No. 18-6662

IN THE
Supreme Court of the United States

EDDIE LEE SHULAR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Eleventh Circuit

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

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QUESTION PRESENTED

Whether the determination of a "serious drug offense" under the Armed Career Criminal Act requires the same categorical approach used in the determination of a "violent felony" under the Act.

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INTEREST OF *AMICUS CURIAE* [1]

Amicus FAMM (formerly Families Against Mandatory Minimums) is a national, nonprofit, nonpartisan organization whose primary mission is to promote fair and rational sentencing policies and to challenge mandatory sentencing laws and the ensuing inflexible and excessive penalties. Founded in 1991, FAMM currently has more than 50,000 members nationwide. By mobilizing prisoners and their families adversely affected by unjust sentences, FAMM illuminates the human face of sentencing as it advocates for state and federal sentencing reform. FAMM advances its charitable purposes in part through education of the general public and through selected *amicus* filings in important cases.

In recognition of the destructive toll mandatory minimums exact on FAMM's members in prison, their loved ones, and their communities, FAMM submits this brief in support of Petitioner. The decision below poses a serious risk to the viability of the categorical method, which has long served to limit the application of harsh mandatory minimum sentences and to provide fair warning of what conduct can subject individuals to such sentences. In light of the grave harm mandatory minimums impose, FAMM is keenly interested in ensuring they are used sparingly and only in accordance with due process.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part and no one other than *amicus* and its counsel made a monetary contribution to fund the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, counsel for *amicus curiae* states that counsel for Petitioner and Respondent have both granted consent to the filing of this brief.

SUMMARY OF ARGUMENT

This Court has frequently reaffirmed application of the categorical approach to determine whether a prior conviction qualifies as a "violent felony" predicate offense under the Armed Career Criminal Act ("ACCA"), a statute that requires imposition of a fifteen-year mandatory minimum sentence for those who possess firearms after three predicate offenses. *Taylor v. United States*, 495 U.S. 575 (1990); *see also United States v. Stitt*, 586 U.S. —, 139 S. Ct. 399, 405 (2018); *Descamps v. United States*, 570 U.S. 254, 257 (2013). Under the categorical approach, a trial court looks "only to the statutory definitions of [a defendant's] prior offenses, and not to particular facts underlying those convictions" to determine whether a prior offense constitutes a predicate under ACCA. *Taylor*, 495 U.S. at 600. The proper application of that approach, as detailed by this Court, requires courts to "compare the elements of the crime of conviction with the elements of the 'generic' version of the listed offense—*i.e.*, the offense as commonly understood." *Mathis v. United States*, 579 U.S. —, 136 S. Ct. 2243, 2247 (2016). If the elements of the crime of conviction "are the same as, or narrower than, those of the generic offense," then the conviction counts as an ACCA "violent felony" predicate. *Id.* But if the crime of conviction "covers any more conduct than the generic offense," it is not an ACCA "violent felony" predicate capable of triggering a mandatory minimum sentence. *Id*. at 2248.

As a matter of statutory construction, due process, and fundamental fairness, this same categorical approach must also apply to 18 U.S.C. § 924(e)(2)(A)(ii), which—parallel to ACCA's "violent felony" provision—provides that certain "serious drug

offense[s]" are mandatory-minimum predicate offenses. The relevant language that requires the categorical approach in the "violent felony" prong similarly requires the same categorical approach for the "serious drug offense" prong. And were there any doubt as to the text's plain meaning, applying the categorical approach to Section 924(e)(2)(A)(ii) would be warranted under numerous canons of statutory construction, including avoidance of absurd statutory interpretation and serious constitutional questions, and the rule of lenity.

Petitioner is correct that the court below erred in failing to apply the categorical approach as this Court has described it; that is, the court of appeals did not compare Petitioner's crime of conviction to the generic serious drug offense. *See United States v. Shular*, 736 Fed. Appx. 876 (11th Cir. 2018). Instead, the Eleventh Circuit, applying circuit precedent, looked solely to whether a defendant's prior conviction "'involv[es]' … certain activities related to controlled substances." *United States v. Smith*, 775 F.3d 1262, 1267 (11th Cir. 2014). Disclaiming any need to "search for the elements of 'generic' definitions of 'serious drug offense' and 'controlled substance offense,'" *id.*, the Eleventh Circuit bypassed this key component of the categorical approach and failed to analyze either this Court's ACCA precedent or Section 924(e)'s plain text. The result was the imposition of a fifteen-year mandatory minimum sentence for Petitioner based on underlying crimes of conviction that under idiosyncratic Florida law, and quite unlike the generic crime, lacked a *mens rea* element.

The government's approach here—as well as its defense of the Eleventh Circuit's decision in *Smith*—ignores ACCA's plain text and this Court's clear

precedent. It is also unduly capacious: unlike the categorical approach, the government's proffered test is not grounded in the certainty that comes from comparing the elements of the crime of conviction with the elements of a "generic" crime. As a result, the government's approach to the "serious drug offense" prong of Section 924(e) fails to provide uniformity, predictability, and fair notice.

Indeed, the government's position would result in an unjust statutory scheme hardly faithful to this Court's prior rulings interpreting ACCA. It would also cause mandatory minimums to proliferate at a time when Congress is limiting them. *See* First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (2018). Simply put, if the government prevails in this case, in States like Florida that lack a *mens rea* requirement for certain drug offenses, including the sale of a controlled substance, an individual could be convicted and sentenced to a mandatory minimum fifteen-year term based on a strict-liability statutory scheme.

The categorical approach and its traditional application are well worth protecting. This Court should reverse.

ARGUMENT

I. The Eleventh Circuit Erred In Not Applying The Traditional Categorical Approach To Section 924(e)(2)(A)(ii).

A. The Eleventh Circuit Did Not Apply The Traditional Categorical Approach Articulated By This Court.

ACCA provides that anyone convicted pursuant to 18 U.S.C. § 922(g)—the felon-in-possession statute—

with three previous "violent felon[ies]" or "serious drug offense[s]" is subject to a fifteen-year mandatory minimum sentence. 18 U.S.C. § 924(e)(1). Section 924(e)(2), the provision at issue, sets forth what offenses count as predicate "serious drug offense[s]" and "violent felon[ies]." This Court has frequently analyzed the statute's violent felony prong—Section 924(e)(2)(B)—which defines "violent felony" as:

> any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—
>
> > (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
> >
> > (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. § 924(e)(2)(B). In particular, this Court has considered whether a previous conviction counts as "burglary" under the statute. *See e.g.*, *Taylor*, 495 U.S. at 579-80; *see Descamps*, 570 U.S. at 258-59. And each time this Court has held that courts must apply the categorical approach by comparing the prior offense to the "generic" definition of burglary to determine whether a prior conviction counts as a burglary predicate. *See, e.g.*, *Taylor*, 495 U.S. at 602; *see Descamps*, 570 U.S. at 257-58.

The categorical approach, as articulated by this Court, has two essential components: *First*, courts

must look only to the elements of the previous conviction, not the underlying facts, in assessing whether that conviction constitutes an ACCA predicate. As this Court has often said, "[t]he key" in applying the categorical method is to look to "elements, not facts." *Descamps*, 570 U.S. at 261; *see also Mathis*, 136 S. Ct. at 2248 ("Distinguishing between elements and facts is [] central to ACCA's operation."). *Second*, courts must compare the elements of the crime of conviction to the elements of the generic crime. *See Mathis*, 136 S. Ct. at 2247; *Descamps*, 570 U.S. at 261; *Taylor*, 495 U.S. at 602. If the conviction matches the generic offense or "defines the crime more narrowly," the conviction counts as an ACCA predicate. *Descamps*, 570 U.S. at 261. But if the conviction "sweeps more broadly than the generic crime," it does not qualify as a predicate. *Id.*

In *Descamps*, for instance, this Court assessed whether a conviction under California Penal Code Ann. § 469 (West 2010) qualified as a "burglary" under ACCA. The California statute provided that "a 'person who enters' certain locations 'with intent to commit grand or petit larceny or any felony is guilty of burglary.'" *Id.* at 258-59. To determine if that crime was an ACCA violent felony predicate, the Court compared the California statute's elements to the generic elements of burglary: an "unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Id.* at 261 (citing *Taylor*, 495 U.S. at 598). Because the California offense lacked a key element—unlawful entry—and therefore went "beyond the normal, 'generic' definition of burglary," it was not an ACCA predicate. *Id.* at 265.

At issue here is whether this same categorical approach applies to the "serious drug offense" prong of the ACCA—which is defined as follows:

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

18 U.S.C. § 924(e)(2)(A).

As shown *infra* Section I.B, the categorical approach this Court has applied to the "violent felony" predicate should, as a matter of statutory construction, apply with equal force to ACCA's "serious drug offense" predicate. The government seemingly agrees that "the [categorical] approach is required here." U.S. Br. at 9-10. But the parties vary significantly in how the categorical approach works. The government agrees only to the first prong: courts should look to elements, not underlying circumstances, of the crime of conviction. The government, however, disagrees that those elements should be compared to the generic version of serious drug offenses—the categorical approach's second prong. Defending the Eleventh Circuit's approach, the government contends that courts should look solely to

whether the crime of conviction "'involv[es]' … certain activities related to controlled substances," *Smith*, 775 F.3d at 1267, with no need to compare the prior offense to the elements of a "generic" crime listed in Section 924(e)(2)(A)(ii)—*i.e.*, "manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance," 18 U.S.C. § 924(e)(2)(A)(ii); U.S. Br. at 10 (arguing Section 924(e)(2)(A)(ii) only requires courts to determine "on a categorical basis whether the state-law predicate offense 'involves' the conduct specified in [the statute], rather than whether the state-law offense 'is' completely equivalent to … the definition of a generic crime.").

The differences between Petitioner's categorical approach and the government's are significant. Under Petitioner's approach, a state offense will only qualify as Section 924(e)(2)(A)(ii) predicate if it has the *same elements* as the generic definition of "manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance." But the government's iteration would greatly expand the state offenses that constitute ACCA predicates, sweeping in any state offense that *involves the act* of "manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance," irrespective of whether the elements for the state offense are broader than those of the related generic offense.

Take the Florida statute underlying Petitioner's prior convictions: Florida Statute § 893.13 makes it unlawful for a person to "sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver, a controlled substance." Applying the traditional categorical method, a court would take the Florida crime

and compare it to a generic analogue like possession with intent to sell. The generic version of that crime includes three elements: (1) possession of the controlled substance; (2) knowledge that the item possessed was a controlled substance; and (3) intent to sell the substance. *United States v. Randall*, 171 F.3d 195, 209 (4th Cir. 1999); *see McFadden v. United States*, 576 U.S. —, 135 S. Ct. 2298, 2302 (2015) (holding federal possession with intent to sell statute requires knowledge that item is a controlled substance). The Florida statute, on the other hand, includes only two of those generic elements: (1) possession of a controlled substance and (2) intent to sell it. Fla. Stat. § 893.13. The statute makes clear that—unlike with the generic crime—"knowledge of the illicit nature of a controlled substance is *not* an element of any offense under this chapter." Fla. Stat. § 893.101(2) (emphasis added). Under the traditional categorical approach, then, a Section 893.13 conviction *cannot* serve as an ACCA predicate, because that statute, in common with only two other states, *State v. Adkins*, 96 So.3d 412, 423 n.1 (Fla. 2012) (Pariente, J., concurring), lacks a *mens rea* and thus sweeps far broader than the generic crime for possession with intent to sell.

The government's approach would produce a far different, unpredictable, and unfair result. Applying the Eleventh Circuit's decision in *Smith*, a trial court would simply ask if a conviction under Section 893.13 "involved" the act of possession with intent to sell. That completely eschews the core of the categorical approach. It does not require courts to place crimes into generic categories or to compare the elements of any generic crime with the crime of conviction. Section 893.13 cannot be properly categorized as prohibiting possession with intent to sell because,

contrary to long-standing principles of criminal law, it lacks any *mens rea* requirement. *Rehaif v. United States*, 588 U.S. —, 139 S. Ct. 2191, 2195 (2019); *Morissette v. United States*, 342 U.S. 246, 256-58 (1952). Nonetheless, the Eleventh Circuit held, and the government argues, that a conviction for this strict-liability crime should qualify as an ACCA predicate.

B. Section 924(e)(2)(A)(ii)'s Plain Text Requires The Categorical Approach's Traditional Application.

For many of the reasons this Court has repeatedly applied the categorical approach to the "violent felony" predicate in Section 924(e)(2)(B), the categorical approach should also apply to the "serious drug offense" predicate embodied in Section 924(e)(2)(A)(ii) of ACCA.

This Court first considered Section 924(e) in *Taylor*, which determined which offenses qualify as "burglary" under ACCA's violent felony prong—Section 924(e)(2)(B)(ii). *Taylor* applied the categorical method: a State conviction "constitutes 'burglary' … if … its statutory definition substantially corresponds to 'generic' burglary." 495 U.S. at 602.

Taylor rested to a large extent on Section 924(e)(1)'s plain language. In particular, the Court reasoned that because Section (e)(1) "refers to 'a person who … has three previous *convictions*' for—not a person who has *committed*—three previous violent felonies or drug offenses," the categorical approach is statutorily commanded. *Taylor*, 495 U.S. at 600 (emphasis added). This Court further stressed that (e)(1)'s key language "supports the inference that Congress intended the sentencing court to look only to the

fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions." *Id*. The text's focus on the crime of conviction, *Taylor* instructs, shows that Congress meant for courts to look to the elements of the prior offense, not solely at the offense as defined by the States or the underlying facts of a prior crime. 495 U.S. at 590-92, 600-01.

This Court was right to apply the categorical approach to Section 924(e)(2)(B), and there is no reason to treat subsection (e)(2)(A)—the "serious drug offense" predicate—any differently. Sections 924(e)(2)(A) and (B) are governed by the same prefatory clause, Section 924(e)(1), which includes the generic term "conviction" on which *Taylor* focused. 495 U.S., at 600. That focus makes sense. Section (e)(2) is derivative of (e)(1): Section (e)(2) defines "violent felony" ((e)(2)(B)) and "serious drug offense" ((e)(2)(A)) to determine whether a mandatory minimum sentence will be imposed under Section (e)(1). As this Court recognized in an analogous context just last term, a prefatory section of a statute must "retain [the] same meaning" when applied across derivative subsections. *United States v. Davis*, 588 U.S. —, 139 S. Ct. 2319, 2328 (2019).

Moreover, subsection (e)(2)(A)(ii)'s specific language, which identifies the relevant serious drug "*offense* under State law," (emphasis added) confirms that the categorical approach this Court has applied to Section 924(e)'s other subparts should apply here. "Simple references to 'conviction,' 'felony,' or 'offense,' … are 'read naturally' to denote the 'crime as *generally* committed.'" *Sessions v. Dimaya*, 584 U.S. —, 138 S. Ct. 1204, 1217 (2018) (plurality opinion) (internal citations omitted). In other words—just as the word

"conviction" in Section (e)(1) evidences the need for application of the categorical method in all of section (e), so, too, does the word "offense" used in Section (e)(2)(A), which defines a "serious drug offense."

The government's main textual argument in response is that the term "involving" in Section 924(e)(2)(A)(ii) permits a broader categorical approach. U.S. Br. at 9-10. Not so. "Involving" means to "include (something) as a necessary part or result." New Oxford American Dictionary 915 (3d ed. 2010); Webster's II New College Dictionary 598 (3d ed. 2005) ("To have as an essential feature … : ENTAIL"). That definition does not suggest any *change* in the application of the categorical approach but rather comports with its traditional application. In fact, although the government purports to agree that the categorical approach applies to Section 924(e)(2)(A)(ii), the government's interpretation of the term "involving" is not about categorizing crimes and comparing elements. Rather, the government's approach invites judges to decide whether a crime—even a disfavored strict-liability crime—normally involves the conduct described in Section 924(e)(2)(A)(ii). That is not how this Court has ever applied the categorical approach to enumerated offenses. Although the government claims to accept the categorical approach's "central feature"—a focus on the crime of conviction's elements—the government rejects the approach's "basic method"—comparing the crime of conviction to its generic analogue. *Descamps*, 570 U.S. at 263.

Contrary to the government's position, the language of Section 924(e)(2)(A)(ii) tracks nearly verbatim to this Court's traditional formulation of the categorical approach—*including* use of the word "involve."

As the Court has explained, under the categorical approach, a court determines if the elements of the state offense " 'necessarily' *involve*[] … facts equating to [the generic offense]." *Shepard v. United States*, 544 U.S. 13, 24 (2005) (plurality opinion) (emphasis added); *see Moncrieffe v. Holder*, 569 U.S. 184, 190-91 (2013) (describing categorical approach as examining what "the state conviction necessarily *involved*"—*i.e.*, whether the "least of th[e] acts criminalized" by state crime "are encompassed by the generic" offense) (emphasis added; internal quotations, citations omitted). *Cf. Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 409 (2003) (holding a statute "involves" extortion if can be "generically classified" as such). Use of the word "involve" in Section 924(e)(2)(A)(ii) is no reason to depart from the traditional categorical approach, which this Court has consistently applied to other statutes—including those that use the word "involve"[2]—and to which the lower courts have applied other provisions of ACCA that use that word, too.[3]

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[2] *Scheidler*, 537 U.S. at 409 (applying categorical approach to 18 U.S.C. § 1961(1) even though it uses the term "involving"); *see Lockhart v. United States*, 577 U.S. —, 136 S. Ct. 958, 968 (2016) (suggesting the categorical approach would apply to 18 U.S.C. § 2252(b)(2) even though it uses term "relating to"); *Kawashima v. Holder*, 565 U.S. 478, 483 (2012) (applying categorical approach to term "involves fraud or deceit" in 8 U.S.C. § 1101(a)(43)(M)(i)).

[3] Under Section 924(e)(2)(B)(ii), a state offense that "*involves* use of explosives" qualifies as "violent felony." 18 U.S.C. § 924(e)(2)(B)(ii) (emphasis added). Lower courts have applied the traditional categorical approach to the "explosives" predicate. *See, e.g.*, *United States v. Wilfong*, 733 Fed. Appx. 920, 928-29, 929 n.6 (10th Cir. 2018) (concluding the crime of making a bomb threat did not qualify as a violent felony because it was not a categorical match with the generic definition of "use of explo-

Likewise erroneous is the Eleventh Circuit's contention that a sentencing court can ignore the "generic" serious drug offense crimes because "[n]o element of *mens rea* with respect to the illicit nature of the controlled substance is expressed or implied by" the statute's text. *Smith*, 775 F.3d at 1267. Section 924(e)(2) does not purport to identify the required elements for listed offenses, whether they be violent felonies or serious drug offenses. *See Taylor*, 495 U.S. at 597. Instead, for listed offenses—*e.g.*, "burglary" or "possession" of a controlled substance "with intent to distribute"—the elements are those found in the generic version of the offense. *Id.* at 598. The Eleventh Circuit effectively treated (e)(2)(A)(ii) as an "elements" clause. But only (e)(2)(B), the violent felony definition, has an elements clause. 18 U.S.C. § 924(e)(2)(B)(i) (applying to offenses that have "as an element the use, attempted use, or threatened use of physical force against the person of another"). If Congress had meant for (e)(2)(A)(ii) to operate as an elements clause—one dispensing with the need for a *mens rea* element in the state offense—it would have tracked (e)(2)(B)(i) by referring to a state offense that "has as an element manufacturing, distributing, or possessing with intent to manufacture or distribute a controlled substance." But Congress did not draft (e)(2)(A)(ii) using the language of a clause that sets forth the minimum requisite elements. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section

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sives"); *cf. United States v. Fish*, 368 F.3d 1200, 1205 (9th Cir. 2004) (holding term "involves use of explosives" in § 4B1.2(a) of Federal Sentencing Guidelines requires crime of conviction to be a categorical match with generic definition of "use of explosives"), *abrogated on other grounds by United States v. Barker*, 689 Fed. Appx. 555 (9th Cir. 2017).

of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)).

The Eleventh Circuit's interpretation of ACCA also contradicts the presumption of scienter that attaches to criminal laws. *Rehaif*, 139 S. Ct. at 2195; *Staples v. United States*, 511 U.S. 600, 605 (1994) (applying presumption of *mens rea* in interpreting criminal statutes).[4] This presumption is especially strong here because most drug statutes, including those referenced in Section 924(e)(2)(A), require *mens rea*. *McFadden*, 135 S. Ct. at 2302 (holding 21 U.S.C. § 841(a)(1) requires proof that defendant had knowledge). Additionally, when the "serious drug offense" prong was added to ACCA in 1986, almost every state required *mens rea* as an element of their respective drug crimes. *See* Pet. Br. at 21-22. Similarly, the predicate convictions identified in Section 924(e)(2)(A)(i) refer to specific laws (*e.g.*, the Con-

[4] Courts have routinely concluded that state offenses are not predicates under ACCA (or similar statutes) if the *mens rea* element under the state statute is broader than the *mens rea* element for the generic crime. *See, e.g.*, *United States v. Windley*, 864 F.3d 36, 37-39 (1st Cir. 2017) (concluding the Massachusetts assault and battery with a dangerous weapon offense is not a categorical match under Section 924(e)(2)(B)(i), because it has a broader *mens rea* requirement); *cf. United States v. Estrella*, 758 F.3d 1239, 1253-54 (11th Cir. 2014) (concluding when the *mens rea* of the generic crime and the crime of conviction do not match, the crime of conviction is not a predicate offense under the Sentencing Guidelines). One lower court has squarely held that a state offense is not a serious drug offense under Section 924(e)(2)(A)(ii) because the *mens rea* element in the state offense was broader. *See United States v. Franklin*, 904 F.3d 793, 802-803 (9th Cir. 2018).

trolled Substances Act) that unquestionably contain an element of *mens rea*. *Id.* at 16-17, 16 n.6 (citing 21 U.S.C. § 801 *et seq*.; 21 U.S.C. § 951 *et seq*.). The Eleventh Circuit's view that no mental state is implied by ACCA's definition of its predicate offenses begs inconsistent application of the categorical approach to different predicate offenses without any rational, textual basis.

Section 924(e)'s text limits the definition of "serious drug offense" to the generic crimes of "manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance." § 924(e)(2)(A)(ii). The categorical approach enumerated by the Supreme Court in the "violent felony" prong of Section 924(e)(2)(B) applies with equal force to the "serious drug offense" predicate in Section 924(e)(2)(A).

C. The Eleventh Circuit's Version Of The Categorical Approach Will Undercut Uniformity And Consistency In ACCA's Application.

Applying the categorical approach to Section 924(e)(2)(A)(ii) also supports the approach's underlying purposes—uniformity, "efficiency, fairness, and predictability." *Mellouli v. Lynch*, 575 U.S. —, 135 S. Ct. 1980, 1987 (2015); *see Taylor*, 495 U.S. at 591 (concluding Congress intended for there to be "uniform categorical definitions" of the predicate offenses). By listing a set of crimes that could serve as mandatory minimum predicates—including "serious drug offense[s]"—Congress intended to establish uniform and consistent categories of predicates. *See Taylor*, 495 U.S. at 597. That way, only individuals who have three previous convictions for a specific "offense" identified in ACCA would qualify for the

Act's mandatory minimum sentencing. *See Chambers v. United States*, 555 U.S. 122, 126 (2009) (The "categorical approach requires courts to choose the right category"), *abrogated on other grounds by Johnson v. United States*, 576 U.S. —, 135 S. Ct. 2551 (2015).

In contrast, the Eleventh Circuit's expansive application of the categorical approach, supported by the government, frustrates the categorical approach's chief purposes by sowing confusion and conflict. Indeed, the lower courts that have adopted the government's position have created different standards for articulating it, sapping it of any uniform or predictable application. For example, some lower courts have concluded that a crime "involves" the conduct described in Section 924(e)(2)(A)(ii) when it "relate[s] to or connect[s] with" drug manufacturing, distribution, or possession with intent to manufacture or distribute. *See United States v. Bynum*, 669 F.3d 880, 886 (8th Cir. 2012) (internal citations omitted); *see also United States v. Whindleton*, 797 F.3d 105, 109 (1st Cir. 2015). Other courts have put it slightly differently: a state offense is an ACCA predicate when manufacturing, distribution, or possession with intent to manufacture or distribute, a controlled substance, is an "inherent part or result of the … crime of conviction." *United States v. Brandon*, 247 F.3d 186, 191 (4th Cir. 2001) (relying on pre-*Johnson* residual clause cases to interpret the term "involving"). The government's proffered categorical test has been applied by some courts to include as a "serious drug offense" under Section 924(e)(2)(A) crimes that are not manufacturing, distributing, *or* possessing with intent to manufacture or distribute a controlled substance. *See, e.g.*, *United States v. White*, 837 F.3d 1225, 1235 (11th Cir. 2016) (concluding a trafficking

conviction for mere possession of "at least 28 grams of cocaine constitutes a serious drug offense"). How one could possibly anticipate under these varying standards what crimes could constitute ACCA predicates, these courts do not (and cannot) say. That shortcoming is significant. *See Taylor*, 495 U.S. at 592 (recognizing need for the fair notice the categorical method, as traditionally applied, provides).[5]

Take, for example, the Eighth Circuit's application of the word "involving" in *Bynum*: a state offense "involve[s]" the conduct described in Section 924(e)(2)(A)(ii) when it constitutes an act to "intentionally enter the highly dangerous drug distribution world." 669 F.3d at 886 (internal citations omitted). Under that interpretation, the Eighth Circuit held that a state statute that criminalizes even a non-genuine offer to sell drugs, made without any actual intent to distribute a controlled substance, constitutes a "serious drug offense." *Id.* at 887. This reading of the term "involving" would "stop nowhere"—any crime related to drugs, even tangentially, would apply under that approach. *Mellouli*, 135 S. Ct. at 1990 (internal quotations and citations omitted).

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[5] The government has previously argued a state offense "involves" the conduct described in Section 924(e)(2)(A)(ii) when it simply "includes the words 'manufacturing, distributing, or possessing [with intent to manufacture or distribute].'" *Franklin*, 904 F.3d at 800. But this approach—ungrounded in any comparison to a generic crime—was expressly rejected in *Taylor* in analyzing subsection 924(e)(2)(B). There, this Court concluded that if the definition of "serious drug offense" was dependent on "labels employed by various States[]" it would lead to "odd" and inconsistent results. 495 U.S. at 591-92.

Indeed, many state offenses do not include "manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance" as elements but could still qualify as ACCA predicates under the government's approach. *See, e.g.*, Fla. Stat. § 893.1351(2) (criminalizing someone having actual or constructive possession of a place they know is used to traffic or manufacture drugs); *see also United States v. Eason*, 919 F.3d 385, 391-92 (6th Cir. 2019) (holding that "purchasing an ingredient that could be used to manufacture methamphetamine with a reckless disregard of its intended use involves the manufacture of a controlled substance").[6] Members of this Court have argued that "drugs *relate to* [violent] crime," *Harmelin v. Michigan*, 501 U.S. 957, 1003 (1991) (Kennedy, J., concurring) (emphasis added); *accord Mellouli*, 135 S. Ct. at 1990 (recognizing relationship between "convictions for offenses related to drug activity more generally, such as gun possession"), suggesting that a plethora of violent crimes having only tangential relationship to the "highly dangerous drug … world," *Bynum*, 669 F.3d at 866, might apply as a "serious drug offense" under ACCA. Lower courts have even found violent crimes that "relate[] to or connect[] with," *id.*, the conduct described in Section 924(e)(2)(A)(ii) qualify as serious drug offenses. *See, e.g.*, *United States v. Gibbs*, 656 F.3d 180, 188-89 (3d

[6] Under ACCA, many state drug laws—even petty ones—already qualify as predicates because many have ten-year maximum sentences. David M. Zlotnick, *The Future of Federal Sentencing Policy*, 79 U. Colo. L. Rev. 1, 53 (2008). The government's approach would sweep up as ACCA predicates numerous lesser crimes, like mere possession crimes that have harsh maximum sentences. *See, e.g.*, S.C. Stat. § 44-53-370(e)(2)(A) (providing a ten-year maximum sentence for mere possession of ten grams of cocaine).

Cir. 2011) (holding a conviction for wearing body armor while committing a felony can qualify as a serious drug offense where felony in question was possession with intent to deliver drugs). That unbounded interpretation would potentially collapse the "violent felony" and "serious drug offense" predicates, resulting in improper statutory redundancy. *See Marinello v. United States*, 584 U.S. —, 138 S. Ct. 1101, 1107 (2018); *Taylor*, 495 U.S. at 597.

In sharp contrast, under the traditional categorical approach, whether the defendant is exposed to Section 924(e)(2)(A)(ii)'s mandatory minimum requirement is clear and certain on the face of the indictment: If the defendant has committed an offense under a State law that meets the generic definition of manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance, then Section 924(e)(2)(A)(ii) is satisfied. But if the charged predicate offense has elements that are different from or broader than those in the generic crime, Section 924(e)(2)(A)(ii) is not satisfied. This predictability and clarity provides constitutionally mandated fair notice to defendants and cabins the discretion of prosecutors and judges. *See infra* Section II. In short, the traditional categorical approach is predictable and uniform.

D. The Eleventh Circuit's Expansive Interpretation Of Section 924(e)(2)(A) Raises Serious Practical And Constitutional Concerns.

Apart from contradicting the statute's text and purposes, the government's approach would lead to absurd results, raise serious constitutional issues, and violate the rule of lenity applied in criminal cases.

1. *Absurdity.* This Court has expressly declined to adopt "unqualified[]" and limitless interpretations of "woolly" statutory phrases. *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 452 (1989); *accord Mellouli*, 135 S. Ct. at 1986, 1989-91 (rejecting government's "sweeping interpretation" of "relating to" in an immigration statute "in favor of a narrower reading"—the categorical approach) (internal quotations and citations omitted). But the government's interpretation here would do just that. Defining "involving" to mean "relating to," or something similar—as the government and lower courts have done—would create boundless indeterminacy. *See Mellouli*, 135 S. Ct. at 1990 (emphasizing the phrase "relating to" is "broad" and "indeterminate") (internal quotations and citations omitted); *cf. Lockhart*, 136 S. Ct. at 968 (concluding using the traditional categorical approach with a statute that uses the term "relating to" would prevent "bizarre or unexpected state offenses" from becoming predicates). In fact, such an interpretation would yield a mandatory minimum sentencing regime so expansive as to be absurd, and would expand the "serious drug offense" predicate to encompass a large swath of crimes neither contem-plated by the plain language of ACCA nor encom-passed in the categorical method's normal application.

2. *Constitutional Avoidance.* The government's interpretation would also result in a statute plagued by ambiguity and vagueness, raising "serious constitutional doubts." *Jennings v. Rodriguez*, 583 U.S. —, 138 S. Ct. 830, 836 (2018). In *Johnson*, this Court held that the residual clause in Section 924(e)(2)(B)—which defines a violent felony as any crime that "otherwise involves conduct that presents a serious potential risk of physical injury to another," 18 U.S.C. § 924(e)(2)(B)(ii)—was unconstitutionally vague be-

cause it left "grave uncertainty about how to estimate the risk posed by a crime." 135 S. Ct. at 2557. Unlike the traditional categorical approach—where judges compare actual prior convictions against the elements of the actual generic crimes—the residual clause required judges to assess "risk" based on a "judicially imagined 'ordinary case' of a crime." *Id*. Leaving sentencing to judicial imagination "leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony." *Id.* at 2558.

The government's interpretation of Section 924(e)(2)(B) presents this fundamental problem. It would leave individuals convicted of crimes somehow related to drug distribution in the dark as to whether their conviction qualifies as an ACCA sentence-enhancing predicate. *Davis*, 139 S. Ct. at 2325; *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (Holmes, J.) (Criminal laws must give "fair warning … of what the law intends to do if a certain line is passed."). Whether a conviction is or is not a "serious drug offense" under Section 924(e) will depend entirely on a judge's assessment of whether a crime ordinarily involves "manufacturing, distributing, or possessing with the intent to manufacture or distribute, a controlled substance." Without an identifiable guidepost, judges will arrive at different answers. *See Dimaya*, 138 S. Ct. at 1212 (emphasizing vagueness doctrine "insist[s] that a statute provide standards to govern the actions of police officers, prosecutors, juries, and judges").

These vagueness concerns are not merely theoretical; they are already playing out in the lower courts' interpretations of Section 924(e)(2)(B)(ii). *Compare Brandon*, 247 F.3d at 195-96 (holding a conviction for possession under North Carolina's drug

trafficking law is not a serious drug offense because it only requires possession of 28 grams of cocaine); *with White*, 837 F.3d at 1235 (concluding a conviction for possession under Alabama's drug trafficking law is a serious drug offense even though it only requires possession of 28 grams of cocaine); *see supra* Section I.C. This type of uncertainty led this Court to hold ACCA's residual clause unconstitutionally vague. *Johnson*, 135 S. Ct. at 2560 (stressing the residual clause has "created numerous splits among the lower federal courts, where it has proved nearly impossible to apply consistently") (internal quotations omitted); *id*. ("The most telling feature of the lower courts' decisions is … pervasive disagreement about the nature of the inquiry one is supposed to conduct and the kinds of factors one is supposed to consider.").[7]

The government's interpretation of "involving" has already generated ambiguity and vagueness in lower courts. If this Court adopts that interpretation, that indeterminacy will only proliferate. This Court should decline to adopt such an approach and avoid

[7] The government claims seven other circuits have adopted the Eleventh Circuit's interpretation, U.S. Br. at 11, but many of these decisions were issued before *Johnson* and *Mellouli*. *See, e.g.*, *United States v. King*, 325 F.3d 110, 113 (2d Cir. 2003). *Johnson* rejected as unconstitutionally vague the residual-clause approach some courts used to take to determine the nature of a "serious drug felony." *See, e.g.*, *Brandon*, 247 F.3d at 191 (explaining the standard is "whether the abstract crime intrinsically involves the proscribed conduct"). And *Mellouli*—decided after *King*—expressly rejected in an analogous context the use of such expansive interpretations as that the government advances here.

the ensuing serious constitutional questions. *Jennings*, 138 S. Ct. at 842.[8]

3. *Lenity.* If the plain language of a statute is ambiguous, "doubts are resolved in favor of the defendant." *United States v. Bass*, 404 U.S. 336, 348 (1971); *see Davis*, 139 S. Ct. at 2333. This rule of lenity—much like the vagueness doctrine—rests on notions of fair notice and separation of powers. *Id.* This rule reflects a historical principle of criminal law: "serious[] criminal penalties" that "represent[] the moral condemnation of the community" should only be imposed when Congress has spoken "plainly and unmistakably." *Bass*, 404 U.S. at 348.

Here, the government's proposed expansive application of the categorical approach will classify a great number more state offenses as ACCA predicates. This, in turn will increase the number of mandatory minimum sentences district courts will impose and exacerbate the already serious deleterious implications of mandatory minimum sentences—including, as in this case, by sweeping into the fold crimes that

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[8] The government's position also raises Sixth Amendment issues to the extent it invites judges to make factual findings about the nature of a particular crime to trigger a mandatory minimum and increase the available statutory maximum sentence. *See Mathis*, 136 S. Ct. at 2252. The government claims its version of the categorical approach does not require courts to look to the facts underlying the conviction, but in practice that interpretation actively pushes courts to look at underlying facts. *See Brandon*, 247 F.3d at 191-94 (assuming if the amount of drugs possessed was large enough, the crime would "involve[]" possession with intent to distribute; recognizing state statute at issue gave range of quantities (28-200 grams); and looking to presentencing report to determine the *actual* amount of drugs defendant had possessed).

lack *mens rea* requirements.[9] By contrast, the traditional categorical approach is narrower: The crime of conviction will only qualify as a predicate if it is a "match" with the generic offense. *Mathis*, 136 S. Ct. at 2248. This, in turn, "serves to narrow the scope of [ACCA's] mandatory sentencing enhancement," thus limiting the number of individuals subjected to longer sentences. *United States v. Faust*, 853 F.3d 39, 65 (1st Cir. 2017) (Barron, J., concurring).

The categorical approach also cabins prosecutorial discretion. It provides pre-trial certainty to (i) prosecutors, who will know which state convictions constitute predicate offenses and can make more informed and reasonable charging decisions, limiting prosecutorial overreach; (ii) defendants and defense counsel, who will know whether the charged predicate conviction will automatically satisfy Section 924(e), permitting more intelligent and informed plea bargaining decisions; and (iii) district judges, who will know whether a prior conviction will automatically

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[9] Strict-liability crimes—those that require no *mens rea*—are generally disfavored. *Rehaif*, 139 S. Ct. at 2195; *Staples*, 511 U.S. at 605; *cf. United States v. Park*, 421 U.S. 658 (1975) (strict liability permitted for certain health and safety offenses because "[t]he duty imposed by Congress on responsible corporate agents is … one that requires the highest standard of foresight and vigilance"). In fact, only two states besides Florida—Washington and North Dakota—have eliminated the *mens rea* requirement from their drug laws. *Adkins*, 96 So.3d at 429 (Pariente, J., concurring). As this Court has said, the "existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 436 (1978) (internal citations omitted). Allowing convictions for crimes without a *mens rea* requirement to form the basis of a sentencing enhancement would threaten to make the exception the rule.

satisfy Section 924(e), simplifying and enhancing the predictability of sentencing determinations.

To the extent the Court finds Section 924(e)(2)(A)(ii) ambiguous, the rule of lenity favors rejection of the government's and Eleventh Circuit's version of the categorical approach.

II. The Eleventh Circuit's Version Of The "Categorical Approach" Would Make Mandatory Minimums The Rule, Not The Exception, Proliferating Their Detrimental Effects Without Basis.

The government's construction of Section 924(e)(2)(A) is expansive and dangerously delimited. *See supra* Section I.C. Under its interpretation, even state offenses that do not *mention* "manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance," could count as predicate offenses under ACCA. A broad swath of state offenses would potentially fall within ACCA's ambit, drastically increasing the potential for mandatory minimum sentences.[10]

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[10] Drug crimes are among the most prosecuted in federal and state court. In the federal system, there were almost 25,000 drug cases filed in 2017, which was more than 30% of the criminal cases that year. *See Table D-2, U.S. District Courts - Criminal Defendants Commenced (Excluding Transfers), by Offense, During the 12-Month Periods Ending December 31, 2013 Through 2017*, Admin. Office of the U.S. Courts (Dec. 31, 2017). In Florida, there were 49,300 drug cases filed in FY 2016-17, which made up more than 28% of its felony docket. Fla. Office of the State Courts Adm'r, Circuit Criminal Overview 3-2-3-3. Consequently, "[w]hile the reach of enhanced penalties for 'violent' offenses shrinks, the reach for drug offenses has only known growth." Lucius T. Outlaw III, *Time for a Divorce: Uncoupling Drug Offenses from Violent Offenses in Federal*

That is not the regime Congress adopted (or intended) with Section 924(e). In fact, when ACCA was originally passed in 1984, Congress intended to target only a "small group" of the most violent offenders. *See* H.R. Rep. No. 98-1073, at 2-3 (noting "[b]oth Congress and local prosecutors around the nation have recognized the importance of incapacitating [the small group of] repeat offenders [responsible for a large number of crimes]"); *Taylor*, 495 U.S. at 587-88 (noting Congress focused its efforts on career offenders "who commit a large number of fairly serious crimes as their means of livelihood" and "who … present at least a potential threat of harm to persons"). And even when ACCA was expanded in 1986 to include "serious" and repeat drug offenders, Congress never suggested it intended to punish prior drug offenders more broadly and severely than those who committed "violent felonies."

There is no logical reason to impose such a reading on the statute either. Indeed, the justifications for mandatory minimums are much weaker as applied to the broad swaths of offenders whose conduct only in some expansive sense "involves" drugs. Generally, the deterrence value of mandatory minimums is statistically nonexistent. *See* Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, 38 CRIME & JUST. 65, 68 (2009). And mandatory minimums are utterly ineffective at combating drug offenses. Marc Mauer, *The Impact of Mandatory Minimums Penalties in Federal Sentencing*, 94 JUDICATURE 6, at 6-7 (2010). Nor do mandatory minimums advance any relevant benefits of incapacitation: Low-level drug offenders—

Sentencing Law, Policy, and Practice, 44 AM. J. CRIM. L. 217, 234 (2017).

those who would be most impacted if the government's view prevails—are usually replaced quickly in their criminal enterprises, rendering any societal benefits of incapacitation minimal at best. Alfred Blumstein & Allen J. Beck, *Population Growth in U.S. Prisons, 1980-1996*, 26 CRIME & JUST. 17, 57 (1999).

By contrast, the costs of mandatory minimum sentences are severe. Longer sentences increase the difficulties of reentry after release, as family and community ties, connections to the job market, and the development of job skills are increasingly frayed by time spent behind bars. Andrew D. Leipold, *Is Mass Incarceration Inevitable?*, 56 AM. CRIM. L. REV. 1579, 1586 (2019); Mauer, *supra*, at 7. Children of incarcerated individuals are further harmed, as they run greater risks of health and psychological problems, lower economic well-being, and decreased educational attainment. Eric Martin, *Hidden Consequences: The Impact of Incarceration on Dependent Children*, 278 NAT'L. INST. JUST. 10, 10-16 (2017). Mandatory minimums also engender distrust of the criminal justice system, particularly in minority communities, which are often most affected. *See* FAMM & Nat'l Council of La Raza, *Disparate Impact of Federal Mandatory Minimums on Minority Communities in the United States* 3-4 (2006); Barbara S. Vincent & Paul J. Holfer, *The Consequences of Mandatory Minimum Prison Terms: A Summary of Recent Findings* 23, (1994).

In fact, long mandatory terms may exacerbate crime rather than reduce it. *See* Daniel S. Nagin *et al.*, *Imprisonment and Reoffending*, 38 CRIME & JUST. 115, 121 (2009); *see also* Michael Tonry, *Less Imprisonment Is No Doubt a Good Thing, More Policing Is Not*, 10 CRIMINOLOGY & PUB. POL. 137, 137-38 (2011)

("The effects of imprisonment on individual deterrence are most likely perverse; people sent to prison tend to come out worse and more likely to reoffend than if they had received a lesser punishment"). Mandatory minimum sentencing if anything *increases* recidivism. Mauer, *supra*, at 7.

If mandatory minimums proliferate, the power to sentence will shift even more from judges to prosecutors—engendering more distrust in the criminal justice system. Wielding mandatory minimum sentences, prosecutors can effectively "pre-set" defendants' sentences through charging decisions, which are virtually unreviewable. *See Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) ("[T]he decision whether or not to prosecute, and what charge to file … generally rests entirely in [the prosecutor's] discretion."); Jeffrey T. Ulmer *et al.*, *Prosecutorial Discretion and the Imposition of Mandatory Minimum Sentences*, 44 J. RES. CRIM. & DELINQ. 427, 451 (2007) ("Our findings support the long-suspected notion that mandatory minimums are not mandatory at all but simply substitute prosecutorial discretion for judicial discretion.").

At bottom, the government's position would undercut Congress's rationale of sentencing the most dangerous, frequent, and hardened offenders and would directly conflict with the growing national consensus that our country's federal sentencing regime for drug offenses is excessive. Indeed, Congress recently passed the First Step Act, broadly reducing the length of mandatory minimums for repeat drug offenders, both prospectively and in certain cases retroactively. Pub. L. No. 115-391, 132 Stat. 5194. The government's attempt to undo that progress here—to *increase* the availability of

mandatory minimums for drug crimes—is not what the law or legislative policy requires.

* * *

The Eleventh Circuit's version of the categorical approach, which the government asks this Court to impose nationwide, undermines the limited system of mandatory minimum penalties Congress enacted. Mandatory minimums can have extremely detrimental and long-lasting impacts, and, as Congress has recognized, should only apply in limited circumstances. As Judge Friendly explained more than a half century ago: people should not "languish[] in prison unless the lawmaker has clearly said they should." Henry J. Friendly, *Benchmarks* 209 (1967). In this case, the traditional application of the categorical approach ensures that only individuals identified by Congress's clear words will be punished. Any other approach should be roundly rejected.

CONCLUSION

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

Respectfully submitted,

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