

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

SAMUEL STOREY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

CORRECTED PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Can a court of appeals disregard the government's deliberate waiver of whether a jury trial right violation is harmless in the enhanced statutory penalty context and affirm over the government's request that the defendant be resentenced without statutory enhancement?

II. Should the Court overrule *Neder v. United States*, 527 U.S. 1 (1999), as inconsistent with Fifth and Sixth Amendment principles underlying this Court's precedent in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny?

III. Does 18 U.S.C. § 922(g)(1) exceed Congress's authority under the Commerce Clause, facially and as applied to Petitioner Samuel Storey's intrastate possession?

PARTIES TO THE PROCEEDING

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is provided below:

- United States of America
- Samuel Storey

RELATED PROCEEDINGS

The following is a list of all proceedings in state and federal trial and appellate courts, including proceedings in this Court, that are directly related to the case in this Court:

- *United States v. Storey*, No. 8:21-cr-48, U.S. District Court for the Middle District of Florida. Judgment entered May 31, 2022.
- *United States v. Storey*, No. 22-11841, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered Oct. 8, 2025.

TABLE OF CONTENTS

Questions Presented.....	i
Parties to the Proceeding	ii
Related Proceedings	ii
Table of Contents.....	iii
Petition for a Writ of Certiorari.....	1
Order and Opinion Below.....	1
Jurisdiction	1
Relevant Constitutional and Statutory Provisions.....	1
Introduction	3
Statement of the Case	6
Reasons for Granting the Writ.....	11
I. This Court’s review is needed on whether a court of appeals may disregard the government’s waiver of whether a jury trial right violation was harmless in the enhanced statutory penalty context.	11
A. The Eleventh Circuit abused its discretion by holding that the <i>Erlinger</i> error was harmless despite the government’s deliberate waiver of the issue.	11
B. The Eleventh Circuit’s exercise of harmless-error review over the government’s deliberate waiver and request that Mr. Storey be resentenced without the ACCA enhancement violates separation of powers and intrudes on prosecutorial discretion.....	14
C. Only this Court can correct the error, and its intervention is important.	18

II. This Court’s review is needed to decide whether to overrule <i>Neder</i>	20
III. This Court’s review is warranted on the important and recurring question of whether Congress’s Commerce Clause authority empowers it to criminalize intrastate firearm possession in 18 U.S.C. § 922(g)(1).	25
Conclusion.....	31
Appendix	

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Alderman v. United States</i> , 131 S. Ct. 700 (2011)	7, 30
<i>Alleyne v. United States</i> , 570 U.S. 99 (2013)	22
<i>Apprendi v. New Jersey</i> , 530 U.S. 466 (2000)	i, 22
<i>Bordenkircher v. Hayes</i> , 434 U.S. 357 (1978)	16
<i>Carachuri-Rosendo v. Holder</i> , 560 U.S. 563 (2010)	17
<i>Clark v. Sweeney</i> , 607 U.S. 7 (2025)	19
<i>Cohens v. Virginia</i> , 19 U.S. (6 Wheat.) 264 (1821)	26
<i>Erlinger v. United States</i> , 602 U.S. 821 (2024)	3, 15, 21, 22, 24
<i>Gamble v. United States</i> , 139 S. Ct. 1960 (2019)	7, 31
<i>Johnson v. United States</i> , 559 U.S. 133 (2010)	13
<i>Kontrick v. Ryan</i> , 540 U.S. 443 (2004)	12
<i>McNeil v. Wisconsin</i> , 501 U.S. 171 (1991)	12

Cases	Page(s)
<i>Neder v. United States</i> , 527 U.S. 1 (1999)	i, 4, 20, 21, 22, 23
<i>Scarborough v. United States</i> , 431 U.S. 563 (1977)	28, 29
<i>Shepard v. United States</i> , 544 U.S. 13 (2005)	9
<i>United State v. Graham</i> , 123 F.4th 1197 (11th Cir. 2024).....	14
<i>United States v. Armstrong</i> , 517 U.S. 456 (1996)	16
<i>United States v. Batchelder</i> , 442 U.S. 114 (1979)	17
<i>United States v. Beasley</i> , 163 F.4th 403 (7th Cir. 2025).....	24
<i>United States v. Bonner</i> , 159 F.4th 338 (5th Cir. 2025).....	25, 26, 27, 29
<i>United States v. Brown</i> , 136 F.4th 87 (4th Cir. 2025).....	24
<i>United States v. Butler</i> , 122 F.4th 584 (5th Cir. 2024).....	24
<i>United States v. Campbell</i> , 122 F.4th 624 (6th Cir. 2024).....	24
<i>United States v. Campbell</i> , 26 F.4th 860 (11th Cir. 2022).....	11
<i>United States v. Haymond</i> , 588 U.S. 634 (2019)	22

Cases	Page(s)
<i>United States v. Hembree</i> , 165 F.4th 909 (5th Cir. 2026).....	25
<i>United States v. Legins</i> , 34 F.4th 304 (4th Cir. 2022).....	23, 24
<i>United States v. McAllister</i> , 77 F.3d 387 (11th Cir. 1996)	28
<i>United States v. Morrison</i> , 529 U.S. 598 (2000)	6, 26
<i>United States v. Nixon</i> , 418 U.S. 683 (1974)	18
<i>United States v. Rahimi</i> , 602 U.S. 680 (2024)	25
<i>United States v. Rawls</i> , 85 F.3d 240 (5th Cir. 1996)	28
<i>United States v. Rivers</i> , 134 F.4th 1292 (11th Cir. 2025).....	20, 21, 23
<i>United States v. Seekins</i> , 52 F.4th 988 (5th Cir. 2022).....	27, 28, 29
<i>United States v. Sharp</i> , 21 F.4th 1282 (11th Cir. 2021).....	15
<i>United States v. Sineneng-Smith</i> , 590 U.S. 371 (2020)	12, 19
<i>United States v. Texas</i> , 599 U.S. 670 (2023)	16
<i>Washington v. Recuenco</i> , 548 U.S. 212 (2006)	21

Cases	Page(s)
<i>Wayte v. United States</i> , 470 U.S. 598 (1985)	16
<i>Wood v. Milyard</i> , 566 U.S. 463 (2012)	12, 13, 14
 Statutes	
18 U.S.C. § 922(g)	2, 25, 26
18 U.S.C. § 924(e)	8
28 U.S.C. § 1254(1)	1
 Other Authorities	
Randy E. Barnett, <i>The Original Meaning of the Commerce Clause</i> , 68 U. Chi. L. Rev. 101 (2001)	27
Rebecca Krauss, <i>The Theory of Prosecutorial Discretion in Federal Law: Origins and Developments</i> , 6 Seton Hall Cir. Rev. 1 (2009).....	17
United States Sentencing Commission, Quick Facts: 18 U.S.C. § 922(g) Firearms Offenses Fiscal Year 2024	26
William J. Seidleck, <i>Originalism and the General Concurrence: How Originalists Can Accommodate Entrenched Precedents While Reining in Commerce Clause Doctrine</i> , 3 U. Pa. J. L. & Pub. Affs. 263, 269 (2018).....	28

Constitutional Provisions	Page(s)
U.S. Const. Art. I, § 8, cl. 3.....	1, 26
U.S. Const, Art. II, § 1, cl. 1; § 3	2
U.S. Const, Amend. 5	2
U.S. Const, Amend. 6	2

PETITION FOR A WRIT OF CERTIORARI

Samuel Storey respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

ORDER AND OPINION BELOW

The Eleventh Circuit’s unpublished opinion affirming Mr. Storey’s conviction and sentence is provided in **Appendix A**. Its order denying Mr. Storey’s timely filed petition for rehearing en banc is provided in **Appendix B**.

JURISDICTION

The Eleventh Circuit’s opinion and judgment was entered on October 8, 2025. The Eleventh Circuit’s order denying Mr. Storey’s petition for rehearing en banc was entered on January 5, 2026. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I of the United States Constitution states that “Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. Const., Art. I, § 8, cl. 3.

Article II of the United States Constitution “vest[s]” the “executive Power” in the President and states the President shall “take Care that the Laws be faithfully executed.” U.S. Const, Art. II, § 1, cl. 1; § 3.

The Fifth Amendment to the United States Constitution states that “no person shall be . . . deprived of life, liberty, or property without due process of law.”

The Sixth Amendment to the United States Constitution states that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.”

Section 922(g)(1) of Title 18 of the United States Code states that it is “unlawful for any person . . . [w]ho 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.”

Section 924(e) of Title 18 of the United States Code states:

- (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

INTRODUCTION

I. Petitioner Samuel Storey was convicted of possessing a firearm as a felon and sentenced, over his objection, to the Armed Career Criminal Act's enhanced statutory penalties based on judicial fact-finding that he had three qualifying convictions for offenses committed on occasions different from one another.

On appeal, the government agreed with Mr. Storey that the constitutional error under *Erlinger v. United States*, 602 U.S. 821 (2024), required reversal—deliberately waiving that the error was harmless—and asked the Eleventh Circuit to remand his case so he could be resentenced without the ACCA enhancement.

The Eleventh Circuit overrode the government's waiver and found the *Erlinger* error harmless beyond a reasonable doubt. In doing so, the court of appeals decided that Mr. Storey must serve the unconstitutional sentence that the government in its exercise of prosecutorial discretion chose not to pursue. Doing so was an abuse of discretion, clearly erroneous under this Court's precedent, and a serious intrusion on the separation of powers. This Court's intervention is needed.

II. By affirming Mr. Storey’s unconstitutional ACCA sentence based on harmless-error review, the Eleventh Circuit replicated the constitutional error that the district court made, finding for itself the facts sufficient to convict Mr. Storey of the ACCA enhancement—even though the Constitution guarantees that only a jury of Mr. Storey’s peers can make that finding. In doing so, the court appeals relied on this Court’s decision in *Neder v. United States*, 527 U.S. 1 (1999), which held that the failure to charge and prove an element of a crime is subject to harmless-error review.

The time has come for the Court to consider whether to overrule *Neder*. The decision cannot be reconciled with the Fifth and Sixth Amendment principles that this Court has since recognized in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny, including *Erlinger*. The Court should rectify the misdirection it took in *Neder* and confirm that it meant what it said (and has said again and again): any fact that increases a defendant’s criminal punishment must be charged by the government and proven to a unanimous jury of the defendant’s peers—not a district judge or panel of court of appeals judges—beyond a reasonable doubt.

III. Section 922(g)(1) of Title 18 of the United States Code is a frequently charged federal offense. Yet the federal government relies on purely intrastate conduct—the possession of a firearm—to prosecute individuals like Mr. Storey. The district court denied Mr. Storey’s motion to dismiss the indictment for violating the Commerce Clause as foreclosed by Eleventh Circuit precedent, but it wrote to explain that the circuit precedent was hard to reconcile with this Court’s Commerce Clause decisions. And it worried that the “minimal nexus” test embraced by the courts of appeals risked creating a federal police power that intruded on the States’ general criminal jurisdiction.

The courts of appeals are intractable on this issue, despite Justice Thomas and multiple federal judges pointing out the serious constitutional problem with the federal government prosecuting intrastate conduct like possessing a firearm. Mr. Storey’s case presents an ideal vehicle for this Court to finally step in and decide whether § 922(g)(1) violates the Commerce Clause.

STATEMENT OF THE CASE

1. The federal government charged Mr. Storey with possessing a firearm knowing he had been convicted of a crime punishable by more than a year's imprisonment. Doc. 1.¹

2. Mr. Storey moved to dismiss the indictment, arguing that 18 U.S.C. § 922(g)(1) exceeds Congress's authority under the Commerce Clause, facially and as applied to his purely intrastate possession of the firearm, but conceding that circuit precedent foreclosed his argument. Doc. 37.

In a written order denying his motion, the district court acknowledged that the Eleventh Circuit's precedent was in "some tension" with this Court's recent Commerce Clause cases. Doc. 41. at 3 (citing *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000)).

The district court expressed concern that the "minimal nexus" test adopted by the Eleventh Circuit and the other courts of appeals was problematic for other reasons. "Under the original meaning of the

¹ "Doc." references the district court docket entries. "App. Doc." references the appellate court docket entries.

Commerce Clause, § 922(g)(1) may” intrude on “the States’ general criminal adjudication” and impose “on the People’s liberty” because it “encompasses an activity—mere intrastate firearm possession—that” is not an economic activity that could substantially affect interstate commerce, even through repetition. *Id.* at 4 (quoting *Gamble v. United States*, 139 S. Ct. 1960, 1980 n.1 (2019) (Thomas, J., concurring), and citing *Lopez*, 514 U.S. at 567).

The logical conclusion of the minimal nexus test, the district court explained, is that Congress can ban possession of any item that ever crossed state lines, which risked “convert[ing] congressional authority under the Commerce Clause into a general police power of the sort retained by the States.” *Id.* (citing *Alderman v. United States*, 131 S. Ct. 700, 703 (2011) (Thomas, J., dissenting from the denial of a petition for writ of certiorari) (alteration adopted)). Despite those concerns, binding Eleventh Circuit precedent meant the district court was “not at liberty to chart another course.” *Id.*

3. Mr. Storey pleaded guilty. Doc. 52. At his change of plea hearing, he admitted that the pistol he possessed in Sarasota County, Florida was manufactured outside of Florida and necessarily crossed

state lines to enter Sarasota County. Doc. 83 at 9–10.

4. The parties proceeded to sentencing. The United States Probation Office recommended that Mr. Storey be sentenced under the Armed Career Criminal Act, 18 U.S.C. § 924(e), because of three Florida sale of cocaine convictions, which Probation characterized as convictions for “serious drug offense[s]” that had been “committed on occasions different than one another.” *See* Doc. 74 (Final Amended PSR) ¶ 21.

5. Mr. Storey objected to the ACCA enhancement, arguing that the government had failed to prove his prior offenses were committed on different occasions as required under ACCA. Doc. 66 at 11. He argued that relying on non-elemental facts about his prior convictions to make the different-occasions finding using a preponderance standard violated the Sixth Amendment. Whether his offenses occurred on “different occasions” was a “multi-factored” inquiry, he explained, that went far beyond the “narrow” exception to the constitutional requirement that every fact that increases statutory penalties must be charged in an indictment and proven to a jury beyond a reasonable doubt. Doc. 66 at 12–13. He also noted that he had pled *nolo contendere* to the prior offenses, thus never admitting the allegations in the charging documents,

id., and he objected to any facts about the offenses in the PSR, Doc. 74 at 30. In response to Mr. Storey’s objections, the government submitted the *Shepard*² documents for each of the three cocaine convictions. Doc. 67 at 3; Doc. 67-1; Doc. 67-2; Doc. 67-3.

6. At sentencing, the district court overruled Mr. Storey’s objections, found ACCA’s different-occasions requirement satisfied based on the alleged offense dates in the *Shepard* documents, and sentenced him to 204 months’ imprisonment. Doc. 84 at 33–34, 39, 53–54.

7. Mr. Storey appealed. He renewed his Commerce Clause challenge, as well as his constitutional challenge to ACCA’s different-occasions element, which had by then been vindicated by *Erlinger v. United States*, 602 U.S. 821 (2024). App. Doc. 33 at 28–32, 41–54. After filing his initial brief and consulting the government, Mr. Storey filed an unopposed motion for summary reversal based on *Erlinger*. App. Doc. 42. The Eleventh Circuit denied the motion and directed the government to file a response brief. App. Doc. 44.

9. In that brief, the government joined Mr. Storey’s request that the court of appeals vacate his sentence and remand for resentencing

² *Shepard v. United States*, 544 U.S. 13 (2005).

without the ACCA enhancement because of the *Erlinger* error. App. Doc. 45 at 15, 19–20. In doing so, the government knowingly and intelligently waived any claim that the error was harmless:

- “[T]he United States does not assert that the error here is harmless.”
- “And the United States does not assert that the error here is harmless.”
- “[T]he United States does not assert that the error here is harmless beyond a reasonable doubt.”

Id. at 15, 19, 23.

10. The Eleventh Circuit affirmed. App. Doc. 49. It concluded, as Mr. Storey had conceded, that his Commerce Clause issue was foreclosed by circuit precedent. *Id.* at 5–6. And despite the government’s waiver of harmless error on the *Erlinger* issue, the panel found the error harmless based on its own review of alleged facts from the sentencing record. *Id.* at 9–10. The Eleventh Circuit also rejected Mr. Storey’s argument that *Erlinger* error was structural as foreclosed by prior circuit precedent. *Id.* at 8.

11. Mr. Storey filed a petition for rehearing focusing on the

impropriety of his ACCA sentence, including the court’s exercise of harmless-error review over the government’s express waiver and the issue of structural error. App. Doc. 54. The Eleventh Circuit denied his petition. App. Doc. 56.

REASONS FOR GRANTING THE WRIT

I. This Court’s review is needed on whether a court of appeals may disregard the government’s waiver of whether a jury trial right violation was harmless in the enhanced statutory penalty context.

A. The Eleventh Circuit abused its discretion by holding that the *Erlinger* error was harmless despite the government’s deliberate waiver of the issue.

The United States of America has an adversarial justice system, with “deep historical roots that predate this country’s founding. *United States v. Campbell*, 26 F.4th 860, 893 (11th Cir. 2022) (en banc) (Newsom, J., dissenting) (discussing history of adversarial system). Our adversarial system “follow[s] the principle of party presentation.” *Greenlaw v. United States*, 554 U.S. 237, 243 (2008). It “rel[ies] on the parties to frame the issues for decision and assign[s] the courts the role of neutral arbiter of matters the parties present.” *Id.*

“What makes a system adversarial rather than inquisitorial is . . . the presence of a judge who does not (as an inquisitor does) conduct the

factual and legal investigation himself, but instead decides on the basis of the facts and arguments . . . adduced by the parties.” *McNeil v. Wisconsin*, 501 U.S. 171, 181 n.2 (1991). In criminal law, any departures from this system “have usually occurred to protect a pro se litigant’s rights.” *United States v. Sineneng-Smith*, 590 U.S. 371, 375 (2020). Otherwise, “parties represented by competent counsel know what is best for them.” *Id.*

Thus, as this Court has held, a federal court cannot “bypass, override, or excuse” the government’s “deliberate waiver.” *Wood v. Milyard*, 566 U.S. 463, 471 (2012) (discussing State’s waiver of limitations defense in habeas proceedings). A “waiver is the intentional relinquishment or abandonment of a known right.” *Kontrick v. Ryan*, 540 U.S. 443, 458 n.13 (2004).

This principal holds especially strong when the government waives a sentencing issue. “Congress . . . has accorded to the top representatives of the United States in litigation the prerogative to seek or forgo appellate correction of sentencing errors,” and “[t]hat measure should garner the Judiciary’s full respect.” *Greenlaw*, 554 U.S. at 246.

This Court has repeatedly denounced judicial resurrection of government-waived issues in criminal cases. *See, e.g., Wood*, 566 U.S. at 466 (holding, in habeas case, that circuit court abused its discretion by taking up timeliness issue when State was “aware of a limitations defense, and intelligently cho[se] not to rely on it”); *Greenlaw*, 554 U.S. at 241–48 (holding that circuit court could not increase defendant’s sentence to mandatory minimum when government had not appealed that issue); *Johnson v. United States*, 559 U.S. 133, 145 (2010) (refusing to remand for consideration of whether prior conviction satisfied ACCA’s “residual clause” because government had earlier disclaimed any reliance on that clause).

The Eleventh Circuit flouted this Court’s precedent and the bedrock principle of party presentation, assuming for itself the inquisitorial role to affirm Mr. Storey’s ACCA sentence based on an issue the government intelligently waived. The government bore the burden to prove the *Erlinger* error was harmless beyond a reasonable doubt. It intentionally relinquished that burden through an affirmative statement disclaiming harmless error, repeatedly stating it “does not assert that the error here is harmless.” App. Doc. 45 at 15, 19, 23. In light of that “deliberate

waiver,” the Eleventh Circuit abused its discretion by deciding to raise harmless error on its own. *Wood*, 566 U.S. at 466.

As a final note, the Eleventh Circuit seemingly treated the government’s waiver as a forfeiture. App. Doc. 49 at 9 (describing harmless error as “not argue[d] and “not raised” and relying on *United State v. Graham*, 123 F.4th 1197, 1272 (11th Cir. 2024), which discusses court’s discretion when government “failed to argue” and “does not address” harmless error). It was not a forfeiture. The government raised harmless error and deliberately disclaimed it. App. Doc. 45 at 15, 19, 23. And as this Court has explained, the distinction between an “intentional relinquishment or abandonment”—like the government did here—and mere forfeiture or inadvertent concession matters. *Wood*, 566 U.S. at 174. It is not within the court of appeals’ discretion to override the former.

B. The Eleventh Circuit’s exercise of harmless-error review over the government’s deliberate waiver and request that Mr. Storey be resentenced without the ACCA enhancement violates separation of powers and intrudes on prosecutorial discretion.

The Eleventh Circuit’s exercise of harmless-error review over the government’s waiver is particularly inappropriate in light of the constitutional error that occurred in the district court. When Mr. Storey

was sentenced, prevailing law required the district court to apply ACCA when it determined a defendant qualified, “regardless of whether the government seeks application of the enhancement.” *United States v. Sharp*, 21 F.4th 1282, 1285 (11th Cir. 2021).

Erlinger established the clear error in that premise: the Fifth and Sixth Amendments require that ACCA’s different-occasions element be charged by the government and proven to a unanimous jury beyond a reasonable doubt. 602 U.S. at 830–36. These principles serve as checks on governmental power—including on the Judiciary. *Id.* at 832. As *Erlinger* explained, the Fifth and Sixth Amendments “seek to constrain the Judicial Branch, ensuring that the punishments courts issue are not the result of a judicial ‘inquisition,’ but are premised on” facts the government proves to a unanimous jury. *Id.* at 832.³

³ That didn’t happen here. The government did not charge the different-occasions element, and no relevant evidence was presented to a jury or admitted during Mr. Storey’s guilty plea. In holding the error harmless, the Eleventh Circuit relied on “facts” from the sentencing record despite Mr. Storey’s objections in the district court. App. Doc. 49 at 8 n.1, 10. The court of appeals acknowledged that it was error for the district court to consider that evidence, but stated that an appellate court could consider the “whole record” for purposes of harmless-error review. *Id.* at 8 n.1. Mr. Storey disagrees, but recognizes that this Court has recently denied petitions asking it to address the scope of the record for harmless-error review. *See, e.g.*, No. 25-5179, *Campbell v. United States*.

After *Erlinger*, the ACCA enhancement, like the rest of “the Nation’s criminal laws,” falls within the Executive Branch’s “broad discretion” to enforce. *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (quoting *Wayte v. United States*, 470 U.S. 598, 607 (1985)). “The Executive Branch—not the Judiciary—makes arrests and prosecutes offenses on behalf of the United States.” *United States v. Texas*, 599 U.S. 670, 678 (2023).

In most cases, “the decision whether or not to prosecute, and what charge to file or bring before a grand jury, . . . rests entirely in [the prosecutor’s] discretion.” *Armstrong*, 517 U.S. at 464 (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)). As this Court has explained, the prosecutor’s “broad discretion” rests in large part on the “the recognition that the decision to prosecute is particularly ill-suited to judicial review.” *Wayte*, 470 U.S. at 607. Factors underlying the decision to prosecute “are not readily susceptible to the kind of analysis the courts are competent to undertake.” *Id.*

Prosecutorial discretion is not limited to whether to prosecute. “The exercise of prosecutorial discretion affects almost every step of the criminal justice process, from charging to sentencing.” Rebecca Krauss,

The Theory of Prosecutorial Discretion in Federal Law: Origins and Developments, 6 Seton Hall Cir. Rev. 1 (2009). A prosecutor can choose which crime to charge (“[this] Court ‘has long recognized that when an act violates more than one criminal statute, the Government may prosecute under either’”) as well as whether to “grant immunity, accept a plea bargain, [or] dismiss charges.” *Id.* (quoting *United States v. Batchelder*, 442 U.S. 114, 123–24 (1979)) (footnotes omitted).

The discretion thus extends to discretionary statutory recidivist enhancements (even those for which the Court has not yet recognized a jury trial right). *See Carachuri-Rosendo v. Holder*, 560 U.S. 563, 579 (2010). Indeed, this Court has stated that when a state system “afford[s] similar deference to prosecutorial discretion when prescribing recidivist enhancements” and the prosecutor “specifically elected to ‘abandon’ a recidivist enhancement under state law, . . . permit[ting] a federal immigration judge to apply his own recidivist enhancement after the fact . . . would denigrate the independent judgment of state prosecutors to execute the laws of those sovereigns.” *Id.* at 579–80 (alteration adopted).

Too here, the government deliberately relinquished its newly recognized right to prosecute Mr. Storey’s ACCA penalty by waiving

harmless error and joining his request for resentencing without the enhancement. App. Doc. 45 at 15, 19–20, 23. Rather than respect the government’s decision, the Eleventh Circuit compounded the district court’s constitutional error by intruding on the Executive Branch’s “exclusive authority and absolute discretion to decide whether to prosecute a case.” *United States v. Nixon*, 418 U.S. 683, 693 (1974).

After *Erlinger*, the power to charge (or not) and to prove (or not) ACCA is in the hands of the Executive Branch, not the Judiciary. This Court’s intervention is needed to safeguard the Fifth and Sixth Amendments’ check on governmental powers and to ensure the continued separation of powers that the framers envisioned and this Court’s precedent demands.

C. Only this Court can correct the error, and its intervention is important.

This petition presents the Court with a critical opportunity not only to remind the lower courts of the importance of following the principle of party presentation but also to ensure that punishment by judicial inquisition does not creep into our adversarial system under the cloak of judicial review.

The Court has recently exercised its review power to correct party-principle transgressions in the criminal context. *See, e.g., Clark v. Sweeney*, 607 U.S. 7, 9–10 (2025) (summarily holding that court of appeals violated party-principle presentation by granting habeas relief on claim prisoner never asserted and remanding for consideration of claim prisoner actually asserted); *Sineneng-Smith*, 590 U.S. at 375 (holding that court of appeals “departed so drastically from the principle of party presentation as to constitute an abuse of discretion” and remanding for adjudication of “the case shaped by the parties rather than the case designed by the appeals panel”).

In both *Sweeney* and *Sineneng-Smith*, this Court corrected violations that had favored the prisoner or criminal defendant. If anything, intervention is even more warranted here, where the Eleventh Circuit’s transgression harmed the criminal defendant and intruded on the Executive Branch’s exercise of prosecutorial discretion regarding the appropriateness of the ACCA enhancement in Mr. Storey’s case.

Mr. Smith gave the Eleventh Circuit an opportunity to right its error through his petition for rehearing. App. Doc. 54 at 15–19. The court declined to do so without explanation. App. Doc. 56. Only this Court’s

discretionary review remains to ensure that Mr. Storey does not serve a statutorily enhanced sentence, in violation of his Fifth and Sixth Amendment rights, despite the government's exercise of prosecutorial discretion *not* to pursue the enhanced penalty and its request that he receive a sentence within the unenhanced penalty range.

II. This Court's review is needed to decide whether to overrule *Neder*.

Putting aside the court of appeals' abuse of discretion and intrusion on the Executive Branch when it overrode the government's deliberate waiver, this case presents another important question following the Court's recent *Erlinger* decision: Whether to overrule *Neder v. United States*, 527 U.S. 1 (1999), which the courts of appeals have uniformly relied on to hold that the failure to charge and prove to unanimous jury an element, including *Erlinger* error, is subject to harmless-error review.

The Eleventh Circuit rejected Mr. Storey's argument that *Erlinger* error is structural and applied harmless-error review based on its decision in *United States v. Rivers*, 134 F.4th 1292, 1305–06 (11th Cir. 2025) (holding that *Erlinger* error is subject to harmless-error review). See App. Doc. 49 at 8.

Rivers, in turn, relied on this Court’s decisions in *Neder* and *Washington v. Recuenco*, 548 U.S. 212 (2006). *Rivers*, 134 F.4th at 1305–06. *Neder* held that jury instructions that omit an element are not structural error but rather subject to harmless-error review. *Neder*, 527 U.S. at 8–9. And *Recuenco* relied conclusively on *Neder* to hold that the same rule applies to the failure to prove a sentencing factor to a jury. *Recuenco*, 548 U.S. at 18–22.

In its *Erlinger* briefing to the Supreme Court, the government argued for harmless-error review, likewise relying on *Neder* and *Recuenco*. See U.S. Br. at 27–28, U.S. Reply Br. at 14, *Erlinger*, 602 U.S. at 821. But *Erlinger* cited neither decision, and only three justices endorsed harmless-error review. See *Erlinger*, 602 U.S. at 849–50 (Roberts, J., concurring); *id.* at 859–61 (Kavanaugh, J., joined by Alito, J., dissenting).

Mr. Storey urges the Court to grant certiorari to reconsider *Neder*.⁴ The decision was criticized from the start as constitutionally untenable. As Justice Scalia explained in his dissent:

The Court . . . acknowledges that the right to trial by jury was denied in the present case, since one

⁴ And, correspondingly, *Recuenco*.

of the elements was not—despite the defendant’s protestation—submitted to be passed upon by the jury. But even so, the Court lets the defendant’s sentence stand, *because we judges can tell that he is unquestionably guilty.*

Even if we allowed (as we do not) other structural errors in criminal trials to be pronounced “harmless” by judges . . . it is obvious that we could not allow judges to validate *this* one. The constitutionally required step that was omitted here is distinctive, in that the basis for it is precisely that, absent voluntary waiver of the jury right, *the Constitution does not trust judges to make determinations of criminal guilt.*

Neder, 527 U.S. at 31–32 (Scalia, J., dissenting in part, joined by Souter & Ginsburg, JJ.)

Shortly after *Neder* came *Apprendi v. New Jersey*, 530 U.S. 466, 468 (2000), which held that under the Sixth Amendment, any fact that increases a defendant’s statutory penalty must be proven to a unanimous jury beyond a reasonable doubt. And the Court has since reaffirmed this constitutional bedrock principle “in response to a variety of other recent sentencing innovations.” *Erlinger*, 602 U.S. at 833 (citing *United States v. Haymond*, 588 U.S. 634 (2019); *Alleyne v. United States*, 570 U.S. 99 (2013)).

If *Neder*'s embrace of harmless-error review when a jury had not found a defendant guilty of every element of a crime was dubious at the outset, *Apprendi* and its progeny confirm its infirmity. *Neder* is impossible to reconcile with Fifth and Sixth Amendment principles underlying those bedrock decisions. As Judge Richardson, joined by Judge Diaz and Judge Floyd wrote, "there is something deeply unsatisfying" about applying harmless-error review to *Apprendi*-type errors. *United States v. Legins*, 34 F.4th 304, 423 (4th Cir. 2022). "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.*

Indeed, under *Neder*, "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.* (quoting *Neder*, 527 U.S. at 32 (Scalia, J., dissenting in part)).

This Court's intervention is needed. The courts of appeals have uniformly relied on *Neder* and *Recuenco* to hold that *Erlinger* errors are amenable to harmless-error review. *See Rivers*, 134 F.4th at 1305–06;

United States v. Beasley, 163 F.4th 403, 406–09 (7th Cir. 2025); *United States v. Brown*, 136 F.4th 87, 93–95 (4th Cir. 2025); *United States v. Butler*, 122 F.4th 584, 589 (5th Cir. 2024); *United States v. Campbell*, 122 F.4th 624, 630–31 (6th Cir. 2024).

And the problem is not limited to *Erlinger* errors. Absent action by this Court, *Neder* will continue to give the courts of appeals permission to sit not as a court of review but as a finder of guilt in the first instance, convicting defendants of crimes and aggravated penalties that the government never charged and a jury of the defendant’s peers never found beyond a reasonable doubt. *See Legins*, 34 F.4th at 324 (expressing concern that this practice “diminishes the jury’s historic” role but stating that it was “bound by” *Neder* and *Recuenco* to apply harmless error review to the omission of “all elements, including sentencing factors” (internal quotation marks omitted)).

In the recent years, this Court has “overruled several decisions inconsistent with” the “principles *Apprendi* and *Alleyne* discussed.” *Erlinger*, 602 U.S. at 833–34. *Neder* should make one more.

III. This Court’s review is warranted on the important and recurring question of whether Congress’s Commerce Clause authority empowers it to criminalize intrastate firearm possession in 18 U.S.C. § 922(g)(1).

Congress has made it criminal for nine categories of individuals, including felons, to possess firearms. 18 U.S.C. § 922(g)(1)–(9). The time for reviewing the constitutionality of § 922(g) is ripe. *See, e.g., United States v. Rahimi*, 602 U.S. 680, 765 n.6 (2024) (Thomas, J., dissenting) (“I doubt that § 922(g)(8) is a proper exercise of Congress’s power under the Commerce Clause”); *United States v. Bonner*, 159 F.4th 338, 340–43 (5th Cir. 2025) (Willett, J., joined by Duncan, J., concurring) (“harbor[ing] doubts that § 922(g)(1) is constitutional” under Congress’s Commerce Clause authority and expressing that further review is warranted); *United States v. Hembree*, 165 F.4th 909, 919–21 (5th Cir. 2026) (Willett, J., concurring) (reiterating openness “to reconsidering whether § 922(g)(1) truly falls within Congress’s enumerated powers”).

Section 922(g) is one of the most commonly prosecuted federal offenses. In fiscal year 2024, of the more than 61,000 cases reported to the Sentencing Commission, over 7,400 (12%) involved convictions under § 922(g). *See* United States Sentencing Commission, Quick Facts: 18 U.S.C. § 922(g) Firearms Offenses Fiscal Year 2024, *available at*

<https://tinyurl.com/4dmjxjns>. Of those, over 90% were § 922(g)(1) convictions. *Id.*

Yet under our Constitution, Congress lacks plenary power to “punish felonies generally.” *Bonner*, 159 F.4th at 340–41 & n.6 (Willett, J., joined by Duncan, J., concurring) (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 428 (1821)). General police power is reserved to the states, leaving Congress with only those powers enumerated in the Constitution. *Id.* at 340–41 & n.3 (citing *United States v. Morrison*, 529 U.S. 598, 607 (2000)); *United States v. Lopez*, 514 U.S. 549, 566-67 (1995).

Congress purports to rely on its Commerce Clause authority to criminalize firearm possession. *See* 18 U.S.C. § 922(g) (proscribing possession “in or affecting commerce”).⁵ But possession of a firearm by a felon, just like possession of a firearm in a school zone, “has nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms.” *Lopez*, 514 U.S. at 561; *see id.* at 551–52 (affirming Fifth Circuit’s decision concluding that 18 U.S.C. § 922(q), which proscribed possessing a firearm in a school zone, exceeds

⁵ Congress has the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. Const. Art. I, § 8, cl. 3.

Congress’s Commerce Clause authority). Nor can § 922(g)(1) be defended by aggregating the effect of all felon firearm possession, because “aggregation is ordinarily appropriate only when the underlying activity is economic—and firearm possession is not.” *Bonner*, 159 F.4th at 342 & n.18 (Willett, J., joined by Duncan, J., concurring) (citing *Lopez*, 514 U.S. at 567).

Mr. Storey and other § 922(g) defendants’ convictions instead rest on the theory that Congress can criminalize the possession of any item “so long as it was manufactured out-of-state—without any regard to when, why, or by whom the item was transported across state lines.” *United States v. Seekins*, 52 F.4th 988, 990 (5th Cir. 2022) (Ho, J., joined by Smith, Engelhardt, JJ., dissenting from denial of rehearing en banc). As several federal judges have recently written, this theory does not accord with the original meaning of the Commerce Clause. *See id.* at 990–91 (citing *Lopez*, 514 U.S. at 585-87 (Thomas, J., concurring); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101, 146 (2001) (“The most persuasive evidence of original meaning . . . strongly supports Justice Thomas’s and the Progressive Era Supreme Court’s narrow interpretation of the Congress’s power [under the

Commerce Clause].”); William J. Seidleck, *Originalism and the General Concurrence: How Originalists Can Accommodate Entrenched Precedents While Reining in Commerce Clause Doctrine*, 3 U. Pa. J. L. & Pub. Affs. 263, 269 (2018) (“The founding generation understood the term ‘commerce’ to mean only ‘trade or exchange of goods.’ . . . The writings of the framers and the purpose behind the creation of the Commerce Clause also confirm its intended narrow scope.”)).

Nor does this theory provide any real limit to Congress’s Commerce Clause authority or its encroachment on the states’ police powers. *Id.* at 990–92. As Fifth Circuit judges have explained, “If it’s enough that some object (or component of an object) at some unknown (and perhaps unknowable) point in time traveled across state lines to confer federal jurisdiction, it’s hard to imagine anything that would remain outside the federal government’s commerce power.” *Id.* at 990.

The theory that Congress can criminalize an item’s possession based on its place of manufacture originates not from the text or history of the Commerce Clause but from appellate court decisions following *Scarborough v. United States*, 431 U.S. 563 (1977). See, e.g., *United States v. McAllister*, 77 F.3d 387, 389–90 (11th Cir. 1996); *United States v.*

Rawls, 85 F.3d 240, 242–43 (5th Cir. 1996) (collecting cases); *see also Bonner*, 159 F.4th at 343 (“Our reliance on *Scarborough* combines these fears: our decisions now expand federal power not by remote implication from the constitutional text, but by remote implication from our own precedents”). In *Scarborough*, this Court construed § 922(g)(1)’s predecessor and found no indication Congress “intended to require any more than the minimal nexus that the firearm have been, at some time, in interstate commerce.” 431 U.S. at 575.

But Congress’s statutory intention and its constitutional authority are different questions. *Scarborough*, which pre-dated *Lopez*, dealt only with the former, statutory interpretation question. *See Seekins*, 52 F.4th at 991 (Ho, J., joined by Smith, Engelhardt, JJ., dissenting from denial of rehearing en banc) (stating that “our reliance on *Scarborough* was erroneous” because “the Court’s holding in *Scarborough* was statutory, not constitutional” and “*Scarborough* pre-dates *Lopez*”); *Bonner*, 159 F.4th at 342 & n.22 (Willett, J., joined by Duncan, J., concurring) (“*Scarborough* addresses only questions of statutory construction, and does not expressly purport to resolve any constitutional issue.” (internal quotation marks omitted)).

The constitutional question presented by this petition can be resolved only by this Court. As Justice Thomas explained over a decade ago:

Fifteen years ago in *Lopez*, we took a significant step toward reaffirming this Court's commitment to proper constitutional limits on Congress' commerce power. If the *Lopez* framework is to have any ongoing vitality, it is up to this Court to prevent it from being undermined by a 1977 precedent that does not squarely address the constitutional issues.

Alderman, 131 S. Ct. at 703 (2011) (dissenting from the denial of a petition for writ of certiorari). And in the years since *Alderman*, the court of appeals have proved Justice Thomas correct, holding fast to their precedent upholding the constitutionality of § 922(g)(1). This Court's intervention is needed.

Mr. Storey's case presents an excellent opportunity to resolve this important constitutional question. His offense, possession, was local and non-economic. But § 922(g)(1) was applied to him based on the firearm's manufacture, at some point in the past, outside of Florida. He raised the constitutional question of whether Congress, consistent with its power to regulate interstate commerce, may criminalize an individual's intrastate firearm possession, in both the district court and the court of appeals.

This Court should thus grant certiorari on this issue, which impacts thousands of criminal defendants, to ensure that § 922(g)(1) does not intrude on “the States’ general criminal adjudication” or impose “on the People’s liberty” by “convert[ing] congressional authority under the Commerce Clause into a general police power of the sort retained by the States.” Doc. 41 at 4 (quoting *Gamble*, 139 S. Ct. at 1980 n.1 (Thomas, J., concurring), and *Lopez*, 514 U.S. at 567).

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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