No. 22-6389

IN THE

Supreme Court of the United States

JUSTIN RASHAAD BROWN

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

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

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – continued

TABLE OF AUTHORITIES – continued

STATUTES AND REGULATIONS

TABLE OF AUTHORITIES – continued

TABLE OF AUTHORITIES – continued

INTRODUCTION

Statutory text, ACCA's purposes, and background presumptions all point in the same direction: When sentencing someone for a federal gun crime, a court should apply *current* federal law, not a superseded version. The government's contrary argument is a paean to *McNeill*, but it ignores the key differences between that case and this one. Post-conviction changes in *state* law reveal nothing about the present-day significance under federal law of a prior drug offense. But when *Congress* changes the *federal* drug schedules, it has made a democratic judgment about the descheduled substance that federal courts should respect. In Mr. Brown's case, the elected branches descheduled hemp because they necessarily concluded that growing, possessing, or selling hemp does not implicate the culpability or harm that federal law previously attributed to it. The government's rule improperly disregards that judgment. And neither the government's rule nor Mr. Jackson's is administrable: The government's position would further complicate ACCA by requiring judges, lawyers, and probation officers to locate and sort through years- or decades-old federal regulatory materials. Mr. Jackson's rule raises indeterminacy concerns because federal gun-possession offenses often do not occur at one discrete point in time. The Court should reject those alternatives and adopt a time-of-federal-sentencing rule.

ARGUMENT

I. Section 924(e)(2)(A)(ii) requires sentencing courts to consult the current drug schedules.

A. The statutory text does not support the government's newly minted "plain" reading.

1. Having urged a "time-of-federal-offense approach" in the court of appeals, the government now says the statute's "plain terms" require something wholly different—a time-of-state-conviction approach. Resp. Br. 18 n.4, 19. The government presumably would have noticed that before if it were true. But it is not. The government misreads the uniformly present-tense language that does appear in the statute and then relies on past-tense language that does not.

To start, that ACCA addresses "previous convictions," *id.* at 19, shows nothing. At issue here is not Mr. Brown's past conduct, but how that past conduct affects his sentence *in the present*. That is a question of current *law*, not of historical *fact*.

For similar reasons, the government finds no support in the word "involving." See Resp. Br. 19–20. To be sure, saying "that a historical event was one 'involving' certain things is to say that the event included those things as attributes." *Id.* at 20. But the next step in the government's argument—that "the attributes of a particular event are fixed in time," *id.*—is a *non sequitur*. Again, while the historical attributes of a past event are fixed, its current legal significance is not. And whether the substance involved in a defendant's prior conviction is "a controlled substance []as defined in" the referenced drug schedules, 18 U.S.C. § 924(e)(2)(A)(ii), is not a historical fact. Significantly, Congress used the *present* participle of "involve," not

the past participle—the statute does not say "an offense … *that involved* a controlled substance (as defined in …)." *Id.*; see *United States* v. *Wilson*, 503 U.S. 329, 333 (1992) ("Congress' use of a verb tense is significant in construing statutes.").

On the phrase "as defined in," the government claims the statutory language is akin to saying "President Lincoln *was diagnosed* with depression (as defined in the psychiatric manual)," which "would plainly refer to the psychiatric manual in existence at the time of the diagnosis." Resp. Br. 21 (emphasis added). But that stacks the deck because the phrase "was diagnosed" points toward a contemporaneous source. If the Lincoln biographer instead wrote a sentence tracking the actual language of ACCA—"mental-health challenges involving depression (as defined in the psychiatric manual)"—no ordinary English speaker would assume that she had consulted obsolete definitions from the 1860s. See, *e.g.*, William Aitken, *The Science and Practice of Medicine* 453 (1866) (describing "religious," "hypochondriacal," and "nostalgic" forms of "melancholia" (cleaned up)).

Hypotheticals aside, the federal definition of a "controlled substance" is irrelevant to whether the defendant committed "an offense under State law," 18 U.S.C. § 924(e)(2)(A)(ii), which is the only contemporaneous inquiry involved in a prior conviction. Again, the government conflates the historical facts (whether the defendant was convicted of an offense and what substance was involved) with their present-day legal significance (whether the conviction triggers ACCA). On the latter question, the statute's phrasing calls for a here-and-now inquiry.

The government brushes aside the lack of retrospective language in the "as defined in" parenthetical, contending that ACCA in general is backward-looking,

and that if Congress intended to incorporate the current drug schedules, it would have "do[ne] so explicitly." Resp. Br. 22. But that is exactly what Congress did. Section 924(e)(2)(A)(ii) defines "controlled substance" by specifically referencing another statute, the Controlled Substances Act's "Definitions" provision, 21 U.S.C. § 802(6). And section 802(6), in turn, defines "controlled substance" by general reference to the federal drug schedules—a "panorama of controlled substances that [Congress] plainly envisioned would be ever-evolving." *United States* v. *Gibson*, 55 F.4th 153, 162 (2d Cir. 2022). In short: section 924(e)(2)(A)(ii) references an "external body" of "evolving law," so it "adopts the law on that subject as it exists whenever a question under the statute arises." *Jam* v. *Int'l Fin. Corp.*, 139 S. Ct. 759, 769 (2019) (citing 2 J. Sutherland, *Statutory Construction* §§ 5207–08 (3d ed. 1943)). It makes no difference that the statute does so by way of a short layover at section 802(6). This Court has never held that the reference canon applies only to direct flights, and the government does not even try to explain why it should.

2. The government's "plain text" argument is less about the statutory text and more about general language from *McNeill* v. *United States*, 563 U.S. 816 (2011). The government relies on *McNeill* to suggest the relevant question is whether a prior conviction "*was for*" an ACCA-predicate offense. Resp. Br. 19 (emphasis added). But "was for" does not appear in the statute. As the government more forthrightly acknowledged in *McNeill* itself: "No past-tense verbs appear in the substantive component of the definition of a state-law 'serious drug offense.'" *McNeill* Resp. Br. 18, *McNeill* v. *United States*, No. 10-5258 (U.S. Mar. 29, 2011).

Nor does *McNeill*'s actual holding "appl[y]" here. *Contra* Resp. Br. 19. *McNeill* held that ACCA "requires a federal sentencing court to consult the maximum sentence applicable to a defendant's previous drug offense at the time of his conviction …." 563 U.S. at 820. Although *McNeill* thus refused to look to "the maximum sentence under *current* state law," *id.* at 819, the question here is different in three key respects.

First, the only sensible time to consider the state-law punishment applicable to a defendant's prior conviction is when he was actually punished by the state court. After all, that is when the permissible punishment is *most* relevant. It was thus incongruous for Mr. McNeill—who was "actually sentenced" to ten years in prison for his state offenses—to claim that later changes to state law meant "the 'maximum term of imprisonment' for those offenses" was just "30 or 38 months." *Id.* at 821. By contrast, the federal-law classification of the substance involved in a defendant's state prosecution is wholly irrelevant to that proceeding; it does not matter until sentencing under section 922(g). Thus, the time of federal sentencing is the natural moment of comparison.

Second, the government's heavy reliance on *McNeill* assumes that "subsequent changes in state law" (at issue there) are no different from subsequent changes in federal law (at issue here). See 563 U.S. at 823. But applying current federal law in federal courts has been the norm for two centuries. See *infra* § I.C. And that norm has particular force here, because incorporating the *current* federal drug schedules gives effect to the *current* Congress's policy judgments, while the government's rule calcifies the views of Congresses past.

Here, an Act of Congress, signed by the President, descheduled hemp because today's legislators decided not to lump hemp in with other forms of cannabis for

federal regulatory and criminal purposes. Descheduling thus reflects the democratically accountable branches' judgment that growing, possessing, or selling hemp does not implicate the culpability or harm that federal law previously attributed to it. See John Hudack, *The Farm Bill, Hemp Legislation and the Status of CBD*, Brookings Inst. (Dec. 14, 2018), https://shorturl.at/htyPU. Consulting the current schedules effectuates that judgment. That is a far cry from a potential ACCA predicate "'disappear[ing]' entirely" based on the happenstance of state criminal-code updates. See *McNeill*, 563 U.S. at 822.

Third, the government emphasizes *McNeill*'s explanation that a present-day analysis of the maximum applicable state-law sentence would produce "absurd" results if states reformulated their criminal codes such that the offense of conviction no longer existed. Resp. Br. 30–31. In that situation, it would be impossible to even ask what the relevant penalty is, as there would be nothing to consult. No such concerns arise here. Consulting the federal drug schedules *never* requires "translat[ing] … the old conviction into the new statutes," 563 U.S. at 823; it merely requires checking whether the substance involved is currently listed—a far simpler task than what the government proposes. See *infra* § II.

None of this means that, if no current match exists, a defendant's prior convictions are erased. That those convictions are not ACCA predicates does not preclude a federal sentencing court from tailoring a sentence that reflects the defendant's criminal record. See *McNeil*, 563 U.S. at 823. Individuals with prior felony drug offenses that do not match the federal schedules may still be sentenced as "career offenders" under USSG §4B1.1 or, of course, receive discretionary sentences at or even above the top of the guideline range.

See 18 U.S.C. § 3553(a)(1) (among the first factors to be considered in sentencing are "the history and characteristics of the defendant"). All of this reflects that sentencing is a holistic, prospective endeavor based on the defendant's characteristics and circumstances today.

Mr. Brown's position also tracks the Sentencing Commission's own approach to intervening changes in the law. The Commission recognizes that, when prior felony convictions have become misdemeanors at the time of sentencing, treating them as felonies "may result in a guideline range that substantially overrepresents the seriousness of the defendant's criminal history or substantially overstates the seriousness of the instant offense." USSG § 4B1.1 app. n.4. The guidelines thus authorize unlimited downward departures from the career-offender guidelines in this situation. By giving effect to Congress's current judgments, Mr. Brown's rule reflects the same common-sense view. See *Dorsey* v. *United States*, 567 U.S. 260, 280 (2012) ("[I]n federal sentencing the ordinary practice is to apply new penalties to defendants not yet sentenced, while withholding that change from defendants already sentenced.").

B. Statutory context does not support the government's position.

The government observes that expunged state convictions do not count as ACCA predicates. Resp. Br. 25. Thus, it says, courts "*may* count a conviction that has *not* been set aside." *Id.* (quoting *Custis* v. *United States*, 511 U.S. 485, 491 (1994). "That is eminently demonstrable, sounds powerfully good, but in fact proves nothing at all." *Almendarez-Torres* v. *United States*, 523 U.S. 224, 260 (1998) (Scalia, J., dissenting). ACCA's expungement provision does not tell sentencing courts whether a prior conviction could count as an

ACCA predicate in the first place. Nor does it suggest which version of the federal drug schedules to consult in determining the present-day import of a historical conviction—much less that that inquiry is "generally fixed at the time of [the state] conviction. Resp. Br. 26.

"Nor does the other clause of the 'serious drug offense' definition shed light on the question before [the Court]." *Shular* v. *United States*, 140 S. Ct. 799, 786 (2020). The statutory language at issue here—"involving … a controlled substance (as defined in [the Controlled Substances Act])"—appears nowhere in section 924(e)(2)(A)(i), which instead refers to "an offense under" specified federal statutes. That is why the government itself has told this Court that "the divergent text of the two provisions makes any divergence in their application unremarkable." *Shular* Resp. Br. 22, *Shular* v. *United States*, No. 18-6662 (U.S. Nov. 22, 2019).

Had Congress wanted section 924(e)(2)(A)(ii) to operate exactly like its next-door neighbor, it could have used the same language that it did elsewhere. See 18 U.S.C. § 3559(c)(2)(H)(ii) ("[T]he term 'serious drug offense' means … an offense under state law that, *had the offense been prosecuted in a court of the United States, would have been punishable* under [the Controlled Substances Act or the Controlled Substances Import and Export Act.]" (emphases added)). Contrary to the government's assertion, that is not an "unsound inference[], Resp. Br. 26; it is a "traditional rule of statutory construction. *Bittner* v. *United States*, 143 S. Ct. 713, 720 (2023) ("[W]e normally understand [a] difference in language to convey a difference in meaning ….").

C. Background presumptions support a time-of-sentencing approach.

1. If text, context, and structure leave any doubt, Chief Justice Marshall's admonition in *United States* v. *Schooner Peggy* resolves it in favor of Mr. Brown's rule. When Congress enacts a new statute while a case is pending, that statute "must be obeyed" because courts "must decide according to existing laws." 5 U.S. (1 Cranch) 103, 110 (1801). In other words: courts have an "obligation" to "give effect to Congress's latest enactment, even when that has the effect of overturning the judgment of an inferior court." *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 227 (1995) (citation omitted).

Against all this, the government says: nothing. It does not suggest, for example, that prospectively consulting current drug law at sentencing would run afoul of the presumption against retroactivity. And it does not deny that *Schooner Peggy*'s rule applies with full force in sentencing cases like this. Nor could it. In *Henderson* v. *United States*, 568 U.S. 266, 270 (2013), this Court looked to *Schooner Peggy* in determining the "temporal scope" of Federal Rule of Criminal Procedure 52(b). The question in *Henderson* was when to assess the plainness of a sentencing error: (i) at the time of the error or (ii) at the time of review, in light of later legal developments. Rejecting the government's time-of-error approach, the Court reasoned that a "'time of review' interpretation furthers the basic *Schooner Peggy* principle that 'an appellate court must apply the law in effect at the time it renders its decision.'" *Id.* at 276 (quoting *Thorpe* v. *Hous. Auth. of Durham*, 393 U.S. 268, 281 (1969)). The same is true of Mr. Brown's approach here.

The federal saving statute does not provide otherwise. While the government has abandoned the point, Mr. Jackson suggests (Br. 17) that "when a statutory

change ameliorates a penalty after an offense occurs," the saving statute "requires courts to apply the law in effect" when "the crime was committed." But the saving statute applies only when a penalty is "incurred under" a statute and Congress later amends or repeals "such statute." 1 U.S.C. § 109. And the Farm Bill did not amend any statute "under" which Mr. Brown "incurred" penalties. Pet. Br. 28–29. For the saving statute to apply here, it would have to sweep more broadly—providing, for example, that "an act or omission [would] be punished in the manner and to the extent authorized by the laws in force when it was commenced …." John P. MacKenzie, Hamm v. City of Rock Hill *and the Federal Savings Statute*, 54 Geo. L.J. 173, 180–81 (1965). Congress considered and rejected just such a proposal. *Id.*

2. The government also ignores the "longstanding tradition" that "[w]hen a defendant appears for sentencing, the sentencing court considers the defendant *on that day*, not on the date of his offense or the date of his conviction." *Concepcion* v. *United States*, 142 S. Ct. 2389, 2395–96 (2022) (emphasis added). As Mr. Brown explained, (Br. 20), nothing in section 924(e)(2)(A)(ii) requires sentencing courts to ignore intervening changes in federal drug law.

D. ACCA's purposes are best served by a time-of-sentencing approach.

ACCA's twin aims are incapacitating dangerous recidivists and reducing sentencing disparities. The government's rule frustrates the first aim by ignoring Congress' current policy determination about the dangers posed by a given drug, and the second by creating sentencing disparities between offenders who have committed identical crimes mere days apart.

According to the government, someone who commits a state drug crime involving a then-federally-controlled substance is not rendered less culpable when Congress later deschedules that substance. Resp. Br. 36–37. To be sure, the defendant committed a crime, which is necessarily considered at sentencing. *Supra* pp. 6–7. But the government overlooks *why* Congress deschedules controlled substances: it determines that their production, sale, and use does not warrant continued criminalization.

That determination necessarily includes the view that these actions are not as culpable as they once seemed. With the benefit of hindsight, Congress sometimes concludes that federal drug penalties are harsher than they should be, *e.g.*, Fair Sentencing Act of 2010, Pub. L. No. 111–220, 124 Stat. 2372 (2010), and federal courts should give effect to those judgments. After all, the point of an ACCA sentence is to prospectively incapacitate "the kind of person who might deliberately point a gun and pull the trigger." See *Begay* v. *United States,* 553 U.S. 137, 146 (2008). That determination can only be made at the time of federal sentencing, based on all the most relevant and timely information. See *Pepper* v. *United States*, 562 U.S. 476, 480 (2011).

The government again errs by conflating federal descheduling with "evolving drug polic[y]" at the state level. Resp. Br. 36. ACCA's "serious drug offense" definition focuses on offenses (i) "under" federal drug laws or (ii) involving federally scheduled substances. That is why "subsequent changes to the *state* drug schedules are irrelevant." *Id.* But in imposing a federal sentence for a federal firearm offense, it is only natural to ask how federal law treats the defendant's actions today.

Changing tack, the government next chides Mr. Brown (Br. 38–39 & n.6) for advancing a rule that

is "antithetical to traditional notice principles." This newfound solicitude for potential felons in possession is admirable. But the "implausibility of [the Solicitor General's] contention that [Mr. Brown's rule] is unfair to criminal defendants is exposed by the lineup of *amici* in this case. It is hard to believe that the National Association of Criminal Defense Lawyers was somehow duped into arguing for the wrong side." *Blakely* v. *Washington*, 542 U.S. 296, 313 (2004).

In all events, the government has things backward. The "notice" offered by a time-of-state-conviction rule is illusory: a *state* court imposing a *state* conviction for a *state* drug crime would have no reason to address a given drug's *federal* status. So under the government's rule, a felon thinking about committing a section 922(g) offense would need to visit his local law library and cross-reference historical copies of the Code of Federal Regulations and the Federal Register to determine whether his prior convictions counted as ACCA predicates.

Under Mr. Brown's rule, by contrast, he could simply consult the current drug schedules. And a defendant is far more likely to be weighing these considerations—and thus to need notice of the potential consequences—when he is charged under section 922(g), not when he first commits a state drug crime. At that earlier moment, ACCA is not relevant to him, and it may never become relevant.

The government is also wrong to claim (at 38 n.6) that Mr. Brown's rule would "subject defendants to enhanced sentences" based on laws enacted "after the[ir] federal offense conduct is complete." Resp. Br. 38 n.6. The *Ex Post Facto* Clause creates a backstop against post-offense scheduling decisions that would "inflic[t] a greater punishment, than the law annexed to the crime, when committed." *Peugh* v. *United States*, 569

U.S. 530, 539 (2013) (quoting *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 390 (1798)). But the Clause does not bar sentencing courts from applying Congress's current policy judgment when (as here) doing so would not yield a harsher sentence. And again: that is how things already work under the Sentencing Guidelines. See *Dorsey*, 567 U.S. at 275 ("The Sentencing Commission has … instructed sentencing judges to 'use the Guidelines Manual in effect [at sentencing],' regardless of when the defendant committed the offense, unless doing so 'would violate the *ex post facto* clause.'" (quoting U.S.S.G. § 1B1.11).

II. Only Mr. Brown's rule promotes judicial economy and avoids needless complexity.

Neither the United States nor Mr. Jackson says a word about administrability. That is telling. The last thing that ACCA needs is another layer of burdensome complexity—yet that is exactly what would follow under either alternative to Mr. Brown's rule.

A. The government's rule would further complicate ACCA and burden the lower courts.

"The Court is tired of the Armed Career Criminal Act …." *Johnson* v. *United States*, 576 U.S. 591, 624 (2015) (Alito, J., dissenting). Indeed, members of this Court have long voiced concern over ACCA's complexity, burdens, and anomalies. See, *e.g.*, *Wooden* v. *United States*, 595 U.S. 360, 384 (2022) (Gorsuch, J., concurring in the judgment) ("Disputes over the statute's meaning have occupied so much of this Court's attention over so many years that various pieces of the law and doctrines associated with it have earned their own nicknames …."); *Quarles* v. *United States*, 139 S. Ct. 1872, 1881 (2019) (Thomas, J., concurring) ("[T]he categorical approach employed today is difficult to apply and can yield dramatically different sentences.");

Chambers v. *United States*, 555 U.S. 122, 133–34 (2009) (Alito, J., concurring in the judgment) (discussing "numerous splits among the lower federal courts, the resolution of which could occupy this Court for years"); *cf. Chazen* v. *Marske*, 938 F.3d 851, 866 (7th Cir. 2019) (Barrett, J., concurring) ("[T]his body of law is plagued by numerous complex issues.").

The government's rule would make things worse.

a. A hypothetical shows why. Suppose that a defendant convicted under section 922(g) has four previous convictions under Florida law:

- A November 1, 1990 conviction for possession with intent to sell Phencyclidine (PCP);
- A June 1, 1999 conviction for possession with intent to sell GHB—sometimes called the date-rape drug;
- A March 1, 2004 conviction for possession with intent to sell TFMPP, an ecstasy-like drug; and
- An October 1, 2011 conviction for possession with intent to sell Methylone (a chemical used to make bath salts).

Each conviction carries a maximum sentence of ten years or more. See Fla. Stat. § 893.13(1)(a).

Under Mr. Brown's rule, the ACCA analysis is simple. The court consults the current drug schedules and finds that PCP is listed. 21 C.F.R. § 1308.12(e)(4). So is GHB. *Id.* § 1308.11(e)(1). TFMPP is not, but bath salts are. *Id.* § 1308.11(d)(47). ACCA applies.

The government's rule is a different story. The federal drug schedules are republished each April in the

Code of Federal Regulations. So to verify whether a given drug was scheduled on a given date, the court would need to compare the drug schedules published before and after each state conviction.

In some cases, that would be straightforward (if laborious). Here, for example, PCP was a Schedule II drug in both 1990 and 1991. *Compare* 21 C.F.R. § 1308.12(e)(3) (Apr. 1, 1990), *with* 21 C.F.R. § 1308.12(e)(5) (Apr. 1, 1991). So the sentencing court could conclude that the November 1990 conviction is an ACCA predicate.

But the GHB conviction is more complicated. The date-rape drug is missing from the 1999 schedules, see 21 C.F.R. §§ 1308 *et seq*. (Apr. 1, 1999), but it appears in the 2000 version, see 21 C.F.R. § 1308.11(e)(1) (Apr.1, 2000), so the court would need to find the mid-year scheduling order in the Federal Register. As it happens, that order was not published until March 2000, so a June 1999 conviction would not count as an ACCA predicate. See Schedules of Controlled Substances: Addition of Gamma-Hydroxybutyric Acid to Schedule I, 65 Fed. Reg. 13,235 (Mar. 13, 2000).

The TFMPP conviction would also require scouring the Federal Register. While TFMPP was a Schedule I drug in 2003, see 21 C.F.R. § 1308.11(g)(4) (Apr. 1, 2003), it is absent from the 2004 schedules, see 21 C.F.R. §§ 1308 *et seq*. (Apr. 1, 2004)—so the court would have to track down the March 19, 2004 descheduling order. See Schedules of Controlled Substances; Placement of 2,5-Dimethoxy-4-(n)-propylthiophenethylamine and N-Benzylpiperazine Into Schedule I of the Controlled Substances Act, 69 Fed. Reg. 12,794 (Mar. 18, 2004). The defendant here was convicted on March 1, 2004, so his TFMPP conviction would count.

The bath salts conviction requires an extra step too. Baths salts were absent from the 2011 drug schedules, see 21 C.F.R. §§ 1308 *et seq.* (Apr. 1, 2011), but they were scheduled by 2012, see 21 C.F.R. § 1308.11(g)(7) (Apr. 1, 2012). After paging through the Federal Register, the sentencing court would find that the defendant's October 1, 2011 conviction predated the scheduling order by two weeks. See Schedules of Controlled Substances: Temporary Placement of Three Synthetic Cathinones Into Schedule I, 76 Fed. Reg. 65,371 (Oct. 21, 2011).

All told—after cross-referencing a dozen outdated agency publications—the sentencing court would find that the defendant has two ACCA predicates: the PCP and TFMPP convictions. (Never mind that TFMPP has been legal for two decades.) But the defendant is off the hook for his date-rape drug and bath salts convictions—even though those drugs have been Schedule I controlled substances since 2000 and 2011, respectively. As a result, the defendant will "avoid ACCA altogether." *Borden* v. *United States*, 141 S. Ct. 1817, 1857 (2021) (Kavanaugh, J., dissenting).

Every sentencing court, prosecutor, probation officer, and defense counsel will have to live with the approach this Court announces—even in run-of-the-mill cases that involve no changes in federal drug law. Under the government's rule, that would mean cross-referencing obsolete agency publications in every ACCA case involving a state drug conviction. *Cf. United States* v. *Crowder*, 87 F.3d 1405, 1429 (D.C. Cir. 1996) (Randolph, J., dissenting) ("Before we start devising detailed procedural rules … , we ought to remember that our rules will have to be administered in a far different setting, without many of the advantages we appellate judges enjoy."), *vacated*, 516 U.S. 1087 (1997).

b. The government ignores these problems, lumping Mr. Brown's arguments together with Mr. Jackson's due-process concerns. See Resp. Br. 39. But Mr. Brown's objections are about administrability—not due process.

Nor is it any answer that *McNeill* "already require[s]" courts to "find[] old state codes." Resp. Br. 17, 39. In the first place, state sentencing records often contain all the information that a federal court needs to decide whether the defendant faced a ten-year maximum. *E.g.*, *McNeill*, 563 U.S. at 821 ("North Carolina courts actually sentenced [Clifton McNeill] to 10 years …."). Yet *state* courts have no reason to address a drug's *federal* status—a question irrelevant at the time of the state conviction. So federal courts inevitably start from scratch when they determine whether a given drug counts for ACCA purposes. Mr. Brown's rule makes that simple.

In all events, it is easy for the Solicitor General to say that ACCA is already so complex that another layer of burden would make no difference. But "lower court judges, who must regularly grapple" with ACCA enhancements, would beg to differ. *Mathis* v. *United States*, 579 U.S. 500, 538 (2016) (Alito, J., dissenting). "The dockets of … all federal courts are now clogged with [ACCA] cases,' and perhaps 'no other area of law has demanded more of [the courts'] resources.'" *Ovalles* v. *United States*, 905 F.3d 1231, 1256 (11th Cir. 2018) (citation omitted) (alterations in original).

B. Mr. Jackson's rule is indeterminate.

Mr. Jackson's rule brings its own administrability problems. Unlike federal sentencing—a discrete point in time—"possess[ing] … a[] firearm or ammunition" is a continuous activity that can occur over the course of months or years. 18 U.S.C. § 922(g); see, *e.g.*, *United*

States v. *Rice*, 259 F. App'x 300, 302 (11th Cir. 2007) ("Illegal possession of a firearm by a convicted felon is a continuing offense."). When undercover officers watch a suspect, they often collect evidence that he was violating federal gun law on numerous occasions. *E.g.*, *United States* v. *West*, 563 F. App'x 745, 746 (11th Cir. 2014) ("six-month undercover operation"); *United States* v. *Heilman*, 377 F. App'x 157, 168–73 (3d Cir. 2010) (yearlong investigation). But Mr. Jackson's rule offers no principled way to determine which moment during a months- or years-long period of possession counts as the "time of federal offense." So if the drug schedules changed during the course of a long investigation, a time-of-federal-offense approach would offer no guidance. Congress created enough timing questions when it enacted ACCA. See, *e.g.*, *Wooden v. United States*, 595 U.S. 360 (2022). This Court should not add more.

III. At a minimum, the rule of lenity precludes applying ACCA here.

The government says the rule of lenity cannot apply here because "petitioners' approaches would … simply shift the set of defendants to whom ACCA would apply," and thus would not produce "an overarchingly more lenient result." Resp. Br. 43. But Mr. Brown's position *is* more lenient overall. Given Congress's decision to deschedule hemp in the 2018 Farm Bill, a time-of-federal-sentencing rule would be more favorable for a significant number of potential ACCA defendants. Many state drug laws do not distinguish between hemp and other forms of marijuana. And even when such laws are "divisible as to drug type," the relevant documents often do not draw such a distinction either. *E.g.*, *United States* v. *Hope*, 28 F.4th 487, 502, 506 (4th Cir. 2022) (neither state law nor relevant charging documents distinguished "marijuana" and "hemp"). Thus,

Mr. Brown's rule produces a more lenient result for any defendants who were, like himself, charged under such state laws. And unless states deschedule hemp too, which few have done, this will be true for future defendants as well.

The government alternatively contends that "no … grievous ambiguity exists here." Resp. Br. 43. But the government's textual arguments lack merit, as explained above, and *McNeill* does not apply here. The government's arguments, including its *volte face*, at best produce a draw, justifying resort to lenity.

IV. Precedent does not support a time-of-state-conviction approach.

The government relies heavily on *McNeill* and *Mellouli* v. *Lynch*, 575 U.S. 798, 801 (2015). But *McNeill* is inapt for the reasons explained above. *Supra* pp. 4–7. And *Mellouli* is even less relevant.

The government says *Mellouli* supports its position because the Court there interpreted a "nearly identical" INA provision. Resp. Br. 34. But the language at issue there was different. *Mellouli* construed the words "relating to" in an INA provision authorizing deporting an alien "convicted of a violation of … any *law or regulation … relating to* a controlled substance (as defined in section 802 of Title 21)." *Mellouli*, 575 U.S. at 801 (emphasis added) (quoting 8 U.S.C. § 1227(a)(2)(B)(i)). That language's focus is the "law or regulation" of conviction, not the offense itself. And the INA "required only that a law *relate to* a federally controlled substance, as opposed to *involve* such a substance." *Id.* at 816 (Thomas, J., dissenting).

Nor did *Mellouli* implicate a timing question. The government's argument seems to hinge on this observation: "At the time of Mellouli's conviction, Kansas' schedules included at least nine substances not

included in the federal lists." *Mellouli*, 575 U.S. at 808. But *Mellouli* "did not consider—because it had no occasion to consider—the issue of what temporal version of the *federal* drug schedules was relevant." *United States* v. *Abdulaziz*, 998 F.3d 519, 530 (1st Cir. 2021). The federal schedules apparently had not changed "in any material way" between Mr. Mellouli's conviction and removal proceedings. *Id.*; see *Mellouli*, 575 U.S. at 803 (noting that the drug at issue "is a controlled substance under both federal and Kansas law").

None of this suggests "deliberate consideration" of the timing question presented here. *Contra* Resp. Br. 25. And to the extent it did touch on that question, *Mellouli* "undermine[s] the government's position" because both the Court and the government relied on federal materials that post-dated the conviction and removal proceedings. See *Abdulaziz*, 998 F.3d at 530. Indeed, the *Mellouli* Court consistently discussed *current* federal law, explaining what "[f]ederal law criminalizes" or "defines" what "is [or is] not criminalized" under federal law. 575 U.S. at 803–04.

Finally, the government suggests that *Mellouli* favors a time-of-state-conviction rule because it mentions that an alien should be able to predict the immigration consequences of a guilty plea for a state crime. Resp. Br. 35 (citing *Mellouli*, 575 U.S. at 806). But in *Mellouli*, the Court was focused on Mellouli's guilty plea for the crime that actually created the risk of deportation. Here, the 2019 guilty plea that risked an ACCA sentence was for Mr. Brown's federal firearm offense—not for any of his earlier state offenses. To the extent *Mellouli*'s comments are relevant, they suggest that a court should look to the federal law in effect during the federal prosecution that could trigger an ACCA sentence—not the law in effect at the time of an earlier state conviction that could not.

CONCLUSION

The Court should reverse the judgment below and remand for resentencing.

Respectfully submitted,

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