of the federal firearm offense. *Id.* at 17, 40.[1]

b. The Government's only other attempt at a textual argument focuses on the word "involving." The Government observes that Section 924(e)(2)(A)(ii) defines "serious drug offense" as an offense "involving" manufacturing, distributing, or possessing with intent to manufacture/distribute a controlled substance. U.S. Br. 19–20, 31. According to the Government, "to say that a historical event was one 'involving' certain

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[1] As petitioners' amici explain in detail, interpreting phrases like "previous conviction" or "prior conviction" to require a time-of-prior-conviction rule would create significant confusion and unintended consequences when applied to federal recidivist statutes across the board. *See generally* Amicus Br. of NAFD.

things is to say that the event included those things as attributes" that do "not change over time." *Id.* at 20.

But the Government cites no authority for this assertion, and it is belied by ordinary English. Imagine a person who worked around asbestos before its link to mesothelioma was known. Were a doctor to now ask that person whether he had ever held a job "involving" exposure to carcinogens, the person would say yes. That is, he would answer based on the list of carcinogens known to him at the time of the doctor's question, not those known to him at the time of the person's prior exposure. The same is true here.

c. The Government also observes that a prior conviction can no longer be an ACCA predicate once it is expunged. U.S. Br. 25 (citing 18 U.S.C. § 921(a)(20)). The Government then asserts that there is a "negative implication that courts *may* count a conviction that has *not* been set aside." *Id.* (quotation omitted). But prior convictions that have not been set aside still do not count when they do not satisfy ACCA's criteria, and that is petitioner's claim here. To the extent the Government is arguing (at 26) that expungement is the *only* "subsequent event[ ]" that may prevent a prior conviction from ceasing to qualify as an ACCA predicate, this too contradicts the Government's own position. Again, it agrees that, if Congress amended ACCA by striking "manufacturing," someone who later committed a federal firearm offense could not be subject to ACCA based on a prior drug manufacturing offense. U.S. Br. 41. The same logic applies where, as here, substances are removed from the federal drug schedules.

II. The time-of-prior offense rule best comports with the Court's precedent.

The Court's ACCA precedent—in particular, *Shular v. United States*, 140 S. Ct. 779, 783–85 (2020)—prescribes a two-step analytical framework. At step one, courts ascertain the attributes of a prior conviction (*i.e.*, the elements and maximum punishment). At step two (the step at issue here), courts compare those attributes against the federal criteria in ACCA itself. *See* Petr. Br. 16–17, 22–23.

Separately, in *Dorsey v. United States*, 567 U.S. 260 (2012), the Court reaffirmed "the important background principle" that courts apply the version of the federal sentencing statute that is in effect at the time of the federal offense. *Id.* at 272, 274. This default rule is embodied in both the Ex Post Facto Clause and the federal saving statute. *See* Petr. Br. 17–18.

The Government does not dispute that *Shular* reaffirmed the two-step analysis. And the Government previously argued in *Brown* that the saving statute, as construed in *Dorsey*, required the court to consult the federal schedules in effect at the time of the federal firearm offense. Brown J.A. 7; Brown U.S. C.A. Br. 8, 15–17. Yet the Government now ignores these aspects of *Shular* and *Dorsey*. Instead, it relies on *McNeill* and *Mellouli v. Lynch*, 575 U.S. 798 (2015). But neither of these cases is relevant to the issue at hand.

1. *McNeill* held that, to ascertain the attributes of a prior conviction at step one, courts must consult the law in effect at the time of the prior conviction. 563 U.S. at 817–18, 825. But when it comes to the federal criteria at step two (the step at issue here), not even the Government thinks that *McNeill* generally displaces the default rule. To the contrary, the

Government concedes that, notwithstanding *McNeill*, courts must still apply the version of ACCA in effect at the time of the federal firearm offense. U.S. Br. 17, 40. That is, the Government agrees that, were Congress to amend ACCA before the federal firearm offense—by, say, striking "burglary," "manufacturing," or even the "serious drug offense" prong entirely—courts would apply the amended version. *See* U.S. Br. 41.

The Government nonetheless tries to distinguish such amendments to ACCA from amendments to the federal schedules that ACCA incorporates. In the key paragraph of its brief, the Government asserts that the federal schedules "are not contained in the ACCA," and so "amending the federal schedules is not the equivalent of amending the ACCA." U.S. Br. 41. On this view, petitioner would prevail in this case if ACCA itself listed all of the CSA's controlled substances. But petitioner is out of luck simply because ACCA instead incorporated the controlled substances by reference.

That view runs contrary to a long-standing rule of statutory construction. It is well established that the "adoption of [an] earlier statute by reference 'makes it as much a part of the later act as though it had been incorporated at full length.'" *U.S. Dep't of Energy v. Ohio*, 503 U.S. 607, 617 (1992) (quoting *Engel v. Davenport*, 271 U.S. 33, 38 (1926)). "This is a recognized mode of incorporating one statute or system of statutes into another, and serves to bring into the latter all that is fairly covered by the reference." *Panama R. Co. v. Johnson*, 264 U.S. 375, 392 (1924). Indeed, Congress depends on the ability to incorporate statutes by reference in this manner.

Applied here, this elementary rule of incorporation makes clear that there is no basis for distinguishing

an amendment to the text of ACCA itself from an amendment to the schedules that ACCA incorporates. Section 924(e)(2)(A)(ii) defines "serious drug offense" as an offense involving "a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))." Section 102 of the CSA, in turn, defines "controlled substance" as a substance on the federal schedules. 21 U.S.C. § 802(6). Thus, "[i]nstead of writing out" all the individual substances, ACCA simply incorporates those substances by adopting Section 802's definition and, in turn, the schedules—creating "the same effect as if [ACCA] itself contained" all the substances on the schedules. *Interstate Consol. St. Ry. Co. v. Massachusetts*, 207 U.S. 79, 84 (1907). The upshot here is that, when a substance is added to or removed from the schedules, it is also added to or removed from ACCA's coverage.

That leaves the Government grasping for one last straw. The Government observes that the CSA's definition of "controlled substance" depends on schedules that can be amended "by regulation." U.S. Br. 41. But this makes no difference either. As petitioner has already explained, "where a regulation is validly enacted pursuant to a statute, 'it has the same force as though prescribed in terms by the statute' itself." Petr. Br. 20 (quoting *Atchison, T. & S.F. Ry. Co. v. Scarlett*, 300 U.S. 471, 474 (1937)). The Government does not dispute that the federal schedules are validly promulgated pursuant to the CSA. So when the schedules are amended—whether by regulation or statute—so too are ACCA's criteria.

2. Unable to find support in ACCA precedent, the Government turns to *Mellouli*—an immigration case. But that case is irrelevant here for two reasons.

First, *Mellouli* did not even address a question comparable to the one here. There, the Court held that a Kansas drug statute was overbroad vis-à-vis a federal immigration statute authorizing the removal of a non-citizen convicted of any offense "relating to a controlled substance (as defined in Section 802 of Title 21)." *Mellouli*, 575 U.S. at 801 (quoting 8 U.S.C. § 1227(a)(2)(B)(i)). In so holding, the Court observed: "At the time of Mellouli's conviction, Kansas' schedules included at least nine substances not included in the federal lists." *Id*. at 802; *accord id*. at 808 (same). But this statement cited and referred *only* to the state schedules "[a]t the time of Mellouli's conviction." *Id*. at 802, 808. So it is unclear what version of the federal schedules the Court might have been contemplating. And, in fact, the Court had no reason to contemplate any particular version *at all*, since that issue did not affect the outcome of the case: At all relevant times, the state law was broader than the federal schedules.[2]

Second, immigration and recidivist sentencing contexts differ in a fundamental respect as to timing.

A state drug conviction *immediately* subjects a non-citizen to removal. So it might make sense in that context to consult federal immigration law at the time

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[2] The Government observes (at 35) that a sentence in the factual background of its *Mellouli* brief stated that two of the nine substances were added to the federal schedules after the conviction. Br. for Resp., 2014 WL 6613094, at *10 (No. 13-1034) (Nov. 20, 2014). But that addition was not material to the reasoning or holding of the Court. The state law was overbroad whether it controlled nine substances that the federal schedules did not, or whether it controlled only seven. A passing sentence in the Government's brief—which the majority did not cite or mention—could not transform any dicta into holding.

of the state conviction; after all, that is when the immigration consequences attach. But consequences under ACCA do *not* attach at the time of the state drug conviction. Rather, ACCA is triggered if—and only if—the state drug offender *later* commits a federal firearm offense, an offense that may never occur.

This basic distinction explains why the Sixth Amendment obligates defense counsel to advise their clients about the immigration consequences of a state conviction. *See Padilla v. Kentucky*, 559 U.S. 356, 367–68 (2010). But the same obligation does *not* extend to potential consequences under recidivist statutes like ACCA. *See* Petr. Br. 31. Thus, as even the author of the decision below acknowledged, "[t]he immigration context fails to supply a helpful analogue" when addressing the ACCA timing question here. *See* Pet. App. 33a n.1 (Rosenbaum, J., concurring). Several other lower courts have agreed. *See, e.g.*, *United States v. Williams*, 48 F.4th 1125, 1143–44 (10th Cir. 2022).

III. The time-of-federal-offense rule respects foundational principles.

1. The Government's time-of-prior-conviction rule contravenes the purpose of recidivist statutes.

The Government argues that a defendant's culpability for federal-law purposes is best measured at the time of a prior state-law conviction. And, as a result, the Government asserts that the subsequent removal of a controlled substance from the federal schedules does not retroactively mitigate the defendant's earlier culpability. U.S. Br. 36–37.

As an initial matter, the Government's logic is once again inconsistent with its own position. If the defendant's culpability must be assessed at the time of

the prior conviction, then that would mean prior drug manufacturing offenses would qualify as ACCA predicates—even if Congress later amended ACCA to exclude such offenses. But the Government correctly disclaims this result on the ground that is contrary to the default time-of-federal-offense rule. U.S. Br. 41.

The Government also misplaces reliance again on *McNeill*. U.S. Br. 32, 36. There, the Court explained that the defendant's culpability was unaffected by "subsequent changes in state law." *McNeill*, 563 U.S. at 823. But that makes perfect sense because culpability for ACCA purposes is a question of *federal* law. Thus, unlike subsequent changes to *state* law, subsequent changes to ACCA's criteria must be given effect. After all, it is for Congress—not the states—to determine what prior convictions are sufficiently culpable for ACCA. *See* Amicus Br. of FAMM 3, 18.

Critically, that culpability must be assessed at the time of the federal firearm offense, not the prior state conviction. Indeed, the Court has repeatedly explained that, when it comes to recidivist statutes like ACCA, "100% of the punishment is for the offense of conviction. None is for the prior convictions." *United States v. Rodriquez*, 553 U.S. 377, 386 (2008); *accord United States v. Bryant*, 579 U.S. 140, 154 (2016); *Nichols v. United States*, 511 U.S. 738, 747 (1994). The Government fails to address this body of precedent.

Once culpability is assessed at the time of the federal offense, the Government does not dispute that it would make no sense to incapacitate defendants for conduct that federal law no longer deems dangerous, let alone illegal. Conversely, where federal law *does* deem the conduct dangerous by the time of the federal

offense, ACCA should apply. The Government's time-of-prior-conviction rule would do exactly the opposite.

2. The Government's time-of-prior-conviction rule would also create intolerable fair-notice problems.

Like the Eleventh Circuit, the Government says that its rule provides fair notice because a state drug offender can discern "at the time of the state crime" whether his offense may later qualify under ACCA. U.S. Br. 39; *see also id*. at 16, 37, 40. As petitioner has explained, however, state drug offenders generally have no reason to think about ACCA at all (and their lawyers need not advise them about it). Unless and until a state drug offender commits a federal firearm offense (and also has two more predicate offenses), ACCA does not come into play. *See* Petr. Br. 29–31.

The Government offers no response to this point. Nor does the Government explain how its conception of notice would permit ACCA to cover prior convictions predating ACCA's enactment. After all, if notice were evaluated at the time of the prior conviction, then there would be no notice of ACCA *at all* in that setting, and ACCA would therefore be unconstitutional. Yet it is well settled that ACCA covers prior convictions predating its enactment. *See, e.g.*, *United States v. Reynolds*, 215 F.3d 1210, 1213 (11th Cir. 2000).

Once notice is properly evaluated at the time of the federal firearm offense, the problems with the Government's time-of-prior-conviction rule become undeniable. The Government's rule would require people to track down superseded federal schedules from the time of their prior convictions, which could be both numerous and decades old. *See* Petr. Br. 27–29; Amicus Br. of Clause 40 Foundation 14–19.

The Government's only response is that this task would not be "any harder than finding old state codes—as *McNeill* would already require the defendant to do." U.S. Br. 39. But the Government overlooks that defendants receive notice of the state codes at the time of their state drug convictions. The Government's rule here would impose a far greater burden: It would require people to track down federal schedules that were in effect long before their federal firearm offense and that have since become difficult to unearth. At the very least, the Government's time-of-prior-conviction rule would add an extra layer of complexity, requiring defendants to find old federal schedules in addition to old state statutes. This area is already rife with confusion for lawyers, judges, and probation officers, not to mention ordinary people. Petitioner's rule would avoid making it any harder.

3. The "reference" canon further undermines the Government's time-of-prior-conviction rule.

Under the reference canon, dynamic references incorporate "the law on that subject as it exists whenever a question under the [referring] statute arises." *Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759, 769 (2019). Here, the Government does not dispute that ACCA incorporates the CSA schedules—a dynamic referent. U.S. Br. 42. Nor does the Government dispute that a question "arises" under ACCA only upon the commission of a federal firearm offense.

Resisting the implication of these concessions, the Government nonetheless argues that the reference canon is irrelevant here because ACCA refers to a specific statute (Section 802), not a general subject. And, it argues, specific references under the reference canon lock in the law at the time of the referring

statute's enactment (here, 1986)—a result that "no party endorses" here. U.S. Br. 17, 41–42.

But the Government incorrectly assumes that the referent here is a "specific" one. Although ACCA references Section 802, "[f]acially specific references can, and sometimes do, operate as general legislative references." Norman Singer & Shambie Singer, 2B Sutherland Statutes & Statutory Construction § 51:8, n.8 (7th ed. 2022) (citing *Dir., Office of Workers' Comp. Programs, U.S. Dep't of Labor v. Peabody Coal Co.*, 554 F.2d 310, 323–24 (7th Cir. 1977)). Thus, courts will sometimes "construe a specific reference, in context, as a general one." *Matter of Commitment of Edward S.*, 570 A.2d 917, 925 n.9 (N.J. 1990).[3]

That is the case here. Read in context, ACCA's reference to Section 802 operates as a general reference. Section 802(6) expressly incorporates the federal schedules and, in turn, the CSA's general framework. And these schedules differ from ordinary statutes because they "shall be updated . . . on an annual basis." 21 U.S.C. § 812(a). The reference canon thus supports petitioner's position. Meanwhile, the Government's time-of-prior-conviction position is not even one of the potential options under this canon.

IV. The time-of-federal-offense rule avoids unjustified anomalies.

The Government asserts that petitioner's time-of-federal-offense rule would create an unjustified

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[3] *Accord CompSource Mut. Ins. Co. v. State ex rel. Okla. Tax Comm'n*, 435 P.3d 90, 98–99 (Okla. 2018); *Haw. Providers Network, Inc. v. AIG Haw. Ins. Co.*, 98 P.3d 233, 243 (Haw. 2004); *George Williams College v. Village of Williams Bay*, 7 N.W.2d 891, 894 (Wis. 1943).

anomaly in ACCA, but it would not. Meanwhile, the Government's time-of-prior-conviction rule would create not one but two anomalies of its own—both of which would be avoided entirely by petitioner's rule.

1. The Government first attempts to identify an anomaly with petitioner's time-of-federal-offense rule. Specifically, the Government reprises the Eleventh Circuit's reasoning below that: (1) ACCA's definition for *federal* "serious drug offenses" in Section 924(e)(2)(A)(i) must look to federal law from the time of the prior conviction; and (2) Section 924(e)(2)(A)(ii) must do the same for prior *state* convictions. U.S. Br. 22–24. But the Government is wrong on both points.

a. Section 924(e)(2)(A)(i) does not necessarily look to old law. It defines a "serious drug offense" as "an *offense* under" the CSA. 18 U.S.C. § 924(e)(2)(A)(i) (emphasis added); *see Shular*, 140 S. Ct. at 786 (emphasizing this phrase). An "offense" is comprised of elements. *See Mathis v. United States*, 579 U.S. 500, 504 (2016). Thus, Section 924(e)(2)(A)(i) first directs courts to ascertain the elements of the prior conviction based on the law in effect at the time of the prior conviction. But courts should then ask whether those elements constitute an "offense under" the version of the CSA in effect at the time of the federal firearm offense. There is no textual reason why courts must compare the elements against the version of the CSA in effect at the time of the prior federal conviction.

Indeed, to justify departing from the default time-of-federal-offense rule in Section 924(e)(2)(A)(i), the Government rewrites the statute. It asserts that, "[b]y its plain terms," Section 924(e)(2)(A)(i) "refers solely to the historical fact of a *conviction under* the CSA." U.S. Br. 14, 22 (emphasis added). But even though

Congress *did* use the phrase "conviction under" elsewhere in ACCA, *see* 18 U.S.C. § 924(e)(1) ("conviction under section 922(g)"), Congress did not use that phrase in Section 924(e)(2)(A)(i). Instead, Congress used the phrase "offense under." The Court should presume that this was a deliberate choice. *See Russello v. United States*, 464 U.S. 16, 23 (1983).[4]

b. Even if ACCA *did* look backwards regarding previous federal drug convictions, the Government acknowledges that Sections 924(e)(2)(A)(i) and (A)(ii) "need not and do not apply identically in all respects." U.S. Br. 23. Indeed, this Court unanimously said exactly that in *Shular*. Quoting the Government's brief in that case, the Court explained that "the divergent text of the two provisions of the serious-drug-offense definition" made "any divergence in their application unremarkable." *Shular*, 140 S. Ct. at 786.

Seeking to qualify *Shular*'s unqualified statement, the Government asserts there would be no reason why the two provisions should not be identical as to "timeframes." U.S. Br. 23. But there *would be* a reason: Consulting the statute of conviction for prior federal convictions would not invite the same fair-notice problems that would arise were people required to locate federal schedules from the time of their prior state convictions. *See* Petr. Br. 27–31; *supra* at 13–14.

2. In reality, it is the Government's rule—not petitioner's—that produces unjustified anomalies.

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[4] Numerous federal criminal provisions—including provisions in both Section 924 and the CSA—also use the phrase "conviction under" rather than "offense under." *See, e.g.*, 18 U.S.C. §§ 924(c)(1)(C), (c)(5); 21 U.S.C. §§ 844(a), 859(b), 860(b), 861(c).

First, the Government admits that its time-of-prior-conviction rule would exclude from ACCA *all* drug convictions—both state and federal—from before 1970. *See* U.S. Br. 27–29. That is because neither the CSA nor its schedules existed before that date.

This result would be highly anomalous. As the Government acknowledges, ACCA's core objective is to incapacitate "career" criminals. U.S. Br. 3, 36. It is implausible that Congress would have categorically excluded drug convictions that were just 16 years old when it amended ACCA in 1986 to cover "serious drug offenses." *See* Petr. Br. 33–34.

The Government responds that it would have been "perfectly sensible" for Congress to "wipe the slate clean" regarding pre-1970 state drug convictions, to relieve courts of the difficulty of mapping them onto the patchwork of pre-CSA federal analogues. U.S. Br. 28–29. But petitioner's rule also avoids that difficulty. Under his time-of-federal-offense rule, courts would never be required to consult the pre-CSA federal landscape. (ACCA does not apply to federal firearm offenses predating its enactment in 1984, since that would violate the Ex Post Facto Clause).

The Government's only other response is that Congress must have excluded *state* drug convictions predating 1970 because Congress "indisputably excluded *federal* drug convictions predating 1970." U.S. Br. 27–28. But, as explained above, this reading of Section 924(e)(2)(A)(i) is not "indisputable." And under petitioner's alternative reading, both state *and* federal drug convictions from before 1970 would still qualify (provided they meet ACCA's criteria). Under the Government's reading, no such convictions could

trigger an ACCA "career" criminal sentence—an anomaly the Government does not even try to justify.[5]

Second, the Government's time-of-prior-conviction rule would also exclude from ACCA's coverage prior state convictions for substances that states controlled *before* the federal Government. Under the Government's rule, courts would be *required* to impose ACCA sentences for substances that are *removed* from the federal schedules, but courts would be *precluded* from imposing ACCA sentences for substances that are *added* to the federal schedules—including dangerous drugs like bath salts, GHB (the "date-rape" drug), methoxetamine, xylazine (the "zombie" drug), etc. *See* Petr. Br. 34–35; Amicus Br. of NACDL 9–10; Amicus Br. of NAFD 21–23.

The Government actually endorses this topsy-turvy regime. *See* U.S. Br. 16, 37–38, 42–43. But this is puzzling. Can it really be that the Government does *not* want federal courts to impose ACCA sentences for dangerous substances that Congress or the Attorney General has added to the federal schedules by the time of the federal firearm offense? Regardless, it cannot be that *Congress* intended such a peculiar outcome. At the very least, had Congress intended to depart from the default time-of-federal-offense rule to create such a counterintuitive sentencing regime, it would have said so clearly. As explained, it did no such thing.

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[5] As petitioners' amici explain, the Government's time-of-prior-conviction rule would also have bizarre consequences when applied to other common federal recidivist statutes, inevitably excluding prior convictions that Congress could not have possibly intended to exclude. *See* Amicus Br. of NAFD 8–17.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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September 20, 2023