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

REPLY BRIEF FOR PETITIONER

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March 19th, 2025

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The parties agree that, under the categorical approach, federal courts must ascertain the elements of the prior state offense. And the parties agree that, to do so, federal courts must consult state-court decisions interpreting the state statute. But sometimes there is a change in state decisional law that affects whether a defendant's prior state conviction qualifies under the Armed Career Criminal Act (ACCA). In that recurring scenario, do federal courts consult the state-court decisions that were in effect at the time of the defendant's prior state conviction? Or do federal courts instead consult the most recent, authoritative state-court decision—even where it post-dates the defendant's state conviction? That is question presented here. Pet. i.

The circuits are divided twice over on this question. Relying on this Court's ACCA precedents, five circuits have issued published opinions employing the former approach. By contrast, the Eleventh Circuit has repeatedly employed the latter. This conflict means that geography alone will determine whether state convictions qualify under ACCA—or any of the many recidivism provisions employing the categorical approach—when there is a material change in state decisional law. Concretely illustrating the problem, and as the government concedes, the Seventh and Eleventh Circuits are divided in applying this disputed methodology to Florida aggravated-assault convictions in particular. This conflict means that—right now—identical Florida convictions qualify under ACCA in the Southeast but not in the Midwest. As petitioner explained in his supplemental brief—a brief the government ignores—each of these circuit splits over ACCA alone warrants review. Put together, they compel it.

The government's opposition does not meaningfully dispute any of this. Instead, the government strains to over-complicate and obfuscate the situation in an effort to deter the Court from granting review. Indeed, the government does not actually dispute that the circuits are divided 4–1 over which state-court decisions to consult. Rather, the government works backward to gerrymander some basis to distinguish this case from the four circuit decisions. But the distinction it contrives is unsupported, irrelevant to the question presented, and inapplicable on its own terms.

As for the undisputed 1–1 conflict over Florida assault, the government argues that it is really a dispute about Florida law. That is simply not true. The Seventh and Eleventh Circuits disagree about whether federal courts should apply federal or state rules of statutory construction to determine the elements of the state offense. That disagreement is about how federal courts apply the categorical approach, and that is purely a question of federal (not state) law. Eliminating any doubt, the Eleventh Circuit has never even applied Florida's rules of statutory construction. So the disagreement underlying the circuit conflict could not possibly be about Florida law.

In light of these two companion circuit splits, the need for review is undeniable. Given the Court's routine practice of granting review to resolve splits over ACCA, the government does not dispute that the broader methodological split warrants review. And the government's arguments for allowing the 1–1 split to persist indefinitely are equally at odds with this Court's past practice. The government does not dispute that this case provides a suitable vehicle for resolving the question presented. And the government offers a conclusory defense of the Eleventh Circuit's outlier precedent.

I. The circuits are doubly divided on the question presented.

The circuits are divided 5–1 about which state-court decisions to consult when there is a material change in state decisional law that post-dates a defendant's state conviction. And, as the government expressly concedes, the circuits are divided 1–1 in applying that disputed methodology to Florida aggravated assault in particular.

A. The circuits are divided 5–1 over the methodological question.

In applying the categorical approach, the circuits have divided on which state-court decisions to consult. The government does not dispute this. Instead, it seeks to distinguish this case on a basis that is unsupported, irrelevant, and inapplicable.

1. In the decision below (Pet. App. 4a), the Eleventh Circuit applied *Somers v. United States*, 66 F.4th 890 (11th Cir. 2023). That precedent is the subject of both circuit splits. In that case, the Eleventh Circuit rejected the argument that Florida aggravated assault did not satisfy ACCA's elements clause under *Borden v. United States*, 593 U.S. 420 (2021). The Eleventh Circuit rejected that argument based on the Florida Supreme Court's decision in *Somers v. United States*, 355 So.3d 887 (Fla. 2022), which held that Florida assault could not be committed with the reckless *mens rea* that *Borden* excluded from ACCA's elements clause. Although some Florida intermediate appellate courts had previously held that recklessness sufficed, the Eleventh Circuit held that "Somers cannot rely on [those] earlier decisions" because "'[w]hen the Florida Supreme Court interprets a statute, it tells us what that statute always meant." *Somers*, 66 F.4th at 896 (cleaned up) (quoting *United States v. Fritts*, 841 F.3d 937, 943 (11th Cir. 2016) and citing *Rivers v. Roadway Express, Inc.*, 511

U.S. 298, 312–13 (1994)). Despite internal criticism, the Eleventh Circuit has applied this approach for nearly a decade—consulting the most recent authoritative state-court decision, even when it post-dates the defendant's conviction. *See* Pet. 11–13. The government does not dispute this characterization of Eleventh Circuit precedent.

On the other side of the split, five circuits have issued published opinions consulting the state-court decisions in effect at the time of the defendant's prior state conviction. For the moment, let's put aside the Seventh Circuit's decision in *United States v. Anderson*, 99 F.4th 1106 (7th Cir. 2024), which is addressed below. Four more circuits—the First, Fourth, Fifth, and Eighth Circuits—have all consulted state-court decisions that were in effect at the time of the defendant's prior state conviction, refusing to consult state-court decisions post-dating the defendant's conviction. *See* Pet. 14–16 (summarizing *United States v. Faust*, 853 F.3d 39, 57–58 (1st Cir. 2017); *United States v. Cornette*, 932 F.3d 204, 213–15 (4th Cir. 2019); *United States v. Vickers*, 967 F.3d 480, 486–87 (5th Cir. 2020); and *United States v. Roblero-Ramirez*, 716 F.3d 1122, 1126–27 (8th Cir. 2013)). Most importantly, the government does not actually dispute petitioner's characterization of these four circuit precedents. Nor does it dispute that their approach is irreconcilable with the Eleventh Circuit's.

2. Rather than simply acknowledge this square 4–1 split, the government suggests that the four circuits might not consult "preconviction decisions on one side of a disagreement among state appellate courts." BIO 11–12. This suggestion is an attempt to distinguish these four circuit precedents from *Somers*. But, as explained below, this distinction is nothing but an unsupported and irrelevant distraction.

a. To begin, there is no support for the government's suggestion. Without qualification, the four circuits consulted the state-court decisions from the time of the defendant's prior conviction.[1] Whether or not the state-court landscape is uniform has no logical bearing on that choice. Indeed, the government fails to explain why a lack of uniformity would be a reason for these circuits to instead consult decisions post-dating the defendant's state conviction—an approach they have all squarely rejected.

Instead, any lack of uniformity in the state-court landscape would go to an entirely separate and subsequent issue under the categorical approach—namely, whether the defendant could show a "realistic probability" that the elements of the state offense (as interpreted at the time of the prior conviction) would have covered conduct outside the federal definition. *See United States v. Taylor*, 596 U.S. 845, 858–59 (2022). The government subtly recognizes this, asserting that it is unclear whether the four circuits would give "dispositive weight" to state-court decisions on one side of a split. BIO 11. But the only circuit to consider that question *has* done so. *See Anderson*, 99 F.4th at 1112–13. And, more importantly, that question is irrelevant to the antecedent one here: whether federal courts should consult—in the first place—state-court decisions from the time of the prior conviction or those post-dating it. Again, there is no dispute about how the four circuits have answered *that* question.

[1] That includes decisions by state intermediate appellate courts. As the government concedes (BIO 11), the Fourth Circuit in *Cornette* consulted a state intermediate appellate court decision from the time of the prior state conviction, even though the state supreme court overruled it the following year. 932 F.3d at 214–15. And because state intermediate appellate court decisions establish state law absent a contrary state supreme court decision, *see Fidelity Union Trust Co. v. Field*, 311 U.S. 169, 177–78 (1940), this Court itself has also routinely consulted such decisions when applying the categorical approach, *see, e.g.*, *Moncrieffe v. Holder*, 569 U.S. 184, 194 (2013); *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 191–93 (2007).

That threshold question, moreover, is the only one that petitioner asks this Court to resolve, and this case squarely presents it for review. Applying circuit precedent, the Eleventh Circuit below refused to consider *at all* any state-court decisions from the time of petitioner's prior convictions; rather, it relied solely on the Florida Supreme Court's decision post-dating his prior convictions. In contrast, four circuits would have considered the decisions from the time of his prior convictions.

All the Court needs to decide here is: which approach is correct? In the event the Court agrees with the four circuits, it would simply vacate the decision below and remand for the Eleventh Circuit to address whether petitioner would prevail under the correct approach in the first instance. After all, the Eleventh Circuit has never addressed that issue because, again, *Somers* precluded any consideration of state-court decisions from the time of petitioner's prior state convictions. Thus, any issues regarding the state-court landscape at that time are not before this Court. *See Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("we are a court of review, not of first view").

b. In any event, and although irrelevant at this stage, the government's effort to distinguish the four circuit precedents fails even on its own terms. Contrary to the government's newfound assertion—which the government failed to raise (and thus forfeited) in the lower courts below—the state law governing petitioner's case actually *was* "settled in his favor" with respect to his 2015 assault conviction. BIO 12.

As an initial matter, the government's contrary position here conflicts with what it told this Court in *Borden*. Petitioner's 2015 aggravated-assault conviction occurred in Largo, Florida (PSR ¶ 51), which is governed by Florida's Second District

Court of Appeals (DCA). In the government's merits brief in *Borden*, it (correctly) cited *DuPree v. State*, 310 So.2d 396, 398 (Fla. 2d DCA 1975), to support the proposition that Florida aggravated assault was defined in "recklessness terms." *Borden*, Br. for U.S. 20 n.5, 2020 WL 4455245 (No. 19-5410) (June 8, 2020). That Second DCA decision was the only Florida court decision that the government cited in *Borden*. Yet the government here conveniently makes no mention of *DuPree* at all.

Instead, the government cites a post-*DuPree* Second DCA decision requiring a "specific intent to do violence." *Swift v. State*, 973 So.2d 1196, 1199 (Fla. 2d DCA 2008); *see* BIO 15. But, in 2011, the en banc Second DCA "receded" from that specific-intent requirement, calling it a "misstatement of the law." *Pinkney v. State*, 74 So.3d 572, 573, 575, 577 n.3, 579 (Fla. 2d DCA 2011) (en banc). The government omits that aspect of *Pinkney*—even though the government itself highlighted it in its *Anderson* rehearing petition. *See* ECF No. 53 at 11 n.2 (7th Cir. No. 21-1325) (May 28, 2024).

The government also omits the actual standard *Pinkney* adopted: "To satisfy the intent element [of assault] the State must prove that the defendant did an act that was substantially certain to put the victim in fear of imminent violence, *not* that the defendant had the intent to do violence to the victim." 74 So.3d at 576 (emphasis added). That standard governed petitioner's 2015 conviction. *See Pardo v. State*, 596 So.2d 665, 667 (Fla. 1992) ("if the district court of the district in which the trial court is located has decided the issue, the trial court is bound to follow it.") (quotation omitted). And that *mens rea* standard does not satisfy *Borden* because it does not require an "intentional act[ ] designed to cause harm." 593 U.S. at 446 (Thomas, J.,

concurring in the judgment); *see Somers v. United States*, 15 F.4th 1049, 1053 n.1 (11th Cir. 2021) (treating Justice Thomas's concurrence and standard as controlling).

To reiterate, this state-law discussion has no relevance at this stage. At best, it would come up on remand if the Court granted review and reversed the Eleventh Circuit's threshold refusal to consider any state-court decisions from the time of petitioner's prior state convictions. Nonetheless, it is telling that the one basis that the government has devised to distinguish *Somers* is not even applicable to this case.[2]

B. The government concedes that the circuits are divided 1–1 on Florida assault, and that conflict is on a question of federal law.

Returning now to the Seventh Circuit's published opinion *Anderson*, the government expressly (and repeatedly) concedes that there is a "disagreement" between the Seventh and Eleventh Circuits on whether Florida aggravated-assault convictions qualify as "violent felonies" under ACCA. BIO 4–5, 10–11, 13–14. After all, *Anderson* openly disagreed with the Eleventh Circuit's precedent in *Somers*, and the government then invoked that split to seek rehearing in *Anderson*. *See* Pet. 17.

Reversing course, the government now boldly asks this Court to allow this undisputed conflict to persist—apparently on an indefinite basis—because the "crux of the analytical disagreement between the Seventh and Eleventh Circuits centers on an issue of state law." BIO 14. That is demonstrably wrong. The crux of the analytical disagreement is about how to apply the categorical approach—a question of *federal*

[2] Although equally irrelevant here, the government also incorrectly suggests that there was adverse precedent governing petitioner's 2003 conviction, which occurred in the Third DCA. The government cites one case (*Lavin*) supporting a specific-intent requirement (BIO 14), but that "was not a holding of the case." *Thomas v. State*, 299 So.3d 23, 25 (Fla. 4th DCA 2020).

law. In particular, the disagreement is over whether courts applying the categorical approach should employ federal or state rules of statutory construction to ascertain the meaning of the state statute at the time of a defendant's prior state conviction.

Recall that the Eleventh Circuit in *Somers* relied exclusively on the Florida Supreme Court's 2022 decision to determine the meaning of the Florida statute, even though that decision post-dated the defendant's prior state conviction. Citing this Court's decision in *Rivers*—and quoting the Eleventh Circuit's earlier decision in *Fritts*, which also cited *Rivers*—*Somers* reasoned that, "[w]hen the Florida Supreme Court interprets a statute, it tells us what that statute always meant." 66 F.4th at 896 (cleaned up; citing *Rivers*, 511 U.S. at 312–13); *see Fritts*, 841 F.3d at 943 (same).

The Seventh Circuit in *Anderson* expressly declined to follow *Somers*' reasoning. The Seventh Circuit gave just one reason for this: "the Eleventh Circuit did not address Florida's approach to statutory interpretation, which, as we explained above, we are bound to follow when interpreting Florida law." *Anderson*, 99 F.4th at 1112. In the relevant explanation above, the Seventh Circuit had acknowledged that, under *Rivers* and ordinary "rules of federal statutory construction," a federal court's construction of a federal statute clarifies what the statute has always meant. *Id*. at 1111. But, as the government acknowledges here (BIO 13), *Anderson* declined to apply the *Rivers* rule "because we are dealing with a Florida statute," and so "we must apply Florida's rules of statutory construction." *Id.* (*Anderson* then went on to apply Florida's rules of construction and conclude that those rules precluded giving the Florida Supreme Court's 2022 decision retroactive effect. *See id*. at 1111–12).

The "crux" of the split, therefore, is whether the *Rivers* rule of federal statutory construction applies in the context of the categorical approach. The Eleventh Circuit has held that it does. The Seventh Circuit has held that it does not; federal courts must instead apply the state's rules of statutory construction. That dispute goes to how federal courts should apply the categorical approach—a quintessential question of federal law, not state law. The government apparently disagrees with the Seventh Circuit's application of Florida's rules of statutory construction. *See* BIO 14. But the Eleventh Circuit has never even gotten that far; it has not had any occasion to apply Florida's rules of statutory construction because it has applied *Rivers* instead. So the Seventh and Eleventh Circuits could not have possibly disagreed over that state-law issue; rather, they have disagreed over how to apply the categorical approach. The government's contrary argument is but another transparent effort to evade review.

II. The question presented warrants review.

The discussion above establishes that the circuits are divided 5–1 about which state-court decisions federal courts should consult. And the circuits are divided 1–1 over how to apply the categorical approach to Florida aggravated-assault convictions. The government does not even bother to dispute that the former conflict warrants review. And the government identifies no basis to leave the latter sub-conflict intact.[3]

a. As explained in the petition, the Court routinely grants review to resolve circuit conflicts over ACCA, no matter how shallow. That practice reflects the

[3] The government observes that the Court has previously denied certiorari in cases involving Florida aggravated assault. BIO 5 & n.2. But every one of those petitions pre-dated, and thus did not implicate, the circuit conflicts implicated here. So those prior denials carry no weight.

conventional wisdom that geography alone should not determine whether defendants are subject to ACCA's harsh penalty. And the Court has repeatedly granted review to resolve conflicts out of the Eleventh Circuit and Florida, which has the most ACCA enhancements in the country. *See* Pet. 18–20. The government disputes none of this.

As explained in the supplemental brief (at 6–8), the 5–1 conflict presents an even stronger case for review than *Shular v. United States*, 589 U.S. 154 (2020) and *Brown v. United States*, 602 U.S. 101 (2024), two ACCA cases where the government acquiesced to review on methodological splits. Unlike those cases, the split here has the potential to affect *any* state offense under *any* federal definition employing the categorical approach. And, unlike those cases, the methodological dispute here has led to a split over a particular predicate. The government disputes none of that either.

b. On top of that, the 1–1 conflict over Florida assault warrants review in its own right. The key precedent here is *Stokeling v. United States*, 586 U.S. 73 (2019), where the Court resolved an undisputed 1–1 conflict between the Ninth and Eleventh Circuits about whether Florida robbery qualified under ACCA. In his supplemental brief (at 6–8), petitioner explained why the case for review is even stronger here: unlike *Stokeling*, this case *also* implicates a broader, lopsided split over methodology.

Ignoring these arguments, the government asserts that the circuit conflict here is "narrow and nascent." BIO 4–5, 10–11, 13. As for the split being "narrow," the same was equally true in *Stokeling*. And the Court granted review there even though the government's opposition repeatedly argued that the 1–1 conflict was "too shallow." *Stokeling*, U.S. Br. in Opp. 7, 14, 17, 2017 WL 8686119 (No. 17-5554) (Dec. 13, 2017).

As for the 1–1 split being "nascent," that was also true in *Stokeling*. In fact, the split in *Stokeling* was more nascent than this one, for it was created by a Ninth Circuit decision that was issued weeks after Mr. Stokeling filed his certiorari petition. *See United States v. Geozos*, 870 F.3d 890, 901 (9th Cir. Aug. 29, 2017); *Stokeling*, Pet. for Cert., 2017 WL 8686116 (No. 17-5554) (Aug. 4, 2017). And, unlike the Seventh Circuit's decision in *Anderson*, the Ninth Circuit's decision was not subject to any government rehearing petition at all, let alone an unsuccessful one. Thus, while the circuit split here may be recent, it is already intractable. It is not going anywhere.

The government nonetheless asks this Court to allow this split to remain forever unresolved because it is a "historical issue . . . of diminishing and limited importance." BIO 15. Again, the government unsuccessfully made that argument in *Stokeling* (at 18). And the government took a very different position when seeking rehearing in *Anderson* (at 14–15), explaining that having "[t]wo different standards in two different circuits calls into question the fairness and public reputation of judicial proceedings." Indeed, subjecting defendants with identical prior convictions to different sentences based on geography is not a problem of "limited importance."

Nor will these untenable disparities "diminish" any time soon. Contrary to the government's assertion (which it repeats but never explains), *Anderson* is not limited to convictions "from the early 2000s." BIO 5, 11. Rather, *Anderson*'s reasoning applies to any Florida assault conviction before the Florida Supreme Court's 2022 decision but after 1989 and 1994 intermediate appellate decisions holding that recklessness sufficed. *See Anderson*, 99 F.4th at 1111–12 ("we are relying on" those decisions). As

a practical matter, that will disqualify the vast majority of Florida assault convictions for the foreseeable future. During that extended period, identical convictions will continue to qualify in the Eleventh Circuit. And, in that regard, the government does not dispute that this is an exceedingly common predicate. *See* Pet. 20–21; Pet. App. C.

Relatedly, the government asserts that petitioner himself would not prevail under *Anderson*. BIO 14. But the government omits that he stands in an even better position than the defendant whose ACCA sentence was vacated in *Anderson* itself, on plain error no less. Indeed, Mr. Anderson's conviction was from the Second DCA, just like petitioner's 2015 conviction. But, unlike petitioner's 2015 conviction, Anderson's 2001 conviction pre-dated *Pinkney*. The government specifically pointed this out in its rehearing petition (at 11 & n.2), and the Seventh Circuit still denied it. Thus, there is simply no basis to suggest that petitioner would not prevail in the Seventh Circuit.

III. The government does not allege any vehicle problems.

The government does not argue that this case would be an unsuitable vehicle; indeed, the word "vehicle" does not appear in its opposition. The government does not dispute that petitioner preserved his argument below, and that the Eleventh Circuit reviewed it *de novo*. *See* Pet. 23; Pet. App. 2a–3a; BIO 3–4.[4] The government does not dispute that the decision below upheld the ACCA sentence based solely on *Somers*. *See* Pet. 23–24; BIO 4. And the government does not dispute that, absent ACCA,

[4] Another pending petition presents the same question. *See Perrin v. United States* (U.S. No. 24-6396) (cert. filed Jan. 27, 2025). But, unlike petitioner here, the petitioner there did not preserve the issue, and the Eleventh Circuit therefore reviewed it under the deferential plain-error standard. *See United States v. Perrin*, 2024 WL 1954159, at *1–2 (11th Cir. 2024).

petitioner would have been subject to a 10-year maximum sentence and even an lower guideline range. *See* Pet. 5, 8, 24; BIO 2. As explained, that would have been the case had he been sentenced in Chicago, Milwaukee, or South Bend rather than Miami.

IV. The government does not defend Eleventh Circuit precedent.

Although the Eleventh Circuit's outlier precedent in *Somers* is the subject of both circuit splits implicated here, the government barely even attempts to defend it.

The government never explains why the Eleventh Circuit was correct to apply the federal rule of statutory interpretation in *Rivers* rather than Florida's rules. After all, the categorical approach requires federal courts to ascertain the meaning of the state statute, and that is a question of state (not federal) law. *See* Pet. 11, 28. Although *Rivers* forms the linchpin of the Eleventh Circuit's precedent, the government cites it just once (in a parenthetical). BIO 13. That treatment is telling.

Moreover, even if Florida followed the *Rivers* rule, applying it here would still be irreconcilable with the categorical approach. As multiple Eleventh Circuit judges have explained, the categorical approach is not about ascertaining the meaning of the state statute as a theoretical matter. Rather, it is about ascertaining the "least culpable conduct" for which the defendant could have been convicted in the real world. *See* Pet. 12–13. The government simply has no answer to this compelling argument.

Instead, the government mischaracterizes it as a state-law problem. Contrary to the government's puzzling assertion (BIO 9–10), the problem with applying *Rivers* in the ACCA context is *not* that a defendant may have been erroneously convicted of the state offense. Rather, the problem is that applying *Rivers* would allow for a state

offense to qualify under ACCA by virtue of a later-in-time decision, even where the defendant's *own conduct* did not satisfy ACCA's definitions. That cannot be correct.

Not only does the government fail to argue in *favor* of applying *Rivers*; it argues *against* applying this Court's ACCA precedents. The circuits on petitioner's side of the split have relied on *McNeill v. United States*, 563 U.S. 816 (2011), the closest precedent. And *Brown* recently reaffirmed *McNeill*'s central teaching that "ACCA requires sentencing courts to examine the law as it was when the defendant violated it, even if that law is subsequently amended." 602 U.S. at 111; *see* Pet. 24–26. The government's only response is that *McNeill* involved a statutory rather than a decisional change to the law. *See* BIO 9. But the government fails to explain why *McNeill*'s backwards-looking approach would apply only to the statutory text and not to judicial decisions interpreting it. Nothing in *McNeill* or its progeny supports such a fine distinction, and adopting it would only further complicate the legal analysis.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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