No. _____

IN THE
Supreme Court of the United States

EARL PENN,
Petitioner,
v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether 18 U.S.C. Section 922(g)(1) violates the Second Amendment either facially, or as applied to individuals who have not been convicted of a violent offense for over a decade?

II. This Court held in *Erlinger* v. *United States*, 602 U.S. 821 (2024) that the Armed Career Criminal Act ("ACCA") guarantees criminal defendants a right to a jury trial to determine if their prior convictions occurred on separate occasions. This Court has also held for over thirty years that the ACCA's text only allows a categorical approach to reviewing a defendant's prior convictions. The question presented is:

Is the ACCA unconstitutional because neither the judge nor the jury may make the occasions clause finding essential to every ACCA sentence?

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PETITION FOR A WRIT OF CERTIORARI

Earl Penn respectfully requests this Court to issue a writ of certiorari to review the opinion of the United States Court of Appeals for the Eighth Circuit.

INTRODUCTION

This case presents two critically important questions of constitutional criminal law, and the panel below was split on each with Judge Stras "still harbor[ing] doubts about the way the court deals with both issues." Appendix A, pg. 1 (concurring in result, citing to prior dissenting opinions).

1. This Court's decision in *New York State Rifle & Pistol Association, Inc.* v. *Bruen*, 597 U.S. 1 (2022), brought about a sea change in Second Amendment jurisprudence. Previously, in *District of Columbia* v. *Heller*, 554 U.S. 570 (2008), this Court recognized the Second Amendment conferred an individual right to possess handguns in the home for self-defense. But in *Bruen*, this Court clarified *Heller*'s text-and-history approach which had been uniformly misunderstood by the lower courts, and set forth a two-step test for deciding the constitutionality of all firearm regulations going forward.

At "Step One," *Bruen* held, courts may consider only whether "the Second Amendment's plain text covers an individual's conduct." 597 U.S. at 17. If it does, *Bruen* concluded "the Constitution presumptively protects that conduct." *Id.* And regulating presumptively protected conduct is unconstitutional unless the government, at "Step Two" of the analysis, can "justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm

regulation"—that is, the tradition in existence "when the Bill of Rights was adopted in 1791." *Id.* at 37.

Applying this test should not have been hard, yet "perhaps no single Second Amendment issue has divided the lower courts more than the constitutionality of the 18 U.S.C. § 922(g)(1)." *United States* v. *Duarte*, 108 F.4th 786, 787 (9th Cir. 2024) (Vandyke, J., dissenting). Those living in the Eighth Circuit are prohibited from bringing an as applied challenge to the constitutionality of Section 922(g)(1). *Duarte*, 108 F.4th at 787. In stark contrast, those living in the Third Circuit may bring such a claim after that court concluded Section 922(g)(1) was unconstitutional as applied to an individual based on his prior conviction because "there was no analogous tradition of disarmament for at least *some* defendants." *Id.*

This Court's intervention is urgently needed to resolve the scope of a fundamental constitutional right on this critically important and recurring question. The Eighth Circuit's decision below is wrong, and Mr. Penn's case is an ideal vehicle to resolve the split and provide courts nationwide direction on both his facial and as-applied challenges to the statute.

2. This Court held in *Erlinger* v. *United States*, 602 U.S. 821 (2024) that "the Fifth and Sixth Amendments do not tolerate" the denial of an ACCA jury trial to determine whether his prior felony convictions were "committed on occasions different from one another," 18 U.S.C. § 924(e)(1). This Court has also held for over thirty years that the ACCA's text only allows a categorical approach to reviewing a defendant's prior convictions. *See Mathis* v. *United States*, 579 U.S. 500, 519-20

(2016). ("For more than 25 years, we have repeatedly made clear that application of ACCA involves, and involves only, comparing elements.").

The ACCA is unconstitutional because while the Constitution requires a jury finding after *Erlinger*, the text of the statute does not allow factual findings to be made. In rejecting petitioner's constitutional claim below, the Eighth Circuit concluded that 18 U.S.C. Section 924(e) permits jury trials because the statute "just lays out the elements." Appendix A, pg. 1. But the lower court failed to address this Court's case law that has repeatedly concluded to the contrary.

Justice Scalia explained why "the only plausible interpretation of the law, therefore, requires use of the categorical approach" because it does not permit an examination of "facts underlying the prior convictions." *Johnson* v. *United States,* 576 U.S. 591, 604 (2015). "If Congress had wanted to increase a sentence based on the facts of a prior offense, it presumably would have said so; other statutes, in other contexts, speak in just that way." *Descamps* v. *United States*, 570 U.S. 254, 267–68 (2013).

The need for this Court's intervention is confirmed by the significant ACCA cases the Court regularly agrees to review. 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 them all and will decide if the statute as written is still constitutionally viable.

OPINION BELOW

The Eighth Circuit's judgment and opinion, affirming the judgment of the district court, is unpublished, but may be found at 2025 WL 891508, at *1 (8th Cir. Mar. 24, 2025), and is included in Appendix A. The judgment of the district court is unreported, but may be found in Appendix B.

JURISDICTION

The Court of Appeals affirmed the district court's judgment and sentence on March 24, 2025. This Court has jurisdiction under 28 U.S.C. Section 1254(1).

CONSTIUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Second Amendment provides: "A well-regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed."

18 U.S.C. Section 922(g)(1) provides: "It shall be unlawful for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to possess in or affecting commerce, any firearm or ammunition."

18 U.S.C. Section 924(e)(1) provides: "In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such persons shall be fined under this title and imprisoned not less than fifteen years."

STATEMENT OF THE CASE

The Trial and Sentencing

Earl Penn invoked his Fifth and Sixth Amendment rights to a jury trial after being indicted for being a felon in possession of a firearm in violation of 18 U.S.C. Section 922(g)(1). R. Doc 145, at 1. He was eventually found guilty by the jury and sentenced to an ACCA sentence of 180 months' imprisonment. *Id.*

Mr. Penn's jury trial was set to begin in July 2022, but the government filed a motion to continue the trial. R. Doc. 100, at 3. In its motion, it sought a continuance because "counsel for the Government learned that pursuant to newly issued guidance, the reasoning of *Wooden* v. *United States*, 142 S. Ct. 1063 (2022), requires a jury to find, or a defendant to admit, that the defendant's ACCA predicate convictions were committed on occasions different from one another." *Id.* at 4.

The government eventually moved to bifurcate trial, seeking the jury to hear evidence of Mr. Penn's prior convictions so the jury could determine whether they were "committed on occasions different from one another." R. Doc. 116, at 1. The district court denied the government's motion to bifurcate trial. R. Doc. 120.

On August 22, 2022, Mr. Penn moved to dismiss the indictment because the Second Amendment protected his right to possess a firearm under *New York State Rifle & Pistol Association, Inc.* v. *Bruen*, 142 S. Ct. 2111 (2022). R. Doc. 122, at 1. Mr. Penn argued that the sole count against him must be dismissed because the felon in possession of a firearm count attempted to criminalize conduct that came within the Second Amendment's plain text, which was "presumptively protected"

and "the government will be unable to rebut that presumption." *Id*. at 2. The government did not respond in writing to Mr. Penn's motion to dismiss.

On August 30, 2022, the jury trial commenced. Before trial started, the district court addressed Mr. Penn's motion to dismiss the indictment and inquired: "Does the government have any argument that you'd like to make on that issue?", to which the government responded: "Not at this time, Your Honor." Tr. at 5.

The district court replied:

> Okay. Well, I guess I'll make the record, then. The motion to dismiss will be denied. I have reviewed the Supreme Court decision, *Bruen*, especially in light of the *Heller* decision, and conclude that *Bruen* does not overrule *Heller*, and the -- it does not invalidate or challenge the constitutionality of the felon in possession of a firearm law, and, therefore, the motion will be denied.

Tr. at 6.

After the government put on its evidence, the jury found Mr. Penn guilty as charged on the sole count in the Indictment. Tr. at 137.

After trial, the district court ordered the probation office to complete a pre-sentence report (PSR), which concluded that Mr. Penn was an Armed Career Criminal. PSR, at 6-7, ¶23. Mr. Penn objected to the PSR's conclusion that he was an ACCA offender. R. Doc. 135, at 26-30. Specifically, Mr. Penn argued that not only were occasions clause findings by a sentencing judge unconstitutional, but the text of the ACCA does not permit a jury trial to determine the occasions clause issue, rendering the ACCA unconstitutional.

In anticipation of the sentencing hearing, the government filed a sentencing

memorandum, where it opined that the district court should sentence Mr. Penn to an ACCA sentence. R. Doc. 141, at 3. Despite previously maintaining that the district court was precluded from making the occasion clause determination after *Wooden*, the government argued the opposite at sentencing: the court should make the occasions clause finding because his three-prior offenses occurred on separate occasions, even suggesting that two of the convictions were "committed 73 days apart." *Id*. at 3-4.

At the sentencing hearing, the district court overruled Mr. Penn's ACCA objection. In doing so, the district court again found that it was bound by Eighth Circuit case law that held the occasions clause issue should be made by the district court. The district court then sentenced Mr. Penn to the mandatory minimum ACCA sentence of 180 months' imprisonment. Appendix B, pg. 1-2.

Appeal to the Eighth Circuit

Mr. Penn raised two issues on appeal. *First*, Mr. Penn argued that his conviction under 18 U.S.C. Section 922(g)(1) violated the Second Amendment both facially and as applied to him. Appendix A, pg. 1-2. The Eighth Circuit, in a divided 2-1 opinion, concluded that "[u]nder federal law, felons like Penn cannot possess firearms" under 18 U.S.C. Section 922(g)(1). *Id*. "In two recent cases, we held that this prohibition is constitutional, regardless of the facts of the crime itself or the nature of the underlying felony." *Id*, citing *United States* v. *Cunningham*, 114 F.4th 671, 675 (8th Cir. 2024) (concluding that 18 U.S.C. § 922(g)(1) is facially constitutional); *United States* v. *Jackson*, 110 F.4th 1120, 1125 (8th Cir. 2024)

(cutting off as-applied challenges to the statute).

Judge Stras concurred in the result. Appendix A, pg. 4. In doing so, he quoted from his dissenting opinion in *Jackson*: "[W]hat *Jackson* says about as-applied challenges conflicts with both [*United States v. Rahimi*, 602 U.S. 680 (2024), and *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022)]"). *Id.*

Second, Mr. Penn challenged the constitutionality of his ACCA 180-month sentence "because [the text of the statute] prohibits the [different-occasions] issue from being submitted to a jury." Appendix A, pg. 3. In two sentences of analysis, the panel rejected this argument: "It does nothing of the sort. Like other criminal statutes, it just lays out the elements, and the entitlement to a jury trial comes from the Sixth Amendment." *Id.* Appendix A, pg. 3.

However, the majority concluded the district court violated Mr. Penn's Sixth Amendment rights to have the occasion clause issue decided by a jury "unanimously and beyond a reasonable doubt" based on this Court's holding in *Erlinger* v. *United States*, 602 U.S. 821 (2024). Appendix A, pg. 3. Nonetheless, the majority concluded the error was harmless because the "facts in the presentence investigation report show that Penn's prior crimes took place weeks apart." Appendix A, pg. 3.

Judge Stras again concurred in the result as it pertained to the ACCA sentence. Appendix A, pg. 4. He offered no opinion as to the ACCA's constitutionality but concluded that the *Erlinger* error was not harmless because "[w]ith no admissible evidence in the record, we can have no confidence about what a jury might have found." *Id.*

REASONS FOR GRANTING THE WRIT

I. Whether 18 U.S.C. Section 922(g)(1) violates the Second Amendment either facially, or as applied to individuals who have not been convicted of a violent offense in over a decade?

A. The courts of appeals are deeply divided over the scope of a fundamental constitutional right.

It cannot be disputed that the circuits are split on this Second Amendment issue. In 2024, the Solicitor General confessed that "Section 922(g)(1)'s constitutionality has divided courts of appeals and district courts." *See* Supplemental Brief in *Jackson* v. *United States,* 23-6170; and *Garland* v. *Range*, 23-374, pg. 2-3 (outlining split, and requesting a plenary grant to resolve the split). This confession was made after the Eighth Circuit in *Jackson* upheld Section 922(g)(1) by rejecting person-by-person litigation about the statute's constitutionality—while the Third Circuit held the opposite in *Range* that Section 922(g)(1) violated the Second Amendment as applied to "people like Range." *Id.* (citations omitted). This Court ultimately GVR'ed both petitions for further consideration of *United States* v. *Rahimi*, 144 S.Ct. 1889 (2024). *See Jackson* v. *United States*, 144 S. Ct. 2710 (2024); *Garland* v. *Range,* 144 S. Ct. 2706 (2024).

On remand, the Eighth Circuit in *Jackson* again upheld Section 922(g)(1), rejecting "felony-by-felony" litigation about the statute's constitutionality. *United States* v. *Jackson*, 110 F.4th 1120, 1125 (2024). The Third Circuit again held that "Range remains among 'the people' despite his" prior criminal conviction, and again rejected the government's "contention that felons are not among 'the people' protected by the Second Amendment." *Range* v. *Att'y Gen. United States*, 124 F.4th

218, 228 (2024).

In other words, the *Rahimi* remand has not resolved the circuit split between the Third and Eighth Circuits. Both cases are currently back before this Court, seeking this Court's intervention based on this same circuit split. *Range*, 24A881 (obtaining continuance to file petition for certiorari by April 22, 2025); *Jackson*, 24-6517 (petition for certiorari filed on February 3, 2025).

Other circuits, in addition to the Third Circuit, have stated a willingness to at least entertain as applied challenges. *See, for example, United States* v. *Diaz*, 116 F.4th 458, 467–71 & n.4 (5th Cir. 2024) (concluding that Diaz's as-applied challenge to § 922(g)(1) failed but "not foreclos[ing]" others "by defendants with different predicate convictions"); *United States* v. *Williams*, 113 F.4th 637, 645–46, 649–50, 657–61 (6th Cir. 2024) (holding courts required to consider as-applied challenges to the felon-in-possession statute); *United States* v. *Gay*, 98 F.4th 843, 846 (7th Cir. 2024) ("assum[ing] for the sake of argument that there is some room for as-applied challenges").

The Fourth and Tenth Circuits, by contrast, have joined the Eighth Circuit in holding that defendants may not assert a claim that Section 922(g)(1) violates the Second Amendment as applied to them. *See United States* v. *Hunt*, 123 F.4th 697 (4th Cir. 2024); *Vincent* v. *Bondi*, 127 F.4th 1263, 1265 (10th Cir. 2025).

The circuit split in this area of the law will persist until this Court intervenes and resolves it. This Court should grant review now, because waiting longer will not resolve the split.

B. This is a critically important and recurring question.

The Court should grant the petition because the question is critically important and recurring. After all, "§ 922(g) is no minor provision." *Rehaif* v. *United* States, 588 U.S. 225, 239 (2019) (Alito, J., dissenting). Out of about 64,000 cases reported to the Sentencing Commission in Fiscal Year 2023, more than 7,100 involved convictions under § 922(g)(1). *See* U.S. Sent'g Comm'n, *Quick Facts: 18 U.S.C. § 922(g) Firearms Offenses*, at 1 (June 2024). Those convictions accounted for over 10% of all federal criminal cases. *See id*. The government itself has acknowledged "the special need for certainty about Section 922(g)(1) given the frequency with which the government brings criminal cases under it." Gov't Supp. Br. at 10 n.5, *Range, supra* (No. 23-374).

Even beyond new prosecutions, Section 922(g)(1)'s reach is staggering. The statute prohibits millions of Americans from exercising their right to keep and bear arms for the rest of their lives. Recent estimates of the number of individuals with felony convictions range from 19 million to 24 million. Dru Stevenson, *In Defense of Felon-in-Possession Laws*, 43 CARDOZO L. REV. 1573, 37 1591 (2022) (citations omitted). And § 922(g)(1) is particularly troubling because most of the individuals it prohibits from possessing firearms are peaceful, with convictions for only nonviolent offenses. Less than 20% of state felony convictions and less than 5% of federal felony convictions are for violent offenses. See Dep't of Justice, Bureau of Justice Statistics, Sean Rosenmerkel et al., *Felony Sentences in State Courts*, *2006—Statistical Tables*, at 3 (Table 1.1) (rev. Nov. 2010); Dep't of Justice, Bureau of

Justice Statistics, Mark A. Motivans, *Federal Justice Statistics*, 2022, at 12 (Table 7) (Jan. 2024). Given Section 922(g)(1)'s widespread impact both on new prosecutions and on the millions of Americans it prohibits from exercising a fundamental constitutional right, this Court should answer this important and recurring question.

C. The Eighth Circuit's decision is grievously wrong.

1. As highlighted above, the Eighth Circuit is one of three circuits to categorically prohibit *any* as applied challenges to Section 922(g)(1) based on the Second Amendment. Judge Stras has repeatedly dissented to this approach, explaining why the Eighth Circuit continues to get the law wrong. *See United States* v. *Jackson*, 121 F.4th 656, 657 (8th Cir. 2024) (7-to-4 judge split, denying petition for rehearing).

Jackson "packs a double whammy" because it "deprives tens of millions of Americans of their right to keep and bear Arms for the rest of their lives, at least while they are in [the Eighth] circuit." *Jackson*, 121 F.4th at 657 (J. Stras, dissenting). "And it does so without a finding of 'a credible threat to the physical safety' of others, *Rahimi*, 144 S. Ct. at 1903, or a way to prove that a dispossessed felon no longer poses a danger." *Id.* "There is no Founding-era analogue for such a sweeping and undiscriminating rule." *Id.*

Judge Stras concluded that "[i]t gets worse" because the Eighth Circuit "turns constitutional law upside down, insulating felon-dispossession laws from Second Amendment scrutiny of *any* kind" because "[f]acial challenges are

disfavored" but "they are the only kind a felon may bring" there. *Jackson*, 121 F.4th at 658 (emphasis original). "And now, it is impossible to prevail in one" in the Eighth Circuit based on the binding precedent of *Jackson*. *Id.*

The Eighth Circuit's decision denying Mr. Penn's Second Amendment challenge is wrong as applied to him. Even though as applied challenges are prohibited in the Eighth Circuit, the decision analyzes in a two-sentence footnote why Mr. Penn's as applied claim "would not succeed." *Penn*, 2025 WL 891508, at *1, fn 2. "His criminal record includes several convictions, some of them violent," and therefore "Penn 'pose[s] a credible threat to the physical safety of others.'" *Id*., quoting *Rahimi*, 602 U.S. at 693. But the decision does not explain which of his convictions are "violent", or when those convictions occurred. That is troubling because this Court has not "resolved[d] whether the government may disarm an individually permanently." *Rahimi*, 602 U.S. at 713 (Gorsuch, J., concurring). Yet the Eighth Circuit fails to acknowledge that Mr. Penn's arguably "violent" convictions occurred over 10 years ago when he was only 16 to 21 years old.

In responding to his Second Amendment challenge, the government never argued below that Mr. Penn was violent. In rejecting his Second Amendment argument, the district court made no findings or conclusions that Mr. Penn was "violent," but instead concluded "*Bruen* does not explicitly question or overrule the relevant portions of *Heller*." R. Doc. 124, 1-2. Thus, the Eighth Circuit made findings of fact and conclusions of law *for the first time* that Mr. Penn was "violent" when no party to this litigation ever argued that as a basis to deny his as applied

Second Amendment challenge.

2. The decision is also wrong because Section 922(g)(1) facially violates the Second Amendment because it imposes a sweeping, historically unprecedented lifetime ban that prevents millions of Americans from possessing firearms for self-defense. The government has not cited a single historical gun law that imposed a permanent prohibition on the right to keep and bear arms—even for self-defense. In other words, no historical regulation "impose[s] a comparable burden on the right of armed self-defense." *Bruen*, 597 U.S. at 29.

That is hardly surprising. When Congress passed the modern felon-in-possession statute—four decades before *Heller* and more than a half-century before *Bruen*—it did not believe that the Second Amendment protected an individual right to *keep* and bear arms. *See* S. Rep. No. 90-1097 (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2169; *see Scarborough* v. *United States*, 431 U.S. 563, 572 (1977) (concluding "Congress sought to rule broadly," employing an "expansive legislative approach" to pass a "sweeping prophylaxis … against misuse of firearms.").

So Congress did not try to pass a law that aligned with the "Nation's historical tradition of firearm regulation." *See Bruen*, 597 U.S. at 17. Instead—dismissing the Second Amendment as no obstacle—it employed an "expansive legislative approach" to pass a "sweeping prophylaxis … against misuse of firearms." *Scarborough*, 431 U.S. at 572. And that sweeping, permanent prohibition on gun possession imposes a burden far broader than any firearm regulation in our Nation's history.

The Eighth Circuit, in rejecting the facial challenge to the statute as unconstitutional under the Second Amendment, concluded that "Congress operated within this historical tradition when it enacted § 922(g)(1) to address modern conditions." *Jackson*, 110 F.4th at 1128. However, as scholars and historians have long pointed out, "no colonial or state law in eighteenth century America formally restricted"—much less prohibited, permanently and under pain of criminal punishment—"the ability of felons to own firearms."[1] Indeed, even before *Bruen,* judges—including then-Judge Barrett—had so recognized. *See Kanter* v. *Barr*, 919 F.3d 451, 458 (7th Cir. 2019 (Barrett, J., dissenting) ("Founding-era legislatures did not strip felons of the right to bear arms simply because of their status as felons," and "no[] historical practice supports a legislative power to categorically disarm felons because of their status as felons").

The Eighth Circuit could only reach its conclusion by treating the Second Amendment as "a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." *Bruen*, 597 U.S. at 70 (cleaned up). And a law is not compatible with the Second Amendment if it regulates the right to bear arms "to an extent beyond what was done at the founding." *Rahimi*, 602 U.S. at 692. Section 922(g)(1) does just that. It imposes a lifetime ban on firearm possession

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[1] Carlton F.W. Larson, *Four Exceptions in Search of a Theory: District of Columbia* v. *Heller and Judicial Ipse Dixit*, 60 Hastings L.J. 1371, 1374 (2009); accord C. Kevin Marshall, *Why Can't Martha Stewart Have A Gun?,* 32 Harv. J.L. & Pub. Pol'y 695, 708 (2009); Royce de R. Barondes, *The Odious Intellectual Company of Authority Restricting Second Amendment Rights to the "Virtuous*", 25 Tex. Rev. L. & Pol. 245, 291 (2021); Adam Winkler, *Heller's Catch-22,* 56 UCLA L. Rev. 1551, 1563 (2009).

that would have been unimaginable to the Founders. Thus, § 922(g)(1) facially violates the Second Amendment because there are "no set of circumstances" under which it is valid. *See Rahimi*, 602 U.S. at 693 (quoting *United States* v. *Salerno*, 481 U.S. 739, 745 (1987)).

D. This case is an ideal vehicle for addressing this question.

This case presents an excellent vehicle for addressing whether Section 922(g)(1) violates the Second Amendment. The appeal cleanly presents a purely legal issue. There are no jurisdictional problems or preservation issues. Mr. Penn thoroughly briefed his facial and as-applied Second Amendment challenges in both the district court and the court of appeals. The district court squarely addressed this constitutional challenge, as did the Eighth Circuit. And several additional features make this case—alone or combined with other cases challenging Section 922(g)(1)—an ideal vehicle.

This case presents both a facial and as applied challenge to § 922(g)(1). Facial challenges are not presented in *Jackson* or *Range*. See Pet. for Writ of Cert. at ii, *Jackson* v. *United States*, No. 24-6517 (U.S. Feb. 3, 2025) (raising only an as applied constitutional challenge). In *Range*, the plaintiff only brought—and the Third Circuit only decided—an as applied challenge. 124 F.4th at 232. So, this case is a strong vehicle for deciding whether Section 922(g)(1) is both facially constitutional, as well as unconstitutional as applied to Mr. Penn.

In the past, the Solicitor General has suggested the Court should "grant review in cases involving different types of predicate felonies" to "enable the Court

to consider Section 922(g)(1)'s constitutionality across a range of circumstances." Gov't Supp. Br. at 6, *Range*, supra (No. 23-374) and *Jackson*, supra (23-6170). If the Court grants plenary review, this case is a strong vehicle for determining whether Section 922(g)(1) is constitutional as applied to individuals determined to be "violent" because, again, this Court has not "resolved[d] whether the government may disarm an individually permanently." *Rahimi*, 602 U.S. at 713 (Gorsuch, J., concurring).

II. Is the ACCA unconstitutional because neither the judge nor the jury may make the occasions clause finding essential to every ACCA sentence?

A. The decision below is wrong.

The ACCA is unconstitutional because while the Constitution requires a jury finding, *see Erlinger* v. *United States*, 602 U.S. at 829, the text of the statute does not allow factual findings to be made. In rejecting petitioner's constitutional claim below, the Eighth Circuit concluded that 18 U.S.C. Section 924(e) permits jury trials because the statute "just lays out the elements." Appendix A, pg. 1. But it failed to address this Court's holdings that the plain text says *much* more. *See supra*, pg. 3.

"We think the only plausible interpretation of § 924(e)(2)(B)(ii) is that, like the rest of the enhancement statute, it generally requires the trial court to look only to the fact of conviction and the statutory definition of the prior offense." *Taylor* v. *United States*, 495 U.S. 575, 602 (1990). This "simple point"—that courts "may look only to the elements of the offense, not to the facts of the defendant's conduct"—has become "a mantra in our subsequent ACCA decisions." *Mathis,* 579 U.S. at 510.

The ACCA's plain text and legislative history both dictate that the statute

does not permit a jury to decide the occasions clause issue. This means the ACCA is unconstitutional based on this Court's holding in *Erlinger* that "the Fifth and Sixth Amendments do not tolerate" the denial of an ACCA jury trial. 144 S. Ct. at 1860.

The ACCA is often used as the prime example of a statute that does not permit different inquiries (both categorical and case-specific) based on its text. *See, for example, Nijhawan* v. *Holder,* 557 U.S. 29, 38 (2009) ("The upshot is that the 'aggravated felony' statute, unlike ACCA, contains some language that refers to generic crimes and some language that almost certainly refers to the specific circumstances in which a crime was committed.").

When striking down the residual clause of 18 U.S.C. Section 924(c)(e)(B), this Court explained why courts cannot assume the statue's text permits a jury trial in *United States* v. *Davis*, 139 S.Ct. 2319, 2326 (2019). In *Davis*, the government faced the looming proposition that the residual clause of 18 U.S.C. Section 924(c)(e)(B) would be held unconstitutional after the Court struck down similar residual clauses in 18 U.S.C. Section 924(e) and 18 U.S.C. Section 16. *Id*. Despite maintaining for years that the residual clause of § 924(c) was constitutional under the then existing judge-based determination, the government changed positions in *Davis* to attempt to cure "the problem" through a jury, by urging "courts to adopt a new case specific method that would look to the defendant's actual conduct." *Davis*, 139 S.Ct. at 2327.

Justice Gorsuch, writing for the Court in *Davis*, concluded that "it wouldn't be that difficult to ask the jury to make an additional finding about whether the defendant's conduct also" satisfied the residual clause of Section 924(c). *Davis,* 588

U.S. at 454. But "this just tells us that it might have been a good idea for Congress to have written [the statute] using a case-specific approach." *Id.* "It doesn't tell us whether Congress actually wrote such a clause." *Id.* "To answer *that* question, we need to examine the statute's text, context, and history." *Id.* at 454-55 (emphasis original). "And when we do that, it becomes clear that the statute simply cannot support the government's newly minted case-specific theory." *Id.* at 455.

The same analysis must be applied to the ACCA before concluding jury trials were authorized by Congress. "Congress added the occasions clause only after a court applied ACCA to an offender [Samuel Petty] . . . arising from a single criminal episode" *Wooden* v. *United States*, 595 U.S. 360, 371 (2022). The Solicitor General conceded that Mr. Petty was sentenced to an ACCA sentence unjustly "because [his prior convictions] arose from a single criminal episode." *Wooden*, 595 U.S. at 373. "Congress amended ACCA to prevent future Pettys from being sentenced as career criminals." *Id.*

In *Petty*, the occasions clause issue was resolved by the district court, not a jury. *See United States* v. *Petty*, 798 F.2d 1157, 1159 (8th Cir. 1986). Had Congress wanted juries instead to make the occasions clause finding, it would have said so when adding the occasions clause. "If Congress had meant to adopt an approach that would require the sentencing court to engage in an elaborate factfinding process regarding the defendant's prior offenses, surely this would have been mentioned somewhere in the legislative history." *Taylor*, 495 U.S. at 602.

Additionally, had Congress wanted to amend the ACCA to include a jury trial

over thirty years ago, this intent would have been obvious because jury trials would have begun immediately in 1988. But it was undisputed below that jury-based ACCA sentencing hearings did not begin in the 1980's, or in the decades that followed. In the 1980's when Congress enacted the ACCA, and later added the occasions clause, it had no reason to anticipate the need for a jury trial. *Apprendi v. New Jersey* would not be decided until much later. 530 U.S. 466 (2000).

The Eighth's Circuit's decision is grievously wrong based on the ACCA's text and legislative history. Only this Court may correct the law now.

B. The question presented is critically important, and the Courts of Appeals will not correct course without this Court's intervention.

This Court should grant certiorari to resolve the constitutional issue in this case that impacts *all* ACCA cases. This Court has always paid careful attention to ensuring that people are not subject to the ACCA's harsh penalty, making ACCA cases a fixture of the Court's docket. *See, e.g., Delligatti* v. *United States*, 144 S.Ct. 2603 (2024); *Brown* v. *United States*, 602 U.S. 101 (2024); *Wooden* v. *United States*, 595 U.S. 360, 365 & nn.1–2 (2022); *Borden* v. *United States*, 593 U.S. 420, 425 & nn.1–2 (2021); *Shular* v. *United States*, 589 U.S. 154, 160 (2020); *Quarles* v. *United States*, 587 U.S. 645, 649 (2019); *Stokeling* v. *United States*, 586 U.S. 73 (2019); *United States* v. *Stitt*, 586 U.S. 27, 31 (2018).

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 them all. That is especially true since this case would decide if the statute as written is viable as applied to *all* criminal defendants.

Certiorari should be granted because the courts of appeals will not correct course without this Courts' intervention. *Erlinger* is an excellent example of the inertia that exists in the lower courts. Despite the Solicitor General's concession that defendants have a constitutional right to a jury trial in the ACCA, the circuit courts refused to change course and this Court eventually overruled every circuits' case law. *Erlinger*, 602 U.S. at 828. *Johnson* is another example, where this Court *sua sponte* ordered "the parties to present reargument addressing the compatibility of the residual clause with the Constitution's prohibition of vague criminal laws." *Johnson*, 576 U.S. at 595; *see also Rehaif v. United States*, 139 S.Ct. 2191 (2019) (overruling every circuit when concluding 18 U.SC. Section 924(e) requires the individual to know not only that he possessed a firearm, but also that he had the relevant status when he possessed the firearm).

If this Court concluded it was too early to grant plenary review to resolve this question presented, remanding the case to the Eighth Circuit for further consideration of *Erlinger* would be prudent. No one, including the Eighth Circuit, disputes the district court violated Mr. Penn's constitutional rights by concluding that his ACCA predicate convictions occurred on separate occasions. Appendix A, pg. 1. Yet the Eighth Circuit essentially ignored Mr. Penn's sole argument as to why he is serving an unconstitutional sentence. Due process requires courts to do more before "condemn[ing] someone to prison for 15 years to life." *Johnson*. 576 U.S. at 602.

C. This case as an ideal vehicle for addressing the question presented.

This case presents a clean vehicle to resolve the question presented. Petitioner repeatedly raised this issue before the district court and squarely raised the issue before the Eighth Circuit.

The question presented is also outcome-determinative as to whether Mr. Penn is serving an illegal sentence that exceeds the statutory maximum. The offense of felon in possession of a firearm carried a maximum term of ten years when Mr. Penn allegedly violated the statute in June 2020. *See* 18 U.S.C. § 922(g); 18 U.S.C. § 924(a)(2).[2]

The ACCA, however, mandates a 15-year minimum sentence—and a maximum of life in prison—for a felon who has "three previous convictions … for a violent felony or for a serious drug offense." 18 U.S.C. § 924(e)(1). Mr. Penn's current fifteen-year sentence, which exceeds the statutory maximum without the ACCA enhancement, is inherently an "illegal sentence" and requires the district court to resentence him to a sentence of 10 years' imprisonment or less. *See United States* v. *DeRoo*, 223 F.3d 919, 923 (8th Cir. 2000).

[2] Since his offense, the statute has been amended in 2022, increasing the statutory maximum sentence to 15 years. *See* Bipartisan Safer Communities Act, Pub. L. No. 117-159, § 12004(c), 136 Stat. 1313, 1329 (2022). But this amendment has no bearing on this case because "'one of the most basic presumptions of our law' is that 'legislation, especially of the criminal sort, is not to be applied retroactively.'" *United States v. J.W.T.,* 368 F.3d 994, 996 (8th Cir. 2004), quoting *Johnson v. United States*, 529 U.S. 694, 701 (2000).

CONCLUSION AND PRAYER FOR RELIEF

The petition for certiorari should be granted.

Respectfully submitted,

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