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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The government agrees with petitioner on three critical issues. First, the government "now acknowledges, given the nature of the different-occasions inquiry articulated in *Wooden [v. United States*, 142 S. Ct. 1063 (2022)], that the Constitution requires a jury to find . . . that the defendant's ACCA predicates were committed on occasions different from one another." Gov't Br. in Opp. (BIO) 6-7. Second, the government agrees that the question presented by the petition for review is "important and frequently recurring" and "may ultimately warrant this Court's review in an appropriate case." *Id.* at 6. Finally, the government concedes that any asserted harmlessness in denying a jury determination on the ACCA "occasions" inquiry (petitioner denies that the error is harmless) "alone would not warrant declining review—particularly given that the courts of appeals have uniformly erred in resolving that question, which has important implications for the procedures to be followed on a common criminal charge." *Id.* at 8-9.

After these numerous concessions, the government's opposition rests on two narrow grounds. Neither is persuasive. First, the government argues that review of the question presented is premature because lower courts have not had sufficient time to assess *Wooden*'s effect. *Id.* at 6. This argument is unsound because, thus far, every court of appeals to consider this issue post-*Wooden* has declined to reconsider its pre-*Wooden* precedent—including in this case—and there is no reason to conclude that waiting will result in *en banc* reversals in *all* of the regional courts of appeals.

Second, the government asserts that this case is a poor vehicle for this Court to consider the question presented. But it concedes away those objections too. The government contends that petitioner waived his right to challenge whether a jury must determine the "occasions" question, and that in any case, the error was harmless. But the question presented is outside the scope of petitioner's appellate waiver, and the government admits it would not object on those grounds if this Court grants certiorari. *See id.* at 8. The government also acknowledges that the harmlessness of any error should not bar this Court's review.

This Court should grant review to address the constitutional question it reserved in *Wooden* and reverse the decision below. The alternative is to force *every* regional court of appeals to address the issue—or to postpone this Court's review while the government and defendants nationwide grapple with precedent that the government concedes violates the Constitution. The far better approach is to grant review and settle the issue this Term—thus saving judicial resources in the lower courts and sparing defendants from being compelled to run the gauntlet of unconstitutional procedures (and enhanced sentences) while waiting for correction of the conceded error. This state of affairs benefits no one. Nothing in the government's opposition counsels otherwise.

ARGUMENT

A. The Question Presented Is Ripe For Review

As the government acknowledges, the question presented by the petition is "important and frequently recurring." BIO 6. Yet the government argues that

review is premature because lower courts have not had sufficient time to address *Wooden*'s effect. *Id.* The government cites two cases to support its argument that the question presented is "actively percolating in the lower courts." *Id.* at 7. In one instance, the government cites an *unpublished* remand in response to its own shifting litigation position; the other involves a grant of *en banc* review in a single circuit. These developments hardly point to an impending sea change in the lower courts that may obviate the need for this Court's intervention. To the contrary, other courts of appeals have already declined to reconsider their precedent in light of *Wooden*—including in this very case. In all, nothing suggests that all of the courts of appeals with criminal jurisdiction will ever reverse their pre-*Wooden* precedent, let alone anytime soon. And in the meantime, defendants will receive unconstitutionally enhanced sentences and the government, defendants, and courts will labor under constitutionally defective procedures, forcing awkward attempted improvisations.[1]

Examination of the cases the government cites in its prematurity argument reveals the need for this Court's review. Initially, the government points to the Ninth Circuit, where the government recently "concede[d] that following *Wooden v. United States*,

[1] For example, the government has acknowledged that "at present, the government is attempting to comply with its view of the Sixth Amendment's application, notwithstanding circuit precedent, through such measures as requesting advisory sentencing juries. But district courts have often rejected the government's proposals, reasoning that circuit law does not require them." Gov't Br. in Opp, 10-11, *Daniels v. United States*, No. 22-5102 (filed Nov. 21, 2022).

142 S. Ct. 1063 (2022), a jury must find, or a defendant must admit, that a defendant's ACCA predicate offenses were committed on different occasions." *United States v. Man*, No. 21-10241, 2022 WL 17260489, at *1 (9th Cir. Nov. 29, 2022). In response, the Ninth Circuit "assume[d], without holding, that an *Apprendi* error occurred." *Id.* Accordingly, the Ninth Circuit did not disturb its pre-*Wooden* precedent that a "district court does not commit an *Apprendi* error by differentiating the occasions on which ACCA violent felonies were committed." *Id.*; *see also United States v. Walker*, 953 F.3d 577, 580 (9th Cir. 2020). The outcome in the Ninth Circuit thus depended entirely on the government's concession in that particular case, and it has no binding impact on the outcome of similar appeals in the Ninth Circuit or elsewhere—let alone in district courts that have to live with existing and binding pre-*Wooden* precedent. Review of the question presented is necessary to ensure that the Fifth Amendment right to indictment by a grand jury, the due process right to proof beyond a reasonable doubt, and the Sixth Amendment right to jury trial are guaranteed for all ACCA defendants, and that the enforcement of these rights does not depend on the government's litigation position.

Next, the government observes that the Eighth Circuit recently granted *en banc* review of the question presented in *United States v. Stowell*, No. 21-2234, 2022 WL 16942355 (8th Cir. Nov. 15, 2022). The government speculates that if the Eighth Circuit changes course in light of *Wooden*, other courts of appeals may follow suit. But the likelihood of all the federal court of appeals going *en banc* to reverse their

pre-*Wooden* precedent is nearly zero. *See* Pet. 3. To the contrary, every other court of appeals to consider this issue post-*Wooden* has declined to reconsider its pre-*Wooden* precedent. *See id.* at 20-21; *see also United States v. Buford*, --- F.4th ---, 2022 WL 17588750, at *2 (8th Cir. Dec. 13, 2022) (holding that the district court did not plainly err by not having a jury find facts related to Buford's ACCA sentencing and declining to review its precedent because the *Wooden* Court "declined to weigh in on the Sixth Amendment question"); *United States v. Robinson*, 43 F.4th 892, 895 (8th Cir. 2022) (precedent "foreclosed" review of whether the ACCA sentence enhancement violated the Sixth Amendment); *United States v. Cook*, No. 22-5056, 2022 WL 4684595, at *2 (3d Cir. Oct. 3, 2022) (*Wooden* "doesn't alter th[e] conclusion" that circuit precedent "forecloses" review of the Sixth Amendment argument). Petitioner's own case exemplifies this pattern: the court of appeals denied petitioner's post-*Wooden* petition for *en banc* rehearing without even requesting the government's views. *See* Pet. 3.

Accordingly, the question presented will persist until this Court provides a nationwide solution. In the meantime, similar cases will come out differently based solely on judicial factfinding on the ACCA "occasions" question at sentencing. As a result, some defendants will serve unjustified years of prison time by the failure to accord them the procedural protections of a jury trial and proof beyond a reasonable doubt necessary to impose a sentence enhancement under the ACCA.

The significance of these procedural protections is highlighted by the first known jury consideration of the ACCA "occasions" question. In *United States v. Pennington*, the jury found defendant Darius Pennington guilty of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). No. 1:19-CR-455-WMR, (N.D. Ga. Sept. 20, 2022), ECF No. 171. Yet the jury—not the judge—was permitted to consider whether the predicate offenses were committed "on occasions different from one another" under ACCA, and it determined they were not, thereby reducing the range for Mr. Pennington's forthcoming sentencing from fifteen years-to-life to zero-to-ten years. *Id.*, (N.D. Ga. Sept. 20, 2022), ECF No. 173. The jury's consideration of the ACCA "occasions" issue has profound practical and constitutional importance not only for Mr. Pennington's sentence, but also for the perceived fairness of his sentence and the credibility and integrity of the criminal justice system more broadly. *See* Pet. 23. Yet without this Court's intervention, those benefits will accrue only if district courts exercise discretion to move beyond (or defy) circuit law, while the courts of appeals, case by case, decide whether to reconsider their precedents.

If the constitutional question here were subtle or complex, those costs might be worth paying so that this Court would benefit from lower-court analyses. But the constitutional issue here is straightforward. The *Appendi* principle is well established, and its application to the "different occasions" issue turns only a single variable: whether facts beyond the fact of prior conviction must be considered. *Wooden* resolves that issue, as the government concedes. Given the

high stakes of the issue, delaying resolution of this straightforward constitutional question is unwarranted. Rather, consideration of the question presented now is needed to ensure that the ACCA "occasions" question is firmly committed to the jury in all cases.

B. This Case Is An Ideal Vehicle For Resolving The Question Presented

This case provides an ideal vehicle for the Court to resolve whether the Constitution requires a jury determination (or the defendant's admission) on the "occasions" question before a court may impose an enhanced sentence under the ACCA. The government does not contest that the legal question is cleanly presented. *See* Pet. 23. Nor does the government dispute that this Court's review is outcome determinative on whether petitioner has the right to have a jury determine the "occasions" question beyond a reasonable doubt. *See id.* at 24. The government's position is instead that this case is not a suitable vehicle for resolving the legal issue because petitioner waived his right to appeal and because the error was harmless. But the government is wrong; this case is an excellent vehicle for this Court's review.

1. Petitioner's appellate waiver is not an obstacle to this Court's review. The government unsuccessfully argued in the court of appeals that because the ACCA enhancement increased petitioner's Guidelines sentence to 15 years and the district court did not vary upward from that ACCA guideline sentence, petitioner's appellate waiver precluded his challenge to the district court's ACCA factfinding authority. In this Court, however, the government concedes that it

"would not challenge" petitioner's position on this issue if this Court were to grant certiorari. BIO 8. That makes the asserted vehicle argument moot. An appellate waiver is not a jurisdictional obstacle to review, *see United States v. Hahn*, 359 F.3d 1315, 1320–22 (10th Cir. 2004) (*en banc*), and the government's concession that it would not reassert its waiver position in this Court takes it out of the case, *see Garza v. Idaho*, 139 S. Ct. 738, 745 (2019) ("even a waived appellate claim can still go forward if the prosecution . . . waives the waiver") (citing *United States v. Story*, 439 F.3d 226, 231 (5th Cir. 2006)).

Beyond that, the court of appeals correctly rejected the government's argument. The issue presented here is outside the scope of the appellate waiver. A "valid and enforceable appeal waiver . . . only precludes challenges that fall within its scope." *Garza*, 139 S. Ct. at 744 (internal quotation marks omitted). Petitioner's constitutional challenge to the district court's authority to determine whether prior offenses occurred on the same "occasion" falls outside the scope of his waiver of the right to appeal his sentence except in the case of an upward departure from the Guidelines range. Pet. App. 13a. Petitioner challenges his sentence as exceeding the *maximum* statutory sentence because the procedures used to impose an ACCA sentence were constitutionally defective.

In the Tenth Circuit, an appellate waiver does not "foreclose a challenge to the imposition of a sentence 'beyond that which could be lawfully imposed'"—as here, where the district court lacked the authority to impose the ACCA enhancement because a jury had not first determined the "occasions" question. *United*

States v. Bonilla, 743 F. App'x 210, 214 (10th Cir. 2018) (quoting *United States v. Gordon*, 480 F.3d 1205, 1209 (10th Cir. 2007)). That rule applies here because "there is no factual dispute . . . and the legality of the district court's [sentence] can . . . be reviewed solely as a question of law." *United States v. Cooper*, 498 F.3d 1156, 1160 (10th Cir. 2007).[2] But again, given the government's decision not to rely on the appellate waiver, it would impose no obstacle to this Court's reaching the *legal* issue here if it were to grant certiorari.

2. Finally, the government contends that the error in petitioner's case was harmless. But the government acknowledges that the asserted harmlessness of the error "would not warrant declining review"—especially because in the government's view this type of error may be harmless in many of the other cases that present the relevant constitutional question, and because the courts of appeals have "uniformly erred" in resolving that question. BIO 8-9. That concession accords with this Court's standard practice. As in many other cases in similar postures, this Court can resolve the underlying constitutional issue and then remand for the government to make its harmless-error argument in the first instance in the courts below. *See, e.g.*, *Neder v. United States,* 527 U.S. 1, 25 (1999) ("Consistent with our normal practice where the court below has not yet passed on the harmlessness of any

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[2] Petitioner's appellate waiver is not ambiguous, but even if it were, any ambiguity must be resolved in petitioner's favor so as not to bar his claim—as the court of appeals held. Pet. App. 13a*; Cooper*, 498 F.3d at 1159 ("[A]ny ambiguities in a plea agreement are construed against the government.").

error, . . . we remand this case to the Court of Appeals for it to consider in the first instance whether the jury-instruction error was harmless.").

Beyond that, the government's harmlessness argument relies on statements in *Wooden* about the likelihood that crimes committed on separate days or different locations would be committed on different occasions, without acknowledging that these are not per se rules and that the facts of *this* case involve another critical factor. Specifically, *Wooden* noted 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. Here, the district court never engaged with that factor. Instead, it relied solely 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," declining to consider petitioner's argument "that they were an ongoing conspiracy or an ongoing flow of events" because the court believed that this factor was unsupported by the case law. *See* Pet. 9-10. The government likewise offers no argument on this point. That a jury might reject the government's position on a full record is eminently possible—and the constitutional error is surely not harmless beyond a reasonable doubt. But petitioner was deprived of his constitutionally guaranteed opportunity to present that issue to a jury. This Court's review is necessary to vindicate it.

CONCLUSION

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

Respectfully submitted,

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December 22, 2022