No. _____

In the

Supreme Court of the United States

_____

Paul Curry, Jr.,

Petitioner,

v.

United States of America,

Respondent.

_____

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

_____

PETITION FOR A WRIT OF CERTIORARI

_____

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QUESTIONS PRESENTED

Petitioner Paul Curry, Jr. was sentenced under the Armed Career Criminal Act (ACCA) to over 21 years imprisonment, despite the fact that the indictment never charged, no jury ever found, and he never admitted that he incurred three qualifying convictions committed on separate occasions. The Fifth Circuit acknowledged that the district court's error was made plain under this Court's decision in *Erlinger v. United States*, 602 U.S. 821 (2024). However, it applied the harmless error test from *Neder v. United States*, 527 U.S. 1, 25 (1999), and affirmed.

Mr. Curry presents two questions for this Court's review.

First, whether as several courts of appeal have held, all *Apprendi* errors including *Erlinger* violations should be treated as trial errors subject to the harmless-error test from *Neder*, or, whether, as the Third Circuit has held, at least some *Apprendi* errors should be treated as sentencing errors and evaluated under the harmless-error test from *Parker v. Dugger*, 498 U.S. 308 (1991)?

Second, whether 18 U.S.C. § 922(g)(1) comports with the Second Amendment?

PARTIES TO THE PROCEEDING

Petitioner is Paul Curry, Jr., who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Federal Statutes

Constitutional Provisions

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner Paul Curry, Jr. seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at *United States v. Curry*, 125 F. 4th 733 (5th Cir. 2025). It is reprinted as Appendix A to this Petition. The district court's judgement and sentence is attached as Appendix B.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on January 13, 2025. The court of appeals denied a timely petition for rehearing en banc on February 21, 2025. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTE AND CONSTITUTIONAL PROVISIONS

Section 922(g) of Title 18 reads in relevant part:

> It shall be unlawful for any person—
>
> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year …
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Section 924(e) of Title 18 reads in relevant part:

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

and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(e)(2)(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that--

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

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

The Second Amendment to the United States Constitution 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.

The Fifth Amendment to the United State Constitution 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.

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.

STATEMENT OF THE CASE

A. Facts and Proceedings in District Court

The government obtained an indictment against Appellant Paul Curry, Jr. alleging that he possessed a firearm following a single felony conviction. Record in the Court of Appeals 60-62. It did not allege that he had three prior qualifying convictions for offenses committed on separate occasions. Record in the Court of Appeals 60-62.

Mr. Curry pleaded guilty to felon in possession of a firearm, admitting that he had one prior felony conviction. Record in the Court of Appeals 277-283, 352-380. Although he acknowledged that his sentencing range might be elevated by the Armed Career Criminal Act (ACCA), he expressly objected in writing at the time of the plea to "any sentence of imprisonment that exceeds ten years …" Record in the Court of Appeals 279. He contended that:

> [a]ny sentence exceeding those limits would violate his right to Due Process, his right to have an indictment that includes the relevant and elemental facts of the charge against him, and his right to have his guilt proven beyond a reasonable doubt regarding those facts.

Record in the Court of Appeals 279.

The Presentence Investigation Report (PSR) recommended a sentence of 262-months imprisonment, well in excess of the ten-year maximum that would otherwise apply, on the ground that Mr. Curry had sustained four "violent felonies" for crimes committed on separate occasions. Record in the Court of Appeals 391–393, 400. Specifically, it named four burglary convictions incurred in the 1980's. Record in the

Court of Appeals 391–393, 400. The district court applied the ACCA and imposed a 262-month sentence, Record in the Court of Appeals 318, 343. Mr. Curry appealed.

B. Appellate Proceedings

1. Proceedings relevant to the *Erlinger* claim

On appeal, the parties filed a joint motion for remand. *See* Joint Motion for Limited Remand in *United States v. Curry*, No. 22-11084, ECF No. 20 (5th Cir. Filed February 14, 2023)("Joint Motion."). They noted that the district court had not been apprised of the government's position regarding the application of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to the ACCA, namely, that the defendant enjoys a right to a jury trial as to whether his prior convictions occurred on occasions different from each other. *See* Joint Motion, at 2. The Fifth Circuit denied the motion and ordered briefing. *See* Order in *United States v. Curry*, No. 22-11084, ECF No. 27 (5th Cir. February 23, 2023). In that Order, the court said that it did not think that any error had been committed by the district court. *See id.* ("As the movants fail to establish that the district court may have committed legal error in its sentencing, IT IS ORDERED that the Joint Motion of the Parties for a limited remand to the district court is DENIED.").

In his Initial Brief, Appellant asserted, *inter alia*, that the separate occasions requirement set forth in the ACCA represented an element of his offense, and that the district court could therefore impose no more than ten years imprisonment. *See* Initial Brief in *United States v. Curry*, No. 22-11084, 2023 WL 3092039, at **28-36 (5th Cir. Filed April 17, 2023)("Initial Brief"). After briefing, this Court issued

Erlinger v. United States, 602 U.S. 821 (2024), which vindicated Mr. Curry's *Apprendi* claim on the merits.

The Fifth Circuit ordered supplemental briefing on the merits in light of *Erlinger*. *See* Order in *United States v. Curry*, No. 22-11084, ECF No. 131 (5th Cir. Filed June 28, 2024). Mr. Curry reiterated his *Apprendi* claim (now an *Erlinger* claim). *See* Supplemental Brief in *United States v. Curry*, No. 22-11084, 2024 WL 3624648, at **11-36 (5th Cir. Filed July 23, 2024)("Appellant's Supplemental Brief"). He contended that trial counsel had adequately preserved the issue by objecting in advance to any sentence exceeding ten years, and by couching the claim in constitutional terms that invoked *Apprendi*. *See* Appellant's Supplemental Brief, at **11-13. He further contended, among other arguments, that the prejudice attendant to *Apprendi* sentencing error could be determined only by asking whether the district court would have imposed the same sentence had it limited itself to the sentencing range authorized by the jury's verdict or the defendant's admissions. *See id.* at **15-24.

The Fifth Circuit affirmed Mr. Curry's conviction and sentence in a published opinion, set forth here as Appendix A. It again declined to remand the case, in part because the government no longer supported the motion to remand. *United States v. Curry*, 125 F. 4th 733, 742-43 (5th Cir. 2025). It also found Mr. Curry's *Erlinger* claim to have been forfeited. *Id.* at 738. The Fifth Circuit also concluded that Mr. Curry could not meet his burden to show that the *Erlinger* error affected his substantial rights. *See id.* at 739-40. On this point, it noted that judicial records showed that his

prior convictions arose from offenses committed at significantly different times. *See id.* And it cited *Greer v. United States*, 593 U.S. 503 (2021), for the proposition that it could consider "the entire record" to determine whether an error prejudiced the defendant. *Id*. Mr. Curry sought rehearing *en banc*. He argued, *inter alia*, the panel's standard for assessing prejudice conflicted with the Fifth Circuit's method of determining sentencing error (as opposed to other classes of *Apprendi* error). *See* Pet. for Reh'g En Banc [Appendix C], *United States v. Curry*, No. 22-11084, ECF No. 167 at **8-9 (5th Cir. Filed Jan. 27, 2025). In doing so, he contended that the court of appeals should decide only whether the defendant would have received a different sentence had the court used the sentencing range authorized by the verdict, not whether the outcome would have been the same had the government charged a different offense. *See id.* The Fifth Circuit denied Mr. Curry's petition without a poll. *See* Order in *United States v. Curry*, No. 22-11084, ECF No. 171 (5th Cir. Filed Feb. 21, 2025).

2. Proceedings relevant to the Second Amendment claim

Mr. Curry also raised a Second Amendment argument on appeal. *See* Initial Brief, at **40-51. He contended that he had a Second Amendment right to possess arms, and that a criminal conviction could not lie for the exercise of that right. *See id.* He also contended that his guilty plea was invalid because the district court did not advise him of the constitutional limits on the government's power to prosecute him for possessing a firearm. *See id.* at **40-42. He conceded that these claims were reviewable only for plain error. *See id.* at *40.

The Fifth Circuit affirmed. *See* [Appx. A]; *Curry*, 125 F. 4th at 737. It applied plain error review and found that any error could not be deemed clear or obvious. *See id.* (citing *United States v. Diaz*, 116 F.4th 458, 461 (5th Cir. 2024)).

REASONS FOR GRANTING THE PETITION

In *Erlinger*, this Court held that the Fifth and Sixth amendments require a jury—not a judge—to resolve the ACCA's "different occasions" inquiry unanimously and beyond a reasonable doubt. 602 U.S. at 834. It explained: "Judges may not assume the jury's factfinding function for themselves, let alone purport to perform it using a mere preponderance-of-the-evidence standard." *Id.* "To hold otherwise," warned the Court, "would intrude on a power the Fifth and Sixth Amendments reserve to the American people." *Id.* at 834-35.

But, courts across the country are doing just that. Many cases were remanded in the wake of *Erlinger*, and the Circuits were forced to grapple with the question of whether the error committed below was harmless, or whether the defendant-appellant—sentenced in violation of the Constitution—was entitled to relief. In published decisions, the Fourth, Sixth, Seventh, Eighth, and Eleventh Circuits joined the Fifth Circuit in applying harmless-error analysis to *Erlinger* errors. *See, e.g.*, *United States v. Campbell*, 122 F. 4th 624, 630-31 (6th Cir. 2024) (viewing *Erlinger* error as "part and parcel with the errors in *Apprendi and Alleyne [v. United States*, 570 U.S. 99, (2013)]" and subject to the harmless error analysis used in *Neder* and *Washington v. Recuenco*, 548 U.S. 212, 222 (2006)); *United States v. Brown*, --F. 4th --, No. 21-4253, 2025 WL 1232493 at **4-5 (4th Cir. Apr. 29, 2025*)* (same); *United States v. Bowling*, --F. 4th --, No. 24-1010, 2025 WL 1258746 (8th Cir. May 1, 2025) (same); *United States v. Johnson*, 114 F. 4th 913, 917 (7th Cir. 2024) (applying *Neder's* harmlessness test but finding that *Erlinger* error was not harmless); *United States v.*

Rivers, 134 F. 4th 1292, 1305-06 (11th Cir. 2025) (same); *see also United States v. Saunders*, No. 23-6735, 2024 WL 4533359, at **2-3 (2d Cir. Oct. 21, 2024) (unpublished) (applying *Neder's* harmless-error test and finding *Erlinge*r error harmless beyond a reasonable doubt); *but see United States v. Man*, No. 21-10241, 2022 WL 17260489 (9th Cir. Nov. 29, 2022) (unpublished) (holding that *Erlinger* error was *not* harmless where the "PSR was the only evidence before the district court of the occasions on which Man committed his ACCA predicate offenses."). *Neder*, applied by these Circuits in assessing harm, involved the omission of a materiality element from the indictment and charge in a tax fraud case. *Neder*, 527 U.S. 1. This Court held that this error could be harmless, so long as it could confidently find it "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Id.* at 18. In other words, *Neder* came from a jury trial, and asks whether the defendant would have been convicted absent the error; it has nothing at all to do with sentencing.

In applying the *Neder* standard, these Circuits have effectively undertaken the exact inquiry that *Erlinger* held unconstitutional. These appellate courts examined *Shepard* documents—or worse, PSR summaries of *Shepard* documents—and speculated as to whether a jury could conclude that the predicate offenses occurred on separate occasions. *See, e.g.*, *Curry*, 125 F. 4th at 742 (examining *Shepard* documents and concluding that "gaps of weeks or even years separated [his] prior offenses[,]" and that "[i]n the absence of any substantiated argument that he would not have pleaded guilty, Curry has not established that the district court's *Erlinger*

error affected his substantial rights."); *United States v. Butler*, 122 F. 4th 584, 590 (5th Cir. 2024) (relying on the PSR and *Shepard* documents, which showed a range of months to several years between offenses to hold that the *Erlinger* error was harmless); *United States v. Valencia*, --F. 4th --, No. 22-50283, 2025 WL 1409043 at **2-3 (5th Cir. May 15, 2025) (reviewing *Shepard* documents and concluding that *Erlinger* error was harmless beyond a reasonable doubt); *Saunders*, No. 23-6735, 2024 WL 4533359, at *3 (same); *Campbell*, 122 F.4th at 632 (same); *United States v. Xavior-Smith*, --F. 4th --, No. 22-3085, 2025 WL 1428240 at *1 (8th Cir. May 19, 2025) (same); *Brown*, --F. 4th --, No. 21-4253, 2025 WL 1232493 at **4-5 (concluding that *Erlinge*r error was harmless after reviewing PSR's summary of *Shepard* documents); *Bowling*, --F. 4th --, No. 24-1010, 2025 WL 1258746 at *2 (same). Despite this Court's clear instruction that "[t]here is no efficiency exception to the Fifth and Sixth Amendments," *Erlinger*, 602 U.S. at 842, many individuals have been deprived of relief, while judges conducted the exact "separate occasions" inquiry that *Erlinger* forbade.

Indeed, if a district court *chose* to decide the separate occasions question itself—perhaps reasoning that the prior offenses were sufficiently far apart that court could be affirmed "as a matter of law---in these Circuits the sentences could be affirmed, so long as the court of appeals agreed that the matter was clear cut. In other words, even after *Erlinger*, it is possible that defendants in these jurisdictions could continue to receive ACCA-enhanced sentences based on a "separate occasions"

determination made by a district judge and blessed by two or more appellate judges, with no jury anywhere in sight.

The Third Circuit, however, uses a different methodology for *Apprendi* errors, reviewing such errors for harmlessness not under *Neder*, but *Parker v. Dugger*, 498 U.S. 308 (1991), which evaluates the harmfulness of sentencing error. *See United States v. Lewis*, 802 F.3d 449 (3d Cir. 2015) (*en banc*). This Court's intervention is necessary to ensure uniformity among the Circuits and to vindicate the rights of defendants sentenced in violation of *Erlinger*.

In addition, § 922(g)(1) is facially unconstitutional because its lifetime prohibition on gun possession imposes a historically unprecedented burden on the right to bear arms. No historical firearm law imposed *permanent* disarmament. And the justification behind § 922(g)(1)—disarming a broad group of potentially irresponsible individuals—also fails historical scrutiny. The decision below relied on the Fifth Circuit's opinion in *Diaz*, which suffers from analogical flaws and is at odds with this Court's guidance in *NYSRPA v. Bruen*, 597 U.S. 1 (2022) and *United States* v. *Rahimi*, 602 U.S. 680 (2024). This Court should grant certiorari.

I. This Court should intervene to vindicate the constitutional rights of defendants who were sentenced in violation of *Erlinger*.

A. This Court should provide guidance about the proper inquiry to determine whether *Erlinger* error is harmless.

Erlinger warned *specifically* about the dangers of allowing a judge to make the "separate occasions" determination based on *Shepard* documents. It stated: "*Shepard* documents will not contain all the information needed to conduct a sensible ACCA

occasions inquiry, such as the exact times and locations of the defendant's past crimes." *Erlinger*, 602 U.S. at 840. "Even when *Shepard* documents do contain that kind of granular information, more still may be required. After all, this Court has held that no particular lapse of time or distance between offenses automatically separates a single occasion from distinct ones." *Id.* at 841 (citing *Wooden v. United States*, 595 U.S. 360, 369-70 (2022)). And, "[n]ot only are *Shepard* documents of limited utility, they can be prone to error." *Id.* (citations omitted; cleaned up). "The risk of error may be especially grave when it comes to facts recounted in *Shepard* documents on which adversarial testing was 'unnecessary' in the prior proceeding." *Id.* (citation omitted). "At the time of his prior conviction, a defendant might not have cared if a judicial record contained a mistake about, say, the time or location of his offense." *Id.* However, "years later and faced with an ACCA charge, those kinds of details can carry with them life-altering consequences." *Id.*

The Court acknowledged that "[o]ften, a defendant's past offenses will be different enough and separated by enough time and space that there is little question he committed them on separate occasions." *Id.* at 842. Critically, however, it added that "none of that means a judge rather than a jury should make the call." *Id.* "There is no efficiency exception to the Fifth and Sixth Amendment." *Id.* "In a free society respectful of the individual, a criminal defendant enjoys the right to hold the government to the burden of proving its case beyond a reasonable doubt to a unanimous jury of his peers regardless of how overwhelming the evidence may seem to a judge." *Id.* (citation omitted; cleaned up).

Chief Justice Roberts in his concurrence and Justice Kavanaugh in his dissent indicated that most constitutional errors, including violations of the Sixth Amendment, are generally subject to harmless-error review. *See id.* at 849-50 (Roberts, C.J., concurring); *id.* at 859-61 (Kavanaugh, J., dissenting). This language appears to have emboldened courts to apply *Neder's* harmless-error test to *Erlinger* errors. *See, e.g., Rivers*, 134 F.4th at 1305 ("Even though the *Erlinger* majority did not discuss harmless error, two justices separately suggested that in their views harmless error review was appropriate.") (citing *Erlinger*, 602 U.S. at 849-850 (Roberts, C.J., concurring); *Erlinger*, 602 U.S. at 859 (Kavanaugh, J., dissenting)); *Campbell*, 122 F. 4th at 630 (citing Chief Justice Roberts's and Justice Kavanaugh's opinions as "recognizing [that] harmless error applies in this setting").

The *Erlinger* majority, however, gave no suggestion that courts of appeals might affirm ACCA sentences based on judicial fact-finding, so long as they thought that fact-finding obviously correct. *See id.* at 835 ("While recognizing Mr. Erlinger was entitled to have a jury resolve ACCA's occasions inquiry unanimously and beyond a reasonable doubt, we decide no more than that."); *id.* at 849 (remanding the case to the Seventh Circuit for "further proceedings consistent with this opinion"). The Court should clarify the proper standard.

The Fifth Circuit determined that an *Erlinger* error is an *Apprendi* error—which, it claimed—is "not [a] structural error[,]" and therefore, subject to harmless-error analysis. *Curry*, 125 F. 4th at 739; *id.* at 739, n. 27 (citing *United States v. Butler*, 122 F. 4th 584, 589-90 (5th Cir. 2024)) (citations omitted, cleaned up). Making

no distinction between trial and sentencing error, it held that the harmlessness test for *Erlinger* error asks only whether, "if the district court had correctly submitted the separate-occasions inquiry to the jury, there is a reasonable probability that [the defendant] would not be subject to the ACCA-enhanced sentence." *Id.* at 739 (footnote omitted); *accord United States v. Schorovsky*, No. 23-50040, 2025 WL 471108 at **2-3 (5th Cir. Feb. 12, 2025) (unpublished); *United States v. Kerstetter*, No. 22-10253, 2025 WL 1079071 at **2-3 (5th Cir. Apr. 10, 2025); *United States v. Valencia*, --F. 4th --, No. 22-50283, 2025 WL 1409043 at **2-3 (5th Cir. May 15, 2025). In Mr. Curry's case, the court examined *Shepard* documents to reach the conclusion that "gaps of weeks or even years separated [his] prior offenses[,]" and that "[i]n the absence of any substantiated argument that he would not have pleaded guilty, Curry has not established that the district court's *Erlinger* error affected his substantial rights." *Curry*, 125 F. 4th at 742.

Although Mr. Curry argued that such an approach is contrary to the Fifth Circuit's precedent, *see* Pet. for Reh'g En Banc at **5-12 [Appendix C], the Fifth Circuit disagreed and denied Mr. Curry's petition for rehearing en banc without a poll. *See* Order in *United States v. Curry*, No. 22-11084, ECF No. 171 (5th Cir. Filed Feb. 21, 2025). As discussed above, most courts have likewise analyzed *Erlinger* errors as "trial errors" subject to harmless-error review under *Neder*, which resulted in perpetuating the constitutional violation.

Although the courts of appeals generally see this analysis as compelled by this Court's harmless error precedent, several federal judges have noted the tension

between vindicating a litigant's rights under *Erlinger*, and then conducting the very analysis that it forbade. *See, e.g., United States v. Stowell*, 82 F. 4th 607, 613-14 (8th Cir. 2023) (en banc) (Erickson, J., dissenting) ("The problem with the majority's approach" of deciding that any Sixth Amendment error would have been harmless "is that it sidesteps the important constitutional question and reaches a conclusion by assuming facts the jury would have no way of knowing."); *Bowling*, --F. 4th --, No. 24-1010, 2025 WL 1258746 at *2 (Kelly, J., concurring) (agreeing that the outcome is dictated by *Stowell*, but "I remain of the view that we cannot simply rely on a presentence report's unchallenged facts when assessing harmlessness in these circumstances. . . . A defendant's decision not to challenge certain facts contained in a presentence report says nothing about whether evidence of those same facts would be admissible at a trial."); *Xavior-Smith*, --F. 4th --, No. 22-3085, 2025 WL 1428240 at *1 (Kelly, J., concurring) ("I continue to have concerns about relying on unchallenged facts at sentencing—including facts contained in documents of the sort admitted at Xavior-Smith's sentencing hearing—to decide whether a district court's occasion determination was harmless."); *Campbell*, 122 F.4th at 637 (Davis, J., concurring) ("[G]iven *Erlinger*'s caution, we should well consider whether the jury right we seek to protect in calling out an *Erlinger* error is best served through harmless error review reliant on *Shepard* documents."). An unpublished opinion of the Fourth Circuit, moreover, vacated the defendant's sentence on a claim of plain *Erlinger* error. *United States v. Billings*, No. 22-4311, 2024 WL 3633571 (4th Cir. Aug. 2, 2024) (unpublished). It found that the error, made plain after *Erlinger*,

"affected Billings' substantial rights because it increased his sentence—both his prison term and his supervised release term—beyond the statutory maximum sentence that could be imposed without the ACCA enhancement." *Id.* at *6. Although this is not the approach taken by the Fourth Circuit's subsequent published case, *see Brown*, --F. 4th --, No. 21-4253, 2025 WL 1232493 at **4-5, it further demonstrates the disease of the courts of appeals with the dismissal of *Erlinger* based on the very kind of judicial fact-finding *Erlinger* found unconstitutional.

Notably, the *en banc* Third Circuit assesses *Apprendi* error quite differently, demonstrating that the prevailing view regarding the treatment of *Erlinger* error is not an inevitable reading of this Court's harmless error precedent. In *United States v. Lewis*, 802 F.3d 449 (3d Cir. 2015) (en banc), the Third Circuit concluded that at least some *Apprendi* errors must be analyzed as sentencing errors when assessing prejudice. *Lewis*, 802 F.3d at 456. An *Apprendi* sentencing error, held the Third Circuit, must be assessed under the standard enunciated in *Parker v. Dugger*, 498 U.S. 308 (1991), which asks whether the error "would have made no difference to the sentence." *Id.* at 456 (quoting Parker, 498 U.S. at 319). By contrast, the Third Circuit held, *Apprendi* trial errors – such as the omission of sentence enhancing facts from the indictment or the omission of such factual questions from the jury charge – may be analyzed under *Neder*. *Id.*

In *Lewis*, the defendant received a mandatory minimum of seven years for brandishing a firearm after a jury convicted him of violating 18 U.S.C. § 924(c). *Id.* at 451. Because the mandatory minimum applies only upon a finding that the

defendant brandished the firearm, and because the jury never actually made that finding, all agreed that the district court committed *Apprendi* error. *Id.* at 452-53. The *Lewis* en banc court held that this represented sentencing error, and reversed because the government could not show that the defendant would have received the same sentence in the absence of the mandatory minimum—it did not ask, as it would have for trial error governed by *Neder*, whether any rational jury could have declined to find brandishing. *Id.* at 455-458. To assess harmlessness by asking what the jury would have done had it been asked to make the appropriate finding, the Third Circuit stressed, "would run directly contrary to the essence of *Apprendi* and *Alleyne*" because the "motivating principle" behind *Apprendi* and *Alleyne* "is that judges must not decide facts that change the mandatory maximum or minimum; juries must do so." *Id.* at 456. "If we affirm because the evidence is overwhelming, then we are performing the very task that *Apprendi* and *Alleyne* instruct judges not to perform." *Id.* (citations omitted).

But this is *exactly* what Circuit courts across the country are doing—conducting the "separate occasions" determination based on *Shepard* documents, or worse, PSR summaries of those documents—despite *Erlinger's* admonishments about judges undertaking such inquiries. In *Legins*, the Fourth Circuit reluctantly applied *Neder* and *Recuenco's* harmlessness test to *Apprendi* error, noting that "there is something deeply unsatisfying about this result." *See United States v. Legins*, 34 F.4th 304, 323 (4th Cir. 2022). "As Justice Scalia observed in his partial dissent in *Neder*, it is bizarre that a deprivation of the jury right, which reflects a distrust of

judges to adjudicate criminal guilt, can be set aside as harmless when we judges find the result sufficiently clear." *Id.* (citation omitted). "It creates an inescapable irony," observed the court, "'in which the remedy for a constitutional violation by a trial judge (making the determination of criminal guilt reserved to the jury) is a repetition of the same constitutional violation by the appellate court (making the determination of guilt reserved to the jury).'" *Id.* (citing *Neder*, 527 U.S. at 32 (Scalia, J., dissenting in part).

And yet, that is the reality across the country. Many defendants sentenced in violation of *Erlinger* are denied relief on remand as a result of judges conducting the separate occasions inquiry that this Court made clear is reserved for juries. In Mr. Curry's case, these compounded constitutional violations cost him 11 years of freedom. This Court should intervene.

This case is a suitable vehicle to address the issue. Although the court below found the error unpreserved, all agreed that the district court erred and that such error was plain. *Curry*, 125 F. 4th at 739. The sole basis for the decision below was the absence of prejudice. *Id.* And the prejudice inquiry – whether the outcome would have been different but for the error – is the same whether or not the defendant preserved error, save one difference: who bears the burden of persuasion. *See United States v. Olano*, 507 U.S. 725, 732 (1993)("When the defendant has made a timely objection to an error and Rule 52(a) applies, a court of appeals normally engages in a specific analysis of the district court record—a so-called "harmless error" inquiry—to determine whether the error was prejudicial. Rule 52(b) normally requires the same

kind of inquiry, with one important difference: It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice."). But if Mr. Curry is correct about the ultimate question at issue – whether the court would have imposed the same sentence had it used the range authorized by the plea – the burden of persuasion is irrelevant. The indictment and the plea authorized a sentence of up to ten years imprisonment; Mr. Curry received more than 21 years. If the question is simply whether the sentencing range affected the outcome, Mr. Curry can make that showing decisively.

In the event that this Court does not view the instant Petition as an appropriate vehicle to address this issue, it should nonetheless grant certiorari to address the issue in a suitable case. Mr. Curry is aware of at least one petition of certiorari that will raise this issue.[1] There will likely be others. This Court should grant certiorari to decide this important and recurring issue, and, if it does so in another case, should hold the instant petition pending the outcome. *See Stutson v. United States*, 516 U.S. 163, 181 (1996) (Scalia, J., dissenting) ("We regularly hold cases that involve the same issue as a case on which certiorari has been granted and plenary review is being conducted *in order that* (if appropriate) they may be 'GVR'd' when the case is decided.") (emphasis in original).

B. In the event that the government again reconsiders its position regarding the proper disposition of the case, this Court should grant certiorari, vacate the judgment below, and remand.

[1] *See* Application to Extend the Time to File a Petition for a Writ of Certiorari from May 20, 2025 to July 19, 2025, *Gerald Lynn Campbell v. United States*, No. 22-5567 at 4 (Filed May 5, 2025) (noting that the question presented in the petition for a writ of certiorari "will concern the correct standard and scope of review of *Erlinger* error.").

As noted above, the Department of Justice made the commendable decision to join Mr. Curry's in a Motion to Remand. This Motion, signed by the attorney for the government, referred to a Department of Justice litigating position that, even prior to *Erlinger*, opposed the application of ACCA unless the defendant admitted, or the jury found, that the defendant's prior convictions occurred on separate occasions. *See* Joint Motion at *2. Further, the Motion acknowledged that this position had not been presented to the district court, and it agreed that this circumstance merited a remand. *See id.* It stated:

> At the time it sentenced Curry, the district court did not know of the Department of Justice's change of position after *Wooden v. United States*, 142 S. Ct. 1063 (2022), that Curry was ineligible for an ACCA sentence because, in pleading guilty, he did not admit that his prior burglary offenses were committed on at least three different occasions. *See* 18 U.S.C. § 924(e)(1). In light of this, the parties file this joint motion for a limited remand of this case so the district court can conduct a hearing at which the government may present its post-*Wooden* position to the district court, and it can consider whether it wishes to accept the government's position and resentence Curry to a sentence within a statutory range of 0 to 10 years.

Id. The Court of Appeals denied the Motion, finding that the district court had not committed any error under then Fifth Circuit law. *See* Order in *United States v. Curry*, No. 22-11084, ECF No. 27 at *1 (5th Cir. Filed February 23, 2023). The government then switched positions regarding the proper disposition of the case and defended the judgment. *See* Appellee's Brief in *United States v. Curry*, No. 22-11084, 2023 WL 4457914, at *24 (5th Cir., Filed July 6, 2023)("This Court should affirm the judgment."). It maintained this new position even after *Erlinger* vindicated the view of the Constitution propounded in the Joint Motion to Remand. *See* Supplemental

Brief in *United States v. Curry*, No. 22-11084, 2024 WL 3408091, at *8 (5th Cir., Filed July 8, 2024)("Caselaw disproves Curry's argument for prejudicial plain error, so the Court should affirm his sentence.").

Mr. Curry respectfully suggests that the government may wish to support his request for relief in this forum. Where the government's charging policies change, or when the government concludes that its charges contradicted the policies it had in place at the time it brought them, it sometimes supports the defendant's claims for relief on appeal. *See United States v. Blaszczak*, 56 F.4th 230, 238-39 (2d Cir. 2022)(citing *Petite v. United States*, 361 U.S. 529, 530-31 (1960), *Rinaldi v. United States*, 434 U.S. 22, 23, 29-30 (1977); *United States v. Houltin*, 553 F.2d 991, 991-92 (5th Cir. 1977); *Gaona-Romero v. Gonzales*, 497 F.3d 694, 695 (5th Cir. 2007)). This is so even if the judgment might be affirmed with the government's support. *See Petite*, 361 U.S. at 530. And this Court and the courts of appeals have agreed that the government's change of positions may provide valid grounds for remand to the district court. *See Blaszczak*, 56 F.4th at 238-239 (recounting such cases).

The present case is analogous. Here, the government's position at the time of sentencing favored Mr. Curry, but it neglected to communicate that position to the district court. As such, the government may wish to support Mr. Curry in order to ensure that similarly situated litigants are similarly treated. The government may also perceive an obligation to correct its own mistakes. Again, the government very commendably sought to fulfill that obligation in the Joint Motion to Remand, but allowed other considerations to overcome it in later stages of the litigation. Indeed,

this case involves especially unique and unfortunate circumstances for Mr. Curry. The government supported his position, but changed its mind after the court of appeals declined its request to remand. Then, the court of appeals cited the government's lack of support for remand in declining to remand the case after *Erlinger*. This chain of events smacks of an arbitrariness ill-befitting the affirmance of a 262-month term of imprisonment.

If the Solicitor General agrees that the case should be remanded, this Court should acquiesce. This Court has recognized that the government's change of position represents an appropriate basis to remand the case to the court of appeals, at least where that changed position occurs after the opinion of the court of appeals. *See Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 166 (1996). This is so even if the government changes its position only as to one aspect of the case, and does not think its opponent is ultimately entitled to relief. *See id.* at 171-72. A GVR order would be especially appropriate in this case, where the court of appeals explicitly cited the government's opposition to relief as a basis for its decision to deny remand. *See Curry*, 125 F. 4th at 742-43.

II. This Court should decide the constitutionality of 18 U.S.C. § 922(g)(1) under the Second Amendment.

The Fifth Circuit's decision below—which relies on its decision in *Diaz*—is wrong. Section 922(g)(1) is a mid-20th century innovation drafted when Congress believed—incorrectly—that the Second Amendment does not protect an individual right to bear arms. So Congress made no effort to pass a law that was "consistent with the Nation's historical tradition of firearm regulation." *See Bruen*, 597 U.S. at 24.

Rather, it passed a sweeping ban that is irreconcilable with our history and tradition. Section 922(g)(1) is facially unconstitutional because its lifetime prohibition on gun possession imposes a historically unprecedented burden on the right to bear arms. No historical firearm law imposed *permanent* disarmament. And the justification behind § 922(g)(1)—disarming a broad group of potentially irresponsible individuals—also fails historical scrutiny.

This question is critically important. Section 922(g)(1) is one of the most commonly charged federal offenses. Uncertainty about whether the statute is constitutional affects thousands of criminal cases each year. Even more concerning, § 922(g)(1) categorically and permanently prohibits millions of Americans from exercising their right to keep and bear arms.

This Court's intervention is urgently needed to resolve the scope of a fundamental constitutional right. After *Rahimi*, the confusion among the courts of appeals has only deepened. The Court should grant certiorari.

A. *Bruen* abrogated precedent upholding the constitutionality of § 922(g)(1).

The Second Amendment to the United States Constitution mandates that 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." U.S. CONST. amend. II. In *District of Columbia v. Heller*, this Court held that the Second Amendment codified an individual right to possess and carry weapons, the core purpose of which is self-defense in the home. 554 U.S. 570, 628 (2008). *See also McDonald* v. *City of Chicago*,

561 U.S. 742, 767 (2010) (holding "that individual self-defense is the central component of the Second Amendment right").

After *Heller*, the Fifth Circuit "adopted a two-step inquiry for analyzing laws that might impact the Second Amendment." *Hollis* v. *Lynch*, 827 F.3d 436, 446 (5th Cir. 2016). In the first step, courts asked "whether the conduct at issue falls within the scope of the Second Amendment right." *United States* v. *McGinnis*, 956 F.3d 747, 754 (5th Cir. 2020) (quoting *Nat'l Rifle Ass'n of Am., Inc.* v. *Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 194 (5th Cir. 2012)). This step involved determining "whether the law harmonizes with the historical traditions associated with the Second Amendment guarantee." *Id.* at 754. If the conduct was outside the scope of the Second Amendment, the law was constitutional. *Id.* Otherwise, courts proceeded to the second step to determine whether to apply strict or intermediate scrutiny. *Id.*

In *Bruen*, this Court announced a new framework for analyzing Second Amendment claims, abrogating the two-step inquiry adopted by the Fifth Circuit and others. *See* 597 U.S. at 19. *See also Diaz*, 116 F. 4th at 465 (holding that *Bruen* "render[s] our prior precedent obsolete") (quotation omitted). It rejected step two of that framework because "*Heller* and *McDonald* do not support applying means-end scrutiny in the Second Amendment context." *Bruen*, 597 U.S. at 19.

The Court elaborated that, under the new framework, "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Id.* at 17. The government then "must

demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Id.* Only then may a court conclude that the individual's conduct falls outside of the Second Amendment's "unqualified command." *Id*. (citation omitted). *See also United States* v. *Rahimi*, 602 U.S. 680, 699–700 (2024) (finding § 922(g)(8) facially constitutional under *Bruen*'s Second Amendment test).

In *Diaz*, the Fifth Circuit considered a facial and as-applied challenge to § 922(g)(1). It first recognized that the constitutionality of § 922(g)(1) was an open question. This Court had not yet directly addressed the constitutionality of § 922(g)(1), and while the Fifth Circuit had issued prior decisions upholding the constitutionality of § 922(g)(1), these decisions relied on "the means-ends scrutiny that *Bruen* renounced" and did not survive *Bruen*. *Diaz*, 116 F. 4th at 465 (citing *United States* v. *Darrington*, 351 F.3d 632, 634 (5th Cir. 2003), and *United States* v. *Emerson*, 270 F.3d 203 (5th Cir. 2001)). The court also rejected the government's arguments that felons were not among "the people" protected by the Second Amendment. *See id.* at 466–67 ("Diaz's status as a felon is relevant to our analysis, but it becomes so in *Bruen*'s second step of whether regulating firearm use in this way is consistent with the Nation's historical tradition rather than in considering the Second Amendment's initial applicability.").

But the court ultimately affirmed Diaz's conviction. *Id.* at 472. It found § 922(g)(1) was constitutional on its face and as-applied because there was a historical tradition of imposing severe, permanent punishments on felons like Diaz who had been convicted of theft offenses. *See id.* at 466–472. Specifically, it explained that "[a]t

the time of the Second Amendment's ratification, those—like Diaz—guilty of certain crimes—like theft—were punished permanently and severely," that is, by death or estate forfeiture, and "permanent disarmament was [also] a part of our country's arsenal of available punishments at that time." *Id.*

B. *Diaz* was wrongly decided, insofar as it holds that the government has met its burden under *Bruen* step 2.

Under *Bruen*, courts must strike down the law unless the government can meet its "heavy burden" to identify a historic tradition of regulations that are "relevantly similar" to § 922(g)(1). *United States* v. *Connelly*, 117 F.4th 269, 274 (5th Cir. 2024). "The challenged and historical laws . . . must both (1) address a comparable problem (the 'why') and (2) place a comparable burden on the right holder (the 'how')." *Id.* (citing *Rahimi*, 602 U.S. 692, and *Bruen*, 597 U.S. at 27–30).

There is no way that the government could have met this heavy burden. Founding-era laws generally limited categorical disarmament to disempowered minority communities—for example, enslaved persons and Native Americans—and those perceived to be disloyal to the government. *See* Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 WYO. L. REV. 249, 261–65 (2020); Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America*, 25 LAW & HIST. REV. 139, 156–61 (2007). These laws are not relevantly similar to § 922(g)(1) because they did not "impose a comparable burden on the right" and are not "comparably justified" to § 922(g)(1). *Bruen*, 597 U.S. at 29. In fact, "[p]ossessing a firearm as a felon . . . was not considered a crime until 1938 at the earliest." *Diaz*, 116 F.4th at 468 (citing

Federal Firearms Act, ch. 850, §§ 1(6), 2(f), 52 Stat. 1250, 1250–51 (1938); An Act to Strengthen the Federal Firearms Act, Pub. L. No. 87–342, § 2, 75 Stat. 757, 757 (1961)).

Such twentieth century laws are well beyond the historical sources cited in *Bruen*, and they cannot demonstrate a longstanding tradition of disarming felons. *See Bruen*, 597 U.S. at 66 (noting that even "late-19th-century evidence cannot provide much insight into the meaning of the Second Amendment when it contradicts earlier evidence"). *See also Kanter* v. *Barr*, 919 F.3d 437, 454 (7th Cir. 2019) (Barrett, J., dissenting) (noting scholars have been unable to identify any founding-era laws disarming all felons); Adam Winkler, *Heller's Catch-22*, 56 UCLA L. REV. 1551, 1563 & n.67 (2009) ("The Founding generation had no laws limiting gun possession by the mentally ill, nor laws denying the right to people convicted of crimes."). Thus, the government cannot show that § 922(g)(1) is consistent with the Nation's historical tradition of firearm regulation.

This Court's decision in *Rahimi* also weighs in favor of striking down § 922(g)(1). *Rahimi* addressed a facial challenge to § 922(g)(8)(C)(i), the federal law that prohibits firearm possession by persons subject to certain domestic violence restraining orders. *Rahimi*, 602 U.S. 693. The Court found the government had met its burden to identify historical analogues that were "relevantly similar" to the challenged statute. *Id.* at 697–98. Specifically, it held that the historical statutes identified by the government—surety laws and laws that prohibited riding or going armed with dangerous weapons—showed a national tradition of "temporarily

disarm[ing]" an "individual found by a court to pose a credible threat to the physical safety of another." *Id.*

But, all the features that prevented this Court from striking down the *Rahimi* statute are missing from § 922(g)(1). In *Rahimi*, the Court emphasized the narrow scope of the challenged statute. It explained that "Section 922(g)(8) applies only once a court has found that the defendant represents a credible threat to the physical safety of another[,]" which "matches" the similar "judicial determinations" required in the surety and going armed laws. *Id.* at 699 (internal quotation marks omitted). The Court also emphasized the limited duration of § 922(g)(8). It explained that "Section 922(g)(8) only prohibits firearm possession so long as the defendant 'is' subject to a restraining order[,]" just "like surety bonds of limited duration[.]" *Id.* In contrast, § 922(g)(1) is a categorical ban that prohibits everyone convicted of a crime punishable by more than a year in prison from possessing a gun—without any individualized finding or consideration of whether or not they threaten others. *See* 18 U.S.C. § 922(g)(1). The analogues that the government relied upon in *Rahimi* cannot justify this broader, permanent ban. And this Court's reliance on features of § 922(g)(8) that are missing from § 922(g)(1) confirms that § 922(g)(1) cannot pass constitutional muster under *Bruen* and *Rahimi*. Thus, for the same reasons § 922(g)(8) is constitutional, § 922(g)(1) is not.

Diaz held that "laws authorizing severe punishments for" certain felonies "and permanent disarmament in other cases establish that our tradition of firearm regulation supports the application of § 922(g)(1) to" certain felons. 116 F.4th at 471.

Respectfully, however, this analysis suffers from critical methodological flaws.

First, as noted above, *Diaz* held that the government had met its burden to show a "relevantly similar" historical analogue to § 922(g)(1) by relying on historical laws that punished certain crimes by capital punishment and estate forfeiture. *See Diaz*, 116 F. 4th at 467–70. But contrary to the reasoning in *Diaz*, laws unrelated to firearms use are not proper analogues. This Court's precedent requires the government to show that a modern gun law aligns with our "historical tradition of *firearm* regulation." *Bruen*, 597 U.S. at 17 (emphasis added); *Rahimi*, 602 U.S. at 691 (same). In other words, the government's historical analogues must regulate *firearms*; capital punishment and estate forfeiture are not firearm regulations. Indeed, *Rahimi* relied only on historical laws that "specifically addressed firearms violence." 602 U.S. at 694–95. So did *Bruen*. *See* 597 U.S. at 38–66.

In justifying its reliance on capital punishment and estate forfeiture, however, *Diaz* asserted that *Rahimi* "consider[ed] several historical laws that were not explicitly related to guns." *Diaz*, 116 F. 4th at 468. But *Rahimi* says just the opposite. In *Rahimi*, this Court relied on two historical legal regimes—surety laws and going armed laws—that "*specifically addressed firearms violence*." 602 U.S. at 694–95 (emphasis added). To be sure, surety laws were not "passed *solely* for the purpose of regulating firearm possession or use." *Diaz*, 116 F. 4th at 468. But this Court emphasized that, "*[i]mportantly for this case*, the surety laws also targeted the misuse of firearms." *Rahimi*, 602 U.S. at 696 (emphasis added). "The purpose of capital punishment in colonial America was threefold: deterrence, retribution, and

penitence." *Diaz*, 116 F.4th at 469 (citation omitted). Targeting the misuse of firearms was *not* one of its purposes. Yet it was a primary purpose for permanent felon disarmament, which aimed "to keep firearms out of the hands of those who are 'a hazard to law-abiding citizens' and who had demonstrated that 'they may not be trusted to possess a firearm without becoming a threat to society.'" *Id.* (citation omitted). In other words, laws that did *not* target the misuse of firearms—like capital punishment and estate forfeiture—are *not* proper analogues.

Second, *Diaz* noted that this Court accepted a "greater-includes-the-lesser" argument in *Rahimi*. *Diaz*, 116 F. 4th at 469–70. This is true only insofar as in *Rahimi*, both the greater restriction (imprisonment under the going armed laws) and the lesser punishment (disarmament under 18 U.S.C. § 922(g)(8)) had *the same purpose*. *Rahimi* held that "if imprisonment was permissible to ***respond to the use of guns to threaten the physical safety of others,*** then the lesser restriction of temporary disarmament … is also permissible." 144 S. Ct. at 1891 (emphasis added). But it does not follow, as *Diaz* concluded, that "if capital punishment was permissible to respond to theft, then the lesser restriction of permanent disarmament that § 922(g)(1) imposes is also permissible." *Diaz*, 116 F. 4th at 469. Capital punishment simply did not target gun violence. Because neither capital punishment nor estate forfeiture establish a tradition of *firearm* regulation, this Court's precedent forecloses employing them as historical analogues for § 922(g)(1).

Third, an historical law must match both metrics to be considered relevantly similar — the why *and* the how — to serve as an analogue under *Bruen*. *Diaz*

accordingly mis-stepped when it concluded that "[g]oing armed laws are relevant historical analogues to § 922(g)(1), just as *Rahimi* found them to be with respect to § 922(g)(8)." *Diaz*, 116 F.4th at 471. In short, "the justification behind going armed laws—to 'mitigate demonstrated threats of physical violence'—does not necessarily support a tradition of disarming [felons] whose underlying convictions do not inherently involve a threat of violence." *Diaz*, 116 F.4th at 471 n.5 (quoting *Rahimi*, 602 U.S. at 698). *Diaz* nonetheless relied on these historical laws because of a match on the "how" part of the test, ignoring the deficit on the "why." *See id.* ("We focus on these laws to address the 'how' of colonial-era firearm regulation, rather than the 'why,' which is supported by other evidence." (citing *Bruen*, 597 U.S. at 29)). This approach directly contradicts this Court's instruction to match an analogue on *both* metrics. *Connelly*, 117 F.4th at 274 (citing *Rahimi*, 602 U.S. at 692; *Bruen*, 597 U.S. at 27–30).

The comparison to *Rahimi* also glosses over a critical difference between § 922(g)(1) and § 922(g)(8)(C)(i), which "applies only once a court has found that the defendant 'represents a credible threat to the physical safety' of another." *Rahimi*, 602 U.S. at 699 (quoting 18 U.S.C. § 922(g)(8)(C)(i)). "That matches the . . . going armed laws," *Rahimi* reasoned, "which involved judicial determinations of whether a particular defendant likely would threaten or had threatened another with a weapon." *Id.* As *Diaz* itself recognized, § 922(g)(1), unlike § 922(g)(8), casts its net irrespective of threats of violence. *Diaz*, 116 F.4th at 471 n.5. *Diaz* cannot excuse this incongruity by only half-applying *Bruen*.

Ultimately, there are no historical firearms laws that imposed the type of categorical, permanent disarmament effected by § 922(g)(1). The government therefore cannot overcome the presumption that § 922(g)(1) violates the Second Amendment. *See Bruen*, 597 U.S. at 24. The statute is unconstitutional, and this Court should grant certiorari.

C. The Court should hold the instant Petition pending resolution of any merits cases presenting this issue.

This Court should grant certiorari to decide this momentous issue, and, if it does so in another case, should hold the instant Petition pending the outcome. *See Stutson v. United States*, 516 U.S. 163, 181 (1996)(Scalia, J., dissenting)("We regularly hold cases that involve the same issue as a case on which certiorari has been granted and plenary review is being conducted in order that (if appropriate) they may be 'GVR'd' when the case is decided.").

This is so notwithstanding the failure of preservation in the district court, which may ultimately occasion review for plain error. *See United States v. Olano*, 507 U.S. 725, 732 (1993). For one, an error may become "plain" any time while the case remains on direct appeal. *See Henderson v. United States*, 568 U.S. 266 (2013). Further, procedural obstacles to reversal – such as the consequences of non-preservation – should be decided in the first instance by the court of appeals. *See Henry v. Rock Hill*, 376 U.S. 776, 777 (1964) (per curiam) (GVR "has been our practice in analogous situations where, not certain that the case was free from all obstacles to reversal on an intervening precedent"); *Torres- Valencia v. United States*, 464 U.S. 44 (1983) (per curiam) (GVR utilized over government's objection where error was

conceded; government's harmless error argument should be presented to the court of appeals in the first instance); *Florida v. Burr*, 496 U.S. 914, 916-919 (1990) (Stevens, J., dissenting) (speaking approvingly of a prior GVR in the same case, wherein the Court remanded the case for reconsideration in light of a new precedent, although the claim recognized by the new precedent had not been presented below); *State Farm Mutual Auto Ins. Co. v. Duel*, 324 U.S. 154, 161 (1945) (remanding for reconsideration in light of new authority that party lacked opportunity to raise because it supervened the opinion of the court of appeals).

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 22nd day of May, 2025.

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