No.22-5102

IN THE
Supreme Court of the United States

NATHANIEL DANIELS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Other Authorities

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ARGUMENT

The United States agrees that Mr. Daniels' petition presents an important question that arises with frequency in the federal appellate courts. BIO at 10. The United States agrees that the Fourth Circuit's opinion is incorrect in light of *Wooden v. United States*, 142 S. Ct. 1063 (2022). BIO at 4. The United States nonetheless asks this Court to deny review for several reasons, none of which are convincing.

1. The United States argues that "[r]eview in this Court only months after *Wooden* . . . would be premature." BIO at 11. But in the same paragraph, the United States acknowledges the procedural machinations it is attempting to employ—such as requesting advisory sentencing juries—to comply with its view of *Wooden*. BIO at 10-11. Procedural workarounds like "advisory juries" that were in no way authorized or contemplated by Congress when it drafted ACCA will themselves

raise serious separation of powers concerns and show just how untenable the status quo is.

Perhaps only months have passed since *Wooden*, but they have been eventful months. This petition does not present the normal case where circuit court percolation will help this Court eventually reach a decision. Instead, during those months, litigants, district courts, and the circuit courts have all indicated that their proposed solutions to the tension created by *Wooden* may end up causing more problems than they solve. This Court's intervention is needed now. We do not need any more months to see that.

2. The United States argues that the 4th Circuit decision is unpublished, making this case an unsuitable vehicle for review. But the opinion is unpublished because it relies on the 4th Circuit's long-standing precedent in *United States v. Thompson*, 421 F.3d 278 (4th Cir. 2005). And *Thompson's* reasoning provides a good vehicle for this Court to engage in a post-*Wooden* analysis. *Thompson* holds that district courts may make factual findings about prior convictions as long as those facts are "inherent" to the conviction. *Id.* at 285. The court opines that "[t]he line between facts that are inherent in a conviction and facts that are about a conviction is a common-sensical one, and there is no way that our conclusion as to the separateness of the occasions here can be seen to represent impermissible judicial factfinding." *Id.* Reviewing this analysis—in significant tension with the elements-based approach that this Court has employed over the last two-decades—will provide this Court with an opportunity to clarify the permissible scope of judicial

factfinding in addition to resolving the Sixth Amendment issues inherent in the occasions different inquiry.

3. The United States also argues that "this case arises not from a trial, but instead from a guilty plea." BIO at 11. But the United States does not explain why that fact makes this case a bad vehicle for review. Almost 98% of federal convictions result from guilty pleas and not trials.[1] Thus a resolution of Mr. Daniels' case will provide more—not less—guidance to the vast majority of district courts and litigants.

4. The government further contends that Mr. Daniels' objection in the district court was not specific. Mr. Daniels disagrees—his written objection to the Presentence Report and his oral objection at sentencing preserved the issue, and his brief to the Fourth Circuit focused entirely on the question presented by this petition. And, because the question presented by this case is one of pure law, Mr. Daniels is not sure what other "case-specific development" this Court needs to resolve the issue. BIO at 11. Indeed, the lack of complicated collateral and tangential factual and legal disputes makes this case a great vehicle to cleanly address the legal question presented.

5. Finally, the United States argues that any error here is harmless. Mr. Daniels disagrees. But, more importantly, the question of harmlessness is a fact-

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[1] *See, e.g.,* Table D-4, U.S. District Courts—Criminal Defendants Disposed of, by Type of Disposition and Offense, During the 12-Month Period Ending June 20, 2017 at 1, *available at* https://www.uscourts.gov/sites/default/files/data_tables/stfj_d4_630.2017.pdf (last visited December 2, 2022).

intensive inquiry that is not appropriate for this Court and can and should be addressed by the Fourth Circuit in the first instance. The relevant *Shepard*[2] documents are not even in the record in this case. Any necessary decision about harmlessness can and should be made by the Fourth Circuit with access to those documents and with this Court's post-opinion guidance. It should have no relevance to the question of whether this Court should grant review in the first place.

6. If this Court chooses not to grant Mr. Daniels' petition because it believes that another petition presents a better vehicle, he requests that this Court hold this petition for review after it grants certiorari in another case and resolves this legal issue. *See* BIO at 5 n.2 (noting other petitions raising the legal question presented by this one).

CONCLUSION

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

Respectfully submitted,

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[2] *Shepard v. United States*, 544 U.S. 13 (2005).

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