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 *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS 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]

The National Association of Criminal Defense Lawyers ("NACDL"), founded in 1958, is a nonprofit voluntary professional bar association comprised of private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committed to preserving fairness and promoting a rational and humane criminal justice system. NACDL has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL often files *amicus* briefs in this Court in cases presenting issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system. It has participated as an *amicus* in many of this Court's decisions involving the Armed Career Criminal Act of 1984, including *Taylor v. United States*, 495 U.S. 575 (1990); *Shepard v. United States*, 544 U.S. 13 (2005); *Descamps v. United States*, 570 U.S. 254 (2013); and *Mathis v. United States*, 136 S. Ct. 2243 (2016).

SUMMARY OF THE ARGUMENT

Defendant A and Defendant B walk into a bar. Each carry a pistol and have three prior convictions for the sale of cocaine. Both are arrested and later convicted. Defendant A is sentenced under the Armed Career Criminal Act of 1984 ("ACCA") to the statutory mandatory minimum of 15 years. Defendant B is sentenced to 10 years. The only difference between the two offenders is the state in which these events occurred.

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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 person or entity other than *amicus curiae* or their counsel made a monetary contribution to this brief's preparation or submission. All parties have consented to the filing of this brief.

This is not a hypothetical; it is reality for repeat drug offenders who receive disparate sentences under ACCA—not because their conduct was different, but because they were convicted in different jurisdictions.

In this case, Mr. Shular had six prior convictions in the State of Florida—five for selling cocaine and one for possession with intent to sell cocaine. None of these offenses had as an element *mens rea* regarding the illicit nature of the substance. After Mr. Shular was convicted under federal law as a felon in possession of a gun, he was sentenced under ACCA's enhancement provision. The U.S. Court of Appeals for the Eleventh Circuit had previously rejected the "categorical approach" to defining what counts as a "serious drug offense" and held that a state drug offense may serve as a predicate conviction for enhancement purposes—whether or not it requires knowledge of the nature of the substance. *See United States v. Travis Smith*, 775 F.3d 1262, 1268 (11th Cir. 2014). Under this precedent, each of Mr. Shular's prior convictions were counted as a "serious drug offense" for purposes of applying the ACCA enhancement provision.

This Court has repeatedly held that state crimes do not qualify as predicate offenses for ACCA enhancement purposes unless their elements are the same or narrower than those of the generic offense. For nearly thirty years, this elements-only inquiry, or "categorical approach," has ensured that ACCA's enhancement provision is applied only where a defendant has been convicted of three qualifying predicate crimes. The virtue of this approach lies in its simplicity: it only requires a straightforward comparison of the elements of the prior offense to the elements of the generic crime. If the generic crime contains an element that the prior offense does not, the prior conviction cannot count toward an enhancement.

Although this Court has repeatedly affirmed that the categorical approach applies to ACCA's "violent felonies" provision, it has not squarely addressed whether it applies to "serious drug offenses." But there is no textual, policy, or other reason to treat this provision differently from other predicate offenses. Interpreting ACCA to reach state drug offenses that are broader than the generic offenses would expand the scope of the Act beyond its text. The notion that a state offense lacking a *mens rea* requirement—an essential element of the generic crime—could serve as a predicate for an enhancement would also be at odds with ACCA's legislative history, which confirms that Congress did not intend the enhancement provision to sweep so broadly.

Moreover, this Court has recognized that a key purpose of the categorical approach is to ensure uniformity in ACCA's application across the states. If that approach is not applied to Section 924(e)(2)(A)(ii) as well, disparate treatment will inevitably result. Defendants who have engaged in the same conduct will receive different sentences, depending on the label that a state legislature has applied to that conduct. Such arbitrary and inconsistent application of the statute directly undermines its goal of uniformity and fundamental principles of fairness.

For the reasons set forth below, this Court should reverse the Eleventh Circuit's decision and confirm that the categorical approach applies to "serious drug offenses."

ARGUMENT

I. *TAYLOR*'S CATEGORICAL APPROACH APPLIES TO ALL ACCA PREDICATES

Federal law prohibits convicted felons from possessing firearms, 18 U.S.C. § 922(g)(1), and imposes a sentence of zero to ten years for violating this provision, 18 U.S.C. § 924(a)(2). But ACCA mandates a minimum 15-year prison term for individuals convicted of this conduct where the defendant has at least three prior convictions for any combination of a "violent felony" or a "serious drug offense." 18 U.S.C. § 924(e).

ACCA defines a "violent felony"[2] and a "serious drug offense"[3] in a similar manner, requiring for both that a predicate state law offense be punishable by a specified term of imprisonment and include certain conduct. For a "violent felony," that conduct—the "generic offense"—includes attempted, threatened, or actual use of physical force. For a "serious drug offense,"

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[2] As relevant here, "violent felony" is defined as "any crime punishable by imprisonment for a term exceeding one year . . . 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).

[3] "Serious drug offense" is defined as "(i) an offense under [various federal controlled substances statutes] 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 . . . for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. § 924(e)(2)(A).

the statutorily-prescribed generic offense includes manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance.

Nearly thirty years ago—and just four years after Congress amended ACCA to include "serious drug offenses"—this Court held that a "categorical approach" must be applied to determine whether a prior "violent felony" conviction constitutes a predicate offense for purposes of the enhancement provision. *Taylor v. United States*, 495 U.S. 575, 602 (1990) (determining whether an offense constituted "burglary" under ACCA). Under the categorical approach, a sentencing court must match the elements of a prior conviction to those of the "generic offense." *Id*. Where the generic offense contains an element that the prior conviction does not, the prior offense is "broader" than the generic offense, and a conviction does not qualify as an ACCA predicate. *Descamps v. United States*, 570 U.S. 254, 261 (2013) ("[I]f the statute sweeps more broadly than the generic crime, a conviction under that law cannot count as an ACCA predicate, even if the defendant actually committed the offense in its generic form."); *Mathis v. U.S.*, 136 S. Ct. 2243, 2257 (2016) ("Courts must ask whether the crime of conviction is the same as, or narrower than, the relevant generic offense."). The categorical approach ensures that where a state offense "cover[s] a greater swath of conduct than the elements of the relevant ACCA offense," it cannot serve as a basis for enhancement. *Mathis*, 136 S. Ct. at 2251.

Taylor, like each of the ACCA cases the Court has reviewed, concerned only the "violent felony" prong. But the Court's reasoning in *Taylor* was not—and should not be—limited to only this provision. *Taylor*, 495 U.S. at 602 ("We think the only plausible interpretation of § 924(e)(2)(B)(ii) is that, *like the rest of the*

enhancement statute, it generally requires the trial court to look only to the fact of conviction and the statutory definition of the prior offense.") (emphasis added). None of this Court's subsequent decisions have disrupted *Taylor*'s guidance that the categorical approach must generally be used to determine whether an offense qualifies as an ACCA predicate. *See Mathis*, 136 S. Ct. at 2257 ("For more than 25 years, we have repeatedly made clear that application of ACCA involves, and involves only, comparing elements."). The United States offers no persuasive reason to disturb this Court's bright-line rule and hold now, for the first time, that only "violent felony" predicate offenses are subject to the categorical approach. The Court should decline the Respondent's invitation to do so.

II. A PRIOR CONVICTION THAT LACKS A *MENS REA* ELEMENT CANNOT CONSTITUTE A "SERIOUS DRUG OFFENSE"

A. Inclusion of the word "involving" in the enhancement provision is not grounds to reject the categorical approach

Both Sections 924(e)(2)(A)(ii) and 924(e)(2)(B)(ii) use the word "involving" or "involves" in delineating the generic offenses against which any prior conviction must be compared in order to qualify as a predicate offense. The United States argues that Section 924(e)(2)(A)(ii), unlike Section 924(e)(2)(B)(ii), "does not call for courts to identify any generic crime to serve as the analogue for particular state-law offenses." Resp't's Br. in Opp'n to Cert. at 9. According to the Respondent, a sentencing court need only look at a prior conviction under state law and determine whether it "'involv[es]' the conduct set forth in Section 924(e)(2)(A)(ii)." *Id.*

The United States contends that its reading is consistent with the categorical approach. *Id*. at 9–10. But accepting this interpretation would denigrate the "elements-matching" inquiry that is the very crux of the categorical approach—"whether the elements of the offense forming the basis for the conviction sufficiently match the elements of the generic (or commonly understood) version of the enumerated crime." *Mathis*, 136 S. Ct. at 2245. As the *Mathis* Court explained, "'[e]lements' are the constituent parts of a crime's legal definition, which must be proved beyond a reasonable doubt to sustain a conviction[.]" *Id.* Regardless of whether a defendant's conduct "fits within the definition" of the generic crime, a "mismatch of elements saves him from an ACCA sentence." *Id*. at 2246. The United States' reading—which does away with the essential step of identifying the generic offense—disregards the matching exercise that is the very essence of the categorical approach.

Moreover, reading "involving" in Section 924(e)(2)(A)(ii) ("…involving manufacturing, distributing, or possessing with intent to manufacture or distribute…") differently than in Section 924(e)(2)(B)(ii) ("…involves use of explosives…") violates traditional canons of construction. A straightforward application of the *in pari materia* canon of construction confirms that "involves" or "involving," both of which appear in different subsections of the same statutory provision, must be accorded the same meaning. "Th[is] rule ... like any canon of statutory construction—is a reflection of practical experience in the interpretation of statutes: a legislative body generally uses a particular word with a consistent meaning in a given context." *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972); *see Grand Trunk W. R.R. Co. v. United States Dep't of Labor*, 875 F.3d 821, 826 n.4 (6th Cir. 2017) (stating

that "[t]he *in pari materia* canon supports giving the same meaning of the identical phrase, "medical or first aid treatment," in both subsections (c)(1) and (c)(2)" of 49 U.S.C. § 20109), *cert. denied* 138 S. Ct. 1698 (2018); *Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 317 (4th Cir. 2005) (explaining that "adjacent statutory subsections that refer to the same subject matter . . . must be read *in pari materia* as if they were a single statute."); *United States v. John C. Grimberg Co., Inc*., 702 F.2d 1362, 1366 (Fed. Cir. 1983) (reading all subsections of a statute *in pari materia* to determine the meaning of the word "claim").

The United States offers no convincing reason to depart from this well-settled approach to statutory interpretation. There is nothing unique about the use of the word "involving" in ACCA's definition of "serious drug offenses," and Congress' decision to include it—just as it included the word "involves" in the definition of "violent felony"—does not warrant disregard of the categorical approach. Just as the elements of a prior "violent felony" must be compared to the elements of the generic offenses set forth in Section 924(e)(2)(B), the elements of a state drug conviction must be compared to the generic offenses set forth in Section 924(e)(2)(A)(ii). That "involving" is used to introduce the list in Section 924(e)(2)(A)(ii) does not alter the rules of the matching game. A prior drug offense lacking an element that the generic offense requires cannot qualify as an ACCA predicate.

B. As this Court recognized in *Taylor*, enhancement cannot depend on how the crime is labeled by the state of conviction

In *Taylor*, this Court recognized that fundamental unfairness would result if a sentencing court were to

defer to the labels a state legislature used to categorize an offense in determining whether an enhancement applied: "That would mean that a person convicted of unlawful possession of a firearm would, or would not, receive a sentence enhancement based on exactly the same conduct, depending on whether the State of his prior conviction happened to call that conduct 'burglary.'" *Taylor*, 495 U.S. at 590–91. As this Court recognized, ACCA cannot be read in this manner.

Outside of the ACCA context, this Court has similarly held that state classifications should not determine the application of a federal statute. *Jerome v. United States*, 318 U.S. 101, 104 (1943) ("[W]e must generally assume, in the absence of a plain indication to the contrary, that Congress when it enacts a statute is not making the application of the federal act dependent on state law."); *United States v. Turley*, 352 U.S. 407, 411 (1957) (same). More recently, this Court unanimously held in *Burgess v. United States* that a state drug offense could qualify as a "felony drug offense" under the Controlled Substances Act even though the state law labeled the offense a "misdemeanor." 553 U.S. 124, 134 (2008).

As this Court has explained, "one reason for this rule of construction is that federal statutes are generally intended to have uniform nationwide application." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43 (1989). Thus, "the cases in which [the Court has] found that Congress intended a state-law definition of a statutory term have often been those where uniformity clearly was not intended." *Id*. at 43–44. In *Holyfield*, the Court applied this rule in concluding that Congress did not intend to rely on state law to supply the definition of "domicile," a critical term in the Indian Child Welfare Act of 1978 ("ICWA"). To the

contrary, "Congress intended a uniform federal law of domicile for the ICWA." *Id*. at 47.

Similarly, deferring to state classifications to determine whether a prior conviction qualifies as a "serious drug offense" under ACCA would compromise the statute's goal of uniformity. *See Taylor*, 495 U.S. at 590 (describing Congress' "general approach, in designating predicate offenses, of using uniform, categorical definitions"). As the *Taylor* Court recognized, deference to disparities in state definitions of an offense would undermine uniformity by subjecting defendants in different states who committed the very same conduct to different treatment under the enhancement provision—a result that simply does not comport with congressional intent or fundamental notions of fairness. *See Hughes v. United States*, 138 S. Ct. 1765, 1776 (2018); *United States v. Booker*, 543 U.S. 220, 253–54 (2005) (explaining that, in the context of the Sentencing Guidelines, a primary objective is to ensure uniformity in sentences imposed by different federal courts for similar criminal conduct).

C. ACCA's definition of "serious drug offense" should be read consistent with the presumption in favor of scienter

This Court has repeatedly acknowledged "a long-standing presumption, traceable to the common law, that Congress intends to require a defendant to possess a culpable mental state regarding 'each of the statutory elements that criminalize otherwise innocent conduct.'" *Rehaif v. United States*, 139 S. Ct. 2191, 2195 (2019) (citing *United States v. X-Citement Video, Inc*., 513 U.S. 64, 72 (1994)). This "interpretive maxim," characterized "as a presumption in favor of scienter," means that a statute, whether or not it contains an explicit *mens rea* requirement, should be read to

"require the degree of knowledge sufficient to make a person legally responsible for the consequences of his or her act or omission." *Rehaif*, 139 S. Ct. at 2195 (internal quotation marks omitted).

ACCA's generic "serious drug offenses" should be interpreted in accordance with this presumption. Thus, whether or not Section 924(e)(2)(A) explicitly requires *mens rea* as to the illicit nature of the substance, the generic offenses described therein should be read to contain such a requirement.

Some states do not require *mens rea* with respect to "each of the statutory elements criminalizing otherwise innocent conduct." The Florida statute under which Mr. Shular was convicted is one example: Florida's controlled substances statute does not require that the prosecution prove the defendant knew he was handling a controlled substance. *See Donawa v. U.S. Att'y Gen.*, 735 F.3d 1275, 1281 (11th Cir. 2013) ("A person could be convicted under the Florida statute [Fla. Stat. § 893.13(1)(a)(2)] without any knowledge of the nature of the substance in his possession."). However, a straightforward application of the categorical approach—which requires a showing that the elements of the conviction match the elements of the generic offense—compels the conclusion that a defendant should face an ACCA enhancement only where his underlying convictions required a showing of mental culpability with respect to each of the constituent elements, including *mens rea*.

III. ACCA'S LEGISLATIVE HISTORY AFFIRMS THAT STATE DRUG CONVICTIONS LACKING A *MENS REA* REQUIREMENT DO NOT QUALIFY AS "SERIOUS DRUG OFFENSES"

The categorical approach requires a straightforward matching of the elements required to establish a defendant's prior conviction to the elements required for conviction of the generic crime. Application of this approach requires a comparison of *all* elements necessary for a conviction, including *mens rea*. Accordingly, a finding that the generic crime requires *mens rea* where the prior offense does not would compel the conclusion that a defendant's prior conviction does not qualify as an ACCA predicate. As set forth below, this approach comports with Congress' concern for uniformity. Moreover, although the 1986 amendments expanded the scope of ACCA, the legislative record reflects that Congress had no intention of sweeping in state offenses lacking a *scienter* requirement.

A. Congress intended for ACCA to be applied uniformly

ACCA's legislative history confirms Congress' intent that state law crimes would not become predicate offenses for enhancement merely because of the way in which they were classified by the state of conviction. In describing the Armed Career Criminal Act of 1983, the Senate Judiciary Committee recognized the "wide variation among states and localities in the ways that offenses are labeled," and acknowledged that such discrepancies could lead to disparate sentences for similar conduct. S. Rep. No. 98-190, at 20 (1983). In an effort to avoid this result and guarantee

"fundamental fairness," Congress drafted ACCA "to 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." *Id*.

Confirming this concern with uniformity, the Committee noted that as originally drafted, the statute imported the definition of "robbery offense" from Section 1721(a) of the Criminal Code Reform Act of 1981 (S. 1630). *Id*.[4] Dispelling any misunderstanding regarding the applicable *mens rea* required to establish the offense of robbery, the Committee stated it "intends that the states of mind required in connection with that offense under the conventions of Chapter 3 of [the Criminal Code Reform Act of 1981] be applicable here as well." *Id*. In other words, *federal* law would set the *mens rea* requirement. The same was true with respect to ACCA's definition of burglary, which was also borrowed from the Criminal Code Reform Act. *Id*. ("Again, the states of mind applicable there would be appropriate here").

Thus, in enacting ACCA, Congress appreciated—and tried to mitigate—the risk that state law discrepancies in defining predicate offenses would result in disparate sentences for the same conduct. As ACCA's early legislative history makes plain, Congress had no intention of establishing a mandatory minimum sentence that would apply (or not) depending solely on the state law definition of the offense.

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[4] Congress removed the definitions of robbery and burglary when it amended ACCA in 1986.

B. When ACCA was amended in 1986, the vast majority of states required *mens rea*

ACCA was amended in 1986 to "expand[] the predicate offenses triggering the sentence enhancement from 'robbery and burglary' to 'a violent felony or a serious drug offense'." *Taylor*, 495 U.S. at 582; Career Criminals Amendment Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207. On May 21, 1986, the Subcommittee on Crime convened to consider two bills, each proposing amendments to the 1984 Act. *Armed Career Criminal Legislation, Hearing Before the Subcommittee on Crime*, 99th Cong. (1986) (the "House Hearing").[5] When Congressman Wyden introduced the proposal to include "serious drug offenses" as ACCA predicates, he stated, "[t]he proposed expansion in both bills under consideration today is to 'serious drug offenses,' the *least serious* of which is defined in the federal criminal code as 'possession with intent to distribute.'" House Hearing at 10 (emphasis added).

In 1986, forty-eight states, either by statute or by judicial decision, required that simple possession be "knowing." *Dawkins v. State*, 313 Md. 638, 646 n.6 (Md. 1988). Unsurprisingly, the more serious offenses of manufacturing, distributing, and possessing with intent to manufacture or distribute also contained a *mens rea* requirement in the overwhelming majority of

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[5] H.R. 4639, introduced by Congressman Wyden, sought to "expand the predicate offenses to many major Federal drug trafficking felonies as well as many State and Federal misdemeanors or felonies committed against persons or property." House Hearing at 2. H.R. 4768, proposed by Representatives William Hughes and Bill McCollum, was similar to H.R. 4639 but more limited in scope in that it excluded property crimes. *Id*; *see also Taylor*, 495 U.S. at 584. The current statute represents a compromise between the two bills. *Taylor*, 495 U.S. at 582–83.

states. Br. for Pet. at 11–13. Thus, in amending ACCA to include "serious drug offenses," Congress could not have anticipated that the enhancement provision would be triggered by a state offense lacking *mens rea*—an element required for conviction under almost every state's laws in 1986.

C. Testimony during the 1986 hearings confirms that "serious drug offenses" were not intended to include state crimes lacking a *mens rea* requirement

Deputy Assistant Attorney General James Knapp was called to testify on behalf of the Department of Justice during the 1986 hearings on proposals to expand ACCA. House Hearing at 13. Knapp's testimony suggests that even the strongest supporters of expanding the scope of the enhancement provision did not anticipate that it would be triggered by a state law conviction lacking evidence of intent. *Id.* at 27.

Following Knapp's opening statements, Representative McCollum inquired about the risk that the proposed expansion could result in mandatory sentence enhancements for mere *users* of drugs, *i.e.*, individuals possessing drugs but lacking any intent to distribute:

> The concern that is raised is that we may be picking up, by the nature of how we drafted this legislation, a person who is just simply a user rather than a distributor and that maybe we ought not to be considering that person to be a career criminal. The suggestion is being made here that under the law, the way we have written it, with the 10-year minimum sentence that is available here, a person could possess a large enough quantity for personal use of some narcotics that he could be

> convicted under the law we cited and could then be brought into this bill without any intent to distribute.

Id. at 26–27. As Knapp's response suggests, the notion that ACCA would ever be expanded to include, as predicate offenses, drug offenses lacking a *mens rea* requirement, was not seen as within the realm of possibility:

> I can assure you that that would not be the case in reality. All those offenses have as an element the intent to distribute, or actual distribution of, controlled substances, or importation or exportation. When you consider the fact that the Federal Government only gets involved in the most serious drug offenses, offenses involving very large quantities, we just don't apply any of those statutes to your typical user. So those offenses would never exist even as a predicate against a particular defendant. I think that is strictly just a remote hypothetical possibility that would not apply in the real world.

House Hearing at 27. Knapp's testimony confirms the general understanding that any ACCA expansion was not to go so far as to trigger sentence enhancements for state drug offenses lacking a *scienter* requirement.

IV. ACCA WILL CONTINUE TO HAVE A GEOGRAPHICALLY DISPARATE IMPACT UNLESS THE CATEGORICAL APPROACH IS APPLIED

A. This Court has clearly indicated that ACCA must be read to prevent geographic disparity

This Court has recognized that ACCA must be interpreted to prevent disparate treatment of similarly situated defendants. *Mathis*, 136 S. Ct. at 2258 (Kennedy, J., concurring) ("Congress . . . could not have intended vast sentencing disparities for defendants convicted of identical criminal conduct in different jurisdictions."); *Descamps*, 570 U.S. at 268 ("Congress . . . meant ACCA to function as an on-off switch, directing that a prior crime would qualify as a predicate offense in all cases or in none."); *Taylor*, 495 U.S. at 589 (Congress intended to "protect[] offenders from the unfairness of having enhancement depend upon the label employed by the State of conviction").

In *Taylor*, this Court acknowledged the significant variation among different states' definitions of burglary:

> For example, Michigan has no offense formally labeled 'burglary.' It classifies burglaries into several grades of 'breaking and entering.' See Mich.Comp.Laws § 750.110 (1979). In contrast, California defines 'burglary' so broadly as to include shoplifting and theft of goods from a 'locked' but unoccupied automobile.

Taylor, 495 U.S. at 591. But the Court refused to relegate application of the enhancement provision to "the vagaries of state law." *Id*. at 588. To the contrary, the *Taylor* court repeatedly stated that a predicate offense under Section 924(e) "must have some uniform

definition independent of the labels employed by the various States' criminal codes." *Id.* at 592; *see also id.* at 590 ("Nor is there any indication that Congress ever abandoned its general approach, in designating predicate offenses, of using uniform, categorical definitions to capture all offenses of a certain level of seriousness that involve violence or an inherent risk thereof, and that are likely to be committed by career offenders, regardless of technical definitions and labels under state law.").

B. In direct contravention of *Taylor*, ACCA has had a geographically disparate impact

In March 2018, the U.S. Sentencing Commission released a study examining the prevalence of ACCA sentence enhancements.[6] The results overwhelmingly show that defendants receive disparate treatment under the statute depending on the state in which they are convicted.

The Commission's data set included 67,742 offenders sentenced in fiscal year 2016. USSC Rep. at 36. Three hundred and four of these offenders were sentenced as armed career criminals. *Id.* Three-quarters of the 304 ACCA cases (76.6%) came from district courts in the Fourth, Sixth, Eighth, and Eleventh Circuits.[7] Out of the country's 94 district

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[6] U.S. Sentencing Comm'n, *Mandatory Minimum Penalties for Firearms Offenses in the Federal Criminal Justice System*, (Mar. 2018), *available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180315_Firearms-Mand-Min.pdf. ("USSC Rep.")

[7] *Id*. at 36. When the Commission conducted this same study in 2010, nearly half of ACCA cases were concentrated in the Fourth and Eleventh circuits. *Id*. at 37.

courts, nine drove nearly half (48%) of ACCA cases.[8] In contrast, 19 districts had only one ACCA case, and 31 reported no ACCA cases at all. *Id.* at 37. The district courts in the state of Florida alone accounted for one-fifth (20.1%) of ACCA enhancements, followed by Missouri (9.6%), Tennessee (8.6%), and North Carolina (6.9%).[9] Although the precise cause of this geographic concentration is not readily apparent, adopting a rule that allows various state law definitions to determine application of the enhancement provision will only exacerbate existing disparities.[10]

It is worth noting that just because ACCA enhancements apply with less frequency in certain circuits does not mean that repeat drug offenders in those jurisdictions will receive more lenient sentences. *See Taylor*, 495 U.S. at 602 n.10 (noting that the government may submit evidence of a defendant's prior offenses to obtain a longer sentence pursuant to the Federal Sentencing Guidelines, even where an ACCA enhancement is unavailable). The availability of other enhancement mechanisms that turn on a defendant's criminal history further supports the conclusion that

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[8] *Id*. Middle Florida (10.9%, n=33); Southern Florida (8.2%, n=25); Eastern Missouri (6.3%, n=19); Eastern Tennessee (5.3%, n=16); Northern Ohio (3.6%, n=11); Minnesota (3.6%, n=11); Western North Carolina (3.6%, n=11); Western Missouri (3.3%, n=10); and South Carolina (3.3%, n=10).

[9] *Id*. at 72–75 (Table A-1. *Mandatory Minimum Status for Firearm Offenders in Each Circuit and District*).

[10] In addition to geographic disparities, ACCA enhancements disproportionately impact people of color. According to the same study, 70.4% of armed career criminals in 2016 were Black. *Id*. at 38. This represents an increase of 6.7 percentage points from 2010, when 63.7% of ACCA offenders were Black. Interpreting the enhancement provision with an eye toward uniformity may mitigate this trend.

there is no need to expand the scope of ACCA beyond its text. Under the current Sentencing Guidelines, a defendant may be sentenced as a "career offender" after committing at least two prior felonies, including controlled substance offenses.[11] Where a defendant (who was at least eighteen years old at the time) commits a "crime of violence" or "controlled substance offense," and has at least two prior felony convictions of either a crime of violence or a controlled substance offense, § 4B1.1 supplies a "guideline range" that is significantly longer than would otherwise apply.[12] According to the Sentencing Commission's August 2016 report to Congress, career offenders receive an average sentence of more than 12 years.[13] Moreover, § 2K2.1 of the Guidelines further elevates a felon-in-possession's "Base Offense Level" where the felon has two prior controlled substance offenses. Where this Base Offense Level applies, the recommended sentencing range will be increased, especially if combined with enhancements based on a defendant's criminal history. Accordingly, even where an ACCA enhancement is unavailable, a sentencing court is not without adequate recourse for imposing stiffer sentences on repeat

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[11] U.S. Sentencing Comm'n Guidelines Manual, § 4B1.1(a) (U.S. Sentencing Comm'n 2018).

[12] *Id*. ("A defendant is a career offender if (1) the defendant was at least eighteen years old the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.").

[13] U.S. Sentencing Comm'n, *Report to Congress: Career Offender Sentencing Enhancements* (Aug. 2016), *available at* https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607_RtC-Career-Offenders.pdf at 18.

offenders, especially where the offense involves firearms.

C. Allowing a state's requirements to control whether an offense qualifies as an ACCA predicate will continue to result in disparate sentences for similar conduct

In 2002, Florida's legislature announced its intention to remove from the state's controlled substance laws any requirement of *mens rea* as to the illicit nature of the substance.[14] Notwithstanding the legislature's clear deviation from the law of other states and even though Florida's statute now criminalizes *more* conduct than the generic offense,[15] convictions under Florida law have repeatedly served as predicate offenses for ACCA enhancement purposes. *See, e.g.*, *United States v. Patrick*, 747 F. App'x 797, 799 (11th Cir. 2018); *United States v. Scott*, 703 F. App'x 924, 926 (11th Cir. 2017); *Jones v. United States*, 650 F. App'x 974, 977 (11th Cir. 2016); *United States v. Pearson*, 662 F. App'x 896, 900

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[14] Fla. Stat. Ann. § 893.101(1) ("The Legislature finds that the cases of *Scott v. State*, Slip Opinion No. SC94701 (Fla. 2002) and *Chicone v. State*, 684 So.2d 736 (Fla. 1996), holding that the state must prove that the defendant knew of the illicit nature of a controlled substance found in his or her actual or constructive possession, were contrary to legislative intent."); Fla. Stat. Ann. § 893.101(2) ("The Legislature finds that knowledge of the illicit nature of a controlled substance is not an element of any offense under this chapter.").

[15] Cf. *McFadden v. United States*, 135 S. Ct. 2298, 2302 (2015) (holding that "§ 841(a)(1) [the Controlled Substances Act] requires the Government to establish that the defendant knew he was dealing with 'a controlled substance.'"); *Donawa*, 735 F.3d at 1281 ("A person could be convicted under the Florida statute [Fla. Stat. § 893.13(1)(a)(2)] without any knowledge of the nature of the substance in his possession.").

(11th Cir. 2016); *United States v. Travis Smith*, 775 F.3d 1262, 1266–68 (11th Cir. 2014).

Allowing ACCA's enhancement provision to cede to the peculiarities of a single state's law has had the very effect this Court endeavored to avoid: Defendants in Florida, unlike defendants in other states across the country, have faced enhancement based on prior convictions that did not require a finding of *mens rea*. If this Court adopts the Eleventh Circuit's view—that the categorical approach should be cast aside in the context of serious drug offenses—then states like Florida will continue to amass ACCA enhancements to the detriment of defendants who happened to commit their crimes within the borders of these strict liability states.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the Eleventh Circuit.

Respectfully submitted,

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