NO. 18-6662

In the Supreme Court of the United States

EDDIE LEE SHULAR,

Petitioner,

v.

UNITED STATES,

Respondent.

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

BRIEF OF *AMICI CURIAE* AMERICAN IMMIGRATION LAWYERS ASSOCIATION, CATHOLIC LEGAL SERVICES, ARCHDIOCESE OF MIAMI, AND AMERICANS FOR IMMIGRANT JUSTICE, IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The American Immigration Lawyers Association ("AILA") is a national association with more than 15,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality, and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before the Department of Homeland Security ("DHS"), immigration courts, and the Board of Immigration Appeals ("BIA"), as well as before the United States District Courts, Courts of Appeals, and this Court. AILA members regularly litigate cases involving the application of the categorical approach to state statutes, including the specific Florida statute involved in this case.

Catholic Legal Services, Archdiocese of Miami, Inc. ("CLS"), a not-for-profit corporation, is the largest provider of *pro bono* and low-cost immigration services

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[1] The Petitioner has filed a blanket consent with the Court. *Amici curiae* have filed, concurrent with this brief, the written consent to file from Respondent. Under Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no persons other than *amici curiae* and their counsel made any monetary contribution intended to fund the preparation and submission of this brief.

in Florida. Nearly two thousand immigrants, migrants and refugees seek the services of CLS each month. Many of these include foreign nationals who face deportation because of the immigration consequences of their criminal convictions, the proper assessment of which is the dispositive factor in the immigrant's eligibility to remain in the United States. CLS has engaged in the nuance of Fla. Stat. § 893.101. CLS has a substantial interest in the issue before the Court, in its advocacy role promoting fair and accurate administration of our immigration and criminal laws, as a leader and educator of the immigration bar, and as a provider of direct services to indigent immigrants, some of whom comprise a subset of the Florida defendants affected—in both criminal and removal proceedings—by the Florida statute at issue in this case.

Americans for Immigrant Justice ("AI Justice") is a non-profit law firm dedicated to promoting and protecting the basic rights of immigrants. Since its founding in 1996, AI Justice has served over 100,000 immigrants from all over the world. AI Justice's clients include unaccompanied immigrant children; survivors of domestic violence, sexual assault, and human trafficking and their children; immigrants who are detained and facing removal proceedings; as well as immigrants seeking assistance with work permits, legal permanent residence, asylum and citizenship. In Florida and on a national level, AI Justice champions the rights of immigrants; serves as a watchdog on immigration detention practices and policies; and speaks for immigrant groups that have particular and compelling claims to justice. As a provider of direct legal services to many in Florida's immigrant community, AI Justice represents individuals in removal

proceedings, for whom the consequences of a criminal conviction are significant. For this reason, the determination of the issue before the Court in this case, can profoundly impact AI Justice's work on behalf of its clients.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

"[T]he requirement of some *mens rea* for a crime . . . is the rule of, rather than the exception to, Anglo-American criminal jurisprudence." *Staples v. United States*, 511 U.S. 600, 605 (1994). When it comes to state statutes penalizing the sale of controlled substances, Florida is decidedly the exception; among the States, Florida alone presumes a culpable *mens rea* regarding the illicit nature of a controlled substance. *See* Fla. Stat. § 893.101(2)(2002).[2] Under this statute, innocence

[2] Fla. Stat. § 893.101 (2002) states the following:

> (1) The Legislature finds that the cases of *Scott v. State*, Slip Opinion No. SC94701 (Fla. 2002) and *Chicone v. State*, 684 So.2d 736 (Fla. 1996), holding that the state must prove that the defendant knew of the illicit nature of a controlled substance found in his or her actual or constructive possession, were contrary to legislative intent.
>
> (2) The Legislature finds that knowledge of the illicit nature of a controlled substance is not an element of any offense under this chapter. Lack of knowledge of the illicit nature of a controlled substance is an affirmative defense to the offenses of this chapter.
>
> (3) In those instances in which a defendant asserts the affirmative defense described in this section, the

is an affirmative defense, which triggers a reiterated presumption of guilt if raised. *See* Fla. Stat. § 893. 101(3).

Since Florida created this unique scheme in 2002, the statute has been the subject of extensive litigation in the constitutional,[3] criminal, and immigration arenas. The case before the Court presents another step toward resolving the consequences of Florida's election to diverge from centuries of criminal norms by presuming a culpable *mens rea*.

* * *

It is uncontroverted that Florida is the only jurisdiction in the country to presume culpable *mens rea* regarding the illicit nature of a controlled substance in criminal prosecutions for drug sales. *See* Brief of Petitioner, at App. (canvassing state jurisdictions); *see also State v. Adkins*, 96 So.3d 412, 423 (Fla. 2012) (noting that Washington state has a similar statute for drug possession, only); *Dawkins v. State*, 313 Md. 638, 646-49 & n.6-8 (Md. 1988) (listing cases

> possession of a controlled substance, whether actual or constructive, shall give rise to a permissive presumption that the possessor knew of the illicit nature of the substance. It is the intent of the Legislature that, in those cases where such an affirmative defense is raised, the jury shall be instructed on the permissive presumption provided in this subsection.

[3] *See Shelton v. Sec'y, Dep't of Corr.*, 691 F.3d 1348, 1354-55 (11th Cir. 2012) (reversing the district court's finding of unconstitutionality and holding that under AEDPA, deference to the state supreme court and state legislature are required, absent controlling Supreme Court precedent); *see also State v. Adkins*, 96 So.3d 412 (Fla. 2012) (rejecting due process challenge).

and statutes); *State v. Cleppe*, 96 Wn.2d 373 (Wash. 1981) (same).

Since the scheme's enactment in 2002, Florida courts have predictably and consistently reiterated that culpable *mens rea* of illicitness is always presumed. *See, e.g., Miller v. State*, 35 So.3d 162, 163 (Fla. Dist. Ct. App. 2010) ("To prove a cocaine possession charge, the state must prove that the defendant knew that he possessed a substance, which was in fact cocaine, but the state does not have to prove that the defendant knew it was cocaine. Instead, the defendant may raise by affirmative defense the claim that he did not know the substance was cocaine.") (emphasis added); *Burnette v. State*, 901 So.2d 925, 927 (Fla. Dist. Ct. App. 2005) ("A defendant charged under section 893.13 can concede all the elements of the offense, *i.e.*, possession of a specific substance and knowledge of the presence of the substance, and still be able to assert the defense that he did not know of the illicit nature of the specific substance.") (emphasis added). Of course, the existence of the affirmative offense does not establish the element of *mens rea*. *See Donawa v. U.S. Att'y Gen.*, 735 F.3d 1275, 1283 (11th Cir. 2013).

* * *

In 2013, the Eleventh Circuit recognized that Florida's reversal of the *mens rea* presumption in Fla. Stat. § 893.101 is dissonant with the federal offense of sale of a controlled substance, 21 U.S.C. § 941(a). *See Donawa, supra*. Shortly thereafter, the Fifth Circuit followed suit. *Sarmientos v. Holder*, 742 F.3d 624, 630-31 (5th Cir. 2014) (following *Donawa*).

These outcomes are clearly correct, as this Court unanimously held that the federal offense does have

a *mens rea* element requiring that defendants either knew the identity of the drug involved or knew that the substance they possessed (perhaps with the exact identity unknown) was listed on the federal schedules of controlled substances and their analogues. *See McFadden v. United States*, 135 S.Ct. 2298 (2015); *cf. Miller, supra*; *Burnette, supra*.[4]

* * *

Because the current Florida scheme clashes with both the federal scheme and the schemes of the 49 other states, the implications of this divergence have been and continue to be explored through various litigation. The Eleventh Circuit has addressed two of those questions thus far. First, the court held that the terms "serious drug offense[s]" and "controlled substance offenses" under the Armed Career Criminal Act ("ACCA") sentencing provision at 18 U.S.C. § 924 (e)(2)(A) do not include a *mens rea* element:

> No element of *mens rea* with respect to the illicit nature of the controlled substance is expressed or implied by either definition. We look to the plain language of the definitions to determine their elements, and we presume that Congress and the Sentencing Commission "said what [they] meant and meant what [they] said."

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[4] In *McFadden*, Chief Justice Roberts issued a separate opinion suggesting the federal offense requires an even higher standard, that "a defendant needs to know more than the identity of the substance; he needs to know that the substance is controlled." *McFadden*, 135 S.Ct. at 2307 (Roberts, C.J., concurring in part and concurring in the judgment).

United States v. Smith, 775 F.3d 1262, 1267 (11th Cir. 2014) (internal citation omitted).

In other words, the Eleventh Circuit believed that, to impose a *mens rea* requirement, Congress would have had to affirmatively say so. Thus, the court found Florida convictions constituted predicate offenses for federal sentencing purposes, notwithstanding the Fla. Stat. § 893.101 elimination of the traditional *mens rea* requirement that contributed to those convictions.

In so holding, the Eleventh Circuit failed to apply (or at least distinguish) this Court's precedent requiring the opposite. *See, e.g., Elonis v. United States*, 135 S.Ct. 2001, 2009 (2015) (quoting *Morissette v. United States*, 342 U.S. 246, 250 (1952)) ("We have repeatedly held that 'mere omission from a criminal enactment of any mention of criminal intent' should not be read 'as dispensing with it.'").

Next, the Eleventh Circuit held that 8 U.S.C. § 1101(a)(43)(B)'s term "illicit trafficking in a controlled substance," as added to the Immigration and Nationality Act in 1990, also does not require an element of *mens rea* to trigger aggravated felony treatment, accepting the argument that:

> [T]here was no reason to believe that Congress intended to impose a specific *mens rea* requirement, and thereby exclude state drug-trafficking crimes from the aggravated-felony definition solely because they did not require knowledge of the illicit nature of the substance involved.

Choizilme v. U.S. Att'y Gen., 886 F.3d 1016, 1024 (11th Cir. 2018). In a seemingly assailable opinion,[5] the Circuit deferred to an agency interpretation of the federal statute, rather than defining the statutory term itself, ostensibly per "principles of deference articulated in *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)." *See Choizilme*, 886 F.3d at 1022.

Neither *Smith* nor *Choizilme* offered any further analysis of the statute or any canvassing of the

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[5] In *Choizilme*, the absence of a Florida *mens rea* requirement should have led to a holding in favor of the petitioner, at *Chevron* "step one." The Court has recently directed that *Chevron* does not invite agency interpretation at every turn, noting that "the type of reflexive deference exhibited in some . . . cases is troubling." *Pereira v. Sessions*, 138 S.Ct. 2105, 2120 (2018) (Kennedy, J., concurring). The Court has indicated it will not defer to an agency, per *Chevron*, where "the statute, read in context, unambiguously forecloses the [agency's] interpretation." *Esquivel-Quintana v. Sessions*, 137 S.Ct. 1562, 1572 (2017) (noting that although a term may not be defined in a specific statutory section, the BIA and the courts should use prevailing definitions of terms to determine what Congress meant, at the time of passing the legislation). In 2016, then-Circuit Judge Gorsuch further explained that proper checks and balances are compromised where courts do not determine the meaning of statutory language, but instead defer to agency interpretation:

> The problem remains that courts are not fulfilling their duty to interpret the law and declare invalid agency actions inconsistent with those interpretations in the cases and controversies that come before them [. . .] [made] by an avowedly politicized administrative agent seeking to pursue whatever policy whim may rule the day.

Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1153 (10th Cir. 2016) (Gorsuch, concurring).

national norms at the time of the enactment of the relevant statute. Of course, in 1986 and in 1990 (the relevant dates for those inquiries), precisely zero (0) jurisdictions—federal or state—reversed the presumption of criminal *mens rea* in drug sale offenses, so Congress could not have imagined a world in which its laws—and heavy sanctions—would be applied to conduct criminalized with no *mens rea* element.

This case arises in the ACCA context and was resolved below by the application of *Smith*, the binding precedent of the Eleventh Circuit.

Part I of this brief will address the need for the Court to discover Congress's intended meaning in the statutory language of § 924(e)(2) to determine the "generic" elements of the offense for application of the "categorical approach." *Amici* suggest that to find this answer, the Court should apply its well-established principles requiring canvassing the national norm in 1986, at the time of Congress' enactment of the ACCA sentencing enhancement.

Part II and III of this brief will address the Court's consistent history of incorporating *mens rea* elements into ambiguous statutes. It will further review the limited and archaic circumstance in which the Court did not invoke *mens rea*, which is inapplicable to the modern ACCA sentencing scheme.

Part IV will apply Parts I-III to the statutes at issue. Because *mens rea* elements are such a settled and expected aspect of criminal law, particularly in controlled substance offenses, and because this Court has consistently required *mens rea* requirements to be read into ambiguous statutes, the Eleventh Circuit was wrong to hold that the absence of an explicit *mens*

rea element in the ACCA reflected Congress's intent to eliminate such an element.

ARGUMENT

I. CONGRESS' INTENDED MEANING OF ITS TERM "SERIOUS DRUG OFFENSE" IS PRESUMED TO BE CONSISTENT WITH THE PREVAILING NATIONAL NORMS OF TERMS AT THE TIME CONGRESS USED THEM; IN 1986 EVERY JURISDICTION HAD A *MENS REA* REQUIREMENT IN DRUG SALE OFFENSES.

This Court has held that to determine congressional understanding of the terms it used in a criminal statute, *i.e.* the elements of "the generic offense," it canvasses the prevailing national norms at the time that Congress used the term. *See Esquivel-Quintana*, 137 S.Ct. 1562 (2017). Relevant here is the term "serious drug offense," as used in § 924(e)(2), and whether a state conviction constitutes a predicate offense for a sentence enhancement. The specific issue is whether the federal courts are free to interpret a federal statute in such a way that negates a *mens rea* element, and in doing so deviate from the unanimous contemporary national consensus on a term's meaning at the time of congressional usage of the term, absent express congressional intent.

In 1986, when Congress enacted § 924(e)(2) and listed "serious drug offenses" as a basis for a sentence enhancement, every jurisdiction in the country imposed an element of *mens rea* in its respective offenses for

unlawful sale of controlled substances.[6] Indeed, Florida did not break from this norm until 2002 and remains the sole jurisdiction to do so. *See Adkins, supra, Dawkins, supra, Cleppe, supra* (canvassing the 50 states); Brief of Petitioner, at App. (canvassing state jurisdictions).

The Florida offense is the lone outlier that presumes culpability in such violations—the very definition of "non-generic" according to the canvassing requirement of *Esquivel-Quintana, supra*. In *Esquivel-Quintana*, the Court analyzed whether a state offense constituted generic "sexual abuse of a minor." *See* 8 U.S.C. § 1101(a)(43)(A). Like the "serious drug offenses" provision at issue here, the "sexual abuse of a minor" provision describes a category of crimes, rather than a specific crime (*e.g.* "burglary"). To define the contours of the offense, the unanimous Court examined how the term "minor" was defined in 1996—the year Congress enacted the "sexual abuse of a minor" provision. Noting that "[a] significant majority of jurisdictions" set the age of consent at 16, the Court concluded that *Esquivel-Quintana* "'show[ed] something special about California's version of the doctrine'"—namely, that the age of consent is 18, rather than 16.

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[6] Those jurisdictions include not only the laws of the 50 states, but also federal statutes. *See* Controlled Substances Act of 1970; Controlled Substances Analogue Enforcement Act of 1986 (both requiring element of *mens rea*); *see also McFadden*, 135 S.Ct. 2298 (imputing *mens rea* requirement, regarding either the identity or illicit nature of substance or analogue involved, to federal offense where federal statute was silent). Further, the Uniform Controlled Substances Act also required *mens rea* regarding the illicit nature of the drug involved. *See* Article 401, Uniform Controlled Substances Act.

Esquivel-Quintana, 137 S.Ct. at 1572 (emphasis omitted) (quoting *Gonzalez v. Duenas-Alvares*, 549 U.S. 183, 191 (2007)). Consequently, he needed "no more to prevail." *Id.* That was so even though at the time, ten jurisdictions set the age of consent at 18. The Florida scheme here is thus even more "special" than the statute at issue in *Esquivel-Quintana*, since no jurisdiction in the United States presumed a culpable *mens rea* when the "serious drug offenses" provision was enacted.

Finally, in the foundational case on this subject, this Court established why the Circuit was wrong to defer to a state standard instead of a uniform generic definition:

> It seems to us to be implausible that Congress intended the meaning of "burglary" for purposes of § 924(e) to depend on the definition adopted by the State of conviction.

Taylor v. United States, 495 U.S. 575, 590 (1990).[7] It is bedrock principle that the Court does not prioritize

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[7] Repeated precedent of the Court, applying *Taylor*, further illustrates the fallacy of the Eleventh Circuit's willingness to eliminate elements of "generic" crimes in order for state offenses to trigger federal sentencing treatment. Under the *Smith* logic, a federal enhancement for "burglary" would apply to state offenses that lacked elements of "unlawful entry" or a necessary relation to a "structure," if Congress did not explicitly enumerate elements of "burglary" when it utilized the term. In addition to *Taylor*, this Court rejected those ideas in *Descamps v. United States*, 570 U.S. 254 (2013), and *Mathis v. United States*, 136 S.Ct. 2243 (2016), both of which held that a state offense must match the elements of the federal generic crime to trigger sentence enhancement. Similarly, federal deportability as "aggravated felonies" would attach to state simple possession cases, if the state treated this

state definitions over uniform federal standards derived from the statutory text and prevailing national norms.

II. *SMITH* AND THE DECISION BELOW ARE CONTRARY TO THE COURT'S CONSISTENT READING OF *MENS REA* ELEMENTS INTO STATUTES, EXCEPT WHERE CONGRESS HAS EXPLICITLY STATED OTHERWISE.

There is no basis to conclude that in enacting § 924(e)(2), Congress intended to eliminate the *mens rea* requirement for convictions to trigger a sentencing enhancement as "serious drug offenses." Congress is free to define a federal crime in an unexpected way. *See Lopez*, 548 U.S. at 54. But to use a counterintuitive or unorthodox definition, "Congress would need to tell us so." *See id.* Here, "there are good reasons to think it was doing no such thing," and that in no way did Congress implicitly eliminate culpable *mens rea* for predicate convictions when creating the sentencing enhancement for prior "serious drug offenses" in the ACCA. *See id.* at 54-55.

A culpable mind is so central to Anglo-American jurisprudence that this Court has consistently found that *mens rea* requirements must be read into (and not implicitly read out of) statutes that are otherwise silent regarding scienter. *See, e.g., Dean v. United States*, 556 U.S. 568, 575 (2008) (citing *Staples*, 511 U.S. at 606, for the principle that "[s]ome indication of congressional intent, express or implied, is required to dispense with *mens rea* as an element of a crime.").

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conduct as a felony. This Court rejected that state-centric logic in *Lopez, supra*.

The Court has further instructed that courts must ordinarily read each phrase in a federal statute enumerating elements of a crime as if the word "knowingly" applied to each element. *See Flores-Figueroa v. United States*, 556 U.S. 646, 652 (2009) (citing *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 79 (1994) (Stevens, J., concurring) (applying same in context of transmission of sexually illicit materials), and referencing *Liparota v. United States*, 471 U.S. 419 (1985) (applying the "intent must adhere to each element" concept to food stamp fraud)).[8]

The Court has further consistently crafted implicit *mens rea* requirements in a wide variety of federal criminal[9] statutes, including firearms offenses, *Rosemond v. United States*, 572 U.S. 65 (2014) (imputing a *mens rea* requirement of knowing that a conspirator would have a gun, in order to be convicted of aiding and abetting a firearm offense); to fraud crimes, *Loughrin v. United States*, 573 U.S. 351 (2014) (imputing an intent—specifically, the purpose to defraud a bank—

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[8] *Flores-Figueroa* is particularly instructive because the statute at issue required an element of intentional possession of a false document, but not an element of knowledge that the identification was real (or that it related to a real person), which is dispositive in the criminality of the action. *Flores-Figueroa*, at 656-57. This is directly analogous to the Fla. Stat. § 893.101 scheme at issue here, where a defendant is proven to knowingly have something, but is never proven culpable of knowing the identity or illicit nature of that something. *See, e.g.*, Fla. Stat. § 893.13(1)(a)(1); *cf.* Fla. Stat. § 893.101.

[9] The Court has also imputed a *mens rea* element into civil statutes. *See, e.g., Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 764 (2011) (imputing a "willful blindness" requirement into an element of a patent infringement statute that was silent on *mens rea*).

to a fraudulent check scheme facially ambiguous on whether the ultimate victim is intentionally a financial institution), but only imputing a lesser-than-full *mens rea* requirement because the statute elsewhere contained a traditional element establishing that the defendant was willfully culpable of reprehensible criminal activity); *see also Loughrin*, at 371 (Alito, J., concurring in part and in the judgment) (critically noting that this aspect of the holding was *dicta* and that the higher *mens rea* of "willfulness" should be imputed to all facially ambiguous elements in future cases).

In *Elonis v. United States*, 135 S.Ct. 2001 (2015), in the context of interstate threats via the internet, Chief Justice Roberts reiterated "the basic principle that 'wrongdoing must be conscious to be criminal,' and that a defendant must be 'blameworthy in mind' before he can be found guilty," further expounding for the unanimous court:

> The fact that the statute does not specify any required mental state, however, does not mean that none exists. We have repeatedly held that "mere omission from a criminal enactment of any mention of criminal intent" should not be read "as dispensing with it." *Morissette v. United States*, 342 U.S. 246, 250 (1952). This rule of construction reflects the basic principle that "wrongdoing must be conscious to be criminal." *Id.*, at 252.
>
> [. . .]
>
> The "central thought" is that a defendant must be "blameworthy in mind" before he can be found guilty, a concept courts have

> expressed over time through various terms such as *mens rea*, scienter, malice aforethought, guilty knowledge, and the like. *Id.*, at 252; 1 W. LaFave, SUBSTANTIVE CRIMINAL LAW § 5.1, pp. 332-333 (2d ed. 2003). Although there are exceptions, the "general rule" is that a guilty mind is "a necessary element in the indictment and proof of every crime." *United States v. Balint*, 258 U.S. 250, 251 (1922). We therefore generally "interpret[] criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them." *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 70 (1994).

Elonis, 135 S.Ct. at 2009 (2015) (emphasis added).

In 2015, a unanimous Supreme Court reviewed the *mens rea* aspects of the federal drug delivery statute, which is directly relevant to this case. In an opinion authored by Justice Thomas, the Court concluded "that 21 U.S.C. § 841(a)(1) requires that the defendant knew he was dealing with 'a controlled substance' . . . even if he did not know its identity." *McFadden v. United States*, 135 S.Ct. 2298, 2302 (2015). In other words, where the statute is facially ambiguous, the Court found a *mens rea* requirement implicitly required, so the defendant must be proven to know either the identity or the illicit nature of the substance to satisfy the federal offense. *See id.*

In Mr. Shular's case, the Eleventh Circuit did the opposite, finding *mens rea* implicitly eliminated from qualifying § 924(e)(2) predicate offenses. This holding cannot be squared with the precedent of this Court.

III. SINCE AT LEAST 1952, THIS COURT HAS INTERPRETED FEDERAL DRUG OFFENSES TO INCLUDE A *MENS REA* ELEMENT, AND CONGRESS RELIED ON THE COURT'S MODERN HOLDINGS IN AMENDING THE ACCA IN 1986.

Federal law has evolved to include *mens rea* requirements in drug offenses. In 1922, when the sale and consumption of cocaine was regulated incidentally via a tax statute,[10] the Supreme Court permitted "drug" (really tax violation) convictions in the absence of *mens rea*. *See United States v. Balint*, 258 U.S. 250, 251-52 (1922).

The Supreme Court has never blindly adhered to its holding in *Balint*. Instead, the Court has critically discussed it and explicitly limited its application to the context of the times in which it was decided. *See Morissette v. United States*, 342 U.S. 246, 260 (1952) ("The conclusion reached in [] *Balint* [] has our approval and adherence for the circumstances to which it was there applied.").[11]

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[10] *See generally* Harrison Narcotic Tax Act (1914), which merely regulated the sale of, but did not criminalize, cocaine; *see also* Lisa N. Sacco, Cong. Research Serv., R43749, *Drug Enforcement in the United States: History, Policy, and Trends* 3 (2014) ("Under the Harrison Act, practitioners were authorized to prescribe opiates and cocaine[.]").

[11] As the Eastern District of New York has explained,

> "[T]he statute [at issue in *Balint*] must be understood in context. It predated the era during which all possession and sale of drugs came to be regarded as serious crimes. Aside from its penalty, it fairly can be characterized as a regulation. It required manufacturers and distributors of certain narcotics [including opium and cocaine]

By1952, this Court concluded that *Balint* was legitimate only because at the time it was decided, the regulation of controlled substances was novel; Congress was thus legislating on a blank slate, rather than against a well-developed backdrop of state law jurisprudence that could inform its intent:

> Congressional silence as to mental elements in an Act merely adopting into federal statutory law a concept of crime already so well defined in common law and statutory interpretation by the states may warrant quite contrary inferences than the same silence in creating an offense new to general law, for whose definition the courts have no guidance except the Act . . . [T]he offense before this Court in the *Balint* [ ] case [was] of this latter class [. . .].

Morissette, 342 U.S. at 262 (emphasis added).

> to register with the IRS, pay a special tax of one dollar per year and record all transactions on forms provided by the IRS. *Id.* §§ 1-3 and 8.
>
> As a case about strict liability and narcotics, *Balint* has no application today. Prior to the Harrison Act narcotics had been freely available without prescription. This change by tax statute was a first modest transitional step towards the present complex and serious criminal statutes dealing with narcotics offenses. They have come to be treated as among the most serious of crimes in the federal criminal code. *See, e.g.*, 21 U.S.C. §§ 960 (mandatory minimum sentences as high as 10 years for certain drug offenses); 848(e) (possible sentence of death for drug offenses in which killing results).

United States v. Cordoba-Hincapie, 825 F.Supp. 485, 507 (E.D.N.Y. 1993) (emphasis added).

By 1986, Congress was no longer legislating against a blank slate when it came to criminalizing controlled substance violations. In the 64 years that had passed between *Balint* (1922) and the 1986 amendments to the ACCA, states and the federal government had developed a wide-ranging compendium of criminal laws governing controlled substance offenses. As the *Morissette* court noted, in 1952:

> Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.

Morissette, 342 U.S. at 263. Thus, by 1986, Congress was presumed to be aware of controlled substance "crime[s] already so well defined in common law and statutory interpretation by the states." *Id.*, at 262.

In 1986, Congress was well aware that drug offenses included a *mens rea* element, as Congress itself made clear by 1970 when it passed the federal Controlled Substances Act ("CSA"). As further evidenced by the Uniform Controlled Substances Act and the laws of all 50 state jurisdictions (in 1986), the "widely accepted definition"—at the time that Congress created the § 924(e)(2) 15-year minimum sentence for those previously convicted of "serious drug offenses"—was the universal requirement of culpable *mens rea* for

all elements in controlled substance trafficking offenses. *See* Controlled Substances Act of 1970; the federal Controlled Substances Analogue Enforcement Act of 1986 (both requiring element of *mens rea*); *see also Adkins, supra* (cataloguing uniform *mens rea* requirement in all 50 states, prior to Florida's 2002 changes).

It was under this understanding of the uniform national landscape, in 1986, that Congress enacted the term "serious drug offense" in § 924(e)(2).

IV. *SMITH* AND THE DECISION BELOW MUST BE REVERSED AS CONTRARY TO THE STATUTE AND THE PRECEDENT OF THE COURT

There is no possible support for the Eleventh Circuit's decision in *Smith* or the panel decision below. Pursuant to *Morissette* and *Esquivel-Quintana*, in drafting § 942(e)(2) and heavily penalizing "serious drug offenses," Congress necessarily invoked its plain understanding of the contemporary (1986) meaning of controlled substances offenses.

Given the opportunity to define the sentencing ground in an explicitly unusual way (*i.e.* by overtly negating *mens rea*), Congress declined. *See Lopez, supra*. Consequently, the Court should construe § 924(e)(2) according to the understanding of the generic terms at the time of its passage. "Put differently, [the Court] 'must presume that Congress said what it meant and meant what it said.'" *In re Hill*, 715 F.3d 184, 297 (11th Cir. 2013); *see also INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987) ("it is assumed that the legislative purpose is expressed by the ordinary meaning of the words used").

The Eleventh Circuit used the same quote to justify upholding the use of a Florida conviction as a sentence-enhancing "serious drug offense":

> No element of *mens rea* with respect to the illicit nature of the controlled substance is expressed or implied by either definition. We look to the plain language of the definitions to determine their elements, and we presume that Congress and the Sentencing Commission "said what [they] meant and meant what [they] said[.]

Smith, supra, at 1267 (internal citation omitted).

The Eleventh Circuit is obviously wrong, as its reasoning is in direct conflict with the *Morissette* admonition to do the opposite, "[w]e have repeatedly held that 'mere omission from a criminal enactment of any mention of criminal intent' should not be read 'as dispensing with it.'" *Morissette, supra*, at 250; *see also X-Citement Video, supra* (same); *Elonis, supra* (same); *Dean, supra* (same); *Staples, supra* (same).[12]

Mens rea regarding the illicit nature of a substance is an essential element of a "serious drug offense." The *Morissette* and *Esquivel-Quintana* lines of cases explicitly preclude the Eleventh Circuit's decision, in *Smith* and in Mr. Shular's case below; consequently, the decision of the Circuit should be reversed.

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[12] The Court has also recently remarked that "a good rule of thumb for reading our decisions is that what they say and what they mean are one and the same." *Mathis v. United States*, 136 S.Ct. 2243, 2254 (2016). Given the Court's repeated opinions on this point, the question of *mens rea* being read into silent statutes is thus one that would appear quite settled.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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