No. 22-

IN THE

Supreme Court of the United States

JUSTIN RASHAAD BROWN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Armed Career Criminal Act provides that felons who possess a firearm are normally subject to a maximum 10-year sentence. But if the felon already has at least three "serious drug offense" convictions, then the *minimum* sentence is fifteen years.

Courts decide whether a prior state conviction counts as a serious drug offense using the categorical approach. That requires determining whether the elements of a state drug offense are the same as, or narrower than those of its federal counterpart. If so, the state conviction qualifies as an ACCA predicate.

But federal drug law often changes—as here, where Congress decriminalized hemp, narrowing the federal definition of marijuana. If state law doesn't follow suit, sentencing courts face a categorical conundrum. Under an earlier version of federal law, the state and federal offenses match—and the state offense *is* an ACCA predicate. Under the amended version, the offenses *do not* match—and the state offense *is not* an ACCA predicate. So the version of federal law that the court chooses to consult dictates the difference between serving a 10-year maximum or a 15-year minimum.

The question presented is:

Which version of federal law should a sentencing court consult under ACCA's categorical approach?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Justin Rashaad Brown, an inmate incarcerated at Federal Correction Institution Schuylkill in Minersville, Pennsylvania.

Respondent is the United States of America.

There are no corporate parties involved in this case.

RULE 14.1(B)(III) STATEMENT

This case arises from the following proceedings in the United States District Court for the Middle District of Pennsylvania and the United States Court of Appeals for the Third Circuit:

United States v. *Brown*, 47 F.4th 147 (3d Cir. 2022)

United States v. *Brown*, No. 1:18-CR-0108 (M.D. Pa. Mar. 10, 2021)

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

Justin Rashaad Brown respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at *United States* v. *Brown*, 47 F.4th 147 (3rd Cir. 2022) and is reproduced in the appendix to this petition at Petition Appendix 1a. The judgement of the United States District Court for the Middle District of Pennsylvania is reproduced at Pet. App. 17a.

JURISDICTION

The court of appeals entered final judgment on August 29, 2022. On November 22, 2022, Justice Alito extended the time within which to petition for a writ of certiorari to and including December 28, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 922(g)(1), (9) of Title 18 of the United States Code provides:

> It shall be unlawful for any person . . . 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 which has been shipped or transported in interstate or foreign commerce.

Section 924(e)(1) of Title 18 of the United States Code provides:

> 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).

Section 924(e)(2)(A)(ii) of Title 18 of the United States Code provides:

> As used in this subsection . . . the term "serious drug offense" means . . . an offense under State law, involving manufacturing, distributing, or possessing with intent to 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.

INTRODUCTION

Ninety miles separate the federal courthouses in Philadelphia and Baltimore. For felon-in-possession offenders in Philadelphia, those 90 miles can mean up to fifteen additional years behind bars because the courts of appeals have split over how to apply the Armed Career Criminal Act.

ACCA forbids persons with felony convictions from possessing a firearm. See 18 U.S.C. § 922(g). Normally, the maximum penalty is ten years. *Id.* § 924(a)(2). But things are different for repeat offenders: the *minimum* penalty is fifteen years for those convicted of three or more "serious drug offenses." *Id.* § 924(e). To decide whether a prior state conviction counts as a "serious drug offense," courts use the categorical approach. See *Taylor* v. *United States*, 495 U.S. 575, 600 (1990). That requires comparing federal law to state law to determine whether the elements of a state drug offense are "the same as, or narrower than" those of its federal counterpart. *Mathis* v. *United States*, 579 U.S. 500, 519 (2016). If so, the state conviction counts for sentence-enhancement purposes.

But federal drug law often changes—as happened here, where Congress narrowed the federal definition of marijuana by decriminalizing hemp. And when state law doesn't change in lockstep, courts applying the categorical approach must decide which version of federal law to consult. If the court consults the older version, the state and federal offenses match, and the state conviction is an ACCA predicate. But if the court consults the amended version, the offenses do not match—so the state conviction does not count under ACCA. Here, that choice spells the difference between a ten-year maximum and a fifteen-year minimum.

The courts of appeals are split three ways on which version of federal law to consult. In the Fourth Circuit, courts look to the version of federal law in effect at the time of federal sentencing. That approach tallies with the Sentencing Guidelines' analogous career-offender enhancement, which "use[s] the Guidelines Manual in effect on the date that the defendant is sentenced." U.S.S.G § 1B1.11(a). By contrast, the Third, Eighth, and Tenth Circuits apply the version of federal law in effect at the time of the felon-in-possession offense. Here, that led the Third Circuit to impose a fifteen-year mandatory minimum based on a now-defunct version of federal law. Meanwhile, the Eleventh Circuit follows a different approach altogether—looking to the version of federal law in effect at the time of the underlying state conviction.

The decision below applied an outdated version of federal law based on the federal saving statute, 1 U.S.C. § 109, and this Court's decision in *Dorsey* v. *United States*, 567 U.S. 260 (2012). That was wrong on both counts. The saving statute says that when Congress repeals a law, penalties incurred under that law remain in effect. But criminal penalties don't attach before a defendant pleads guilty or is convicted. And here, Mr. Brown pleaded guilty *after* Congress changed the law—so the saving statue doesn't apply. Nor does *Dorsey* support the Third Circuit's approach. Properly read, that decision favors applying federal law as it stood at the time of sentencing.

This Court should not permit incarcerating a federal defendant for an additional fifteen years just because he was sentenced in Philadelphia rather than Baltimore. Nor should the Court allow different constructions of the same statute when a fifteen-year enhancement hangs in the balance.

STATEMENT OF THE CASE

A. Legal background

1. 18 U.S.C. § 922(g) bans firearm possession by various classes of persons, including any felon "who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year."

2. ACCA imposes a mandatory-minimum sentence of fifteen years for § 922(g) violators with three previous "serious drug offense" or "violent felony" convictions. 18 U.S.C. § 924(e).

3. Sentencing courts use the categorical approach to determine whether a prior conviction counts as a "violent felony" or "serious drug offense" under ACCA. See *Taylor*, 495 U.S. at 600. Under the categorical approach, "[c]ourts must ask whether the crime of conviction is the same as, or narrower than, the relevant generic offense" or other federal law comparator. *Mathis*, 579 U.S. at 519. If the federal offense is narrower than the state offense, the previous state conviction does not count as an ACCA predicate offense for sentence-enhancement purposes.

4. The Agriculture Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat. 4490 (2018), modified the federal Controlled Substances Act, 21 U.S.C. § 802, by removing hemp from the federal ban on marijuana. 21 U.S.C. § 802(16)(B).[1]

5. As a result, the federal Controlled Substances Act is now categorically narrower than state laws that still

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[1] "Hemp" is defined as "the plant Cannabis sativa L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis." 7 § U.S.C. § 1639o(1).

criminalize all parts and derivatives of the cannabis plant. See Pet. App. 7a ("Pennsylvania's definition of marijuana is now broader than its federal counterpart."). In ACCA cases, then, the categorical approach now requires courts to avoid counting state marijuana convictions as "serious drug offenses" if the state law encompassed hemp at the time of the state conviction.

6. But courts have split on which version of the Controlled Substances Act is the proper federal comparator for sentencing a particular class of offenders: defendants with prior state marijuana convictions who violated 922(g) before Congress decriminalized hemp but were convicted and sentenced for their 922(g) violation after decriminalization. For them, which version of the Controlled Substances Act applies is critical. If the sentencing court compares the applicable state statute to federal law as it stands at sentencing, the applicable state statute is categorically broader—rendering an ACCA enhancement unlawful. But if the court compares the relevant state statute to federal law in place at the time of the 922(g) offense, then the prior state convictions will qualify as "serious drug offenses"—requiring an ACCA enhancement.

B. Factual and procedural background

1. In November 2016, Mr. Brown was arrested after police found cocaine, money, and a firearm in his apartment. Pet. App. 3a. He was later indicted under 18 U.S.C. § 922(g) for possessing a firearm. *Id.*

2. Shortly after Mr. Brown's indictment, Congress enacted the Agriculture Improvement Act. That statute amended the federal Controlled Substances Act—narrowing the federal definition of marijuana by decriminalizing hemp.

3. Mr. Brown then pleaded guilty to the section 922(g) offense in July 2019. *Id.* Normally, a felon-in-

possession conviction carries a maximum ten-year sentence. See 18 U.S.C. § 924(a)(2). But the sentencing court applied an ACCA enhancement based on Mr. Brown's prior Pennsylvania drug convictions: one for delivering cocaine, and four for possessing marijuana with intent to deliver. As a result, Mr. Brown faced a fifteen-year mandatory-minimum. *Id.* § 924(e)(1).

4. Mr. Brown objected to the ACCA enhancement. In his view, the Pennsylvania marijuana convictions could not count as "serious drug offenses" under ACCA because Pennsylvania forbids conduct (hemp possession) that the federal government does not. Specifically, whereas the Agriculture Improvement Act decriminalized hemp, the relevant Pennsylvania stature still outlaws it—making Pennsylvania law categorically broader than its federal counterpart. The district court disagreed and sentenced Mr. Brown to 180 months, the mandatory minimum. Pet. App. 3a.

5. On appeal, Mr. Brown argued that the district court erred by consulting the wrong version of federal law. Urging the court to "look to the Sentencing Guidelines to decide the comparison time question under the ACCA," Mr. Brown argued that the proper comparator was the version of federal law in effect "at the time of federal sentencing." *Id.* at 7a, 12a. In particular, he highlighted U.S.S.G. § 1B1.11(a), which requires sentencing courts to "use the Guidelines Manual in effect on the date that the defendant is sentenced." Multiple circuits have read that rule to require a time-of-sentencing approach when applying the Guidelines' career-offender enhancement. *Id.* at 13a (citing *United States* v. *Abdulaziz*, 998 F.3d 519, 521–22 (1st Cir. 2021); *United States* v. *Bautista*, 989 F.3d 698, 701 (9th Cir. 2021)).

6. The Third Circuit disagreed. The court conceded that Pennsylvania's marijuana statute is now categorically broader than the federal Controlled Substances Act. See Pet. App. 7a. But it held that the federal saving statute[2] required it to apply the version of federal law in effect at the time of the section 922(g) offense—before Congress decriminalized hemp. *Id.* at 16a. The court thus affirmed Mr. Brown's ACCA enhancement.

REASONS FOR GRANTING THE PETITION

I. The courts of appeals are split three ways on which version of federal law to apply under ACCA's categorical approach.

Five circuits have split three ways on the question presented. In the Fourth Circuit, courts apply the categorical approach using the version of federal law in effect at the time of sentencing. In the Third, Eighth, and Tenth Circuits, courts follow a different rule—looking to federal law at the time of the firearm offense. And the Eleventh Circuit takes a different approach altogether, looking to federal law at the time of state conviction. Meanwhile, even circuits that agree on the same rule can't agree on the same rationale. One invokes the Sentencing Guidelines. Another looks to the saving statute. A third talks about due process. And yet another points to a decision by this Court. The split is entrenched and deepening, and there is no reason to think that the lower courts will resolve it on their own.

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[2] 1 U.S.C. § 109 (providing that the "repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide").

A. The Fourth Circuit looks to federal law at the time of sentencing.

The Fourth Circuit has held that ACCA's categorical analysis turns on federal law in effect "at the time of [the defendant's] sentencing." *United States* v. *Hope*, 28 F.4th 487, 504 (4th Cir. 2022).

Soterio Hope illegally possessed a firearm before Congress enacted the Agriculture Improvement Act. *Id.* at 492. Then, after Congress changed the law in 2018, Hope pleaded guilty and was sentenced in 2020. *Id.* at 493. At sentencing, Hope argued that his 2013 South Carolina marijuana convictions could not be ACCA predicates because the South Carolina statute was now categorically broader than federal law. *Id.* at 493–94. The district court disagreed, applying an ACCA enhancement and imposing a fifteen-year mandatory-minimum sentence. *Id.*

The Fourth Circuit reversed. In the court's view, the proper categorical analysis was to "compare the definition of 'marijuana' under federal law at the time of Hope's [firearm] sentencing" in 2020 with "South Carolina's definition of 'marijuana' at the time he was sentenced" in 2013. *Id.* at 504. That was so, the court reasoned, in light of the Sentencing Guidelines' requirement that courts use the sentencing manual "in effect on the date that the defendant is sentenced." *Id.* at 505 (quoting U.S.S.G. § 1B1.11). Under that approach, the Fourth Circuit found that Hope's marijuana convictions were "*not* a categorical match" because the Agriculture Improvement Act had dropped hemp from the federal schedule, making South Carolina law categorically broader than federal law. *Id.* at 493–94, 508.

The First Circuit and the Ninth Circuit have both endorsed *Hope*'s time-of-sentence approach under the Guidelines' analogous career-offender provision. See

United States v. *Abdulaziz*, 998 F.3d 519, 531 (1st Cir. 2021); *United States* v. *Bautista*, 989 F.3d 698, 704 (9th Cir. 2021).

B. The Third, Eighth, and Tenth Circuits look to federal law at the time of the firearm offense.

1. The Third Circuit here chose a different approach—consulting the version of federal law "in effect at the time the defendant committed the federal offense." Pet. App. 12a. In doing so, it "part[ed] ways with the Fourth Circuit, which, when faced with the same categorical inquiry in the ACCA context, held that courts must look to federal law in effect when the defendant is sentenced federally." *Id.* at 12a–13a.

Like the defendant in *Hope*, Justin Brown violated § 922(g) before Congress enacted the Agriculture Improvement Act. *Id.* at 6a. Then, after Congress changed the law, Brown pleaded guilty. *Id.* at 7a. At sentencing, the district ruled that Brown's four prior Pennsylvania marijuana convictions were ACCA predicates and applied a fifteen-year mandatory minimum. *Id.* at 3a–4a.

The Third Circuit affirmed, rejecting Brown's argument that it should "look to the Sentencing Guidelines" and consult "the federal schedule at the time of federal sentencing." *Id.* at 7a, 12a. Instead, the court held that the federal saving statute required it to consult "the federal schedule at the time of commission of the federal offense." *Id.* at 7a. In the court's view, the saving statute applied because the Agriculture Improvement Act "effectively repealed federal penalties associated with federal marijuana convictions." *Id.* at 8a. And because the Act "does not make its new definition of marijuana retroactive," the saving statute requires courts to "apply the penalties in effect at the

time the defendant committed the federal offense." *Id.* at 12a.

Citing *Hope*, the court acknowledged that its approach "necessarily reject[ed]" the Fourth Circuit's view. *Id.* As the Third Circuit saw things, "background principles applicable to Guidelines cases" did not come into play because "neither *Hope* nor this case are Guidelines cases." *Id.* at 13a. The court thus "respectfully disagree[d] with the Fourth Circuit." *Id.*

2. The Eighth Circuit has likewise held that "the relevant federal definition for ACCA purposes is the definition in effect at the time of the federal offense." *United States* v. *Perez*, 46 F.4th 691, 699 (8th Cir. 2022).

In 2013, Christopher Perez was convicted of three Iowa cocaine offenses. *Id.* at 698. Six years later, he pleaded guilty to possessing a firearm illegally. *Id.* at 696. The district court treated the Iowa convictions as ACCA predicates and sentenced Perez to a fifteen-year mandatory minimum. *Id.* at 696–97. On appeal, Perez argued that an intervening change in federal law meant that his cocaine convictions could not count as ACCA predicates. (The government dropped a cocaine-related drug called ioflupane from the federal drug schedules in 2015. Iowa didn't follow suit, making its law categorically broader than federal law.) That change meant that Perez's sentence turned on which version of federal law the sentencing court consulted.

The Eighth Circuit held that "the categorical approach requires" courts to consult "the federal schedule at the time of the federal offense." *Id.* at 700. In the court's view, "due process and fair notice considerations compel" this approach "so that an actor has notice . . . of his potential minimum and maximum pen-

alty for his violation and whether his prior felony convictions could affect those penalties." *Id.* at 699 (citation omitted).

3. The Tenth Circuit has also held that "the correct point of comparison is the time of the instant federal offense." *United States* v. *Williams*, 48 F.4th 1125, 1141 (10th Cir. 2022).

Gregory Williams had three Oklahoma marijuana convictions (in 1996, 1997, and 2003), followed by a § 922(g) conviction (in 2020). *Id.* at 1129, 1137. On appeal, he argued that his state drug convictions could not be ACCA predicates because "the definition of marijuana that applied in Oklahoma from 1996–2003 criminalized hemp, while the current federal definition of marijuana expressly excludes it." *Id.* at 1137. The Tenth Circuit agreed, "reject[ing] the government's time-of-prior-state-conviction rule and adopt[ing] a time-of-instant-federal-offense comparison." *Id.* at 1138. In a footnote, the court observed that "the federal schedules excluded hemp" at the time of both conduct and sentencing, so the court "need not decide . . . which definition would apply" if those definitions differed. *Id.* n.8. But the same footnote noted the split between *Hope* and *Brown* on that precise question. *Id.*

The Tenth Circuit has since reaffirmed the time-of-offense approach announced in *Williams*. See *United States* v. *Pitts-Green*, No. 21-6111, 2022 WL 17175397, at *2 (10th Cir. Nov. 23, 2022) ("Our recent decision in *Williams* dictates that we look to the federal drug schedule in effect at the time of the instant federal offense.").

C. The Eleventh Circuit looks to federal law at the time of state conviction.

The Eleventh Circuit follows a different approach altogether. After initially siding with the Third, Eighth, and Tenth Circuits, the Eleventh Circuit reversed course and announced a new rule—consulting "the version of the federal controlled-substances schedules in effect when the defendant was convicted of the prior state drug offense." *United States* v. *Jackson*, No. 21-13963, 2022 WL 17588240, at *11–12 (11th Cir. Dec. 13, 2022). As Judge Rosenbaum acknowledged, that approach puts the Eleventh Circuit at odds with every other circuit to weigh in. See *id.* at *13 (Rosenbaum, J., concurring).

Jackson's facts are like *Perez*'s. In 1998 and 2004, Eugene Jackson was convicted of cocaine offenses under Florida law. *Id.* at *3. At the time, federal law matched Florida law. But that changed in 2015, when the federal government dropped ioflupane from its schedule, making state law categorically broader. *Id.* So when Jackson illegally possessed a firearm in 2017, his sentence turned on which version of federal law the court consulted. *Id.* at *1.

At first, the Eleventh Circuit joined the Third, Eighth, and Tenth Circuits in applying "the version of the Controlled Substance Act Schedules in place when the defendant committed the federal firearm-possession offense." *United States* v. *Jackson*, 36 F.4th 1294, 1297 (11th Cir. 2022). But the court later vacated its opinion *sua sponte* and ordered supplemental briefing. See *United States* v. *Jackson*, No. 21-13963, 2022 WL 4959314, at *1 (11th Cir. Sept. 8, 2022).

It then issued a new opinion—"reject[ing]" the other circuits' approach and consulting "the version of the federal drug schedules in effect when [the] defendant

was convicted of his prior state drug offenses." *Jackson*, 2022 WL 17588240, at *11–12. The court based this rule on *McNeill* v. *United States*, 563 U.S. 816 (2011), which considered a similar timing question: which version of *state* law to apply under ACCA's categorical approach. *Jackson*, 2022 WL 17588240, at *7. (The answer? Apply the version of state law in effect at the time of state conviction—not federal sentencing. *McNeill*, 563 U.S. at 820.) According to the Eleventh Circuit, *McNeill*'s "backward-looking" logic "requires" a time-of-state-conviction rule here. *Jackson*, 2022 WL 17588240, at *7–8.

Judge Rosenbaum, who authored both opinions, wrote separately to voice "deep[] concern[]." *Id.* at *13–14. (Rosenbaum, J., concurring). Noting the circuit split and the court's "confusing" about-face, she acknowledged that "judges struggle" to resolve ACCA questions. *Id.* at 13 (citing Rachel E. Barkow, *Categorical Mistakes: The Flawed Framework of the Armed Career Criminal Act and Mandatory Minimum Sentencing*, 133 Harv. L. Rev. 200, 206 (2019)). Worse still, she feared, the court's rule would create a "heavy lift for the ordinary citizen" seeking "notice about whether her prior offenses qualify as ACCA predicates." *Jackson*, 2022 WL 17588240, at *13. As a result, Judge Rosenbaum "respectfully urge[d] Congress to consider amending the statute." *Id.* at *14.

II. The decision below is wrong.

The Third Circuit sentenced Mr. Brown under a defunct law because it thought that the federal saving statute and *Dorsey* v. *United*, 567 U.S. 260 (2012), required that outcome. That was wrong on both counts. The saving statute says that when Congress repeals a law, penalties incurred under that law remain in effect. But criminal penalties don't attach before a defendant pleads guilty or is convicted. And here,

Mr. Brown pleaded guilty *after* Congress changed the law—so the saving statue does not apply. Nor does *Dorsey* support the Third Circuit's approach. Properly read, that decision favors applying federal law as it stood at the time of sentencing.

A. The saving statute does not apply.

1. Under the federal saving statute, the "repeal of any statute" does not "release or extinguish any penalty . . . incurred under such statute, unless the repealing Act shall so expressly provide." 1 U.S.C. § 109. Instead, the old statute "shall be treated as still remaining in force for the purpose of sustaining any … prosecution for the enforcement of such penalty." *Id.*

By its terms, the saving statute applies only when an offender has "incurred" a "penalty." Those words are undefined, so this Court must ask what their "'ordinary, contemporary, common meaning' was when Congress enacted [the statute]." *Food Mktg. Inst.* v. *Argus Leader Media*, 139 S. Ct. 2356, 2362 (2019) (quoting *Perrin* v. *United States*, 444 U.S. 37, 42 (1979)). In 1871, the verb "incur" was commonly understood to mean "cast upon . . . by act or operation of law." *Black's Law Dictionary* (1891). And "penalty" meant "[p]unishment; censure; judicial infliction." John Craig, *The Universal English Dictionary* (1869).

In the criminal law, both words presuppose an adjudication of guilt. After all: "[h]owever guilty defendants, upon due inquiry, might prove to have been, they [a]re, until convicted, presumed to be innocent." *Powell* v. *Alabama*, 287 U.S. 45, 52 (1932). So nothing is "cast upon" a criminal defendant "by act or operation of law" until he has pleaded guilty or been convicted. And judges can "inflict[]" no "[p]unishment" or "censure" before plea or conviction.

Statutory context supports this reading. After providing that repeal does not extinguish any "penalty" already "incurred," Congress added that a repealed statute remains in force "for the purpose of sustaining any . . . prosecution for the *enforcement* of such penalty." 1 U.S.C. § 109 (emphasis added). But again, no criminal penalty can be enforced against a criminal defendant who has not pleaded guilty or been convicted.

This Court's pardon precedent illustrates the point. Just four years before Congress enacted the saving statute, the Court considered "the effect and operation of a pardon"—setting forth principles on which "all the authorities concur." *Ex Parte Garland*, 71 U.S. 333, 380 (1866). As the Court explained, a pardon "granted before conviction . . . *prevents* any of the penalties and disabilities consequent upon conviction from attaching." *Id.* (emphasis added). By contrast, a pardon "granted after conviction . . . *removes* th[ose] penalties and disabilities." *Id.* (emphasis added). Distinguishing between pre-conviction and post-conviction pardons would make no sense if a criminal defendant incurred penalties at the moment he violated the law.

All of that boils down to this. Under the saving statute, penalties incurred under an old law do not vanish when Congress repeals that law. But no criminal penalties attach before a defendant is convicted or pleads guilty. Until then, the saving statute has nothing to, well, save. So when (as here) a defendant pleads guilty *after* Congress changes the law, the saving statute does not come into play.

2. The Third Circuit never analyzed the statute's text. Instead, it relied chiefly on dictum from this Court's decision in *Dorsey*. See 567 U.S. at 271 (suggesting that an offender incurs penalties when he "commits the underlying conduct"). Pet. App. 9a. But

Dorsey didn't address the question raised here, and it didn't analyze the words "penalty" or "incur" either.

Dorsey involved the Fair Sentencing Act's reduced mandatory minimums for crack cocaine. Edward Dorsey pleaded guilty to selling crack two months before Congress passed the Fair Sentencing Act. See *United States* v. *Fisher*, 635 F.3d 336, 338 (7th Cir. 2011). Then, at sentencing, he argued that the new, lower penalties should apply. *Dorsey*, 567 U.S. at 271. This Court agreed. As to the saving statute, the Court found that "Congress intended the Fair Sentencing Act's more lenient penalties to apply to those offenders whose crimes preceded [the statute's enactment], but who are sentenced after that date." *Id.* at 273, 275. That "plain import" was enough to overcome the saving statute's "background norm." *Id.* at 275.

At no point did *Dorsey* address the threshold question raised here: whether the saving statute applies when a defendant pleads guilty *after* the law changes. But that's hardly surprising. For starters, Mr. Dorsey pleaded guilty *before* Congress passed the Fair Sentencing Act. And in all events, the Court found that Congress wanted the Fair Sentencing Act to apply to "pre-Act offenders." That settled the issue, leaving no need to parse the timing question. As a result, *Dorsey*'s aside about when a penalty is incurred "ought not to control the judgment in a subsequent suit when the very point is presented for decision." *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821).

And the cases that *Dorsey* relied on don't settle the issue either. *Dorsey* cited two opinions for the idea that penalties are incurred when the offender "commits the underlying conduct," 567 U.S. at 272, yet neither analyzed that question or grappled with the relevant language. The first case, *United States* v. *Reisinger*, 128

U.S. 398, 403 (1888), held that the saving statute applies to criminal, as well as civil, liability. Along the way, *Reisinger* ventured that "offenses committed before the passage of the repealing act" fall under the saving statute. *Id.* at 401. But there is no indication that the issue was briefed or argued, and the Court did not ground its assumption in the statute's text. And the same is true of *Dorsey*'s second case, *Great Northern Railway Co.* v. *United States*, 208 U.S. 452 (1908). Neither party seems to have raised the question at issue here, and the Court did not address the meaning of "penalty" or "incurred."

B. The Third Circuit misapplied *Dorsey*.

Even if Mr. Brown had incurred penalties for purposes of the saving statute, the Third Circuit's analysis was wrong under *Dorsey*. Properly read, that opinion favors applying the law in effect when Mr. Brown was sentenced.

In *Dorsey*, "[s]ix considerations, taken together, convinced [this Court] that Congress intended the Fair Sentencing Act's more lenient penalties to apply to offenders whose crimes preceded [the statute's enactment] but who are sentenced after that date." 567 U.S. at 273. *First*, Congress can displace the saving statute's "background principle" either expressly or by "fair implication." *Id.* at 273–74. *Second*, the Sentencing Reform Act creates a "special and different background principle" that courts should look to the Guidelines in effect at the time of sentencing. See *id.* at 275 (emphasis omitted). *Third*, "language in the Fair Sentencing Act implie[d] that Congress intended to follow the Sentencing Reform Act background principle." *Id.* at 275–76 (emphasis omitted). *Fourth*, sentencing pre-Act offenders under the defunct, higher mandatory minimums would create sentencing disparities that Congress wanted to avoid. *Id.* at 276. *Fifth*, applying

mandatory minimums to some defendants but not others would worsen those disparities. *Id.* at 278. And *sixth*, no "strong countervailing consideration[s]" weighed against retroactivity. *Id.* at 279 (emphasis omitted). Those considerations warrant a similar result here.

Start with *Dorsey*'s first three considerations, which ask about the interplay of text and "background principle[s]." *Id.* at 274–75. Since the Agriculture Improvement Act does not expressly address sentencing retroactivity, the question under *Dorsey* is whether the Congress did so by "fair implication." *Id.* at 274. The Third Circuit thought not, reasoning that the Agriculture Improvement Act "says nothing about sentences, let alone retroactivity" and "contains no language" pointing to the "background principle embodied in the Sentencing Reform Act." Pet. App. 10a–11a.

But that ignores a basic rule of statutory interpretation. "[I]t is not only appropriate but also realistic to presume that Congress was thoroughly familiar with [this Court's] precedents" and "expects its enactments to be interpreted in conformity with them." *N. Star Steel Co.* v. *Thomas*, 515 U.S. 29, 34 (1995) (cleaned up) (quoting *Cannon* v. *Univ. of Chi.*, 441 U.S. 677, 699 (1979)). Here, Congress enacted the Agriculture Improvement Act against the backdrop of *Dorsey*, where the saving statute gave way to the Sentencing Reform Act's "special and different background principle." *Dorsey*, 567 U.S. at 275 (emphasis omitted). In fact, as four dissenting Justices observed, "[p]ortions of the Court's opinion . . . suggest" that "after the Sentencing Reform Act, § 109 has no further application to criminal penalties, at least when statutory amendments lead to modification of the Guidelines[.]" *Id.* at 297 The Third Circuit considered none of this, giving short shrift to the background principle that prevailed in

Dorsey and assuming that the saving statute remains the "default rule" in sentencing cases. Pet. App. 9a.

It makes no difference (as the Third Circuit insisted) that this is not a Guidelines case. See Pet. App. 13a. To begin with, that overlooks the whole-code canon and the parallels between the Guidelines and ACCA. See *Wachovia Bank, Nat'l Ass'n* v. *Schmidt*, 546 U.S. 303, 305 (2006) (citing *Erlenbaugh* v. *United States,* 409 U.S. 239, 243 (1972)) ("[S]tatutes addressing the same subject matter generally should be read 'as if they were one law.'"). Nor does the distinction hold up. Contra the Third Circuit, there is nothing odd about applying principles announced in a Guidelines case to an ACCA case and vice-versa. *E.g.*, *United States* v. *Rodriguez*, 553 U.S. 377, 392 (2008).

Finally, the Third Circuit also misapplied *Dorsey*'s remaining considerations, which address the type of sentencing disparities that courts should avoid. See 567 U.S. at 276–81. In the court's view, those factors counted against Mr. Brown because offenders who committed the same conduct on the same day might receive different sentences under his rule. (If, say, one pleaded faster and were sentenced before Congress changed the law.) Pet. App. 11a–12a. But *Dorsey*'s concern was for disparities at the time of *sentencing*—not disparities at the time of *conduct*. In other words, the same sentencing law should apply when defendants are sentenced at "the same time, the same place, and [before] the same judge." 567 U.S. at 277. Mr. Brown's rule passes that test; the Third Circuit's flunks it.

III. The question presented is important and recurring.

a. The question presented carries high stakes. Had Mr. Brown lived in Parkton, Maryland instead of York, Pennsylvania—just half an hour south—he would

have faced a Guidelines range of 92 to 115 months. Instead, sentenced in the Third Circuit, he received a fifteen-year mandatory minimum. At the very least, that's five additional years behind bars. And the disparity is all the more perverse because mandatory minimums are supposed to make sentencing uniform. If a penalty enhancement is too important to turn on judicial discretion, then it should certainly not turn on geographic happenstance. For criminal defendants and the criminal-justice system alike, these issues are too important to leave for another day.

b. And the problem will fester until this Court intervenes. Federal drug definitions are a "moving target." *United States* v. *Gibson*, No. 20-3049, 2022 WL 17419595, at *7 (2d Cir. Dec. 6, 2022) (quoting *Doe* v. *Sessions*, 886 F.3d 203, 210 (2d Cir. 2018)). In fact, "approximately 160 substances [were] added, removed, or transferred" between 1970 and 2014. *Id*. Unless states move in lockstep, federal courts applying the categorical approach will face difficult questions about those changes.

Since Congress changed the federal definition of marijuana, the question presented has repeatedly confronted the lower courts. See *United States* v. *Hope*, 28 F.4th 487 (4th Cir. 2022); *United States* v. *Williams*, 48 F.4th 1125 (10th Cir. 2022); *United States* v. *Pitts-Green*, No. 21-6111, 2022 U.S. App. LEXIS 32378 (10th. Cir. 2022); *Wade* v. *United States*, No. 1:18-CR-00084, 2021 U.S. Dist. LEXIS 145903, at *12 (E.D. Mo. Aug. 4, 2021); *United States* v. *Voltz*, 579 F. Supp. 3d 1298, 1300 (N.D. Ala. 2022). And the same problem has arisen under the Sentencing Guidelines' analogous "career offender" provision. *United States* v. *Baker*, No. 22-5110, 2022 WL 17581659, at *2 (6th Cir. Dec. 12, 2022); *United States* v. *Clark*, 46 F.4th 404, 407 (6th Cir. 2022); *United States* v. *Bautista*, 989 F.3d

698, 701 (9th Cir. 2021); *United States* v. *Abdulaziz*, 998 F.3d 519, 524 (1st Cir. 2021); *United States* v. *Williams*, 850 F. App'x 393, 399 (6th Cir. 2021); *United States* v. *Johnson*, No. 18-0220, 2021 U.S. Dist. LEXIS 1794, at *81 (D.N.M. Jan. 6, 2021); *United States* v. *Perry*, No. 6183, 2021 U.S. App. LEXIS 24896, at *5 (6th Cir. Aug. 18, 2021).

Nor is the confusion limited to marijuana cases. In 2015, the federal government removed ioflupane from its definition of cocaine. Since then, courts have struggled to decide which federal definition to use under ACCA's categorical approach. See *United States* v. *Jackson*, 36 F.4th 1294, 1300 (11th Cir. 2022); *United States* v. *Perez*, 46 F.4th 691, 701 (8th Cir. 2022); *United States* v. *Taylor*, No. 20-CR-20449, 2022 U.S. Dist. LEXIS 147261, at *5 (E.D. Mich. Aug. 17, 2022); *United States* v. *Baskerville*, No. 1:19-CR-0033, 2022 U.S. Dist. LEXIS 176560, at *7 (M.D. Pa. Sep. 28, 2022). Ditto under the Guidelines. See *United States* v. *House*, 31 F.4th 745, 754 (9th Cir. 2022); *United States* v. *Holliday*, 853 F. App'x 53, 54 (9th Cir. 2021); *United States* v. *Lucas*, No. 19-3937, 2021 U.S. App. LEXIS 24883, at *11 (2d Cir. Aug. 20, 2021); *United States* v. *Swinton*, 495 F. Supp. 3d 197, 206 (W.D.N.Y. 2020); *United States* v. *Medrano*, No. 2:20-CR-00017, 2022 U.S. Dist. LEXIS 203068, at *5 (S.D. Ind. Nov. 8, 2022); *United States* v. *Scott*, No. 18-547, 2021 U.S. Dist. LEXIS 253093, at *28–31 (D.N.J. Dec. 6, 2021).

This problem is not going anywhere. Between 2001 and 2010, police made more than eight million marijuana arrests. See *Report: The War on Marijuana in Black and White*, ACLU (Sep. 11, 2013), https://bit.ly/3PJfs2b. If any of those arrested are later sentenced under ACCA, the sentencing court will have to confront the intervening change in federal law. And (at least where states have not kept pace), that issue

will "clog[] the federal court dockets" until this Court offers guidance. *Jackson*, 2022 WL 17588240, at *13 (Rosenbaum, J., concurring) (citation omitted).

IV. This case is an ideal vehicle

This is the right vehicle for offering that guidance. The case arises on direct appeal. There are no jurisdictional problems, no preservation issues, and no factual disputes. The record is not voluminous. And the question presented is outcome determinative. Had the Third Circuit followed the Fourth Circuit's rule, Mr. Brown's marijuana convictions could not have served as ACCA predicates, and he would not have faced a fifteen-year mandatory minimum sentence. But the Third Circuit "reject[ed]" that approach and affirmed the enhanced sentence. Pet. App. 12a. If this Court granted review and reversed, Mr. Brown would have only a single predicate offense, making him ineligible for the ACCA enhancement. In that case, the Third Circuit would have to vacate the sentence—granting Mr. Brown the full relief he seeks. It is hard to imagine a better vehicle for resolving this acknowledged circuit split.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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