No. 20-5279

In the Supreme Court of the United States

WILLIAM DALE WOODEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

ALLON KEDEM
Counsel of Record
ANDREW T. TUTT
MICHAEL ROIG
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000
allon.kedem@arnoldporter.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

In the Supreme Court of the United States

No. 20-5279

WILLIAM DALE WOODEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

The Court should take this case to resolve a circuit conflict regarding how to decide when two crimes are "committed on occasions different from one another" for purposes of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(1).

Petitioner William Dale Wooden broke into a mini-storage facility in Georgia one night in 1997. He entered ten units during the course of the crime and later pleaded guilty to ten counts of burglary. Were these burglaries committed "on occasions different from one another"? Fifteen years in federal prison depends on the answer. If not, Wooden's sentence for possessing a firearm as a felon would have been only 21 to 26 months; he would have been "home by Christmas 2016." D. Ct. Dkt. 84, 1-2.

But the Sixth Circuit answered yes, affirming a harsh mandatory-minimum sentence. So Wooden will remain incarcerated until 2028. That wrongheaded decision exacerbated an acknowledged circuit split on an important and recurring question.

First, the statute's text, structure, history, and purpose show that offenses are not committed on *different* "occasions" merely because they occur sequentially. That plain-language interpretation explains why cases like this one—which feel wrong to ordinary English speakers—indeed *are* wrong. One night in a storage facility does not an "Armed Career Criminal" make.

Second, courts of appeals are deeply divided over how to apply the "occasions" provision. *United States* v. *McElyea*, 158 F.3d 1016, 1020 (9th Cir. 1998) ("The Circuits Are Split On The Meaning Of 'Occasions Different From One Another'"). Some echo the Sixth Circuit's erroneous view that crimes are committed on different occasions whenever they take place sequentially—even only *minutes* apart at the *same* location. Others correctly refuse to treat temporal distinctness as dispositive, instead conducting a broader inquiry into whether offenses arose under the same circumstances or resulted from the same criminal opportunity.

This split cannot heal itself. The circuits have adopted different approaches with full knowledge of the disagreement. *E.g.*, *United States* v. *Morris*, 821 F.3d 877, 880 (7th Cir. 2016) ("our sister circuits have applied the ACCA differently"); *United States* v. *Carr*, 592 F.3d 636, 642 (4th Cir. 2010) ("other courts have reached differing results under similar facts"); *McElyea*, 158 F.3d at 1021 ("other circuits have confronted similar fact patterns with differing results"). Every circuit has weighed in.

Third, this question is important and recurring. Harsh criminal sentences should be meted out in proportion to the gravity of the relevant offenses, and only where Congress intended that result. Under the better reading of the "occasions" provision, the ACCA enhancement was

not warranted in Wooden's case—or countless others like it. The Court should grant the petition.[*]

A. The Decision Below Is Wrong

Different "occasions" under the ACCA are different *circumstances or opportunities*, not simply different *times*. That follows from the text, structure, history, and purpose of the clause.

Here, Wooden's ten burglaries were committed on the *same* occasion: He burgled all ten units at the mini-storage facility in a single criminal episode that flowed from the same opportunity; no intervening change in circumstances made his entry into the first storage unit any different from his entry into the second or third (or tenth). Wooden's offenses accordingly took place on the same "occasion" under § 924(e)(1).

Text. The word "occasion" has two common meanings: (1) an "opportunity or circumstance"; or (2) "a time at which something happens." *Merriam-Webster Dictionary*, http://bit.ly/3hiwYJ6. As Judge Cabranes explained, the former "broader sense" is the primary definition. *United States* v. *Bordeaux*, 886 F.3d 189, 195 (2d Cir. 2018). A regular English speaker would thus understand the phrase "crimes committed on *occasions* different from one another" as referring to offenses spawned under

[*] This case is also an appropriate vehicle to decide whether officers who use deception to gain access to constitutionally protected areas have violated the Fourth Amendment. Officer Mason procured unlicensed entry into Wooden's home through deceit: He asked to "step inside, to stay warm," but his real purpose was to find a fugitive. Pet.App.2. Mason's physical intrusion led directly to Wooden's firearm-possession conviction. Pet.App.2. This issue is preserved, Pet.6-7; C.A. Br.14-17; and the decision below splits with the Ninth Circuit, *Whalen* v. *McMullen*, 907 F.3d 1139, 1147-48 (2018) (Bybee, J.) (entry by ruse unconstitutional).

differing circumstances, not merely to those committed sequentially rather than simultaneously.

Other textual clues point in the same direction. The clause is precisely phrased: It refers not to crimes "committed *on different occasions*," but rather to crimes committed "on occasions *different from one another*." Congress would not have used that phrase if "occasions" merely denoted different times—since, by definition, all times are different from one another. By contrast, it makes perfect sense to speak of circumstances or opportunities "different from one another," which conveys the added sense that those circumstances or opportunities must be different in *kind* or *quality*.

Structure. The statute's title (the Armed *Career* Criminal Act) suggests a focus on "a particular type of offender," *Begay* v. *United States*, 553 U.S. 137, 146 (2008), namely, one who makes a career out of lawbreaking. A "Career Criminal" is one who habitually exploits criminal opportunities—not an offender (like Wooden) who, in a single spree on a single night of bad judgment, commits crimes of the same kind sequentially.

History and purpose. The ACCA's predecessor did not include the phrase "committed on occasions different from one another." See 18 U.S.C. App. §1202(a)(1) (1982). Congress added it later, in response to *United States* v. *Petty,* 798 F.2d 1157 (1986), where the Eighth Circuit held that the defendant's armed-robbery conviction—for robbing six people at a restaurant—qualified for a sentencing enhancement. See *McElyea*, 158 F.3d at 1019-20 (discussing legislative history). In response to the petition for certiorari in *Petty*, the Solicitor General confessed error: The statute was intended to reach only "career criminals," "repeat offenders," "habitual offenders," "recidivists," "revolving door" offenders, "three time loser[s]," and "third-time offender[s]." *Ibid.* The defendant's robbery

of six different victims on a single spree did not merit the enhancement, the Solicitor General explained, because Congress did not intend "to count previous convictions on multiple felony counts arising from a single criminal episode as multiple 'previous convictions.'" *Ibid.*

Congress amended the statute to ratify the Solicitor General's view. As then-Senator Biden explained, the different occasions language was added to "clarif[y] the armed career criminal statute to reflect the Solicitor General's construction," so as to "plainly express[ ] … what is meant by a 'career criminal,' that is, a person who over the course of time commits three or more of the enumerated kinds of felonies and is convicted therefor." *Ibid.*

Rule of lenity. Treating offenses as having been committed on different "occasions" whenever the offenses are non-simultaneous would sweep within ACCA vastly more conduct than a rule reaching only those crimes committed under different circumstances or opportunities. The rule of lenity "is founded on 'the tenderness of the law for the rights of individuals' to fair notice of the law 'and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department.'" *United States* v. *Davis*, 139 S. Ct. 2319, 2333 (2019). At minimum, the "occasions" clause is sufficiently ambiguous to require adopting the narrower interpretation as a matter of lenity.

Rule against absurdities. Under a temporal reading of "occasions," nearly identical conduct will result in different ACCA consequences based on the fortuity of whether one offense ended before the next began. Here, had Wooden stood at the truck and loaded goods stolen from the mini-storage by a confederate—rather than physically entering each unit himself—his ten burglaries would have been considered simultaneous rather than sequential. Though Wooden would still have been guilty of precisely the same burglary offenses, he would not have

received a fifteen-year enhancement (as the government conceded, Gov't C.A. Br. 19-20). See *United States* v. *Murphy*, 107 F.3d 1199, 1210 (6th Cir. 1997) (rejecting enhancement for robbery accomplice who stayed at first location while second location was robbed). "[I]t is quite impossible that Congress could have intended th[at] result," and "the alleged absurdity is so clear as to be obvious to most anyone." *Public Citizen* v. *Department of Justice*, 491 U.S. 440, 470-71 (1989) (Kennedy, J., concurring in judgment).

B. The Circuits Are Deeply Divided on This Important and Recurring Question

The courts of appeals are divided over the interpretation of § 924(e)(1). Despite some variation, their decisions fall into two general categories, reflecting broader or narrower interpretations of the "occasions" provision:

- Eight circuits apply the enhancement whenever crimes are committed *at different times*—that is, sequentially rather than simultaneously.
- Four circuits do not treat temporal separateness as sufficient, but instead apply the enhancement only when crimes are committed *under different circumstances* or pursuant to different opportunities.

Had Wooden been sentenced in a circuit that uses the "different circumstances" test, he would be free today.

1. Like the Sixth Circuit below, some circuits hold that crimes were *automatically* committed on different "occasions" whenever the crimes were committed "successively rather than simultaneously." *United States* v. *Carter*, 969 F.3d 1239, 1243 (11th Cir. 2020); see *United States* v. *Schoolcraft*, 879 F.2d 64, 73 (3d Cir. 1989); *United States* v. *Fuller*, 453 F.3d 274, 278 (5th Cir. 2006); *United States* v. *Morris*, 821 F.3d 877, 880 (7th Cir. 2016); *United States* v. *Abbott*, 794 F.3d 896, 898 (8th Cir. 2015); *United States* v. *Johnson*, 130 F.3d 1420, 1431 (10th Cir. 1997); *United States* v. *Thomas*, 572 F.3d 945, 951 (D.C.

Cir. 2009). Although these circuits also sometimes articulate multi-factor tests, they treat temporal distinctness as dispositive: "[T]o prove that two offenses are sufficiently separate and distinct for ACCA purposes, *it is sufficient … to show that some time elapsed between* [*them*]." *Abbott*, 794 F.3d at 898 (emphasis added); see *Fuller*, 453 F.3d at 278 (whether offenses occurred sequentially is "[t]he critical inquiry").

In other circuits, by contrast, showing that offenses are temporally sequential is *not* sufficient. These courts "understand 'occasions' in its broader sense, as the conjuncture of circumstances that provides an opportunity to commit a crime." *Bordeaux*, 886 F.3d at 196 (2d Cir.) (Cabranes, J.). They "consider *not only whether a defendant has committed different crimes at different times*, but also the other circumstances of the crimes." *Ibid.* (emphasis added). Accordingly, they require the Government to establish, through "a case-by-case examination of the totality of the circumstances," that the offenses were committed under different circumstances or arose as a result of different opportunities. *United States* v. *Stearns*, 387 F.3d 104, 108 (1st Cir. 2004); see *Bordeaux*, 886 F.3d at 196 (2d Cir.); *United States* v. *Tucker*, 603 F.3d 260, 263 (4th Cir. 2010); *McElyea*, 158 F.3d at 1021 (9th Cir). These circuits thus "distinguish between the defendant who simply commits several offenses in a connected chain of events and the defendant who is targeted by ACCA—someone who commits multiple crimes separated by substantial effort and reflection." *Bordeaux*, 886 F.3d at 196.

2. As a result of these distinct tests, "courts have reached differing results under similar facts." *Carr*, 592 F.3d at 642. That is particularly true in cases like this one: where separately charged offenses are committed in the same location at *nearly* the same time—but sequentially. Under the Sixth Circuit's test, Wooden's burglaries took place on different occasions because he entered the

storage units one after the other. That was the beginning and end of the court's analysis. Pet.App.A9-A10.

Other circuits similarly treat temporal separateness—however slight—as a clear dividing line between "occasions." See *United States* v. *Elliott*, 703 F.3d 378, 386-87 (7th Cir. 2012) (collecting cases). For these circuits, the test "is simple: were the crimes *simultaneous* or were they *sequential?*" *Ibid.* Even where offenses were separated by only minutes, they are deemed to have occurred on different occasions. *E.g.*, *United States* v. *Hudspeth*, 42 F.3d 1015, 1018-19 (7th Cir. 1994) (en banc) (35 minutes total for defendant's burglaries at adjoining stores at a strip mall); *United States* v. *Schieman*, 894 F.2d 909, 913 (7th Cir. 1990) (ten minutes).

For circuits on the other side of the split, even temporally sequential offenses can occur on the same occasion if other indicia show that the offenses arose under the same circumstances. Thus the Ninth Circuit in *McElyea* concluded that the defendant's burglary of two different stores in a strip mall were *not* committed on different occasions. 158 F.3d at 1018. Instead, he had "committed two identical crimes in basically the same location *within a short time period*." *Id.* at 1021 (emphasis added). That the defendant's "acts were part of one criminal episode" meant he did "not meet the profile of a career criminal envisioned by Congress." *Ibid.*

Similarly, in *Tucker*, the Fourth Circuit concluded that two separately charged burglaries of storage units at a mini-storage facility were *not* shown to be crimes committed on different occasions. 603 F.3d at 263. The facts there are essentially identical to this case: The defendant was one of several individuals charged with multiple counts of burglary stemming from close-in-time break-ins of different storage units within the same mini warehouse. *Id.* at 264. Applying a five-factor test, the court found that

the offenses had not occurred as part of "distinct episodes." *Id.* at 265.

3. Even circuits that purport to automatically treat sequential events as different "occasions" have sometimes ignored this principle where its application would be unfair. For instance, in *United States* v. *Willoughby*, 653 F.3d 738, 742 (2011), the Eighth Circuit held that sequential drug sales to different individuals constituted one occasion because they occurred "in essence, simultaneously." And in *United States* v. *Sweeting*, 933 F.2d 962, 967 (1991), the Eleventh Circuit treated "the burglarizing of one home, fleeing to another home when the police approached, and hiding in a closet to escape detection" as a single occasion. These deviations from the temporal approach reveal the rottenness at its core.

4. The question here is important and recurring, as shown by numerous published decisions—including two en banc—involving ACCA enhancements for crimes that were committed under identical circumstances at *nearly* the same time. The actual number of criminal defendants affected likely numbers in the thousands. This issue will continue to recur with some frequency because criminals often rob structures with adjacent (but distinct) units, such as mini-storages, strip malls, storage lockers, and lockboxes.

The exceptional harshness of the ACCA's fifteen-year enhancement also counsels in favor of review. Severe criminal sentences should be imposed only on proportionally severe offenses—and only where Congress has clearly indicated the enhancement is appropriate. The best reading of the "occasions" provision indicates that Congress did not intend for offenders like Wooden, whose offenses arose as part of a single criminal episode, to be treated as career criminals.

C. The Government Mischaracterizes the Petition and Offers No Persuasive Ground to Deny Review

The Government sidesteps the circuit split entirely. Its brief in opposition construes Wooden's pro se petition solely as raising a forfeited argument that § 924(e)(1) is unconstitutionally vague. That badly mischaracterizes the petition, which asserts the same interpretive claim that Wooden has pursued throughout.

1. Wooden's challenge to his sentence has always been based on the argument that his burglary offenses could not count as separate ACCA predicates under a proper reading of the "occasions" provision. In the district court, "Mr. Wooden argue[d] that these ten convictions should be considered as one prior conviction as they happened on the same date, time, and place." Sentencing Mem., D. Ct. Dkt. 84 at 6. He then raised the same argument before the Sixth Circuit, C.A. Br. 17-18, which resolved his appeal on that basis, holding that because "Wooden could not be in two (let alone ten) [mini warehouses] at once," "his burglary offenses were separate offenses for purposes of the ACCA." Pet.App. A9, A11.

Wooden has raised the same argument in this Court, framing his second question presented as follows:

> Did the Sixth Circuit err by expanding the scope of 18 U.S.C. § 924(e)(1) in the absence of clear statutory definition with regard to the vague term "committed on occasions different from one another?"

Pet. i. His petition explained that "[o]n direct appeal[,] Mr. Wooden, through counsel, argued that his ten prior Georgia Burglary convictions should be treated as one criminal episode, and thus one conviction for ACCA purposes." Pet. 8. He then argued that the Sixth Circuit had improperly rejected his argument by "expand[ing] the scope of § 924(e)(1) rather than pursu[ing] a narrower

interpretation." *Ibid.* "This expansionalist view defies logic," he argued, "when viewed through the lens of strict statutory construction." Pet. 9.

2. The Government's brief in opposition does not address this interpretive question, on which the decision below turned. Instead, the Government says that Wooden, rather than carrying forward the same claims he has made throughout this case, has instead elected to intentionally abandon those claims in favor of an entirely *new* claim that § 924(e)(1) is unconstitutionally vague. That reading beggars belief.

To be sure, Wooden's petition does assert that the statute is unconstitutionally vague, at least if read to encompass his conduct. Pet. 10. But his petition clearly focuses on his argument—raised at every stage—that the statute, when properly construed, simply does not reach his conduct. Wooden, a non-lawyer, raised the same claim he has asserted throughout and sought to bolster it (however unartfully) with arguments of his own. Pet. 4 ("[I]t was error for the Sixth Circuit to expand the scope of § 924(e)(1) rather than take a narrow interpretation when the statute is vague."). Reading his petition as solely raising a new, forfeited constitutional vagueness challenge is beyond uncharitable—and particularly incomprehensible in light of *this Court's order calling for a response*, which sought the Government's views on the acknowledged circuit split.

3. This petition is a good vehicle for review and resolution of the "occasions" question. But if the Court has any hesitation about granting certiorari without hearing the Government's position on the circuit split, the Court should call for a new response directed to addressing the question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ALLON KEDEM
Counsel of Record
ANDREW T. TUTT
MICHAEL ROIG
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000
allon.kedem@arnoldporter.com

JANUARY 2021