No. 20-7284

IN THE

Supreme Court of the United States

TYRELL CURRY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR *AMICUS CURIAE* AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF PETITIONER

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Under Supreme Court Rule 37.2, Americans for Prosperity Foundation ("AFPF") respectfully submits this *amicus curiae* brief in support of Petitioner.[1]

INTEREST OF *AMICUS CURIAE*

Amicus curiae AFPF is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. As part of this mission, it appears as *amicus curiae* before federal and state courts.

AFPF is part of a transpartisan coalition of organizations that advocate for a broad array of consensus-based criminal justice reforms. AFPF strongly believes in second chances—*everyone* has a gift and something to offer to society, people can change, and incarcerated persons who do not pose a danger to public safety and who have paid their debt to society deserve to have a chance to rejoin their families and communities and become contributing members of society. Examples abound of individuals who despite being incarcerated have managed to grow from whatever mistakes they made, overcome obstacles, and use their unique experiences and gifts

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[1] All parties have consented to the filing of this brief after receiving timely notice. *Amicus* states that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* or its counsel made any monetary contributions intended to fund the preparation or submission of this brief.

to benefit society. After all, "[c]haracter is not static, people change," Shon Hopwood, *Second Looks & Second Chances*, 41 Cardozo L. Rev. 83, 119 (2019), as the district court recognized. *See* Pet. App. 62a–63a.

AFPF is interested in this case because it believes that the Armed Career Criminals Act ("ACCA") is an irrational, draconian statute that is a prime contributor to the problem of overincarceration and a symptom of the broader problem of overcriminalization. The ACCA, like other mandatory minimum laws, leads to cruel, unjust penalties for individual defendants, harms families, damages communities, and undermines the legitimacy of our criminal justice system, all at taxpayer expense.

AFPF believes that, at the least, ACCA enhancements should be reserved for the most dangerous armed career criminals who intend to violently harm others. The ACCA's plain language supports this conclusion and is consistent with the historical background presumption that, absent a clear statement to the contrary, criminal statutes that are silent about *mens rea* should be construed to require knowing or intentional conduct.

AFPF also believes the real-world stakes are high and radiate far beyond this particular case. As Petitioner ably explains and documents, *see* Pet. Br. 19–21; Pet. App. 72a–80a, the Eleventh Circuit's sweeping interpretation of ACCA has resulted in literally centuries of additional prison time. This should not be allowed to stand.

SUMMARY OF ARGUMENT

The ACCA and other mandatory minimum statutes frequently result in cruel, unjust outcomes, as this case illustrates. Those statutes also impose real costs on our society and undermine the legitimacy of our criminal justice system. The reason why the ACCA leads to disproportionate and arbitrary sentences is that the triggering event for the sentencing enhancement—possession of ammunition or a firearm—is not *malum in se* but rather *malum prohibitum* and solely based on status as a felon. And there is no requirement that the underlying convictions (for which the defendant has already paid his or her debt to society) supporting the fifteen-year mandatory minimum be related—temporally or otherwise—to the events giving rise to the felon-in-possession charge. So too here.

Particularly where severe criminal penalties are involved, and a statute is silent about the required *mens rea*, courts should presume that the legislature intended for a *mens rea* requirement, such as knowledge, to apply. At the least, Congress must speak clearly if it wishes to displace traditional *mens rea* requirements. It did not do so here with respect to the ACCA's "serious drug offense" definition.

Nonetheless, the Eleventh Circuit has mistakenly conflated the *mens rea* presumption, which is a default background rule of statutory interpretation, with the rule of lenity, which is a tie-breaker canon that applies at the end of the statutory interpretation process, to hold that potentially strict liability drug offenses are predicates for the ACCA enhancement. For the reasons set forth in the Petition, this Court

should correct this error of statutory interpretation, which has led to unjust consequences for countless defendants, families, and communities, all at taxpayer expense.

It is fundamentally unfair for Mr. Curry to languish in prison based on an expansive, overbroad reading of the ACCA's "serious drug offense" definition that flips the *mens rea* presumption on its head. Even absent this presumption, the rule of lenity and constitutional avoidance canon counsel in favor of rejecting the Eleventh Circuit's interpretation of ACCA's definition of "serious drug offense." This case is an ideal vehicle for correcting this injustice.

ARGUMENT

I. THE ELEVENTH CIRCUIT'S INTERPRETATION OF ACCA UNNECESSARILY EXACERBATES THE PROBLEM OF OVERINCARCERATION.

"The ACCA is not only poorly drafted, but its irrational harshness has become one of the engines driving mass over-incarceration in America." Stephen R. Sady & Gillian R. Schroff, Johnson: *Remembrance of Illegal Sentences Past*, 28 Fed. Sent. R. 58, 63 (2015). The "real issue [is] overcriminalization and excessive punishment in the U.S. Code." *Yates v. United States,* 135 S. Ct. 1074, 1100 (2015) (Kagan, J., dissenting). "The broad reach of the ACCA creates a deep gulf between the statute's literal purpose—incarcerating dangerous career criminals—and its sweep." Stephen R. Sady, *The Armed Career Criminal Act—What's Wrong with "Three Strikes, You're Out"?*, 7 Fed. Sent. R. 69, 69 (1994).

This case showcases this gulf between the ACCA's putative purpose and its all-too-broad sweep, which leads to highly unjust and arbitrary results. To be sure, taking things out of unoccupied vehicles (which is the genesis of the 18 U.S.C. § 922(g) offense here underlying the ACCA enhancement, *see* Pet. App. 56a–57a) is and should be a crime. Some period of incarceration may be warranted for that offense, often coupled with substance abuse treatment, rehabilitative programs, and a period of post-incarceration supervised release.[2] But § 922(g) violations already carry a ten-year maximum penalty.[3] *See* 18 U.S.C. § 924(a)(2). Mr. Curry's Guidelines range *without* the ACCA designation was already 100 to 125 months. *See* Pet. App. 55a–56a.

But a *fifteen-year mandatory minimum* sentence for taking a gun a car owner left on the seat of an unoccupied vehicle is beyond draconian under any set of circumstances in a rational world. *See* Pet. App. 56a–57a. On its face, this sentence lacks any hallmark of proportionality. That is particularly true here, where *all* of the predicate offenses used to justify the

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[2] There is reason to think that Mr. Curry would not have done this but for relapsing back into substance misuse after he tragically lost both of his parents in a short period of time.

[3] For offenders with three or more qualifying predicate convictions, the ACCA transforms the ten-year maximum into a fifteen-year mandatory minimum. 18 U.S.C. § 924(e). One federal judge likened the ACCA enhancement to a Charles Dickens novel: "[T]his sentence is not so much a punishment for the present crime as it is a punishment for your history of crimes[.]" Sentencing Tr. 25, *United States v. Young*, No. 12-45 (E.D. Tenn. May 9, 2013), ECF No. 41

ACCA enhancement can be strict liability crimes and involved less than one gram of a controlled substance. *See* Pet. 6–7.

As the transcript of the sentencing hearing makes clear, Mr. Curry's punishment simply did not fit his crime and was untethered to the real-world severity of the predicate convictions. For example, not only did the sentencing judge state on the record that Mr. Curry's sentence was "high" and "the Guidelines range is much lower," but went on to add that Mr. Curry had arguments for a *downward variance* from even his Guidelines range *without* the ACCA enhancement. *See* Pet. App. 63a. If Mr. Curry truly was the dangerous "armed career criminal" that ACCA is supposed to aim at, it seems unlikely the sentencing judge would have suggested he had arguments for a downward variance below even the unenhanced Guidelines range.

There is a reason for this. Mr. Curry has battled serious substance abuse issues since he was a child, as well as depression; was only twenty-eight years old when he was sentenced; had recently lost both his parents; unquestionably took responsibility for his actions; and had never done serious prison time before. *See* Pet. App. 56a–57a, 60a–61a. The sentencing judge seemed to think that if Mr. Curry could address his substance misuse issues and stay sober, he would be a contributing member of society. *See* Pet. App. 60a, 65a–66a; *see also* Pet. App. 68a, 70a. By all indications, Mr. Curry was doing just this, working with his father who was a horse breeder until his father passed away, then shortly thereafter his mother passed away, and Mr. Curry slid back into substance misuse. *See* Pet. App. 57a, 60a. This tragic

turn of events seems to have set in motion Mr. Curry's unfortunate decision to take a gun from an unoccupied car, which, in turn, resulted in his fifteen-year mandatory minimum. *See* Pet. App. 56a–58a, 60a.

The record does not appear to counsel toward the conclusion that Mr. Curry is "the kind of person who might deliberately point the gun and pull the trigger."[4] *Begay v. United States*, 553 U.S. 137, 146 (2008). He is not the type of person Congress had in mind for the ACCA enhancement. And the record is clear that but for binding, wrongly decided Eleventh Circuit precedent, Mr. Curry would have received a sentence more than five years shorter than he did. *See* Pet. App. 52a, 56a, 63a. This is not an abstract concept and it is fundamentally unjust. *See also Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1907 (2018) ("prospect of additional time behind bars is not some theoretical or mathematical concept" and "has exceptionally severe consequences for the incarcerated individual and for society" (citations omitted)).

While some period of incarceration coupled with substance misuse treatment was warranted here,

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[4] The ACCA's title, the "Armed Career Criminals Act," underscores its focus: protecting society from dangerous, violent career criminals, particularly those with a history of intentionally harming others using firearms and other weapons. "As suggested by its title, the [ACCA] focuses upon the special danger created when a particular type of offender—a violent criminal or drug trafficker—possesses a gun." *Begay*, 553 U.S. at 146; *see also Yates*, 135 S. Ct. at 1090 (Alito, J., concurring in the judgment) ("Titles can be useful devices to resolve doubt about the meaning of a statute." (cleaned up)).

there is no reason Mr. Curry should face a fifteen-year *mandatory minimum*.[5] That sentence will keep Mr. Curry in prison (instead of contributing to society *and* at taxpayer expense) long after all of the four traditional justifications for punishment—rehabilitation, deterrence, retribution, and incapacitation—have expired.[6] *Cf.* Pet. App. 62a–63a (discussing impact of First Step Act). And for Mr. Curry, who was only twenty-eight-years old when he was sentenced, the difference between being released is his early or mid-thirties had he been sentenced without the ACCA enhancement, as opposed to when he is nearing his mid-forties as a result of the ACCA enhancement, cannot be overstated.

II. UNDER THE MENS REA PRESUMPTION, SCIENTER REQUIREMENTS SHOULD BE INFERRED IN 18 U.S.C. § 924(E)(2)(A)(II).

To avoid or limit the ACCA's harshest and most irrational applications, its scope should be properly cabined to reach only the most dangerous armed career criminals clearly targeted by Congress. As

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[5] Imposition of the ACCA enhancement frequently doubles a defendant's Guidelines range for a § 922(g) violation. *See also Walker v. United States*, 931 F.3d 467, 469 (6th Cir. 2019) (Kethledge, J., dissenting from denial of rehearing en banc).

[6] "Long sentences of incarceration can actually increase crime because incarceration is criminogenic[.]" Hopwood, 41 Cardozo L. Rev. at 93. Indeed, "economists and scholars are increasingly clear that there is little convincing evidence that at today's margins in the US, increasing the frequency or length of sentences deters aggregate crime." *Id.* at 98. *See also* Marc Mauer, *Long Term Sentences: Time to Reconsider the Scale of Punishmen*t, 87 UMKC L. Rev. 114, 114, 121 (2018).

discussed below, ACCA was never intended to link potentially innocuous conduct to the enhancement. Instead, Congress's focus was on giving prosecutors a tool—to be used sparingly—to protect the public from truly violent, recidivist career offenders who, unlike Mr. Curry, have shown a penchant for intentionally inflicting serious physical harm against others using weapons and who would pose a real danger to society if not incarcerated.

A. *Mens Rea* Presumption is Deeply Rooted in Our System of Law.

ACCA should be construed "in light of the background rules of the common law, in which the requirement of some *mens rea* for a crime is firmly embedded." *Staples v. United States*, 511 U.S. 600, 605 (1994). "The existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *Dennis v. United States*, 341 U.S. 494, 500 (1951).

The modern form of the principle that the accused must have possessed the requisite *mens rea* at the time of an action before that action can qualify as a criminal offense dates to at least the thirteenth century. *See* Richard G. Singer, *The Resurgence of Mens Rea: The Rise and Fall of Strict Liability*, 30 B.C. L. Rev. 337, 338 n.4 (1989) ("There is no debate that, by the middle of the thirteenth century when Bracton wrote *De Legibus Angelae*, *mens rea* was becoming necessary[.]"). Indeed, by the end of the twelfth century, English jurists had begun to pay attention to the ancient Roman concepts of *dolus* and *culpa*, both of which centered on the mindset of the accused. *See* Francis Bowes Sayre, *Mens Rea*, 45

Harv. L. Rev. 974, 983 (1932) ("Bracton borrow[ed] ideas . . . directly from the Code and Digest" both of which were Roman legal texts.).

As the concept of *mens rea* became embedded in English criminal jurisprudence, so too did the notion that the moral culpability of the accused was needed for conviction. *Id.* at 988–89. Consequently, by the dawn of the seventeenth century, *mens rea* was recognized "as a *sine qua non* for criminal conviction." Singer, 30 B.C. L. Rev. at 337–38. As Blackstone wrote in the eighteenth century, "an unwarrantable act without a vicious will is no crime at all. To constitute a crime against human laws there must be first, a vicious will, and secondly, an unlawful act consequent upon such vicious will." 4 William Blackstone, Commentaries *21.

The fulcrum of the criminal law's impositions of liability has historically turned on a finding that the accused has made a blameworthy choice: "*Actus non facit reum nisimens sit rea*." *See* Sayre, 45 Harv. L. Rev. at 988. As this Court put it:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as

> the child's familiar exculpatory "But I didn't mean to[.]"

United States v. Morissette, 342 U.S. 246, 250–51 (1952). "[E]ven a dog distinguishes between being stumbled over and being kicked." Oliver Wendell Holmes, Jr., The Common Law 3 (1881).

Mens rea does not merely play a threshold gatekeeping role in distinguishing between innocuous and criminal conduct at the guilt-innocence stage. Even when a defendant's actions give rise to criminal liability, *mens rea* performs an important additional function: distinguishing the *degree* to which the defendant is culpable and how blameworthy the actions are. *Mens rea* has therefore historically played a vital role in assigning the proper punishment proportional to an offense.

"*Mens rea*, a principle central to our criminal law, is crucial in linking punishment to individual culpability. It is the bridge between morality and law." Hon. Jack Weinstein, *et al.*, *The Denigration of Mens Rea in Drug Sentencing*, 7 Fed. Sent. R. 121, 121 (1994). "The operation of the *mens rea* principle takes on a special character at the sentencing stage. . . . [O]ne might assume that concerns about the *mens rea* principle fall away once a finding of guilt has attached. In fact, the opposite is true." *United States v. Cordoba-Hincapie*, 825 F. Supp. 485, 521 (E.D.N.Y. 1993). *See also* Stephen F. Smith, *Proportional Mens Rea*, 46 Am. Crim. L. Rev. 127, 155 (2006). Indeed, "some of the law's harshest punishments are often (and have long been) reserved for intentional wrongs precisely because to intend something is to endorse it as a matter of free will—and freely choosing

something matters." Neil Gorsuch *et al*., *A Republic, If You Can Keep It*, 206 (2019).

B. *Mens Rea* Presumption Applies to ACCA's "Serious Drug Offense" Definition.

Given the centrality of *mens rea* to our entire system of criminal justice, as well as its historical pedigree, the existence of a *mens rea* requirement must always be the rule. Thus, to the extent Congress may, consistent with the Constitution, dispense with the *mens rea* requirement, the burden is on *Congress* to clearly say so.

Yet, according to the Eleventh Circuit, "[t]he presumption in favor of mental culpability and the rule of lenity apply to sentencing enhancements only when the text of the statute or guideline is ambiguous." *United States v. Smith*, 775 F.3d 1262, 1267 (11th Cir. 2014).[7] The Eleventh Circuit's approach flips the presumption in favor of *mens rea* on its head, seemingly conflating it with the rule of lenity, which applies on the back end of the statutory construction process when a statute is found to be ambiguous *after* other tools of statutory construction have been exhausted. That was error. *See Staples*, 511 U.S. at 619 n.17; Cert. Pet. 15–16.

"[D]etermining the mental state required for commission of a federal crime requires construction of

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[7] The panel below found itself bound by *Smith* to reject the argument that convictions under Fla. Stat. § 893.13 were not ACCA predicates, *see* Pet. App. 5a–6a, as did the district court, *see* Pet. App. 52a, 54a.

the statute and inference of the intent of Congress." *Staples*, 511 U.S. at 605 (cleaned up). Accordingly, this Court has "stated that offenses that require no mens rea generally are disfavored and . . . some indication of congressional intent, express or implied, is required to dispense with mens rea as an element of a crime." *Id.* at 606 (cleaned up). Thus, the *mens rea* presumption is not simply a backend tie-breaker canon but operates upfront as a clear-statement rule, requiring *Congress* to affirmatively express its intention to depart from the default rule.

Staples is instructive on this critical distinction between the rule of lenity (which is a tie-breaker canon used to resolve lingering ambiguity) and the *mens rea* presumption (which operates on the front end as a default rule). As *Staples* illustrates, statutory ambiguity may be a precondition for the lenity principle but is *not* a requirement for applying the *mens rea* presumption:

> [W]e find it unnecessary to rely on the rule of lenity, under which an ambiguous criminal statute is to be construed in favor of the accused. That maxim of construction is reserved for cases where, after seizing every thing from which aid can be derived, the Court is left with an ambiguous statute. . . . Here, the background rule of the common law favoring *mens rea* and the substantial body of precedent we have developed construing statutes that do not specify a mental element provide considerable interpretive tools from which we can seize aid, and they do not leave us with

> the ultimate impression that . . . [the statute] is grievously ambiguous. Certainly, we have not concluded in the past that statutes silent with respect to *mens rea* are ambiguous.

Id. at 619 n.17. Thus, as *Staples* makes clear, unlike lenity, the *mens rea* presumption is a *background default rule* that applies irrespective of statutory ambiguity.

More broadly, this Court has not hesitated to "read a state-of-mind component into an offense even when the statutory definition did not in terms so provide." *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 437 (1978). "The fact that the statute does not specify any required mental state . . . does not mean that none exists. . . . The central thought is that a defendant must be blameworthy in mind before he can be found guilty, a concept courts have expressed over time through various terms such as *mens rea*, scienter, malice aforethought, guilty knowledge, and the like." *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (cleaned up).

Mens rea requirements are favored, in part, because they help to prevent the criminalization of unknowing mistakes. *See, e.g., Staples*, 511 U.S. at 617 (imposing a mens rea requirement on a firearms statute because the absence of a requirement would "criminalize a broad range of innocent conduct"); *Liparota v. United States*, 471 U.S. 419 (1985) (interpreting a statute prohibiting food stamp fraud to require a mens rea element); *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 563–64 (1971) (suggesting that if a person shipping acid mistakenly

thought that he was shipping distilled water, he would not be in violation of a statute criminalizing undocumented shipping of acids). "[A] severe penalty is a further factor tending to suggest that Congress did not intend to eliminate a mens rea requirement." *Staples*, 511 U.S. at 618; *see also United States v. X-Citement Video*, 513 U.S. 64, 72 (1994).

Of course, subject to other constitutional limits on Congress's authority to criminalize conduct, Congress has the power to textually specify a low *mens rea* for a *malum prohibitum* crime carrying severe penalties. And, unfortunately, Congress has done so all too often. Under our system of government, Congress may pass stupid laws that are nonetheless constitutional. "Justice Scalia once said that he wished all federal judges were given a stamp that read 'stupid but constitutional.'" *Brown v. Chi. Bd. of Educ.*, 824 F.3d 713, 714 (7th Cir. 2016).

But "absent a clear statement from Congress that *mens rea* is not required, . . . [courts] should not apply the public welfare offense rationale to interpret any statute defining a felony offense as dispensing with *mens rea*." *Staples*, 511 U.S. at 618. There is no such clear statement here. And it makes no sense to assume that offenses that may be committed without any *mens rea* can be "serious drug offense[s]," as defined by 18 U.S.C. § 924(e)(2)(A)(ii).

The Eleventh Circuit erred here by mistakenly conflating the *mens rea* presumption with the rule of lenity, instead of analyzing whether ACCA's text contains sufficient evidence that Congress wanted to eliminate any *mens rea* requirements. It does not. Nowhere in ACCA's definition of "serious drug

offense" is any language showing legislative intent to eliminate any *mens rea* requirement as an element for drug offenses. There is nothing in the statute's text, structure, or history to rebut the *mens rea* presumption. And unless and until Congress clearly states that potentially strict liability offenses created by state law can be predicates for the ACCA enhancement, the separation of powers and centuries of jurisprudence counsel toward applying the presumption to the definition of "serious drug offense."

C. Failure to Apply *Mens Rea* Presumption to ACCA's "Serious Drug Offense" Definition Sweeps in Strict Liability Drug Offenses.

Unless the presumption of *mens rea* applies with full force to § 924(e)(2)(A)(ii), it will sweep in potentially innocuous conduct.[8] *See State v. Adkins,* 96 So. 3d 412, 431–33 (Fla. 2012) (Perry, J., dissenting) (providing examples). After all, "under Florida's statute, a person is guilty of a drug offense if he delivers a controlled substance without regard to whether he does so purposefully, knowingly, recklessly, or negligently" and "in the absence of a *mens rea* requirement, delivery of cocaine it is a strict liability crime[.]" *Shelton v. Sec'y, Dep't of Corr*., 802 F. Supp. 2d 1289, 1295 (M.D. Fla. 2011) (citing Fla.

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[8] *See also Rehaif v. United States*, 139 S. Ct. 2191, 2195 (2019) ("In determining Congress' intent, we start from a longstanding 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." (cleaned up)).

Stat. §§ 893.101, 893.13), *rev'd on other grounds* 691 F.3d 1348 (11th Cir. 2012). That is because Florida chose to clearly establish that violations of Fla. Stat. § 893.13 do not require *any* proof that a defendant was in any way aware of the nature of the substance:

> (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.
>
> (2) *The Legislature finds that knowledge of the illicit nature of a controlled substance is not an element of any offense under this chapter*. . . .

Fla. Stat. § 893.101(1)–(2) (emphasis added); *see Adkins*, 96 So. 3d at 416.[9]

And if allowed to stand, the Eleventh Circuit's construction of ACCA renders convictions under this statute, which purports to criminalize potentially innocuous conduct, to serve as predicates for an "armed career criminal" designation supporting a fifteen-year mandatory minimum. *See Adkins*, 96 So.

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[9] Fla. Stat. § 893.101(1)–(2) contains the kind of clear statement that rebuts the *mens rea* presumption. *Chicone v. State*, 684 So.2d 736 (Fla. 1996), properly applied the presumption of *mens rea*. The Legislature then chose to amend the statute in response.

3d at 424 (Pariente, J., concurring in result) ("shar[ing] Justice Perry's concerns about the Act's harsh application to a potentially blameless defendant" but concluding that "these legitimate concerns do not render the Act facially unconstitutional"). This Court should grant cert here to correct this error.

III. UNDER THE RULE OF LENITY AND CONSTITUTIONAL AVOIDANCE CANON, THE ACCA "SERIOUS DRUG OFFENSE" DEFINITION MUST INCLUDE A SCIENTER REQUIREMENT.

Even if the *mens rea* presumption did not resolve this case, if there were any doubt whether a "serious drug offense" has a *mens rea* requirement for all elements, the rule of lenity and constitutional avoidance canon demand the statute be construed narrowly in favor of Mr. Curry.[10]

"[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Yates*, 135 S. Ct. at 1088 (cleaned up). "The maxim that penal statutes should be narrowly construed is one of the oldest canons of interpretation." Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 128 (2010). That rule is "'perhaps not much less old than' the task of statutory 'construction itself.'" *United States v. Davis*, 139 S. Ct. 2319, 2333 (2019) (quoting *United States v. Wiltberger*, 18 U.S.

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[10] The Government, of course, bears the burden of establishing that a given conviction, as a categorical matter, constitutes an ACCA predicate offense. *See Pereida v. Wilkinson*, 592 U. S. ____ (2021) (slip Op., at 14–15 & n.7).

76, 5 Wheat. 76, 95 (1820)). "The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *United States v. Santos*, 553 U.S. 507, 514 (2008).

Thus, "when there are two rational readings of a criminal statute, one harsher than the other, [courts] are to choose the harsher only when Congress has spoken in clear and definite language." *McNally v. United States*, 483 U.S. 350, 359–60 (1987). As Justice Scalia explained: "This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead." *Santos*, 553 U.S. at 514.

"[T]his principle of statutory construction applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose." *Bifulco v. United States*, 447 U.S. 381 (1980); *see, e.g.*, *United States v. Granderson*, 511 U.S. 39, 56–57 (1994); *Taylor v. United States*, 495 U.S. 575, 596 (1990). "This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Ladner v. United States*, 358 U.S. 169, 178 (1958).

It is simply wrong for Mr. Curry to "languish[] in prison" without "the lawmaker ha[ving] clearly said they should." *United States v. Bass*, 404 U.S. 336, 348

(1971). "[I]t is appropriate, before . . . [the Court] choose[s] the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *Yates*, 135 S. Ct. at 1088 (quotation marks omitted)); *see Sessions v. Dimaya*, 138 S. Ct. 1204, 1225–27 (2018) (Gorsuch, J., concurring in part and in the judgment).

Buttressing this conclusion is the doctrine of constitutional avoidance, which often works in a synergistic tandem with the rule of lenity to counsel a *narrow* reading of a criminal statute. Under the avoidance canon, "when presented with two fair alternatives, this Court has sometimes adopted the *narrower* construction of a criminal statute to avoid having to hold it unconstitutional if it were construed more broadly." *Davis*, 139 S. Ct. at 2332 (cleaned up). "[W]hat Congress has written . . . must be construed with an eye to possible constitutional limitations so as to avoid doubts as to its validity." *United States v. Rumely*, 345 U.S. 41, 45 (1953) (cleaned up); *see, e.g.*, *McDonnell v. United States,* 136 S. Ct. 2355, 2372–73 (2016) (rejecting expansive reading of criminal statute that "would raise significant constitutional concerns"); *Skilling v. United States*, 561 U.S. 358, 405 (2010) ("It has long been our practice . . . before striking a federal statute as impermissibly vague, to consider whether the prescription is amenable to a limiting construction."). "Applying constitutional avoidance to narrow a criminal statute . . . accords with the rule of lenity." *Davis*, 139 S. Ct. at 2333. So too here.

Here, the ACCA statute, like all too many federal criminal laws, suffers from serious constitutional vagueness problems. *See, e.g.*, *Johnson v. United*

States, 576 U.S. 591 (2015) (striking down ACCA's residual clause on vagueness grounds). "[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). "So too, vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute." *United States v. Batchelder*, 442 U.S. 114, 123 (1979).

However, in many cases, "a scienter requirement in a statute alleviates vagueness concerns, narrows the scope of the its prohibition, and limits prosecutorial discretion."[11] *McFadden v. United States*, 576 U.S. 186, 197 (2015) (cleaned up); *see, e.g.*, *Posters 'N' Things v. United States*, 511 U.S. 513, 526 (1994) ("the scienter requirement that we have inferred in § 857 assists in avoiding any vagueness problem"); *see also Colautti v. Franklin,* 439 U.S. 379, 395 (1979) ("This Court has long recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of *mens rea*."). So too here.

Construing the definition of "serious drug offense" set forth in 18 U.S.C. § 924(e)(2) to sweep in

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[11] *McFadden* held that the government must prove that a defendant knew he was dealing with a controlled substance to convict him in prosecutions involving a controlled substance analogue, such as bath salts. *See* 576 U.S. at 188–89.

potentially excusable conduct would seem to create substantial vagueness problems. By contrast, inferring a *mens rea* requirement in § 924(e)(2), consistent with the bedrock presumption of *mens rea* and constitutional avoidance canon, would alleviate this vagueness problem.

CONCLUSION

This Court should grant Mr. Curry's petition.

Respectfully submitted,

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