

No. 25-7216

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IN THE  
SUPREME COURT OF THE UNITED STATES

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SAMUEL STOREY,  
*Petitioner,*

v.

UNITED STATES OF AMERICA,  
*Respondent.*

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

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REPLY BRIEF FOR PETITIONER

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## REPLY BRIEF FOR PETITIONER

### **I. The Eleventh Circuit’s decision to affirm Mr. Storey’s ACCA sentence over the government’s deliberate waiver warrants this Court’s action—whether through plenary review or summary reversal.**

In the Eleventh Circuit, the government intelligently waived that the *Erlinger*<sup>1</sup> error was harmless and asked the court to remand so that Mr. Storey could be resentenced without the Armed Career Criminal Act enhancement:

- “[T]he United States does not assert that the error here is harmless. This Court should remand to the district court with instructions to sentence Storey without the ACCA enhancement.” App. Doc. 45 (Government’s Brief) at 15.<sup>2</sup>
- “And the United States does not assert that the error here is harmless. Thus, the United States agrees that Storey should be resentenced without the ACCA enhancement.” *Id.* at 19–20.
- “[T]he United States does not assert that the error here is harmless beyond a reasonable doubt. Because the United States does not assert that the *Erlinger* error is harmless, this Court should remand for the district court to resentence Storey without the ACCA enhancement.” *Id.* at 23 (citation omitted).
- “The United States requests that this Court affirm Storey’s conviction but vacate his sentence and remand for resentencing without the ACCA enhancement.” *Id.* at 27.

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<sup>1</sup> *Erlinger v. United States*, 602 U.S. 821 (2024).

<sup>2</sup> Mr. Storey cites the circuit court record (“App. Doc.”) and district court record (“Doc.”) by the pages in the ECF header.

Under our adversarial system’s principle of party presentation, the Eleventh Circuit’s decision overriding that deliberate waiver and affirming Mr. Storey’s ACCA sentence based on harmless error was an abuse of discretion. *See* Petition at 11–14 (citing, among other cases, *Wood v. Milyard*, 566 U.S. 463, 471 (2012); *Greenlaw v. United States*, 554 U.S. 237, 246 (2008)).

The government never disputes that its actions in the court of appeals constituted a deliberate waiver. *See* Brief in Opposition (BIO) at 4–10. Yet it now defends the Eleventh Circuit’s blatant violation of the party-presentation principle on the grounds that the court of appeals affirmed the very sentence it asked that court to vacate. About-face aside, the government’s argument against this Court’s intervention fails at every turn.

First, the government is wrong to draw an affirmance/reversal distinction. BIO at 8–9. *Wood*, as the government tacitly admits, concerned the circuit court’s affirmance of the denial of a habeas petition. 566 U.S. at 465. Instead, the line that matters is a knowing relinquishment versus an “inadvertent error.” *Id.* at 474. In *Wood*, the State informed the district court that it wouldn’t challenge timeliness,

and this Court treated that statement as a waiver. *Id.* Here, the government said multiple times that it wasn't asserting harmlessness. App. Doc. 45 at 15, 19–20, 23. The Eleventh Circuit's affirmance based on harmless error here, no less than the Tenth Circuit's affirmance based on timeliness in *Wood*, was an abuse of discretion.

Second, if the Eleventh Circuit's blatant error does not meet certiorari requirements, BIO at 9, it is a candidate for summary reversal. See Stephen M. Shapiro et al., *Supreme Court Practice* § 5.12(c)(3), at 5–45 (11th ed. 2019) (suggesting ordinary certiorari criteria do not apply to summary reversals, which focus on “error correction”). The error is obvious and clearly conflicts with this Court's precedent, including *Wood*. And this Court has repeatedly admonished the circuit courts that failed to abide by the party-presentation principle. Indeed, twice this past year the Court has summarily reversed for such transgressions. See *Margolin v. Nat'l Ass'n of Immigr. Judges*, 146 S. Ct. 1285 (2026); *Clark v. Sweeney*, 607 U.S. 7 (2025). The decision below warrants similar treatment.

Third, the government (which bears the burden to prove harmlessness and never even attempted to meet that burden) spills ink discussing the policy reasons behind the “affirm for any reason” rule. BIO

at 5–6. But that policy—to avoid wasteful remands or burdening the court system with a resource-heavy retrial—is inapposite here. A remand for resentencing without the ACCA enhancement, the exact remedy the government requested in the court of appeals,<sup>3</sup> would not be wasteful or resource intensive. *See Rosales-Mireles v. United States*, 585 U.S. 129, 140 (2018) (discussing that resentencing is a “brief event,” that “does not invoke the same difficulties as a remand for retrial”). Instead, it would save Mr. Storey months of unlawful imprisonment.<sup>4</sup> The Eleventh Circuit’s refusal to fix that kind of error risks undermining the public’s confidence in the judicial process. *See Rosales-Mireles*, 585 U.S. at 141. And the risk of disrepute is only enhanced by the fact that the refusal came in the face of the government’s repeated, express request that Mr. Storey’s sentence be vacated so he could be resentenced without the ACCA enhancement.

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<sup>3</sup> *See* App. Doc. 45 at 15, 19–20, 23, 27.

<sup>4</sup> The district court recently granted the government’s motion under Rule 35 of the Federal Rules of Criminal Procedure and reduced Mr. Storey’s sentence to 132 months’ imprisonment. Docs. 97, 103, 104. That sentence still exceeds his applicable statutory maximum of 120 months. *See* 18 U.S.C. § 924(a)(2) (2021).

Fourth, the government provides no meaningful response to Mr. Storey's separation of powers and prosecutorial discretion argument. *See* Petition at 14–18. True, the government cited 18 U.S.C. § 924(e) in the indictment and didn't object to the ACCA enhancement in the PSR. BIO at 10. But so what? As Mr. Storey explained, the district court proceedings predated *Erlinger*, which established that it is the government's prerogative, and burden, to prove the ACCA enhancement beyond a reasonable doubt. Petition at 14–15. With the benefit of *Erlinger*, the government disclaimed its burden and repeatedly requested that Mr. Storey be resentenced without ACCA's enhanced penalties.

The Eleventh Circuit's insistence on subjecting Mr. Storey to the ACCA anyway intruded on Executive Branch's authority. Petition at 15–18. Though the government may now try to handwave away that intrusion, this Court's intervention is needed on this important issue to ensure that judicial imposition of statutory sentence enhancements the government deliberately chose not to pursue does not violate the Fifth and Sixth Amendments or separation of powers.

## II. The government’s *stare decisis* argument against granting review to decide whether to overrule *Neder* and *Recuenco* is unavailing.

As Justice Scalia explained, *Neder*<sup>5</sup> has the distinction of being the “only instance . . . 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 criminal guilt reserved to the jury).” *Neder*, 527 U.S. at 32 (Scalia, J., dissenting in part). A dubious honor, indeed.

The government asserts that “[n]o sound reason” exists to overrule *Neder* or *Recuenco*<sup>6</sup> and claims that Mr. Storey has not identified “the sort of additional factors, beyond the merits, that this Court has looked for when considering whether to set aside a prior decision.” BIO at 11–12. But in recent years, this Court has repeatedly overruled decisions that are inconsistent with the principles underlying *Apprendi*<sup>7</sup> and *Alleyne*.<sup>8</sup> See *Erlinger*, 602 U.S. at 833–34 (collecting decisions). And

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<sup>5</sup> *Neder v. United States*, 527 U.S. 1 (1999).

<sup>6</sup> *Washington v. Recuenco*, 548 U.S. 212 (2006).

<sup>7</sup> *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

<sup>8</sup> *Alleyne v. United States*, 570 U.S. 99 (2013).

although the government correctly notes that *Recuenco* postdated *Apprendi*, BIO at 12, it ignores that *Alleyne* came after *Recuenco*—and *Alleyne* is an important decision among the last two decades of precedent, all of which has led to the constitutional principles being “firmly entrenched.” *Erlinger*, 602 U.S. at 833.

As for *stare decisis*, the government cites *Gamble v. United States*, 587 U.S. 678 (2019). BIO at 12. That is a curious case for the government to rely on: the Court granted certiorari in *Gamble* to decide whether to overrule precedent. 587 U.S. at 681–83. It should do the same here.

*Stare decisis* is not “an inexorable command.” *Ramos v. Louisiana*, 590 U.S. 83, 105 (2020) (citing *Pearson v. Callahan*, 555 U.S. 223, 233 (2009)). And here, where the Court must interpret the Constitution, “the doctrine is at its weakest . . . because a mistaken judicial interpretation of that supreme law is often practically impossible to correct through other means.” *Id.* at 105–06 (internal quotation marks omitted).

Moreover, the *stare decisis* factors support Mr. Storey. First, the government does not seriously dispute that *Neder* is wrong on the “merits.” BIO at 12. Although it asserts that the reasons for harmless-error review haven’t changed, its only support for that proposition is a

conclusory line from *Neder* itself. *Id.* at 11–12 (quoting *Neder*, 527 U.S. at 8). And regardless, the issue isn’t whether the reasons for harmless-error review have changed, it’s whether the jury-trial right allows a judge, district or appellate, to make factual findings that belong to the jury.

Second, as for *Neder*’s “consistency with related decisions and recent legal developments,” see *Ramos*, 590 U.S. at 106, Mr. Storey has explained that *Neder* cannot be squared with *Apprendi* or the decades of jury-trial right precedent that followed in its footsteps, including *Alleyne*.

Third, as to reliance interests, the government rightly makes no claim that it has any future interest in affirming convictions it failed to prove beyond a reasonable doubt. If the concern is finality of criminal judgments, *Ramos* counsels that such an interest does not tip the scale in the government’s favor. *Ramos*, 590 U.S. at 108–11. Indeed, this Court has since held that there is no “watershed” exception to the principle that new constitutional rules of criminal procedure do not apply retroactively on federal collateral review. See *Edwards v. Vannoy*, 593 U.S. 255, 272 (2021). If anything, the “American people” have an interest “we all

share”—“the preservation of our constitutionally promised liberties.”  
*Ramos*, 590 U.S. at 111.

Mr. Storey’s case captures that shared interest. It also highlights the problem with permitting “harmless error” review of a missing element. There is no consensus on whether or why the failure to charge and prove ACCA’s different-occasions element was harmless:

- The district court found by a preponderance of the evidence that Mr. Storey’s alleged predicates had occurred on different occasions based on the offense dates in the *Shepard*<sup>9</sup> documents. Doc. 84 at 33–34; Doc. 67-1 at 7; Doc. 67-2 at 7; Doc. 67-3 at 7.

- The Eleventh Circuit then upheld his unconstitutional sentence—in excess of the statutory maximum—based not on the offense dates but on its determination that the arrest and conviction dates for the alleged predicates rendered the constitutional error harmless beyond a reasonable doubt. App. Doc. 49 at 10. Presumably, the court of appeals did not rely on the offense dates because Mr. Storey had objected to those dates in the district court and, by pleading *nolo contendere*, had never even admitted them in the state court proceedings. *See* Petition at 8–9

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<sup>9</sup> *Shepard v. United States*, 544 U.S. 13 (2005).

(citing Doc. 66 at 12–13; Doc. 74 at 30); *see also Erlinger*, 602 U.S. at 841–42 (discussing reliability and notice problems with using *Shepard* documents to prove details of prior offenses).

- For its part, the government waived any argument that the error was harmless in the circuit court, *see* Part I, *supra*, and now cannot bring itself to endorse the Eleventh Circuit’s reasoning. Instead, it suggests to this Court that the error is harmless based on the objected-to and unproven offense dates the Eleventh Circuit did not rely on. BIO at 7–8.

- Finally, contrary to the government’s suggestion, *id.*, Mr. Storey’s issue selection in his petition was not a concession that his drug offenses occurred on different occasions. He has never had the burden to prove his offenses were not on different occasions but has nevertheless explained why the error was not harmless. *See, e.g.*, App. Doc. 33 at 51–54. The government has not refuted that explanation.

These splintering views expose the untenable risk *Neder* and *Recuenco* create: an individual may serve years in prison not only without a jury finding beyond a reasonable doubt, but also without clarity on what “facts” would support a hypothetical finding. The Constitution does not

countenance such a diminishment of the jury's important role, and it does not permit deprivation of liberty on the changing whims of judicial and governmental actors. This Court's review is needed.

**III. Mr. Storey's case presents an ideal vehicle to decide whether 18 U.S.C. § 922(g)(1) exceeds Congress's authority under the Commerce Clause.**

The government offers no real defense that 18 U.S.C. § 922(g) complies with the Commerce Clause, instead regurgitating the reasoning of the courts of appeals who have "misapprehended" this Court's precedent about § 922(g)'s constitutionality. *United States v. Hemani*, 146 S. Ct. 1677, 1698 (2026) (Thomas, J., concurring); see BIO at 13 (relying on *Scarborough v. United States*, 431 U.S. 563, 564 (1977), a statutory interpretation case). And although it asserts that this Court has denied certiorari on the same issue, every petition it cites predates *Hemani*. BIO at 13 & 13 n.5. The government also fails to note that on July 20, 2026, shortly after this Court's decision in *Hemani*, the Fifth Circuit granted rehearing en banc on a petition raising a Commerce Clause challenge to § 922(g)(1). See *United States v. Squire*, 182 F.4th 481 (5th Cir. 2026).

Contrary to the government’s suggestion, BIO at 14, Mr. Storey’s offense was local. Section 922(g)(1) regulates possession, a non-economic activity. *See United States v. Lopez*, 514 U.S. 549, 561 (1995); *United States v. Morrison*, 529 U.S. 598, 610–11 (2000). As the government notes, Mr. Storey pointed a firearm at an individual in a store whom he claimed owed him \$200. *See* BIO at 14; Doc. 74 (PSR) ¶¶ 7–10. But that doesn’t change matters. At most, the conduct was a state assault and a monetary dispute best resolved in small claims court.<sup>10</sup>

The government’s reliance on *Taylor v. United States*, 579 U.S. 301, 307 (2016), and *Perez v. United States*, 402 U.S. 146 (1971), is therefore misplaced. There is no evidence that he robbed a drug dealer or was engaged in “loan sharking.” The Commerce Clause reasoning in *Perez* and *Taylor* simply does not apply to Mr. Storey’s actions.

Indeed, this “Court has emphatically rejected ‘the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce.’”

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<sup>10</sup> In Florida, where Mr. Storey was prosecuted, “[a] small claims case is a legal action filed in county court to settle minor legal disputes where the dollar amount involved is \$8,000 or less.” Small Claims, *Florida Courts*, <https://www.flcourts.gov/Courts-System/florida-courts-help/other-resources/small-claims> (last visited Sep. 7, 2026).

*Hemani*, 146 S. Ct. at 1696 (quoting *Morrison*, 529 U.S. at 617). And in any event, the federal government did not prosecute Mr. Storey for his relevant conduct. It prosecuted him for his intrastate possession of a firearm that had, at one point in time, crossed state lines. For the reasons explained in Mr. Storey’s petition, the district court’s order denying his motion to dismiss, Doc. 41 at 3–4, and Justice Thomas’s concurrence in *Hemani*, his conviction violates the Commerce Clause. This Court’s review is warranted.

### CONCLUSION

The Court should grant the petition for a writ of certiorari and set the case for plenary review or summarily reverse.

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