No. 25-7216

IN THE SUPREME COURT OF THE UNITED STATES

SAMUEL STOREY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals permissibly affirmed the application of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), on the ground that petitioner was not prejudiced by an error by the district court in its application.

2. Whether this Court should overrule Neder v. United States, 527 U.S. 1 (1999), and Washington v. Recuenco, 548 U.S. 212 (2006).

3. Whether 18 U.S.C. 922(g)(1) violates the Commerce Clause on its face or as applied to petitioner.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A13) is available at 2025 WL 2846450.[1]

JURISDICTION

The judgment of the court of appeals was entered on October 8, 2025. A petition for rehearing was denied on January 5, 2026. Pet. App. B1. The petition for a writ of certiorari was filed on April 2, 2026. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] Appendix A and Appendix B to the petition for a writ of certiorari are not sequentially paginated. This brief treats both appendices as if they were, beginning with page 1 following each cover page.

STATEMENT

Following a guilty plea in the United States District Court for the Middle District of Florida, petitioner was convicted of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(e). Judgment 1. He was sentenced to 204 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. A1-A13.

1. On August 22, 2020, petitioner walked up to a man in a store, struck him in the head, pulled out a gun, pointed it at the man, and demanded "get my money." Presentence Investigation Report (PSR) ¶ 8; see PSR ¶¶ 7-9. When petitioner returned to the same store later that day, he was arrested by an officer investigating the incident, who found a loaded .380 caliber pistol with an extended magazine in petitioner's pocket. PSR ¶ 8. Petitioner confessed to committing the assault and claimed that the victim owed him $200. PSR ¶ 10.

At the time, petitioner had an active state arrest warrant for aggravated assault with a deadly weapon and possession of a weapon by a convicted felon. PSR ¶ 9. He also had four previous felony convictions, including one for possessing a firearm and ammunition as a felon. PSR ¶ 2. Petitioner admitted that he knew that he was prohibited from possessing a firearm. PSR ¶ 10.

2. A grand jury in the Middle District of Florida charged petitioner with possessing a firearm following a felony

conviction, in violation of 18 U.S.C. 922(g)(1) and 924(e). Indictment 1-2. Petitioner filed a motion to dismiss the indictment on the theory that Section 922(g)(1) exceeds Congress's authority under the Commerce Clause, which the district court denied. Pet. App. A2. Petitioner then pleaded guilty without a plea agreement. Ibid.

The Probation Office determined that petitioner qualified for an enhanced sentence under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e). PSR ¶¶ 21, 116. At the time of petitioner's offense, the default term of imprisonment for possessing a firearm following a felony conviction was zero to ten years. See 18 U.S.C. 924(a)(2) (2018). The ACCA prescribes a penalty of 15 years to life imprisonment if the defendant has at least "three previous convictions * * * for a violent felony or a serious drug offense, or both, committed on occasions different from one another." 18 U.S.C. 924(e)(1).

The Probation Office determined that petitioner had three prior convictions for serious drug offenses that qualified as ACCA predicates: a 1998 conviction for the sale or delivery of cocaine; a 2000 conviction for the sale or delivery of cocaine; and a 2005 conviction for the sale of cocaine. PSR ¶ 21. Petitioner objected, arguing that a jury, not the district court, should make "the factual findings of the dates of these offenses." Sent. Tr. 33. The court rejected that argument and found that petitioner qualified for sentencing under the ACCA based on the judicial

records of his prior convictions. Id. at 33-34, 39. The court sentenced petitioner to 204 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3.

3. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. A1-A13.

With respect to petitioner's ACCA sentence, the court of appeals noted that the parties agreed that the district court erred in light of this Court's intervening decision in Erlinger v. United States, 602 U.S. 821, 834-835 (2024), which held that the Fifth and Sixth Amendments require that a jury determine whether prior offenses were committed on different occasions for purposes of the ACCA. Pet. App. A8. The court also noted that the parties agreed that a remand was appropriate, ibid., because the government did "not assert" harmless error in its appellate brief, Gov't C.A. Br. 9. The court then further noted discretion to "consider issues not raised by a party in 'extraordinary circumstances,'" such as when "'the proper resolution is beyond any doubt.'" Pet. App. A9 (citations omitted). And in this case, it affirmed the ACCA sentence on the ground that it was "patently obvious" that petitioner's three prior cocaine offenses "occurred on different occasions" because the offenses were "separated by years." Id. at A9-A10 (citation and internal quotation marks omitted).

With respect to the constitutionality of Section 922(g), the court of appeals concluded that petitioner's Commerce Clause argument was foreclosed by circuit precedent. Pet. App. A5-A6

(citing United States v. Longoria, 874 F.3d 1278, 1283 (11th Cir. 2017) (per curiam), cert. denied, 586 U.S. 899 (2018)).[2]

ARGUMENT

Petitioner contends (Pet. 11-20) that the court of appeals erred in affirming his conviction on a ground that the government did not advance. Petitioner further contends (Pet. 20-24) that this Court should overrule Neder v. United States, 527 U.S. 1 (1999), and Washington v. Recuenco, 548 U.S. 212 (2006), and hold that the failure to submit an element of an offense to the jury is not subject to harmless-error review. Finally, petitioner contends (Pet. 25-31) that 18 U.S.C. 922(g)(1), which prohibits convicted felons from possessing firearms "in or affecting commerce," exceeds Congress's authority under the Commerce Clause, U.S. Const. Art. 1, § 8, Cl. 3. Petitioner's contentions lack merit and do not warrant this Court's review.

1. a. As to petitioner's contention that the court of appeals should not have applied harmless-error review, it is well-settled that appellate courts "have discretion to affirm on any ground supported by the law and the record that will not expand the relief granted below." Upper Skagit Indian Tribe v. Lundgren, 584 U.S. 554, 560 (2018). "The reason for this rule is obvious. It would be wasteful to send a case back to a lower court to

[2] In July 2026 -- after the petition for a writ of certiorari was filed -- the district court resentenced petitioner to 132 months of imprisonment given his substantial assistance to law enforcement in another matter. Am. Judgment 2; D. Ct. Doc. 97, at 1 (June 22, 2026); see Fed. R. Crim. P. 35(b).

reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground within the power of the appellate court to formulate." SEC v. Chenery Corp., 318 U.S. 80, 88 (1943); see Richison v. Ernest Grp., Inc., 634 F.3d 1123, 1130 (10th Cir. 2011) ("This reluctance to command do-overs in the district court is * * * why we treat arguments for affirming the district court differently than arguments for reversing it. We have long said that we may affirm on any basis supported by the record, even if it requires ruling on arguments not reached by the district court or even presented to us on appeal.").

That rule is particularly apt in the criminal context. "The reversal of a conviction entails substantial social costs." United States v. Mechanik, 475 U.S. 66, 72 (1986). It burdens "jurors, witnesses, courts, the prosecution, and the defendants"; it creates the risk that the guilty may go free due to the passage of time; and it "compromises society's 'interest in the prompt administration of justice.'" Ibid. (citation omitted). Accordingly, Federal Rule of Criminal Procedure 52(a) specifically provides that any error in a criminal trial "that does not affect substantial rights must be disregarded." Fed. R. Crim. P. 52(a)(emphasis added). And the courts of appeals uniformly recognize that they have discretion to consider whether an error

was harmless even if the state or federal government has forfeited the argument.[3]

Here, as petitioner recognizes (Pet. 14), the court of appeals viewed the government to have forfeited, rather than waived, a harmless-error argument. The court then found that the record made it "patently obvious" that the district court's Erlinger error was harmless beyond any doubt. Pet. App. A9 (citation omitted). This Court has approvingly observed that, when offenses occur "a day or more apart," courts have "nearly always" treated them "as occurring on separate occasions." Wooden v. United States, 595 U.S. 360, 370 (2022). And there is no basis for concluding that a jury would deem petitioner's offenses -- which occurred years apart, Pet. App. A10 -- not to have occurred on different occasions. Indeed, in this Court, petitioner does not even dispute that his drug offenses occurred on different occasions, and he could not reasonably do so. Petitioner's second drug offense

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[3] See, e.g., Jones v. Cain, 600 F.3d 527, 541 & n.12 (5th Cir. 2010); United States v. Davis, 596 F.3d 852, 861 (D.C. Cir. 2010); United States v. Doe, 572 F.3d 1162, 1175 (10th Cir. 2009), cert. denied, 559 U.S. 974 (2010); United States v. Gonzalez-Flores, 418 F.3d 1093, 1100-1101 (9th Cir. 2005); United States v. Dolah, 245 F.3d 98, 107 (2d Cir. 2001), abrogated on other grounds by Crawford v. Washington, 541 U.S. 36 (2004); United States v. McLaughlin, 126 F.3d 130, 135 (3d Cir. 1997), cert. denied, 524 U.S. 951 (1998); United States v. Rose, 104 F.3d 1408, 1414 (1st Cir.), cert. denied, 520 U.S. 1258 (1997); United States v. Montgomery, 100 F.3d 1404, 1407 (8th Cir. 1996); United States v. Adams, 1 F.3d 1566, 1575-1576 (11th Cir. 1993), cert. denied, 510 U.S. 1198, and 510 U.S. 1206 (1994); United States v. Giovannetti, 928 F.2d 225, 227 (7th Cir. 1991) (per curiam).

occurred 15 months after his first offense, and his third drug offense occurred over five years after that. See ibid.

b. Petitioner's authorities (Pet. 11-13, 18-19) do not displace the settled rule that a court of appeals may affirm on any ground supported by the record. In most of the cited cases, this Court found that a court of appeals had improperly reversed or vacated on a newly injected ground. In Greenlaw v. United States, 554 U.S. 237 (2008), the court of appeals, "acting on its own initiative, order[ed] an increase in a defendant's sentence," which violated the rule that "an appellate court may not alter a judgment to benefit a nonappealing party." Id. at 240, 244. In United States v. Sineneng-Smith, 590 U.S. 371 (2020), the court of appeals "radical[ly] transform[ed]" the case by appointing three amici, relegating the parties to a "secondary role," and reversing a conviction by invalidating a federal statute on a constitutional ground that the defendant had not raised. Id. at 375, 380; see id. at 378-380. And in Clark v. Sweeney, 607 U.S. 7 (2025) (per curiam), the court of appeals "departed so drastically from the principle of party presentation as to constitute an abuse of discretion" by reversing the district court and granting relief on an ineffective-assistance-of-counsel claim that a state habeas applicant did not raise. Id. at 10 (citation omitted); see also Margolin v. National Ass'n of Immigration Judges, 608 U.S. 339, 342-343 (2026) (per curiam) (summarily reversing a court-of-appeals decision that granted relief to an appellant on a ground

that the appellant had not raised). None of those cases casts any doubt on appellate courts' ability to affirm on a basis not pressed by the appellee.

Petitioner's other authorities also cast no doubt on the decision below. In Wood v. Milyard, 566 U.S. 463 (2012), this Court held that a court of appeals abused its discretion by affirming the denial of a habeas petition on a statute-of-limitations ground that the State had affirmatively waived. Id. at 466, 474. But it made clear "that courts of appeals * * * have the authority -- though not the obligation -- to raise a forfeited timeliness defense on their own initiative." Id. at 473 (emphasis added). Here, petitioner does not dispute that the court of appeals treated this case as involving a forfeiture (e.g., Pet. 14). And his case-specific contention that the court should in fact have construed the particular statements in the government's briefs as an affirmative waiver of reliance on harmless error -- a contention whose correctness is presumed by the wording of the first question presented, see Pet. i -- does not warrant this Court's review. See Sup. Ct. R. 10.

Johnson v. United States, 559 U.S. 133 (2010), is even further afield. In that case, this Court held that a Florida battery offense did not have as an element "the use . . . of physical force against the person of another," and thus was not a "violent felony" under the ACCA. Id. at 135 (quoting 18 U.S.C. 924(e)(1) and (2)(B)(i)); see id. at 140-141. The Court declined to remand

for the court of appeals to consider whether Florida battery was a "violent felony" under the ACCA's then-operative "residual clause," on which the government had "disclaimed" reliance at sentencing. Id. at 145 (citation and internal quotation marks omitted). The Court made no general pronouncements about harmless-error review nor suggested that courts of appeals categorically lack the authority to consider sua sponte whether an error was harmless.

c. Petitioner's assertion (Pet. 14) that application of the harmless-error doctrine in this case "violates separation of powers and intrudes on prosecutorial discretion" is also without merit. The court of appeals did not force the Executive Branch to bring or maintain a charge that it did not, or does not, wish to pursue. The indictment cited the ACCA, 18 U.S.C. 924(e), and listed petitioner's prior offenses, making clear that the government intended that petitioner be subject to that sentencing enhancement. Indictment 1-2. And the government did not object to the Probation Office's determination that the ACCA enhancement applied. Am. Addendum to PSR 1.

2. Petitioner alternatively urges (Pet. 20-24) this Court to overrule Neder v. United States, 527 U.S. 1 (1999), and Washington v. Recuenco, 548 U.S. 212 (2006), and hold that an Erlinger error is structural error. This Court has previously

denied petitions for writs of certiorari presenting similar questions and should follow the same course here.[4]

In Neder, this Court held that harmless-error analysis applies to the omission of an element of an offense from a jury instruction. 527 U.S. at 8-15. In Recuenco, this Court reached the same conclusion with respect to the failure to submit to the jury a fact that increased the defendant's sentencing exposure. 548 U.S. at 221-222. This Court explained that such errors do not fall within the limited class of constitutional errors that "necessarily render[] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." Id. at 218-219 (quoting Neder, 527 U.S. at 9).

No sound reason exists to overrule Neder or Recuenco. As petitioner observes (Pet. 23), the courts of appeals are "uniform[]" in applying those precedents to cases involving Erlinger errors. Moreover, the reasons for applying harmless-error review in these circumstances have not changed since the Court's decisions in Neder and Recuenco. "[M]ost constitutional errors can be harmless." Neder, 527 U.S. at 8 (citation omitted). An error like the one asserted here "differs markedly from the constitutional violations [the Court has] found to defy harmless-error review," which involve "defect[s] affecting the framework

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[4] See, e.g., Jordan v. United States, 144 S. Ct. 2717 (2024) (No. 23-650); Zheng v. United States, 144 S. Ct. 2604 (2024) (No. 23-928); Greenlaw v. United States, 144 S. Ct. 2518 (2024) (No. 23-631).

within which the trial proceeds, rather than simply an error in the trial process itself." Ibid. (citation omitted).

Petitioner asserts (Pet. 22-23) that Neder was undermined by Apprendi v. New Jersey, 530 U.S. 466 (2000), which held that any fact that increases the statutory maximum sentence must be found by a jury. Id. at 469. But, as petitioner appears to recognize (Pet. 21), his structural-error argument is foreclosed by Recuenco, which postdates Apprendi and expressly considered that decision. See Recuenco, 548 U.S. at 219-220. Recuenco cannot have been undermined by a decision that came before it.

Finally, even assuming that the Court might decide Neder differently today, petitioner does not identify the sort of additional factors, beyond the merits, that this Court has looked for when considering whether to set aside a prior decision. See, e.g., Gamble v. United States, 587 U.S. 678, 691 (2019). Consideration of the second question presented is unwarranted.

3. Lastly, petitioner renews his contention (Pet. 25-31) that 18 U.S.C. 922(g)(1), which prohibits convicted felons from possessing firearms "in or affecting commerce," exceeds Congress's authority under the Commerce Clause, U.S. Const. Art. I, § 8, Cl. 3. In particular, he argues (Pet. 27-30) that the fact that a firearm has previously traveled across state lines does not establish a constitutionally sufficient basis for prohibiting a felon from possessing it. That contention also does not warrant further review.

This Court has held that "proof that the possessed firearm previously traveled in interstate commerce is sufficient to satisfy" the jurisdictional element of a similarly worded predecessor felon-in-possession statute. Scarborough v. United States, 431 U.S. 563, 564 (1977); see United States v. Bass, 404 U.S. 336, 350 (1971) ("[T]he Government meets its burden here if it demonstrates that the firearm received has previously traveled in interstate commerce."). As petitioner appears to recognize (Pet. 28-29), the courts of appeals have uniformly read Section 922(g)(1) the same way and have consistently upheld that reading against constitutional challenges. See, e.g., United States v. Singletary, 268 F.3d 196, 205 (3d Cir. 2001) (collecting cases), cert. denied, 535 U.S. 976 (2002). This Court has recently and repeatedly denied certiorari on the issue and should do the same here.[5]

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[5] See, e.g., Beaird v. United States, No. 25-5343 (Apr. 20, 2026); Hensley v. United States, No. 25-7248 (June 8, 2026); York v. United States, 146 S. Ct. 144 (2025) (No. 24-7244); Mason v. United States, 146 S. Ct. 140 (2025) (No. 24-7286); Freeman v. United States, 146 S. Ct. 129 (2025) (No. 24-7101); Martinez v. United States, 146 S. Ct. 127 (2025) (No. 24-7104); Riddick v. United States, 145 S. Ct. 2859 (2025) (No. 24-7182); Dean v. United States, 145 S. Ct. 2859 (2025) (No. 24-7217); Dominguez v. United States, 145 S. Ct. 2857 (2025) (No. 24-6772); Hemphill v. United States, 145 S. Ct. 2855 (2025) (No. 24-6731); Collette v. United States, 145 S. Ct. 2853 (2025) (No. 24-6497); see also Br. in Opp. at 5 n.1, Hemphill, supra (citing 44 additional denials of certiorari petitions seeking review of the same Commerce Clause issue in 2024 and 2025). The government's brief in opposition in Hemphill is publicly available on the Court's online docket.

In any event, petitioner did more than just possess a firearm that crossed state lines at some point in the past. As petitioner admitted to the arresting officer, he entered a store with a loaded firearm and attempted to extort $200 from someone who purportedly owed him money. PSR ¶ 10. That use of a firearm to attempt to collect a debt is plainly commercial activity within Congress's Commerce Clause authority. Cf. Taylor v. United States, 579 U.S. 301, 307 (2016) (Hobbs Act robbery of a drug business affects interstate commerce); Perez v. United States, 402 U.S. 146, 154 (1971) ("[e]xtortionate credit transactions" affect interstate commerce). Even if Section 922(g)(1) were theoretically unconstitutional in some cases, it would not be unconstitutional as applied to petitioner.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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