No. 22-336

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

BRIEF FOR AMICUS CURIAE THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers is a nonprofit, voluntary professional bar

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the National Association of Criminal Defense Lawyers ("NACDL"), its members, or its counsel made a monetary contribution to this brief's preparation or submission. Both parties were timely notified more than 10 days in advance of NACDL's intent to file this brief and have consented to its filing.

association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. Founded in 1958, NACDL has a nationwide membership of many thousands of direct members and up to 40,000 with affiliates. NACDL is the only nationwide professional bar association for both public defenders and private criminal-defense lawyers, and its members include public defenders, private criminal-defense lawyers, military defense counsel, law professors, and judges. Consistent with NACDL's mission of advancing the proper, efficient, and fair administration of justice, NACDL files numerous amicus briefs each year in the United States Supreme Court and other state and federal courts, all aimed at providing assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

This is one such case. The Court has explained "over and over" for more than twenty years that under the Sixth Amendment, "only a jury, and not a judge, may find facts that increase a maximum penalty, except for the simple fact of a prior conviction." *E.g.*, *Mathis* v. *United States*, 579 U.S. 500, 511-20 (2016) (citing, *inter alia*, *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000)). A sentencing court "can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of." *Id.* at 511-12; *see also*, *e.g.*, *Alleyne* v. *United States*, 570 U.S. 99, 111-12 & n.1 (2013). Yet in the context of applying the Armed Career Criminal Act's "occasions" test, the circuits routinely permit sentencing courts to do much more. Specifically, any factfinder conducting the inquiry prescribed in *Wooden* v. *United States*, 142 S. Ct. 1063

(2022), must make a series of fine-grained determinations pertaining not just to the elements of a defendant's prior convictions, but also to the factual circumstances and real-world conduct that gave rise to them. When such findings are made to support an increased maximum penalty (as they indisputably are in this context), they must be made by *a jury*, on proof beyond a reasonable doubt. "That simple point" has become a "mantra" in this Court's jurisprudence. *Mathis*, 579 U.S. at 510. But both before and since *Wooden*, lower courts conducting the occasions inquiry have routinely ignored it. Despite this Court's repeated teachings, they routinely sift through "legally extraneous circumstances" to support ACCA enhancements, thus conducting the precise inquiry the Sixth Amendment and this Court's precedents unambiguously prohibit. *Descamps* v. *United States*, 570 U.S. 254, 270 (2013); see also, *e.g.*, *Mathis*, 579 U.S. at 510.

That oft-repeated failure to properly apply this Court's precedents cries out for the Court's attention. In a typical year, 300 to 600 individuals are sentenced as Armed Career Criminals in United States courts, with no apparent jury involvement. U.S. Sent'g Comm'n, *Federal Armed Career Criminals: Prevalence, Patterns, and Pathways* 19, 28 (2021) (available at https://tinyurl.com/v272h233); see also U.S. Sent'g Comm'n, *2021 Annual Report & Sourcebook of Federal Sentencing Statistics* 77, 80 (available at https://tinyurl.com/36danyb6). Each of them is exposed not only to ACCA's 15-year mandatory minimum term of imprisonment, but also to a dramatically higher average sentence than a comparable non-ACCA offender. See, *e.g.*, *Federal Armed Career Criminals*, *supra*, at 28. Yet because

the facts necessary to conduct the occasions inquiry are rarely (in fact, likely never) elements of any predicate offense, much less of all three predicate offenses necessary to support an ACCA sentence, see, *e.g.*, Pet. 5-7, virtually every one of those sentences rests on a court's decision to do "just what [this Court] ha[s] said it cannot: rely on its own finding about a non-elemental fact to increase a defendant's maximum sentence." *Descamps*, 570 U.S. at 270. And all eleven numbered circuits have mistakenly ratified that practice. See Pet. 20.

As Justices Gorsuch and Sotomayor suggested in *Wooden*, 142 S. Ct. at 1079, 1082-87, the time has come for the Court to reestablish the controlling force of its decisions. The courts of appeals have "missed more than a few * * * clear signs" that their current approach to the occasions inquiry is unconstitutional, *United States* v. *Perry*, 908 F.3d 1126, 1135 (8th Cir. 2018) (Stras, J., concurring) (citing, *inter alia*, *Mathis*, 579 U.S. at 510-11, *Descamps*, 570 U.S. at 268-69, and *Alleyne*, 570 U.S. at 111 n.1), and, despite the existence of at least five unambiguously correct separate opinions addressing the issue,[2] there is no indication that any lower court will change its approach unless and until this Court intervenes. Indeed, as the petition explains (at 20-21), "every court of appeals that has reached the issue" post-

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[2] See *United States* v. *Dudley*, 5 F.4th 1249, 1273-78 (11th Cir. 2021) (Newsom, J., concurring in part and dissenting in part); *United States* v. *Hennessee*, 932 F.3d 437, 446-55 (6th Cir. 2019) (Cole, C.J., dissenting); *Perry*, 908 F.3d at 1134-36 (Stras, J., concurring); *United States* v. *Thomas*, 572 F.3d 945, 952-53 (D.C. Cir. 2009) (Ginsburg, J., concurring in part); *United States* v. *Thompson*, 421 F.3d 278, 294-95 (4th Cir. 2005) (Wilkins, C.J., dissenting).

Wooden "has continued to apply its pre-*Wooden* precedent," and "every request for rehearing en banc asking the courts of appeals to reconsider their pre-*Wooden* precedent has been denied." The error on which the decision below (along with many others like it) depends will thus persist until the Court reaffirms its Sixth Amendment "mantra," *Mathis*, 579 U.S. at 510, yet again. The Court should grant certiorari and do so.

ARGUMENT

I. LOWER COURTS ROUTINELY MISAPPLY THIS COURT'S PRECEDENTS WHEN ADDRESSING THE QUESTION PRESENTED.

No ACCA enhancement can be imposed without a finding that the defendant's predicate offenses were committed "on occasions different from one another." 18 U.S.C. § 924(e)(1). That inquiry necessarily requires findings regarding the factual circumstances underlying each predicate conviction. Cf. *Wooden*, 142 S. Ct. at 1067-71 (inquiry turns on such factors as whether offenses were "committed close in time, in an uninterrupted course of conduct," whether their "location[s]" were "[p]roxim[ate]," and whether they "share[d] a common scheme or purpose"). This Court has emphasized and reemphasized, to the point of "downright tedium," *Mathis*, 579 U.S. at 510, 519, that such factual findings cannot be made by a sentencing court when they change the available sentence, as an ACCA enhancement indisputably does. Yet the lower courts routinely make the findings themselves.

A. The Court's Precedents Clearly Foreclose The Use Of Judicial Factfinding To Support ACCA Enhancements.

1. In *Taylor* v. *United States*, the Court "established the rule for determining when a defendant's prior conviction counts as one of ACCA's enumerated predicate offenses." 495 U.S. 575 (1990); *Descamps*, 570 U.S. at 260-61. As the Court has described *Taylor*, that case establishes that a sentencing court may "'look only to the statutory definitions'—*i.e.*, the elements—of a defendant's prior offenses, and *not* 'to the particular facts underlying those convictions.'" *Descamps*, 570 U.S. at 261 (quoting *Taylor*, 495 U.S. at 600). There are no exceptions to that bright-line rule. However, *Taylor* explained that in a "narrow range of cases" in which a statute of conviction might list alternative elements, such as by prohibiting unlawful "entry of an automobile" (which is not an ACCA predicate offense) "as well as [unlawful entry of] a building" (which is), applying *Taylor*'s rule could mean looking to "the charging paper and jury instructions" to determine what the crime of conviction actually was. *Taylor*, 495 U.S. at 602. As *Taylor* made clear, however, the question would always remain focused on identifying the elements of the crime of conviction, as opposed to any legally extraneous underlying facts. *Id.*

2. *Taylor* mentioned, but did not expressly rest on, the Sixth Amendment. See 495 U.S. at 601. But "[d]evelopments in the law" between *Taylor* and the Court's next ACCA case, *Shepard* v. *United States*, 544 U.S. 13, 24 (2005), made *Taylor*'s constitutional basis clear. In *Shepard*, the Court explained for the first time that *Taylor*'s adoption of the categorical

approach "anticipated the very rule later imposed for the sake of preserving the Sixth Amendment right, that any fact other than a prior conviction sufficient to raise the limit of [a] possible federal sentence must be found by a jury[.]" *Shepard*, 544 U.S. at 24 (citing *Apprendi*, 530 U.S. at 490; *Jones* v. *United States*, 526 U.S. 227, 243 n.6 (1999)); see also U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a * * * trial[] by an impartial jury of the State[.]"). That rule became fully apparent ten years after *Taylor* (and five years before *Shepard*), in *Apprendi*, 530 U.S. at 490, in which the Court so held in the context of concluding that unless specifically found by a jury, facts regarding an offender's racially biased motivation could not permissibly support exposing that offender to a greater maximum sentence than would otherwise have been applicable.[3] As *Shepard* explained its own holding,[4] any finding of "a fact *about* a prior conviction," as opposed to the simple fact *of* a prior conviction, "is too far removed from the conclusive significance of a prior judicial

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[3] The year before *Apprendi*, in *Jones*, 526 U.S. at 243 n.6, the Court had suggested the same, employing constitutional avoidance to interpret a statute to require a jury, rather than a judge, to make findings regarding a victim's injury when those findings increased an offense's otherwise-applicable sentencing range.

[4] *Shepard*'s core holding was that when a prior conviction arises from a plea agreement, a sentencing court may look only to "the terms of [the] plea agreement or transcript of colloquy between judge and defendant" to identify the crime of conviction. *Descamps*, 570 U.S. at 261-62 (citing *Shepard*, 544 U.S. at 26). As noted, *Shepard* emphasized that any review of such documents must remain focused on identifying the crime of conviction and cannot devolve into a search for underlying facts. *Shepard*, 544 U.S. at 25-26.

record, and too much like the findings subject to * * * *Apprendi*" to fall within the narrow range of facts this Court had authorized sentencing judges to find themselves. *Shepard*, 544 U.S. at 24-25 (emphasis added) (citing *Apprendi*, 530 U.S. at 490; *Jones*, 526 U.S. at 243 n.6).[5]

3. In more recent years, the Court has been still more explicit about the Sixth Amendment's prohibition on increasing a sentence based on judge-made findings about "the who, what, when, and where of a conviction." Cf. *Pereida* v. *Wilkinson*, 141 S. Ct. 754, 765 (2021). In *Descamps*, the Court reversed a judgment affirming an ACCA enhancement that was based on a judge-made, non-elemental finding that the defendant's prior conviction involved breaking and entering (which is an ACCA predicate) rather than shoplifting (which is not). See 570 U.S. at 259, 277-78. The Court explained that because the statute under which the conviction was entered encompassed both offenses, any inquiry into which one the defendant had committed was an impermissible quest for facts "superfluous" to the conviction itself and could not "license a later sentencing court to impose extra punishment." *Id.* at 270. As the Court put it, "[t]he Sixth Amendment contemplates that a jury—not a

[5] *Shepard*'s distinction of "the conclusive significance of a prior judicial record" is a reference to *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998), in which the Court "recognized a narrow exception" to the *Apprendi* rule "for the fact of a prior conviction." *Alleyne*, 570 U.S. at 111 n.1. Although this Brief assumes arguendo *Almendarez-Torres*'s continuing validity, the Court has made clear that it rests on a shaky foundation, *e.g.*, *Alleyne*, 570 U.S. at 111 n.1; *Apprendi*, 530 U.S. at 489-90, and NACDL respectfully maintains that it was wrongly decided and should be overruled.

sentencing court—will find such facts, unanimously and beyond a reasonable doubt." *Id.* at 269.

The Court also reiterated that, as it had explained in *Shepard*, the Sixth Amendment prohibition applies no matter how confident a sentencing court might be of the veracity of the facts it wishes to find. That is because the *Almendarez-Torres* exception, see *supra* at 8 n.5, extends only to "identifying the defendant's crime of conviction," and does not permit an inquiry into the conduct from which the conviction arose. *Descamps*, 570 U.S. at 269. Accordingly, even when a prior conviction was entered based on a defendant's express admission, "whatever [the defendant] sa[id], or fail[ed] to say, about superfluous [*i.e.*, non-elemental] facts cannot license a later sentencing court to impose extra punishment." *Id.* at 270 (citing *Shepard*, 544 U.S. at 24-26); see *infra* at 10-11.

The Court restated those principles yet again in *Mathis*. See 579 U.S. at 509-510. That case involved an ACCA enhancement imposed based on a prior conviction under a statute that enumerated various alternative means of committing a single element—in particular, breaking into a "building, structure, [or] land, water, or air vehicle"—some of which would be ACCA predicate offenses and some of which would not. *Id.* at 507. Although separately listed in the statute, those different means of committing the same offense were legally extraneous facts, not elements, because state law did not require a jury to find which means was employed. *Id.* Based on *Descamps*, the Court held that a sentencing court could not refer to *Shepard* documents to determine which version of the offense was committed, because "[w]hether or not mentioned in a statute's text, alternative factual scenarios remain just that—and so remain off-limits

to judges imposing ACCA enhancements." *Id.* at 512-13. Put differently, "[t]he itemized construction gives a sentencing court no special warrant to explore the facts of an offense[.]" *Id.* at 509.

Once more, the Court set forth the Sixth Amendment basis for its holding. As the Court explained, "a construction of ACCA allowing a sentencing judge to go any further [than identifying the elements of the crime of conviction] would raise serious Sixth Amendment concerns," because "[t]his Court has held that only a jury, and not a judge, may find facts that increase a maximum penalty, except for the simple fact of a prior conviction." *Mathis*, 579 U.S. at 511 (citing *Apprendi*, 530 U.S. at 490). "That means," the Court held, "a judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed that offense." *Id.* For that proposition, the Court approvingly cited Justice Thomas's separate opinion in *Shepard*, in which the Justice noted that exploration of extraneous facts would amount to "constitutional error." *Id.* (citing 544 U.S. at 28 (concurring in part and concurring in judgment)). The Court fully endorsed Justice Thomas's view, holding once again that a sentencing judge "can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of." *Id.* at 512.

Picking up on a thread from earlier cases, the Court also explained that basing an increased sentence on judicial findings regarding non-elemental facts is profoundly unfair to defendants. As *Descamps* had explained, permitting such findings would allow sentencing courts, "[i]n case after case," to "examin[e] (often aged) documents for evidence that a defendant

admitted in a plea colloquy, or a prosecutor showed at trial, facts that, although unnecessary to the crime of conviction," might otherwise be relevant to ACCA's application. 570 U.S. at 270. "The meaning of those documents will often be uncertain[,] [a]nd the statements of fact in them may be downright wrong." *Id.* "A defendant, after all, often has little incentive to contest facts that are not the elements of the charged offense—and may have good reason not to," such as where a dispute might confuse the jury or appear to a prosecutor or court as irksome "squabbling about superfluous factual allegations." *Id.* "Such inaccuracies," *Mathis* explained, "should not come back to haunt the defendant many years down the road by triggering a lengthy mandatory sentence." *Mathis*, 579 U.S. at 512.

B. Lower Courts Routinely Impose ACCA Enhancements Based On Improper Judicial Factfinding.

The Court has thus spent years explaining that sentencing courts cannot permissibly probe non-elemental facts underlying a prior conviction in order to increase a defendant's sentencing range. Yet lower courts around the country regularly do just that in the context of ACCA. Indeed, *every* ACCA enhancement depends on a determination that the occasions requirement is satisfied, and every occasions inquiry requires a factfinder to determine, at the very least, when and how each putative predicate offense was committed. Cf. *Wooden*, 142 S. Ct. at 1067-71. And an offense's date and time will rarely, if ever, have been anything other than an "extraneous fact[]," see *Descamps*, 570 U.S. at 270, irrelevant to establishing guilt as to any prior offense, much less as to all three prior offenses required to support an ACCA sentence.

Moreover, unconstitutional findings regarding *when* an offense occurred are often insufficient, standing alone, to support a "different occasions" finding. Cf. *Wooden*, 142 S. Ct. at 1067-71 (discussing factors governing occasions inquiry). So courts often go even further, mapping out the precise details of how they believe each of a number of putative predicates was committed. The inquiry often devolves, as it did in this case, into an impermissibly detailed narrative account that makes the findings held unconstitutional in *Shepard*, *Descamps*, *Mathis*, and elsewhere appear modest by comparison. For instance, even though *Mathis* makes clear that a sentencing court cannot peek behind a burglary conviction for even the limited purpose of determining the type of structure burgled, one Eighth Circuit case deemed the occasions inquiry satisfied based on the following judge-found facts:

> [The defendant] entered a gas station, pointed a gun at the cashier, and took money from the register. * * * Grabbing the cash, [the defendant] ran outside, still holding the gun. Someone saw him. As [he] fled, this witness drove after him. [He] then shot toward the witness's vehicle, close enough that the witness heard a 'zing' and smelled gunpowder. For that, [he] received [an] assault conviction. The question is whether the * * * assault was committed on an occasion different from the robbery itself.

Perry, 908 F.3d at 1131 (quotation omitted).

And that is just one example. In other cases, courts have relied on their own findings regarding such non-elemental facts as which particular buildings were burgled, how many feet apart they were, and how many seconds it would have taken to bridge the distance, *United States* v. *Weeks*, 711 F.3d 1255, 1258,

1261 (11th Cir. 2013) ("Shirley's Restaurant" and "the Florida Times Union Building": separate occasions), or which particular Minnesota lakes three targeted cabins were on, *United States* v. *Deroo*, 304 F.3d 824, 828 (8th Cir. 2002) ("Spider Lake," "Boulder Lake," and "Island Lake": burglaries were on separate occasions), or, in analyzing two hand-to-hand drug sales, the exact locations of the purchasers and the physical distance between them, *United States* v. *Willoughby*, 653 F.3d 738, 744 (8th Cir. 2011) (purchasers "stood side-by-side": one occasion). In another case, before being reversed solely for straying from *Shepard* documents—not for finding non-elemental facts—a district court found different occasions based on non-jury findings that one offense was "for a robbery committed on February 18, 2006 in Brooklyn, at 11:00 a.m., in which [the defendant] and a co-defendant stole a debit card from the victim using a box cutter," another was "for a robbery committed on the subway in Manhattan on February 19, 2006, together with two co-defendants, using a box cutter and a bladed knife," and a third was "for a robbery also committed on February 19, 2006, on the subway in Queens, with two unnamed individuals, using a box cutter and a bladed knife." *United States* v. *Dantzler*, 771 F.3d 137, 139-40 (2d Cir. 2014). This case is no exception: here, the sentencing court openly relied on its own findings as to the supposed date of each offense and each offense's supposed "location[]": "a local restaurant parking lot; the parking lot of a local park; [and] a local convenience store." Pet. App. 41a-42a.

The justifications lower courts have invoked for disregarding this Court's teachings are profoundly unpersuasive. Often, courts have reasoned that the

date, location, and other specific factual circumstances underlying a given conviction are all "recidivism-related," and are therefore inseparable from the fact of conviction itself. *United States* v. *Harris*, 794 F.3d 885, 887 (8th Cir. 2015).[6] The Government—which now agrees with the petitioner[7]—has previously expressed that view in this Court. See, *e.g.*, Br. For The United States In Opposition at 6-7, *Starks* v. *United States*, No. 19-6693 (Jan. 21, 2020) ("A sentencing court's authority under *Almendarez-Torres* to determine the fact of a conviction, without offending the Sixth Amendment, necessarily includes the determination of when a defendant's prior offenses occurred, and whether two of them occurred on the same or separate occasions.") (citing *Santiago*, 268 F.3d at 156-57); Br. For The

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[6] See also, *e.g.*, *Dantzler*, 771 F.3d at 144 ("[A] sentencing judge's determination of whether ACCA predicate offenses were committed 'on occasions different from one another' is no different, as a constitutional matter, from determining the *fact* of those convictions.") (quoting *United States* v. *Santiago*, 268 F.3d 151, 153 (2d Cir. 2001)); *United States* v. *Blair*, 734 F.3d 218, 227-28 (3d Cir. 2013) (interpreting *Descamps* to permit court to find "the date or location of the crimes charged"); *Thomas*, 572 F.3d at 952 n.4; *United States* v. *White*, 465 F.3d 250, 254 (5th Cir. 2006); *United States* v. *Michel*, 446 F.3d 1122, 1132-33 (10th Cir. 2006) (holding that "*Apprendi* left to the judge[]" the task of finding facts *beyond* "the mere fact of previous convictions") (quotation omitted); *Thompson*, 421 F.3d at 286 ("To take notice of the different dates or locations of burglaries—something inherent in the conviction—is to take notice of different occasions of burglary as a matter of law."); *United States* v. *Burgin*, 388 F.3d 177, 186 (6th Cir. 2004) (similar); *United States* v. *Morris*, 293 F.3d 1010, 1012-13 (7th Cir. 2002) (similar).

[7] See Pet. 12 n.3 (citing Gov't Response to Sentencing Mem. at 2, *United States* v. *Dutch*, Cr. No. 16-1424 MV (D.N.M July 20, 2022), Doc. 102).

United States In Opposition at 10-11, *Hennessee* v. *United States*, No. 19-5924 (Dec. 6, 2019) (similar).

But this Court rejected exactly that position in *Shepard*, then again in *Descamps*, and still again in *Mathis*. As noted, in *Shepard* and *Mathis*, the findings the Court held impermissible were about the modest question of whether prior burglaries had targeted buildings (as would trigger the enhancement) or vehicles (as would not). See *Mathis*, 579 U.S. at 508; *Shepard*, 544 U.S. at 15-16. In *Descamps*, the out-of-bounds finding was about whether the defendant had entered a store illegally (triggering the enhancement) or legally (not). See 570 U.S. at 259. "[T]here simply is no way to square an expansive view of the prior conviction exception" with those holdings. See *Perry*, 908 F.3d at 1135 (Stras, J., concurring). Indeed, given that *Mathis* and *Shepard* clearly hold that "a finding of * * * the location of the crime * * * cannot be treated the same as the fact of a prior conviction," it cannot possibly be permissible to "assign judges the role of finding even *more* facts—including the timing, location, *and* nature of *multiple* convictions—in search of an answer to the * * * different-occasions question." *Id.*

In addition to misapplying the *Almendarez-Torres* exception, lower courts have also often misconceived the inquiry *Taylor* and *Shepard* permit. Thus, it has become common for courts of appeals (including the court below) to excuse non-elemental factfinding as long as that factfinding is based on the documents *Taylor* and *Shepard* approve. See, *e.g.*, Pet. App. 41a-42a; see also, *e.g.*, *United States* v. *Carter*, 969 F.3d 1239, 1243 (11th Cir. 2020), *abrogated by Wooden*, 142 S. Ct. at 1068 n.1; *United States* v. *Young*, 809 F. App'x 203, 209-10 (5th Cir. 2020) (discussing circuit

precedents); *Hennessee*, 932 F.3d at 444-45. But "[r]epurpos[ing] *Taylor* and *Shepard* to *justify* judicial fact-finding * * * turns those decisions on their heads." *Perry*, 908 F.3d at 1136 (Stras, J., concurring) (quoting *Mathis*, 579 U.S. at 513-14) (emphasis added). The principal holding of each case is that *no matter what documents are used*, sentencing courts cannot engage in factfinding beyond the offense of conviction and its elements. *Supra* at 6-11. That is why, as *Descamps* reiterated, the sole permissible use of *Taylor* and *Shepard* documents is for the "limited function" of identifying that offense and those elements. 570 U.S. at 260, 262-63. This Court has never—in any circumstance—"authorized" the use of such documents toward any other end. *Id.* Once the offense of conviction is known—as it must be to trigger an occasions analysis—"the inquiry is over," and those documents "ha[ve] no role to play." *Id.* at 264-65.

Nor can unconstitutional factfinding be justified by the supposedly "counterintuitive" results to which proper application of this Court's precedents might sometimes give rise. Cf. *Mathis*, 579 U.S. at 509-10. It may well be that "[i]n some cases, a sentencing judge knows (or can easily discover)" the facts underlying a given offense, and might be frustrated by his or her inability to impose an ACCA enhancement based on that knowledge. *Id.* at 510. But as the Court has explained, that is "[n]o matter." *Id.* Indeed, it might be said that frustrating such impulses is the Sixth Amendment's core purpose.[8]

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[8] Cf. *Blakely* v. *Washington*, 542 U.S. 296, 305-06 (2004) ("Our commitment to *Apprendi* in this context reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of jury trial. That right is no mere procedural formality, but a fundamental reservation of power in our

Two other rationales the lower courts have invoked are still less substantial. More than one court has suggested that merely because *Descamps* and *Mathis* addressed a different part of section 924(e)(1)—the "violent felony" definition—they have no application to the occasions inquiry. See, *e.g.*, *United States* v. *Walker*, 953 F.3d 577, 581 (9th Cir. 2020) ("To the extent that *Mathis* expresses broader disfavor of factual determinations by sentencing judges, it is not clear whether and how this disfavor extends beyond determining that a given state-law crime is an ACCA predicate."); *United States* v. *Doctor*, 838 F. App'x 484, 487 (11th Cir. 2020). And another has reasoned that to faithfully apply this Court's precedents would simply be too disruptive to ACCA's framework. See, *e.g.*, *Hennessee*, 932 F.3d at 443 (refusing to apply *Descamps* and *Mathis* because "[a] sentencing judge would be hamstrung * * * in making most different-occasions determinations if he or she were only allowed to look to elemental facts"). Both lines of reasoning fail. The Sixth Amendment does not cease to apply halfway through section 924(e)(1). Nor can it be ignored simply because it might make ACCA enhancements more inconvenient to impose. See, *e.g.*, *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803).

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constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary. * * * *Apprendi* carries out this design by ensuring that the judge's authority to sentence derives wholly from the jury's verdict. Without that restriction, the jury would not exercise the control that the Framers intended.") (citations omitted).

II. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE AN IMPORTANT QUESTION THE CIRCUITS HAVE GOTTEN EGREGIOUSLY WRONG.

As explained, the decision below reflects a widespread, systemically important, and indefensible misapprehension of what the Constitution and this Court's precedents require before an ACCA enhancement may be imposed. That misapprehension demands this Court's attention. As the petition explains, "[t]he jury is a central foundation of our justice system and our democracy," Pet. 22 (quoting *Peña-Rodriguez* v. *Colorado*, 137 S. Ct. 855, 860 (2017)), and by routinely bypassing it in a manner this Court's precedents unambiguously prohibit, the lower courts impose on criminal defendants unwarranted stigma and unjustified deprivations of liberty on a near-daily basis across the Country.

The lower courts' persistent misapplication of the Court's precedents also has serious implications for the Court's Supremacy. Decisions of this Court "constitute[] * * * binding precedent for the federal and state courts, and for this Court, unless and until * * * this Court" overrules them. *E.g.*, *Ramos* v. *Louisiana*, 140 S. Ct. 1390, 1416 n.6 (2020) (Kavanaugh, J., concurring in part). As explained, the decisions below—and countless others like them—"cast a blind eye over a good many" of those decisions. *Pereida*, 141 S. Ct. at 764.[9] That state of affairs is

[9] See also, *e.g.*, *supra* at 5-11 (discussing *Mathis*, *Descamps*, *Shepard*, and *Apprendi*); *United States* v. *Davis*, 139 S. Ct. 2319, 2327 (2019) (noting the "Sixth Amendment complications" that arise when court attempts to "reconstruct[], long after [an] original conviction, the conduct underlying that conviction")

unacceptable, and this Court is the only one that can end it.

(quoting *Johnson* v. *United States*, 576 U.S. 591, 605 (2015)) (emphasis omitted); *Sessions* v. *Dimaya*, 138 S. Ct. 1204, 1217 (2018) ("[T]his Court adopted the categorical approach in part to avoid the Sixth Amendment concerns that would arise from sentencing courts' making findings of fact that properly belong to juries."); *Alleyne*, 570 U.S. at 111 & n.1; *S. Union Co.* v. *United States*, 567 U.S. 343, 346 (2012); *United States* v. *O'Brien*, 560 U.S. 218, 224 (2010); *United States* v. *Booker*, 543 U.S. 220, 230-31 (2005) ("We held [in *Apprendi*]: 'Other 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.'") (quoting *Apprendi*, 530 U.S. at 490); *Blakely*, 542 U.S. at 305-06.

CONCLUSION

For the foregoing reasons and those in the petitioner's brief, the Court should grant certiorari and reverse.

Respectfully submitted,

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