CASE NO. 17-10172

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

IRMA OVALLES,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

On Appeal from the United States District Court
for the Northern District of Georgia

CORRECTED EN BANC AMICI CURIAE BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND FAMILIES AGAINST MANDATORY MINIMUMS IN SUPPORT OF PETITIONER-APPELLANT

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CERTIFICATE OF INTEREST AND CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, Amici Curiae National Association of Criminal Defense Lawyers and Families Against Mandatory Minimums respectfully state that the following persons have an interest in the outcome of this case:

1. Dammers, Kim, Assistant United States Attorney;
2. Dodge, W. Matthew, counsel for Petitioner-Appellant;
3. Dube, Nicholas A., counsel for Amici Curiae National Association of Criminal Defense Attorneys and Families Against Mandatory Minimums;
4. Families Against Mandatory Minimums, Amicus Curiae;
5. Ference-Burke, Jonathan R., counsel for Amici Curiae National Association of Criminal Defense Attorneys and Families Against Mandatory Minimums;
6. Goldberger, Peter, counsel for Amicus Curiae Families Against Mandatory Minimums;
7. Grossman, Richard A., former attorney for Petitioner-Appellant;
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9. Horn, John A., former United States Attorney;
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11. Kearns, Stephanie A., Executive Director, Federal Defender Program;

12. Macgowan, Erin R., counsel for Amici Curiae National Association of Criminal Defense Attorneys and Families Against Mandatory Minimums;

13. Markus, David O., counsel for Amicus Curiae National Association of Criminal Defense Attorneys;

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15. Ovalles, Irma, Petitioner-Appellant;

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21. Thrash, Jr., Hon. Thomas W., Chief United States District Judge;

22. United States of America, Respondent-Appellee;

23. Vineyard, Russell G., United States Magistrate Judge; and

24. Yates, Sally Quillian, former United States Attorney.

No publicly traded company or corporation has an interest in the outcome of this appeal.

Dated: June 4, 2018

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STATEMENT OF THE ISSUES

This amici curiae brief addresses the second issue on which this Court called for en banc briefing, which is: Should this Court overrule *United States v. McGuire*, 706 F.3d 1333, 1336-37 (11th Cir. 2013), insofar as it requires applying the categorical approach to determine whether an offense constitutes a "crime of violence" under 18 U.S.C. § 924(c)(3)?

INTEREST OF AMICI CURIAE[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit association comprised of more than 10,000 criminal defense attorneys from across the country that works to ensure justice and due process for the accused and to advance the proper, efficient, and fair administration of justice. NACDL files numerous amicus briefs each year in the Supreme Court and the courts of appeals in cases of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system. The issues that this case presents regarding the constitutionality and application of 18 U.S.C. § 924(c), which routinely forces district court judges to impose prison sentences many times longer than they

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), amici state that no party's counsel authored this brief in whole or in part and no party or person other than amici or their counsel contributed money toward the preparation or submission of this brief.

otherwise would, are exceptionally important to NACDL's members and many of their clients.

Families Against Mandatory Minimums ("FAMM") is a national, nonprofit, nonpartisan organization whose primary mission is to promote fair and rational sentencing policies and challenge mandatory sentencing laws and the inflexible and excessive penalties these laws require. Founded in 1991, FAMM currently has more than 50,000 members. By giving a voice to prisoners and mobilizing their families who have been adversely affected by unjust sentences, FAMM puts a human face on suffering while advocating reform. FAMM advances its work through public education and by selected amicus filings in important cases. FAMM's participation in this case derives in part from a deep concern about the severity of the mandatory minimums required by 18 U.S.C. § 924(c). In light of the harm these and other mandatory sentences cause, FAMM is keenly interested in ensuring they be applied sparingly, and only when they are required by federal law and consistent with the dictates of the Constitution.

SUMMARY OF THE ARGUMENT

Section 924(c) forces a district judge to impose a harsh mandatory minimum sentence on any individual who possesses, carries, or uses a firearm while committing a "crime of violence." In many cases, the § 924(c) mandatory minimum will be multiple times longer than the term of imprisonment that the district judge

otherwise would deem appropriate and impose under the 18 U.S.C. § 3553(a) sentencing factors. Because the determination of whether § 924(c) applies can dramatically impact the defendant's sentencing exposure, the statute can significantly impact the entire course of the defendant's criminal proceedings, including the decision to plead guilty or go to trial.

In *United States v. McGuire*, this Court held that whether a predicate offense constitutes a "crime of violence" for purposes of § 924(c) must be determined on a categorical basis. 706 F.3d 1333, 1336-37 (11th Cir. 2013) (O'Connor, J.). Under this "categorical approach," a court looks solely to the predicate offense's statutory elements to determine whether it qualifies as a "crime of violence." If the predicate offense categorically requires the prosecution to prove beyond a reasonable doubt that the defendant used, attempted to use, or threatened to use physical force against someone else's person or property, then the offense is a "crime of violence." If it does not require such proof, then it is not a "crime of violence." There is no good reason for this Court to jettison this clean and clear rule:

First, *McGuire*'s categorical approach is both faithful to the plain language of § 924(c)(3) and compelled by Supreme Court precedent. The Supreme Court has held that numerous statutory provisions that on their face are materially identical, and in some instances precisely identical, to § 924(c)(3) compel the categorical approach. *See, e.g.*, *Descamps v. United States*, 570 U.S. 254, 258 (2013).

Overruling *McGuire* would effectively be abrogating those binding Supreme Court decisions, which is not within the prerogative of this Court.

Second, because *McGuire*'s categorical approach narrows the circumstances in which a defendant will be subject to § 924(c)'s harsh mandatory minimum, it is faithful to the rule of lenity, which this Court would be bound to apply if it were to deem § 924(c)(3) ambiguous.

Third, *McGuire*'s categorical approach serves important pragmatic interests. By making the "crime of violence" inquiry a question of law that can always be decided on the face of the indictment, *McGuire*'s elements-focused approach enables the district court and the parties to know with certainty at the outset of the proceedings whether the defendant, if found guilty of the predicate offense with which he is charged, will be subject to § 924(c)'s mandatory minimum. By contrast, a Sixth Amendment-compliant, fact-based approach to the "crime of violence" inquiry would require the jury to determine not merely whether the defendant committed the predicate offense, but whether he committed it in a manner that involved the use, attempted use, or threatened use of physical force. This additional layer of uncertainty and unpredictability would, in many cases, protract and impede the parties' plea negotiations; make trials longer, more complex, and more costly; require more complicated jury instructions and special verdict forms; and demand more record-intensive district and appellate court review of jury verdicts.

For all of these reasons, it is not surprising that ten other circuit courts of appeal—indeed, all but the Third Circuit, *see United States v. Robinson*, 844 F.3d 137 (3d Cir. 2016)—agree with *McGuire* that § 924(c) compels a strict categorical approach to the "crime of violence" inquiry.[2] This Court should reaffirm *McGuire*'s categorical approach.

ARGUMENT

I. SECTION 924(C)(3)'S PLAIN LANGUAGE AND SUPREME COURT PRECEDENT COMPEL *MCGUIRE*'S CATEGORICAL APPROACH

This Court must begin its analysis, of course, with § 924(c)(3)'s plain language. Section 924(c)(3) provides two definitions of "crime of violence." First, under the *force clause*, an "offense" constitutes a "crime of violence" if it "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A). Second, under the *residual clause*, an "offense" constitutes a "crime of violence" if "by its nature" it "involves

[2] *See United States v. Taylor*, 848 F.3d 476, 491 (1st Cir. 2017); *United States v. Hill*, 832 F.3d 135, 139 (2d Cir. 2016); *United States v. McNeal*, 818 F.3d 141, 152 (4th Cir. 2016); *United States v. Williams*, 343 F.3d 423, 431 (5th Cir. 2003); *United States v. Gooch*, 850 F.3d 285, 290 (6th Cir. 2017); *United States v. Jackson*, 865 F.3d 946, 952 (7th Cir. 2017); *United States v. Prickett*, 839 F.3d 697, 698 (8th Cir. 2016) (per curiam); *United States v. Watson*, 881 F.3d 782, 784 (9th Cir. 2018) (per curiam); *United States v. Salas*, 889 F.3d 681, 683-84 (10th Cir. 2018); *United States v. Kennedy*, 133 F.3d 53, 56 (D.C. Cir. 1998).

a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."[3] *Id.* § 924(c)(3)(B).

The Supreme Court has provided substantial guidance on how § 924(c)(3)'s statutory text must be construed, and all of this guidance points in a single direction: Section 924(c)(3)'s plain language compels the categorical approach. For example, in *Leocal v. Ashcroft*, a unanimous Supreme Court examined 18 U.S.C. § 16(a), which is worded and structured identically to § 924(c)(3)'s force clause. 543 U.S. 1, 4-13 (2004). The Supreme Court explained that because § 16(a)'s plain language "directs [a court's] focus to the 'offense,'" it requires an examination of the "elements" of the predicate offense, "rather than . . . the particular facts relating to petitioner's crime." 543 U.S. at 7. The Supreme Court in *Descamps* reached the same conclusion with respect to 18 U.S.C. § 924(e)(2)(B)(i), which defines the term "violent felony" in almost exactly the same way that § 924(c)(3)'s force clause defines "crime of violence"—namely as an offense that "has as an element the use, attempted use, or threatened used of physical force against the person of another." 570 U.S. at 263 (holding that the provision requires "a focus on the elements, rather

[3] Although this brief is focused on the second question on which this Court called for en banc briefing, amici agree with Petitioner-Appellant that the Supreme Court's recent opinion in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), requires this Court to strike down § 924(c)(3)'s residual clause as unconstitutionally vague on its face.

than the facts, of a crime").[4] And in *Johnson v. United States*, it reached the same conclusion with respect to 18 U.S.C. § 924(e)(2)(B)(ii)'s residual clause, which is materially identical to § 924(c)(3)'s residual clause. 559 U.S. 133, 138-45 (2010).

That *Leocal*, *Descamps*, and *Johnson* did not expressly address § 924(c)(3) is beside the point. The plain language of the statutory provisions addressed in those cases cannot plausibly be distinguished from § 924(c)(3). *McGuire*'s categorical approach is, therefore, not merely consistent with Supreme Court precedent, but *compelled* by it. The only way this Court could overrule *McGuire* in favor of a fact-based approach to the crime of violence inquiry would be to completely ignore those Supreme Court decisions (which this Court clearly is not entitled to do) or to hold that the plain language of § 924(c)(3) means something different than the *exact same* plain language of several neighboring statutory provisions (which is contrary to fundamental canons of statutory construction). Overruling *McGuire* would therefore put this Court in the company of the Ninth Circuit in *Descamps*, whose decision the Supreme Court reversed and chastised as having "no roots in our precedents," "subvert[ing]" Supreme Court precedent, and "conflicting with each of the rationales

[4] Section 924(e)(2)(B)(i) differs from that of § 924(c)(3)(A) only insomuch as the former does not include force directed against property as being within the definition of a "crime of violence." *Compare* 18 U.S.C. § 924(e)(2)(B)(i) *with id.* § 924(c)(3)(A).

supporting the categorical approach and threatening to undo all its benefits." 570 U.S. at 267.

II. THE RULE OF LENITY REQUIRES APPLICATION OF THE STRICT CATEGORICAL APPROACH

A fundamental tenet of criminal law is that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *United States v. Bass*, 404 U.S. 336, 347 (1971) (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)); *see United States v. Smith*, 775 F.3d 1262, 1267 (11th Cir. 2014). Accordingly, to the extent that § 924(c)(3)'s plain language is susceptible either to *McGuire*'s categorical, elements-based approach or a fact-based approach to the "crime of violence" inquiry, the rule of lenity demands that this Court resolve the ambiguity in favor of *McGuire*'s categorical approach. *See, e.g.*, *United States v. Diaz*, 778 F.2d 86, 88 (2d Cir. 1985) (per curiam) (applying the rule of lenity to § 924(c)(3)'s definition of a "crime of violence").

Section 924(c) is among the harshest federal criminal statutes, stripping district judges of their sentencing discretion and requiring them to impose prison sentences that would not otherwise be appropriate under the § 3553(a) sentencing factors. If the defendant's predicate offense is a "crime of violence," then the defendant, even if he has absolutely no criminal history, is subject to a 5-year mandatory minimum if he merely "carries" a firearm during the commission of the predicate offense. 18 U.S.C. § 924(c)(1)(A). That mandatory minimum is

quintupled to 25-years' imprisonment if the defendant commits a second violation of the statute, even as part of a single course of conduct. 18 U.S.C. § 924(c)(1)(C)(i). As if this was not harsh enough, as construed by the Supreme Court, the statute requires that each mandatory minimum sentence run *consecutive* to any other sentence imposed on the defendant, including a first sentence under the same provision. 18 U.S.C. § 924(c)(1)(D)(ii); *Deal v. United States*, 508 U.S. 129 (1993). Because of this stacking requirement, § 924(c) in some instances has resulted in defendants receiving prison sentences of more than 100 years for crimes that did not result in any injury to person or property. *See, e.g.*, *Deal*, 508 U.S. at 137 (105-year prison term for six armed bank robberies); *United States v. Rivera-Ruperto*, 846 F.3d 417, 425-26 (1st Cir. 2017) (161-year prison term for six drug trafficking violations); *see also United States v. Angelos*, 433 F.3d 738, 750-54 (10th Cir. 2006) (55-year prison term for possessing a weapon contemporaneous with three sales of marijuana to a confidential informant).

McGuire's categorical approach is undoubtedly more lenient than a fact-based approach. This is because, if a defendant's predicate offense satisfies *McGuire*'s categorical approach, it necessarily would satisfy a fact-based approach as well, whereas the converse is not true. As Judge Barron stated in *United States v. Faust*, because the categorical approach "serves to narrow the scope of [the] mandatory sentencing enhancement, at least as compared to [the fact-based approach]," it

"respects . . . the notice-protecting principle of lenity that we have long presumed that Congress has in mind when it imposes severe criminal punishment." 853 F.3d 39, 65 (1st Cir. 2017) (Barron, J., concurring).

The rule of lenity is doubly appropriate here because the United States for years has agreed that § 924(c)(3) requires a categorical approach. Even in *Robinson*, 844 F.3d 137, where a divided Third Circuit became the sole federal court of appeal to adopt a fact-based approach to § 924(c)(3)'s "crime of violence" inquiry, the United States stated in its appellee's brief that it "does not agree" with the "suggest[ions]" of some judges "that the categorical approach should not apply at all in defining a 'crime of violence' under § 924(c)." Appellee's Brief, *United States v. Robinson*, No. 15-1402 (3d Cir.), at 26 n.6 (Dec. 28, 2015) (acknowledging that the Supreme Court in *Leocal* held that "the identical 'crime of violence' definition in 18 U.S.C. § 16(a)" requires a categorical, elements-based approach).

III. THE CATEGORICAL APPROACH PROVIDES SIGNIFICANT PRAGMATIC BENEFITS THAT HELP TO ENSURE THE PROPER FUNCTIONING OF THE CRIMINAL JUSTICE SYSTEM

Under *McGuire*'s categorical approach, whether the defendant is exposed to § 924(c)(3)'s draconian mandatory minima is clear and certain on the face of the indictment: If the charged predicate offense can be committed only through the actual, attempted, or threatened use of physical force, then § 924(c)(3) is satisfied; if the charged predicate offense can be committed in a manner that does not involve

the actual, attempted, or threatened use of physical force, then § 924(c)(3) is not satisfied.[5]

The pre-trial certainty that *McGuire*'s categorical approach provides cannot be overstated: prosecutors know which predicate offenses will satisfy § 924(c)(3), thus allowing more informed charging decisions; defendants and defense counsel know whether the charged predicate offense will automatically satisfy § 924(c)(3), thus allowing for more intelligent plea bargaining decisions; and district courts know whether a jury's finding of guilty on the charged predicate offense will automatically satisfy § 924(c)(3), thus allowing for simplified jury instructions and post-verdict review. This may explain why the United States has for years agreed that § 924(c)(3) requires *McGuire*'s categorical, elements-based approach.

Contrast that with the numerous procedural and substantive complexities that the fact-based approach would create. Under a fact-based approach, whether the charged predicate offense satisfies § 924(c)(3) would turn not on *whether* the defendant committed the predicate offense, but *how* he committed it. Ironically, such facts would not have to be litigated at a trial (or conceded at a guilty plea) of the predicate offense itself, because they are not elements of the predicate offense.

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[5] In the rare event that there is a legitimate question whether the actual, attempted, or threatened use of physical force is an element of a particular predicate offense, that question of law will need only to be resolved once by the court of appeals.

Where the charged predicate crime can involve—but does not need to involve—the actual, attempted, or threatened use of physical force, whether the defendant decides to plead guilty or take the case to trial might turn entirely on whether there is a dispute regarding *the precise manner* in which the defendant committed the offense. This would mean that the parties' plea negotiations might end up focusing not on whether the defendant is willing to admit to the predicate offense, but whether he is willing to admit that his commission of that offense involved the actual, attempted, or threatened use of force. And if the case goes to trial, the Sixth Amendment would require jury, in reaching its verdict on the § 924(c) count, to find not merely whether the defendant committed the essential elements of the predicate offense, but also whether the defendant committed those elements in a particular way. This would necessarily be a jury question, of course, because the question of whether those facts satisfy the applicable legal test will have become a question of proof of an element. *See Apprendi v. New Jersey*, 530 U.S. 466 (2000); *cf. Robinson*, 844 F.3d at 143 (acknowledging that under a fact-based approach to the "crime of violence" inquiry, the "only facts that may support the conclusion that a particular crime is a 'crime of violence' are those that have either been found by the jury or admitted by the defendant in a plea").

As just one example, suppose that an armed defendant was caught red-handed driving across state lines with jewelry that he shop-lifted from a shopping mall

department store, in violation of 18 U.S.C. § 2314. Under *McGuire*'s categorical approach, it is clear that the defendant would not, by virtue of having violated § 2314, be subject to § 924(c)(3). But what if the prosecutor believed the defendant, while speeding out of the parking lot in the getaway car, made a physically threatening remark to the shopping mall's security guard? Under the fact-based approach, the prosecutor could tack a § 924(c)(3) charge on to the indictment, and the entire rest of the proceedings—plea negotiations, trial, jury instructions, jury deliberations, the jury's verdict, and the district court's and appellate court's post-verdict review—would be about what (if anything) the defendant said to the security guard, a fact that is not even an element of the predicate offense.[6]

In sum, if this Court jettisons *McGuire*'s categorical approach in favor of a fact-based approach to the "crime of violence" inquiry, it will result in more protracted plea negotiations, longer and more complex trials, more complicated jury instructions and special verdict forms, and more burdensome post-verdict review of the jury's verdict. The Third Circuit in *Robinson* did not consider any of this in

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[6] Prosecutorial discretion is not an answer to this absurdity. The Department of Justice's current policy is that prosecutors "should charge and pursue the most serious, readily provable offense . . . , including mandatory minimum sentences" and "must disclose to the sentencing court all facts that impact . . . mandatory minimum sentences." Memorandum from Jeff Sessions, Att'y Gen., U.S. Dep't of Justice, to Federal Prosecutors, at 1 (May 10, 2017). The Department of Justice's policy means that prosecutors will not have the discretion to avoid § 924(c)(3) either by fact- or charge-bargaining.

deciding to become the sole court of appeal to reject the categorical, elements-focused approach in favor of a fact-based one.[7] *See* 844 F.3d at 141-45.

CONCLUSION

For all the foregoing reasons, the Court should not overrule *McGuire*.

[7] The Third Circuit in *Robinson* held that a categorical approach is "unwarranted when the convictions of contemporaneous offenses, read together, necessarily support the determination that the predicate offense was committed with the 'use, attempted use, or threatened use of physical force against the person or property of another.'" 844 F.3d at 143 (quoting § 924(c)(3)(A)). The principal problem with this analysis, of course, is that § 924(c)(3) cannot mean one thing in an "easy" case and another in a hard one. Thus, whether the fact-based approach might be relatively simple to apply to facts such as those in *Robinson* says nothing about the difficulty that it would pose for parties, juries, and judges in a rash of other factual scenarios.

Respectfully submitted,

Dated: June 4, 2018

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(b)(4) because this brief contains 3,363 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14 point font.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing brief has been delivered to a third-party carrier for express delivery to the Court and has been filed electronically using the Court's CM/ECF system. All parties are represented by registered CM/ECF users and will be served by the appellate CM/ECF system.

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