No. 10-5258

# In the Supreme Court of the United States

CLIFTON TERELLE MCNEILL, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE FOURTH CIRCUIT*

**BRIEF FOR THE UNITED STATES**

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## QUESTION PRESENTED

The Armed Career Criminal Act of 1984 provides a 15-year minimum sentence for a convicted felon who possesses a firearm in violation of 18 U.S.C. 922(g)(1), if that person "has three previous convictions * * * for a violent felony or a serious drug offense." 18 U.S.C. 924(e)(1). A "serious drug offense" is defined to include a state-law drug offense "for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. 924(e)(2)(A)(ii). Petitioner was convicted of drug offenses that occurred in North Carolina in 1991, 1992, and 1994, when the maximum term of imprisonment for such offenses was ten years or more. Before petitioner's current prosecution under Section 922(g), North Carolina changed its sentencing scheme and provided significantly lower maximum sentences for similar drug offenses that were committed after October 1, 1994. The question presented is as follows:

Whether, in determining that a prior state offense is one "for which a maximum term of imprisonment of ten years or more is prescribed by law" for purposes of 18 U.S.C. 924(e)(2)(A)(ii), a federal sentencing court is required to look to the maximum penalty prescribed by state law at the time of the federal sentencing, without regard to whether the State has made that law retroactively applicable to the defendant's offense.

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## OPINIONS BELOW

The opinion of the court of appeals (J.A. 126-136) is reported at 598 F.3d 161. The order of the district court (J.A. 109-125) is unreported.

## JURISDICTION

The judgment of the court of appeals was entered on March 8, 2010. A petition for rehearing was denied on April 5, 2010 (J.A. 137). The petition for a writ of certiorari was filed on July 2, 2010, and granted on January 7, 2011. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-4a.

## STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of North Carolina, petitioner was convicted on one count of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1); and on one count of possession with intent to distribute cocaine base, in violation of 21 U.S.C. 841(a)(1). Petitioner thereupon became subject to scrutiny under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), which was enacted to supplement state enforcement efforts in addressing the threat to public safety posed by career criminals. *Taylor* v. *United States*, 495 U.S. 575, 581 (1990). As amended, ACCA provides a 15-year minimum sentence for a person convicted of possessing a firearm in violation of 18 U.S.C. 922(g), if that person "has three previous convictions" for "a violent felony or a serious drug offense, or both, committed on occasions different from one another." 18 U.S.C. 924(e)(1). The statute defines a "serious drug offense" as, *inter alia*, a state-law offense "involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance * * *, for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. 924(e)(2)(A)(ii).

Petitioner disputed that his prior state-law drug offenses qualified as "serious drug offense[s]," arguing that the State of North Carolina had, since the time he was convicted of the predicate offenses, reduced the maximum term of imprisonment for those kinds of offenses to a period shorter than ten years—even though the State had not made that amendment applicable to previously committed offenses. The district court rejected that argument and applied a sentence enhancement under ACCA. It also departed upward from the

advisory Guidelines range, sentencing petitioner to 300 months of imprisonment, to be followed by five years of supervised release. J.A. 82, 84. The court of appeals affirmed. J.A. 126-136.

1. On February 28, 2007, an officer with the Fayetteville, North Carolina, Police Department tried to stop the vehicle that petitioner was driving after it ran a red light. Petitioner evaded the officer for several miles, then came to an abrupt stop and fled on foot. An officer chased petitioner, tackled him, and found a .38-caliber Smith & Wesson revolver under his body. A search of petitioner found 3.1 grams of crack cocaine, packaged for distribution, along with $369. J.A. 46, 110.

2. a. On January 2, 2008, a grand jury in the Eastern District of North Carolina returned a three-count indictment against petitioner, charging him with one count of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1) and 924; one count of possession with intent to distribute cocaine base, in violation of 21 U.S.C. 841(a)(1); and one count of knowingly possessing a firearm during and in relation to a federal drug-trafficking offense, in violation of 18 U.S.C. 924(c)(1)(A)(i). J.A. 13, 29-30. At a hearing on August 18, 2008, petitioner pleaded guilty to the first two counts; under the plea agreement, the government agreed to dismiss the third count (which would have carried a mandatory, consecutive sentence of at least five years). J.A. 18, 31-40; 18 U.S.C. 924(c)(1)(A)(i) and (D)(ii). With respect to the felon-in-possession count, the plea agreement expressly stated that petitioner would be subject to a mandatory minimum sentence of 15 years and a maximum of life imprisonment if his criminal history made ACCA's sentence enhancement applicable. J.A. 36.

b. Petitioner has an extensive criminal history, including, as relevant here, four 1992 convictions for the sale of cocaine on four different days in October 1991 (J.A. 47-49) and two 1995 convictions for possession with intent to manufacture, sell, or deliver cocaine in February 1992 and September 1994 (J.A. 50, 53). Petitioner has not disputed that two other prior convictions under North Carolina law—for assault with a deadly weapon and common-law robbery (J.A. 53-55)—qualified as "violent felon[ies]" for ACCA purposes. J.A. 77, 129 n.1. Petitioner has, however, contended that his cocaine-related convictions should not be considered "serious drug offense[s]" for ACCA purposes, because, after he committed them, intervening changes in North Carolina law reduced the maximum term of imprisonment for such offenses to less than ten years. J.A. 75-76, 117-118.

When petitioner committed the drug offenses for which he was convicted in 1992 and 1995, those offenses were Class H felonies subject to a maximum term of imprisonment under North Carolina law of ten years. See J.A. 76 (petitioner's sentencing memorandum); Pet. Br. 7; see also N.C. Gen. Stat. § 14-1.1(a)(8) (Michie 1993) (repealed effective Oct. 1, 1994) ("A Class H felony shall be punishable by imprisonment up to 10 years, or a fine or both."). Petitioner in fact received ten-year sentences for his convictions. See J.A. 47-50, 53. In 1993, however, North Carolina revamped its sentencing laws by enacting the Structured Sentencing Act. J.A. 131-132. Since that Act took effect on October 1, 1994, offenses involving the sale (or possession with intent to distribute) of less than 28 grams of cocaine have been either Class G or H felonies, for which the maximum

terms of imprisonment would be 38 or 30 months.[1] Those lower maximum terms of imprisonment, however, have not been made applicable to earlier offenses. Instead, the structured-sentencing regime expressly applies only to "offenses * * * that occur on or after October 1, 1994." N.C. Gen. Stat. § 15A-1340.10 (2009); see also *State* v. *Branch*, 518 S.E.2d 213, 215 (N.C. Ct. App. 1999) (noting that offenses committed before that date are governed by the earlier sentencing regime).

c. In the Presentence Investigation Report (PSR), the probation office concluded that petitioner's prior drug offenses were ACCA predicates. J.A. 66. The re-

[1] In the district court, petitioner said (J.A. 76) that the "longest term of imprisonment" someone could receive under the Structured Sentencing Act for his cocaine-related offenses is 25 months. But, as petitioner now acknowledges (Br. 7 & n.3), the maximum possible term of imprisonment for a sale of less than 28 grams of cocaine is actually 38 months, because that has been a Class G felony since December 1, 1997. See N.C. Gen. Stat. §§ 15A-1340.17(c) and (d), 90-95(a)(1) and (b)(1)(i) (2009); 1997 N.C. Sess. Laws 443, § 19.25(b) and (jj). And the maximum possible term of imprisonment for a cocaine-possession-with-intent-to-distribute offense that occurred after October 1, 1994, is actually 30 months, because that is a Class H felony. See N.C. Gen. Stat. §§ 15A-1340.17(c) and (d), 90-95(a)(1) and (b)(1); see also *State* v. *Mullaney*, 500 S.E. 2d 112, 114 (N.C. Ct. App. 1998) ("Under Structured Sentencing, the maximum possible term of imprisonment for a Class H felony is thirty months.").

Petitioner's earlier mistaken reference to a 25-month maximum may have been due to the punishment chart associated with North Carolina's Structured Sentencing Act. It provides for ranges of *minimum* terms of imprisonment, and the range for a Class H felony committed by an offender with the highest "prior record level" under circumstances justifying an "aggravated sentence" is 20-25 months. See N.C. Gen. Stat. § 15A-1340.17(c) (2009). The maximum sentence must then be derived from the minimum sentence through application of a separate table. The maximum sentence corresponding to a 25-month minimum is 30 months. *Id.* § 15A-1340.17(d).

sulting enhancement under the Armed Career Offender Guideline, § 4B1.4, increased his adjusted offense level from 28 to 34, but after a three-level adjustment for acceptance of responsibility, his total offense level was 31. J.A. 66. The PSR detailed petitioner's criminal history, which included 12 felony convictions between 1992 and 2007 (including three crimes involving guns) and several additional misdemeanors. J.A. 47-59. The PSR also noted that petitioner's offense conduct in this case occurred approximately seven months after he had been released from state custody, J.A. 59, and that he had since been convicted of additional state-law felonies, for which he had been sentenced to 72 to 96 months of custody, with a projected release date of July 4, 2012, J.A. 56, 58. The PSR calculated a criminal history category of VI. J.A. 59-60. That resulted in an advisory Guidelines range of 188-235 months, but the PSR noted that "[t]he court may wish to consider an upward departure * * * if reliable information indicates that [petitioner's] criminal history category substantially under-represents the seriousness of [his] criminal history or the likelihood that [he] will commit other crimes." J.A. 69.

d. At sentencing, petitioner contended that his prior drug convictions should not be considered "serious drug offense[s]" for purposes of ACCA because, although those offenses had been subject to "maximum statutory sentences" of "at least 10 years" when he was convicted, his "precise offenses no longer carry such an extensive punishment." J.A. 76. He claimed that an ACCA sentence enhancement would create an unwarranted sentencing disparity in light of the fact that, "[f]or more than 12 years, these types of convictions simply have not come close to constituting 'serious drug offenses.'" *Ibid.* Petitioner acknowledged that he qualified as a career

offender under Sentencing Guidelines § 4B1.1, and he calculated that, without an Armed Career Criminal enhancement under Guidelines § 4B1.4, his advisory Guidelines range would be 151-188 months. J.A. 77. He requested a sentence of 188 months. *Ibid.*

3. On January 13, 2009, the district court sentenced petitioner to 300 months of imprisonment on count one and to 240 months of imprisonment on count two, both sentences to run concurrently with each other, but consecutively to the state term that petitioner was serving; the term of imprisonment was to be followed by five years of supervised release. J.A. 80-92.

The district court adopted the findings of the PSR and calculated an advisory Guidelines range of 188 to 235 months. J.A. 93, 95. The court rejected petitioner's argument that he should not receive a sentence enhancement under ACCA. J.A. 117-118. It recognized that petitioner's offenses would not have been serious drug offenses if they had been committed at later dates.[2] But, the court explained, petitioner "chose to commit the [state-law drug] offenses when he did and was convicted

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[2] As petitioner had in his sentencing memorandum (J.A. 76), the district court stated that North Carolina's Structured Sentencing Act went into effect on December 1, 1995 (J.A. 117-118). In fact, as noted above, it generally applies to offenses committed on or after October 1, 1994. See p. 5, *supra*; see also Pet. Br. 8. The December 1, 1995, date was relevant to some amendments that altered the punishment chart, but not in ways that affected the maximum terms of imprisonment associated with Class G or H felonies. There is now another punishment chart, which applies to felonies committed on or after December 1, 2009, but which, again, has not altered the maximum terms of imprisonment associated with Class G or H felonies. All three iterations of the punishment chart that have applied to felonies committed since October 1, 1994 are available at http://www.nccourts.org/Courts/CRS/Councils/spac/Sentencing/Default.asp (visited Mar. 28, 2011).

and sentenced in North Carolina shortly thereafter. Under the ACCA, a court looks to the maximum sentences for the offenses at issue at the time of the offense." J.A. 118 (citing *United States* v. *Williams*, 57 Fed. Appx. 553, 556 (4th Cir. 2003)). Thus, the court held that petitioner's "prior drug convictions are serious drug offenses, and [he] is properly designated an armed career criminal under 18 U.S.C. § 924(e)." *Ibid.*

The district court further decided to make an upward departure under Sentencing Guidelines § 4A1.3, finding that petitioner's "criminal history category substantially underrepresents the seriousness of his criminal history or his likelihood of recidivism." J.A. 119. The court explained that petitioner "has a long and unrelenting history of serious criminal conduct," including "many types of criminal behavior, with an emphasis on illegal drugs and violence," that had resulted in petitioner "and three other individuals being shot, leaving one dead." J.A. 119-120. It observed that "[t]he North Carolina criminal justice system ha[d] not deterred [petitioner]," even though he had been sentenced to ten years of imprisonment at the age of 16. J.A. 120. Analyzing successively higher offense levels, the court found that an offense level of 34 "contains the guideline range most appropriate for this case" (262 to 327 months). J.A. 121.

The district court then considered the sentencing factors under 18 U.S.C. 3553(a), "all the facts and circumstances of this case, the PSR, and all arguments and filings of counsel" and sentenced petitioner to "a term of 300 months for count one and 240 months for count two (the statutory maximum)." J.A. 123-124. Finally, the court stated that, even if it had "incorrectly calculated the advisory guideline range or ha[d] erroneously de-

parted," it would still "impose the same 300-month and 240-month sentences as variance sentences." J.A. 124.

4. The court of appeals affirmed petitioner's sentence. J.A. 126-136. It reviewed *de novo* whether petitioner's prior drug offenses qualified as predicate offenses under ACCA. J.A. 128.

Petitioner relied on ACCA's definition of a "serious drug offense" as one "for which a maximum term of imprisonment of ten years or more *is* prescribed by law." 18 U.S.C. 924(e)(2)(A)(ii) (emphasis added). As the court of appeals summarized, he contended that "the statute's use of the present tense 'is' reflects congressional intent to defer to a state's current judgment regarding whether it deems a particular drug offense serious," and it can thus be triggered only by a state offense that "carr[ies] a maximum penalty of at least ten years in prison at the time of the defendant's *federal* sentence." J.A. 129-130; see also Pet. C.A. Br. 18-19.

The court of appeals concluded that petitioner's drug convictions were properly found to be ACCA predicates because they "were punishable by a maximum term of imprisonment of at least ten years both at the time he committed the offenses and at the time of his federal sentencing." J.A. 132. The court explained that, "[w]hen North Carolina revised its sentencing scheme in 1994, it specifically provided that the revised sentences would not apply to crimes committed before the effective date of the revisions. In effect, then, North Carolina has two sentencing schemes—one governing offenses committed before October 1, 1994, and another governing offenses committed after October 1, 1994." J.A. 131-132 (citations omitted). In light of the simultaneous persistence of those two schemes (and the lack of a statute of limitations under North Carolina law for felony of-

fenses), the court concluded that, "[i]f [petitioner] were tried and convicted today for his drug offenses committed in 1991, 1992, and September 1994, he would be subject to the higher sentences imposed by the pre-October 1994 sentencing statutes." J.A. 132 & n.2.

In relying on North Carolina's determination that its new sentencing regime does not apply to crimes committed before its effective date, the court of appeals found "persuasive" the Fifth Circuit's decision in *United States* v. *Hinojosa*, 349 F.3d 200 (2003), cert. denied, 541 U.S. 1070 (2004), which turned on Texas's decision not to make a revised sentencing scheme applicable to earlier offenses, holding that, "even under" a rule that looks to "the maximum sentence for a previous conviction at the time of federal sentencing," Hinojosa "would still be subject to a maximum term of at least ten years." *Id.* at 205. The court of appeals disagreed with the Second Circuit's decision in *United States* v. *Darden*, 539 F.3d 116 (2008), which had found the nonretroactive nature of New York's 2005 reforms of its drug laws to be irrelevant to ACCA's applicability, because it concluded that "ACCA instructs courts to defer to state lawmakers' current judgment about the seriousness of an offense as expressed in their current sentencing laws." *Id.* at 128.[3]

## SUMMARY OF ARGUMENT

Petitioner contends that, for purposes of determining whether his prior state-law drug offenses are "previous convictions" that trigger a sentence enhancement under the Armed Career Criminal Act of 1984, 18 U.S.C.

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[3] The court of appeals also rejected petitioner's challenges to the procedural and substantive reasonableness of the district court's upward departure, J.A. 132-136, which petitioner has not renewed in this Court, Pet. Br. 3 n.1.

924(e), the "maximum term of imprisonment" associated with his prior state-law drug offenses should be judged as if those offenses had been committed on the date of his federal sentencing. He thus disregards the maximum sentences to which he was actually exposed (and in his case, the ten-year sentences he actually received). He also disregards the sentences that state law still prescribes for offenses (like his) that were committed before October 1, 1994. The judgment in this case should be affirmed whether the Court evaluates the maximum sentence for petitioner's predicate convictions by reference to the time he received them or by reference to the time of the federal sentencing proceeding. Under either analytical approach, the law applicable to the offenses underlying his previous convictions prescribes a maximum term of at least ten years of imprisonment.

A. The relevant time for evaluating the "maximum term of imprisonment" associated with a defendant's conviction for a potential predicate offense is the time of the sentencing for that conviction.

1. Petitioner's thesis that a court applying ACCA should look to the maximum sentence for a prior offense at the time of the federal sentencing relies chiefly on the present-tense verb "is" in ACCA's definition of a serious drug offense. In context, however, that verb refers to the time of the conviction for which the maximum sentence is at issue, consistent with the meaning of the rest of the same definition. Petitioner's focus on the time of sentencing for the Section 922(g) offense is inconsistent with this Court's approach in *United States* v. *Rodriquez*, 553 U.S. 377 (2008). In that case, the Court identified a prior offense's maximum term for ACCA purposes based on its analysis of the Washington statutes that applied "[a]t the time of respondent's drug of-

fenses." *Id.* at 381. Petitioner's interpretation is also inconsistent with the rationale of *Rodriquez*, because his reading would mean that the "maximum term of imprisonment * * * prescribed by law" for his prior offense was lower than the sentence that he actually could have received (and in fact did receive). See *id.* at 383.

2. ACCA's overall structure reinforces the focus of the definitional provisions on the time of the prior conviction. The definition in ACCA of "violent felony" is immediately adjacent to that for "serious drug offense." That definition also contains present-tense verbs, but they have been construed as referring to the time of the underlying conviction, not the time of the federal sentencing to which ACCA may apply. Moreover, the evolution of ACCA's statutory text and the legislative history suggest that Congress's addition to ACCA of "serious drug offense[s]" and "violent felon[ies]" was intended only to expand the scope of ACCA's predicate offenses. It was not intended to alter a prior conviction's status as a predicate offense whenever a state legislature changes the maximum sentence for a similar offense committed at a later date (without making that change retroactively applicable to prior offenders).

3. Evaluating the maximum penalty associated with a previous conviction as of the time of that conviction avoids the serious practical difficulties associated with petitioner's hypothetical inquiry about current-day sentencing and better serves ACCA's purposes. Petitioner's approach creates serious difficulties whenever a State amends the offense definition between the time of the original conviction and the time of the federal sentencing. Under his approach, if a State decided to legalize certain drugs and decriminalize their use and distribution, there could be no "maximum term of imprison-

ment" for former offenses involving those drugs. That would mean that "previous convictions" for those offenses would vanish for ACCA purposes, even if the State had deliberately preserved those convictions as a matter of state law by making the decriminalization only prospective. Petitioner's reading would also allow a mandatory minimum sentence under ACCA to depend on the happenstance of the timing of the federal sentencing proceeding (rather than the timing of the defendant's state and federal criminal offenses).

The government's reading avoids the difficulties and inconsistencies associated with petitioner's reading. Nor does it present the difficulties that petitioner attributes to it. Although petitioner suggests it might be difficult to determine when a prior offense occurred, ACCA already requires the sentencing court to determine whether the defendant's "three previous convictions" were "committed on occasions different from one another." 18 U.S.C. 924(e)(1). Moreover, a sentencing court must evaluate the "statutory elements" of an offense to determine whether it qualifies as an ACCA predicate, which presumes an ability to determine which statutory regime was in effect at the time of the offense. See *Shepard* v. *United States*, 544 U.S. 13, 16 (2005).

4. The government's approach is consistent with similar inquiries in other statutes addressing recidivists.

B. Even if the maximum penalty associated with a prior conviction should be determined as of the time of the ACCA proceeding, the nonretroactive nature of intervening changes in state law should be taken into account. The sole relevant question is *what* the "maximum term of imprisonment * * * prescribed by [state] law" for the defendant's prior offense actually is—not *why* the State decided to change a maximum sentence with-

out making that change applicable to previously committed offenses (such as petitioner's). Although "Congress chose to defer to the state lawmakers' judgment" about the seriousness of drug offenses for ACCA purposes, *Rodriquez*, 553 U.S. at 388, it did not intend that federal courts would look behind those judgments to determine whether the old or new sentencing regime better reflects the State's judgment. Nor does ACCA indicate an intention to incorporate (as petitioner suggests) state-law viewpoints on how prior convictions are to be treated under state recidivism statutes.

C. In this case, the maximum sentences for petitioner's previous cocaine offenses were ten years, whether they are judged as of the time of those convictions or as of the time of his federal proceedings. It is undisputed that, at the time of petitioner's prior convictions in 1992 and 1995, the maximum term of imprisonment for his offenses was ten years. Although North Carolina later reduced the maximum penalties associated with similar offenses if they were committed on later dates, it did not make those changes retroactive to offenses (like petitioner's) committed before October 1, 1994. N.C. Gen. Stat. § 15A-1340.10 (2009). Thus, even if petitioner were to be sentenced by a state court today for his prior convictions, he would still be subject to a maximum term of imprisonment of at least ten years.

Principles of lenity do not dictate a contrary result. In light of the context and structure of ACCA (as well as other federal recidivism provisions), petitioner's reading of Section 924(e)(2)(A)(ii) is not in equipoise with the approach of either the district court or the court of appeals in this case. Nor does petitioner's reading effectuate the underlying purposes of the rule of lenity. His rule does not provide fair warning of the consequences

of criminal conduct because it makes it impossible to know the punishment until long after a Section 922(g) offense is committed. And petitioner's reading would not consistently assist criminal defendants, because legislatures are as likely to increase as to decrease the maximum sentences associated with particular crimes.

## ARGUMENT

Petitioner argues that in determining whether his previous state drug offenses are ones "for which a maximum term of imprisonment of ten years or more is prescribed by law" under the definition of "serious drug offense" in Section 924(e)(2)(A)(ii) of ACCA, a court should not consider the maximum term actually prescribed by state law for petitioner's previous offense. Instead, he contends, the court should consider the maximum term that state law would prescribe for that offense if it had been committed on the date of petitioner's federal sentencing. In other words, petitioner claims that for ACCA purposes he should receive the benefit of intervening changes in state sentencing law that have not been made retroactive and thus do not apply to his prior offenses as a matter of state law. Petitioner's interpretation is inconsistent with the statutory text, the structure of ACCA, and prior decisions of this Court. Under his interpretation, although he was actually sentenced to ten years of imprisonment for his prior offenses, the law prescribes a maximum term of less than ten years for those offenses. "It is hard to accept the proposition that a defendant may lawfully be sentenced to a term of imprisonment that exceeds the 'maximum term of imprisonment . . . prescribed by law,' but that is where [petitioner's] reading of the statute leads." *United States* v. *Rodriquez*, 553 U.S. 377, 383 (2008).

Petitioner contends both (1) that the maximum sentence for his predicate state-law convictions under ACCA should be determined "by reference to the state law in effect at the time of the federal sentencing" in this case, Br. 13 (capitalization modified); and (2) that the maximum sentence under "current state law" is to be determined without regard to whether current law "applies retroactively to the date the defendant committed the state offense," Br. 15 (capitalization modified). The district court correctly rejected petitioner's first contention. J.A. 118. The court of appeals, without resolving the first, correctly rejected the second. J.A. 131-132.

The judgment in this case should be affirmed whether the Court evaluates the maximum sentence for petitioner's predicate convictions by reference to the time he received them or by reference to the time of the federal sentencing proceeding on appeal here. But the government begins its analysis by addressing the temporal reference point for assessing whether an offense is punishable by the stated ten-year maximum in 18 U.S.C. 924(e)(2)(A)(ii).[4]

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[4] In its brief opposing certiorari, the government did not directly address the temporal reference point, instead stating (at 7-8) as follows: "The government assumes here that the statute's use of the present tense * * * refers to the applicable state sentence at the time of the federal prosecution, not at the time of the underlying state prosecution. In this case, * * * the applicable state sentence was a maximum term of imprisonment of 10 years both at the time of petitioner's state prosecution and at the time of his federal prosecution." Even though the court of appeals (unlike the district court) did not address the antecedent issue, it has been briefed by petitioner and is squarely included within the question presented, see Pet. Br. i (asking in relevant part whether ACCA's definition refers to "state law at the time of the federal sentencing").

### A. The Maximum Potential Sentence Associated With A Prior Conviction Should Be Determined By Looking To The Sentence Applicable At The Time Of That Conviction

The relevant time for evaluating the "maximum term of imprisonment" associated with a defendant's conviction for a potential predicate offense is the time of the sentencing for that conviction. That answer is consistent with the text of the statute, its structure, and the way other recidivism statutes are construed. Moreover, because that construction is based on the actual "previous conviction" that makes an ACCA sentence enhancement potentially applicable, it is manifestly easier to apply than petitioner's proposed construction.

#### *1. The present-tense verb in the reference to the maximum term of imprisonment that "is prescribed by law" refers to the time of the conviction that exposed petitioner to that potential penalty*

a. Petitioner's argument that the maximum penalty for a state-law drug offense must be determined as of the time of the ACCA sentencing is grounded entirely on the use, in the statutory phrase "maximum term of imprisonment of ten years or more is prescribed by law," of the present-tense verb "is." Pet. Br. 13-15. That argument fails to account for the context of ACCA's definitions of predicate offenses.

ACCA applies to "the case of a person who violates [18 U.S.C. 922(g)] and has three previous convictions * * * for a violent felony or a serious drug offense, or both, committed on occasions different from one another." 18 U.S.C. 924(e)(1). The accompanying definition of "serious drug offense" refers to "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a con-

trolled substance * * * for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. 924(e)(2)(A)(ii). Petitioner reads the verb "is" in that provision to refer to the time of the federal sentencing proceeding at which an ACCA sentence enhancement may be imposed. In context, however, that verb refers to the time of the conviction for which the maximum sentence is at issue, consistent with the meaning of other verbs in the same definition.

No past-tense verbs appear in the substantive component of the definition of a state-law "serious drug offense" (*i.e.*, whether the offense is one "*involving* manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance," 18 U.S.C. 924(e)(2)(A)(ii) (emphasis added)). Nevertheless petitioner does not seem to dispute that whether a prior offense meets that substantive component should be determined by reference to the time of the previous conviction rather than the time of the Section 922(g) prosecution. Indeed, it is difficult to see how the elements of a prior offense of conviction could be determined at any time other than when the conviction was imposed.

In that context, petitioner's view that ACCA turns on the maximum penalty for a former offense, not when it was imposed, but as of the time of the federal sentencing for the Section 922(g) violation, makes little sense. Both the nature of the prior offense and the maximum term by which it is punishable relate to the same time: when the defendant was convicted and punished.[5] Indeed,

[5] Of course, if a State subsequently lowered the maximum penalty and made that reduction available to defendants previously sentenced as of the same date as the defendant now at issue, the defendant could plausibly look to that reduced maximum as stating the law applicable to his previous conviction. For example, if such a defendant had taken

even the amici supporting petitioner do not agree with his focus on the time of the federal sentencing.[6]

b. Construing the present tense of a statutory verb to correlate contextually with other times relevant to the statute's application is entirely consistent with this Court's cases. For instance, in *Woodford* v. *Ngo*, 548 U.S. 81 (2006), the Court considered a statutory requirement that "[n]o [federal-law] action shall be brought with respect to prison conditions * * * by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as *are* available are exhausted," 42 U.S.C. 1997e(a) (2000) (emphasis added). The Court held the administrative remedies that must be exhausted are those that were available when the prisoner's complaint arose, not those remedies that are available at the time federal suit is brought. 548 U.S. at 99-100; see also, *e.g.*, *Ingalls Shipbuilding, Inc.* v. *Director, Office of Workers' Comp. Programs*, 519 U.S. 248, 255 (1997) (statutory reference to a "person entitled to

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advantage of state sentence-modification proceedings to lower his sentence in accordance with a reduced maximum, cf. 18 U.S.C. 3582(c), that reduced maximum could apply to his conviction for ACCA purposes. Because no such retroactive modification of state sentencing law is at issue here, however, the Court need not address that issue.

[6] The amici argue instead that ACCA directs the federal sentencing court "to assess the seriousness of a predicate drug offense as of the time of the § 922(g) *violation*." NACDL Amicus Br. 5 (emphasis added). The two circuits that have ruled against the government, however, have adopted petitioner's approach and focused on the time of the federal sentencing proceeding. See *United States* v. *Darden*, 539 F.3d 116, 122 n.8 (2d Cir. 2008); *United States* v. *Morton*, 17 F.3d 911, 915 (6th Cir. 1994). In this case, the applicable sentence under North Carolina law did not change between February 28, 2007, when petitioner committed his felon-in-possession offense, and January 13, 2009, when he was sentenced for that offense.

compensation * * * [who] enters into a settlement with a third person" requires the entitlement to compensation to exist at the time of the settlement); *Weedin* v. *Chin Bow*, 274 U.S. 657, 667-668 (1927) (statutory context requires the phrase, "all children born outside the limits of the United States who are citizens thereof," to turn on whether those children were citizens at the time of birth, not whether they are citizens at the present time).

Although petitioner invokes (Br. 14) *Carr* v. *United States*, 130 S. Ct. 2229 (2010), the Court's opinion in that case instructively distinguished between the kind of provision it was construing and the kind of provision at issue here. In *Carr*, the Court stressed that it was applying "present-tense verbs that * * * proscribe conduct on a prospective basis." *Id.* at 2236 n.5. That is, of course, not what ACCA's sentencing enhancement does, because it does not proscribe any conduct. And the Court contrasted such proscriptive (and prospective) commands with "a definitional section that merely elucidates the meaning of certain statutory terms and proscribes no conduct." *Id.* at 2237 n.6. Here, Section 924(e)(2)(A)(ii) is part of such a definitional section, where context indicates that the appropriate reference point—for identifying both the nature of the prior crime and its maximum punishment—is the time of the prior conviction.[7]

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[7] The fundamental difference between this case and *Carr* is also illustrated by the Court's reluctance there to "construe[] a present-tense verb in a criminal law to reach preenactment conduct." 130 S. Ct. at 2236. Here, no matter which construction of ACCA the Court adopts, there is no doubt that the "present-tense verb[s]" in ACCA's definition of predicate offenses will "reach preenactment conduct." *Ibid.* See, *e.g.*, *Taylor* v. *United States*, 495 U.S. 575 (1990) (involving convictions

c. Notwithstanding petitioner's reading of the assertedly "plain language" of the verb tense in ACCA (Pet. Br. 14), this Court in *Rodriquez*, *supra*, described ACCA consistent with a time-of-conviction approach to determining the maximum sentence. *Rodriquez* addressed whether the "maximum sentence" under Section 924(e)(2)(A)(ii) should account for the greater sentences under Washington law for repeat drug offenders compared to first-time offenders. Rather than looking to current state law at the time of the respondent's felon-in-possession offense or at the time of the ACCA sentencing proceeding, the Court began its analysis by describing the Washington statutes that applied "[a]t the time of respondent's drug offenses." 553 U.S. at 381. It then repeatedly used past-tense verbs to characterize the maximum term of imprisonment prescribed by those statutes, without ever mentioning whether current law was the same. See *id.* at 381 ("[R]espondent *faced* a maximum penalty of imprisonment for 10 years."), 382 ("the maximum term that respondent *faced* on at least two of the Washington charges *was* 10 years"), 383 ("there is no dispute that [the Washington statute] *permitted* a sentence of up to 10 years"), 384 ("the maximum term prescribed by Washington law for each of respondent' two relevant offenses *was* 10 years"), 393 ("we hold that the 'maximum term of imprisonment . . . prescribed by law' for the state drug convictions at issue in this case *was* the 10-year maximum set by the applica-

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from 1963 and 1971, long before ACCA was enacted). Indeed, the very nature of a recidivism provision is to look back on prior crimes and enhance punishment for the present offense because the defendant is a repeat offender. See *Gryger* v. *Burke*, 334 U.S. 728, 732 (1948) (habitual-offender sentence "is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one").

ble recidivist provision") (all emphases added). This is not to say that *Rodriquez* decided the issue in this case. But the Court's natural inclination to paraphrase in the past tense and to apply the statutes that were in effect at the time of the defendant's underlying drug offenses seriously undermines petitioner's submission (Br. 14) that ACCA's "plain language" directs a sentencing court to use "current" state law.

The rationale of *Rodriquez* further undercuts petitioner's interpretation. As the Court explained, "[i]t is hard to accept" a construction that would deem the "'maximum term of imprisonment . . . prescribed by law'" for purposes of Section 924(e)(2)(A)(ii) to be only "five years" when the defendant could in fact "ha[ve] been sentenced to, say, six years' imprisonment." 553 U.S. at 383. But, like the reading of the Ninth Circuit that the Court rejected in *Rodriquez*, that is precisely "where [petitioner's] reading of the statute leads." *Ibid.* Petitioner himself received ten-year sentences for his drug-related convictions (and, as a result of parole violations, served nearly all of that time in prison), J.A. 47-50, 53, even though he now contends that his "maximum term of imprisonment" should be deemed to be only 30 or 38 months, Pet. Br. 7 & n.3.[8] Of course, the "maximum term of imprisonment * * * prescribed" by state law may often exceed the actual sentence that a defen-

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[8] See 1/13/2009 Tr. 13 (at sentencing hearing, petitioner's counsel stated, in reference to the convictions described at J.A. 48-50, that petitioner "was sentenced to a ten year sentence and now * * * under the structured sentencing, I think the maximum somebody could possibly get * * * [is] something like 24 months"); Pet. C.A. Br. 5 (noting that petitioner received ten-year sentences for his 1992 and 1995 convictions); see also note 1, *supra* (describing calculation of sentences under North Carolina's Structured Sentencing Act).

dant received for his prior offense, but petitioner's counterintuitive position that his "maximum term" is far lower than the one that he actually could have received (and in fact did receive) remains a proposition that is "hard to accept." *Rodriquez*, 553 U.S. at 383.

***2. ACCA's overall structure reinforces the focus of the definitional provisions on the time of the prior conviction***

a. ACCA's structure strongly supports the conclusion that, throughout the definitional provisions, the present-tense verb "is" refers to the time of the prior conviction. The immediately adjacent provision, Section 924(e)(2)(B), defines "violent felony" for ACCA purposes. Like Section 924(e)(2)(A), it uses present-tense verbs. It applies to "any crime punishable by imprisonment for a term exceeding one year" that

> (i) *has* as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) *is* burglary, arson, or extortion, *involves* use of explosives, or otherwise *involves* conduct that *presents* a serious potential risk of physical injury to another[.]

18 U.S.C. 924(e)(2)(B) (emphases added). While petitioner contends that the plain meaning of the present tense of "is" in Section 924(e)(2)(A)'s definition of "serious drug offense" demands an evaluation of current state law (as opposed to state law at the time of the underlying conviction), that is not the approach that this Court has applied in determining whether a state crime "*is* burglary" for purposes of the definition of "violent

felony" in the adjoining subparagraph, 18 U.S.C. 924(e)(2)(B) (emphasis added).

In construing ACCA's definition of "violent felony," this Court has considered the time of the underlying conviction, not the time of the federal sentencing to which ACCA may apply. Thus, in *Taylor* v. *United States*, 495 U.S. 575 (1990), the question was whether the petitioner's 1963 and 1971 convictions for second-degree burglary under Missouri law were for "any crime punishable by imprisonment for a term exceeding one year * * * that * * * is burglary," 18 U.S.C. 924(e)(2)(B). Notwithstanding the present-tense verb, the Court held that whether a prior offense "is burglary" depends on the "statutory definition of the prior offense" that was in effect at the time of Taylor's earlier convictions. *Taylor*, 495 U.S. at 602. Accordingly, it remanded for a determination of which "former Missouri statutes defining second-degree burglary * * * were the bases for Taylor's prior convictions." *Ibid.* Similarly, in *James* v. *United States*, 550 U.S. 192 (2007), this Court evaluated ACCA's applicability to the versions of Florida's burglary and criminal attempt statutes that were in effect "at the time of James' [state-law] conviction." *Id.* at 197; see also *id.* at 196 (noting that James had been convicted under state-law definitions in effect in 1993).

The appearance of the same present-tense verb ("is") in the immediately adjacent provision, and this Court's interpretation of it as referring to the time of the underlying conviction, counsel strongly against petitioner's reading of Section 924(e)(2)(A)(ii). See, *e.g.*, *Nijhawan* v. *Holder*, 129 S. Ct. 2294, 2301 (2009) ("Where, as here, Congress uses similar statutory language * * * in two

adjoining provisions, it normally intends similar interpretations.").

b. Moreover, petitioner's textual argument would not apply to determining whether a prior violent offense carries the requisite sentence to qualify under the penalty component of ACCA's "violent felony" definition, because that definition does not use the present-tense verb "is." Instead, it refers to "any crime punishable by imprisonment for a term exceeding one year," 18 U.S.C. 924(e)(2)(B), without using any verb. The natural time to refer to in deciding the felony status of an offense underlying a "previous conviction" (18 U.S.C. 924(e)(1)) is the time when that conviction was entered, and petitioner can point to nothing in the text to rebut that inference. But petitioner does not suggest why Congress would have wanted to look to the time of the prior conviction to determine the punishment associated with a potential "violent felony," but to the time of the ACCA sentencing proceeding to determine the penalty associated with a potential "serious drug offense."

The statutory history suggests that Congress did not intend a different result by using the phrase "is prescribed" in ACCA's definition of "serious drug offense," compared to the unadorned word "punishable" in the definition of "violent felony." Before Congress expanded ACCA's predicate offenses to include "serious drug offense[s] and violent felon[ies]," ACCA applied to persons who had "three previous convictions * * * for robbery or burglary," and those two categories of convictions were both defined by reference to "any crime *punishable* by a term of imprisonment exceeding one year." Firearm Owners' Protection Act, Pub. L. No. 99-308, § 104(a), 100 Stat. 458 (1986) (emphasis added). Nothing in the addition of "serious drug offense[s]" to

the list of predicate ACCA offenses suggests a different temporal focus on the issue of the prior offense's degree of punishment.

The legislative history supports the conclusion that Congress intended only to expand the scope of ACCA's predicate offenses to include serious drug crimes and violent felonies other than robbery and burglary. See, *e.g.*, H.R. Rep. No. 849, 99th Cong., 2d Sess. 3 (1986) ("a consensus developed in support of an expansion of the predicate offenses to include serious drug trafficking offenses under both State and Federal law and violent felonies, generally"); see also *Taylor*, 495 U.S. at 587 (quoting same). That legislative history does not evince any expectation that inserting the word "is" would create an unusual, dynamic regime under which a prior conviction's status as a predicate offense could shift whenever the legislature changes the potential sentence for a similar offense committed at a later date (without making that change applicable to prior offenders).

***3. Evaluating the maximum penalty as of the time of the prior conviction avoids the serious practical difficulties associated with petitioner's hypothetical inquiry about current-day sentencing and better serves ACCA's purposes***

Petitioner describes his proposed rule as one that is "simple to apply" because "a federal sentencing court need only [1] identify the offense of conviction and [2] determine whether current state law prescribes a penalty of ten years or more." Br. 20, 30. Although he contrasts the administrability of his approach with that of the court of appeals (Br. 31), he does not claim that his rule is easier to apply than the one the district court applied here. Nor should he, for his approach invites

difficult conceptual and practical difficulties that do not arise when the sentencing court simply considers *both* the definition of the prior offense *and* the accompanying maximum penalty by reference to the sentence applicable to the earlier conviction.

a. Petitioner's approach presents considerable potential difficulties. As an initial matter, it requires the federal sentencing court to convert the offense of the previous conviction into whatever that offense would have been if it had, hypothetically, been committed at the time of the federal sentencing proceeding, and then determine the current maximum sentence for that offense. Petitioner sidesteps that potential pitfall for purposes of this case by observing (Br. 18) that "[t]he state law defining the [sale-of-cocaine] offenses at issue did not change in the interval between [p]etitioner's state convictions and his federal sentencing."

Petitioner's amici, however, acknowledge the "potential complexity" that would arise whenever a State "had reformulated the offense itself in some respect after the defendant's conviction." NACDL Amicus Br. 15 n.4. Although the amici assert that such complications will be "very rare" and could be "simply" handled by translating the old offense conduct into current terms, *ibid.*, the cases belie that sanguine prediction. The Fifth Circuit, when confronted with Texas's revisions to its drug laws, found that it was "impossible to reclassify [a defendant's] 1989 conviction for delivery of less than 28 grams of cocaine under the current Texas statutory scheme," because it "could fall under 3 separate provisions of the current version of" the statute defining the offense. *United States* v. *Allen*, 282 F.3d 339, 343 (2002). Accordingly, it found itself obliged to "retain the classification of [the defendant's] drug offense under the statute

in effect at the time of his conviction." *Ibid.* Similarly, the Sixth Circuit, which follows the approach proposed by petitioner, abandoned it when construing the definition of a "controlled substance offense" for the Career Offender Guideline (Guidelines §§ 4B1.1, 4B1.2(b)) in the wake of Ohio's 1996 revision of its sentencing regime for drug offenders, which moved from a system based on "unit dose amount" to one based on grams. *Mallett* v. *United States*, 334 F.3d 491, 502 (6th Cir.), cert. denied, 540 U.S. 1133 (2003). The court was unable to "determine how Mallett would now be sentenced under Ohio's revised drug laws," because "the offense for which [he] had been convicted no longer exists and no conversion between the former and amended statutes is facially apparent." *Ibid.* Thus, the court used the sentence that applied to the defendant's "controlled-substance offense as of the time of the state-court conviction." *Id.* at 503.

If such difficulties can arise when a State does something as simple as change its drug-quantity tables, complications will only multiply when a State, for instance, adds a new element to an offense definition. Petitioner's amici forthrightly contend that the addition of a new element to an offense definition—one that was not "necessarily established in the earlier conviction"—would mean that there would not be "any" current offense that could be identified as comparable, which would mean that there would be "no predicate offense under ACCA." NACDL Amicus Br. 15 n.4. Congress, however, based ACCA's enhancement on actual convictions and could not have expected courts to treat those convictions as if they had simply disappeared.

Congress has provided for only a limited number of ways that a prior "conviction" can cease to be a conviction for purposes of the Firearms Chapter of Title 18

(which includes ACCA). See 18 U.S.C. 921(a)(20) ("Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter[.]"). A change in the definition of the elements of an offense (or in the punishment applicable to future offenses) is not among them. See *Custis* v. *United States*, 511 U.S. 485, 491 (1994) ("The provision that a court may not count a conviction 'which has been . . . set aside' creates a clear negative implication that courts *may* count a conviction that has *not* been set aside.").[9] Cf. *Lewis* v. *United States*, 445 U.S. 55, 60, 61 n.5 (1980) (holding, in the context of a statutory predecessor to Section 922(g)(1), that "a felony conviction imposes a firearm disability" which "should cease only when the conviction upon which that status depends has been vacated," and therefore the disability applied "while a felony conviction was pending on appeal," even if it was later reversed). Under petitioner's approach, if a State decided to legalize certain drugs and decriminalize their use and distribution, there could be no "maximum term of imprisonment" for former offenses involving those drugs. Accordingly, "previous convictions" for those offenses would vanish for ACCA purposes—even if the State had deliberately preserved those prior convictions as a matter of state law under a savings statute analogous to 1 U.S.C. 109. It seems unlikely that Congress intended such an oddity.

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[9] Although *Custis* expressly decided the issue only with respect to convictions that satisfy ACCA's "violent felony" definition, see 511 U.S. at 491, the language in Section 921(a)(20) is broad enough to extend to all convictions relevant to Section 924(e), and there is no reason to think Congress intended pardons and expungements to extinguish, for ACCA purposes, violent felonies but not serious drug offenses.

In addition, because petitioner's reading allows ACCA's applicability to depend on the happenstance of the timing of the federal sentencing proceeding (rather than the timing of the defendant's state and federal criminal offenses), it could produce arbitrary results. Because of different docket pressures, the availability of defense counsel, and other reasons, the timing of sentencing may vary considerably from district to district and case to case. While some variation is inevitable, it would be troubling if two defendants who each violated Section 922(g) on the same day and who each had an identical criminal history (down to the dates on which they committed each of their prior offenses) could receive substantially different federal sentences solely because one of them happened to be sentenced for his Section 922(g) offense after the State legislature had—long after the predicate offenses were committed—amended the maximum punishment in a way that applied only to crimes committed at later dates.[10]

[10] Petitioner makes a superficially similar point. He claims (Br. 31) that it would be "arbitrary" to distinguish between "[t]he unfortunate defendant who commits [an] offense one day prior to the state law's effective date," and another defendant who "commits the same crime one day later." There is, however, a critical difference between those two defendants, because the legislature changed the punishment after the first one acted and before the second one did. Whether the penalty for an offense goes up or down on such an occasion, it is very often the case that each defendant is subjected to the punishment that was applicable at the time of his offense, not the amended penalty. See, *e.g.*, *Warden* v. *Marrero*, 417 U.S. 653, 661 (1974) (noting that the federal savings statute, 1 U.S.C. 109, "has been held to bar application of ameliorative criminal sentencing laws repealing harsher ones in force at the time of the commission of an offense"). In light of that long-established and rational practice, there is no merit to petitioner's suggestion (Br. 32 & n.7) that "serious equal protection [and due process]

b. The government's reading avoids all of the foregoing difficulties and inconsistencies because it does not require the court to translate prior offense conduct into current-day terms; it permits a defendant to know even before he commits his Section 922(g) offense whether he "has three previous convictions" that would trigger an ACCA enhancement; and it does not allow a defendant's statutory maximum and minimum sentences to fluctuate depending on the date of his federal sentencing. Similarly, to the extent that ACCA is intended to have a specific-deterrence effect on a class of felons with prior convictions, relying on the maximum sentences associated with those offenses at the time of their prior convictions would further that purpose. An individual is more likely to know the statutory maximum to which he was actually exposed in a prior prosecution than he is to know how long the sentence might "now" be for somebody who committed the same offense at a more recent time.

Petitioner's claims of other purported difficulties presented by the government's approach rest on unwarranted assumptions.

Petitioner suggests (Br. 32-33), for instance, that it might be difficult to determine when a prior offense occurred because that fact "is not always apparent on the face of the conviction" and "in all likelihood will not have been litigated at the state level." Petitioner's speculation about the difficulty of determining the time of the prior offense is misplaced because—wholly apart from the question of calculating the maximum term of imprisonment associated with a prior offense—ACCA requires

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concerns" arise when a legislature changes the punishment for an offense solely on the basis of when that offense was committed.

the sentencing court to determine whether the defendant's "three previous convictions" were "committed on occasions different from one another." 18 U.S.C. 924(e)(1). It is difficult to imagine how such a determination could be made without knowing *when* the prior offenses were committed. Similarly, this Court has consistently assumed that courts will look to the "statutory elements" of an offense to determine whether an earlier conviction qualifies as a violent felony under ACCA. See *Shepard* v. *United States*, 544 U.S. 13, 16 (2005) (describing *Taylor*, *supra*). That inquiry necessarily presumes an ability to determine which statutory regime was in effect at the time of the offense, which again depends on knowing when the offense occurred.[11]

c. The administrability of the government's approach is also confirmed by *Rodriquez*, where the Court expressly rejected arguments that it might "often be difficult to determine whether a defendant faced the possibility of a recidivist enhancement in connection

[11] Petitioner suggests (Br. 33) that the need to determine at sentencing when a prior offense occurred might present a Sixth Amendment problem in light of *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000), but lower courts have not found any Sixth Amendment problems in judges' applying ACCA's different-occasions requirement. See, *e.g.*, *United States* v. *Wilson*, 406 F.3d 1074, 1075 (8th Cir.), cert. denied, 546 U.S. 917 (2005); *United States* v. *Burgin*, 388 F.3d 177, 186 (6th Cir. 2004), cert. denied, 544 U.S. 936 (2005); *United States* v. *Morris*, 293 F.3d 1010, 1013 (7th Cir.), cert. denied, 537 U.S. 987 (2002); *United States* v. *Santiago*, 268 F.3d 151, 156-157 (2d Cir. 2001), cert. denied, 535 U.S. 1070 (2002). Cf. *United States* v. *Grisel*, 488 F.3d 844, 847 (9th Cir.) (en banc) (rejecting defendant's "assertion that the dates of his prior convictions are not a part of the 'fact' of his prior convictions. When * * * the face of the document demonstrating [d]efendant's prior conviction includes the date of the offense, the date is just as much a part of the plea as is the nature of the offense described on the face of the document."), cert. denied, 552 U.S. 970 (2007).

with a past state drug conviction." 553 U.S. at 388. As the Court explained, such problems were "greatly exaggerate[d]," because the sentencing court would often be able to determine that fact from "the length of the sentence imposed" in the earlier proceeding; from the judgment of conviction, which "will sometimes list the maximum possible sentence"; or from "the plea colloquy," which "will very often include a statement by the trial judge regarding the maximum penalty." *Id.* at 388-389.[12] To the extent that the Court thought that it would be appropriate to rely on such documents to infer whether a defendant was exposed to a recidivist enhancement, it follows *a fortiori* that they could suffice to establish the maximum penalty associated with the offense.

***4. The time of the prior conviction is the reference point for similar inquiries in other statutes addressing recidivists***

The government's reading is also supported by other federal statutes that impose restrictions upon or alter punishments for individuals who have prior felony convictions. With few exceptions, such provisions are typically phrased like ACCA's definition of "violent felony," referring to an offense or crime "punishable by imprisonment for" a term exceeding one year. *E.g.*, 18 U.S.C. 175b(d)(2)(B), 842(d)(2), 842(*i*)(1), 922(d)(1), 922(g)(1).

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[12] As the Court noted in *Rodriquez*, 553 U.S. at 389 n.3, North Carolina is among the many States that, like the federal government, require a trial judge accepting a guilty plea to "[i]nform[ ]" the defendant "of the maximum possible sentence on the charge for the class of offense for which the defendant is being sentenced." N.C. Gen. Stat. § 15A-1022(a)(6) (2009); see also Fed. R. Crim. P. 11(b)(1)(H). Here, petitioner pleaded guilty to his prior drug offenses. J.A. 47-50, 53.

Petitioner does not suggest that those provisions are susceptible to his construction, which is based on the presence of the word "is." A handful of outlier statutes, like ACCA's definition of "serious drug offense," do include the verb "is." But they do not assist petitioner, because they have not been construed as referring to the time of federal sentencing either. See, *e.g.*, 21 U.S.C. 802(44) (defining "felony drug offense" as "an offense that is punishable by imprisonment for more than one year" under federal, state, or foreign drug laws); *United States* v. *McCaney*, 177 Fed. Appx. 704, 709-710 (9th Cir.) ("Nor is there any support for reading § 802's definition of felony drug offense as referring to how the offense is presently punishable, as opposed to the maximum punishment which could be imposed at the time of conviction."), cert. denied, 549 U.S. 1097 (2006).

One particularly telling example is the Federal Three Strikes Law, 18 U.S.C. 3559(c), which provides for mandatory life imprisonment for a defendant who is convicted of a "serious violent felony" if that person has previously been convicted of, *inter alia*, "one or more serious violent felonies and one or more serious drug offenses." 18 U.S.C. 3559(c)(1)(A)(ii). The term "serious drug offense" is defined differently for purposes of Section 3559(c) than it is for ACCA. For purposes of the Three Strikes Law, it is defined as

> (i) an offense that *is punishable* under [21 U.S.C. 841(b)(1)(A) or 848] or [21 U.S.C. 960(b)(1)(A)]; or
>
> (ii) an offense under State law that, had the offense been prosecuted in a court of the United States, *would have been punishable* under [21 U.S.C. 841(b)(1)(A) or 848] or [21 U.S.C. 960(b)(1)(A)].

18 U.S.C. 3559(c)(2)(H) (emphases added). The amici supporting petitioner cite the second clause of that definition (the one that asks whether state-law offenses "would have been punishable" had they been prosecuted under specified federal statutes) as evidence that Congress knows how to "make[] clear its intention to look back to the time of the prior offense." NACDL Amicus Br. 11. But the first clause of the definition (referring to federal offenses) applies to "an offense that *is punishable*" under the same specified federal statutes (emphasis added). Petitioner and his amici would presumably read the present tense of "is punishable" as referring to the time of the Three Strikes sentencing proceeding. But it would be highly anomalous to measure the seriousness of prior *federal* drug offenses in the present and that of *state* drug offenses in the past. Recognizing that both provisions, despite the use of the term "is" in one of them, refer to the time of the earlier conviction—as the government urges for purposes of ACCA's own definition of serious drug offense—would unify the two portions of the Three Strikes definition. Cf. *United States* v. *Romero*, 122 F.3d 1334, 1342 (10th Cir. 1997) ("In determining whether a felony satisfies the ten-year maximum penalty requirement" of the Three Strikes Law's definition of "serious violent felony," the relevant inquiry is "the penalty at the time of the conviction, not in 1994 when Congress enacted the Three Strikes Law."), cert. denied, 523 U.S. 1025 (1998).

In the state and federal cases that appear to have addressed a similar question, courts have construed definitions in recidivist statutes that use the word "is" (to describe the relevant punishment threshold that a prior offense must cross) to refer to the time of the earlier conviction rather than the second proceeding. Thus, in

*State* v. *Vainio*, 466 A.2d 471 (1983), cert. denied, 467 U.S. 1204 (1984), the Supreme Judicial Court of Maine construed a state statute prohibiting gun possession by any person "who has been convicted of any crime * * * which *is punishable* by one year or more imprisonment." *Id.* at 473 (emphasis added). It held the "natural import" of the provision to refer to "crimes which *at the time of their commission in the jurisdiction where committed* carried the potential punishment by one year or more imprisonment." *Id.* at 474.

Similarly, in *United States* v. *McGlory*, 968 F.2d 309, cert. denied, 506 U.S. 956, and 506 U.S. 1009 (1992), and 507 U.S. 962 (1993), the Third Circuit construed an earlier definition of "felony drug offense," which referred to a drug offense "that is a felony * * * under any law of a State," 21 U.S.C. 841(b)(1)(A) (1988). The court held that an offense qualified if it was a felony as of the time of the defendant's December 1971 conviction, even though "if he were convicted of the same conduct today, that conduct would only amount to a misdemeanor conviction under Pennsylvania law." 968 F.2d at 348-350.[13]

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[13] It has long been the case that, for purposes of most state habitual-offender statutes triggered by an earlier felony conviction, the predicate offense's status as a felony was typically evaluated as of the time of the predicate conviction, not the time of the subsequent offense or prosecution. See R.P. Davis, Annotation, *Determination of Character of Former Crime as a Felony, So as To Warrant Punishment of an Accused as a Second Offender*, 19 A.L.R. 2d 227, 235 (1951) ("The cases agree on the point that the fact that the previous conviction of an offense which at the time of such conviction was a felony * * * will not preclude its subsequent use under such statutes to enhance the punishment of one subsequently convicted of a felony, even though prior to the commission of the subsequent offense the prior offense was reduced from the grade of felony to misdemeanor.").

### B. Even If The Maximum Penalty Associated With A Prior Conviction Should Be Determined As Of The Time Of The ACCA Proceeding, The Nonretroactive Nature Of Intervening Changes In State Law Should Be Taken Into Account

Even assuming that the relevant time for determining the "maximum term of imprisonment" associated with an individual's prior convictions is the time of the Section 922(g) prosecution at which an ACCA sentence enhancement might be imposed, petitioner cannot prevail unless the maximum penalty under "current state law" should be determined without regard to whether current law "applies retroactively to the date the defendant committed the state offense," Pet. Br. 15 (capitalization modified). To that end, petitioner makes three arguments that are inconsistent but ultimately irrelevant, because they do not address the only question that matters under ACCA. The sole relevant question is *what* the "maximum term of imprisonment * * * prescribed by [state] law" for the defendant's prior offense actually is—not *why* the State decided to change a maximum sentence without making that change applicable to previously committed offenses (like petitioner's).

Petitioner's attempt to divine the motivations for North Carolina's shift to a structured sentencing regime and its decision to make that regime applicable only to new offenses bears no relation to the text of ACCA. Congress has specified that the seriousness of a defendant's drug offense is to be judged by whether it carries "a maximum term of imprisonment of ten years or more." In relying on that measure, "Congress chose to defer to the state lawmakers' judgment." *Rodriquez*, 553 U.S. at 388. That approach will undoubtedly reflect fluctuations over time in the degree of seriousness at-

tached to particular offense conduct, as state legislators make different policy judgments. But Congress did not intend that federal courts would look behind those state judgments or inquire whether the old or new sentencing regime better reflects the State's "normative judgment" (Pet. Br. 21). Rather, if a sentencing regime remains applicable to a defendant, the maximum sentence for his offense under that regime determines ACCA's coverage.

1. Petitioner first contends (Br. 22) that a State's decision about whether to make a sentencing law retroactive "is wholly unrelated to the State's view of the seriousness of the offense," because there are usually reasons other than the offense's perceived seriousness that counsel against making a change retroactive. While that may be true, it does not change the reality that the intervening changes in the law on which petitioner wants to rely are inapplicable to the "serious drug offense[s]" that he "committed on occasions different from one another" in 1991, 1992, and 1994. 18 U.S.C. 924(e)(1).[14]

[14] Echoing the Second Circuit's discussion in *Darden*, petitioner contends that "a retroactivity determination is remedial in nature" and does not concern "the temporal scope of the [underlying] legal right." Br. 23-24 (citing *Darden*, 539 F.3d at 127-128). That proposition, however, derives entirely from the discussion in *Danforth* v. *Minnesota*, 552 U.S. 264 (2008), which has no relevance here. Although *Danforth* contains statements that tie retroactivity to "the availability or nonavailability of remedies," those statements arose in the context of "[this Court's] jurisprudence concerning the 'retroactivity' of 'new rules' *of constitutional law*." *Id.* at 290-291 (emphasis added). Constitutional rules originate from "the Constitution itself, not [from] any judicial power to create new rules of law," which means that they "necessarily pre-exist[] [this Court's] articulation" of them. *Id.* at 271. That constitutional paradigm, however, is irrelevant to the question of whether North Carolina's new sentencing regime should be retroactive. Neither petitioner nor any other offender had a "necessarily pre-exist[ing]" right (*id.* at 271) to be sentenced according to the Structured Sentenc-

2. Petitioner next contends (Br. 26-28) that the prospective changes to maximum sentences introduced by North Carolina's structured sentencing regime do not reflect a judgment that earlier offenses were "categorically more serious" than later ones. Whether or not that is so, it does not change the inquiry for offenses to which the structured sentencing regime does *not* apply. ACCA does not invite a court to ask anything other than what sentence "is prescribed by law" for the prior offenses in question. If the "current" sentencing regime does not apply to offenses that were committed before it became effective, then it does not reduce the relevant maximum term of imprisonment.

3. Finally, petitioner suggests (Br. 29-30) it is "[i]mportant[]" that "North Carolina makes the state's current law the measure of an offense's seriousness when that offense is considered for recidivist purposes" (by assigning point levels to prior convictions for calculating the "prior record level" on the horizontal axis of the felony punishment chart). While Congress accepted state judgments about maximum punishments as the measure of an offense's seriousness, *Rodriquez*, 553 U.S. at 388, it did not incorporate state-law viewpoints on how prior convictions are to be treated under state recidivism statutes. ACCA reflects a federal judgment about recidivism, *i.e.*, "the special danger created when a particular type of offender—a violent criminal or drug trafficker—possesses a gun." *Begay* v. *United States*, 553 U.S. 137, 146 (2008). The manner in which North Carolina treats

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ing Act before it went into effect. That Act was indisputably a creature of the state legislature, which had the correlative power to create rules about its retroactive application (subject to the limits imposed by the Ex Post Facto Clause applicable to the States, U.S. Const. Art. I, § 10, Cl. 1).

its convictions for recidivism purposes is irrelevant in applying ACCA.

The irrelevance of North Carolina's own recidivism calculations is demonstrated by two disparities between their operation and effect under state law and the result petitioner urges under ACCA. First, the North Carolina statute requires the prior offense to be classified as of the date of the current offense, not the date of the recidivist sentencing proceeding that petitioner contends should be used under ACCA. See N.C. Gen. Stat. § 15A-1340.14(c) (2009) ("[T]he classification of a prior offense is the classification assigned to that offense at the time the offense for which the offender is being sentenced is committed."). Second, under the structured sentencing regime, the effects of intervening reclassifications of North Carolina felonies are far less significant than the one that petitioner seeks under ACCA. The State uses current felony classifications when counting points associated with prior record offenses (the point total plays a role that is roughly analogous to a defendant's criminal history category under the federal sentencing guidelines). But even with respect to those prior offenses, most felony reclassifications have *increased*, not decreased, their severity, and usually by only one or two levels. No reclassification has had the effect (as petitioner seeks here) of having the maximum sentence associated with a prior offense drop from ten years to 38 months.[15]

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[15] Out of 48 felony reclassifications identified on the current felony-classification chart, only one of them decreased the severity of the classification ("Statements under oath," a Class I felony, was previously part of "Perjury," a Class F felony). And only three offenses were made more severe by more than two levels (manufacture of methamphetamine; violations of sex-offender-registration obligations; and a

### C. In This Case, The Maximum Sentences For Petitioner's Previous Cocaine Offenses Were At Least Ten Years, Whether They Are Judged As Of The Time Of Those Convictions Or As Of The Time Of His Federal Proceeding

1. Petitioner concedes, as he must, that at the time of his prior convictions in 1992 and 1995, the maximum term of imprisonment for his offenses was ten years. Br. 7; see also p. 4, *supra*. Indeed, petitioner actually received ten-year sentences. See p. 22 & note 8, *supra*. Although North Carolina later reduced the maximum penalties associated with similar offenses if they were committed on later dates, it has not made those changes retroactive to offenses (such as petitioner's) that were committed before October 1, 1994. See N.C. Gen. Stat. § 15A-1340.10 (2009). Thus, even if petitioner were to be sentenced by a state court today for his prior convictions, he would still be subject to a maximum term of imprisonment of at least ten years.

Accordingly, petitioner cannot prevail unless this Court accepts both of his contentions and decides that the maximum term of imprisonment for purposes of Section 924(e)(2)(A)(ii) needs to be determined as if his prior offense had not been committed until the time of his federal sentencing. The Court should decline that invitation to engage in a hypothetical inquiry so

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second or subsequent offense of stalking). The great majority of the reclassifications have been one- or two-level *increases* in severity. See North Carolina Sentencing & Policy Advisory Comm'n, *Structured Sentencing: Training and Reference Manual*, Supp. 2, at 3, 6, 24 (2010), http://www.nccourts.org/Courts/CRS/Councils/spac/Documents/App-f10.pdf. The cited examples omit misdemeanors that have been reclassified as felonies (which also result in more severe treatment for criminal-history purposes, and thus have an effect that is the opposite of what petitioner seeks).

divorced from the circumstances of petitioner's actual prior convictions and associated sentence exposure. Cf. *Carachuri-Rosendo* v. *Holder*, 130 S. Ct. 2577, 2586-2588 (2010) (rejecting a "hypothetical approach" to determining whether an alien had been convicted of crime for which the maximum term of imprisonment is more than one year).

2. Despite petitioner's cursory suggestion to the contrary (Br. 30), principles of lenity provide no basis for a different conclusion. Resort to those principles is appropriate only when there is a "grievous ambiguity" in the statutory text, such that, "after seizing everything from which aid can be derived, . . . [the Court] can make no more than a guess as to what Congress intended," *Muscarello* v. *United States*, 524 U.S. 125, 138-139 (1998) (internal quotation marks and citations omitted), and "the equipoise of competing reasons cannot otherwise be resolved," *Johnson* v. *United States*, 529 U.S. 694, 713 n.13 (2000). That is not the case here. In light of the context and structure of ACCA (as well as other federal recidivism provisions), petitioner's reading of Section 924(e)(2)(A)(ii) is not in "equipoise" with the approach of either the district court or the court of appeals in this case.

In any event, adopting petitioner's reading would not effectuate the underlying purposes of the rule of lenity. To the extent it is intended to assure that a criminal defendant has "fair warning * * * of what the law intends to do if a certain line is passed," *McBoyle* v. *United States*, 283 U.S. 25, 27 (1931), petitioner's reading of ACCA is uniquely unsuited to provide such warning, because it makes it impossible to know what the statutory minimum and maximum punishments for a Section 922(g) offense will be until long after the offense

is completed. In addition, as a practical matter, it is reasonable to assume that a convicted felon—even one who is familiar with ACCA—is more likely to know what his maximum potential sentence for a state-law offense was at the time of his former conviction than to know how the legislature (perhaps in a State where he no longer resides) may since have changed the sentence for individuals who committed such an offense at a later date. Similarly, there is little reason to believe that petitioner's reading would generally benefit, as opposed to harm, criminal defendants. Legislatures are at least as likely to increase as to decrease the maximum terms of imprisonment associated with particular crimes.[16] Because petitioner's reading would often work against Section 922(g) defendants, principles of lenity are inapplicable. See *United States* v. *O'Neil*, 11 F.3d 292, 301 n.10 (1st Cir. 1993) (declining to invoke lenity because "[d]epending on the facts of any particular defendant's situation, a generous reading of the [statutory] provision can produce either a harsher or a more lenient result than a cramped reading will produce"); *McGlory*, 968 F.2d at 355-356 (Becker, J., concurring) (finding present-tense verb in a recidivism statute to be ambiguous but refusing to adopt the defendant's interpretation because it "is not necessarily more lenient to the entire class of affected criminal defendants").[17]

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[16] Since the shift to structured sentencing (which petitioner characterizes as having been "essentially punishment neutral," Br. 28), the great majority of North Carolina's reclassifications of felonies have made them more rather than less severe. See note 15, *supra* (describing reclassifications shown on current felony-classification chart).

[17] Even if the Ex Post Facto Clause applicable to Congress (U.S. Const. Art. I, § 9, Cl. 3) would prevent a defendant from becoming newly eligible for an ACCA sentence enhancement as a result of changes in

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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the law that occurred after he committed the Section 922(g) violation, it would not do so for changes in the law—such as those in this case—that occurred before the federal offense. Moreover, there is no evidence that Congress intended for ACCA to incorporate the one-way, defendant-friendly ratchet that petitioner's time-of-federal-sentencing rule would produce for changes in state-law maximums that occur between the Section 922(g) offense and the federal sentencing for that offense.

## APPENDIX

1. 18 U.S.C. 921 provides in pertinent part:

**Definitions**

(a) As used in this chapter—

* * * * *

(20) The term "crime punishable by imprisonment for a term exceeding one year" does not include—

(A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or

(B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.

What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess or receive firearms.

* * * * *

2. 18 U.S.C. 922 provides in pertinent part:

**Unlawful acts**

* * * * *

(g) It shall be unlawful for any person—

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

* * * * *

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

* * * * *

3. 18 U.S.C. 924 provides in pertinent part:

**Penalties**

* * * * *

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46, for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

* * * * *