No. 24-5776

IN THE

Supreme Court of the United States

RICHARD ALLEN HARRIS, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF FOR PETITIONER

Pursuant to Rule 15.8, petitioner submits this supplemental brief to advise the Court that the Seventh Circuit has recently denied the government's petition for panel rehearing in *United States v. Anderson*, 99 F.4th 1106 (7th Cir. 2024). As explained below, this intervening development solidifies a direct circuit conflict with the decision below and removes any doubt about the need for this Court's review.

1. This petition presents the following question under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e): to determine the elements of a prior state offense for purposes of applying the categorical approach, should federal courts consult: a) the most recent authoritative state court decisions; or b) the state court decisions in effect at the time of the defendant's prior state conviction? Pet. i.

As explained in the petition, the circuits are divided on that question. On the one hand, the First, Fourth, Fifth, and Eighth Circuits have all issued published opinions employing the latter approach, consulting only the state court decisions that were in effect at the time of the defendant's prior state conviction. *See* Pet. 3–4, 14–16. On the other hand, the Eleventh Circuit—in several published opinions over the last decade—has instead consulted the most recent authoritative state court decision, even where that decision post-dates the defendant's prior conviction. *See* Pet. 11–14.

In *Somers v. United States*, 66 F.4th 890 (11th Cir. 2023), the Eleventh Circuit most recently applied that contemporaneous approach in the context of Florida aggravated assault. As explained in the petition (at 7–8, 11–12, 14), the defendant in that case argued that, under *Borden v. United States*, 593 U.S. 420 (2021), his prior

Florida aggravated assault conviction did not qualify as an ACCA "violent felony" because it could have been committed recklessly. Although that argument found support in earlier Florida intermediate appellate court decisions, the Eleventh Circuit held that he could not rely on those decisions. The Eleventh Circuit explained that, in recently resolving a certified question in 2022, the Florida Supreme Court held for the first time that Florida assault could not be committed recklessly. And "[w]hen the Florida Supreme Court interprets a statute, it tells us what that statute always meant. Somers cannot rely on earlier decisions of Florida's intermediate courts of appeal to avoid this clear holding." *Somers*, 66 F.4th at 896 (cleaned up).

2. One year after *Somers*, the Seventh Circuit reached the exact opposite conclusion in *Anderson*. As explained in the petition (at 16–17), and despite reviewing for plain error, the Seventh Circuit held that the defendant's 2001 Florida aggravated assault conviction did not qualify as a "violent felony," and it vacated his ACCA sentence. Although the Seventh Circuit had held the appeal in abeyance pending the Florida Supreme Court's decision, and although it acknowledged that the Florida Supreme Court had held that Florida assault could not be committed recklessly, the Seventh Circuit declined to rely on that decision. *Anderson*, 99 F.4th at 1109–10.

Like the four other circuits, the Seventh Circuit instead "look[ed] to the law at the time of the [prior] offense," but it used different reasoning. *Id.* at 1111. Expressly disagreeing with *Somers* that the Florida Supreme Court's decision "tells us what the statute always meant," the Seventh Circuit explained that "the Eleventh Circuit did not address Florida's approach to statutory interpretation." *Id.* at 1112. And, under

Florida's approach to statutory interpretation, the Florida Supreme Court's decision did not apply retroactively. As a result, the Seventh Circuit looked to the intermediate appellate court decisions from the time of the prior conviction. *See id*. at 1111–13.

As explained in the petition (at 17–18), the government filed a petition for panel rehearing in *Anderson*, arguing that the Seventh Circuit had misapplied the plain-error standard of review. Importantly here, the government's petition expressly and repeatedly acknowledged that the panel opinion had created a conflict with the Eleventh Circuit's decision in *Somers*. *See* Pet. 17 (quoting the government's petition).

At the time petitioner sought certiorari here, the government's rehearing petition was pending. Critically, however, the Seventh Circuit has since *denied* the government's petition—without modifying the panel opinion. *Anderson*, ECF No. 66 (7th Cir. No. 21-1325) (Nov. 13, 2024) ("On consideration of the petition for rehearing filed by Plaintiff-Appellee on May 28, 2024, the majority of judges on the panel have voted to deny panel rehearing. Judge Ripple voted to grant panel rehearing. It is therefore **ORDERED** that the petition for rehearing is **DENIED**.") (footnote omitted).[*] The Seventh Circuit has also issued the mandate, showing no interest in en banc review. *Anderson*, ECF No. 67 (7th Cir. No. 21-1325) (Nov. 21, 2024).

Thus, there is now a direct, entrenched circuit conflict between the Seventh and Eleventh Circuits. As explained below, this undisputed 1–1 circuit conflict as to the ACCA status of Florida aggravated assault cements the need for certiorari here.

[*] The original panel had divided 2–1, with Judge Wood in the majority. Because Judge Wood subsequently retired, the court randomly assigned a new judge (Judge Rovner) to replace Judge Wood for purposes of resolving the government's rehearing petition.

3. As explained in the petition (at 18), this Court's review was warranted regardless of how the Seventh Circuit resolved the government's rehearing petition. Even if *Anderson* did not exist, the circuits would still be divided on the methodological question whether federal courts should consult the most recent authoritative state court decisions (as the Eleventh Circuit has repeatedly done), or the state court decisions that were in effect at the time of the defendant's prior state conviction (as four other circuits have done). And even if *Anderson* did not exist, that conflict would still warrant the Court's review. As explained in the petition, this Court grants review nearly every Term to resolve circuit conflicts over ACCA (no matter how shallow)—doing so several times with the government's acquiescence—because geography should not determine whether defendants are subject to ACCA's harsh penalty. *See* Pet. 18–19. And, as explained, the question here would also affect many other legal provisions incorporating the categorical approach. *See* Pet. 21–22.

But the case for certiorari is unassailable now that the Seventh Circuit has reaffirmed its decision in *Anderson*. As the government itself acknowledged in its rehearing petition in that case, the Seventh Circuit's published decision in *Anderson* created a direct conflict with the Eleventh Circuit's published decision in *Somers*. Not only did *Anderson* expressly reject *Somers*' reasoning, both deepening and broadening the conflict over methodology; it also created a more specific conflict about Florida aggravated assault in particular. Under the current landscape, Florida aggravated assault convictions pre-dating the Florida Supreme Court's 2022 decision will qualify as ACCA predicates in the Eleventh Circuit but not in the Seventh Circuit. Thus, the

ACCA status of Florida aggravated assault convictions now depends entirely on the geographical circuit in which the defendant is sentenced. This Court has never allowed such arbitrariness to determine ACCA's applicability. It should not start now.

This case concretely illustrates the problem. Petitioner was subject to ACCA based on two Florida aggravated assault convictions pre-dating 2022. Had he been sentenced in Chicago, Milwaukee, or South Bend, *Anderson* would control, and his prior convictions would not qualify under ACCA. As a result, his statutory maximum sentence would be capped at 10 years, and his guideline range would be even lower. *See* Pet. 8, 24. But because he was sentenced in Miami, *Somers* controlled. Expressly applying *de novo* review, the Eleventh Circuit rejected petitioner's ACCA challenge on the sole basis that it was foreclosed by its precedent in *Somers*. Pet. App. 3a–4a; *see* Pet. 2–3, 9–10. As a result, he received ACCA's 15-year mandatory minimum.

Petitioner's case is hardly an outlier. As explained in his petition (at 4, 20) and documented in Appendix C, Florida aggravated assault is one of the most common predicates in the Eleventh Circuit when it comes to sentencing enhancements under both ACCA and the Sentencing Guidelines (which has an identical elements clause). And because Florida is the national epicenter for ACCA, this Court has repeatedly granted review to resolve circuit conflicts over ACCA in cases involving other common Florida offenses. *See* Pet. 19–20 (citing cases involving Florida cocaine distribution, battery, attempted burglary, and robbery). This practice is correct; people with Florida convictions should not be treated differently for ACCA based solely on whether they remain in the Eleventh Circuit to commit their federal firearm offense.

4. A trilogy of ACCA precedents confirms that certiorari is warranted here.

The first precedent is *Stokeling v. United States*, 586 U.S. 73 (2019). Like this case, the petitioner there sought review of an unpublished Eleventh Circuit opinion applying circuit precedent holding that Florida robbery qualified under ACCA's elements clause. After he sought certiorari, the Ninth Circuit issued a published opinion reaching the opposite conclusion on Florida robbery. In its brief in opposition in *Stokeling*, the government acknowledged that there was "shallow" and "recent" circuit conflict between the Ninth and Eleventh Circuits. But the government argued that this circuit conflict did not warrant the Court's review because it was "premised on the interpretation of a specific state law," did "not present an issue of broad legal importance," and lacked "sufficient recurring importance in the Ninth Circuit." *Stokeling*, U.S. Br. in Opp. 7, 14, 16–18, 2017 WL 8686119 (No. 17-5554) (Dec. 13, 2017). Those arguments did not overcome the 1–1 circuit conflict on Florida robbery.

The second precedent is *Shular v. United States*, 589 U.S. 154 (2020). The question presented there concerned how to apply the categorical approach to ACCA's "serious drug offense" definition—specifically, whether the elements of the prior state drug offense should be compared to drug conduct or to generic drug offenses. The Eleventh Circuit had long adopted the former approach in the context of Florida cocaine. However, the Ninth Circuit subsequently adopted the latter approach in a published opinion in the context of a different state drug offense. Two months later, the petitioner in *Shular* sought review of an unpublished Eleventh Circuit opinion applying its circuit precedent. In response, the government acquiesced to review

because the Ninth Circuit's decision conflicted with the Eleventh Circuit's decision, the Ninth Circuit had denied the government's petition for rehearing, and the question presented was a recurring one affecting state drug offenses under ACCA. *See Shular*, Br. for U.S. 5–6, 10–13, 2019 WL 4750019 (No. 18-6662) (Feb. 13, 2019).

The third (and very recent) precedent is *Brown v. United States*, 602 U.S. 101 (2024). A consolidated case, one of the two petitioners (Jackson) received an ACCA sentence in the Eleventh Circuit based on a Florida drug offense, and the government acquiesced to review in that case too. Like this case, the question in *Brown* was about timing: in determining whether a prior state drug conviction qualified under ACCA, should federal courts consult the federal drug schedules in effect at the time of the prior state drug conviction or those in effect at the time of the federal firearm offense/sentencing? The circuits were divided 4–1 on that question, with the Eleventh Circuit as the outlier there. But there was no conflict on any particular drug offenses.

This case has all of the features of the trilogy above—and none of the bugs.

Like *Stokeling*, this case involves an undisputed 1–1 circuit conflict on whether a very common Florida offense qualifies under ACCA's elements clause. But, unlike this case, the question presented in *Stokeling* had not otherwise divided the circuits. And the question there was relatively narrow—namely, whether force necessary to overcome a victim's resistance qualified as "physical force" under the elements clause. Resolving that discrete question had the potential to affect whether some other state robbery offenses qualified under ACCA, but it was limited to robbery offenses alone. This case is not so limited. Rather, the question here is a methodological one that has

the potential to affect the outcome in *any* categorical approach case when there is a material change in state decisional law after the defendant's prior state conviction.

Like *Shular*, this case thus involves a broad "methodological dispute" about the categorical approach, 589 U.S. at 161—one pitting the Eleventh Circuit directly against another circuit that has denied a government rehearing petition, *see id.* at 160 (noting the 1–1 conflict). And, like *Brown*, this is also a timing dispute that has divided the circuits in a lopsided manner, with the Eleventh Circuit as the outlier.

But this case is an even stronger candidate for review than *Shular* and *Brown* (both cases where the government acquiesced). Most notably, unlike this case (and *Stokeling*), there was no circuit conflict in either *Shular* or *Brown* about any particular state offense. In addition, the impact of *Shular* and *Brown* was limited to state *drug* offenses, whereas the question here will again apply across the board to *any* state offense—whether for drugs or for violence—whenever there is a material change in state decisional law post-dating the defendant's prior conviction. There is no limit to the type or number of state offenses that could be affected. Finally, and with respect to *Shular*, the Ninth Circuit had denied creating a conflict with the Eleventh Circuit on the question presented, *United States v. Franklin*, 904 F.3d 793, 802–03 (9th Cir. 2018), whereas the Seventh Circuit openly admitted doing so here.

The upshot is that, if certiorari was warranted in *Stokeling*, *Shular*, and *Brown* (as the Court determined), then certiorari must be warranted here as well. There is a circuit split about *both* a broad methodological issue concerning ACCA's categorical approach *and* that issue's application to a particular, common Florida offense.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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