No. ____

IN THE
SUPREME COURT OF THE UNITED STATES

DARRELL FREEZE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fifth and Sixth Amendments permit judges to find the facts necessary to support an otherwise substantively unreasonable federal sentence.

RELATED PROCEEDINGS

United States District Court (S.D. Tex.):

United States v. Freeze, No. 17-cr-532 (Apr. 13, 2018)

United States Court of Appeals (5th Cir.):

United States v. Freeze, No. 18-40339 (Aug. 12, 2019)

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PETITION FOR WRIT OF CERTIORARI

Petitioner Darrell Freeze respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The unpublished opinion of the court of appeals (Pet. App. 1a-13a) is not yet reported in the Federal Appendix but is available at 2019 WL 3798411 and 2019 U.S. App. LEXIS 23977.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 2019. This petition is filed within 90 days of that date. *See* Sup. Ct. R. 13.1 & 30.1. The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law[.]

The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury[.]

INTRODUCTION

In *Rita v. United States*, 551 U.S. 338 (2007), this Court left open the question whether it violates the Fifth and Sixth Amendments for a judge to find the facts necessary to support an otherwise substantively unreasonable federal sentence. That question—and the closely related question whether a judge may find and sentence a defendant on the basis of conduct for which he was acquitted—has provoked extensive debate in the intervening years. Numerous federal jurists (including five current and former Justices of this Court) have expressed serious doubts as to the constitutionality of both forms of judicial factfinding. But the many lower-court judges who have expressed misgivings perceive themselves bound by this Court's precedent to allow these controversial practices to persist. As such, these judges have repeatedly urged this Court to provide further guidance on the constitutional boundaries of judicial factfinding in federal sentencing.[1]

This case presents the opportunity to resolve the question, expressly reserved in *Rita*, whether the Fifth and Sixth Amendments prohibit the imposition of a federal sentence that, but for a judge-found fact, would be substantively unreasonable. After pleading guilty to attempting to entice fictitious minors, 18 U.S.C. § 2422(b), petitioner, then a 54-year-old man with no criminal record, learned that the government would seek to enhance his Sentencing Guidelines range based on an allegation of uncharged criminal conduct—previously unknown to petitioner—claimed to have occurred over a decade earlier. Petitioner

[1] A petition raising the acquitted-conduct question is currently pending before this Court, awaiting an ordered response from the government. *See Asaro v. United States*, No. 19-107.

categorically denied the surprise allegation and vigorously contested its reliability at sentencing, but to no avail. Under the same preponderance-of-the-evidence standard that applies at civil trials, the district court found that petitioner committed the uncharged offense and sentenced him inside an enhanced Guidelines range to 380 months' imprisonment—more than *12 years* above the top of the range recommended by the Guidelines based on petitioner's admitted offense conduct alone.

Petitioner's sentence is an apt illustration of one that would violate the Constitution if the due process and jury-trial guarantees of the Fifth and Sixth Amendment require that the facts necessary to support an otherwise unreasonable federal sentence be found beyond reasonable doubt by a jury, or else admitted by the defendant. There is no doubt that, but for the uncharged-conduct finding, the district court could not reasonably have increased petitioner's sentence by over 12 years. This case therefore presents an excellent vehicle for resolving the question left open in *Rita*. Because that question is a recurring one of nationwide importance, and the answer is outcome determinative in this case, this Court should grant certiorari.

STATEMENT OF THE CASE

In the summer of 2017, petitioner Darrell Freeze, 54 years old at the time, responded to a Craigslist advertisement posted by an undercover law enforcement agent posing as the father of two fictitious adolescent sons aged 11 and 14. Petitioner went on to exchange multiple emails and text messages with the agent, in which he expressed a desire to perform sexual acts with the fictional minors and agreed to meet for that purpose. Petitioner arrived

at the meeting location at the agreed time and was arrested without incident. Once in custody, he voluntarily confessed to having intended to follow through with the discussed activity. Pet. App. 2a.

The federal government indicted petitioner on one count of attempting to persuade, induce, entice, or coerce a minor to engage in prohibited sexual activity, in violation of 18 U.S.C. § 2422(b). Pet. App. 2a-3a. Petitioner pleaded guilty pursuant to a written plea agreement. C.A.5 Record on Appeal (ROA.) 145, 177-79, 258-62. The factual basis for the plea consisted of the offense conduct summarized above, supplemented with specifics not relevant here. *Id.* at 141-44. The case proceeded to the sentencing phase.

Under the applicable statute, petitioner's conviction exposed him to a mandatory minimum prison sentence of 120 months and a maximum sentence of life. Based on petitioner's admitted offense conduct and complete lack of criminal history, the Sentencing Guidelines would have recommended a sentencing range of 188–235 months, far below the statutory maximum. Def. C.A.5 Br. 4-6; Pet. App. 5a n.5, 6a.

Upon receiving his presentence report, however, petitioner learned that the probation officer had assessed a five-level enhancement under Guidelines Section 4B1.5(b)(1). That enhancement applies to anyone convicted of a "covered offense" (including enticement) who is found to have "engaged in a pattern"—i.e., "at least two separate occasions"— "of activity involving prohibited sexual conduct" with a minor. Def. C.A.5 Br. 4-5, 27. The probation officer concluded that petitioner had engaged in the requisite pattern on the strength of an allegation by a 25-year old Army enlisted man formerly stationed in

Tucson, Arizona, Randall Bischak, who claimed that he and petitioner shared two consensual sexual encounters more than a decade ago when he was 14 or 15 years old. Def. C.A.5 Br. 5-6. Bischak had recently pleaded guilty in the District of Arizona to three counts of producing child pornography, and his allegation—totally unknown to petitioner until its appearance in the presentence report—had come to light during the investigation into Bischak's own crimes starting in April 2016. *Id.*; Pet. App. 3a. With the five added levels, petitioner's Guidelines range ballooned to 324–405 months. Pet. App. 5a-6a, 6a n.6.

The propriety of the surprise enhancement dominated petitioner's sentencing hearing. Although Bischak was in federal custody and available, the government chose not to produce him to testify. Instead, the government principally relied on unsworn statements Bischak made in a February 2017 audio-recorded interview, introduced through the testimony of an agent who did not attend that interview but listened to the recording and recited his recollection of what Bischak said. C.A.5 ROA.181-90. The government neither played the audio recording for the court nor admitted it into evidence. Pet. App. 4a.

Petitioner vigorously objected to the enhancement, noting that it drastically increased his Guidelines exposure based on an allegation of decade-old uncharged conduct with no relationship to the instant federal offense. C.A.5 ROA.263-67, 312. With no opportunity to cross-examine his accuser, petitioner focused his rebuttal presentation on the numerous inconsistencies, inaccuracies, and omissions in Bischak's prior unsworn statement, which he exposed through cross examination of the agent and testimony from two defense witnesses. *Id.* at 190-241. When the dust settled, petitioner argued that the evidence

before the district court showed that the allegation came from an inherently incredible source, was facially unreliable, and lacked any meaningful corroboration. He thus urged the court to set the allegation aside as unsupported by a preponderance of the evidence and decline to apply the enhancement. *Id.* at 241-46.[2]

The district court overruled petitioner's objection without comment and proceeded to sentence him to a term of 380 months (just shy of 32 years). Pet. App. 9a, 11a n.19. In doing so, the court made clear that its sentencing decision was influenced by both the enhanced Guidelines range and the seriousness of the disputed uncharged conduct, remarking, "obviously, I'm going to sentence him inside the Guidelines," and explaining that it viewed 380 months as "the least restrictive sentence to address the crimes charged *and* [petitioner's] corresponding conduct." C.A.5 ROA.255. The difference between the 380-month term and the top of the 188–235 month Guidelines range that would have applied based on petitioner's offense conduct and criminal history alone was more than 12 years. Pet. App. 6a n.6.

Petitioner appealed, arguing that his sentence should be reversed for two reasons. First, he challenged the five-level enhancement as unsupported by even a preponderance of the evidence. Pet. App. 10a. Alternatively, noting that the enhanced term would clearly

[2] Petitioner did not alternatively object on the ground that the court was prohibited from considering the uncharged conduct because, even if supported by a preponderance of the evidence, the Fifth and Sixth Amendments required that conduct to be either found beyond a reasonable doubt by a jury or admitted by petitioner. Any such objection would have been futile, however, because that argument is squarely foreclosed by Fifth Circuit precedent. *See United States v. Hebert*, 813 F.3d 551, 563-64 (5th Cir. 2015), *cert. denied*, 137 S. Ct. 37 (2016); Def. C.A.5 Br. 42 n.15.

be substantively unreasonable if not for the judge's pattern finding, petitioner preserved the foreclosed claim that, even if adequately proved, the enhancement was nevertheless improper because any fact necessary to prevent a sentence from being substantively unreasonable must be either admitted by the defendant or found beyond a reasonable doubt by a jury, not by a judge. Def. C.A.5 Br. 41-42 & nn.14-15; Def. C.A.5 Reply Br. 3-4.

The Fifth Circuit affirmed petitioner's sentence. Pet. App. 1a-13a. Despite acknowledging that petitioner had raised serious issues as to the propriety of the uncharged-conduct allegation, Pet. App. 11a-12a, 13a, the court of appeals concluded that the trial court's factual finding was at least "plausible" and that it was therefore required to uphold the increase. Pet. App. 2a, 13a. The court did not question that petitioner's sentence would be substantively unreasonable without the enhancement.

REASONS FOR GRANTING THE PETITION

The question presented warrants review: it raises a recurring federal sentencing issue of national importance that has sparked extensive debate in the lower courts and repeated requests for this Court's guidance. Review is warranted in this case, moreover, because the question is squarely presented and the answer is outcome determinative to petitioner. The Court should grant certiorari and finally resolve the question it left open in *Rita*.

There is another reason why the Court should grant review of this important federal question now. A petition squarely presenting the intimately related question over the constitutionality of the use of acquitted conduct at sentencing is presently before this Court. *See Asaro v. United States*, No. 19-107. The lower-court opinions calling for this Court's

guidance make clear that the questions raised here and in *Asaro* are inextricably linked and equally important, but a positive or negative answer to one will not fully control the outcome of the other. The Court should therefore take the opportunity to definitively resolve these two significant questions together by granting certiorari in both cases. At a minimum, if review is granted in *Asaro*, the Court should hold petitioner's case pending its decision in that case.

I. The constitutionality of the practice of allowing courts to find facts necessary to support an otherwise substantively unreasonable federal sentence is an important and recurring question that warrants this Court's review.

The question whether the Constitution permits a judge to find the facts necessary to save a federal sentence from being reversed as substantively unreasonable is extremely important. Currently, once a defendant is convicted of *one* crime, the law in every federal circuit allows the district judge to increase his sentence, sometimes by decades or more, upon finding that he committed *other* crimes that either were never charged, tried, or admitted, or for which he was previously tried and acquitted, by only a preponderance of the evidence. Several Justices of this Court and numerous lower-court judges have voiced serious concerns that, at least where the uncharged or jury-rejected facts are essential to the substantive lawfulness of the sentence, this practice violates the Fifth Amendment right to due process and the Sixth Amendment right to trial by jury. This open and recurring question of federal sentencing law warrants this Court's review.

In *Rita v. United States*, 551 U.S. 338 (2007), this Court held that an appellate presumption of reasonableness for within-Guidelines sentences is constitutional on the ground

that the Sixth Amendment does not "automatically forbid" a sentencing judge from taking account of factual matters not determined by a jury. *Id.* at 352. Justice Scalia, joined by Justice Thomas, expressed concern that, in those cases in which a defendant's sentence is "upheld as reasonable only because of the existence of judge-found facts," this system would condone violations of the rule established in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), that all facts essential to a lawful sentence must be found by a jury or admitted by the defendant. *Rita*, 551 U.S. at 374 (opinion concurring in part and concurring in the judgment). In response, the Court stated that the question posed by Justice Scalia was "not presented by this case." *Id.* at 353. Justice Stevens, joined by Justice Ginsburg, noted that "[s]uch a hypothetical case should be decided if and when it arises." *Id.* at 366 (concurring opinion).

In the years since, five current and former Justices have expressed serious concerns over the reliance on judge-found facts to elevate a federal sentence to otherwise unreasonable heights. In 2014, Justice Scalia, joined by Justices Thomas and Ginsburg, highlighted the need for the Court to address the question in an opinion dissenting from the denial of certiorari. *See Jones v. United States*, 135 S. Ct. 8, 8-9 (2014). A jury found the *Jones* petitioners guilty of distributing small amounts of crack cocaine, but acquitted them of participating in a larger distribution conspiracy. *Id.* at 8. But, based on a finding that the petitioners *had* engaged in the charged conspiracy, the district judge imposed sentences far greater than the Guidelines otherwise would have recommended. *Id.*

Justice Scalia believed the petitioners presented a "strong case" that, "but for the judge's finding of fact, their sentences would have been 'substantively unreasonable' and therefore illegal." *Id.* If so, Justice Scalia explained, the sentences violated the constitution:

> The Sixth Amendment, together with the Fifth Amendment's Due Process Clause, 'requires that each element of a crime' be either admitted by the defendant, or 'proved to the jury beyond a reasonable doubt.' Any fact that increases the penalty to which a defendant is exposed constitutes an element of a crime, and 'must be found by a jury, not a judge.' We have held that a substantively unreasonable penalty is illegal and must be set aside. It unavoidably follows that any fact necessary to prevent a sentence from being substantively unreasonable—thereby exposing the defendant to the longer sentence—is an element that must be either admitted by the defendant or found by the jury.

Id. (internal citations omitted). Justice Scalia observed that ever since the question was "left for another day" in *Rita* the courts of appeals had "uniformly taken [the Court's] continuing silence to suggest that the Constitution *does* permit otherwise unreasonable sentences supported by judicial factfinding, so long as they are within the statutory range," and urged the Court to grant certiorari in an appropriate case. *Id.* at 9 (original emphasis).

Shortly after Justice Scalia's dissent in *Jones*, then-Judge Gorsuch noted that the "assum[ption] that a district judge may either decrease or increase a defendant's sentence (within the statutorily authorized range) based on facts the judge finds without the aid of a jury or the defendant's consent" is "far from [constitutionally] certain." *United States v. Sabillon-Umana*, 772 F.3d 1328, 1331 (10th Cir. 2014) (citing *Jones*). One year later, then-Judge Kavanaugh remarked that "[a]llowing judges to rely on acquitted or uncharged con-

duct to impose higher sentences than they otherwise would impose seems a dubious infringement of the rights to due process and to a jury trial." *United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (opinion concurring in the denial of rehearing en banc); *see also id.* ("If you have a right to have a jury find beyond a reasonable doubt the facts that make you guilty, and if you otherwise would receive, for example, a five-year sentence, why don't you have a right to have a jury find beyond a reasonable doubt the facts that increase that five-year sentence to, say, a 20-year sentence?").

Numerous lower-court judges have echoed and elaborated on these concerns. Calling the practice of "using judge-found facts to calculate the applicable sentencing range under the Guidelines" a "widespread problem," Judge Merritt, writing on behalf of five other judges, has advanced the position that a sentence violates the Sixth Amendment where "the reasonableness—and thus legality—of the sentence depends entirely on the presence of facts that were found by a judge, not a jury[.]" *United States v. White*, 551 F.3d 381, 386-87 (6th Cir. 2008) (en banc) (Merritt, J., dissenting). Other judges have reached the same conclusion. *See Bell*, 808 F.3d at 930-32 (Millett, J., concurring in the denial of rehearing en banc); *United States v. Mercado*, 474 F.3d 654, 660-63 (9th Cir. 2007) (Fletcher, J., dissenting); *United States v. Faust*, 456 F.3d 1342, 1349-51 (11th Cir. 2006) (Barkett, J., specially concurring).

A number of judges have also concluded that when the facts found by the judge amount to a separate criminal offense for which the defendant has never been charged, this form of judicial factfinding separately violates "the Fifth Amendment's imperative that a

criminal defendant is entitled to the determination of his or her guilt beyond a reasonable doubt." *United States v. Grier*, 475 F.3d 556, 589 (3d Cir. 2007) (en banc) (Sloviter, J., joined by McKee, J., dissenting); *see id.* at 582-83 (Ambro, J., concurring) (endorsing position that due process requires "sentencing enhancements that themselves constitute separate crimes [to] be proven beyond a reasonable doubt"); *id.* at 604-08 (McKee, J., joined by Sloviter, J., dissenting) (same); *Faust*, 456 F.3d at 1352 (Barkett, J., specially concurring) (same). Judge Ambro described the problem in stark terms: by permitting judges to find extra-offense crimes "for which [the defendant] was not tried—or worse, tried and acquitted—and to sentence him as if he had been convicted of" those crimes as well, he explained, the current practice creates, "[i]n effect," a "shadow criminal code under which, for certain suspected offenses, a defendant receives few of the trial protections mandated by the Constitution." *Grier*, 475 F.3d at 574 (opinion concurring in the judgment) (emphasis removed).

Despite the serious constitutional problems flagged by the Justices of this Court and other lower-court jurists, binding precedent in every circuit forecloses any constitutional challenge to the practice of relying on judicial factfinding to drive the reasonableness of federal sentences. *See Jones*, 135 S. Ct. at 9 (collecting cases). Even after *Jones*, the lower courts continue to perceive themselves bound to affirm sentences that would be reversed as substantively unreasonable but for a judge-found fact. *See, e.g.*, *United States v. Ulbricht*, 858 F.3d 71, 128 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 2708 (2018); *United States v. Bell*, 795 F.3d 88, 103-04 (D.C. Cir. 2015), *cert. denied*, 137 S. Ct. 37 (2016); *United*

States v. Hebert, 813 F.3d 551, 563-64 (5th Cir. 2015), *cert. denied*, 137 S. Ct. 37 (2016). And, in the face of continued inaction from other institutional players, like Congress or the Sentencing Commission, it is unlikely that the serious constitutional problems with the current practice will be remedied elsewhere.

The fact that so many federal appellate judges have concluded that a recurring and consequential sentencing practice is unconstitutional, but feel constrained to allow that practice to persist in the absence of further guidance from this Court, demonstrates how sorely this Court's intervention is needed. And there is no doubt as to the issue's significance to criminal defendants: "It is all too real that advisory Guidelines sentences routinely change months and years of imprisonment to decades and centuries on the basis of judge-found facts[.]" *Rita*, 551 U.S. at 375 n.4 (Scalia, J., joined by Thomas, J., concurring in part and concurring in the judgment). Indeed, under the current system, individuals, like petitioner, continue to suffer drastic sentencing increases based on conduct for which they have never been arrested, charged, or tried, and that is wholly unrelated to their federal offense of conviction. "This has gone on long enough." *Jones*, 135 S. Ct. at 9 (Scalia, J., joined by Thomas and Ginsburg, JJ., dissenting from denial of certiorari).

For the reasons just described, the question presented warrants review in its own right. But the importance of resolving the question now is magnified in light of another pending petition raising the intimately related issue of the constitutionality of sentencing based on acquitted conduct.

This Court's *Apprendi* line of cases not only raised the question left open in *Rita* and presented here—can judges find facts without which a sentence would be unreasonable?—but also reinvigorated the longstanding debate over a related question: can judges find and sentence a defendant based on conduct for which he was acquitted? Justice Scalia's dissent in *Jones*, and many of the thoughtful concurring and dissenting opinions of lower-court judges cited above, make clear that these questions are equally important and inextricably linked.

In *Jones*, Justice Scalia described his view of the answer to the question presented here as "any fact necessary to prevent a sentence from being substantively unreasonable . . . is an element that must be either admitted by the defendant or found by the jury." 135 S. Ct. at 8. And the "facts" necessary to save the *Jones* petitioners' sentences from unreasonableness constituted conduct for which they had been acquitted. *See id.* at 8-9 (noting that the case was "particularly appealing" in light of the fact that "not only did no jury convict these defendants of the [judge-found] offense, but a jury *acquitted* them of that offense" (original emphasis)). To be sure, the questions do not fully overlap. *See White*, 551 F.3d at 392 (White, J., joined by five others, dissenting) (discussing the "host of unique concerns" raised by the "subset of judge-found facts" that is "acquitted conduct"). But, as the lower-court opinions expressing concern demonstrate, the criticisms of both practices derive from the same constitutional sources, *see id.* at 390 (noting that while the use of acquitted conduct to render a sentence reasonable might be more problematic than the use of other judge-found facts, "the Sixth Amendment violation is identical"); *Bell*, 808 F.3d

at 928 (Kavanaugh, J., concurring in the denial of rehearing en banc) ("Allowing judges to rely on acquitted or uncharged conduct to impose higher sentences than they otherwise would impose seems a dubious infringement of the rights to due process and to a jury trial."), and the need for guidance on "this important, frequently recurring, and troubling" practice is equally acute. *Bell*, 808 F.3d at 932 (Millett, J., also concurring in the denial of rehearing en banc); *see also United States v. Lasley*, 832 F.3d 910, 920-23 (8th Cir. 2016) (Bright, J., dissenting) (urging this Court to review acquitted-conduct issue).

As noted above, *see supra*, at note 1, a petition raising the acquitted-conduct question is currently pending before the Court, and the government has been ordered to respond. *See Asaro v. United States*, No. 19-107. Given the intimate relationship between the acquitted-conduct issue and the facts-necessary-to-prevent-unreasonableness issue, the request for a response as to the former amplifies the importance, and timeliness, of petitioner's request for review of the latter. Should the Court grant review in *Asaro*, the briefing and argument on the acquitted-conduct question will unavoidably encroach on, and in many ways beg, the question presented here. But the petitioner in *Asaro* will have no incentive to fully develop or defend the case against judicial factfinding outside the context of reliance on acquitted conduct.

Petitioner therefore suggests that the Court should take the opportunity to fully consider and definitively resolve these two significant and recurring questions at the same time by granting review in petitioner's case and *Asaro* in tandem. That approach would be the most efficient, as considering the cases together would allow the Court's decision in each

case to be informed by the potential implications of the other. It would also avoid leaving the lower courts with only half the guidance they need on these interwoven issues. At a minimum, however, if the Court does not grant certiorari outright in this case, it should hold the petition pending resolution of *Asaro*.

II. The decision below is incorrect.

The Fifth Circuit precedent that foreclosed petitioner's constitutional claim is wrong. This Court's modern sentencing jurisprudence shows that the Fifth and Sixth Amendments prohibit courts from finding the facts necessary to make an otherwise unreasonable federal sentence reasonable.

A. Judicial finding of the facts necessary to make a sentence reasonable violates the Sixth Amendment.

The Sixth Amendment's guarantee of a trial by jury is a constitutional protection "of surpassing importance." *Apprendi*, 530 U.S. at 476. "Just as the right to vote sought to preserve the people's authority over their government's executive and legislative functions, the right to a jury trial sought to preserve the people's authority over its judicial functions." *United States v. Haymond*, 139 S. Ct. 2369, 2375 (2019) (plurality). That "fundamental reservation of power" ensures that a "judge's authority to sentence derives wholly from the jury's verdict." *Blakely v. Washington*, 542 U.S. 296, 306 (2004) (citing *Apprendi*, 530 U.S. 466). Because "[a] judge's authority to issue a sentence derives from, and is limited by, the jury's factual findings of criminal conduct," *Haymond*, 139 S. Ct. at 2376, the Sixth Amendment, together with the Due Process Clause, requires that "every fact 'which the

law makes essential to a punishment' that a judge might later seek to impose" be found beyond reasonable doubt by a jury or admitted by the defendant. *Id.* (quoting *Blakely*, 542 U.S. at 304).

The *Apprendi* line of cases makes clear that the class of facts that are legally "essential to punishment," and thus that implicate the jury-trial right, is not limited to statutorily defined elements. *See Blakely*, 542 U.S. at 301-04 (applying *Apprendi* to facts triggering an elevated range under mandatory state sentencing guidelines); *United States v. Booker*, 543 U.S. 220, 230-37 (2005) (same as to then-mandatory federal guidelines). In *Blakely*, for instance, this Court rejected the idea that a jury "need only find whatever facts the legislature chooses to label elements of the crime," explaining that such a rule "would mean . . . that a judge could sentence a man for committing murder even if the jury convicted him only of illegally possessing the firearm used to commit it—or of making an illegal lane change while fleeing the death scene." 542 U.S. at 306. "The jury could not function as circuitbreaker in the State's machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish." *Id.* at 306-07 (original emphasis). Instead, the Court emphasized, it is the character of facts as "pertain[ing] to whether the defendant has a legal *right* to a lesser sentence" that "makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned." *Id.* at 309 (original emphasis).

Putting the *Apprendi* rule together with the requirement that federal sentences be "substantively reasonable" dictates that if a sentence would be reversed as substantively *un*reasonable without a particular fact, then that fact implicates the Sixth Amendment jury-trial right. Federal sentences "must" be "substantive[ly] reasonabl[e]" to survive appellate review. *Gall v. United States*, 552 U.S. 38, 51 (2007); *see Booker*, 543 U.S. at 261-63 (remedial opinion). In other words, a federal criminal defendant whose sentence is deemed unreasonable has a "legal right" to remand for the imposition of a lesser sentence. In petitioner's case, the alleged decade-old sexual offense found by the district court represents the only "fact" separating his sentence from substantive unreasonableness. As such, the existence or nonexistence of that fact unquestionably "pertain[s] to whether [petitioner] has a legal *right* to a lesser sentence." *Blakely*, 542 U.S. at 309. Before that fact could be used to increase petitioner's sentence by 12 years, therefore, it had to be found beyond a reasonable doubt by a jury or admitted by petitioner.

That the 12-year increase left petitioner's sentence below the maximum term authorized by his statute of conviction does not alter this result. The Fifth Circuit precedent that foreclosed petitioner's constitutional claim reasons that judicial finding of the facts necessary to make a sentence reasonable poses no *Apprendi* problem so long as "the defendant's sentence ultimately falls within the statutory maximum term." *Hebert*, 813 F.3d at 565. This is the prevailing wisdom in the courts of appeals, *see, e.g.*, *Ulbricht*, 858 F.3d at 128; *Bell*, 795 F.3d at 103-04; *White*, 551 F.3d at 385, and it is misguided.

That is because, as far as the Sixth Amendment right to a jury trial is concerned, the question is one of *jury*, not statutory, authorization. In the *Apprendi* context, the "statutory maximum" is "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Blakely*, 542 U.S. at 303 (original emphasis). In other words, if the jury's verdict or the defendant's plea "alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied." *Cunningham v. California*, 549 U.S. 270, 290 (2007).

Under the federal system's guided-discretion sentencing regime, it is simply not the case that the facts supporting a guilty plea or verdict automatically authorize a sentence up to the maximum term set by the applicable U.S. Code provision. Absent procedural error, a sentence at or below that maximum is lawful only if it is substantively reasonable. *See Gall*, 552 U.S. at 51. And substantive reasonableness "imposes a very real constraint on a judge's ability to sentence across the full statutory range." *Cunningham*, 549 U.S. at 309 (Alito, J., joined by Kennedy and Breyer, JJ., dissenting). Indeed, the courts of appeals have reversed sentences well below the applicable maximum set out in the statute of conviction as substantively unreasonable. *See, e.g.*, *United States v. Singh*, 877 F.3d 107, 116-17 (2d Cir. 2017) (five-year sentence where maximum was 20 years); *United States v. Chandler*, 732 F.3d 434, 437, 440 (5th Cir. 2013) (35-year sentence where maximum was life). If a particular sentence would be substantively unreasonable under the facts found by

a jury or admitted by the defendant alone, then "the judge acquires th[e] authority [to impose that term] only upon finding some additional fact." *Booker*, 543 U.S. at 235 (quoting *Blakely*, 542 U.S. at 305). In those circumstances, the sentence exceeds "the 'statutory maximum' for *Apprendi* purposes." *Blakely*, 542 U.S. at 303.

"[I]t is not the abstract dignity of the statutory maximum that is at stake in [this] Court's Sixth Amendment jurisprudence, but the integrity of the jury right itself, the cornerstone of our criminal justice system." *Faust*, 456 F.3d at 1350 (Barkett, J., specially concurring). Because the facts petitioner admitted in pleading guilty did not authorize the district court to lawfully increase his sentence to 380 months, that sentence violates the Sixth Amendment.

B. Judicial finding of the facts necessary to make a sentence reasonable also violates the Fifth Amendment.

Allowing judges to find facts without which a federal sentence would be substantively unreasonable—and thus, unlawful—also runs afoul of the Due Process Clause. This Court has long recognized that "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." *Gardner v. Florida*, 430 U.S. 349, 358 (1977). Indeed, *Apprendi* and its progeny made clear that the Fifth Amendment's promise that "no one may be deprived of liberty without 'due process of law'" works in concert with the jury-trial right when it comes to judicial factfinding, *Haymond*, 139 S. Ct. at 2376, and that same promise altogether prohibits certain types of information from factoring into the sentencing calculus. *See Zant v. Stephens*, 462 U.S. 862, 885 (1983) (defendant's race,

religion, or politics); *North Carolina v. Pearce*, 395 U.S. 711, 723-25 (1969) (fact that defendant prevailed on appeal).

As numerous jurists have advocated, *see supra*, at 11-12, due process should similarly preclude judges from finding the facts necessary to render reasonable an otherwise unreasonable sentence. That is particularly the case where, as here, the judge-found facts constitute a separate state or federal criminal offense for which the defendant has never been charged or tried.

"[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). This standard—"indispensable to command the respect and confidence of the community in applications of criminal law," *id.*—guards against the "'lack of fundamental fairness'" that would result if a defendant "'could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case.'" *Id.* at 363 (quoted source omitted).

The practice of permitting a judge to find by a mere preponderance of the evidence that a defendant "committed a separate offense for which he was never tried or convicted," and then to materially increase the defendant's sentence on that basis, "erodes" this fundamental due-process protection. *Grier*, 475 F.3d at 589 (Sloviter, J., joined by McKee, J., dissenting). This Court's hypothetical in *Blakely* makes the point: it would be an "absurd result" if "a judge could sentence a man for committing murder even if the jury convicted him only of illegally possessing the firearm used to commit it—or of making an illegal lane

change while fleeing the death scene." 542 U.S. at 306. Indeed, in dissenting from the majority's Sixth Amendment holding, Justice Breyer, joined by Justice O'Connor, noted that if Congress were to "permit a judge to sentence an individual for murder though convicted only of making an illegal lane change," that would be "the kind of problem the Due Process Clause is well suited to cure." *Id.* at 344 (Breyer, J., joined by O'Connor, J., dissenting). Seven Justices therefore agreed in *Blakely* that, at a minimum, the Due Process Clause curbs the government's ability to manipulate the criminal justice system by circumventing the procedural protections of trial—chief among them the entitlement to proof beyond reasonable doubt—to achieve the same result at sentencing.

Petitioner's case illustrates how judicial factfinding related to uncharged criminal conduct can create exactly this kind of constitutional loophole. Had either the state or federal government attempted to prosecute petitioner for the uncharged conduct that ultimately added 12 years to his instant sentence, petitioner would have been entitled to formal indictment and arraignment, to discover exculpatory information, to compel his own witnesses to testify, to confront and cross examine his accuser, and, as a final backstop, to have a jury find the facts establishing his guilt beyond a reasonable doubt. As it was, petitioner's federal sentencing hearing became a forum where he was effectively tried, convicted by a preponderance of the evidence, and sentenced to more than 10 years for a separate crime—all without any of the protections attendant to the jury trial the Constitution would have otherwise guaranteed.

Put simply, petitioner was sentenced for two crimes though convicted of only one. This is precisely the "absurd result" that seven Justices found plainly inconsistent with due process in *Blakely*. "When a sentencing judge finds facts that could, in themselves, constitute entirely free-standing offenses under the applicable law—that is, when an enhancement factor could have been named in the indictment as a complete criminal charge—the Due Process Clause of the Fifth Amendment requires that those facts be proved beyond a reasonable doubt." *Faust*, 456 F.3d at 1352 (Barkett, J., specially concurring) (citing *Winship*, 397 U.S. at 364).

III. This case is an excellent vehicle for resolving this important question of federal sentencing law.

The question whether the Constitution prohibits judges from finding the facts necessary to sustain an otherwise unreasonable federal sentence warrants review in this case.

Petitioner's sentence is an apt example of one that would be unconstitutional under a correct interpretation of the Fifth and Sixth Amendment limitations on judicial factfinding at sentencing. Petitioner's admitted offense conduct and criminal history alone carried a Guidelines range of 188–235 months. Based on the disputed pattern finding and consequent five-level enhancement, the Guidelines range skyrocketed to 324–405 months. The 380-month term the district court imposed inside that enhanced range is 12 years above the top of the otherwise applicable range. A variance of that magnitude would plainly be substantively unreasonable in the absence of the district judge's uncharged-conduct finding. *Cf. Jones*, 135 S. Ct. at 9 (citing Guidelines increase of around 10 years based on judge-found

conspiracy as implicating the constitutional issue). The question whether judges may find facts essential to a substantively lawful federal sentence is thus both squarely presented by, and outcome determinative in, petitioner's case.

Moreover, the fact that petitioner raised his constitutional claim for the first time on appeal does not create an obstacle to this Court's ability to reach the question presented. The Court has previously granted certiorari in, and decided, cases where the central legal issue was not raised in the trial court. *See, e.g.*, *Tapia v. United States*, 564 U.S. 319, 322 (2011). And here, a decision in petitioner's favor would clearly entitle him to relief even on plain-error review. If recognized by this Court, the constitutional error will have become "plain" on appeal. *See Henderson v. United States*, 568 U.S. 266, 279 (2013). The government conceded below that application of the pattern enhancement, if erroneous, could not be deemed harmless. Gov't C.A.5 Br. 19 n.6. That concession, together with the district court's expressed intent to follow the enhanced Guidelines range, *see supra*, at 6, suffices to establish the requisite effect on substantial rights. *See Molina-Martinez v. United States*, 136 S. Ct. 1338, 1346 (2016). And leaving in place a sentence within a Guidelines range increased by 7–14 years on the basis of unconstitutional judicial factfinding would clearly undermine the fairness, integrity, or public reputation of judicial proceedings. *See Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1903 (2018).

Finally, the case for review is all the more compelling because, as discussed above, petitioner's case presents the Court with the unique opportunity to consider and resolve the question presented here *and* the equally important acquitted-conduct question presented in

Asaro at the same time. The lower courts have repeatedly requested guidance on both questions. This Court could answer that call, and provide truly definitive clarity on these important issues, by granting review in and considering petitioner's case and *Asaro* in tandem.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 12, 2019