No. 22-6640

IN THE
Supreme Court of the United States

EUGENE JACKSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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

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QUESTION PRESENTED

Whether the "serious drug offense" definition in the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(A)(ii), incorporates either the federal drug schedules that were in effect at the time of the federal firearm offense (as the Third, Fourth, Eighth, and Tenth Circuits have held), or the federal drug schedules that were in effect at the time of the prior state drug offense (as the Eleventh Circuit held below).

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INTEREST OF THE *AMICUS CURIAE*[1]

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in Florida, Georgia, and Alabama vulnerable to fifteen-year mandatory minimum sentences because of the application of superseded federal drug schedules of which they had no fair notice, in violation of the Fifth Amendment's Due Process Clause.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

SUMMARY OF ARGUMENT

According to the Eleventh Circuit, whether a prior state drug conviction qualifies as a "serious drug offense" under the Armed Career Criminal Act turns on the content of old, superseded, federal drug schedules that existed at the time of the prior state drug offense, not the current schedules that exist when the federal penalty is incurred. This backwards interpretation is incorrect and creates dire fair notice concerns for federal criminal defendants in the Eleventh Circuit.

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[1] Under Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amicus*, its members, or its counsel, make a monetary contribution to the preparation or submission of this brief. Under Supreme Court Rule 37.2, counsel of record for all parties received timely notice of the intent to file this brief.

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

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

As explained below, the Eleventh Circuit's interpretation takes a wrecking ball to the three pillars of fair notice: (1) it abandons a commonsense, accessible reading of legal text in favor of a vague and confusing construction; (2) it creates avoidable problems with the Ex Post Facto Clause; and (3) it fails to apply the rule of lenity to ambiguity in a criminal statute. The result is a statutory interpretation that unnecessarily creates fair notice problems where an alternative interpretation—embraced by all other circuits to have considered this statutory-interpretation question—could avoid them.

This Court should grant *certiorari* so it may review, and then reverse, the Eleventh Circuit's outlier decision.

ARGUMENT

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

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

Fair notice applies both to what conduct the law prohibits as well as what consequences apply to violations. *See Beckles v. United States*, 580 U.S. 256, 276 (2017) (stating that vague Sentencing Guidelines do not provide fair notice of the consequences of a person's actions); *United States v. Batchelder*, 442 U.S. 114, 123 (1979) ("So too, vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute."). This Court repeatedly has applied fair notice principles to statutes governing federal sentencing.

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

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

Fair notice does not assume universal knowledge of statutory law, but it does require that statutes be sufficiently clear. Even though "most ordinary people today don't spend their leisure time reading statutes," the principle of "fair notice isn't about indulging a fantasy. It is about protecting an indispensable part of the rule of law—the promise that, whether or not individuals happen to read the law, they can suffer penalties only for violating standing rules announced in advance." *Wooden v. United States*, 142 S. Ct. 1063, 1083 (2022) (Gorsuch, J., concurring in the judgment). "Although it is not likely that a criminal will carefully consider the text of the law . . . fair warning should be given to the world in

language that the common world will understand." *McBoyle*, 283 U.S. at 27.

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

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

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

those constitutional problems pertain to the particular litigant before the Court.").

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

The due process concerns outlined above were entirely avoidable. In the Eleventh Circuit's first decision, its interpretation of the ACCA's definition of "serious drug offense" aligned with fair notice principles and with how seven other federal circuit courts have interpreted the phrase (in both the ACCA and the Sentencing Guidelines contexts). *See United States v. Jackson*, 36 F.4th 1294, 1297 (11th Cir. 2022), *vacated*, No. 21-13963, 2022 WL 4959314 (11th Cir. Sept. 8, 2022), *and superseded*, 55 F.4th 846 (11th Cir. 2022). But despite the Government declining to seek rehearing, the Eleventh Circuit panel *sua sponte* vacated its opinion, called for supplemental briefing, and issued a second opinion that interpreted the ACCA in a way that violated the three pillars of fair notice and created significant due process concerns. The Eleventh Circuit's second opinion rendered the statute vague and confusing, violated the Ex Post Facto Clause, and failed to apply the rule of lenity. *See United States v. Jackson*, 55 F.4th 846 (11th Cir. 2022).

A. The Eleventh Circuit's Interpretation Renders The Statute Vague And Confusing.

1. A Plain Reading Of § 924(e)(2)(A)(ii) Leads To A Commonsense Interpretation: The Applicable Federal Drug Schedules Are Those In Effect When The Federal Penalty Is Incurred.

Fair notice prohibits vague laws; it requires that the law clearly communicate what conduct violates it and what penalties will result from a violation. *See Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) ("[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning.").

To achieve this end, fair notice requires the law to be interpreted in a way that a person with ordinary intelligence will understand it, meaning that the interpretation comports with the text's plain meaning. *See id.*; *see also Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020) ("When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit."); *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004) ("[W]hen the statute's language is plain, the sole function of the courts . . . is to enforce it according to its terms" (citation omitted)). The Eleventh Circuit interprets the ACCA in a way that creates an unnecessary and unintuitive reference to

antiquated federal law not readily understandable by people of common intelligence.

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

> **(e)(2)** As used in this subsection--(A) the term 'serious drug offense' means-- . . . (ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (*as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)*), for which a maximum term of imprisonment of ten years or more is prescribed by law[.]

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

According to the statute's text, to qualify as a "serious drug offense," the offense must have involved a "controlled substance." *Id.* To determine what qualifies as a "controlled substance," the reader follows § 924(e)(2)(A)(ii)'s reference to "section 102 of the Controlled Substances Act (21 U.S.C. 802)." *Id.* That section, in turn, provides that "[t]he term 'controlled substance' means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part

B of this subchapter." 21 U.S.C. § 802(6). Finally, part B, codified at 21 U.S.C. § 812, provides the drug schedules and states that those schedules "shall be updated and republished on an annual basis." 21 U.S.C. § 812(a). Thus, the text of § 924(e)(2)(A)(ii) and its referenced statutes ultimately refer the reader to federal drug schedules that are updated annually.

So which version of these annually updated schedules applies to a prior state offense under § 924(e)(2)(A)(ii)—an outdated and superseded version that happened to be in effect at the time of the prior state offense or the current version in effect at the time of either the federal offense or the federal sentencing? The correct interpretation is that which "give[s] the person of ordinary intelligence a reasonable opportunity" to understand what conduct subjects him to enhanced punishment. *Grayned*, 408 U.S. at 108. In this case, the choice of which interpretation is straightforward.

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

Judicial gloss on the statute further supports this conclusion. *See Lanier*, 520 U.S. at 266 ("[C]larity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute . . . ."). Five courts of appeals have considered the timing question of § 924(e)(2)(A)(ii), and all but the Eleventh Circuit have determined the statute to mean that courts look to the federal schedules in effect no earlier than the commission of the federal offense.[2] *See United States v. Williams*, 48 F.4th 1125, 1142 (10th Cir. 2022); *United States v. Perez*, 46 F.4th 691, 699 (8th Cir. 2022); *United States v. Hope*, 28 F.4th 487, 504–05 (4th Cir. 2022); *United States v. Brown*, 47 F.4th 147, 151 (3d Cir. 2022), *petition for cert. filed*, No. 22-6389 (U.S. Dec. 23, 2022).

When examining similar language in the Sentencing Guidelines context, courts have explained that it is "illogical" to "ignore current federal law and turn to a superseded version of the United States Code." *United States v. Bautista*, 989 F.3d 698, 703 (9th Cir. 2021). Such an interpretation would be at odds with § 924(e)(2)(A)(ii)'s reference to annually updated drug schedules, and it "would prevent amendments to federal criminal law from affecting federal sentencing and would hamper Congress' ability to revise federal criminal law." *Bautista*, 989 F.3d at 703; *see also Williams*, 48 F.4th at 1141 n.11. Accordingly, for the person of ordinary intelligence seeking to understand what punishment this

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[2] The Eleventh Circuit originally sided with the other four circuits, but in a rare *sua sponte* reversal of its prior decision, it ruled that § 924(e)(2)(A)(ii)'s "serious drug offense" definition somehow incorporates federal drug schedules at the time the defendant was convicted of his prior state drug offense rather than at the time of the federal firearm offense, thus creating a 4 to 1 circuit split.

statute provides, there is no contest between this illogical interpretation and the alternative, commonsense, judicially embraced reading that aligns with the text's plain meaning.

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

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

But the Government's argument misses a key timing distinction between the ACCA and the relevant immigration statute. The ACCA contemplates several hypothetical separate crimes over time eventually being pieced together to trigger enhanced punishment for the "career criminal" who ultimately commits a federal gun crime. The immigration statute, by contrast, imposes immigration consequences immediately following a single state drug conviction. *See* 8 U.S.C. § 1227(a)(2)(B)(i);

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

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

penalty is incurred, not those that were in effect years, possibly decades, earlier.

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

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

In practical terms, applying drug schedules in effect at the time the ACCA penalty is incurred affords the defendant fair notice of how federal law applies to his earlier state conviction. The Eleventh Circuit's interpretation, by contrast, deprives a defendant of that fair notice.

Imagine an ACCA defendant with three prior state drug convictions. She committed her federal gun crime

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

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

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

is not only forgivable, but the only practical outcome. The Court need not force a nonsensical outcome when a more reasonable interpretation of the statute is available.

Here, Mr. Jackson never had any reason to consider whether then-existing (but now superseded) federal drug schedules applied to the state drug statutes under which he was convicted. His lawyers during his previous state proceedings never had any reason to discuss these schedules with him, and no one rationally can presume that he had the intention at the times of his prior state convictions to commit a federal gun crime in the future.

To have a reasonable opportunity to understand what future punishment federal law held in store for him, Mr. Jackson and his previous defense lawyers would have needed clairvoyance at the time of his first and second state drug prosecutions to predict that he would be prosecuted for a third, and further that he would eventually plead to or be found guilty of a federal firearm offense. Each time, he and his defense team should have been given an opportunity to research the state drug statute he was convicted under and compare them to the then-existing federal drug schedules at the time of each prosecution. And then he should have had access to those comparative results and an equally informed effective defense counsel when he eventually decided to commit a federal firearm offense.

Such unrealistic requirements do not "give the person of ordinary intelligence a reasonable opportunity" to understand what conduct subjects him to enhanced punishment. *Grayned*, 408 U.S. at 108. The Eleventh Circuit asks too much of people of ordinary intelligence to accord its interpretation with fair notice principles. Its

interpretation renders the law vague, confusing, and out of step with the more understandable and accessible reading that other federal circuits employ.

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

The Ex Post Facto Clause in Article I, Section 9, bars Congress "from making substantive criminal offenses retroactive." *Lanier*, 520 U.S. at 266–67; *see also* U.S. Const. art. I, § 9, cl. 3. This clause forbids *ex post facto* laws, defined generally as "[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." *Peugh*, 569 U.S. at 532–33 (citation omitted).

As the Court has held, sentence-enhancement laws, like the ACCA, do not violate the Ex Post Facto Clause—even where that law imposes enhanced punishment based on convictions that pre-date the law's enactment—on the grounds that a recidivist enhancement is not a punishment for the earlier crime but rather a "stiffened penalty for the latest crime" that occurred after the enhancement law was passed. *See Gryger v. Burke*, 334 U.S. 728, 732 (1948). When circuit courts were faced with early ACCA cases, they embraced that understanding of the relationship between federal sentence enhancements and the Ex Post Facto Clause. The ACCA was enacted in 1984, and it was amended in 1986 to provide, for the first time, that drug-related offenses could be predicate offenses. Soon after, circuit courts were faced with *ex post facto* challenges to reliance on drug convictions that pre-dated the ACCA's enactment or the 1986 amendment as predicate offenses for enhancement. Following the Court's guidance in *Gryger*,

the circuits uniformly held that the ACCA could apply based on these earlier convictions and that doing so did not violate the Ex Post Facto Clause. *E.g.*, *United States v. Springfield*, 337 F.3d 1175, 1178–79 (10th Cir. 2003); *United States v. Reynolds*, 215 F.3d 1210, 1212–13 (11th Cir. 2000); *United States v. Stuart*, 81 F.3d 162, 1996 WL 145857, at *2 (6th Cir. 1996) (unpublished table decision); *United States v. Presley*, 52 F.3d 64, 68 (4th Cir. 1995), *abrogated on other grounds by Johnson v. United States*, 559 U.S. 133 (2010).

These cases confirm that, for ACCA purposes, notice is evaluated at the time the federal penalty is incurred, not at the time of the prior offense, because "a prior conviction is an ACCA predicate [only] if it meets the definition of 'violent felony' or 'serious drug offense' at the time of the instant federal offense." *See Williams*, 48 F.4th at 1141 n.11 (discussing *Springfield*). "[W]ere it otherwise, then no convictions predating the passage of the ACCA could qualify as predicates." *Id.*

In these cases, applying the federal law in effect at the time the federal penalty is incurred avoided the *ex post facto* problems with applying the ACCA to convictions that pre-dated the ACCA. The only interpretation of § 924(e)(2)(A)(ii) that comports with the Ex Post Facto Clause is the one that likewise applies the federal law in effect at the time the federal penalty is incurred, not at the time of the prior state conviction serving as the predicate offense. The Eleventh Circuit's interpretation should be rejected in favor of one that does not raise *ex post facto* concerns.

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

Lastly, the rule of lenity requires courts to read ambiguous penal statutes strictly in favor of the defendant. *See Wooden*, 142 S. Ct. at 1082–83 (Gorsuch, J., concurring in the judgment). If there is ambiguity in a penal statute that leaves reasonable doubt of its meaning, a court's duty is not to inflict the penalty. *Id.*

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

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

Lenity enforces the constitutional requirement of fair notice by ensuring that an individual's liberty always prevails over ambiguous laws. *See Wooden*, 142 S.

Ct. at 1082–83 ("[T]he connection between lenity and fair notice [is] clear: If the law inflicting punishment does not speak 'plainly' to the defendant's conduct, liberty must prevail.").

Here, as explained above and as evidenced by the 4 to 1 circuit split, the criminal statutory phrase at issue is ambiguous, and lenity requires that this Court interpret it most favorably to Mr. Jackson. The Eleventh Circuit's interpretation transforms what would otherwise be a ten-year statutory maximum into a fifteen-year mandatory minimum prison sentence. (Cert. Pet. at 6.) Lenity requires avoiding the interpretation of this statute that would drastically increase the length of prison sentences for Mr. Jackson and many other federal defendants.[3] (*See id.* at 28–29, 29 n.7).

CONCLUSION

The Eleventh Circuit's decision violates all three pillars of fair notice and creates dire due process concerns. If this decision stands, it will lead to far longer prison sentences than those for which defendants were given fair notice. As explained in Mr. Jackson's Petition for a Writ of *Certiorari*, his case presents an excellent vehicle

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

to resolve a circuit split on this timing issue in both the ACCA and the Sentencing Guidelines contexts. (*See* Cert. Pet. at 15–26.). Accordingly, this Court should grant *certiorari* so it may review, and then reverse, the Eleventh Circuit's outlier decision.

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