Nos. 22-6389 & 22-6640

In the Supreme Court of the United States

JUSTIN RASHAAD BROWN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

EUGENE JACKSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writs of Certiorari to the United States Courts of Appeals for the Third and Eleventh Circuits

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous *amicus* briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. NACDL has a particular interest in the Controlled Substances Act, including its interaction with the Armed Career Criminal Act.

INTRODUCTION AND SUMMARY OF ARGUMENT

These cases involve an important and recurring question about the interplay between provisions of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), and the Controlled Substances Act (CSA), 21 U.S.C. §§ 802, 811-12. Specifically, the question is

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, or its counsel made a monetary contribution to its preparation or submission.

whether ACCA's "serious drug offense" definition incorporates the CSA's federal drug schedules in effect at the time of the federal firearm offense or the sentencing for that federal firearm offense—or instead incorporates, as the government contends, federal drug schedules that were in effect at the time of the prior state drug offense.

As petitioners in both cases persuasively explain, every available tool of statutory construction points against the government's proposed rule and in favor of courts using the federal drug schedules in place at the time of the federal firearm offense or the federal firearm sentence. (NACDL takes no position between the two approaches advocated by petitioners.)

NACDL writes separately to provide additional context about the CSA, context which undermines the government's proposed rule that courts evaluating ACCA should look to outdated or superseded federal drug schedules that were in effect at the time of a prior state drug offense.

Congress designed the CSA to be dynamic. The CSA requires the federal drug schedules to be updated and republished on an annual basis, and it establishes a detailed process for substances to be added to, transferred between, or removed from the federal drug schedules to account for scientific and medical developments. See 21 U.S.C. § 811; *Touby* v. *United States*, 500 U.S. 160, 162-63 (1991).

That process requires, for example, "a scientific and medical evaluation" by the Department of Health and Human Services, and findings related to the "*current* scientific knowledge" regarding the substance and whether the substance has a "*currently* accepted medical use." 21 U.S.C. §§ 811(b), (c)(3), 812(b)

(emphases added). The statutory process also provides for input from interested third parties at every stage. The CSA permits interested parties to petition for scheduling action at the front end, generally requires notice-and-comment rulemaking compliant with the Administrative Procedure Act, and authorizes judicial review of scheduling decisions at the back end. See 21 U.S.C. §§ 811(a), 877.

The CSA's scheduling process is not only dynamic in design, but also in practice. Hundreds of substances have been added to, transferred between, or removed from the federal drug schedules since the CSA was enacted. The government's proposal to rely on ossified or long-superseded versions of the federal drug schedules fails to give due account to these frequent changes or the evolution in scientific or medical understanding that they reflect.

ARGUMENT

THE DYNAMIC NATURE OF THE CSA'S SCHEDULING PROCESS SUPPORTS PETITIONERS' POSITIONS.

A. The CSA Establishes A Detailed Process For Updating The Federal Drug Schedules Based On Current Medical And Scientific Understandings.

Congress enacted the CSA as part of the broader Comprehensive Drug Abuse Prevention and Control Act of 1970. See Pub. L. No. 91-513, § 100, 84 Stat. 1236, 1242, as amended, 21 U.S.C. §§ 801 *et seq*. The CSA categorizes all controlled substances into one of five schedules, 21 U.S.C. § 812, "based on their accepted medical uses, the potential for abuse, and their psychological and physical effects on the body," *Gonzales* v. *Raich*, 545 U.S. 1, 13 (2005).

Congress in 1970 provided a starting point by enumerating a list of substances in each schedule under the heading "*[i]nitial* schedules of controlled substances." 21 U.S.C. § 812(c) (emphasis added); see *id.* § 812(a) (providing that the drug schedules "shall *initially* consist of the substances listed in this section") (emphasis added). But Congress made clear that its initial list was "not an unchanging array engraved in stone" and that the federal drug schedules instead "would be ever-evolving." *United States* v. *Gibson*, 55 F.4th 153, 162 (2d Cir. 2022).

To that end, Congress mandated that "[t]he schedules established by this section *shall be updated* and republished on a semiannual basis during the two-year period beginning one year after October 27, 1970, and *shall be updated* and republished on an annual basis thereafter." 21 U.S.C. § 812(a) (emphases added). See 21 C.F.R. §§ 1308.11-15 (publication of subsequent schedules).[2]

Congress also established a detailed process to govern the evolving classification of substances that it envisioned. See generally 21 U.S.C. § 811.

Section 811(a) authorizes the Attorney General to add a substance to the federal drug schedules or transfer a substance to a different schedule if the Attorney General finds that the substance meets the requirements for inclusion in the relevant schedule. 21 U.S.C. § 811(a)(1); see also 21 U.S.C. § 812(b)

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[2] As petitioners note (Jackson Br. 28, Brown Br. 9-10) and as further discussed below, the federal drug schedules are updated often, including in between annual publications. Consulting the drug schedules published in the Code of Federal Regulations alone therefore does not necessarily provide an accurate picture of those schedules at a specific point in time.

(requirements for inclusion on each schedule). Section 811(a) similarly authorizes the Attorney General to "remove any drug or other substance from the schedules if he finds that the drug or other substance does not meet the requirements for inclusion in any schedule." *Id.* § 811(a)(2). The Attorney General may propose scheduling actions on his own motion, at the request of the Secretary of Health and Human Services (HHS), or on the petition of any interested party. *Id.* § 811(a).[3]

The Attorney General "must follow specified procedures" before taking action under Section 811(a). *Touby*, 500 U.S. at 162. The Attorney General must "request from the Secretary [of HHS] a scientific and medical evaluation." 21 U.S.C. § 811(b). The Secretary's recommendations are binding on the Attorney General as to "scientific and medical matters," and the Attorney General may not control a substance if the Secretary recommends against doing so. *Ibid.*[4]

Congress further directed the Attorney General, informed by the scientific and medical evaluation from HHS, to consider the following eight factors with

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[3] The Attorney General has since delegated its functions under Section 811 to the Administrator of the Drug Enforcement Administration (DEA). See 28 C.F.R. § 0.100(b); *Touby*, 500 U.S. at 164, 169. To avoid confusion, we refer to the statutory term "Attorney General" in describing the scheduling process set forth in the CSA.

[4] The Food and Drug Administration acts as the lead agency within HHS in carrying out the Secretary's scheduling responsibilities under the CSA, with the concurrence of the National Institute on Drug Abuse. See Memorandum of Understanding with the National Institute on Drug Abuse, 50 Fed. Reg. 9518 (Mar. 8, 1985); see also Joanna R. Lampe, Cong. Rsch. Serv., R45948, *The Controlled Substances Act (CSA): A Legal Overview for the 118th Congress* 10 (2023).

respect to a substance that the Attorney General proposes to control or to remove from the schedules:

> (1) Its actual or relative potential for abuse.
>
> (2) Scientific evidence of its pharmacological effect, if known.
>
> (3) The state of current scientific knowledge regarding the drug or other substance.
>
> (4) Its history and current pattern of abuse.
>
> (5) The scope, duration, and significance of abuse.
>
> (6) What, if any, risk there is to the public health.
>
> (7) Its psychic or physiological dependence liability.
>
> (8) Whether the substance is an immediate precursor of a substance already controlled under this subchapter.

21 U.S.C. § 811(c). As the statutory language makes explicit, scheduling decisions must reflect "*current* scientific knowledge." *Id.* § 811(c)(3) (emphasis added); see also *id.* § 812(b) (requiring findings related to a substance's "currently accepted medical use"). As scientific and medical understandings change, so too should the federal drug schedules.

Congress also designed the CSA's scheduling process to allow for scientific, medical, or other policy input from outside of the government. Any "interested party" may petition the Attorney General to take a scheduling action under Section 811(a). 21 U.S.C. § 811(a). As the DEA recognizes, a wide variety of individuals and entities may qualify as interested parties who may petition for a scheduling action—

including, but not limited to, drug manufacturers, medical societies or associations, pharmacy associations, public interest groups, state or local government agencies, and individual citizens. Drug Enforcement Administration, *The Controlled Substances Act*, https://www.dea.gov/drug-information/csa (last accessed July 17, 2023).

The Attorney General must also comply with the notice-and-comment provisions of the Administrative Procedure Act, which permit comment by interested parties. 21 U.S.C. § 811(a). And the CSA permits aggrieved persons to challenge a final scheduling decision by the Attorney General in a court of appeals. See 21 U.S.C. § 877; *Touby*, 500 U.S. at 163.

Separately, Congress amended the CSA in 1984 to authorize the Attorney General to temporarily schedule a substance in order "to avoid an *imminent* hazard to the public safety." 21 U.S.C. § 811(h) (emphasis added); see *Touby*, 500 U.S. at 163-64. That amendment underscores the fluidity of the drug schedules, allowing the Attorney General to react quickly to "dangerous new drugs" prior to completion of "the permanent scheduling process" described above. *Touby*, 500 U.S. at 164. Even under the expedited process for temporary scheduling, however, the Attorney General is required to notify the Secretary of HHS of its proposed scheduling action and "'take into consideration any comments submitted by the Secretary in response.'" *Id.* at 166 (quoting 21 U.S.C. § 811(h)(4)).

Finally, Congress can, and does, mandate changes affecting the federal drug schedules directly through legislation. For example, Congress directed the Attorney General to add gamma hydroxybutyric acid (GHB), sometimes referred to as the "date rape" drug, to schedule I. See Hillory J. Farias and Samantha

Reid Date-Rape Drug Prohibition Act of 2000, Pub. L. No. 106-172, § 3, 114 Stat. 7, 8-9. And Congress removed "hemp" from the definition of marijuana for purposes of the CSA. See Agriculture Improvement Act of 2018, Pub. L. No. 115-134, §12618, 132 Stat. 4490, 5018, 21 U.S.C. § 802(16)(B)(i).

In short, Congress designed the federal drug schedules to continuously evolve. As one of the architects of the CSA summarized in a book he co-authored, "the intent of the [CSA's] scheduling system and its greatest value is its practicality and ability to adjust the regulatory framework." Robert L. Bogomolny, Michael R. Sonnenreich & Anthony J. Roccograndi, *A Handbook on the 1970 Federal Drug Act* 28 (1975).

B. The Federal Drug Schedules Are In Fact Constantly Evolving.

Although NACDL does not always agree with the government's scheduling decisions, there can be no dispute that the federal drug schedules are in fact "ever-evolving." *Gibson*, 55 F.4th at 162.

The DEA, while cautioning that its lists "are not comprehensive," maintains and publishes a list summarizing hundreds of scheduling actions under the CSA that have taken place since 1970. U.S. Dep't of Justice, Drug Enforcement Administration, Diversion Control Division, *Orange Book – Lists of Scheduling Actions, Controlled Substances and Regulated Chemicals* 23-40 of 112 (July 2023), https://www.deadiversion.usdoj.gov/schedules/orangebook/orangebook.pdf (last accessed July 17, 2023).

Judicial decisions citing the DEA's list of scheduling actions have reported that "approximately 160 substances had been added, removed, or transferred from one schedule to another" between 1970 and 2015.

Gibson, 55 F.4th at 163 (quotation marks and alterations omitted).

What's more, the DEA's list confirms that the pace of scheduling actions has shown no sign of slowing in recent years, with scores of additional proposed scheduling actions in the nine years since 2014. *Orange Book*, *supra*, at 31-40. The DEA reports that, overall, "over 200 substances have been added, removed, or transferred from one schedule to another." *Id.* at 2. The majority of these scheduling actions involve adding new substances to the federal drug schedules. See generally *id.* at 23-40.

A few examples illustrate how these scheduling decisions can reflect consideration of current scientific and medical understandings.

Bath salts. Reacting to reports from "federal, state and local public health departments and poison control centers" about "emergency room admissions and deaths," the DEA temporarily scheduled three chemicals used to make "bath salts." See Schedules of Controlled Substances: Temporary Placement of Three Synthetic Cathinones Into Schedule I, 76 Fed. Reg. 65371, 65372 (Oct. 21, 2011). As the temporary scheduling order discussed, there are "no currently accepted medical uses" for those substances in the United States, and their potential for harm to the public health is great—with poison control centers receiving "4,720 calls" related to their use in the first eight months of 2011 alone. *Id.* at 65372, 65373; see also *id.* at 65373 (detailing the adverse effects reflected in clinical case reports).

The DEA later permanently scheduled one of those substances, again noting the potential for harm from abuse of the substance and that there are "no

known medical uses" for it. Schedule of Controlled Substances: Placement of Methylone into Schedule I, 78 Fed. Reg. 21818, 21818 (Apr. 12, 2013).

Methoxetamine. The DEA recently added methoxetamine, a substance similar to phencyclidine (PCP) and ketamine, to schedule I. See Schedules of Controlled Substances: Placement of Methoxetamine (MXE) in Schedule I, 87 Fed. Reg. 34166 (June 6, 2022). After receiving HHS's scientific and medical evaluation and recommendation to control the substance under schedule I, the DEA found that methoxetamine has a "high potential for abuse" comparable to PCP and ketamine and that it has "no currently accepted medical use" and "no known therapeutic applications" in the United States. *Id.* at 34167.

Naloxegol. The decision to remove a substance from the federal drug schedules can also reflect consideration of the scientific and medical facts on the ground.

For example, Naloxegol is derived from opium alkaloids, and was therefore previously controlled as a schedule II substance. See Schedules of Controlled Substances: Removal of Naloxegol from Control, 80 Fed. Reg. 3468, 3468 (Jan. 23, 2015); *Gibson*, 55 F.4th at 156. The FDA had approved the drug for marketing based on its use for treating opioid-induced constipation in adults with chronic pain. 80 Fed. Reg. at 3468.

The drug sponsor petitioned to remove the substance from the drug schedules, and the DEA issued a final order doing so after receiving a recommendation from HHS and comments from pharmaceutical industry members, a former nurse, and patient advocacy groups, all supporting decontrol. 80 Fed. Reg. at 3468-69. As the order notes, the medical and scientific data

supported a finding that the substance "does not possess abuse or dependence potential" and provides a "new therapeutic option" for a medical condition affecting individuals suffering from chronic pain. *Id.* at 3469.

In sum, "the CSA schedule is a moving target," just as Congress designed it to be. *Gibson*, 55 F.4th at 163 (quotation marks omitted). The Court should take into account the dynamic and evolving nature of the federal drug schedules when deciding these cases.

CONCLUSION

The Court should interpret ACCA's "serious drug offense" definition to incorporate the federal drug schedules that were in effect at the time of the federal firearm offense or at the time of the federal firearm sentence, not at the time of the prior state drug offense, and dispose of the judgments below in accordance with the rule that the Court adopts.

Respectfully submitted.

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