No. 23-____

IN THE

# Supreme Court of the United States

PAUL ERLINGER,

*Petitioner*,

v.

UNITED STATES OF AMERICA,

*Respondent.*

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

## PETITION FOR A WRIT OF CERTIORARI


Heather Welles
Louis W. Fisher
O'MELVENY & MYERS LLP
400 S. Hope Street,
18th Flr.
Los Angeles, CA 90071

Jessie A. Cook
3650 N. Washington Blvd.
Indianapolis, IN 46205

Michael R. Dreeben
*Counsel of Record*
Rachel A. Chung
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, DC 20006
(202) 383-5400
mdreeben@omm.com

## QUESTION PRESENTED

Whether the Constitution requires a jury trial and proof beyond a reasonable doubt to find that a defendant's prior convictions were "committed on occasions different from one another," as is necessary to impose an enhanced sentence under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1).

**RELATED PROCEEDINGS**

*United States v. Erlinger,* No. 2:18-cr-00013-001 (S.D. Ind.)

*United States v. Erlinger*, No. 2:19-cv-00518, 2021 WL 2915014 (S.D. Ind. July 12, 2021)

*United States v. Erlinger*, 77 F.4th 617 (7th Cir. 2023)

**TABLE OF CONTENTS**

**TABLE OF CONTENTS**
(continued)

**Page**

## TABLE OF AUTHORITIES

**Page(s)**

### CASES

**TABLE OF AUTHORITIES**
**(continued)**

**Page(s)**

**TABLE OF AUTHORITIES**
**(continued)**

**Page(s)**

**TABLE OF AUTHORITIES**
**(continued)**

**Page(s)**

**TABLE OF AUTHORITIES**
**(continued)**

**Page(s)**



**CONSTITUTIONAL PROVISIONS**



**STATUTES**



**RULES**



**OTHER AUTHORITIES**

**TABLE OF AUTHORITIES**
**(continued)**

**Page(s)**

## PETITION FOR A WRIT OF CERTIORARI

Petitioner Paul Erlinger respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals is reported at 77 F.4th 617 and reprinted in the Appendix to the Petition ("Pet. App.") 1a-9a. The judgment of the district court is available at *United States v. Erlinger*, No. 2:18-cr-00013-001 (S.D. Ind. May 16, 2022), ECF No. 109.

## JURISDICTION

The court of appeals issued its decision on August 10, 2023. Pet. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." U.S. Const. amend. VI.

The relevant statutory provision, Section 924(e) of Title 18 of the U.S. Code, is reproduced at Pet. App. 62a.

## INTRODUCTION

This case presents a critically important question of constitutional criminal procedure, with a straightforward answer. Facts that can enhance sentences—including whether predicate offenses were committed on different "occasions" under the Armed Career Criminal Act (ACCA)—must be alleged in a federal indictment and proved to a jury beyond a reasonable doubt under the Fifth and Sixth Amendments. Yet since *Wooden v. United States*, 595 U.S. 360 (2022), when the Court construed the occasions clause in a way that necessitates factfinding to enhance a sentence under ACCA and reserved the constitutional issue presented here, the courts of appeals have failed to revise their holdings to accord with the Constitution, and district courts have taken widely disparate approaches in similarly situated cases. This Court's intervention is necessary to resolve this issue and restore a uniform application of the ACCA.

The ACCA mandates a fifteen-year minimum sentence, and permits a maximum sentence of life imprisonment, for unlawful possession of a firearm if the defendant has three prior qualifying convictions for offenses "committed on occasions different from one another." 18 U.S.C. § 924(e)(1). The Fifth and Sixth Amendments require that "any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury" and "found beyond a reasonable doubt," subject only to a "narrow exception . . . for the fact of a prior conviction." *Alleyne v. United States*, 570 U.S. 99, 102-03 & 111 n.1 (2013) (citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000)). And *Wooden* held that the ACCA's "on occasions different

from one another" clause can be triggered only after a fact-intensive inquiry into whether the prior crimes arose from the "single criminal episode," which requires a "multi-factored" examination of the time, place, "character and relationship of the offenses," as well as any intervening events. 595 U.S. at 363, 369. Because those factors fall outside the narrow "fact of a prior conviction" exception to *Apprendi*, the existence of three qualifying offenses committed on different occasions must be alleged in the indictment and proved to a jury.

Nevertheless, in this case, the court of appeals denied petitioner's constitutional right to a jury determination on the "occasions" question based solely on its pre-*Wooden* case law. That error has been replicated in case after case across the nation—despite the government's acknowledgment in this case and others that a "jury should be deciding these questions." Pet. App. 7a n.3. The courts of appeals have made clear that they do not intend to change course without this Court's direction. And making matters worse, different district courts—and even judges in the same district—apply different rules, creating chaos in the federal trial courts and precisely the unwarranted disparities and denials of constitutional rights that warrant this Court's review. The result is disorder, confusion, and unfairness to defendants—with ACCA defendants facing unjustified years in prison while the courts of appeals refuse to accord them their constitutional rights.

Only this Court can establish a nationally applicable rule on this important question of constitutional law. The Court should grant review to address—and

resolve this Term—the *Apprendi* issue it reserved in *Wooden*.

## STATEMENT

### A. Legal Framework

1. Under the Armed Career Criminal Act of 1984, a defendant convicted of unlawful possession of a firearm, in violation of 18 U.S.C. § 922(g), faces more severe punishment if he has three or more previous convictions "for a violent felony or a serious drug offense, or both, committed on occasions different from one another." 18 U.S.C. § 924(e)(1). At the time of the offense conduct in this case, a violation of Section 922(g) was punishable by up to ten years imprisonment. *See* former 18 U.S.C. § 924(a)(2); *Wooden v. United States*, 595 U.S. 360, 364 (2022).[1] But if the individual who violates Section 922(g) has three or more qualifying convictions "committed on occasions different from one another," the ACCA increases his prison term to a minimum of fifteen years and a maximum of life. 18 U.S.C. § 924(e)(1); *Welch v. United States*, 578 U.S. 120, 122 (2016).

In *Wooden*, this Court adopted a multifactor test for assessing whether crimes occurred on different occasions. Rejecting the government's position that "an

---

[1] In the Bipartisan Safer Communities Act, Congress increased the maximum penalty for a violation of Section 922(g) to "not more than 15 years" of imprisonment. *See* Pub. L. No. 117-159, div. A, tit. II, § 12004(c), 136 Stat. 1313, 1329 (June 25, 2022), *codified at* 18 U.S.C. § 924(a)(8). That amendment has no bearing on the constitutional issue in this case. Under the amended penalty scheme, as in the former one, the ACCA significantly enhances both the minimum and the maximum sentence for a violation of Section 922(g).

'occasion' happens 'at a particular point in time'—the moment 'when [an offense's] elements are established,'" 595 U.S. at 366—the Court held that the proper test asks whether the prior convictions arose "from a single criminal episode," *id.* at 363. The Court provided several contextual considerations that bear on that issue. "Offenses committed close in time, in an uninterrupted course of conduct, will often count as part of one occasion; not so offenses separated by substantial gaps in time or significant intervening events." *Id.* at 369. "Proximity of location is also important," the Court explained: "the further away crimes take place, the less likely they are components of the same criminal event." *Id.* "And the character and relationship of the offenses may make a difference," the Court added: "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." *Id.*

Applying that fact-specific inquiry, the Court held that Wooden's ten burglaries occurred "on a single occasion" because they were committed "on a single night, in a single uninterrupted course of conduct," and "all took place at one location," while "[e]ach offense was essentially identical, and all were intertwined with the others." *Id.* at 370. The Court added that Wooden's "burglaries were part and parcel of the same scheme, actuated by the same motive, and accomplished by the same means." *Id.*

2. Having adopted this context-specific inquiry into the factual relationship between offenses to assess whether they occurred on a single "occasion,"

*Wooden* raised a corresponding procedural question: Could the occasions inquiry be resolved by a judge at sentencing? After all, *Apprendi* recognized only a single exception to its jury-trial-protective holding for sentencing for a single offense: a judge may determine at sentencing, by a preponderance of the evidence, a minimum- or maximum-increasing fact *only* for the "fact of a prior conviction." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *Alleyne v. United States*, 570 U.S. 99, 103 (2013) (*Apprendi* applies to facts that require a mandatory minimum); *Almendarez-Torres v. United States*, 523 U.S. 224, 230, 234, 244 (1998) (prior-conviction exception). Apart from that narrow exception, the right to a jury trial—with the government bearing the burden of proof beyond a reasonable doubt—attaches to such sentence-enhancing facts. *Apprendi* explained why those guarantees apply: "If a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that the defendant should not—at the moment the State is put to proof of those circumstances—be deprived of protections that have, until that point, unquestionably attached." *Apprendi*, 530 U.S. at 484.

This Court has consistently applied that principle to require jury determinations, beyond a reasonable doubt, of facts that increase an individual's sentence above the otherwise-applicable minimum or maximum sentence. *See, e.g.*, *Ring v. Arizona*, 536 U.S. 584 (2002) (imposition of death penalty based on judicial factfinding); *Blakely v. Washington*, 542 U.S. 296

(2004) (mandatory state sentencing guidelines); *United States v. Booker*, 543 U.S. 220 (2005) (mandatory federal sentencing guidelines); *Cunningham v. California*, 549 U.S. 270 (2007) (mandatory state sentencing enhancements); *S. Union Co. v. United States*, 567 U.S. 343 (2012) (imposition of criminal fines based on judicial factfinding). Thus, unless the defendant admits the relevant facts, the judge "exceeds his proper authority" by imposing an enhanced sentence on the basis of facts—other than the fact of prior conviction—not found by a jury. *Blakely*, 542 U.S. at 303-04.

**B. Proceedings Below**

1. In 1991, when he was eighteen years old, petitioner pleaded guilty to four counts of burglary, arising from four nonresidential burglaries in Dubois County, Indiana. All four offenses were charged in a single complaint on May 8, 1991, and the convictions were entered on September 30, 1991. Pet. App. 21a. The complaint alleged that each burglary occurred within the same county and within the City of Jasper over the course of a week: April 4, April 8, and April 11, 1991. Pet. App. 22a; C.A. Dkt. 6 App'x at 43-45, 49.[2] Petitioner received concurrent sentences for each conviction.

2. In 2017, petitioner was charged by information with being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(e)(1). Pet. App. 10a-11a. The information alleged four prior convictions purportedly to invoke the ACCA, but did not

[2] "C.A. Dkt." refers to the Seventh Circuit docket.

allege that they were committed on occasions different from one another. *Id*.

Petitioner pleaded guilty and was sentenced to a term of 180 months to be followed by a one-year term of supervised release. Pet. App. 2a; Judgment at 2, No. 2:18-CR-00013 (S.D. Ind. Oct. 24, 2018), ECF No. 51. The court imposed that sentence in accordance with the mandatory-minimum term required by the Armed Career Criminal Act. *See United States v. Erlinger*, No. 2:19-cv-00518, 2021 WL 2915014 at *1 (S.D. Ind. July 12, 2021). On July 12, 2021, the district court granted petitioner's motion to vacate his sentence pursuant to 28 U.S.C. § 2255, subject to resentencing, because three of the four offenses that the court originally relied on no longer qualified as ACCA predicates under intervening circuit law. *Id.* at *1-2.

At resentencing, the government recommended that petitioner again be sentenced under the ACCA based on four Indiana burglary convictions entered in 1991. Pet. App. 2a-3a. Petitioner objected, arguing that under *Wooden*, his 1991 burglary convictions were not committed on different occasions from each other because they were committed in the same city, were charged on the same day, produced concurrent sentences, and were not separated by intervening arrests. *Id.* at 3a, 22a. He further argued that "judicial factfinding" on this point was impermissible, citing *Mathis v. United States*, 579 U.S. 500 (2016); Pet. App. 23a.

At the sentencing hearing, petitioner expanded on his constitutional argument, contending that the district court "is prohibited by the Sixth Amendment and by *Apprendi* [*v. New Jersey*, 530 U.S. 466 (2002)] . . .

from engaging in judicial fact finding other than finding the simple fact of a prior conviction and the elements of that prior conviction." Pet. App. 37a. Petitioner elaborated on the unreliability of conviction records as a basis for finding that the ACCA applied, *id.* at 37a-41a, and noted that "in order for the [district court] to make a determination that the two addresses set forth in the charging documents are not adjacent to one other requires judicial fact finding, which is absolutely barred by the Sixth Amendment." *Id.* at 45a; *see also id.* at 45a-48a (parties and court addressing the impact of *Wooden* on judicial factfinding to impose an ACCA sentence); *id.* at 56a-57a (court noting that petitioner had "preserv[ed]" the Sixth Amendment issue for "appellate review").

The district court held that, under *Shepard v. United States*, 544 U.S. 13 (2005), it could rely on the generic factual information contained in the 1991 charging document for the purposes of ACCA. Pet. App. 55a-57a. Although it acknowledged that the sentence enhancement resulted in an "excessive," "artificially inflate[d]" and "unjust punishment," the district court applied the ACCA enhancement and sentenced petitioner to 180 months of imprisonment. *Id.* at 58a. The court found this "unfortunate," stating that, if it were not "compelled" to impose the ACCA enhancement, it would have sentenced petitioner to a term of 60 months of imprisonment *Id.*

3. Petitioner appealed the ACCA enhancement, arguing that the district court impermissibly engaged in judicial factfinding and erred in concluding that his 1991 burglary convictions qualified for enhanced penalties under the ACCA. C.A. Dkt. 6 at 6-15.

Petitioner argued that *Wooden* "raise[d] questions such as whether the Occasions Clause can be squared with the Fifth and Sixth Amendment rights of defendants to be sentenced only on facts proven beyond a reasonable doubt by juries and not by sentencing judges" because, under this Court's jurisprudence, judicial factfinding is precluded "where it increases the maximum potential penalty for an offense and goes beyond an inquiry into the simple fact of a prior conviction." C.A. Dkt. 6 at 14-15. The government agreed that petitioner had not admitted that the burglaries were committed on separate occasions and that "[f]ollowing *Wooden*, . . . the Sixth Amendment requires a jury to determine whether predicate offenses were committed on different occasions." C.A. Dkt. 15 at 7, 11.

The court of appeals affirmed, noting that "*Wooden* expressly reserved the Sixth Amendment issue" and the court was, therefore, "bound by [its] [pre-*Wooden*] precedent." Pet. App. 7a. Applying circuit precedent, the court of appeals held that the government was not required to prove to a jury beyond a reasonable doubt that petitioner committed the 1991 burglaries on separate occasions. And the court determined that, under *Wooden*, the 1991 burglaries were committed on different occasions.[3] *Id*. at 8a.

---

[3] The panel also held that Indiana's burglary statute was not overly broad and could properly qualify for an enhanced sentence under ACCA. Pet. App. 4a-6a. Petitioner does not seek certiorari on this question.

## REASONS FOR GRANTING THE PETITION

As Justice Gorsuch recognized in *Wooden*, "[a] constitutional question simmers beneath the surface" of the Court's decision. *Wooden v. United States*, 595 U.S. 360, 397 n.7 (2022) (Gorsuch, J., joined by Justice Sotomayor, concurring). Having construed the ACCA's occasions clause to turn on multiple facts not contained in prior judgments of conviction, the question arises whether a judge, rather than a jury, may make the necessary determinations under "only a preponderance of the evidence standard." *Id.* The Court declined to reach that issue in *Wooden* because the defendant "did not raise it." *Id.* at 365 n.3 (majority opinion). But as Justice Gorsuch noted, "there is little doubt that [the Court] will have to do so soon." *Id.* at 397 n.7 (Gorsuch, J., concurring).

The time has arrived. In the seventeen months since the Court issued *Wooden*, the courts of appeals have repeatedly refused to revisit their precedent on this question. Instead, like the Seventh Circuit here, many circuits have dismissed the impact of *Wooden* on the *Apprendi* issue and affirmed longstanding circuit precedent holding that a judge may conduct the occasions inquiry. Meanwhile, district courts are applying different rules to similarly situated cases, particularly in light of the government's agreement that *Apprendi* applies. *See infra* at 18-22.

The court of appeals' holding that *Apprendi* does not apply to the occasions issue under ACCA conflicts with this Court's precedents. The Constitution requires that, "[o]ther 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." *Apprendi*, 530 U.S. at 490. *Wooden* leaves no doubt that whether a defendant's prior, qualifying convictions stem from offenses "committed on occasions different from one another" depends on a host of factual determinations that fall outside the fact of prior conviction for the separate predicate offenses. Because the ACCA raises a defendant's statutory sentencing range, *Apprendi*'s principles directly apply to the occasions issue.

The government agrees with this position. The government recognizes that in light of *Wooden*, the different-occasions issue is for the jury—as the government told the Seventh Circuit, Pet. App. 7a n.3, has argued in multiple other courts of appeals, and has acknowledged to this Court, *see*, *e.g.*, U.S. Br. in Opp. 6-7, *Reed v. United States*, No. 22-336 (filed Dec. 2022). Yet the gridlock in the lower courts persists.

This state of affairs is untenable, and it is only getting worse. It has become clear that the regional circuits will not reconsider and correct their erroneous pre-*Wooden* precedent without this Court's intervention. Most have denied en banc review, with judges in one circuit (the Fourth) explicitly stating that this Court should take up the issue. And the only court to grant en banc—the Eighth Circuit—ultimately declined to resolve the question. District courts, meanwhile, apply *Apprendi* in some cases while declining to do so in others. This disparate application of constitutional rights benefits no one—not defendants, not the lower courts, and not the government. This Court should therefore intervene to avoid years of wasteful litigation, to prevent scores of erroneously

imposed ACCA sentences, and to protect critically important constitutional rights.

This case is an ideal vehicle for review. Petitioner preserved his constitutional claim in the district court, and the court of appeals relied on binding circuit precedent on direct review, in a published, post-*Wooden* opinion, to reject the *Apprendi* claim. That rejection was dispositive to the court's decision to affirm petitioner's sentence.

No asserted need for percolation of this clear-cut issue can justify delaying its resolution. The government's nationwide concession that *Apprendi* applies confirms the clarity of the correct answer. And the discordant results in the district courts underscores the need for this Court's review and the unfairness of deferring it. The petition should be granted, and the decision below reversed.[4]

---

[4] Other pending petitions for certiorari seeking review of the same issue include *Valencia v. United States*, No. 23-5606 (filed Sept. 12, 2023); *Thomas v. United States*, No. 23-5457 (filed Aug. 22, 2023); and *McCall v. United States*, No. 22-7630 (filed May 22, 2023). Several other petitions seeking review of the same issue—filed before it became clear that the courts of appeals would not correct their flawed pre-*Wooden* precedent through the en banc process—were denied on October 2, 2023. *See Turner v. United States*, No. 23-5226 (filed July 21, 2023); *Williams v. United States*, No. 23-5085 (filed July 10, 2023); *Jackson v. United States*, No. 22-7772 (filed June 8, 2023); *Hunley v. United States*, No. 22-7758 (filed June 8, 2023); *Lovell v. United States*, No. 23-5081 (filed July 10, 2023); *Buford v. United States,* No. 22-7660 (filed May 25, 2023). Petitions for certiorari on this issue can be expected to proliferate until this Court resolves the issue.

**A. The Decision Below Is Wrong**

*Apprendi* applies here because of a straightforward syllogism. When any fact other than the fact of a prior conviction increases the minimum or maximum sentence for an offense, it must be determined by a jury beyond a reasonable doubt. The ACCA increases the minimum and maximum sentence when a defendant has three prior convictions for offenses committed on different occasions—and *Wooden* makes clear that the occasions issue turns on facts beyond the bare entry of a prior conviction. Therefore, unless the defendant admits that the ACCA applies, the occasions issue must be resolved by the jury beyond a reasonable doubt.[5]

1. The ACCA increases the imprisonment range for a violation of 18 U.S.C. § 922(g) by mandating a fifteen-year minimum term and elevating the maximum to life. Even before *Wooden*, multiple judges recognized that the ACCA's "occasions different from one another" requirement turns on facts that cannot be determined by ascertaining the elements of the offense from a prior judgment of conviction, so *Apprendi*

[5] "In federal prosecutions, such [sentence-enhancing] facts must also be charged in the indictment." *United States v. Cotton*, 535 U.S. 625, 627 (2002). The Department of Justice has determined that "going forward, where the government seeks imposition of an ACCA sentence, it will charge the pertinent facts in an indictment, and seek either a jury verdict or defendant admission regarding those facts." Gov't Mot. to Withdraw Appeal at 3, *United States v. Brown*, No. 22-2550 (3d Cir. Mar. 12, 2023), ECF No. 30. Here, the information to which petitioner pleaded guilty did not allege that he had ACCA-qualifying convictions for offenses committed on different occasions from one another." *See* Pet. App. 10a-13a.

requires that this issue be resolved by a jury. *See, e.g.*, *United States v. Perry*, 908 F.3d 1126, 1134 (8th Cir. 2018) (Stras, J., concurring) (court's treatment of different-occasions issue as one for the court "falls in line with our cases but is a departure from fundamental Sixth Amendment principles"); *United States v. Thompson*, 421 F.3d 278, 294 (4th Cir. 2005) (Wilkins, C.J., dissenting) (employing *Apprendi* analysis to find that facts "about a crime underlying a prior conviction," including dates, are beyond the "fact of a prior conviction" exception); *see also United States v. Dudley*, 5 F.4th 1249, 1275 (11th Cir. 2021) (Newsom, J., concurring in part and dissenting in part) ("[W]hy doesn't judicial factfinding involving ACCA's different-occasions requirement itself violate the Sixth Amendment? After all, we've described the different-occasions inquiry as a factual one.").

As this Court held in *Wooden*, the proper inquiry for determining whether offenses were committed on occasions different from one another is "multi-factored." 595 U.S. at 369. "Offenses committed close in time, in an uninterrupted course of conduct, will often count as part of one occasion; not so offenses separated by substantial gaps in time or significant intervening events." *Id.*. Similarly, "[p]roximity of location" matters; "the further away crimes take place, the less likely they are components of the same criminal event." *Id.* And "[t]he 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." *Id.* These facts—and the application of *Wooden*'s legal standard to them—raise

quintessential matters for jury determination. *See United States v. Gaudin*, 515 U.S. 506, 512 (1995) (jury-trial right embraces both questions of historical fact and "the application-of-legal-standard-to-fact sort of question").

2. The exception to the rule articulated in *Apprendi* for the fact of a prior conviction does not apply to the occasions inquiry. Again, multiple judges have recognized this point. In *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), this Court held that a court (rather than a jury) may find the *fact* of a prior conviction to "increase the sentence for a recidivist." *Id.* at 226. This recidivism exception is limited to only the fact of the conviction itself (including the elements of the offense of conviction). *See Mathis*, 579 U.S. at 511-12. A judge "can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of." *Id.* "[A] judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed the offense." *Id.* at 511 (citing *Shepard*, 544 U.S. at 25). "[A]llowing a sentencing judge to go any further would raise serious Sixth Amendment concerns." *Id.*

A determination of the fact and elements of a prior conviction does not suffice to make the occasions determination under *Wooden*. The fact of multiple prior convictions says nothing about whether they arose "from a single criminal episode." *Wooden*, 595 U.S. at 363. The entry of a conviction does not show whether the offenses were committed in one uninterrupted course of conduct, nor the extent of the gaps in time between them, nor the proximity of the locations at

which the offenses occurred, nor whether they share a common scheme or purpose. *See id.* at 369. Indeed, the entry of a conviction does not even determine the date on which an underlying offense was committed. The facts necessary to determine the occasions inquiry necessarily "relate to the commission of the offense," *Almendarez-Torres*, 523 U.S. at 244 (internal quotation marks omitted), and therefore cannot fall within the fact-of-conviction exception articulated by *Almendarez-Torres*.

3. Some courts—including the Seventh Circuit—sought to solve this invasion of the jury's domain by confining courts determining the ACCA's occasions issue to the documents identified in *Shepard*, . *See*, *e.g.*, *Kirkland v. United States*, 687 F.3d 878, 883-86 (7th Cir. 2012); *United States v. Hennessee*, 932 F.3d 437, 442-43 (6th Cir. 2019). But that approach fails. *See Hennessee*, 932 F.3d at 450-52 (Cole, C.J., dissenting) (finding that reasoning "constitutionally problematic"). *Shepard* documents comprise conviction records such as the charging instrument, guilty-plea transcript, or jury instructions; the court may review this narrow set of documents only to determine which of the alternative elements within a divisible statute necessarily served as the basis for the prior conviction. *Descamps v. United States*, 570 U.S. 254, 262-63 (2013).

But *Shepard* documents cannot be used "to determine what the defendant and state judge must have understood as the factual basis of the prior plea." *Id.* (internal quotation marks omitted). *Mathis* reaffirmed this holding, explaining that it is unfair to defendants to rely on "'non-elemental fact[s]' in the

records of prior convictions," as these purported facts "are prone to error precisely because their proof is unnecessary." 579 U.S. at 512 (quoting *Descamps*, 570 U.S. at 270); *id.* ("[A] defendant may have no incentive to contest what does not matter under the law; to the contrary, he may have good reason not to" (internal quotation marks omitted)). "Such inaccuracies should not come back to haunt the defendant many years down the road by triggering a lengthy mandatory sentence." *Id.*

*Shepard* documents thus cannot be used to establish the facts underlying a prior conviction. "[T]he who, what, when, and where of a conviction" all "pose questions of fact." *Pereida v. Wilkinson*, 141 S. Ct. 754, 765 (2021). None of them is embraced by the fact of the conviction itself, and none is admitted through a guilty plea. It follows that they cannot be used by a sentencing court to resolve the "occasions different from one another" inquiry. Not even the date or location of an offense is an element that can be discerned from the *Shepard* documents consistent with *Apprendi*, *Descamps*, and *Mathis*—much less the exact time between the offenses, their geographic proximity, or how similar they are in nature. The ineluctable conclusion is that under *Apprendi* such issues are matters for jury determination beyond a reasonable doubt.

### B. The Courts Of Appeals Will Not Correct Course Without This Court's Intervention

Before *Wooden* clarified the proper multi-factored, factual occasions-clause test, the courts of appeals uniformly held that a judge (rather than a jury) may answer ACCA's occasions clause question. After

*Wooden*, the courts of appeals have uniformly persisted in this erroneous view. This Court must intervene to correct course.

Pre-*Wooden*, the courts of appeals held that *Apprendi*'s jury-trial rule did not apply to the occasions clause question based on *Almendarez-Torres*'s narrow exception to *Apprendi*. *See United States v. Santiago*, 268 F.3d 151, 156-57 (2d Cir. 2001); *United States v. Jurbala*, 198 F. App'x 236, 237 (3d Cir. 2006); *United States v. Thompson*, 421 F.3d 278, 285 (4th Cir. 2005); *United States v. Tatum*, 165 F. App'x 367, 368 (5th Cir. 2006); *United States v. Burgin*, 388 F.3d 177, 183 (6th Cir. 2004); *United States v. Morris*, 293 F.3d 1010, 1012-13 (7th Cir. 2002); *United States v. Wilson*, 406 F.3d 1074, 1075 (8th Cir. 2005), *abrogated on other grounds by United States v. Miller*, 305 F. App'x 302, 303 (8th Cir. 2008); *United States v. Walker*, 953 F.3d 577, 580 (9th Cir. 2020); *United States v. Michel*, 446 F.3d 1122, 1132-33 (10th Cir. 2006); *United States v. Longoria*, 874 F.3d 1278, 1283 (11th Cir. 2017); *cf. United States v. Stearns*, 387 F.3d 104, 106, 109 (1st Cir. 2004) (affirming district court's determination that two of defendant's prior offenses were committed on separate "occasions"). These courts reasoned that Section "924(e)'s 'different occasions' requirement falls safely within the range of facts traditionally found by judges at sentencing" because "the separateness" of prior convictions cannot "be distinguished from the mere fact of their existence." *Santiago*, 268 F.3d at 156-57; *see also Dudley*, 5 F.4th at 1260 (collecting pre-*Wooden* cases), *cert. denied*, 142 S. Ct. 1376 (2022).

Since *Wooden* clarified the multifactored, fact-intensive test for "different occasions" under the ACCA, ten courts of appeals have considered the *Apprendi* issue that *Wooden* left unresolved. None has revised its pre-*Wooden* precedents, with several explicitly stating that those precedents remain binding unless overruled en banc or by this Court. *United States v. Stowell*, -- F.4th --, 2023 WL 6168341, at *1 (8th Cir. Sept. 22, 2023) (en banc); *United States v. Gallimore*, 71 F.4th 1265, 1269 (10th Cir. 2023); *United States v. Brown*, 67 F.4th 200, 215, *pet. for reh'g denied*, 77 F.4th 301 (4th Cir. 2023); *United States v. Golden*, 2023 WL 2446899, at *4 (3d Cir. Mar. 10, 2023); *United States v. Hatley*, 61 F.4th 536, 542 (7th Cir. 2023); *United States v. Williams*, 2023 WL 2239020, at *1 (5th Cir. Feb. 23, 2023) (per curiam); *United States v. Lovell*, No. 20-6287, 2023 WL 1879530, at *3 (6th Cir. Feb. 10, 2023); *United States v. Williams*, 39 F.4th 342, 351 (6th Cir. 2022), *pet. for reh'g denied*, 2022 WL 17409565 (6th Cir. Oct. 26, 2022), *cert. denied*, 143 S. Ct. 1783 (U.S. Apr. 24, 2023); *United States v. Haynes*, 2022 WL 3643740, at *5 (11th Cir. Aug. 24, 2022) (per curiam), *pet. for reh'g denied*, No. 19-12335 (11th Cir. Nov. 1, 2023), *cert. denied*, 143 S. Ct. 1009 (2023); *United States v. Reed*, 39 F.4th 1285, 1295 (10th Cir. 2022), *pet. for reh'g denied*, No. 21-2073 (10th Cir. Sept. 1, 2022), *cert. denied*, 143 S. Ct. 745 (2023); *United States v. Barrera*, 2022 WL 1239052, at *2 (9th Cir. Apr. 27, 2022), *pet. for reh'g denied*, No. 20-10368 (9th Cir. Sept. 21, 2022), *cert. denied*, 143 S. Ct. 1043 (2023); *United States v. Daniels*, 2022 WL 1135102, at *1 (4th Cir. Apr. 18, 2022) (per curiam), *cert. denied*, 143 S. Ct. 749 (2023).

Courts of appeals have also repeatedly confirmed that they will not overrule their pre-*Wooden* precedents on rehearing en banc, and will instead follow and reinforce those precedents unless this Court corrects them. *See*, *e.g.*, *Stowell*, 2023 WL 6168341, at *1 (relying on harmless-error analysis); *Gallimore*, 71 F.4th at 1269 (Defendant "cannot argue to the contrary absent en banc reconsideration or a superseding contrary decision by the Supreme Court." (internal quotation marks omitted)); *United States v. Thomas*, 2023 WL 5535124, at *2 (6th Cir. Aug. 8, 2023) (similar).[6] At least five courts have denied petitions for rehearing en banc on this question. *See supra* at 20-21 (collecting cases from Fourth, Sixth, Ninth, Tenth, and Eleventh Circuits).

Even judges who *agree* that existing circuit law is wrong still vote against en banc review because of their view that this Court should answer the question presented here because it "implicates 'an important question of federal law that has not been, but should be, settled by the Supreme Court." *Brown*, 77 F.4th at 301 (Heytens, J., statement concerning denial of rehearing en banc) (alterations omitted) (quoting S. Ct. R. 10(c)). And some judges who disagree that

---

[6] In *United States v. Man*, the government "concede[d] that following *Wooden* . . . , a jury must find, or a defendant must admit, that a defendant's ACCA predicate offenses were committed on different occasions," and the Ninth Circuit "assume[d], without holding, that an *Apprendi* error occurred." 2022 WL 17260489, at *1 (9th Cir. Nov. 29, 2022) (mem.). *Man*, too, thereby declined to alter otherwise binding Ninth Circuit precedent that a "district court does not commit an *Apprendi* error by differentiating the occasions on which ACCA violent felonies were committed." *Id.*

*Apprendi*'s rule applies to the occasions-clause issue are likewise "urging the Supreme Court to clarify and settle the question" and "give the courts of appeals guidance in this important matter." *Id.* at 302 (Niemeyer, J., concurring in part in Judge Heyten's statement).

Only the Eighth Circuit has granted en banc review to consider *Wooden*'s implications on this question, and that court recently determined not to decide the issue. The majority held that "it was harmless beyond a reasonable doubt" to permit a judge to decide the "different occasions" question because, based on the PSR and charging documents, it saw no "reasonable possibility" that *Apprendi* error "contributed to the sentence" in that case—"[w]hatever [its] views are on any Sixth Amendment error." *United States v. Stowell*, 2023 WL 6168341, at *2. The en banc court's inaction on the constitutional issue—after investing resources in an en banc proceeding that the United States had supported precisely to reconsider circuit law—provides overwhelming evidence that the courts of appeals will not fix this pervasive constitutional error without direction from this Court.

Further percolation of the question presented will not yield any new insights. The issue has been extensively debated and analyzed in majority, concurring, and dissenting opinions. *E.g. Brown*, 77 F.4th at 209. The trendline in the courts of appeals is that each will place conclusory reliance on their own and each other's erroneous post-*Wooden* precedents in declining to reconsider their holdings. *E.g.*, *Hatley*, 61 F.4th at 542 ("[I]n *Wooden*'s wake, other circuits have

continued to recognize the propriety of sentencing judges making this finding.").

**C. The Question Presented Is Critically Important**

Answering the question presented is vital to protecting the Fifth Amendment right to indictment by a grand jury, the due process right to proof beyond a reasonable doubt, and the Sixth Amendment jury-trial right. That question also has sweeping practical importance for criminal sentencing across the country, which has fallen into intolerable disarray in the district courts.

1. "The jury is a central foundation of our justice system and our democracy." *Peña-Rodriguez v. Colorado*, 580 U.S. 206, 210 (2017). "The jury is a tangible implementation of the principle that the law comes from the people." *Id.* The Framers adopted it because the jury serves as a "necessary check on governmental power," *id.*, an essential "protection against arbitrary rule," *Duncan v. Louisiana*, 391 U.S. 145, 151 (1968), and the "bulwark" between the individual and the state, Joseph Story, Commentaries on the Constitution of the United States 764-65 (1833) (Lonang Inst. ed., 2005). Similarly, grand juries afford "basic protection" to an individual by "limit[ing] his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge" and thereby "protecting the citizen against unfounded accusation." *Stirone v. United States*, 361 U.S. 212, 218 & n.3 (1960).

The Sixth Amendment "right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure" and "meant to

ensure [the people's] control in the judiciary." *Blakely v. Washington*, 542 U.S. 296, 305-06 (2004). And the interlinked protection of the right to have the government prove its case beyond a reasonable doubt guards against error in a system that prizes the presumption of innocence. *See Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993); *In re Winship*, 397 U.S. 358, 363-64 (1970). Defendants who are deprived of these constitutional rights risk unjustified deprivations of liberty and unwarranted stigma.

2. The question presented has sweeping practical importance—for courts, defendants, the government, and the administration of justice.

a. During the ten-year period between October 2009 and September 2019, courts imposed 4,480 ACCA sentences. U.S. Sent'g Comm'n, Federal Armed Career Criminals: Prevalence, Patterns, and Pathways, 18-19 & n.44 (Mar. 2021). Defendants who were subject to the ACCA's fifteen-year mandatory minimum penalty at sentencing received an average sentence of 206 months in fiscal year 2019, *id.* at 6, 7, 26, representing a 70 percent increase in the median sentence over the maximum ten-year sentence that a defendant would face without an ACCA enhancement.

Such dramatic increases in individual sentences heighten the stakes in this case. Entrusting to a judge alone the determination of the underlying issues undermines the credibility and perceived fairness of the criminal justice system. *See Marshall v. Jerrico, Inc.*, 446 U.S. 238, 243 (1980) ("[J]ustice must satisfy the appearance of justice." (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)). And excluding

juries from these momentous decisions undermines public confidence in the law. As this Court has noted, "[j]ury service preserves the democratic element of the law." *Powers v. Ohio*, 499 U.S. 400, 407 (1991). Maintaining the connection between criminal judgments and community participation affords yet another reason for this Court to resolve this issue.

b. Meanwhile, the courts of appeals' failure to resolve the tension between their precedents on the one hand, and *Wooden* and *Apprendi* on the other, is producing chaos in the lower courts, with criminal defendants' access to their jury-trial rights depending on the fortuities of geography and individual judge—even within the same circuit. For example, in the Middle District of Florida, one judge recently (and unconstitutionally) applied ACCA's mandatory minimum after a defendant pleaded guilty to an indictment that did not allege ACCA's "different occasions" requirement, despite the defendant's and government's objection that "the Sixth Amendment requires a jury to find (or a defendant to admit) that the defendant committed at least three ACCA predicates on occasions different from one another." *United States v. Brown*, No. 22-cr-64 (M.D. Fla.), ECF No. 70 at 2 (Gov't's Response to Def.'s Mot.); *id.*, ECF No. 69 at 2-3 (Def.'s Mot. to Schedule Def.'s Sentencing Hr'g) (similar); *id.*, ECF No. 77 (Judgment) (finding the defendant guilty under 18 U.S.C. §§ 922(g)(1) and 924(e) and imposing ACCA minimum). Yet within the same district, four other "similarly situated" defendants had recently been sentenced to non-ACCA sentences where the defendant did not admit, and no jury found, prior convictions that occurred on different occasions

under ACCA. *Id.*, ECF No. 69 (collecting cases). Similar intra-district discord pervades other districts across the country.[7]

The Third Circuit's approach highlights the need for this Court's review. That court has vacated ACCA sentences and remanded for resentencing in unpublished summary orders, based on the argument—conceded by the government—that sentencing defendants under the occasions clause when the indictment does not charge it is reversible "*Wooden*/Ap*prendi* error." *See*, *e.g.*, *United States v. Spry*, No. 22-3025 (3d Cir.), ECF Nos. 28, 30-1 (granting motion for

---

[7] *Compare United States v. McDonald*, No. 20-cr-57 (E.D. Pa.), ECF Nos. 1, 72 (Gov't Sentencing Memo.) (conceding ACCA did not apply where occasions clause was not alleged in indictment "in light of the 'multi-factored' and 'holistic' inquiry now required by *Wooden*"), 74 (imposing non-ACCA sentence); *United States v. Castro*, No. 21-cr-378 (E.D. Pa.), ECF Nos. 1, 22, 27 (similar); *and United States v. White*, No. 21-cr-460 (E.D. Pa.), ECF Nos. 7, 62, 66 (similar), *with United States* v. *Spry*, No. 20-cr-84 (E.D. Pa.), ECF Nos. 1, 69, 73 (imposing ACCA sentence despite similar government concession regarding occasions clause).

*Compare also United States v. Taylor*, No. 21-cr-168 (W.D. Tex.), ECF No. 16 (indictment), 46 (government concession that occasions clause must be indicted to apply ACCA), 49 (imposing non-ACCA sentence), *with United States v. Charles*, No. 22-cr-154 (W.D. Tex.), ECF No. 1 (indictment), 73 (judge rejecting similar government concession at sentencing), 66 (ACCA sentence).

*Compare also United States v. Macklin*, No. 22-cr-20024 (W.D. Tenn.), ECF Nos. 36 (government conceding in sentencing submission that "[i]n the absence of an admission by Defendant or a jury finding, . . . it violates the Sixth Amendment, and Defendant should not be sentenced under the ACCA"), 40, 42 (imposing non-ACCA sentence), *with United States v. Robinson,* 21-cr-20096 (W.D. Tenn), ECF Nos. 1, 59, 76, 83 (rejecting similar government concession); *United States v. Thomas*, 21-cr-20078 (W.D. Tenn.), ECF Nos. 1, 79, 96 (similar).

summary action vacating judgment and remanding). Yet the court of appeals has not revisited circuit precedent, creating a disconnect between what the court says and what it does. Such unexplained actions are inconsistent with a sound administration of criminal justice.

These differential results for similarly situated defendants in different jurisdictions—and even within the same circuit or district—is unfair. It results directly from the lack of clarity on *Apprendi's* application to the "different occasions" inquiry in *Wooden*'s wake and the failure of the courts of appeals to grapple with the issue, absent guidance from this Court.

c. The significance of applying *Apprendi*'s procedural protections in this context 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). 1:19-CR-455-WMR (N.D. Ga. Sept. 20, 2022), ECF No. No. 171. And the jury was then permitted to consider whether the government carried its burden to establish that the three ACCA predicate offenses—which occurred months and years apart and in two different counties—were committed "on occasions different from one another." *Id.*, ECF No. 172 (Sept. 20, 2022). In a verdict rendered the same day as the verdict on the underlying offenses, the jury determined that the government had not carried its burden, thereby reducing Mr. Pennington's sentencing range from fifteen-years-to-life to zero-to-ten years. *Id.*, ECF No. 173 (Sept. 20, 2022).

d. Denying the jury's role in finding the facts surrounding the ACCA occasions issue has profound significance for the credibility and integrity of the criminal justice system. Community trust and confidence in the administration of justice is enhanced when the jury plays its constitutionally assigned role. Yet without this Court's intervention, those benefits will accrue only if district courts exercise discretion to move beyond (or defy) circuit law, often with the government's support. This state of affairs has serious adverse effects on the administration of justice. One legal regime should prevail nationwide; critical procedural protection should not vary based on the predilections of particular judges. Only this Court can provide a definitive national solution to this critical issue.

4. The need for this Court's intervention is confirmed by the significant number of ACCA cases that the Court regularly agrees to review. Besides *Wooden*, this Court has in recent years addressed questions concerning the mens rea necessary to satisfy the ACCA's elements clause, *Borden v. United States*, 141 S. Ct. 1817 (2021); the methodology for determining when a state offense qualifies as a "serious drug offense," *Shular v. United States*, 140 S. Ct. 779 (2020); aspects of generic burglary, *Quarles v. United States*, 139 S. Ct. 1872 (2019); when robbery qualifies under the elements clause, *Stokeling v. United States*, 139 S. Ct. 544 (2019); another generic-burglary case, *United States v. Stitt*, 139 S. Ct. 399 (2018); and the procedural questions implicated in *Mathis*, *Descamps,* and *Shepard*. The Court has granted two other ACCA cases for argument this term. *See Brown*

*v. United States*, No. 22-6389; *Jackson v. United States*, No. 22-6389 (addressing definition of "serious drug offense"). The constitutional issue in this case cuts across *all* ACCA cases. If this Court's intervention is warranted to resolve discrete circuit splits that reflect subcategories of ACCA cases, it is equally warranted to settle a recurring issue that affects all of them.

### D. This Case Is An Ideal Vehicle For Addressing The Question Presented

The Court should resolve the question presented in this case. The legal issue was preserved in the district court and is cleanly presented in a published opinion, in which the court held that petitioner was not constitutionally entitled to a jury finding that his prior convictions resuled from offenses committed on different occasions. Pet. App. 1a-2a, 6a-9a. And it did so with full awareness that, after *Wooden*, the United States *agrees* with petitioner that the occasions issue must be submitted to the jury as a matter of constitutional law. *See supra* at 11-12.

The question presented is also outcome-determinative. If petitioner is entitled to a jury determination beyond a reasonable doubt on whether his prior offenses were committed on occasions different from one another, he cannot be subjected to the ACCA enhancement. Petitioner never admitted the relevant issue—that his prior burglaries arose on different occasions—and under a correct understanding of the law as articulated in *Wooden*, they did not.[8] Despite

[8] Although the government acknowledged that petitioner did not admit that that the 1991 burglaries occurred on separate

petitioner's Sixth Amendment objection, the court conducted its own factfinding and felt "compelled to impose" an enhanced sentence under ACCA, although such a sentence was "unjust" and "artificially inflate[d]." Pet. App. 58a. This Court should grant review to determine whether that unjust and artificially inflated sentence was also imposed unconstitutionally.

---

occasions, it argued that the district court's finding was harmless because, by pleading guilty to the burglaries, petitioner effectively "admitted to the facts in his charges, including the date and location of his burglaries," and thus waived his claim that he was entitled to indictment and jury consideration of those facts. C.A. Dkt. 15 at 18. But, through his guilty plea, petitioner merely admitted that the "that the facts as stated in the information to which I am pleading guilty are true and correct." *Id.* at 18. In Indiana, the specific time and place of a crime are not considered essential elements of a crime, Ind. Code 35-34-1-5(a)(7), and petitioner had no incentive to dispute these facts; he was completely unaware that failure to object to inaccurate temporal facts in the Information could subject him to a ten-year sentence enhancement almost 30 years later. *See Mathis*, 579 U.S. at 512-13; Pet App. at 36a-56a (advancing this argument). And in any event, under *Wooden*, these facts are not dispositive of the occasions inquiry. 595 U.S. at 369; *see* Pet. App. 59a (noting that petitioner's challenge to the district court's application of sentencing enhancement under ACCA was "well preserved"). Finally, the government has acknowledged that the asserted "harmlessness of the [*Apprendi* error in this context] 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." U.S. Br. in Opp. 9-10, *Reed v. United States*, No. 22-336 (filed Dec. 2022); *see also* U.S. Br. in Opp. 12, No. 22-7660 (filed Aug. 2023) (similar).

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

Heather Welles
Louis W. Fisher
O'MELVENY & MYERS LLP
400 S. Hope Street,
18th Flr.
Los Angeles, CA 90071

Jessie A. Cook
3650 N. Washington Blvd.
Indianapolis, IN 46205

Michael R. Dreeben
*Counsel of Record*
Rachel A. Chung
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, DC 20006
(202) 383-5400
mdreeben@omm.com

October 4, 2023