No. 18-6662

IN THE

Supreme Court of the United States

EDDIE LEE SHULAR,

Petitioner,

v.

UNITED STATES,

Respondent.

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

REPLY BRIEF FOR PETITIONER

JEFFREY T. GREEN
DAVID W. MCALOON
CHRISTOPHER S. ROSS
TJ HERRON
LAURA C. MULHERIN
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

SUSAN E. PROVENZANO
NORTHWESTERN SUPREME COURT PRACTICUM
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-0063

RANDOLPH P. MURRELL
FEDERAL PUBLIC DEFENDER
RICHARD M. SUMMA*
ASSISTANT FEDERAL PUBLIC DEFENDER
227 N. Bronough Street, Suite 4200
Tallahassee, FL 32301
(850) 942-8818
richard_summa@fd.org

Counsel for Petitioner

* Counsel of Record

December 20, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—continued

STATUTES AND REGULATIONS

OTHER AUTHORITIES

INTRODUCTION

The government offers an entirely new approach to analyzing predicate offenses under ACCA. That approach stems from the government's failure to analyze the entire text of 18 U.S.C. § 924(e)(2)(A)(ii). Instead, it treats one word in the statute—"involving"—as triggering a hunt for conduct underlying a state crime that courts can construe as a "serious drug offense." Yet a full review of the surrounding language—"manufacturing, distributing, or possessing with intent to manufacture or distribute" a controlled substance—shows that Congress set forth offenses, not conduct. And these offenses necessarily entail *mens rea* as to the illicit nature of the substance.

These drug offenses have been almost universally defined by the federal government and the States to include a *mens rea* requirement. Nothing in the text or structure of § 924(e)(2)(A)(ii) shows that Congress intended to selectively incorporate portions of state drug offenses, such that the near universal state law requirement of *mens rea* evaporates to accommodate an outlier state.

The word "involving" in § 924(e)(2)(A)(ii) does not somehow transform the character of the words that follow from bedrock drug offenses to mere "action words," such that no comparison of predicate offenses to generic analogues can follow. This Court has construed similar statutes beginning with "involving" to necessitate the generic-offense approach. See *Scheidler* v. *Nat'l Org. for Women, Inc.*, 537 U.S. 393 (2003).

Even if § 924(e)(2)(A)(ii) lists conduct rather than offenses, that conduct necessarily entails *mens rea*. Words must be given their ordinary meaning, in con-

text. *Leocal* v. *Ashcroft*, 543 U.S. 1, 9 (2004). Here, the text includes the substantive phrases "manufacture . . . of a controlled substance," "distribution . . . of a controlled substance," and "possession with intent to manufacture or distribute . . . a controlled substance." In the same way that the phrase "use . . . of physical force against the person or property of another" includes intentionality, so too does a phrase such as "manufacture of a controlled substance" carry with it knowledge that the substance is a controlled substance. See *id.*

The government's new analytical approach offers neither uniformity nor simplicity. Under its approach, Florida's outlier law—one that was virtually nonexistent in 1986—would qualify as a "serious drug offense," even though the same conduct would not satisfy the elements of federal law or the laws of the other States.

The categorical approach Mr. Shular advances requires courts to ask a simple question: Whether the prior conviction required knowledge of the substance's illicit nature. That approach is faithful to the text of the statute, consistent with the way the Court has historically construed ACCA, and produces uniform results for different cases and different defendants.

I. SECTION 924(e)(2)(A)(ii) LISTS WELL-KNOWN OFFENSES, NOT "ACTION WORDS"

1. The government's textual analysis begins and ends with only one word: "involving." That narrow focus is misplaced because what is essential to resolving the question presented here is the meaning of the words that follow: "manufacturing, distributing, or

possessing with intent to manufacture or distribute, a controlled substance." 18 U.S.C. § 924(e)(2)(A)(ii).

Mr. Shular's empirical analysis showed that "manufacturing, distributing, and possession with intent to manufacture or distribute" were well-known controlled substance offenses used at the federal level and throughout the States at the time Congress amended ACCA in 1986 to include "serious drug offenses." See Pet. Br. at 9–13; Pet. Br. App. Then, as now, those offenses almost universally carried a *mens rea* requirement, even if the words used in the various statutes were (and are) not consistent. The government's response is that these terms are "plain action words," but even if that were correct grammar (and it's not—it's not grammar at all),[1] these action words still denote intentionality. See U.S. Br. at 15.

The government further contends that Mr. Shular's detailed history of the state and federal drug trafficking offenses "simply assumes the answer to the question presented in this case." *Id.* at 26 (citing Pet. Br. at 10–13, 19–23). But Mr. Shular has assumed the truth of no premise in his argument and, obviously, the parties in this case are squarely at odds over precisely what "manufacturing, distribution, and possession with intent to manufacture or distribute"[2]

---

[1] The appellation "action words" is not found in any other opinion issued by this Court, ever.

[2] The government's contention that Congress' inclusion of the "possession with intent" offense signals a decision to exclude *mens rea* from distribution and manufacture demonstrates a misunderstanding of different criminal elements and cannot be credited. U.S. Br. at 15. The specific intent element in "possession with intent to distribute" offenses is an entirely different element of an offense that elevates simple possession offenses into more serious trafficking offenses. This apples-to-oranges comparison provides no insight into the question presented here.

means. Again, the government offers up the phrase "action words," but nowhere grapples with the definition of those words.

The government's theory instead rests on the presumption that the term "involving" transforms the character of the words that follow it, such that offenses become conduct, negating any need for an offense-matching inquiry. It wishes the words of the statute read as it writes them: involving "*the activity of* manufacturing, distributing, or possessing with intent to distribute a controlled substance." U.S. Br. at 18 (emphasis added). But that is not the statute that Congress enacted.

The Court's precedent dispels the notion that the term "involving" negates the need for a categorical inquiry that matches predicate offenses to their generic analogues. See *Scheidler*, 537 U.S. at 410. In *Scheidler*, when analyzing RICO, 18 U.S.C. § 1961(1)(A), where "involving" precedes the qualifying offense of "extortion," the Court determined that "the Model Penal Code and a majority of States recognize the *crime of extortion* as requiring a party to obtain or to seek to obtain property" and thus "the *state extortion offense* for purposes of RICO must have a similar requirement." See *Scheidler*, 537 U.S. at 410 (emphasis added).

The Court's analytical approach has been consistent, and the Court's reliance in *Scheidler* on *Taylor* to reach this conclusion confirms that it was benchmarking the state offense against its generic analogue. *Id.* at 410–11. Just as the offense-matching test applies when the word "involving" precedes the offense of "extortion" in § 1961(1)(A), *id.* at 409–11, it likewise applies when the word "involving" precedes "manufacturing, distributing, or possessing with intent to manufacture or distribute,"

§ 924(e)(2)(A)(ii). Concessions by the parties did not control the analysis in *Scheidler*. See U.S. Br. at 24. Nor did the Court simply define "extortion" in a manner akin to consulting a "legal dictionary," *id.* at 25, without comparing the elemental components of the crime to the generic analogue.

2. The government's structural analysis is likewise wanting. First, it disregards the significance of the immediately neighboring federal offense provision, which keys "serious drug offenses" to complete offenses under the Controlled Substances Act that have a *mens rea* requirement—not merely "the activity of" manufacturing, distributing, or possessing with intent. See 18 U.S.C. § 924(e)(2)(A)(i); see also *McFadden* v. *United States*, 135 S. Ct. 2298, 2302–07 (2015) (explaining the knowledge requirement under the Controlled Substances Act). If the government's interpretation of § 924(e)(2)(A)(ii) is correct, then § 924(e)(2)(A)(i) is unnecessary. *United States* v. *Jicarilla Apache Nation*, 564 U.S. 162, 185 (2011) ("As our cases have noted in the past, we are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law."). Congress simply could have written a single enhancement provision whereby any controlled substance conviction "involving" (which, in the government's view, means "involving *the activity of*") manufacturing, distributing, or possessing with intent to manufacture or distribute qualifies as a "serious drug offense."

Second, the *mens rea* requirement in § 924(e)(2)(A)(ii) is reinforced elsewhere in the statute. Under § 924(c)(1)(A), for example, anyone using or possessing a firearm in furtherance of a federal "drug trafficking crime" qualifies for a sentence enhancement. Any crime under the Controlled Sub-

stances Act (which each include a *mens rea* requirement) punishable by more than one year qualifies as a "drug trafficking crime." 18 U.S.C. § 924(c)(2). It is illogical to believe that Congress would require *mens rea* for a class of less egregious drug offenses under § 924(c), yet omit that requirement in its definition of the most "serious drug offense[s]" punishable by ten years or more. See 18 U.S.C. § 924(e)(2)(A)(ii).

Third, although the government calls it something different, its approach is effectively an elements-clause test akin to those under § 924(e)(2)(B)(i). The government argues that the described conduct need not be listed as an express element, so long as some element in the predicate offense "necessarily entails" the conduct described. U.S. Br. at 22. That is no different from how the elements clause is interpreted now, which includes as a "violent felony" any offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i).

There are already statutes in which "use of force" (attempted, threatened, or otherwise) is not an express element of the crime, yet they qualify under the elements clause because an element of physical injury in a crime necessarily entails the use of force. See, *e.g.*, *Sanchez* v. *United States*, 940 F.3d 526, 535 (11th Cir. 2019) (holding "New York's second-degree murder statute, which requires the intentional causation of death, categorically requires use of physical force," sufficient to trigger ACCA), *cert. denied*, No. 19-6279, 2019 WL 6257490 (U.S. Nov. 25, 2019); *United States* v. *Reid*, 861 F.3d 523, 526–28, 529 (4th Cir. 2017) (holding Va. Code Ann. § 18.2-55, which criminalizes an inmate's intentional causation of "bodily injury" to, among others, correctional officers, qualifies as a "violent felony" under the elements

clause, even though it could be committed by means such as intentionally spilling water to cause someone to fall), *cert. denied*, 138 S. Ct. 462 (2017).

If Congress wanted to adopt a similar test for serious drug offenses, it "presumably would have done so expressly as it did in the immediately following subparagraph." See *Sandoz Inc.* v. *Amgen Inc.*, 137 S. Ct. 1664, 1677 (2017) (quotation marks omitted). That it did not here underscores the conclusion that the government's interpretation of the statute is incorrect.

Finally, the government puts much stock in the fact that the state drug offense clause uses "involving" to introduce its offenses, while the violent felony's enumerated offense clause begins with "is." But both parties agree on the dictionary definition of "involving," and both agree that the term "involving" better captures offenses lacking the deep roots of common law crimes such as burglary. See Pet. Br. at 14; U.S. Br. at 11, 13. As Mr. Shular previously noted, States have defined those core drug offenses with all manner of terminology, including: trafficking, selling, giving, dispensing, distributing, delivering, promoting, and producing. See Pet. Br. 13; Pet. Br. App.; *e.g.*, Me. Stat. tit. 17-A, § 1106 ("furnishing").

The Court's generic-offense analysis in *Taylor* did not turn on the existence of the word "is," such that Congress' use of "involving" mandates a different result. See U.S. Br. at 17 (citing *Taylor* v. *United States*, 495 U.S. 575, 597 (1990); *United States* v. *Stitt*, 139 S. Ct. 399 (2018); *Descamps* v. *United States*, 570 U.S. 254 (2013)). Rather, the Court in *Taylor* relied upon an exhaustive review of ACCA's legislative history, the common law, and the generally understood meaning of "burglary" in reaching its generic-offense approach. See *Taylor* v. *United*

States, 495 U.S. 575, 581–96 (1990). The government's cited passage merely states that Congress' use of "is" and "otherwise involves" in § 924(e)(2)(B)(ii) indicated Congress' intent to capture a broader range of burglary offenses than the more limited definition of burglary advanced by Taylor (*viz.*, burglary limited to dwellings and at night). *Taylor*, 495 U.S. at 597. This brief textual analysis offers but little support to reject *Taylor*'s overarching endorsement of the generic-matching approach.

Other cases the government cites for its proposition have nothing to do with a textual analysis of the word "is" under § 924(e)(2)(B)(ii). See *United States* v. *Stitt*, 139 S. Ct. 399 (2018) (analyzing the scope of the term "burglary" in the context of vehicles adapted for overnight use); *Descamps* v. *United States*, 570 U.S. 254 (2013) (analyzing whether the modified categorical approach applied in the context of indivisible statutes).

3. Even if Congress used "involving" in § 924(e)(2)(A)(ii) to introduce "plain action words" describing conduct, such conduct "necessarily entails" *mens rea* as to the illicit nature of the substance. This is because a proper textual analysis still begins by determining the meaning of such conduct. See *Kawashima* v. *Holder*, 565 U.S. 478, 484 (2012) (determining what the meaning of "deceit" was at the time the relevant provision was enacted).

Following the approach in *Kawashima* therefore requires determining what "manufacturing . . . a controlled substance," "distributing . . . a controlled substance," or "possessing with intent to distribute or manufacture . . . a controlled substance" means. "When interpreting a statute, we must give words their ordinary or natural meaning," and must "construe language in its context and in light of the terms

surrounding it." *Leocal*, 543 U.S. at 9 (quotation marks omitted). For example, the phrase "use . . . of physical force against the person or property of another" carries with it intentionality, even though no reference to intent appears in the statute. See *id.* (evaluating 18 U.S.C. § 16). "[W]e would not ordinarily say a person 'use[s] . . . physical force against' another by stumbling and falling into him." *Id.* Only when one acts intentionally, such as by pushing another, can we say he "used physical force" meriting criminal punishment. See *id.*

The ordinary meaning of each of "manufacturing, distributing, or possessing with intent to manufacture or distribute . . . a controlled substance" also carries with it knowledge of the illicit nature of the controlled substance. One cannot be criminally convicted of manufacturing or distributing a controlled substance without forming an antecedent belief about its illicit nature, because one should not be liable for "stumbling . . . into" manufacturing or distribution. Cf. *id.* Likewise, being criminally liable for possession with intent to distribute or manufacture rests on the knowledge that the thing being distributed or manufactured was illicit in nature.

The implied *mens rea* is all the more appropriate because identical conduct proscribed under § 924(e)(2)(A)(ii) is punishable under § 841(a)(1) of the Controlled Substances Act *only if* it requires knowledge of the illicit nature of the substance. Cf. *Lopez* v. *Gonzales*, 549 U.S. 47, 60 (2006) ("[A] state offense constitutes a 'felony punishable under the Controlled Substances Act' only if it proscribes *conduct* punishable as a felony under that federal law.") (emphasis added); *Moncreiffe* v. *Holder*, 569 U.S. 184, 188, 192 (2013) (same).

This ordinary meaning was applied across the States both at the time ACCA was amended and now: For such conduct to be regarded as criminal, it must include knowledge as to the illicit nature of the substance. See Pet. Br. App.; *e.g.*, *Thomas* v. *State*, 522 P.2d 528, 530 (Alaska 1974) ("The state also concedes that the statute prohibits only the knowing sale of or traffic in narcotic drugs, although the statute contains no express provision for a knowledge requirement.").

This interpretation not only accords with the ordinary meaning and general understanding of those terms, but also because § 924(e)(1) requires "convictions" for state offenses under § 924(e)(2)(A)(ii). The presumption of *mens rea* is not some "burden of proof" issue, as the government fashions it. U.S. Br. at 28. The existence of a *mens rea* as to every single element of a complete offense is "the rule of, rather than the exception to, Anglo-American jurisprudence." *United States* v. *U.S. Gypsum Co.*, 438 U.S. 422, 436 (1978); *Rehaif* v. *United States*, 139 S. Ct. 2191, 2195 (2019) (explaining that "Congress intends to require a defendant to possess a culpable mental state regarding each of the statutory elements that criminalize otherwise innocent conduct.").

II. THE GOVERNMENT'S RELIANCE ON *KAWASHIMA* IS MISPLACED

The government rests much of its argument on this Court's decision in *Kawashima*. U.S. Br. at 13–15, 20–22. But *Kawashima* supports Mr. Shular's arguments.

There, the Court interpreted an immigration statute that triggered removal of an alien based upon a prior conviction for an "aggravated felony," defined as an "offense that" "involves fraud or deceit." See *Ka-*

washima, 565 U.S. at 481 (quoting 8 U.S.C. § 1101(a)(43)(M)(i)).

The Court noted that interpreting the statute required "a categorical approach." *Id.* at 483. And it conducted this analysis by defining the phrase "involves fraud or deceit" as "meaning offenses with elements that necessarily entail fraudulent or deceitful conduct." *Id.* at 484. The Court proceeded to examine a dictionary definition of deceit and use that definition to examine whether the Kawashimas' false-tax-return offenses necessarily involved deceit. See *id.*

This approach can be broken into two steps: (1) defining "involves" as examining what a prior offense "necessarily entails"; and (2) defining the object of the verb "involves" and comparing that to the prior offense. *Kawashima*'s second step shows that the key inquiry is how to define the object of "involves." In *Kawashima*, the relevant part of the verb's object was "fraud or deceit." *Id.* To answer this question, the Court turned to a dictionary for a definition of "deceit" when the immigration statute was enacted.

"Deceit"—which was the Court's main focus in light of the Kawashimas' prior convictions—is not an offense. And while "fraud," standing alone, could refer to an offense, the *noscitur a sociis* canon counsels interpreting "fraud" in context with "deceit." See *United States* v. *Williams*, 553 U.S. 285, 294 (2008). Together, they require an analysis of "fraudulent or deceitful conduct." *Kawashima*, 565 U.S. at 484. Indeed, the phrase "fraud or deceit" has been used to describe a class of criminal offense known as *crimen falsi*. See *United States* v. *Papia*, 560 F.2d 827, 846 n.12 (7th Cir. 1977) (describing *crimen falsi* as "any crime perpetrated by means of fraud or deceit"). For example, this same class of conduct underlies the

Federal Rule of Evidence allowing impeachment of witnesses on the basis of prior convictions. Cf. Fed. R. Evid. 609(A)(2) (allowing impeachment of witnesses previously convicted of "a dishonest act or false statement"); H.R. Conf. Rep. No. 93–1597, at 9 (1975) (classifying "dishonest act or false statement" as offenses falling within a class of crimes known historically as *crimen falsi*).

The government's failure here to explain the meaning of "manufacturing, distributing, and possessing with intent" is fatal to its analysis. The government assumes that those words describe conduct, resting on the idea that the *Kawashima* Court "did not construe the phrase ['involves fraud or deceit'] to require positing a 'generic' version of a 'fraud' or 'deceit' crime." U.S. Br. at 14. But that was not a position argued by either party in *Kawashima*, and the Court did not address "generic" offenses. And, the statutory text and context of the immigration statute do not prompt the use of a generic analogue in the way that § 924(e)(2)(A)(ii) does. The phrase "fraud or deceit" does not denote generic offenses.

By contrast, the language following "involving" in the serious-drug-offense provision does denote generic offenses. Pet. Br. at 9–13. Thus, the relevant question becomes whether Mr. Shular's prior convictions "necessarily entailed" the conduct proscribed by those generic offenses. And Mr. Shular's prior Florida convictions for selling cocaine did not "necessarily entail" an element of the generic offense of distribution of a controlled substance because the Florida crime lacks a *mens rea* element. The same is true of Mr. Shular's Florida conviction for possession with intent to distribute a controlled substance.

As this Court's analysis in *Scheidler* shows, the answer in cases such as this one lies not in the word

"involving" but in its object. Both *Scheidler* and *Kawashima* apply a categorical approach. And both required the Court to interpret the meaning of words following "involving" in a statute. *Scheidler* involved generic offenses, so the Court looked to whether the prior conviction had the same elements as the defined generic offense. *Kawashima* described conduct, so the Court could look to see whether the elements of the prior conviction required that conduct.

Contrary to the government's assertion, Mr. Shular's objections do not "rest largely" on a "misunderstanding of the *Kawashima* approach adopted by the court below." U.S. Br. at 19. Indeed, the Eleventh Circuit did not cite *Kawashima* in either the per curiam opinion on review in this Court or in the Eleventh Circuit's precedent it relied upon. See generally *United States* v. *Smith*, 775 F.3d 1262 (11th Cir. 2014). Moreover, neither court applied the two-step analysis turning on conduct necessarily entailed within an element of an offense, as the government suggests. Rather, the Eleventh Circuit in *Smith* essentially agreed with Mr. Shular's position that § 924(e)(2)(A)(ii) listed offenses; it just believed, contrary to a large body of statutory history and evidence, that those offenses did not include a *mens rea* element. See *id.*

III. THE GOVERNMENT'S APPROACH OFFERS NEITHER UNIFORMITY NOR SIMPLICITY

The government's incomplete textual analysis results in a new approach under ACCA that would have the effect of sweeping in Florida's outlier statutes. The government suggests its approach offers both uniformity and simplicity. That is wrong on both accounts.

1. "In terms of fundamental fairness, [ACCA] should ensure, to the extent that it is consistent with the prerogatives of the States in defining their own offenses, that the same type of conduct is punishable on the Federal level in all cases." *Taylor*, 495 U.S. at 582. Mooring the sentencing enhancement to a standard offense definition prevents the inclusion of "bizarre or unexpected state offenses." *Lockhart* v. *United States*, 136 S. Ct. 958, 968 (2016).

Mr. Shular's approach serves that purpose. That the government makes the opposite assertion does not make it so. See U.S. Br. at 31–32. The overwhelming majority of state drug crimes required *mens rea* when the federal statute was enacted in 1986, and still require it today. See Pet. Br. App. Florida stands apart. It does not punish individuals for the same conduct. Evidence sufficient to convict in Florida would not be enough to convict in a trial under federal law nor in any other state.

The government argues that all of Mr. Shular's prior convictions "require a particular mens rea," *i.e.*, "knowledge of the presence of the substance." See U.S. Br. at 27. This is a misstatement of Florida law for two reasons: (1) knowledge of the presence of the substance applies only to possession offenses, *In re Standard Jury Instructions in Crim. Cases (No. 2005-3)*, 969 So. 2d 245, 248 (Fla. 2007) (per curiam); and (2) knowledge of the presence of the substance, while it is a state of mind element, is not a *mens rea* or guilty knowledge element, *Chicone* v. *State*, 684 So. 2d 736, 739–46 (Fla. 1996), *superseded by* Fla. Stat. § 893.101. In any event, the government has conceded that knowledge of the illicit nature of the substance is not an element of the Florida offense. U.S. Br. at 27.

Nothing in the text of § 924(e)(2)(A)(ii) shows that Congress somehow intended that some portion of state drug crimes would be incorporated piecemeal into the federal framework, so that the near-universal requirement of *mens rea* is read completely out of the statute. Instead, the *mens rea* requirement serves an important gatekeeping function under § 924(e)(2)(A)(ii)—it ensures that criminal defendants are treated uniformly under ACCA regardless of the state where they are convicted.

Without the presumption of *mens rea*, prior crimes like Mr. Shular's trigger an enhancement under federal law even though the conviction arose under Florida law, which is significantly different than Pennsylvania law, for example. This absurd result conflicts with congressional intent that the courts apply federal statutes uniformly throughout the country, and the Court should reject the government's attempt to shoehorn any state drug crime, even those without *mens rea*, into "statutory sections where it does not fit." *Leocal*, 543 U.S. at 13.

Although this case is about *mens rea*, the government's approach invites application in the future to other activities it argues are "necessarily entailed" in drug trafficking offenses, far beyond the intent of Congress in defining "serious drug offenses."

2. Nor does the government's approach offer simplicity. As an initial matter, the government's analytical framework is not one courts have ever applied under ACCA before, nor has its "*Kawashima* approach" been adopted in other contexts. Should the Court adopt the government's approach, there will inevitably be a new line of cases testing the bounds of this entirely new analytical framework that will necessitate further clarification from this Court. By contrast, the generic-offense approach espoused in

Taylor has been in use for almost thirty years and is one with which courts, including this one, are intimately familiar.

Under Mr. Shular's approach, courts will not have difficulty "synthesiz[ing]" a generic version of these offenses. See U.S. Br. at 30. As the government itself notes, nearly all of the elements of these offenses are included in the name of such offenses. U.S. Br. at 15. For example, "distribution of a controlled substance," under Mr. Shular's formulation, contains three elements: (1) distribution; (2) of a controlled substance; and (3) with knowledge of the illicit nature of the substance. Given the nature and number of elements, these kinds of offenses do not lend themselves to the same kinds of challenges other enumerated offense have, such as what constitutes a "dwelling," or at what point the intent to commit a felony within a building or structure. See *Stitt*, 139 S. Ct. at 407; *Quarles* v. *United States*, 139 S. Ct. 1872, 1875 (2019).

It is difficult to see how Mr. Shular's formulation would be more challenging to apply than the government's. To its credit, the government has adopted a narrow definition of "involving," and seems to have abandoned the unmoored interpretation of "involving" that other courts have applied in the past. See U.S. Br. at 28–29 (declining to respond to Mr. Shular's argument about the problems with an expansive definition of "involving," saying only "that is not the case here"). Under the government's approach, any inquiry for what constitutes the activity of "distribution of a controlled substance" would likewise satisfy those elements under Mr. Shular's test.[3]

---

[3] And, in any event, one of the elements—whether a substance is controlled—will be immune from extensive litigation in courts

All that is left, then, is the one element the government hopes to avoid—whether the defendant had knowledge as to the illicit nature of the substance. This question would easily be satisfied in all but one state, Florida, as that element is necessary for conviction in all other states. Thus, adopting the categorical approach advanced by Mr. Shular would not trigger a mass review of previously sentenced defendants. *Contra Rehaif*, 139 S. Ct. at 2201 (Alito, J. and Thomas, J., dissenting) ("Today's decision will make it significantly harder to convict persons falling into some of these categories, and the decision will create a mountain of problems with respect to the thousands of prisoners currently serving terms for § 922(g) convictions.")

Beginning with *Taylor*, the Court could have simply matched the "labels" and let the States' definitions of offenses control the determination of what triggers sentencing enhancements under ACCA. Instead, the Court concluded that ACCA should ensure that the same kind of conduct is punished the same way. *Taylor*, 495 U.S. at 582. That is what Mr. Shular's approach does.

---

given that question is resolved by reference to the federal controlled substances list. *See* 18 U.S.C. § 924(e)(2)(A)(ii).

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below and reinstate a categorical analysis comparing state law crimes and generic analogues when determining sentencing enhancements under § 924(e)(2)(A)(ii).

Respectfully submitted,

JEFFREY T. GREEN
DAVID W. MCALOON
CHRISTOPHER S. ROSS
TJ HERRON
LAURA C. MULHERIN
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

SUSAN E. PROVENZANO
NORTHWESTERN SUPREME COURT PRACTICUM
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-0063

RANDOLPH P. MURRELL
FEDERAL PUBLIC DEFENDER
RICHARD M. SUMMA*
ASSISTANT FEDERAL PUBLIC DEFENDER
227 N. Bronough Street,
Suite 4200
Tallahassee, FL 32301
(850) 942-8818
richard_summa@fd.org

Counsel for Petitioner

* Counsel of Record

December 20, 2019