NO. _____

In the Supreme Court of the United States

VERNON LEE WHEELER AND
JACKIE PHILLIP SOSEBEE,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When deciding whether "state law" provides "clear answers" about divisibility and juror unanimity, *Mathis v. United States*, 579 U.S. 500, 517–18 (2016), may a federal court of appeals declare a crime "divisible" based on its own interpretation of statutory language if the state's own appellate courts have held that the alternatives are means rather than elements?

2. May a federal court of appeals refuse to consider a constitutional claim raised after briefing was completed where the U.S. Government first conceded the constitutional violation in other litigation months after the principal briefs were filed.

DIRECTLY RELATED PROCEEDINGS

United States v. Wheeler, No. 3:16-cr-75 (N.D. Tex. May 22, 2017, amended judgment entered Sept. 13, 2019)

United States v. Wheeler, No. 17-10607 (5th Cir. Aug. 1, 2018, amended judgment entered Feb. 15, 2019)

United States v. Wheeler, No. 19-11022 (5th Cir. Dec. 16, 2022, reh'g denied, Feb. 2, 2022)

United States v. Sosebee, 7:06-cr-22 (N.D. Tex. June 27, 2007)

United States v. Sosebee, 7:16-cv-80 (N.D. Tex. Oct. 8, 2020)

In re Sosebee, No. 17-11037 (5th Cir. Oct. 20, 2017)

United States v. Sosebee, No. 17-11125 (5th Cir. Feb. 22, 2018)

United States v. Sosebee, No. 20-11141 (5th Cir. Feb. 1, 2023)

United States v. Sosebee, No. 21-10780 (5th Cir. Feb. 1, 2023)

TABLE OF CONTENTS

Petition Appendix

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

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Vernon Lee Wheeler and Jackie Phillip Sosebee respectfully petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Fifth Circuit in their respective cases.

OPINIONS BELOW

The Fifth Circuit issued three opinions in Petitioner Vernon Wheeler's case. None were selected for publication. *See United States v. Wheeler*, 733 F. App'x 221 (5th Cir. 2018), *vacated and superseded*, 754 F. App'x 282 (5th Cir. 2019); *see also United States v. Wheeler*, No. 19-11022, 2022 WL 17729412 (5th Cir. 2022).

The Fifth Circuit's opinion in Petitioner Jackie Sosebee's case is published at 59 F.4th 151.

JURISDICTION

In Vernon Wheeler's case, the Fifth Circuit entered judgment on December 16, 2022. The court denied Mr. Wheeler's timely petition for rehearing on February 2, 2023.[1] His petition is timely. *See* S. Ct. R. 13.3.

In Jackie Sosebee's consolidated appeals, the Fifth Circuit entered judgment on February 1, 2023. His petition is also timely under Rule 13.3.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the interpretation and application of 18 U.S.C. § 924(e) and Texas Penal Code § 29.02(a) and § 29.03(a).).

At all times relevant to this petition,[2] 18 U.S.C. § 924 provided, in pertinent part:

§ 924. Penalties

(a)

* * * *

(2) Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as

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[1] On December 21, 2022, the Fifth Circuit extended the deadline to request rehearing until January 13, 2023. Mr. Wheeler filed his petition on January 13.

[2] Last June, Congress amended § 924(a). Among other changes, the amendment raised the default penalty for violating § 922(g) from 10 years to 15 years. Pub.L. 117-159, Div. A, Title II, § 12004(c), 13 6 Stat. 1329 (June 25, 2022).

provided in this title, imprisoned not more than 10 years, or both.

* * * *

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection--

(A) the term "serious drug offense" means--

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one

year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that--

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

Texas Penal Code § 29.02(a) provides:

Sec. 29.02. ROBBERY. (a) A person commits an offense if, in the course of committing theft as defined in Chapter 31 and with intent to obtain or maintain control of the property, he:

(1) intentionally, knowingly, or recklessly causes bodily injury to another; or

(2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.

Texas Penal Code § 29.03(a) provides:

Sec. 29.03. AGGRAVATED ROBBERY. (a) A person commits an offense if he commits robbery as defined in Section 29.02, and he:

(1) causes serious bodily injury to another;

(2) uses or exhibits a deadly weapon; or

(3) causes bodily injury to another person or threatens or places another person in fear of imminent bodily injury or death, if the other person is:

(A) 65 years of age or older; or

(B) a disabled person.[3]

STATEMENT

Both Petitioners were sentenced under the Armed Career Criminal Act, 18 U.S.C. § 924(e), on the assumption that their prior Texas convictions for simple or aggravated robbery were "violent felonies" as defined in § 924(e)(2)(B). Throughout years of litigation below, the Fifth Circuit changed its mind—several times—about whether these Texas crimes could be classified as violent felonies.[4]

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[3] Subsection (a)(3) was added to the statute in 1989. Section 29.03(a)(3) was available to prove aggravated robbery for two of Vernon Wheeler's four aggravated robbery convictions. *See* 5th Cir. ROA.19-11022.153 ("The Government just pointed out to me that the senior or disabled victim status aggravator was put in between the 1987 and 1991 convictions.").

[4] On Texas robbery: *See United States v. Fennell*, 695 F. App'x 780 (5th Cir. 2017) (affirming an order holding that Texas robbery was not a violent felony); *United States v. Burris*, 896 F.3d 320, 323 (5th Cir. 2018), *as revised* (Aug. 3, 2018) (holding that neither Texas Penal Code § 29.02(a)(1) robbery-by-injury nor § 29.02(a)(2) robbery-by-fear is a violent felony, regardless of divisibility), *opinion withdrawn*, 908 F.3d 152 (5th Cir. 2018), and *on reh'g*, 920 F.3d 942 (5th Cir. 2019) (holding that *both* robbery-by-injury and robbery-by-fear are violent felonies, regardless of divisibility), *cert. granted, judgment vacated*, 141 S. Ct. 2781 (2021), *on remand*, 856 F. App'x 547 (5th Cir. 2021) (holding that robbery-by-injury is not a violent felony); *United*

Ultimately, the Fifth Circuit rejected Petitioners' challenges to the ACCA based on that court's dubious divisibility decision in *United States v. Garrett*, 24 F.4th 485 (5th Cir. 2022). The primary bone of contention concerns a federal court's role when analyzing "state law" under *Mathis v. United States*, 579 U.S. 500, 517–18 (2016). The Fifth Circuit adopted an interpretation of the Texas robbery statute that found most persuasive, just as it would in a diversity jurisdiction appeal or any other case where state law provides the rule of decision. It so happens that this interpretation contradicts a precedential decision in a Texas appellate court. Petitioners contend that this is an improper application of *Mathis*. The divisibility inquiry does not invite a federal appellate court to render its own opinion about the *best* interpretation of a state statute. Instead, the federal court's role is limited to searching for "clear answers" in the statutory text and state case law. *Mathis*, 579 U.S. at 517–18.

A. Vernon Wheeler

On November 3, 2015, police stopped Petitioner Vernon Wheeler for a jaywalking offense and found him in possession of a pistol. Pet. App. 2a. He later pleaded guilty to unlawful possession of a firearm under 18 U.S.C. § 922(g)(1). Pet. App. 2a. For years, the parties have been fighting over the proper analysis of four prior Texas convictions for aggravated robbery. Two of those offenses were committed in February of

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States v. Garrett, 24 F.4th 485 (5th Cir. 2022) (holding that robbery-by-injury and robbery-by-fear are divisible offenses, and robbery-by-fear is a violent felony).

1987 and two were committed in September of 1991. 5th Cir. ROA.19-11022.334, 339, 344, 353.

After two hearings and extensive briefing and argument, the district court refused to apply the ACCA and sentenced Mr. Wheeler to 33 months in prison. Pet. App. 3a. The Fifth Circuit initially affirmed that decision, *see United States v. Wheeler*, 733 F. App'x 221 (5th Cir. 2018), but later granted rehearing, vacated its own decision, and remanded for a re-sentencing hearing. *United States v. Wheeler*, 754 F. App'x 282 (5th Cir. 2019).

On remand, the district court decided that it was required to apply the ACCA and imposed the mandatory minimum sentence of 180 months in prison. Pet. App. 3a. This time, Mr. Wheeler appealed. By the time of the Fifth Circuit's decision below, this Court had abrogated and vacated the precedent on which the district court had relied at re-sentencing. *See Burris v. United States,* 141 S. Ct. 2781, 2782 (2021) (vacating *United States v. Burris*, 920 F.3d 942 (5th Cir. 2019)); *see also Borden v. United States*, 141 S. Ct. 1817 (2021).

Even so, the Fifth Circuit affirmed the ACCA sentence. Pet. App. 4a–6a. The court relied on its 2022 decision in *Garrett*, which held that Texas Penal Code § 29.02(a) "creates multiple crimes, including (1) robbery-by-injury, which may be committed recklessly, and (2) robbery-by-threat, which may be committed intentionally or knowingly." Pet. App. 4a (discussing *Garrett*, 24 F.4th at 489–90). The court rejected Mr. Wheeler's argument that the Government waived or forfeited its divisibility argument by repeatedly assuring the sentencing court that it was

not pressing that argument. Pet. App 5a–6a. This is in direct contrast to the ruling in the earlier appeal:

> Throughout this litigation, the Government repeatedly made the intentional decision to forgo any argument based on the divisibility of the Texas aggravated robbery statute, as well as any argument based on differences between simple and aggravated robbery.

Wheeler, 733 F. App'x. at 222; *see also* 5th Cir. ROA.19-11022.154 ("We don't believe that they're indivisible. But we're not going to argue that today."), 189 ("[W]e're not challenging divisibility."), 258 ("Now the Fifth Circuit has determined—had determined along the way that the Government waived any argument about the divisibility of the aggravated robbery statute, but certainly Mr. Wheeler wouldn't have known that back in 2015.").

The court took a much harder line with Mr. Wheeler. After the court's questions at oral argument strongly suggested it would overlook the Government's repeated waiver of the divisibility argument and decide the appeal in the Government's favor, Mr. Wheeler moved for permission to file a supplemental brief raising an additional argument that he had not raised in the earlier appeal.

On March 7, 2022, this Court decided *Wooden v. United States*, 142 S. Ct. 1063 (2022). While the Court overruled Fifth Circuit precedent on the meaning of the ACCA's Occasions Clause, it reserved judgment on "whether the Sixth Amendment requires that a jury, rather than a judge, resolve whether prior crimes occurred on a single occasion." 142 S. Ct. at 1068 n.3.

Even so, the Government's analysis of *Wooden* eventually led it to concede "that a jury must find, or a defendant must admit, that a defendant's ACCA predicates were committed on occasions different from one another." *See*, e.g., U.S. Notice of Supplemental Authority, *United States v. Hadden*, Docket Entry 57, No. 19-4151 (4th Cir. filed July 25, 2022). As far as Petitioners' counsel is aware, the first such concession in *this* Court was in the Brief in Opposition for *Daniels v. United States*, No. 22-5102 (filed Nov. 21, 2022).

On December 8, 2022, Petitioner Wheeler asked the Fifth Circuit for permission to file a supplemental brief relying on *Wooden* and the Government's recent confession to argue an additional ground for reversal. Eight days later, the court "decline[d] to consider" the issue because Mr. Wheeler had not raised it in his November 2021 Initial Brief or at the November 8, 2022 oral argument. Pet. App. 8a–9a n.3.

Mr. Wheeler petitioned for rehearing en banc, arguing that *Garrett* conflicted with other Fifth Circuit decisions interpreting and applying *Mathis*. (19-11022, Docket Entry 137). The Fifth Circuit denied the petition. Pet. App. 10a.

B. Jackie Phillip Sosebee

Petitioner Jackie Phillip Sosebee had two cases pending before the Fifth Circuit raising the same challenge as Petitioner Wheeler. In 2007, Mr. Sosebee pleaded guilty to unlawfully possessing ammunition in violation of 18 U.S.C. § 922(g)(1). Pet. App. 12a. The district court imposed an ACCA-enhanced sentence of 180 months in prison, followed by three years of supervised release. 5th Cir. ROA.20-11141.224–225.

On May 30, 1985, a Texas court convicted him of robbery and burglary. 5th Cir ROA.20-11141.300. in August of 2002, he was again convicted of burglary. 5th Cir. ROA.20-11141.304. So in the 2007 federal case, the district court imposed an ACCA-enhanced sentence of 180 months. ROA.20-11141.224.

In June of 2016, Mr. Sosebee moved to vacate his ACCA sentence, arguing that Texas robbery could not count as a violent felony without the ACCA's unconstitutional residual clause. While that motion was pending, he completed his prison sentence and began serving supervised release.

In October 2020, the district court denied Mr. Sosebee's 28 U.S.C. § 2255 motion. 5th Cir. ROA.20-11141.140–145 (relying on *Burris*, 920 F.3d at 945). Mr. Sosebee appealed.

Meanwhile, the Government had filed new charges against Mr. Sosebee, giving rise to his second prosecution under § 922(g)(1). Pet. App. 12a. The jury convicted him. *Id.* Consistent with pre-*Wooden*, pre-DOJ-concession practice, the indictment did not allege three predicates committed on separate occasions; the Government did not present evidence of three predicates committed on separate occasions; and the jury did not find evidence of three predicates committed on separate occasions. The district court revoked his supervised release in the earlier case, but ran that two-year sentence concurrently with the new ACCA-enhanced sentence of 188 months in prison. Pet. App. 12a. Mr. Sosebee appealed, and the Fifth Circuit consolidated the post-conviction appeal with the new-sentence appeal.

On February 1, 2023, the Fifth Circuit affirmed the new ACCA sentence but dismissed the post-conviction appeal as moot. Pet. App. 19a. Citing its earlier unpublished decision in Petitioner Wheeler's appeal, the court again refused to consider the Government's recent concession that the Sixth Amendment requires a jury to find that ACCA predicates were committed on three separate occasions. Pet. App. 19a n.36.

REASONS FOR GRANTING THE PETITION

I. The Court should grant the petition to clarify whether the ACCA's demand for certainty constrains a federal court's interpretation of conflicting state-law decisions.

When analyzing a prior state-law conviction to determine whether it qualifies for a recidivist sentencing enhancement (or an immigration consequence), federal courts sometimes have to "make a judgment about the meaning of a state statute." *United States v. Taylor*, 142 S. Ct. 2015, 2025 (2022). "Appreciating the respect due state courts as the final arbiters of state law in our federal system," this Court's precedent requires a federal court to "consult how a state court would interpret its own State's laws." *Id.*; *see also (Curtis) Johnson v. United States*, 559 U.S. 133, 139 (2010) (A federal sentencing court is "bound by" a state supreme court's "interpretation of state law.").

Where a state's highest court has "definitively answer[ed]" a question, the federal court's task is "easy"—"a sentencing judge need only follow what it says." *Mathis*, 579 U.S.at 518.

But this petition involves a slightly different situation, The Texas Court of Criminal Appeals has not *definitively* answered the jury-unanimity question at the heart of federal divisibility. This Court's categorical-approach precedents do not directly address what a sentencing court should do in that situation. And the lower courts disagree. By granting certiorari here, the Court can eliminate that confusion.

A. The Circuits are divided over how to resolve conflicting state-law authorities in the context of the ACCA.

This Court's categorical-approach precedents describe a "'demand for certainty' when determining whether a defendant was convicted of a generic offense." *Mathis*, 579 U.S. at 519 (quoting *Shepard v. United States*, 544 U.S. 13, 21 (2005)). Following that "demand," the Eighth and Tenth Circuits have held that conflicting and "inconsistent" state-court decisions must be resolved in the federal defendant's favor, especially where *more recent* state-court decisions support the federal defendant's argument. *See Jimenez v. Sessions*, 893 F.3d 704, 712 (10th Cir. 2018) ("Colorado case law demonstrates that the intended crime is not an element, *although we acknowledge the jurisprudence is somewhat mixed*.") (emphasis added).

Noting that Colorado courts have been inconsistent in their use of the term "elements," the Tenth Circuit ultimately concluded that most state court decisions favored indivisibility. *Id.* at 714–716 ("Decisions from Colorado's intermediate appellate court and decisions

that pre-date [*People v. Williams*, 984 P.2d 56 (Colo. 1999)] do not persuade us to deviate from its holding."). In *United States v. Cantu*, 964 F.3d 924 (10th Cir. 2020), the court acknowledged that it could only hold a state statute divisible if the state-court decisions gave rise to certainty. *Id.* at 930 (vacating an ACCA sentence because "Oklahoma case law makes it impossible to say with certainty that the Oklahoma statute is divisible by drug.").

The Eighth Circuit followed the same rule when analyzing state-court decisions in *United States v. Naylor*, 887 F.3d 397 (8th Cir. 2018). Although "Missouri courts have not yet decided the precise issue," the court determined many state courts resolved cases "in a manner consistent with" indivisibility. *Id.* at 402–403. The court dismissed a conflicting Missouri Supreme Court decision as dicta. *Id.* at 404. To resolve the question, the federal court had to "grapple with" decisions that pointed in both directions. *Id.* at 407 (Colloton, J., concurring). "Missouri law is patently unclear on whether the statutory terms are means or elements." *Id.* at 410–411 (Shepherd, J., dissenting). Yet the defendant prevailed.

The Fifth Circuit has chosen a different approach. Where there is no binding authority from the Texas Court of Criminal Appeals, the Fifth Circuit will not respect the indeterminacy of state law. The Fifth Circuit instead resolves the ambiguity by adopting whichever reading of state law it finds more persuasive. As often as not, that interpretation favors the federal government.

Garrett is the most obvious example. There, the defendant-appellant pointed to *substantial* state law authority indicating that "causing bodily injury or threatening the victim are different methods of committing the same offense." *Burton v. State*, 510 S.W.3d 232, 237 (Tex. App.—Fort Worth 2017, no pet.). In *Cooper v. State*, 430 S.W.3d 426 (Tex. Crim. App. 2014), the Court of Criminal Appeals ruled that a defendant could not be convicted of two separate offenses for robbing the same victim by injury and by threat/fear. Four of the five judges who joined the majority explicitly reasoned that robbery-by-injury and robbery-by-threat/fear were alternative means, not separate crimes. *Id.* at 434 (Keller, P.J., concurring); *id.* at 439 (Cochran, J., concurring). Three dissenting judges argued, based on statutory structure and analogy to assault, that the two theories represented divisible crimes. 430 S.W.3d at 443–44 (Price, J., dissenting).

After *Cooper*, Texas authorities have coalesced around the "alternative means" interpretation of Texas Penal Code § 29.02(a). *Burton* is directly on point: "it was not error for the charge of aggravated robbery to be submitted in the disjunctive because causing bodily injury or threatening the victim are different methods of committing the same offense." 510 S.W.3d at 237. *Burton* remains binding within the jurisdiction of the Fort Worth Court of Appeals.

But *Burton* (or *Burton*'s interpretation of *Cooper*) hold sway throughout the state. Many prosecutors have charged both theories within single-count indictments, which is "the proper method of charging different ways of committing an offense." *United*

States v. Perlaza-Ortiz, 869 F.3d 375, 379 (5th Cir. 2017) (discussing Tex. Crim. Proc. Code art. 21.24). *See*, e.g., *Martin v. State*, No. 03-16-00198-CR, 2017 WL 5985059, at *3 (Tex. App. Dec. 1, 2017); *Alexander v. State*, 02-15-00406-CR, 2017 WL 1738011, at *6 (Tex. App. May 4, 2017); *Hunter v. State*, 04-19-00252-CR, 2020 WL 4929796, at *2–3 (Tex. App. July 29, 2020).

In *Garrett*, the Fifth Circuit acknowledged the debate: "There is, unsurprisingly, more than one interpretation among the Texas courts of appeal." 24 F.4th at 490. Rather than moving to other sources of authority or respecting the indeterminacy, the Fifth Circuit decided to resolve uncertainty in the federal Government's favor. According to the Fifth Circuit, *Burton* and other Texas authorities favoring indivisibility were "either inapposite or unpersuasive." *Id.* The Fifth Circuit preferred the interpretation of the *Cooper* dissenting judges, based on the Fifth Circuit's own independent interpretation of the statutory text: "We begin with the statute and find it unambiguous." *Garrett*, 24 F.4th at 489.

In the cases below, the Fifth Circuit reaffirmed *Garrett* and rejected Petitioners' arguments that the case was inconsistent with *Mathis* and with Fifth Circuit precedent. Pet. App. 4a–5a, 17a–18a. That Circuit is thus firmly entrenched in the view that its own interpretation of Texas statutory text provides the necessary certainty, notwithstanding substantial *state court* authority adopting the opposite view.

B. This methodological dispute is an important and recurring question of federal law—and federalism—that can only be resolved in this Court.

This Court has previously warned of the mischief that arises when a federal court has free rein to reject state-court interpretations of state law. *Cf. Schad v. Arizona*, 501 U.S. 624, 638 (1991) (plurality) (acknowledging the "impossibility of determining, as an a priori matter, whether a given combination of fact is consistent with there being only one offense," and insisting that federal courts defer to state-court interpretations of state law). Federalism requires a deference to the way state courts would likely resolve a question, even if the federal court thinks that resolution is wrong.

Without a uniform federal rule to govern this very common situation, each "divisibility" decision will be shaded by a judge's (or appellate panel's) preferences vis-à-vis the ACCA. For those judges who, in general, favor longer sentences, debatable state-law questions will more often be resolved in the Government's favor: state crimes will be deemed divisible, even if most state-court decisions uphold general verdicts against unanimity challenges.

Thus far, Respondent has successfully resisted review of the *Garrett* by arguing that this Court is *also* bound by the Fifth Circuit's reading of Texas law, or that the Court should at least "defer" to *Garrett*. See, e.g., U.S. Br. in Opp. 9, *Lipscomb v. United States*, No. 22-5159 (citing *Bowen v. Massachusetts*, 487 U.S. 879, 908 (1988), and *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 16 (2004)). As a preliminary

matter, that "deference" is never absolute—*Newdow* reversed the Ninth Circuit's interpretation of California intermediate appellate decisions. 542 U.S. at 16.

More importantly, that argument is circular. It presumes that the Fifth Circuit's approach in *Garrett* is the correct one. If Petitioners are right about *Mathis*, then the Fifth Circuit had no business resolving the unanimity question at all. Surely this Court should not "defer" to a lower court's debatable resolution of a state-law question if the federal framework should have preempted that decision entirely.

The important and recurring question of federal law is whether the ACCA's "demand for certainty," applies to a sentencing court's interpretation of state law. Multiple state courts have interpreted the statute and binding precedent to allow disjunctive indictments and disjunctive verdicts. If those Texas-court decisions about Texas law are wrong, it is not the Fifth Circuit's place to say so.

This Court should grant the petition to make clear that a federal appellate court cannot hold a state statute divisible if substantial state-law authorities adopt the opposite position.

II. The Court should remand the case to the Fifth Circuit with instructions to decide the *Wooden*-inspired constitutional challenges.

Petitioners' constitutional challenges arising from *Wooden* are eerily similar to the contentions at issue in *Joseph v. United States*, 574 U.S. 1038, 135 S. Ct. 705 (2014) (mem.) In that case, the Court stopped just

short of vacating a similar decision in the Eleventh Circuit. There, as here, a petitioner sought to file a supplemental brief raising an argument that was foreclosed at the time the opening brief was filed. 135 S. Ct. at 705–06 (Kagan, J., respecting the denial of certiorari). There, as here, a court of appeals refused to consider the argument because it was "not raised in an opening appellate brief." *Id.* There, as here, intervening authority upset the precedent that had foreclosed the claim during earlier stages. As Justice Kagan, Ginsburg, and Breyer explained, every other circuit would "accept[ ] supplemental or substitute briefs as a matter of course when this Court issues a decision that upsets precedent relevant to a pending case and thereby provides an appellant with a new theory or claim." *Id.* at 706. They even noted that other circuits allowed supplementation late in the process—after briefing, after oral argument, and even after a panel opinion has issued. *Id.* at 706 (discussing *United States v. Cabrera-Gutierrez*, 756 F.3d 1125, 1127 (9th Cir. 2014), and *United States v. Blair*, 734 F.3d 218, 223 (3d Cir. 2013)).

Justices Kennedy and Sotomayor publicly dissented from the denial of certiorari in *Joseph*. That meant five Justices would look unfavorably upon a circuit court's decision to refuse to consider supplemental briefs relying on intervening Supreme Court authority.

The Eleventh Circuit took the hint. In *United States v. Duham*, 795 F.3d 1329 (11th Cir. 2015), the en banc court cited Justice Kagan's opinion in *Joseph* in a subsequent decision abrogating its unfair forfeiture rule. *See id.* at 1330–31.

Here, it is not merely an intervening Supreme Court decision—*Wooden*—but the Government's own concession of constitutional error in other cases that led Petitioners to file their supplemental briefs. The Government did not make the concession in their cases, and it did not make the concession immediately after *Wooden* was decided. The Government apparently changed its longstanding position around July of 2022, and filed its first Brief in Opposition around November of that year. On that time scale, December 2022 does not represent an unreasonable delay.

This is especially appropriate where there Fifth Circuit decided the case in the Government's favor on an issue—divisibility—it had not only forfeited, but affirmatively waived years earlier in the litigation.

CONCLUSION

This Court should grant the petition and overrule or abrogate the Fifth Circuit's decision in *Garrett*. Alternatively or additionally, the Court should remand these cases to the Fifth Circuit for a ruling on the constitutional issue raised in Petitioners' supplemental briefs.

Respectfully submitted,

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