No. 06-11543

IN THE

Supreme Court of the United States

LARRY BEGAY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

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

BRIEF OF FAMILIES AGAINST MANDATORY MINIMUMS FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does the rule of lenity contribute to a conclusion that the crime of driving while intoxicated is not a "violent felony" for purposes of triggering a 15-year mandatory minimum sentence under the Armed Career Criminals Act?

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INTEREST OF *AMICUS CURIAE*[1]

Families Against Mandatory Minimums Foundation (FAMM) is a national, nonprofit, nonpartisan organization of 13,000 members founded in 1991.

[1] Pursuant to Rule 37.6, Amicus Curiae certify that no counsel for a party authored this brief in whole or in part, no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

FAMM's primary mission is to promote fair and proportionate sentencing policies and to challenge inflexible and excessive penalties required by mandatory sentencing laws. By mobilizing prisoners and their families who have been adversely affected by unjust sentences, FAMM illuminates the human face of sentencing as it advocates for state and federal sentencing reform.

FAMM promotes sentencing policies that give judges discretion to distinguish among defendants and to sentence them according to their role in the offense, the seriousness of the offense, the potential for rehabilitation and the characteristics of the offender. In short, FAMM believes the punishment always must fit the crime. FAMM's vision is a nation in which sentencing is individualized, humane, and sufficient but not greater than necessary to impose just punishment, secure public safety, and support successful rehabilitation.

Petitioner Begay's case—that of a man never convicted of a crime of violence against another person or property and yet sentenced as an "armed career criminal" to a mandatory minimum sentence of fifteen years—exemplifies what FAMM urges is wrong with mandatory minimum sentencing, in general, and with the Armed Career Criminals Act, in particular. FAMM's interest in the instant case derives from its conviction that, to the extent mandatory minimums are required by law, they must punish no one other than whom the legislature intended and only to the extent the law provides.

Amicus Curiae files this brief in support of Petitioner Begay because his case raises an important question of statutory interpretation regarding the proper construction of the term "violent felony" under

the Armed Career Criminals Act (ACCA), 18 U.S.C. § 924(e). The proper interpretation of "violent felony" under the ACCA may ultimately turn upon the application of the rule of lenity. Amicus Curiae offers its view as to the role the rule of lenity should play in the resolution of this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner Larry Begay is a middle-aged Navajo. He has a serious drinking problem, as his driving record attests. Yet he has never been convicted of a violent crime against any person or property, and he certainly has not made a "career" out of crime. However, after police found him in possession of an unloaded gun, he was convicted under the ACCA and sentenced to 188 months as an "armed career criminal." Amicus Curiae supports Petitioner's contention that the type of felony for which he was previously convicted, driving while intoxicated (DWI), is not a "violent felony" as defined in the "otherwise" clause of the Armed Career Criminals Act (ACCA), 18 U.S.C. § 924(e)(2)(B)(ii).[2] As Petitioner forcefully argues, inclusion of DWI convictions as "violent felonies" is inconsistent with the language and purpose of the ACCA, is contrary to well-established canons of statutory construction, and is not in keep-

[2] The ACCA defines a "violent felony," in pertinent part, as "any crime punishable by imprisonment for [more than] one year . . . that . . . (i) has as an element the use, attempted use, or threatened use of physical force against . . . 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). The italicized portion of the statute is commonly referred to as the ACCA's "otherwise" clause.

ing with either common sense or Congressional intent.

Were the Court to find, however, that neither the plain text of the ACCA, nor the text as construed using relevant canons of construction, excludes DWI as a "violent felony," the Court should conclude that the ACCA's use of the term "violent felony" is ambiguous. The resulting ambiguity would in that circumstance invite application of the rule of lenity, resulting in construction of the ACCA in Petitioner's favor. This brief focuses on that possibility, and thus on the rule of lenity.

Amicus Curiae believes that application of the rule of lenity may be warranted in this case for several reasons. *First*, while the statutory language, when viewed in its proper context, precludes inclusion of DWI as a "violent felony," there is, at a minimum, a lack of textual clarity as to what criminal offenses fall within the sweep of the ACCA's "otherwise" clause. This Court, like the Tenth Circuit below, has in effect acknowledged this lack of clarity. This alone justifies application of the rule of lenity.

Second, two well-established textual canons of statutory construction, *noscitur a sociis* and *ejusdem generis*, support Petitioner's position that DWI is not a "violent felony" under the ACCA. DWI does not resemble any of the property crimes specifically listed in Section 924(e)(2)(B)(ii)—burglary, arson, extortion and the use of explosives—all of which involve not merely a significant risk of danger to other persons but also an intent to injure or violate another's property interests. At the least, these familiar tools of statutory construction preclude a finding that the government's interpretation of the "otherwise" clause is the only reasonable one. That two or more plau-

sible but conflicting interpretations of the statute exist triggers resort to the rule of lenity.

Third, the ACCA's legislative history reveals that Congress crafted the "otherwise" clause to cover *property* crimes similar to those specifically enumerated in § 924(e)(2)(B)(ii). DWI is not a property crime. Nor is it a crime of a type that is in any other essential way similar to those that Congress chose to list. Accordingly, there is no risk that the rule of lenity would here produce a result inconsistent with Congressional intent.

Fourth, Amicus Curiae contends that the term "violent felony" as used in the ACCA must be construed in accordance with common sense. A common-sense approach helps to ensure that the government provides "fair notice" of the consequences associated with criminal conduct, in language the citizenry will understand. Fair notice is a concept rooted deeply in this country's jurisprudence, and it is one that anchors the rule of lenity. The government's insistence that DWI is a violent felony does not comport with a common-sense reading of the statute, and it fails to provide fair notice.

In short, employing the rule of lenity is particularly apt in this case given the ACCA's potential ambiguity and the grave consequences associated with impermissibly construing that ambiguity against the Petitioner—as the facts of Petitioner's case remind us. The rule of lenity ensures that the Petitioner will not be forced to suffer the draconian consequences that flow from Congressional lack of clarity. This case provides an exemplary vehicle for the Court to provide guidance about proper application of the rule of lenity and about construction of the term "violent felony" under the ACCA.

ARGUMENT

I. PETITIONER'S CONSTRUCTION OF THE ACCA'S "OTHERWISE" CLAUSE IS CORRECT.

Amicus Curiae does not believe the term "violent felony" in 18 U.S.C. § 924(e) is necessarily ambiguous. A "violent felony," if given its common meaning, connotes an offense carrying *scienter*[3] that results in, or poses a strong risk of, active violence directed at either other persons or property. The statute's definition of "violent felony" supports that common-sense interpretation in that it targets certain serious completed or attempted crimes against persons, as well as specific crimes against property raising the strong risk of bodily injury (i.e., burglary, arson, extortion, and those involving the use of explosives). Petitioner's interpretation is also supported by the statute's title (the Armed Career Criminals Act) and its purpose (to punish career criminals who commit dangerous offenses involving a firearm). One might obscure the meaning of "violent felony" only by construing it out of context against the open-ended "otherwise" clause of the ACCA, which makes room for additions to the types of criminal conduct governed by the Act.

Seizing on the "otherwise" clause in isolation, the government argues that DWI is a "violent felony" under the ACCA because it is a crime that arguably "involves conduct that presents a serious potential risk of physical injury to another." The government's interpretation ignores the words introducing and

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[3] As Petitioner points out, DWI in New Mexico does not even require a showing of a *mens rea,* much less criminal *scienter*. *See* Pet. Br. at 30-31, 36-37.

surrounding the "otherwise" clause, as well as the statute's very purpose.

Petitioner's reading of the statute, whereby felony DWI is not a "violent felony," is more persuasive. Not only is Petitioner's interpretation in keeping with the language of the statute as well as its purpose, but it is consistent with well-established canons of statutory construction. The "otherwise" clause follows an enumeration of specific crimes—burglary, arson, extortion, and crimes that involve the use of explosives. The familiar textual canons of *noscitur a sociis* and *ejusdem generis* teach that where words are grouped together, their meaning can be discerned by examining others within the group, and where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those set forth by the preceding specific words. *See Washington State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384-85 (2003).

A straightforward interpretation of "violent felony" in the ACCA rules out crimes, such as DWI, that require no proof of *scienter* and that are not active, violent offenses directed at the person or property of another. The Tenth Circuit held otherwise, albeit in a decision that generated three separate opinions. The fractured decision suggests, at a minimum, that there are at least two plausible ways in which to interpret the "otherwise" clause—one dictating the result urged by the Petitioner, the other yielding the much harsher result advocated by the government. The ACCA penalty clause, as applied to cases such as Petitioner's, thus suffers from a "grievous ambi-

guity." *Muscarello v. United* States, 524 U.S. 125, 138 (1998).

In such circumstances, as explained below, the rule of lenity should be applied to construe the ACCA in Petitioner's favor.

II. IF THE ACCA'S USE OF "VIOLENT FELONY" IS AMBIGUOUS, THE RULE OF LENITY SHOULD PRECLUDE THE TENTH CIRCUIT'S UNDULY BROAD AND HARSH INTERPRETATION.

Petitioner's brief ably demonstrates that the ACCA must be construed in his favor given the statute's text and purpose. Amicus Curiae therefore takes this opportunity to expand on a supplemental rationale for finding in Petitioner's favor, one briefly advanced by Petitioner's opening brief—the rule of lenity. *See* Pet. Br. 51-53.

A. The Rule Of Lenity Is Applied To Construe Penal Statutes In A Defendant's Favor Where The Statute Is Ambiguous.

The rule of lenity provides that "where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant." *United States v. Bass*, 404 U.S. 336, 348 (1971). Or, in the context of determining the proper punishment under a statute, "Where it is doubtful whether the text includes the penalty, the penalty ought not be imposed." *United States v. R.L.C.*, 503 U.S. 291, 309 (1992). (Scalia, J., concurring); *see also Commissioner v. Acker*, 361 U.S. 87, 91 (1959) (stating that "one is not to be subject to a penalty unless the words of the statute plainly impose it") (internal quotations omitted). Indeed, the

rule of lenity applies with equal force to penalty statutes as to laws defining the crime itself. *Bifulco v. United States,* 447 U.S. 381, 401-02 (1998) (Burger, C.J., concurring).

The rule of lenity is called "venerable" because of its age and the respect it commands.[4] *See R.L.C.*, 503 U.S. at 305. Blackstone commented on the vigorous role it played in limiting criminal punishment in sixteenth- and seventeenth-century English courts. William Blackstone, *Commentaries on the Laws of England* 88. He described the rule as one of strict construction: "Penal statutes must be construed strictly." *Id.*

Lenity has profound implications for the interpretive process because it derives from the principle of legality itself—*nulla poena sine lege* ("there can be no punishment without law"). *See generally* Herbert L. Packer, *The Limits of the Criminal Sanction* 93 (1968) (describing the rule of lenity and the vagueness doctrine as "devices worked out by the courts to keep the principle of legality in good repair"); *see*

[4] The rule of strict construction—now known as the rule of lenity—emerged in American courts in *United States v. Wiltberger*, 18 U.S. 76 (1820), in which the government sought an expansive interpretation of a penal statute. Chief Justice John Marshall, writing for the Court, rejected the government's approach and instead adhered to the rule of strict construction, explaining that the rule's underlying policies required a narrow, consistent interpretive approach to penal statutes: "The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment." *Id.* at 95.

Rogers v. Tennessee, 532 U.S. 451, 467-68 (2001) (Scalia, J., dissenting) (noting that "the maxim *nulla poena sine lege* . . . 'dates from the ancient Greeks' and has been described as one of the most 'widely held value-judgments in the entire history of human thought'") (brackets omitted); *see also Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926) (stating that enforcement of overly vague criminal statutes "violates the first essential of due process of law"). Whether courts explicitly call on the rule or not, they all recognize that the principles underlying the maxim—consistency and fairness in the application of criminal law—are bedrock.

The Court has recognized that the rule of lenity serves three fundamental purposes: "to promote fair notice to those subject to the criminal laws, to minimize the risk of selective or arbitrary enforcement, and to maintain the proper balance between Congress, prosecutors, and courts." *United States v. Kozminski*, 487 U.S. 931, 952 (1988). Each of these goals is essential to the proper functioning of our criminal justice system.

The first purpose, to ensure fair notice, arises from the general principle that warning must be given "to the world in language that the common world will understand." *United States v. Bass*, 404 U.S. 336, 348 (1971) (quoting *McBoyle*, 283 U.S. at 27). In *McBoyle v. United States*, 283 U.S. 25 (1931), Justice Oliver Wendell Holmes emphasized how the rule of lenity serves fair notice, even though courts agree that most defendants do not actually read the United States Code:

> Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair

> warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear."

Id. at 27. Justice John Marshall Harlan II reiterated this particular point thirty-five years later, when he explained, "The policy thus expressed [by the rule of lenity] is based primarily on a notion of fair play: in a civilized state the least that can be expected of government is that it express its rules in language all can reasonably be expected to understand." *United States v. Standard Oil Co.*, 384 U.S. 224, 236 (1966) (Harlan, J., dissenting). That underlying purpose remains vital to this day, given that fair notice is "required in any system of law." *See United States v. R.L.C.*, 503 U.S. 291, 309 (1992) (Scalia, J., concurring). Indeed, as noted above, fair notice is closely tied to the principle of legality itself.

Two important results flow from the need for fair notice. First, a premium is placed on the common-sense meaning of a statute. *See, e.g.*, *McBoyle*, 283 U.S. at 27. It is inherently unfair to impose on "the common world" a statutory interpretation that is overly obscure or clever. Second, a premium is put on the text of the statute itself. Judges should not rely on extratextual considerations to construe an unclear criminal statute against a defendant. As this Court noted, "[b]ecause construction of a criminal statute must be guided by the need for fair warning, it is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text." *Crandon v. United States*, 494 U.S. 152, 160 (1990).

Lenity's second core purpose is to preserve the respective powers of the separate branches of government. *See Bass*, 404 U.S. at 348. "[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity." *Id*. *See also United States v. Granderson*, 511 U.S. 39, 68-69 (1994) (Kennedy, J., concurring) ("It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think, perhaps along with some Members of Congress, is the preferred result. . . . This admonition takes on a particular importance when the Court construes criminal laws.") (internal citations omitted). Lenity impedes punishments that are not clearly authorized by Congress, the only branch of government competent to establish criminal penalties.

The third purpose served by the rule of lenity is to avoid arbitrariness and inconsistency in the enforcement of criminal statutes. *See Kozminski*, 487 U.S. at 952. The rule of lenity responds to this need by "fostering uniformity in the interpretation of criminal statutes." *Bryan v. United States*, 524 U.S. 184, 205 (1998) (Scalia, J., dissenting). It fosters uniformity because, in every case of criminal statutory interpretation, it calls on courts to examine the governing text for ambiguity and to resolve any such ambiguity in the defendant's favor. *See generally id*; *Crandon*, 494 U.S. at 175-78 (Scalia, J., concurring); William N. Eskridge, Jr., *Formalism and Statutory Interpretation*, 66 U. Chi. L. Rev. 671, 678-79 (1999) (suggesting that adherence to the rule of lenity could "generate greater objectivity and predictability in statutory interpretation"). Faithfully applied, the rule of lenity prevents the sovereign

from punishing individuals based on an innovative or creative interpretation of ambiguous criminal statutes.

The Court applies the rule of lenity as the determining tool of construction when review of the language and legislative history of a criminal statute do not resolve the ambiguity surrounding the statute's appropriate meaning and application. As the Court noted in *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393 (2003), "when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definitive language." *Id.* at 409 (alteration omitted) (quoting *McNally v. United States*, 483 U.S. 350, 359-60 (1987)); *Castillo v. United States*, 530 U.S. 120, 131 (2000); *United States v. R.L.C.*, 503 U.S. 291, 305 (1992) (plurality opinion) (when "ambiguity survives," the Court "choos[e]s the construction yielding the shorter sentence by resting on the venerable theory of lenity"); *Moskal v. United States*, 498 U.S. 103, 108 (1990) (the rule of lenity applies where the text, structure and history of a penal statute leave reasonable doubt about the statute's intended scope).

As demonstrated below, the rule of lenity should have been applied in this case, and by all courts of appeals, to construe the "otherwise" clause of the ACCA. The rule of lenity compels the conclusion that DWI is not a "violent felony" for purposes of the ACCA.

B. ACCA's "Otherwise" Clause Is, In The Most Generous Light, Susceptible To Two Plausible Constructions.

As explained above, Petitioner's reading of the term "violent felony" under the ACCA provides the best and most natural interpretation of the statute in light of its language, structure, and purpose. Nonetheless, the fact that the ACCA has caused confusion in the courts, and the fact that this Court is being asked yet again to provide guidance on its meaning,[5] strongly suggests that the definition of "violent felony" set forth in the statute is susceptible to at least two competing and linguistically plausible interpretations.

1. *Controversy within and among courts shows that ACCA is capable of more than one textual interpretation.*

Section 924(e)(2)(B)(ii) does not define which offenses are and are not included within the "otherwise" clause. The dissenting opinion for the Tenth Circuit recognized as much when it noted that the language of § 924(e) is "anything but 'plain.'" *United States v. Begay*, 470 F.3d 964, 979 (10th Cir. 2006) (McConnell, J., dissenting).[6] In *James v. United*

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[5] The ACCA's lack of clarity is demonstrated by this Court's recent docket. *See Shepard v. United States*, 544 U.S. 13 (2005), *Taylor v. United States*, 495 U.S. 575 (1990); *James v. United States*, 127 S.Ct. 1586 (1996); *United States v Rodriguez*, 464 F.3d 1072, *cert. granted*, ___ S. Ct. ___, 2007 WL 1700499 (Sept. 25, 2006) (No. 06-1646).

[6] Indeed, even Judge Hartz writing for the majority of the court did not find the language of the statute unambiguous. Rather, he wrote that it was his view that the "natural"

States, 127 S.Ct. 1586 (2007), Justice Scalia similarly acknowledged that: "The residual provision of clause (ii) of ACCA's definition of violent felony—the clause that sweeps within ACCA's ambit any crime that "otherwise involves conduct that presents a serious potential risk of physical injury to another"—is, to put it mildly, not a model of clarity." *Id*. at 1602 (Scalia, J., dissenting). Moreover, the *James* majority used tools of statutory construction to find that attempted burglary poses the same risk as burglary, indicating that the majority did not find the statutory language clear on its face. Justice Scalia went further to suggest that the Court's decision "permits an *unintelligible* criminal statute to survive uncorrected, unguided and unexplained." *Id*. at 1610 (emphasis added). It is this lack of clarity that makes lenity relevant.

The lack of clarity identified above has generated two, competing constructions of the ACCA's "otherwise" clause. Under what has been coined the "all crimes" interpretation, advocated by the government, a "violent felony" includes all crimes, regardless of their nature, that involve conduct presenting a serious potential risk of physical injury to another. The Tenth Circuit, along with two other courts of appeals, adopted the "all crimes" approach and held felony DWI to be a "violent felony" within the meaning of the ACCA. *See Begay*, 470 F.3d at 974-75; *United States v. McCall*, 439 F.3d 967 (8th Cir. 2006) (en banc); *United States v. Sperberg*, 432 F.3d 706 (7th Cir. 2005).

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meaning of the statute covered Begay's circumstances. *Begay*, 470 F.3d at 973.

In contrast, Petitioner urges the "similar crimes" interpretation, whereby the general phrase "otherwise" denotes conduct that is "similar to" the enumerated crimes of burglary, arson, extortion, and crimes using explosives and that presents a serious potential for physical injury to another.[7] Judge McConnell adopted this interpretation in his dissent for the Tenth Circuit Court of Appeals. *Begay*, 470 F.3d at 980 (McConnell, J., dissenting). This Court lent support to the "similar crimes" approach in *James*, noting, "The specific offenses enumerated in clause (ii) provide one baseline from which to measure whether other *similar conduct* 'otherwise . . presents a serious potential risk of physical injury.' In this case, we can ask whether the risk posed by attempted burglary is comparable to that posed by its closest analogue among the enumerated offenses—here, completed burglary." *James*, 127 S.Ct. at 1594 (citation omitted) (emphasis added). Justice Scalia's dissenting opinion in *James* provides further support for the "similar crimes" interpretation advanced by Petitioner. *James*, 127 S.Ct. at 1603 (Scalia, J., dissenting) ("[T]he enumerated crimes are examples of what Congress had in mind under the residual provision, and the residual provision should be interpreted with those examples in mind.").

Finally, the Eighth Circuit, in *United States v. Walker*, adopted a "similar crimes" interpretation in a substantially similar context. In *Walker*, the court of

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[7] The "similar crimes" and "all crimes" labels were first adopted in *United States v. McCall*, 439 F.3d 967, 977, n. 8 & n. 9 (8th Cir. 2006) (en banc), they were used in the dissent below, *United States v. Begay,* 470 F.3d 964, 979 (10th Cir. 2006), and they were referenced in the Brief of the United States in Opposition to Certiorari at 13-14.

appeals construed the term "crime of violence" as used and defined under the United States Sentencing Guidelines. The term "crime of violence" under the Guidelines is defined identically to the term "violent felony," as it appears in 18 U.S.C. § 924(e)(2)(B), aside from the Guideline's addition of the phrase "of a dwelling" after the word "burglary." *United States v. Walker*, 393 F.3d 819 (8th Cir. 2005), *overruled by United States v. McCall*, 439 F.3d 967 (8th Cir. 2006) (en banc).

As Petitioner has explained, the "similar crimes" approach comports with the language of the ACCA.[8] It is also in keeping with the statute's purpose. Each of the enumerated crimes involves violent, aggressive conduct that criminals may adopt as a means of making their living, and each of the crimes are made more dangerous when committed with a firearm. The "otherwise" clause was not meant to sweep up offenses, like DWI, that are not similar to the enumerated offenses in these ways. And, in fact, the government does not appear to seriously contend that DWI *is* similar to the enumerated offenses in *any* of these ways.

But even if Petitioner's textual interpretation is not accepted outright, the "otherwise" clause's susceptibility to competing interpretations that produce profoundly different sentencing outcomes compels application of the rule of lenity. This is especially so where familiar canons of statutory construction and

[8] Petitioner's interpretation of the "otherwise" provision is the only reading that keeps intact the remainder of § 924(e)(2)(B) because, under the government's reading, the residual clause would swallow the crimes against persons described in part (i), as well as the specifically enumerated property offenses listed in part (ii) of that subsection.

the ACCA's legislative history do not reveal any clear Congressional intent that would support the government's position. If anything, these interpretive tools strongly support Petitioner.

2. *Familiar canons of statutory construction support Petitioner's interpretation.*

Two cardinal textual canons support the "similar crimes" interpretation of the ACCA.[9] These canons are applied by courts as elementary rules of thumb for reading statutes as they were meant to be read. Because they act as a backdrop against which Congress legislates, they provide an additional means of discerning Congressional intent.

The first such canon is *noscitur a sociis*, which provides that "a word is known by the company it keeps." This rule is typically applied to a general term that "is capable of multiple meanings in order to avoid the giving of unintended breadth to the acts of Congress." *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961). In the ACCA's case, the canon directs that the "otherwise" clause be limited to

[9] Petitioner's interpretation also finds support in the maxim that courts should, whenever possible, avoid construction of statutes that render any section mere surplusage. *See Ratzlaf v. United* States, 510 U.S. 135, 140-41 (1994). As the dissenting opinion below noted, interpreting the "otherwise" clause as the government argues would render the word "otherwise" irrelevant. The creative argument made by some that the term "otherwise" is not redundant because it signifies that the residual clause is reserved for crimes that are *different from* the enumerated property crimes that come before it simply reinforces the view that the statute is ambiguous and, thus, that this is a case in which the rule of lenity should apply.

include only those offenses that are related to the previous listed offenses.

The second canon germane to this case is *ejusdem generis*, which means that "[w]here general words follow specific words in a statute, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001). This canon also indicates that the crimes listed before the "otherwise" clause are illustrative of the crimes covered by the clause.

Under these venerable principles, the ACCA's "otherwise" clause does not extend to DWI and other crimes that are conceptually dissimilar to the enumerated property crimes of burglary, arson, extortion, and use of explosives. At the very least, fidelity to these canons raises serious doubts about the legitimacy of the government's interpretation of the "otherwise" provision. Those doubts require resort to the rule of lenity.

C. The ACCA's Legislative History Does Not Support The Government's "All Crimes" Interpretation.

Application of the rule of lenity does not risk any inconsistency with Congress's intent. The government's "all crimes" interpretation of the ACCA finds no clear support in the statute's legislative history. Rather, the ACCA's legislative history supports Petitioner's interpretation of the "otherwise clause."[10]

[10] The Court has gone back and forth about whether the rule of lenity should play a role in statutory interpretation before or

As this Court acknowledged just last term, the ACCA's legislative history reveals that § 924(e)(2)(B)(ii) was crafted to cover *property* crimes that carry "a significant risk[] of bodily injury or confrontation that might result in bodily injury." *James v. United States*, 127 S. Ct. 1586, 1592 (2007). This *James* Court cited with approval legislative history that specifically ties the property crimes intended to be covered by § 924(e)(2)(B)(ii)'s "otherwise" clause to the enumerated crimes of burglary, arson, extortion, and use of explosives:

> The other major question involved in these hearings was as to what violent felonies involving physical force against property should be included in the definition of "violent felony." The Subcommittee agreed to add the crimes punishable for a term exceeding one year that involve conduct that presents a serious potential risk of physical injury to others. This will add State and Federal crimes against property such as burglary, arson, extortion, use of explosive *and similar crimes* as predicate offenses where the conduct involved presents a serious risk of injury to a person.

127 S.Ct. 1586, 1592-93 (2007) (citing H.R. Rep. No. 99-849, at 3 (1986) (emphasis added).

DWI felonies are *not* property crimes. Nor are they similar to the crimes of burglary, arson, extortion, or use of explosives in terms of their mental state, motive, or inherent risks of confrontation or bodily injury.

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after recourse to legislative history. *See R.L.C.*, 503 U.S. at 306 n.6 (plurality opinion).

The legislative history thus supports Petitioner's advancement of Section 924(e)'s "similar crimes" interpretation. By contrast, the Act's history fails to support the government's notion that Congress intended for all crimes presenting any risk of injury—even those conceptually distinct from burglary, arson, extortion, and use of explosives—to be subsumed within the "otherwise" clause. Even Judge Hartz, writing for the Tenth Circuit in this case, acknowledged that the statute's "ambiguous history is not particularly persuasive either way." *Begay*, 470 F.3d at 974. Given the ambiguity, the rule of lenity mandates adoption of the interpretation that favors the criminal defendant—here, the only construction that does not subject persons with prior DWI convictions to draconian punishment.

D. Petitioner's Interpretation Comports With Common Sense.

A fundamental purpose of the rule of lenity is to ensure that the government provides "fair notice" of the consequences associated with criminal conduct "'to the world in language that the common world will understand.'" *United States v. Bass*, 404 U.S. 336, 348 (1971) (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931)). In keeping with that fundamental notion of fairness, penal statutes should be interpreted with common sense in mind.

The government's sweeping "all crimes" interpretation is not sensible and would produce absurd conclusions. Under Indiana law, for example, an individual's third conviction for prostitution constitutes a Class D felony with a potential sentence of up to three years. *See* Indiana Code § 35-45-4-2 and § 35-50-2-1. Applying the "all crimes" approach could

compel a finding that that felony prostitution constitutes a "violent felony" under the ACCA because it involves conduct that presents a serious potential risk of physical injury to another, given that those who engage in such conduct may have a heightened risk of infecting others with potentially deadly sexually transmitted diseases. As with DWI, there is no evidence that Congress intended to bring within the ambit of "violent felonies" crimes such as prostitution.

However wrongful, DWI, like felony prostitution, shares none of the common attributes of the predicate crimes that Congress identified in the ACCA as warranting imposition of dramatically increased sentences for firearm violations under 18 U.S.C. § 922(g). The government's "all crimes" interpretation would fold within the ACCA's coverage crimes that are not, by their nature, violent. This is the opposite of common sense. Petitioner's interpretation more closely matches the common-sense understanding of the terms used in the statute, thereby providing the kind of fair notice that is so central to the rule of law, generally, and to criminal jurisprudence, in particular.

E. The Rule of Lenity Should Be Applied To Exclude Felony DWI To Prevent A Draconian Result In This Case.

If the Court were to find—after resort to traditional tools of statutory construction—that "violent felony," as used in ACCA, does not definitively capture DWI felonies, the rule of lenity applies. *See, e.g.*, *Cleveland v. United States*, 531 U.S. 12, 25 (2000) ("[T]o the extent that the word 'property' is ambiguous as placed in [the mail fraud statute], we

have instructed that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'") (citation omitted). Much like this case, the Court in *Cleveland* was construing a statute—the mail fraud statute, 18 U.S.C. § 1341—that enumerated a category of predicate offenses. This Court concluded, "In deciding what is 'property' under [the mail fraud statute], we think 'it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.'" *Id.* (citation omitted).

The same result follows here. This Court has warned about the evil of "men languishing in prison unless the lawmaker has clearly said they should." *Bass*, 404 U.S. at 348 (citation omitted). The statute at issue, if misconstrued, illustrates that potential for evil, particularly as applied to the facts of Petitioner's case. The ACCA warrants a mandatory minimum sentence of 15 years' imprisonment under 18 U.S.C. § 924(e)(1). Before courts enhance a criminal's sentence based on previous convictions for felony DWI, Congress must be clear that the statute demands such a result.

The rule of lenity is fundamentally a rule of judicial restraint. The purpose of any penal statute is to punish wrongdoers. Prosecutors, and even sometimes judges, interpreting such statutes may be tempted to stretch their reach. *See United States v. Wiltberger*, 18 U.S. 76, 96 (1820); *Moskal v. United States*, 498 U.S. 103, 132 (1990) (Scalia, J., dissenting) ("The temptation to stretch the law to fit the evil is an ancient one, and it must be resisted."). The rule of lenity counteracts this temptation by requiring courts to hew to statutory text, eschew arguments based on general policies, place a pre-

mium on commonsense, and resolve any ambiguity in the defendant's favor. *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 284-85 (1976) (Rehnquist, C.J.,) ("doubts are resolved in favor of the defendant"); *Bifulco v. United States,* 447 U.S. 381, 401-02 (1998) (Burger, C.J., concurring) (indicating that the rule of lenity respond to "[our] temptation to exceed our limited judicial role and do what we regard as the more sensible thing").

CONCLUSION

If the natural reading of a statute favors a criminal defendant, as Petitioner has persuasively shown, that meaning must be adopted. When the statutory meaning is less than clear, moreover, the rule of lenity mandates adoption of the most lenient, reasonable interpretation of the statute. As applied to the ACCA, the rule of lenity compels that the term "violent felony" be construed so as not to include DWI offenses.

Amicus Curiae respectfully requests that the Court reverse the judgment of the United States Court of Appeals for the Tenth Circuit.

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