No. 10-5258

IN THE
Supreme Court of the United States

CLIFTON TERELLE MCNEILL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND FAMILIES AGAINST MANDATORY MINIMUMS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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This brief is submitted on behalf of the National Association of Criminal Defense Lawyers ("NACDL") and Families Against Mandatory Minimums ("FAMM") as *amici curiae* in support of petitioner.[1]

INTEREST OF *AMICI CURIAE*

NACDL is a nonprofit organization with a national membership of more than 12,500 attorneys and 35,000 affiliates from all fifty states, including private criminal defense attorneys, public defenders, and law professors. Founded in 1958, NACDL is the only professional association that represents the criminal defense bar at the national level. Its mission is to promote the proper administration of justice, including the correct interpretation of federal criminal statutes and the sound application of federal sentencing law, and to foster the integrity, independence, and expertise of the criminal defense profession. The American Bar Association recognizes NACDL as an affiliate organization with full representation in its House of Delegates. NACDL fre-

[1] Pursuant to Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief, and letters reflecting their consent have been filed with the Clerk.

quently files *amicus curiae* briefs in criminal cases here and in other courts.

FAMM is a national nonprofit, nonpartisan organization of over 24,500 members, founded in 1991. FAMM's 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 families who have been affected by unjust sentences, FAMM illuminates the human face of sentencing as it encourages state and federal sentencing reform. FAMM advocates sentencing policies that give judges discretion to distinguish among differently situated defendants and to sentence them according to their role in the crime, the seriousness of the crime, their potential for rehabilitation, and other characteristics of the offender. FAMM advances its charitable purpose in part through education of the general public and through *amicus* filings in important cases.

NACDL and FAMM are filing this brief because they believe the decision of the court of appeals is incorrect. It imposes a rule that will be burdensome to litigate and is potentially inequitable. The statutory text at issue in this case is clear. The Government strains for a reading that allows for enhanced punishment in this case, but its analysis ultimately distorts the text's plain meaning, and creates needless complexities for courts and litigants alike. The Government's reading, and the decision adopting it, should be rejected.

STATEMENT OF THE CASE

In August 2008, petitioner Clifton McNeill pleaded guilty to two counts of a federal indictment: one count of unlawful possession of a firearm by a felon, in violation of 18 U.S.C. § 922(g)(1), and one count of possession with intent to distribute a quantity of cocaine base, in violation of 21 U.S.C. § 841(a)(1). The indictment arose out of petitioner's February 2007 arrest following a traffic stop, during which police found a firearm and cocaine base in his possession.

The district court sentenced petitioner to 300 months' imprisonment for the felon-in-possession offense, to be served concurrently with a 240-month sentence for the drug offense. The severe punishment for merely possessing a firearm unlawfully arose in part from the district court's application of the Armed Career Criminal Act ("ACCA" or the "Act"). Under ACCA, a sentencing enhancement applies to felons in possession with at least three prior convictions for violent felonies or serious drug offenses. 18 U.S.C. § 924(e)(1).

The district court applied ACCA because of petitioner's record of North Carolina convictions between 1991 and 1995—one for robbery, one for assault, and several for drug offenses. The robbery and assault convictions qualified as violent felonies within the meaning of ACCA, but petitioner disputed that any of his drug convictions amounted to a "serious drug offense," which the Act defines as "an offense under" certain state or federal drug laws "for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. § 924(e)(2)(A)(i), (ii).

At the time petitioner was convicted for the state-law drug offenses, the crimes carried a maximum prison term of ten years. *See* N.C. Gen. Stat. § 14-1.1(8) (1993) (repealed). But North Carolina soon undertook a substantial reform of its sentencing system, eliminating minimum sentences for a number of offenses and reducing the maximum sentences for others. In particular, North Carolina reduced the maximum penalty for the drug offenses of which petitioner had been convicted from ten years to thirty months. *Id.* § 15A-1340.17(c), (d) (2011).

Petitioner argued that his state drug convictions did not qualify as "serious drug offenses" under ACCA because at the time he committed the federal offense for which he was being punished pursuant to ACCA, the maximum penalty for his state-law crimes was thirty months' imprisonment. The district court and court of appeals disagreed, holding that the relevant maximum for determining petitioner's ACCA eligibility was the maximum that applied at the time he committed the state-law offenses. JA129-32. Noting that North Carolina has no statute of limitations for felony offenses, the court of appeals reasoned that if petitioner "were tried and convicted today" for the drug offenses he committed in the early 1990s, he would be subject to the pre-reform sentencing statute because the sentencing revisions had not been made retroactive. JA131-32.

This Court granted certiorari on the question whether ACCA's definition of "serious drug offense" requires a federal sentencing court to look to the penalties imposed by state sentencing law at the time of the federal offense, regardless whether that

sentencing law relates back to the defendant's earlier state conviction.

SUMMARY OF ARGUMENT

ACCA imposes punishment for a federal offense—the unlawful possession of a firearm—with reference to federal or state offenses previously committed by the defendant. If a person has three or more convictions on his record for acts constituting "serious drug offenses" (or violent felonies) under ACCA when he commits a § 922(g) violation, that violation is deemed more serious and his punishment is enhanced. Because the Act is ultimately concerned with determining the seriousness of the *current* firearms offense and punishing it accordingly, the Act directs a court to assess the seriousness of a predicate drug offense as of the time of the § 922(g) violation. The use of the present tense in the statute makes the point clear: a drug offense is "serious" if "a maximum term of imprisonment of ten years or more *is* prescribed by law" for it, 18 U.S.C. § 924(e)(2)(A)(i), (ii) (emphasis added)—not "*was* prescribed by law when the offense was committed."

To explain the statute's use of the present tense, the Government contends that Congress sought to identify the maximum sentence the defendant would receive if he were convicted *now* for his actual prior offense—i.e., if the defendant were convicted today for conduct committed in 1980, what maximum sentence could be imposed on him for that conduct? The Government thus pins the maximum term allowable for the predicate crime not to "*an* offense," understood generally, but to "*the defendant*'s actual offense."

The practical effect of the Government's rule *in this case* is to calibrate petitioner's prior drug offenses to the maximum penalties in place at the time of those offenses. The practical effect of the Government's rule *in other cases*, however, is almost impossible to ascertain, which exposes the flaws in the Government's reading. The Government's approach requires an ACCA sentencing court to resolve numerous potentially difficult and even novel issues of state law. That analysis will be burdensome in practice and will create considerable uncertainty regarding what offenses may predicate a § 924(e)(1) sentence enhancement.

The Government's interpretation is unsound as a textual matter and unworkable as a practical matter. This Court should reject the Government's rule, and hold that a predicate drug offense is "serious" within the meaning of ACCA only if the generic offense is currently subject to a maximum penalty of ten years in prison.

ARGUMENT

Federal law proscribes the possession of a firearm by a person who—like petitioner here—has a felony record. 18 U.S.C. § 922(g). Under ACCA, violators of § 922(g) are subject to an enhanced sentence if they have three or more prior convictions for "a violent felony" or "a serious drug offense." *Id.* § 924(e)(1). The Act defines "serious drug offense" to mean "an offense under State law, involving … a controlled substance"—or an offense under the Controlled Substances Act and other federal drug laws—"for which a maximum term of imprisonment of ten years or more is prescribed by law." *Id.*

§ 924(e)(2)(A). The question here is whether the sentencing court, in determining whether the "serious drug offense" enhancement applies, looks to (a) the maximum term applicable to the predicate offense at the time the defendant committed the ACCA offense for which he is being punished (as petitioner and *amici* submit), or (b) the maximum term the defendant could receive if he were, in fact, prosecuted today for the conduct he committed earlier (as the Government submits). As shown below, the former reading reflects the simplest, most straightforward reading of the statute's text and structure, whereas the latter reading not only distorts the text, but also introduces needless complexities in its application.

I. THE TEXT AND STRUCTURE OF THE ACCA REQUIRE CONSIDERATION OF THE "SERIOUSNESS" OF A DRUG OFFENSE AT THE TIME OF THE FEDERAL FIREARMS VIOLATION

The present-tense structure of § 924(e)(2)(A) is the beginning of the end of the answer to the question presented. The statute specially penalizes § 922(g) offenders if each predicate drug offense is one for which a maximum term of ten years or more "*is* prescribed by law." The statute does *not* define the qualifying predicate offense as one for which a ten-year maximum "was prescribed when the offense was committed." Accordingly, nobody seriously contends that § 924(e)(1) applies whenever the predicate drug offense *was* punishable by more than ten years when the defendant was actually sentenced for his predicate offense.

What the Government argues instead is that the

statute refers to the maximum sentence the defendant could receive if he were hypothetically prosecuted *now* for the prior conduct he committed. That is, if the defendant committed a crime in 1980, but was not prosecuted until today for that crime, what maximum sentence could be imposed on him under state law? By asking that question, the Government asserts, the sentencing court would still read the statute in the present tense—whatever maximum sentence the defendant might receive in a hypothetical prosecution today for his earlier conduct is the maximum sentence that currently "is prescribed by law" for that earlier conduct. For multiple reasons, the Government's reading cannot be sustained.

To start, an ACCA enhancement does not penalize the commission of the earlier state drug offense. Rather, it enhances the punishment for the "offense of conviction," i.e., a federal firearms violation. *See* 18 U.S.C. § 924(e)(1). "The sentence is a stiffened penalty *for the latest crime*, which is considered to be an aggravated offense because [it is] a repetitive one." *United States v. Rodriquez*, 553 U.S. 377, 386 (2008) (emphasis added; quotation omitted). As the Court explained in *Rodriquez*, ACCA effectively incorporates state-law judgments about the seriousness of the predicate drug offense into the punishment applied to the federal offense. "Congress presumably thought—not without reason—that if state lawmakers provide that a crime is punishable by 10 years' imprisonment, the lawmakers must regard the crime as 'serious,' and Congress chose to defer to the state lawmakers' judgment." *Id.* at 388. But because it is the federal offense being punished, it is the state legislative judgment about the predicate

offense *at the time of the federal offense* that matters, as the present-tense structure of the statute confirms. *See also* 18 U.S.C. § 924(e)(1) (mandatory minimum itself is set forth in the present tense, referring to one "who *violates*" § 922(g) and who "*has* three previous [qualifying] convictions," and expressly linking "serious drug offense" to that present violation (emphasis added)).

The Government's contrary argument assumes that the statute focuses on the actual crime committed by the defendant—including when it was committed—and requires reference to the current state legislative judgment about how the defendant himself could be punished if he were prosecuted today for his earlier action. That view finds no support in ACCA. To the contrary, ACCA's use of statutory maximums suggests a focus on the state legislative judgment about the seriousness of the *generic offense*, rather than on the defendant's particular crime, as to which a maximum might be wholly irrelevant in fact. *Cf. Rodriquez*, 553 U.S. at 393 (distinguishing ACCA's definition of "serious drug offense" from a provision focusing on the circumstances of the particular defendant).[2] Further, the statute uses the term "conviction" when it means

[2] In theory, the applicable maximum reflects a legislative judgment of the appropriate punishment for a given statutory offense when violated under the most aggravating circumstances. Conversely, statutory eligibility for probation may reflect a legislative judgment about the appropriate punishment for the offense in its most mitigated form. Statutory maximums are conventionally used to compare the relative categorical seriousness of different offenses. *See Rodriquez*, 553 U.S. at 388.

"*the* defendant's offense." *See, e.g.*, 18 U.S.C. § 924(e)(1). Thus, for example, in accounting for intervening circumstances that bear on the seriousness of the defendant's *particular* felony, the Act speaks of a "conviction," not an "offense." *See id.* § 921(20) (excluding from the statute's reach "[a]ny conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored").

That understanding of § 924(e)(2)(A) coheres with the statute's basic structure. Congress determined that felon-in-possession violations are "aggravated" if committed with a record of "serious" offenses, and for state offenses it defers to the state's judgment of seriousness. But a scheme that fixes the seriousness of an offense to a *repudiated state judgment* with respect to that offense does nothing to establish that the *current ACCA violation* is aggravated in the relevant sense. It shows only that the predicate offense was previously thought to be serious, and it *rejects* the current state judgment about the offense—the very judgment in effect when the ACCA violation occurs. In effect, it simply punishes the defendant again for his old crimes, contrary to the teaching of *Rodriquez*. *See United States v. Darden*, 539 F.3d 116, 122 (2d Cir. 2008) ("In light of [the ACCA's] statutory purpose [to defer to the sentencing policy of each state as the measure of the seriousness of the drug offense], it was eminently reasonable for Congress to defer to the state lawmaker's current judgment rather than to the state lawmaker's discarded judgment.").

Congress knows how to condition recidivist sen-

tence enhancements on the law governing the prior offense at its commission, when that is Congress's design. *Cf. Atlantic Sounding Co. v. Townsend*, 129 S. Ct. 2561, 2564 (2009). The federal "Three Strikes" law, for example, imposes a mandatory life sentence for certain federal felonies when the offender was previously convicted of multiple serious violent felonies or serious drug offenses. 18 U.S.C. § 3559(c)(1). The statute uses markedly different language from ACCA's to demarcate a "serious drug offense," defining it as "an offense under State law that, *had the offense been* prosecuted in a court of the United States, *would have been* punishable under [certain federal drug laws]." *Id.* § 3559(c)(2)(H)(ii) (emphasis added). Congress's use of the hypothetical past perfective makes clear its intention to look back to the time of the prior offense. *See* Randolph Quirk *et al.*, *A Comprehensive Grammar of the English Language* § 14.23, at 1010 (1985) (hypothetical past perfective denotes past reference). In ACCA, by contrast, Congress asked not whether the state drug offense "would have been" punishable by a ten-year maximum sentence, but whether such a sentence "*is* prescribed" for the offense. 18 U.S.C. § 924(e)(2)(A)(i), (ii) (emphasis added).

Indeed, Congress has on several occasions considered amending ACCA to condition the seriousness of a predicate offense on the penalty in place when it was committed. *See, e.g.*, 139 Cong. Rec. H10191, H10.240-41 (daily ed. Nov. 19, 1993) (proposing to amend "serious drug offense" to include "an offense under State law which, if it *had been* prosecuted as a violation of the Controlled Substances Act *at the time of the offense* … would have been punishable by a

maximum term of imprisonment of ten years or more" (emphasis added)); 138 Cong. Rec. S6.671 (daily ed. May 14, 1992) (similar, supposing prosecution "as a violation of the Controlled Substances Act … *as that Act provided at the time of the offense*" (emphasis added)). There is no question Congress could have formulated a retrospective seriousness rule if it had intended to do so.

ACCA in its current form is the product of considerable debate about the statute's federalism implications. *See generally* James G. Levine, Note, *The Armed Career Criminal Act and the U.S. Sentencing Guidelines: Moving Toward Consistency*, 46 Harv. J. Legis. 537, 546 (2009); Derrick D. Crago, Note, *The Problem of Counting to Three Under the Armed Career Criminal Act*, 41 Case W. Res. L. Rev. 1179, 1192 (1991). Against that background, the best reading of the statute is the one that accounts for the full reach of the state policy which Congress has incorporated. A state pronounces the seriousness of an offender's *particular crime* when it prosecutes and sentences him for it. But the state may alter its judgment about the seriousness of the *statutory offense* he committed, as it revisits the applicable sentencing maximums and minimums (if any). Section 924(e) punishes a federal violation of firearms law with reference to the state's current sentencing law for an offense. This Court's interpretation should respect the statutory language and fulfill Congress's design by giving that state law effect.

II. THE GOVERNMENT'S RULE WOULD CREATE UNNECESSARY COMPLEXITY AND UNCERTAINTY

Petitioner's interpretation of § 924(e)(2)(A) is simple and clear. To determine whether an offender has a conviction for a "serious drug offense" within the meaning of ACCA, a federal court need only identify the maximum penalty for the predicate offense under current state law. The inquiry requires no difficult judgments regarding unsettled issues of state law or the record of earlier proceedings. Its simplicity will promote uniformity in federal courts' treatment of a given prior offense.

The Government's approach, by contrast, asks courts to indulge in a difficult hypothetical exercise. On this reading, which attempts to account for ACCA's use of the present tense to describe the sentence applicable to the federal defendant's state offenses, a court must imagine that an offender has not yet been sentenced for his prior offenses (which may have occurred decades in the past) and attempt to determine what penalty a state court could impose on him if he were prosecuted and convicted for those offenses today. As the decision below recognizes, that thought experiment requires a sentencing court to determine the retroactive effect of any intervening changes in state sentencing law, which itself introduces complication and uncertainty, especially given the ambiguity of many retroactivity rules in application. But there are also other complicating factors overlooked by the decision below, including statutes of limitation and the doctrine of abatement on a delayed prosecution—rules that in many cases would

substantially confuse or even preclude the sentencing analysis imagined by the Government.[3]

1. This Court frequently considers the judicial administrability of competing interpretations in order to determine the better interpretation of a statute. *See*, *e.g.*, *Skilling v. United States*, 130 S. Ct. 2896, 2932 (2010) (construing 18 U.S.C. § 1346 narrowly to avoid interpretation encompassing "amorphous category of cases" that produced "inter-circuit inconsistencies"); *Bartlett v. Strickland*, 129 S. Ct. 1231, 1244-45 (2009) (plurality op.) (finding "support for the majority-minority requirement [of 42 U.S.C. § 1973] in the need for workable standards and sound judicial and legislative administration"); *Gonzalez v. United States*, 553 U.S. 242, 249-50 (2008) (construing 28 U.S.C. § 636(b)(3) and concluding that "[t]o hold every instance of waiver requires the personal consent of the client … would be impractical"). When a proposed interpretation is dysfunctional—because it is confusing in operation, or taxes judicial resources, or produces unpredictable results—and a clear alternative exists, this Court is rightly skeptical that Congress intended the impractical meaning. *See Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 588-89 (2008) ("It strains credulity that Congress would have abandoned [a] predictable, workable framework for the uncertain and complex … re-

[3] The Government's interpretation also poses constitutional issues, insofar as it potentially requires court findings concerning details about the state conviction (apart from the fact that it occurred) that have not been pleaded and proved by the government. *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *Darden*, 539 F.3d at 123 n.11.

quirements that [the alternative] rule would inflict").

2. The construction of § 924(e)(2)(A) advanced by petitioner produces the simplest possible rule for identifying predicate drug offenses: determine the offense's current maximum penalty. *See Darden*, 539 F.3d at 128 (holding that courts should "defer to state lawmakers' current judgment about the seriousness of the offense as expressed in their current sentencing laws"). The procedure requires that litigants and courts do nothing more than consult the state sentencing statute in place at the time of the § 922(g) violation, and it ensures national uniformity in the administration of ACCA (at least insofar as such uniformity is possible in a statute that incorporates state law). The maximum allowable sentence is likely to be easily ascertained, and federal defendants, prosecutors, and sentencing courts can advert to a settled body of law to determine the governing penalty with little fuss. The ease of this analysis means that courts can be expected to reach uniform decisions about the applicability of § 924(e)(2)(A) to particular drug offenses in any given state.[4]

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[4] The only potential complexity risked by this interpretation would arise if the state had reformulated the offense itself in some respect after the defendant's predicate conviction. That circumstance is not present here, but it would not be a serious complication where it did arise. The court could simply identify the current offense (if any) violated by the conduct necessarily established in the earlier conviction. If there is no relevant offense identifiable, then there is no predicate offense under ACCA. At worst the analysis would be one step more complicated in a very rare set of circumstances, whereas it would not even be *possible* in many instances to conduct the analysis proposed by the Government, as explained *infra*.

3. By contrast, the rule urged by the Government is subject to multiple complexities and ambiguities, casting serious doubt on any notion that Congress intended the rule for a nationwide federal sentencing scheme. In this case, to be sure, the rule is applied with relative ease. The Fourth Circuit determined that petitioner's prior offenses were serious by examining the sentence he would receive "if [he] were tried and convicted today for his drug offenses." JA132. Because North Carolina's revised sentencing scheme was not made retroactive, and there is no limitations period for petitioner's state-law offenses, the court could easily identify the maximum sentence petitioner would have received if he were prosecuted and sentenced today for those decades-old crimes. *Id.*

Although that conclusion was relatively straightforward here, it is not difficult to foresee the difficult questions that the same analysis would require of courts in different cases.

a. One variable, identified by the court of appeals, is the retroactivity of a change in penalty. Retroactive changes to sentencing regimes are less common than prospective ones, but they do occur. *See, e.g.*, Cal. Penal Code § 1170.2. The issue they present is simple. Under the Government's approach, if a sentence revision reducing the maximum to less than ten years is made retroactive, then the ACCA sentencing court must apply the sentence revision to the defendant's offense and find that the offense is not "serious" under state law. If the sentence revision is not retroactive, then the ACCA court applies the maximum in place at the time of

the predicate offense.

The issue is thus easily stated, but it is not easily resolved, because retroactivity rules are often unclear in application. Even a statutory provision disclaiming retroactivity does not necessarily settle the issue. *See, e.g.*, *State v. Cummings*, 386 N.W.2d 468, 472 (N.D. 1986) (holding that new, lesser criminal penalty should be applied retroactively, irrespective of general statutory provision conditioning retroactivity on express declaration, because "the excess in punishment can serve no other purpose than to satisfy a desire for vengeance, a legislative motivation we will not presume"). Litigating the question of retroactivity accordingly can be resource intensive, as courts must closely parse statutory language to determine whether the legislature intended a given change to be retroactive. *See, e.g.*, *State v. Reis*, 165 P.3d 980, 991-92 (Haw. 2007); *id.* at 1018-19 (dissent) (arguing that saving clause was general and did not evince a legislative intent to deny retroactive amelioration in the applicable penalty). And reasonable minds may often take differing views as to the retroactivity of a statute. *See, e.g.*, *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 36 n.5 (2006) (detailing circuit split on retroactivity of the Illegal Immigration Reform and Immigrant Responsibility Act). The Government's focus on the retroactivity of sentencing changes opens the door to divergent judgments about the intended retroactive effect of a given state sentencing change (a question which could arise in any number of federal courts across the country), with the consequence that defendants may be subject to variable treatment depending only on where they are sentenced for violating § 922(g).

b. There are other problems with requiring courts to pretend that the original crime is just now being brought to trial. Statutes of limitation, in particular, present a complication the decision below did not address.

When a statute of limitations applies to the offender's prior offense and the limitations period has expired, it is a nonstarter to ask what sentence the offender would be subject to were he sentenced for his crime today—he could not even be *charged* for the offense today. It is, of course, possible that the Government contemplates that we imagine the offender was prosecuted then and *sentenced* today, but that simply exchanges the limitations question for a host of constitutional issues. The point is not to suggest that one problem is preferable to another, but to show the bankruptcy of the entire framework.

The problems are not hypothetical. Suppose that an individual "H" has a 2000 Texas conviction for a drug offense carrying a maximum sentence of ten years or more (*e.g.*, possession of mescaline with intent to deliver, *see* Tex. Health & Safety Code §§ 481.103, 481.113(d) (2000); Tex. Penal Code § 12.32 (2000)). If H has been convicted of two other ACCA predicate offenses and violates § 922(g) in 2010, it is unclear whether H's 2000 conviction would come within § 924(e)(1) and qualify him for its mandatory minimum, because Texas law applies a three-year statute of limitations to the 2000 drug offense. Tex. Code Crim. Proc. § 12.01(7). It would be nonsensical to ask what sentence he could get today for his 2000 drug offense—the only answer is *none at all*. Even if we suppose that H was charged within

the limitations period, the intervening years would still implicate H's speedy trial rights and thus cast doubt on whether he could actually be sentenced today for the ten-year-old offense. *See Doggett v. United States*, 505 U.S. 647, 652 n.1 (1992) (courts "have generally found postaccusation delay 'presumptively prejudicial'" when it approaches one year).

The facts in *United States v. Hinojosa*, 349 F.3d 200 (5th Cir. 2003), squarely presented these issues. There, the defendant committed a drug offense in 1993 whose then-applicable 99-year statutory maximum was later reduced to two years. *Id.* at 204. Years later, in 2002, the defendant was convicted of an ACCA violation, and the court of appeals upheld the application of § 924(e)(1)'s mandatory minimum. In order to maintain the fiction that it was evaluating the seriousness of the defendant's predicate drug offense in view of the sentence he could receive in 2002, the court of appeals necessarily ignored the three-year limitations period that would have barred his hypothetical prosecution. The court more likely simply applied the sentence that governed when the predicate offense was committed, in direct contravention of ACCA's present-tense construction.

ACCA itself imposes no expiration date on its predicate offenses, and many ACCA cases involve individuals who committed predicate drug offenses many years earlier. *See, e.g.*, *Darden*, 539 F.3d at 118 (§ 922(g) violation in 2000; defendant's predicate drug offense committed in 1989); *Hinojosa*, 349 F.3d at 204 (2002 § 922(g) violation, 1993 predicate drug offense). Because numerous states have statutes of

limitations for felonies, the limitations problem will confront many courts under the Government's reading of ACCA. *See, e.g.*, N.Y. Code Crim. Proc. § 30.10; Cal. Penal Code §§ 800-801; 720 Ill. Comp. Stat. 5/3-5; 42 Pa. Cons. Stat. § 5552.

c. Abatement and saving clauses pose yet another challenge. Abatement is a well-established common-law doctrine providing that all pending prosecutions must terminate following a legislative repeal or amendment of the authorizing statute, in the absence of a contrary saving provision. *See, e.g.*, *Bell v. Maryland*, 378 U.S. 226, 230 (1964); S. David Mitchell, *In with the New, Out with the Old: Expanding the Scope of Retroactive Amelioration*, 37 Am. J. Crim. L. 1, 6 (2009). Several states do not have a general saving statute, and so pending prosecutions may be abated by changes in penalties such as those in this case. *See id.* at 47 (listing states without general saving statutes). Even saving provisions, enacted by legislatures to avoid abatement, also sometimes provide for the retroactive application of reduced penalties. *See, e.g.*, 5 Ill. Comp. Stat. 70/4 (allowing affected party to choose whether new or old penalty shall apply); Tex. Gov't Code § 311.031(b); Vt. Stat. tit. 1, § 214(c).

The principles of abatement and retroactive amelioration of pending prosecutions complicate the analysis proposed by the Government, which looks to the sentence available if the defendant "were tried and convicted today." JA132. If a court must determine the maximum sentence for an individual's prior offense by imagining that the offender is being sentenced for the prior offense today, then it is effec-

tively also imagining that a final judgment has not yet been rendered. The hypothetical state sentencing court could thus be expected either to abate the prosecution or to apply a new penalty, if the legislature has reduced it. In a state like Vermont, then, where the general saving statute provides that a statute revising the penalty for any offense downward must be given effect unless final judgment has already been entered, *see* Vt. Stat. tit. 1, § 214(c), the hypothetical present-day maximum sentence would have to be reduced accordingly.

Any federal court not familiar with the niceties of Vermont legislative procedure is thus in for a difficult determination.[5] Yet in today's highly mobile economy, someone with a prior Vermont conviction could easily be subject to ACCA sentencing years later in any federal district court in the country. And state law may be particularly prone to uncertainty on the question whether a saving clause applies to any given enactment, because the number of cases directly impacted by such a change in criminal law will likely be small. Only those cases still open at the time the new law becomes effective would be directly affected. *See* Mitchell, *supra*, at 9. The Fourth Circuit's approach multiplies the importance of that question, applying it to a vastly greater number of offenders, because it asks federal courts effec-

[5] Similar saving statutes also exist in Illinois, Iowa, Kentucky, New Hampshire, Ohio, Texas, Virginia, and West Virginia. 5 Ill. Comp. Stat. 70/4; Iowa Code § 4.13(2); Ky. Rev. Stat. Ann. § 446.110; N.H. Rev. Stat. Ann. § 624:5; Ohio Rev. Code Ann. § 1.58(B); Tex. Gov't Code § 311.031(b); Va. Code Ann. § 1-239; W. Va. Code § 2-2-8.

tively to reopen a large number of closed predicate convictions. But it will be federal, not state, courts struggling to interpret these esoteric state rules.

d. The Government's approach also would require federal courts to engage in difficult inquiries surrounding the application of state recidivism enhancements. States will on occasion revise their statutes directing additional penalties for repeat offenders whose prior offense meets certain conditions, to material effect. *See, e.g.*, *Harlow v. State*, 820 P.2d 307, 309 (Alaska Ct. App. 1991) (discussing revisions to Alaska Stat. § 12.55.145 (1981)). On the Government's reading, federal courts would now also have to determine the retroactive effect of *those* changes in order to hypothesize an ACCA defendant's maximum state sentence. That would require accounting for not just the intended effect of changes, but also the *ex post facto* implications of any effective increase in penalty. *See Collins v. Youngblood*, 497 U.S. 37, 40-46 (1990). Of all the novel state issues forced on federal courts by the Government's interpretation, this is perhaps the least likely to have a developed body of state precedent to guide the federal determination. While *Rodriquez* obviously requires some steps into the quagmire surrounding state recidivism enhancements, *see* 553 U.S. at 388-89, this interpretation thrusts federal courts waist-deep into the bog.

* * * *

The Government's proposed interpretation of § 924(e)(2)(A) requires courts to interpret uncertain areas of state law. Courts would have to engage in detailed readings of state statutes in order to under-

stand the maximum penalty available for the earlier offense and determine whether subsequent alterations had a retroactive effect. The suggested hypothetical exercise would not even be *possible* in some cases, where the operation of a statute of limitations would bar a defendant's being "tried and convicted today." JA132. In addition to needlessly complicating ACCA prosecutions and wasting judicial resources, the legal uncertainty engendered by the Government's rule would result in disparate treatment for ACCA violators with prior convictions for the same offenses in the same state. For all those costs, little would be gained, save the opportunity to sentence a federal defendant according to a repudiated assessment of his state offense's severity. It is highly doubtful that Congress intended such a scheme. *See Busic v. United States*, 446 U.S. 398, 409 (1980) (rejecting "assumption" that "Congress' sole objective was to increase the penalties for firearm use to the maximum extent possible"). Petitioner's interpretation, which gives the statutory text its most natural meaning without creating "practical difficulties and potential unfairness," *Taylor v. United States*, 495 U.S. 575, 601 (1990), should be adopted by this Court. A state drug offense is "serious" within the meaning of the ACCA if the generic offense is punishable by ten years' imprisonment at the time of the ACCA violation.

CONCLUSION

For the foregoing reasons and those stated in petitioner's briefs, the Court should vacate the judgment of the court of appeals and remand for resentencing.

Respectfully submitted,

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