No. 22-____

IN THE

Supreme Court of the United States

JASON REED,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Constitution requires an indictment, jury trial, and proof beyond a reasonable doubt to find that a defendant's prior convictions were "committed on occasions different from one another," as is necessary to impose an enhanced sentence under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1).

RELATED PROCEEDINGS

United States v. Reed, 2020 WL 6743099 (D.N.M. Nov. 17, 2020)

United States v. Reed, 39 F.4th 1285 (10th Cir. 2022)

TABLE OF CONTENTS

Page

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW.. 1

JURISDICTION.. 1

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS 1

INTRODUCTION 2

STATEMENT 4

A. Legal Framework................................ 4

B. Proceedings Below 7

REASONS FOR GRANTING THE PETITION 12

A. The Decision Below Is Wrong 15

B. The Courts Of Appeals Will Not Correct Course Without This Court's Intervention 19

C. The Question Presented Is Critically Important 21

D. This Is An Ideal Vehicle To Address The Question Presented...... 23

CONCLUSION 25

APPENDIX A:
Court of Appeals Opinion
(10th Cir. July 7, 2022)..................................... 1a

TABLE OF CONTENTS
(continued)

Page

APPENDIX B:
District Court Judgment
(D.N.M. Nov. 17, 2020) 19a

APPENDIX C:
Court of Appeals Order Denying Rehearing
(10th Cir. Sept. 1, 2022) 33a

APPENDIX D:
Indictment 35a

APPENDIX E:
Information 39a

APPENDIX F:
Excerpt of Sentencing Transcript 41a

APPENDIX G:
Relevant Statutory Provisions 44a

TABLE OF AUTHORITIES

Page(s)

CASES

Alleyne v. United States,
570 U.S. 99 (2013) 2, 6

Almendarez-Torres v. United States,
523 U.S. 224 (1998) 6, 17

Apprendi v. New Jersey,
530 U.S. 466 (2000) .... passim

Blakely v. Washington,
542 U.S. 296 (2004) 7, 22

Cunningham v. California,
549 U.S. 270 (2007) 7

Descamps v. United States,
570 U.S. 254 (2016) 18

Duncan v. Louisiana,
391 U.S. 145 (1968) 22

In re Winship,
397 U.S. 358 (1970) 22

Marshall v. Jerrico, Inc.,
446 U.S. 238 (1980) 23

Mathis v. United States,
579 U.S. 500 (2016) 17, 18, 19

Offutt v. United States,
348 U.S. 11 (1954) 23

Peña-Rodriguez v. Colorado,
137 S. Ct. 855 (2017) 22

Pereida v. Wilkinson,
141 S. Ct. 754 (2021) 19

Powers v. Ohio,
499 U.S. 400 (1991) 23

TABLE OF AUTHORITIES
(continued)

Page(s)

Ring v. Arizona,
536 U.S. 584 (2002)... 7

S. Union Co. v. United States,
567 U.S. 343 (2012)... 7

Shepard v. United States,
544 U.S. 13 (2005)..17, 18

Stirone v. United States,
361 U.S. 212 (1960)... 22

Sullivan v. Louisiana,
508 U.S. 275 (1993)... 22

United States v. Barrera,
2022 WL 1239052 (9th Cir. Apr. 27, 2022)....... 21

United States v. Booker,
543 U.S. 220 (2005)... 7

United States v. Burgin,
388 F.3d 177 (6th Cir. 2004).............................. 20

United States v. Cotton,
535 U.S. 625 (2002)... 15

United States v. Daniels,
2022 WL 1135102 (4th Cir. Apr. 18, 2022)....... 21

United States v. Dudley,
5 F. 4th 1249 (11th Cir. 2021)........................... 16

United States v. Gaudin,
515 U.S. 506 (1995)... 17

United States v. Harris,
447 F.3d 1300 (10th Cir. 2006).......................... 11

United States v. Hennessee,
932 F.3d 437 (6th Cir. 2019).............................. 18

United States v. Jurbala,
198 F. App’x 236 (3d Cir. 2006)......................... 20

TABLE OF AUTHORITIES (continued)

Page(s)

United States v. Longoria,
874 F.3d 1278 (11th Cir. 2017)........................... 20

United States v. Michel,
446 F.3d 1122 (10th Cir. 2006)......................11, 20

United States v. Miller,
305 F. App'x 302 (8th Cir. 2008) 20

United States v. Morris,
293 F.3d 1010 (7th Cir. 2002)............................ 20

United States v. Perry,
908 F.3d 1126 (8th Cir. 2018)............................ 16

United States v. Santiago,
268 F.3d 151 (2d Cir. 2001) 20

United States v. Stearns,
387 F.3d 104 (1st Cir. 2004) 20

United States v. Stowell,
40 F.4th 882 (8th Cir. 2022) 20-21

United States v. Tatum,
165 F. App'x 367 (5th Cir. 2006) 20

United States v. Thompson,
421 F.3d 278 (4th Cir. 2005).........................16, 20

United States v. Walker,
953 F.3d 577 (9th Cir. 2020).............................. 20

United States v. Williams,
39 F.4th 342 (6th Cir. 2022) 21

United States v. Wilson,
406 F.3d 1074 (8th Cir. 2005)............................ 20

Welch v. United States,
578 U.S. 120 (2016).. 5

Wooden v. United States,
142 S. Ct. 1063 (2022).................................passim

TABLE OF AUTHORITIES (continued)

Page(s)

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V 1

U.S. Const. amend. VI 1

STATUTES

18 U.S.C. § 924(a)(2) 4

18 U.S.C. § 924(a)(8) 4

18 U.S.C. § 924(e)(1) ....passim

Pub. L. No. 117-159, div. A, tit. II, § 12004(c),
136 Stat. 1313, 1329 (June 25, 2022)................. 4

OTHER AUTHORITIES

Joseph Story, Commentaries on the
Constitution of the United States (1833)
(Lonang Inst. ed., 2005).................................... 22

U.S. Sent'g Comm'n, Federal Armed Career
Criminals: Prevalence, Patterns, and
Pathways (Mar. 2021) 23

PETITION FOR A WRIT OF CERTIORARI

Petitioner Jason Reed respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 39 F.4th 1285 and reprinted in the Appendix to the Petition ("Pet. App.") at 1a-18a. The order of the court of appeals denying rehearing is unpublished but reprinted at Pet. App. 33a-34a. The judgment of the district court is unpublished but available at 2020 WL 6743099 and reprinted at Pet. App. 19a-32a.

JURISDICTION

The court of appeals issued its decision on July 7, 2022, Pet. App. 1a, and denied rehearing on September 1, 2022, *id.* at 33a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." U.S. Const. amend. VI.

The relevant statutory provision, Section 924(e) of Title 18 of the U.S. Code, is reproduced in the appendix.

INTRODUCTION

This case involves a pressing constitutional question in the administration of the Armed Career Criminal Act ("ACCA"). The ACCA requires a minimum sentence of fifteen years imprisonment—and a maximum of life—for a defendant convicted of unlawful possession of a firearm *if* a defendant has three qualifying prior convictions "committed on occasions different from one another." 18 U.S.C. § 924(e)(1). This Court has held that "any fact," "[o]ther than the fact of a prior conviction, . . . that increases the penalty for a crime beyond the prescribed statutory maximum"—or that increases the mandatory minimum—"must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *see Alleyne v. United States*, 570 U.S. 99 (2013) (applying *Apprendi* to mandatory minimums). In *Wooden v. United States*, 142 S. Ct. 1063 (2022), this Court held that the ACCA's "on occasions different from one another" inquiry turns on whether prior crimes arose from the "same criminal episode"—and this question turns on a "multi-factored" inquiry that considers time, place, intervening events, and "the character and relationship of the offenses." *Id.* at 1067, 1070-71. Those considerations fall outside the "fact of a prior conviction" and thus squarely implicate the jury trial right. Yet in this case, the court of appeals refused to reconsider its pre-*Wooden* precedent treating the "occasions" inquiry as a matter for the judge at sentencing—thus depriving petitioner of the

indictment and jury determination beyond a reasonable doubt to which he is entitled.

Wooden reserved whether *Apprendi*'s principles apply to the occasions issue because the parties did not raise it. 142 S. Ct. at 1068 n.3. The time to resolve that question has arrived. The government *agrees* that in light of *Wooden*'s interpretation of "occasions," the jury trial right applies to that determination. Yet, as in this case, courts of appeals refuse to revisit their pre-*Wooden* precedent holding that a jury need not resolve ACCA's occasions question. This issue will persist until this Court definitively resolves it—and the need for this Court's intervention is all the more essential because ACCA defendants face unjustified years in prison while the lower courts refuse to accord them their constitutional rights.

Only this Court can establish a uniform national rule that corrects the lower courts' errors. Before *Wooden*, all of the courts of appeals that addressed the issue adopted the erroneous view that the occasions issue fell into the narrow exception to *Apprendi* permitting a court to find the fact of a prior conviction at sentencing. Until told otherwise, district courts will follow that precedent. And the odds of *all* of the courts of appeals going en banc to overturn their erroneous pre-*Wooden* precedent approach zero. This case proves that point: the court of appeals denied petitioner's request to grant rehearing en banc to correct its precedent—despite being advised that the government agrees that its precedent is wrong and that the issue is enbancworthy.

The ACCA error here affects numerous defendants each year. And this case is the perfect vehicle for review: the issue was raised and preserved below, and the error is outcome determinative. Petitioner was not charged on the same occasions issue, never admitted that he was ACCA-eligible, and objected to the sentencing court's imposition of an ACCA sentence. This Court should grant review to address the *Apprendi* issue it reserved in *Wooden* and reverse the decision below.

STATEMENT

A. Legal Framework

1. Under the Armed Career Criminal Act of 1984, a defendant convicted of unlawful possession of a firearm, in violation of 18 U.S.C. § 922(g), faces more severe punishment if he has three or more previous convictions "for a violent felony or a serious drug offense, or both, committed on occasions different from one another." 18 U.S.C. § 924(e)(1). At the time of the offense conduct in this case, a violation of Section 922(g) was punishable by up to ten years of imprisonment. *See* former 18 U.S.C. § 924(a)(2); *Wooden*, 142 S. Ct. at 1068.[1] But if the individual who violates Section

[1] In the Bipartisan Safer Communities Act, Congress increased the maximum penalty for a violation of Section 922(g) to "not more than 15 years" of imprisonment." *See* Pub. L. No. 117-159, div. A, tit. II, § 12004(c), 136 Stat. 1313, 1329 (June 25, 2022), *codified at* 18 U.S.C. § 924(a)(8). That amendment has no bearing on the constitutional issue in this case. Under the amended penalty scheme, as in the former one, ACCA significantly enhances both the minimum and the maximum sentence for a violation of Section 922(g).

992(g) has three or more qualifying convictions "committed on occasions different from one another," ACCA increases his prison term to a minimum of fifteen years and a maximum of life. 18 U.S.C. § 924(e)(1); *Welch v. United States*, 578 U.S. 120, 122 (2016).

In *Wooden*, this Court adopted a multifactor test for assessing whether crimes occurred on different occasions. Rejecting the government's position that "an 'occasion' happens 'at a particular point in time'—the moment 'when [an offense's] elements are established,'" 142 S. Ct. at 1069—the Court held that the proper test asks whether the prior convictions arose "from a single criminal episode," *id.* at 1067. The Court provided several contextual considerations that bear on that issue. "Offenses committed close in time, in an uninterrupted course of conduct, will often count as part of one occasion; not so offenses separated by substantial gaps in time or significant intervening events." *Id.* at 1071. "Proximity of location is also important," the Court explained: "the further away crimes take place, the less likely they are components of the same criminal event. *Id.* "And the character and relationship of the offenses may make a difference," the Court added: "The more similar or intertwined the conduct giving rise to the offenses—the more, for example, they share a common scheme or purpose—the more apt they are to compose one occasion." *Id.* at 1071.

Applying that fact-specific inquiry, the Court held that Wooden's ten burglaries occurred "on a single occasion" because they were committed "on a single night, in a single uninterrupted course of conduct,"

and "all took place at one location," while "[e]ach offense was essentially identical, and all were intertwined with the others." *Id.* The Court added that Wooden's "burglaries were part and parcel of the same scheme, actuated by the same motive, and accomplished by the same means." *Id.*

2. Having adopted this context-specific inquiry into the relationship between offenses to assess whether they occurred on a single "occasion," *Wooden* naturally raised a corresponding procedural question: Could the occasions inquiry be resolved by a judge at sentencing? After all, this Court has recognized only a single exception to its jury-trial-protective holding in *Apprendi*: a judge may determine at sentencing, by a preponderance of the evidence, a minimum- or maximum-increasing fact *only* for the "fact of a prior conviction." *Apprendi*, 530 U.S. at 490; *Alleyne*, 570 U.S. at 103 (*Apprendi* applies to facts that require a mandatory minimum); *Almendarez-Torres v. United States*, 523 U.S. 224, 230, 234, 244 (1998) (recidivism exception). Apart from that narrow exception, the right to a jury trial, with the government bearing the burden of proof beyond a reasonable doubt, attaches to such sentence-enhancing facts. *Apprendi* explained why those guarantees apply, notwithstanding a legislature's designation of those facts as matters for sentencing: "If a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that the defendant should not—at the moment the State is put to proof of those circumstances—be

deprived of protections that have, until that point, unquestionably attached." *Apprendi*, 530 U.S. at 484.

This Court has consistently applied that principle to require jury determinations, beyond a reasonable doubt, of facts that increase an individual's sentence above the otherwise-applicable minimum or maximum sentence. *See, e.g.*, *Ring v. Arizona*, 536 U.S. 584 (2002) (imposition of death penalty based on judicial factfinding); *Blakely v. Washington*, 542 U.S. 296 (2004) (mandatory state sentencing guidelines); *United States v. Booker*, 543 U.S. 220 (2005) (mandatory federal sentencing guidelines); *Cunningham v. California*, 549 U.S. 270 (2007) (mandatory state sentencing enhancements); *S. Union Co. v. United States*, 567 U.S. 343 (2012) (imposition of criminal fines based on judicial factfinding). Thus, unless the defendant admits the relevant facts, the judge "exceeds his proper authority" by imposing an enhanced sentence on the basis of facts not found by a jury. *Blakely*, 542 U.S. at 303.

B. Proceedings Below

1. In 2004, petitioner was convicted in federal court of four felonies: three counts of distributing a mixture containing cocaine base and one count of disposing a firearm to a convicted felon. Pet. App. 2a. Each conviction was contained in a single judgment. *Id*. A year later, petitioner was convicted in state court of trafficking cocaine. *Id*.

2. In 2017, petitioner brought a handgun and ammunition to an acquaintance's apartment in Farmington, New Mexico. I Record on Appeal ("ROA") 20. A grand jury later indicted him on one count of violating

18 U.S.C. § 922(g)(1) for being a felon in possession of a firearm and ammunition. 1 ROA 13. An information listing several of his prior convictions was filed later. *Id.* at 14. Neither of those charging instruments alleged that petitioner had ACCA-qualifying convictions committed on occasions different from one another. Pet. App. 35a-38a, 39a-40a.

Petitioner initially wanted to proceed to trial, but the government offered him a plea agreement. Pet. App. 3a. The proposed agreement stated that the maximum sentence petitioner could receive was ten years, unless the district court determined that he was an armed career criminal within the meaning of ACCA. *Id.* at 3a, 21a. In that case, the plea agreement stated, petitioner's minimum sentence would be fifteen years and his maximum would be life. *Id.*

Petitioner's trial counsel advised petitioner that he did not have the requisite number of felony convictions to qualify for an ACCA enhancement. Pet. App. 3a, 20a. Counsel believed that, because petitioner's prior federal offenses were contained in a single judgment, they were not committed on "occasions different from one another," as required to satisfy ACCA. *Id.* at 20a. After receiving that advice, petitioner entered a guilty plea. *Id.* at 3a, 20a-21a.

In the Presentence Investigation Report ("PSR"), the probation office concluded that ACCA applied. Pet. App. 4a. The PSR counted towards the three qualifying convictions petitioner's three prior federal drug-trafficking convictions. *Id.* Because the PSR's ACCA finding contradicted counsel's advice, petitioner obtained new counsel and moved to withdraw his guilty plea. *Id.* at 22a. He argued that his guilty

plea was unknowing or involuntary because trial counsel's erroneous advice constituted ineffective assistance of counsel. *Id*. After an evidentiary hearing, however, the district court denied petitioner's motion, holding that petitioner could not show he was prejudiced in entering a guilty plea by trial counsel's deficient advice. *Id.* at 22a-32a.

Petitioner filed objections to the PSR, arguing that the district court lacked authority to find that his prior convictions were serious drug offenses "committed on occasions different from one another" under 18 U.S.C. § 924(e)(1). *See* Pet. App. 41a-43a. Petitioner maintained that because facts that increase the mandatory minimum sentence must be submitted to the jury and found beyond a reasonable doubt, the district court could not make the occasions determination at sentencing. *See id*. And petitioner had never admitted that his prior federal drug convictions—the only ones that could possibly qualify under ACCA—arose from offenses committed on different occasions (and they did not). The district court overruled petitioner's objections and found "by a preponderance of the evidence" that the convictions were imposed on different occasions. *Id.* The court relied on information in the prior federal judgment and associated presentencing report to find that the three prior drug offenses occurred on different days and "in three separate locations," while giving no weight to petitioner's argument "that they were an ongoing conspiracy or an ongoing flow of events" because it believed that this factor was unsupported by the case law. *Id.* at 42a; *but see Wooden*, 142 S. Ct. at 1071 ("[T]he character and relationship of the offenses may make a difference:

The more similar or intertwined the conduct giving rise to the offenses—the more, for example, they share a common scheme or purpose—the more apt they are to compose one occasion."). The court accordingly imposed ACCA's mandatory minimum sentence—*i.e.*, fifteen years of imprisonment. Pet. App. 2a.

3. On appeal, petitioner argued, among other things, that the district court could not constitutionally decide whether his prior convictions were "committed on occasions different from one another," 18 U.S.C. § 924(e)(1), because a jury must find facts that increase a defendant's mandatory minimum sentence. Pet'r C.A. Br. 35-43. The court of appeals rejected that claim and affirmed. Pet. App. 12a-16a, 18a. [2]

The court of appeals held that its precedent foreclosed the argument that "whether [a defendant's] prior convictions were committed on occasions different from one another was a factual question that must be decided by a jury." Pet. App. 14a. "Relying on *Apprendi*'s prior-conviction exception—which excludes the 'fact or a prior conviction' as a matter for jury deliberation," the court of appeals had previously "held

[2] The court of appeals first held that the sentence-appeal waiver in petitioner's plea agreement did not preclude his challenge to the "district's court's power to make factual findings." *See* Pet. App. 13a (construing ambiguities in the waiver "against the Government and in favor of [petitioner's] appellate rights"). The court also rejected two other claims: that petitioner's plea was unknowing or involuntary because of his counsel's ineffective assistance and that he did not have sufficient notice of ACCA's potential applicability. *Id.* at 7a-12a, 16a-18a. Petitioner raises neither of those claims in this Court.

that 'whether prior convictions happened on different occasions from one another is not a fact required to be determined by a jury but is instead a matter for the sentencing court.'" *Id.* at 15a (quoting *United States v. Michel*, 446 F.3d 1122, 1133 (10th Cir. 2006), and citing *United States v. Harris*, 447 F.3d 1300, 1303 (10th Cir. 2006)). *Michel* "reasoned that certain issues of fact 'inherent in the convictions themselves' or 'sufficiently interwoven with the facts of the prior crimes' do not need to be submitted to a jury and found beyond a reasonable doubt because *Apprendi* left to the judge 'the task of finding not only the mere fact of previous convictions but other related issues as well.'" *Id.* (quoting *Michel*, 446 F.3d at 1133). "Absent en banc reconsideration or a superseding contrary decision by the Supreme Court," the court of appeals held that it was "bound by the precedent of prior panels." *Id.*

The court of appeals recognized that petitioner's jury trial "argument is not without some force" and that this Court "may disagree with our prior precedent and reach a different result in the future…." Pet. App. 14a, 16a. But given that *Wooden* had "declined to reach the issue" of "whether the Sixth Amendment requires that a jury, rather than a judge, resolve whether prior crimes occurred on a single occasion," the court adhered to its prior rulings. Thus, the court concluded, "the district court had the authority to decide whether [petitioner's] prior convictions were 'committed on occasions different from one another.'" *Id.* at 16a (quoting 18 U.S.C. § 924(e)(1)).

4. Petitioner sought rehearing and rehearing en banc, asking the Tenth Circuit to reconsider its prior

precedent holding that a jury determination of the "occasions" question is not required. *See* Pet. for Reh'g, *United States v. Reed*, No. 21-2073 (10th Cir. filed Aug. 18, 2022). By then, *the government* had determined that, in light of *Wooden*, a jury determination is required on the occasions issue—and indeed, had stated that "[a]lthough the Tenth Circuit has recently held that *Harris* and *Michel* remain binding precedent, *United States v. Reed*, No. 21-2073, 2022 WL 2513456 (10th Cir. July 7, 2022), the United States will ask the court to revisit that conclusion at an appropriate time."[3] An amicus brief filed by the Federal Defenders in the Tenth Circuit supporting petitioner's request for rehearing en banc called the government's filing to the Tenth Circuit's attention.[4] Yet despite all this, the Tenth Circuit denied petitioner's request on September 1, 2022—without asking the government to respond and without recorded dissent. Pet. App. 33a-34a.

REASONS FOR GRANTING THE PETITION

As Justice Gorsuch recognized in *Wooden*, "[a] constitutional question simmers beneath the surface" of the Court's decision. *Wooden*, 142 S. Ct. at 1087 n.7 (Gorsuch, J., joined by Justice Sotomayor, concurring). Having construed ACCA's "occasions" clause to

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[3] *See* Gov't Response to Sentencing Mem., *United States v. Dutch*, Cr. No. 16-1424 MV (D. Mex. Filed July 20, 2022), Doc. 102, at 2.

[4] *See* Amici Br. of Federal Defenders of New Mexico, Colorado/Wyoming, Kansas, Western District of Oklahoma, Northern/Eastern District of Oklahoma and Utah in Support of Rehearing En Banc at 3, *United States v. Reed*, No. 21-2073 (10th Cir. filed Aug. 25, 2022).

turn on multiple facts not contained in prior judgments of conviction, the question arises whether a judge, rather than a jury, may make the necessary determinations under "only a preponderance of the evidence standard." *Id.* The Court declined to reach that issue in *Wooden*—despite amicus briefs laying out the arguments for vindicating the jury trial right in these circumstances—because the defendant "did not raise it." *Id.* at 1068 n.3. But as Justice Gorsuch noted, "there is little doubt that [the Court] will have to do so soon." *Id.* at 1087 n.7 (Gorsuch, J., concurring). This is the case: the issue is squarely raised and preserved, and the Court should grant review to resolve it.

Review is all the more warranted because the correct answer flows directly from this Court's precedents, yet the Tenth Circuit declined to correct its erroneous view. The Constitution requires that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. *Wooden* leaves no doubt that whether a defendant's prior, qualifying convictions stem from offenses "committed on occasions different from one another" depends on a host of factual determinations. Because ACCA raises a defendant's sentencing range, *Apprendi*'s principles directly apply to the "occasions" issue. Indeed, the government itself agrees with this position. *See supra* at 12 & n.3.

Nevertheless, every court of appeals that reached the issue before *Wooden* rejected the *Apprendi* claim—and none has since taken up the call to reverse

course. Here, the Tenth Circuit adhered to its pre-*Wooden* precedent because it remained binding "[a]bsent en banc reconsideration or a superseding contrary decision by [this] Court." Pet. App. 15a. It then denied petitioner's petition for rehearing en banc raising the constitutional issue—without even asking for the government's response. *Id*. at 33a-34a. And it did this even after being advised that the government agrees with petitioner's legal position and of the serious sentencing and constitutional stakes for myriad defendants. *See supra* at 12 & nn.3-4.

This state of affairs is untenable. The likelihood that all of the regional circuits will reconsider and correct their erroneous pre-*Wooden* precedent is vanishingly remote. In the meantime, defendants will receive unconstitutionally enhanced sentences and will seek rehearing en banc in court after court. This benefits no one—not defendants, not the lower courts, not the government. This Court should therefore intervene to avoid years of wasteful litigation, to prevent scores of erroneously imposed ACCA sentences, and to protect critically important constitutional rights.

This case is the perfect vehicle to address the issue. Petitioner raised and preserved the constitutional issue at every relevant stage. He has never admitted that his prior federal drug convictions occurred on different occasions, and they did not. The case arises on direct review, and the court of appeals reached the question presented in a published opinion, rejecting petitioner's position. And the court of appeals bypassed the opportunity to revisit its erro-

neous precedent through the en banc process. The petition should be granted, and the decision below reversed.

A. The Decision Below Is Wrong

Apprendi applies here because of a straightforward syllogism. When a fact other than prior conviction increases the minimum or maximum sentence, it must be determined by a jury beyond a reasonable doubt. ACCA increases the minimum and maximum sentence when a defendant has three prior convictions from offenses committed on different occasions—and *Wooden* makes clear that the "occasions" issue turns on facts beyond the bare entry of conviction. Therefore, unless the defendant admits that ACCA applies, the "occasions" issue must be included in the indictment and resolved by the jury beyond a reasonable doubt. [5]

1. ACCA increases the imprisonment range for a violation of 18 U.S.C. § 922(g) by mandating a fifteen-year term and elevating the maximum to life. Even before *Wooden*, multiple judges recognized that ACCA's "occasions different from one another" requirement turns on facts that cannot be determined by ascertaining the elements of the offense from a

[5] "In federal prosecutions, such facts must also be charged in the indictment." *United States v. Cotton*, 535 U.S. 625, 627 (2002). Here, neither the indictment nor the information to which petitioner pleaded guilty alleged that he had ACCA-qualifying convictions for offenses committed on different occasions. Pet. App. 35a-40a; *see* Pet'r C.A. Br. 43-45 (arguing that petitioner was deprived, *inter alia*, of "presentment or indictment of a grand jury under the Fifth Amendment"). That error also requires reversal of petitioner's sentence.

prior judgment of conviction, so *Apprendi* requires that this issue be resolved by a jury. *See, e.g.*, *United States v. Perry*, 908 F.3d 1126, 1134 (8th Cir. 2018) (Stras, J., concurring) (court's treatment of different-occasions issue as one for the court "falls in line with our cases but is a departure from fundamental Sixth Amendment principles"); *United States v. Thompson*, 421 F.3d 278, 294 (4th Cir. 2005) (Wilkins, C.J., dissenting) (employing *Apprendi* analysis to find that facts "about a crime underlying a prior conviction," including dates, are beyond the "fact of a prior conviction" exception); *see also United States v. Dudley*, 5 F. 4th 1249, 1275 (11th Cir. 2021) (Newsom, J., concurring in part and dissenting in part) ("[W]hy doesn't judicial factfinding involving ACCA's different-occasions requirement itself violate the Sixth Amendment? After all, we've described the different-occasions inquiry as a factual one.").

As this Court held in *Wooden*, the proper inquiry for determining whether offenses were committed on occasions different from one another is "multi-factored." 142 S. Ct. at 1070. "Offenses committed close in time, in an uninterrupted course of conduct, will often count as part of one occasion; not so offenses separated by substantial gaps in time or significant intervening events." *Id.* at 1071. Similarly, "[p]roximity of location" matters; "the further away crimes take place, the less likely they are components of the same criminal event." *Id.* And "[t]he more similar or intertwined the conduct giving rise to the offenses—the more, for example, they share a common scheme or purpose—the more apt they are to compose one occasion." *Id.* These facts—and the application *Wooden*'s

legal standard to them—raise quintessential matters for jury determination. *See United States v. Gaudin*, 515 U.S. 506, 512 (1995) (jury trial right embraces both questions of historical fact and "the application-of-legal-standard-to-fact sort of question").

2. The exception to the rule articulated in *Apprendi* for the fact of a prior conviction does not apply to the occasions inquiry. Again, multiple judges have recognized this point. In *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), this Court held that a court (rather than a jury) may find the *fact* of a prior conviction. *Id.* at 226. But this exception is a limited one: It reaches only the fact of the conviction itself—and the elements of the offense of conviction. *See Mathis v. United States*, 579 U.S. 500, 511-12 (2016). A judge "can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of." *Id.* (citing *Apprendi*, 530 U.S. at 490). "[A] judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed the offense." *Id.* at 511 (citing *Shepard v. United States*, 544 U.S. 13, 25 (2005)). "Allowing a sentencing judge to go any further would raise serious Sixth Amendment concerns." *Id.*

A determination of the fact and elements of a prior conviction does not reveal information sufficient to make the occasions determinations under *Wooden*. The fact of multiple prior convictions says nothing about whether they arose "from a single criminal episode." 142 S. Ct. at 1067. The entry of a conviction does not show whether the offenses were committed

in one, uninterrupted course of conduct, nor the extent of the gaps in time between them, nor the proximity of the locations at which the offenses occurred, nor whether they share a common scheme or purpose. *Id.* at 1071. Indeed, the entry of a conviction does not even determine the date on which an underlying offense was committed. As a result, the "occasions" issue cannot fall within the exception articulated by *Almendarez-Torres* because resolving that issue requires determining far more than the fact of a prior conviction.

3. Some courts sought to solve this invasion of the jury's domain by confining courts determining ACCA's "occasions" issue to the documents identified in *Shepard v. United States*, 544 U.S. 13 (2005), *see, e.g.*, *United States v. Hennessee*, 932 F.3d 437, 442-43 (6th Cir. 2019), but that approach fails. *See id.* at 450-52 (Cole, C.J., dissenting) (finding that reasoning "constitutionally problematic"). *Shepard* documents comprise conviction records such as the charging instrument, guilty plea transcript, or jury instructions; the court may review this narrow set of documents only to determine which of the alternative elements within a divisible statute necessarily served as the basis for the prior conviction. *Descamps v. United States*, 570 U.S. 254, 262-63 (2016). As *Descamps* confirmed, *Shepard* documents cannot be used "to determine what the defendant and state judge must have understood as the factual basis of the prior plea." *Id.* (internal quotation marks omitted). *Mathis v. United States*, 579 U.S. 500 (2016), reaffirmed this holding, explaining that it is unfair to defendants to rely on

"'non-elemental fact[s]' in the records of prior convictions," because these purported facts "are prone to error precisely because their proof is unnecessary." *Id.* at 512; *id.* ("[A] defendant may have no incentive to contest what does not matter under the law; to the contrary, he may have good reason not to" (internal quotation marks omitted)). "Such inaccuracies should not come back to haunt the defendant many years down the road by triggering a length mandatory sentence." *Id.*

Shepard documents thus cannot be used to establish the facts underlying a prior conviction. "[T]he who, what, when, and where of a conviction" all "pose questions of fact." *Pereida v. Wilkinson*, 141 S. Ct. 754, 765 (2021). None of them is embraced by the fact of the conviction itself, and none is admitted through a guilty plea. It follows that they cannot be used by a sentencing court to resolve the "occasions different from one another" inquiry. Not even the date or location of an offense is an element that can be discerned from the *Shepard* documents consistent with *Apprendi*, *Descamps*, and *Mathis*—much less can courts determine the exact time between the offenses, their geographic proximity, or how similar they are in nature. The ineluctable conclusion is that such issues are matters for jury determination beyond a reasonable doubt.

B. The Courts Of Appeals Will Not Correct Course Without This Court's Intervention

Both before and after *Wooden*, the courts of appeals have incorrectly held that judge (rather than a jury) may answer the ACCA "occasions" question.

Before *Wooden*, courts of appeals that addressed the issue held that *Apprendi*'s rule did not apply to the "occasions" question because that question fell within the exception outlined by *Almendarez-Torres*. *See United States v. Santiago*, 268 F.3d 151, 156-57 (2d Cir. 2001); *United States v. Jurbala*, 198 F. App'x 236, 237 (3d Cir. 2006); *Thompson*, 421 F.3d at 285; *United States v. Tatum*, 165 F. App'x 367, 368 (5th Cir. 2006); *United States v. Burgin*, 388 F.3d 177, 183 (6th Cir. 2004); *United States v. Morris*, 293 F.3d 1010, 1012-13 (7th Cir. 2002); *United States v. Wilson*, 406 F.3d 1074, 1075 (8th Cir. 2005), *abrogated on other grounds by United States v. Miller*, 305 F. App'x 302, 303 (8th Cir. 2008); *United States v. Walker*, 953 F.3d 577, 580 (9th Cir. 2020); *Michel*, 446 F.3d at 1132-33; *United States v. Longoria*, 874 F.3d 1278, 1283 (11th Cir. 2017); *cf. United States v. Stearns*, 387 F.3d 104, 106, 109 (1st Cir. 2004) (affirming district court's determination that two of defendant's prior offenses were committed on separate "occasions"). In these courts' view, Section "924(e)'s 'different occasions' requirement falls safely within the range of facts traditionally found by judges at sentencing" because "the separateness" of prior convictions cannot "be distinguished from the mere fact of their existence." *Santiago*, 268 F.3d at 156-57. As a result, these courts hold "that *Apprendi* does not require different fact-finders and different burdens of proof for Section 924(e)'s various requirements." *Id.*

After this Court issued its decision in *Wooden*, every court of appeals that has reached the issue has continued to apply its pre-*Wooden* precedent. *See* Pet. App. 12a-16a; *United States v. Stowell*, 40 F.4th 882,

885 (8th Cir. 2022), *pet. for reh'g filed*, No. 21-2234 (8th Cir. filed Sept. 6, 2022); *United States v. Williams*, 39 F.4th 342, 351 (6th Cir. 2022), *pet. for reh'g filed*, No. 21-5856 (6th Cir. Aug. 19, 2022); *United States v. Barrera*, 2022 WL 1239052 (9th Cir. Apr. 27, 2022), *pet. for reh'g denied*, No. 20-10368 (9th Cir. Sept. 21, 2022); *United States v. Daniels*, 2022 WL 1135102 (4th Cir. Apr. 18, 2022), *pet. for cert. pending*, *Daniels v. United States*, No. 22-5102 (filed July 11, 2022). To date, every request for rehearing en banc asking the courts of appeals to reconsider their pre-*Wooden* precedent has been denied. *See* Pet. App. 33a-34a; Order Denying Petition For Panel Rehearing and Rehearing En Banc, *Barrera*, 2022 WL 1239052.

Despite the courts of appeals' adherence to the rule applied here, the question of that rule's constitutionality has "simmer[ed] beneath the surface" of post-*Apprendi* jurisprudence. *Wooden*, 142 S. Ct. at 1087 n.7 (Gorsuch, J., concurring). The pre-*Wooden* recognition of this issue, which was swept under the rug, has now become the elephant in the room. Only this Court's intervention can correct the lower courts' error and establish a consistent national rule that accords with the Fifth and Sixth Amendments.

C. The Question Presented Is Critically Important

Answering the question presented is vital to protect the Fifth Amendment right to indictment by a grand jury, the due process right to proof beyond a reasonable doubt, and the Sixth Amendment jury trial right. That question also has sweeping practical importance for criminal sentencing across the country.

1. "The jury is a central foundation of our justice system and our democracy." *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 860 (2017). "The jury is a tangible implementation of the principle that the law comes from the people." *Id.* The Framers adopted it because the jury serves as a "necessary check on governmental power," *id.*, an important "protection against arbitrary rule," *Duncan v. Louisiana*, 391 U.S. 145, 151 (1968), and the "bulwark" between the individual and the state, Joseph Story, Commentaries on the Constitution of the United States (1833) 764-65 (Lonang Inst. ed., 2005). Similarly, grand juries afford "basic protection" to an individual by "limit[ing] his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge" and thereby "protecting the citizen against unfounded accusation." *Stirone v. United States*, 361 U.S. 212, 218 & n.3 (1960).

The Sixth Amendment "right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure" and "meant to ensure [the people's] control in the judiciary." *Blakely*, 542 U.S. at 305-06. And the interlinked protection of the right to have the government prove its case beyond a reasonable doubt guards against error in a system that prizes the presumption of innocence. *See Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993); *In re Winship*, 397 U.S. 358, 363-64 (1970). Defendants who are deprived of these constitutional rights risk unjustified deprivations of liberty and unwarranted stigma.

2. The question presented has sweeping practical importance. During the ten-year period between October 2009 and September 2019, courts imposed 4,480 ACCA sentences. U.S. Sent'g Comm'n, Federal Armed Career Criminals: Prevalence, Patterns, and Pathways, 18-19 & n. 44 (Mar. 2021). Defendants who were subject to ACCA's fifteen-year mandatory minimum penalty at sentencing received an average sentence of 206 months in fiscal year 2019, *id.* at 6, 7, 26, representing a 70% increase in the median sentence over the maximum 10-year sentence that a defendant would face without an ACCA enhancement.

Such dramatic increases in an individual's sentence heighten the stakes in this case. Entrusting to a judge alone the determination of the underlying issues undermines the credibility and perceived fairness of the criminal justice system. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 243 (1980) ("[J]ustice must satisfy the appearance of justice." (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954))). And excluding juries from these momentous decisions undermines public confidence in the law. As this Court has noted, "[j]ury service preserves the democratic element of the law." *Powers v. Ohio*, 499 U.S. 400, 407 (1991). Maintaining the connection between criminal judgments and community participation affords yet another reason for this Court to resolve this issue.

D. This Is An Ideal Vehicle To Address The Question Presented

This case presents the perfect opportunity for the Court to resolve the question presented. The legal issue is cleanly presented in a published opinion, and the court of appeals denied rehearing en banc despite

recognizing that petitioner's claim had force and that this Court might disagree with its contrary rule. *See* Pet. App. 14a-16a, 33a-34a. And it did so with full awareness that, after *Wooden*, the United States *agrees* with petitioner that the occasions issue is for the jury. *See supra* at 12 & nn.3-4.

The question presented is also outcome determinative. If petitioner is entitled to a grand jury indictment and jury determination beyond a reasonable doubt on whether his prior offenses were committed on occasions different from one another, he cannot be subjected to the ACCA enhancement. Petitioner was never charged under ACCA. And he never admitted the relevant issue—that his prior federal drug convictions (two of which arose on successive days and a common scheme)—arose on different occasions, and under a correct understanding of the law as articulated in *Wooden*, they did not. Despite petitioner's objections, the judge determined by a preponderance of the evidence that his prior convictions were committed on different occasions and imposed an enhanced ACCA sentence. Pet. App. 41a-43a. This error requires reversal.

Underscoring the prejudicial nature of the violations, the district court relied on non-elemental facts in the prior convictions and ignored important factors under *Wooden*. The court placed weight on the bare statement in a prior judgment that two of petitioner's federal drug offenses were committed on different days. Pet. App. 41a. It also cited the prior PSR's statement that the drug offenses were committed in different locations. *Id.* at 42a. But no jury deter-

mined how long was the gap in time or distance between locations—assuming the government could prove those things with admissible evidence. And the district court entirely ignored—as legally irrelevant—petitioner's argument that the offenses arose from an ongoing conspiracy or an ongoing flow of events. *Id.* Yet this Court held in *Wooden* that the "character and relationship of the offenses may make a difference: The more similar or intertwined the conduct giving rise to the offenses—the more, for example, they share a common scheme or purpose—the more apt they are to compose one occasion." 142 S. Ct. at 1071. All of this underscores why the right to jury matters in this context—and why petitioner's sentence was drastically affected by its absence.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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