No. 22-6389

IN THE

Supreme Court of the United States

JUSTIN RASHAAD BROWN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

HEIDI FREESE
RONALD KRAUSE
FEDERAL PUBLIC DEFENDER'S OFFICE
100 Chestnut St., 3rd Fl.
Harrisburg, PA 17101
(717) 782-2237

JEFFREY T. GREEN*
PETER A. BRULAND
DREW LANGAN
SIDLEY AUSTIN LLP
1501 K Street NW
Washington, DC 20005
(202) 736-8291
jgreen@sidley.com

XIAO WANG
NORTHWESTERN SUPREME COURT PRACTICUM
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-1486

MEREDITH R. ASKA MCBRIDE
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, IL 60603
(312) 853-7081

Counsel for Petitioner
*Counsel of Record

April 12, 2023

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

I. Respondent concedes that the question presented warrants immediate review 1

II. The Solicitor General's recommendation would leave the circuit split unresolved ... 2

III. To resolve the circuit split, the Court should grant both this case and *Jackson* .. 3

CONCLUSION 4

TABLE OF AUTHORITIES

CASES Page

Cutter v. *Wilkinson*, 544 U.S. 709 (2005) 3
Kelly v. *United States*, 140 S. Ct. 661 (2019) 4
PDK Lab'ys, Inc. v. *DEA,* 362 F.3d 786 (D.C. Cir. 2004) 3
Turner v. *United States*, 137 S. Ct. 1248 (2017) 4
United States v. *Jackson*, 55 F.4th 846 (11th Cir. 2022) 2
United States v. *Williams*, 61 F.4th 799 (10th Cir. 2023) 2
Yeager v. *United States*, 557 U.S. 110 (2009) 2

INTRODUCTION

The United States agrees that the question presented warrants immediate review. As the government acknowledges (Br. 9), five circuits have split three ways as to which version of federal law a sentencing court should consult under the Armed Career Criminal Act's categorical approach. That issue is "both important and recurring," and "the Court should grant certiorari" to resolve it. U.S. Br. 8–9.

But the government is partially mistaken in suggesting that the Court grant only the later-filed petition in *Jackson* v. *United States*, No. 22-6640 (U.S. Jan. 26, 2023). See U.S. Br. 8. In this three-sided split, no single case covers all three corners.

The sounder approach would be to grant both this case and *Jackson*, consolidate, and order separate briefing. That is a well-worn path, and following it here would ensure that each corner of the split is adequately represented. Alternatively, the Court might grant both cases separately. When the stakes are this high and the lower courts this divided, hearing separate arguments on behalf of each potential resolution makes the most sense in this unusual situation.

I. Respondent concedes that the question presented warrants immediate review.

The question presented "implicates a circuit conflict that warrants resolution by this Court." U.S. Br. 11, *United States* v. *Jackson*, No. 22-6640. Nor is there any reason to wait. All agree that the issue is "important." All agree that "the emergence of a five-circuit conflict in roughly the past year illustrates the frequency with which this issue arises." *Id.* at 12. And all agree that the Court should "eliminate the circuit conflict by determining which of the three approaches [to

ACCA] is correct." *Id.* at 13. Until it does, the "circuit debates" will rage on, *United States* v. *Williams*, 61 F.4th 799, 803 (10th Cir. 2023), "clogging the federal court dockets," *United States* v. *Jackson*, 55 F.4th 846, 862 (11th Cir. 2022) (Rosenbaum, J., concurring) (citation omitted), *petition for cert. filed* (U.S. Jan. 26, 2023) (No. 22-6640).

II. The Solicitor General's recommendation would leave the circuit split unresolved.

The government asserts that *Jackson* is a better vehicle because its position in that case matches its current position on the question presented, whereas it "would not continue to advocate" the position it took in *Brown*. U.S. Br. 9–10. Putting to one side the government's significant change of position, that change is of no moment because the government is free to argue for affirmance on any ground. See *Yeager* v. *United States*, 557 U.S. 110, 126 (2009).

Moreover, the government's approach would leave the conflict unresolved. As the United States admits (Br. 9), sentencing courts applying ACCA's categorical approach have come up with three different rules:

Rule 1:	Consult the version of federal law in effect at the time of the § 922(g) firearm offense
Rule 2:	Consult the version of federal law in effect at the time of federal sentencing
Rule 3:	Consult the version of federal law in effect at the time of the underlying state conviction

When the Eleventh Circuit reconsidered *Jackson*, it adopted Rule 3 (state conviction) and rejected Rule 1

(federal offense). But the Eleventh Circuit did not directly consider whether to adopt Rule 2 (federal sentence). So while Mr. Jackson now "advocates for [Rule 2] in the alternative," U.S. Br. 10, it would be unusual for this Court to reach that question. See, *e.g.*, *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (declining to consider issues "not addressed by the Court of Appeals" because "we are a court of review, not of first view.").

In all events, Mr. Jackson doesn't need this Court to decide between Rule 1 and Rule 2 because he "would prevail under either . . . approach." U.S. Br. 10. As a result, granting Mr. Jackson's case alone would not necessarily resolve the split. And contra the United States (at 10), the "cardinal principle of judicial restraint" makes it unlikely that this Court would reverse the Eleventh Circuit—rejecting Rule 3 and granting Mr. Jackson full relief—and then issue an advisory opinion (or dictum) as between Rule 1 and Rule 2. *PDK Lab'ys, Inc.* v. *DEA,* 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in judgment) ("[I]f it is not necessary to decide more, it is necessary not to decide more.").

By contrast, the choice between Rule 1 and Rule 2 makes all the difference to Mr. Brown. For him, Rule 2 means a 10-year maximum sentence; Rule 1, a 15-year minimum. The Court should hear from Mr. Brown to ensure it has a litigant before it with a singular incentive to argue in favor of Rule 2.

III. To resolve the circuit split, the Court should grant both this case and *Jackson*.

A better option exists. Instead of taking the government's advice, the Court should grant both this case and *Jackson*, consolidate, and order separate briefing.

Doing that would ensure that each corner of the split is adequately represented:

Rule 1 (federal offense)	Mr. Jackson
Rule 2 (federal sentence)	Mr. Brown
Rule 3 (state conviction)	United States

Petitioners would then move for divided argument at the appropriate time. *E.g., Kelly* v. *United States*, 140 S. Ct. 661 (2019) (granting divided argument in consolidated case); *Turner* v. *United States*, 137 S. Ct. 1248 (2017) (same). In the alternative, the Court should grant both cases and hear them separately. Compare, *e.g.*, *Greer* v. *United States* (U.S. June 14, 2021) (No. 19-8709) with *Gary* v. *United States* (U.S. June 14, 2021) (No. 20-444) and *Riley* v. *California* (U.S. June 25, 2014) (No. 13-132) with *United States* v. *Wurie* (U.S. June 25, 2014) (No. 13-212).

CONCLUSION

For the reasons stated above, the Court should grant Mr. Brown's petition.

Respectfully submitted,

HEIDI FREESE
RONALD KRAUSE
FEDERAL PUBLIC DEFENDER'S OFFICE
100 Chestnut St., 3rd Fl.
Harrisburg, PA 17101
(717) 782-2237

XIAO WANG
NORTHWESTERN SUPREME COURT PRACTICUM
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-1486

JEFFREY T. GREEN*
PETER BRULAND
DREW LANGAN
SIDLEY AUSTIN LLP
1501 K Street NW
Washington, DC 20005
(202) 736-8291
jgreen@sidley.com

MEREDITH R. ASKA MCBRIDE
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, IL 60603
(312) 853-7081

Counsel for Petitioner

April 12, 2023

*Counsel of Record