

No. 25-970

In the Supreme Court of the United States

RAMI GHANEM, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

**On Petition for a Writ of Certiorari to the
U.S. Court of Appeals for the Ninth Circuit**

**MOTION FOR LEAVE TO FILE BRIEF AND
BRIEF OF LAW PROFESSORS DOUGLAS
BERMAN, ABBE SMITH, AND VALERIE HANS
AS *AMICI CURIAE* IN SUPPORT OF
PETITIONER**

CORRINE A. IRISH
SQUIRE PATTON BOGGS
1211 Avenue of the
Americas, 26th Floor
New York, NY 10036
212 872 9800
corrine.irish@squirepb.com

KEITH BRADLEY
Counsel of Record
SQUIRE PATTON BOGGS
717 17th Street
Suite 1825
Denver, CO 80202
303 830 1776
keith.bradley@squirepb.com

ELLEN H. PHILLIPS
SQUIRE PATTON BOGGS
201 E. Fourth St.
Suite 1900
Cincinnati, OH 45202
513 361 1200
ellen.phillips@squirepb.com

Counsel for Amici Curiae

(1)

UNOPPOSED MOTION FOR LEAVE

Professors Douglas Berman, Valerie Hans, and Abbe Smith, move the Court for leave to file the attached brief as *amici curiae*. Supreme Court Rule 37 provides that all parties must receive notice of the intent of amicus curiae to file a brief in support of a petition 10 days before the due date. *Amici* provided the requisite notice to all counsel on March 13, 2026, 7 days before the due date.

All parties consented in writing to *amici curiae* filing a brief in support of the Petition, despite the belated notice under Rule 37. The brief of *amici curiae* will assist the Court in considering the Petition, as it raises important policy concerns of notable criminal justice legal scholars.

Accordingly, because all parties consent and none will be prejudiced, *amici curiae* request leave to file the attached brief.

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INTEREST OF AMICI CURIAE¹

Amici are legal scholars who teach, conduct research, and practice in the fields of criminal law and sentencing in the United States. Professor Douglas Berman is the co-author of the casebook *Sentencing Law and Policy: Cases, Statutes, and Guidelines* (5th ed. 2022) and has served as an editor of the *Federal Sentencing Reporter* for more than a quarter century. Professor Berman is also the sole creator and author of the widely-read blog, *Sentencing Law and Policy*, which this Court and numerous lower courts have cited. Professor Abbe Smith has authored numerous works, including *Guilty People* (Rutgers University Press, 2020) and *Case of a Lifetime: A Criminal Defense Lawyer's Story* (Palgrave MacMillan, 2008), and has served on the American Board of Criminal Lawyers since 2010. Professor Vanessa Hans is one of the nation's leading authorities on the jury system, and has authored or edited 10 books and over 150 research articles, including *Juries, Lay Judges, and Mixed Courts: A Global Perspective* (2021) and *American Juries: The Verdict* (2007).

Amici have a professional interest in ensuring that federal sentencing law is interpreted and applied in a manner that coherently advances its purposes and is consistent with longstanding constitutional principles and with contemporary function in the criminal law.

¹ No counsel for a party authored this brief in whole or in part. No person or entity, other than *amici curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief. As set forth in the contemporaneously-filed motion for leave, all parties received notice seven days before this filing and consented to filing.

SUMMARY OF ARGUMENT

Rami Ghanem, upon being accused by federal authorities of various crimes, invoked “constitutional protections of surpassing importance,” *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000), by exercising trial rights “designed ‘to guard against a spirit of oppression and tyranny on the part of the rulers.’” *United States v. Gaudin*, 515 U.S. 506, 510 (1995). He defended against a 18 U.S.C. § 2332g charge and the jury convicted him under erroneous jury instructions. Without the erroneous instructions, there was “a reasonable likelihood” Ghanem would have been acquitted, according to the Ninth Circuit. *United States v. Ghanem*, 993 F.3d 1113, 1130 (9th Cir. 2021). The Ninth Circuit, seeking to respect the defendant’s constitutional rights, vacated Ghanem’s conviction and remanded for resentencing. *See id.* The Government chose not to retry Ghanem, and instead proceeded to sentencing for lesser charges to which Ghanem pled guilty. Despite having no valid jury conviction for the § 2332g charge, the Government advocated for the same 30-year sentence Ghanem had received before his most serious conviction was vacated (based on a 22-year upward variance from the applicable Guidelines range). The court complied, sentencing Ghanem as if the invalidation of his jury conviction was legally insignificant while relying on judge-found facts related to the vacated and legally invalid § 2332g conviction. This case thus raises the oft-recurring issue of whether the Constitution places any limits on judicial fact-finding at sentencing relating to charges on which the defendant has been acquitted or which

the prosecution has abandoned after a conviction has been vacated.

Several members of this Court flagged concerns with acquitted conduct sentencing just three years ago. *See McClinton v. United States*, 600 U.S. ___, 143 S. Ct. 2400 (2023). This Court denied certiorari in *McClinton*, with Members of this Court suggesting that it was “appropriate” to await then on-going work by the Sentencing Commission concerning the use of “acquitted conduct” in federal sentencing. *Id.* at 2403 (Kavanaugh J., joined by Justices Gorsuch and Barrett, statement respecting the denial of certiorari). Multiple Justices at that time stressed the range of deep constitutional issues raised by various sentencing practices that risk undermining Fifth and Sixth Amendment commands. *See id.* at 2402 (Sotomayor, J., statement respecting the denial of certiorari) (discussing “concerns about procedural fairness and accuracy when the State gets a second bite at the apple”); *see id.* at 2404 n.1 (Alito, J., concurring in the denial of certiorari) (contending “there is no relevant difference for [constitutional] purposes between acquitted conduct and uncharged conduct”).

In 2024, the Sentencing Commission amended the Guidelines’ relevant conduct rules to formally exclude only “conduct for which the defendant was criminally charged and acquitted in federal court, unless such conduct also establishe[d], in whole or in part, the instant offense of conviction.” U.S.S.G. App. C, Amend. 826 (Nov. 1, 2024); U.S.S.G. § 1B1.3(c). As written, the Guidelines still leave unclear exactly when and how jury acquittals will limit judicial enhancement of Guideline sentencing ranges, and it

is quite clear that judges are still permitted (and perhaps statutorily obligated) to rely upon acquitted conduct when exercising their broader statutory sentencing discretion under 18 U.S.C. § 3553(a). Consideration of dismissed conduct to ground significant Guidelines enhancements or major upward variances is not addressed by the amendment whatsoever, leaving district courts free to impose extreme enhanced punishments for crimes on which prosecutors were unable to secure a valid conviction. That is precisely what occurred here, with the district court imposing an upward variance of 22 years to punish Ghanem for a conviction that the Ninth Circuit vacated as legally unsound.

Of course, the U.S. Sentencing Commission's work revising the Guidelines and even proposals in Congress to amend various federal sentencing statutes do not and cannot define the constitutional guardrails that must apply to the sentencing of criminal defendants in state courts. Only this Court can provide nationwide constitutional guidance regarding how the Fifth and Sixth Amendments impact the consideration of acquitted or dismissed conduct in sentencing for all criminal justice systems. *See McClinton*, 143 S. Ct. at 2403 (Alito, J., concurring in the denial of certiorari) (noting that any action by the Commission "will not affect state courts, and therefore the constitutional issue will remain").

Understandably, many state courts and lower federal courts continue to read this Court's past jurisprudence to call for treating judicial fact-finding on acquitted or dismissed conduct at sentencing as indistinguishable from any other form of judicial fact-finding at sentencing. But if oft-repeated statements

about the importance of Fifth and Sixth Amendment rights as a limit on government power are to have real purchase—and if the text, history and traditions embraced by the Founders of our Nation are to be given enduring meaning—the Court should grant review in this case to articulate sound limits on judicial authority to increase a sentence based on charges pursued by prosecutors that resulted in an acquittal or were dismissed by the prosecution without securing a valid jury conviction.

This Court has repeatedly extolled and stressed the importance of a defendant’s right to have a jury decide facts essential to punishment: “Only a jury, acting on proof beyond a reasonable doubt, may take a person’s liberty. That promise stands as one of the Constitution’s most vital protections against arbitrary government.” *United States v. Haymond*, 588 U.S. 634, 637 (2019) (plurality op.); *accord Erlinger v. United States*, 602 U.S. 821 (2024); *Allelyne v. United States*, 570 U.S. 99, 114 (2013); *Blakely v. Washington*, 542 U.S. 296, 306 (2004); *Apprendi*, 530 U.S. at 477. But when a judge directly and expressly relies on facts a jury rejected or never fairly considered to increase a sentence, the jury trial “promise” becomes empty and this “vital” protection against the government becomes illusory.

This case² presents a timely vehicle for this Court to grant certiorari, receive full briefing, and hear

² *Amici* are also aware of another pending petition raising the related and more common issue of acquitted-conduct sentencing, *United States v. Pharms*, No. 25-1086. *Amici* posit that the two cases, raising different facets of the same fundamental Fifth and Sixth Amendment concerns, each present timely vehicles for resolving the scope of how judges may rely on facts related to

these and all other arguments regarding important and persistent questions that arise in many cases. The original meaning and proper application of the jury trial right in the Sixth Amendment and the due process right in the Fifth and Fourteenth Amendments with respect to judicial punishment increases based on acquitted or dismissed conduct should be directly addressed.

For these reasons, the Court should grant Ghanem's petition for a writ of certiorari.

ARGUMENT

After a jury convicted Rami Ghanem of conspiring to acquire, transport, and use surface-to-air missiles in violation of 18 U.S.C. § 2332g under legally erroneous jury instructions, the Ninth Circuit properly vacated that conviction. The Government then had the opportunity to re-try Mr. Ghanem in a full and fair trial before a different jury. But, rather than respecting that the Constitution places “the jury at the heart of our criminal justice system,” *Erlinger*, 602 U.S. at 831, federal prosecutors forwent trying Ghanem by jury and instead encouraged the district court to sentence Ghanem in exactly the same way as if he had been convicted of the vacated charge. Such disregard of the jury's role in the United States' criminal justice system suggests prosecutorial and judicial views of the Fifth and Sixth Amendments as a mere procedural formality, even though this Court has repeatedly emphasized that the reach and application of jury trial rights should not be driven by “Sixth Amendment formalism, but by the need to

charges a jury expressly rejected or that were dismissed by prosecutors without securing a valid conviction.

preserve Sixth Amendment substance.” *United States v. Booker*, 543 U.S. 220, 237 (2005); *see also Erlinger*, 602 U.S. at 832 (stressing that Fifth and Sixth Amendment “principles represent not procedural formalities but fundamental reservations of power to the American people” (cleaned up)).

Despite the constitutional issues resulting from upward sentencing variances based on an alleged offense never properly considered by a jury, the district judge relied upon the vacated conviction to impose a sentence 22 years above the top of the Guidelines range. The people’s role in determining the truth of the prosecutors’ accusations was ignored; the vacatur of Ghanem’s illegitimate conviction was functionally nullified by the judge through his sentencing decision-making.

When vacatures of flawed convictions carry no real sentencing consequences, prosecutors have nothing to lose (and much to gain) from engaging in unfair trial practices. Prosecutors can disregard a defendant’s right to a full and fair trial, safe in the belief that even vacatur of a conviction on appeal will not preclude them from renewing their allegations for judicial reconsideration as long as the defendant is being sentenced for any offense. Under such practices, the sentencing becomes a trial, and the trial becomes just a convenient dress rehearsal for prosecutors. Any sentencing rules that permit substantive circumvention of the jury trial right and related constitutional protections enables overzealous prosecutors to run roughshod over the traditional democratic checks of the adversarial criminal process the Framers built into the U.S. Constitution. *See Erlinger*, 602 U.S. at 832 (stressing how the jury trial

right seeks to “mitigate the risk of prosecutorial overreach and misconduct, including the pursuit of ‘pretended offenses’ and ‘arbitrary convictions’” (quoting *The Federalist* No. 83, p. 499 (C. Rossiter ed. 1961))).

I. As Justices and Judges Recognize, the Historic Rights and Protections of Jury Trials are Gravely Undermined when Sentences are Enhanced After Acquittal or Dismissal.

This Court has repeatedly emphasized that the jury-trial right is “clearly intended to protect the accused from oppression by the Government.” *Singer v. United States*, 380 U.S. 24, 31 (1965); *see also Williams v. Florida*, 399 U.S. 78, 100 (1970); *Batson v. Kentucky*, 476 U.S. 79, 86 (1986) (the jury-trial right “safeguard[s] a person accused of crime against the arbitrary exercise of power by prosecutor or judge”); *Gaudin*, 515 U.S. at 510; *Jones v. United States*, 526 U.S. 227, 244–48 (1999); *Apprendi*, 530 U.S. at 477 (the jury “guard[s] against a spirit of oppression and tyranny on the part of rulers,” and acts “as the great bulwark of our civil and political liberties” (citation omitted)); *Blakely*, 542 U.S. at 305–06; *Booker*, 543 U.S. at 237–39; *Alleyne*, 570 U.S. at 114 (noting “the historic role of the jury as an intermediary between the State and criminal defendants”). This Court has described the jury-trial right as an “inestimable safeguard” protecting a defendant “against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.” *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). As stressed recently, jury trials are “fundamental to the American scheme of justice.”

Ramos v. Louisiana, 590 U.S. 83, 93 (2020) (quoting *Duncan*, 391 U.S. at 148–50). As “the framers appreciated,” the jury safeguards are “anchor[s] essential to prevent a slide back toward regimes like the vice-admiralty courts [the framers] so despised.” *Erlinger*, 602 U.S. at 832 (quoting Letter from T. Jefferson to T. Paine (July 11, 1789), reprinted in 15 Papers of Thomas Jefferson 266, 269 (J. Boyd ed. 1958)).

Yet oft-repeated proclamations about the importance of “the jury’s historic role as a bulwark between the State and the accused,” *Southern Union Co. v. United States*, 567 U.S. 343, 350 (2012), ring disturbingly hollow for Ghanem and other defendants when, after being vindicated by jury acquittals or vacatur of legally flawed convictions, prosecutors are still permitted to seek, and judges are still permitted to impose, increased sentences based on the very same allegations for which no proper conviction was obtained. Convictions, in these cases, are only formal matters; there is no limit on the state’s effort to punish based on allegations a jury either rejected or never fairly considered. Ghanem and other defendants subject to sentences enhanced by acquitted or dismissed conduct are left to wonder just what kind of “bulwark” or “safeguard” the Fifth and Sixth Amendments truly provide if and when prosecutors and judges can entirely disregard the jury trial requirement at sentencing. When prosecutors are empowered to pursue procedural loopholes in the operation of our criminal justice system, such as when they can claim a vacatur of a flawed conviction on appeal has no impact on sentencing outcomes, they are emboldened to view constitutional rights as mere

tripwires to be avoided whenever and however possible.

Recognizing the fundamental tension between sentence enhancements based on acquitted conduct and giving real meaning to jury trial rights, Justices of this Court and lower court judges have described the practice of increasing sentences based on jury-rejected facts as, among other things, “repugnant,” “Kafka-esque,” “uniquely malevolent,” and “pernicious.” See *United States v. Watts*, 519 U.S. 148, 170 (1997) (Stevens, J., dissenting); *United States v. Ibanga*, 454 F. Supp. 2d 532, 536 (E.D. Va. 2006) (Kelley, J.); *United States v. Canania*, 532 F.3d 764, 777 (8th Cir. 2008) (Bright, J., concurring); *United States v. Papakee*, 573 F.3d 569, 578 (8th Cir. 2009) (Bright, J., concurring); see also *United States v. Mercado*, 474 F.3d 654, 663 (9th Cir. 2007) (Fletcher, J., dissenting); *United States v. Faust*, 456 F.3d 1342, 1349 (11th Cir. 2006) (Barkett, J., concurring); *United States v. Safavian*, 461 F. Supp. 2d 76, 83 (D.D.C. 2006) (Friedman, J.); *United States v. Coleman*, 370 F. Supp. 2d 661, 671 (S.D. Ohio 2005) (Marbley, J.); *United States v. Pimental*, 367 F. Supp. 2d 143, 152 (D. Mass. 2005) (Gertner, J.). The concerns expressed by so many jurists about the circumvention of jury trial rights also apply to the practice of increasing sentences based on vacated or dismissed conduct, such as here.

Ghanem was not ultimately afforded the protections guaranteed by the Fifth and Fourteenth Amendments, but was sentenced well above what was reasonable under the Guidelines applicable to his proper convictions. Judge-found facts guided the sentencing, not a sound conviction by a jury of

Ghanem’s peers as the Constitution guarantees. Indeed, Judge Collins concurred in the opinion below, noting “how this case starkly illustrates a very troubling feature” of criminal sentencing. *United States v. Ghanem*, 143 F.4th 1114, 1132 (9th Cir. 2025) (Collins, J., concurring). She encouraged this Court to “address this disquieting anomaly” of a jurisprudence that purportedly protects Fifth and Sixth Amendment rights, and yet allows judicial factfinding to significantly increase prison sentences. *Id.* at 1134.

II. This Case Is Yet Another Example of Constitutionally Problematic Sentencing Based on Judge-Found Facts.

Ghanem’s case demonstrates clearly how judicial fact-finding can still drive sentencing outcomes that are not supported by sound jury verdicts. The district judge expressly based a significant upward variance on facts underlying a charge that was never fairly tried to a jury, led to a faulty verdict that was vacated by the Court of Appeals, and then was dropped by the Government. Critically, the ruling below made clear that the judge-found facts related to the dismissed charge was “essential to the punishment imposed.” 1 J. Bishop, *Criminal Procedure* 50 (2d ed. 1872); *cf. Alleyne*, 570 U.S. at 109–10 (Thomas, J., plurality op.) (describing the significance of “a well-established practice of . . . submitting to the jury, every fact that was a basis for imposing or increasing punishment”).

Though the U.S. Sentencing Commission has now amended the Guidelines to exclude acquitted conduct in some circumstances from being considered in Guidelines calculations, there are still many

defendants like Ghanem serving longer, constitutionally-suspect sentences based on judge-found facts related to acquitted or dismissed conduct. *See, e.g., United States v. Touray*, 151 F.4th 1317 (11th Cir. 2025) (upholding sentence based on acquitted conduct based on the pre-amendment Guidelines); *United States v. Sharkey*, 131 F.4th 621, 623 (8th Cir. 2025) (holding that the sentencing court was not required “to apply proposed amendments to the Sentencing Guidelines that would prohibit consideration of acquitted conduct”). Moreover, judges have noted the various situations in which the new Guidelines amendment does not itself preclude a sentence lengthened based on acquitted conduct, whether in consideration of the statutory § 3553(a) factors or in consideration of conduct that underlies both acquitted and convicted offenses. *See, e.g., United States v. Jacques*, No. 08-CR-00577 (NCM), 2025 WL 2466994, at *2–3 (E.D.N.Y. Aug. 27, 2025) (where defendant was acquitted of importing and possessing five kilograms or more of cocaine but convicted only of 500 grams or more, sentencing court held it could still sentence based on large quantity because “the same conduct underlies both a convicted and acquitted offense”); *United States v. Spivak*, No. 1:21-CR-491-1, 2025 WL 1167185, at *3 (N.D. Ohio Apr. 22, 2025) (holding that, notwithstanding Guidelines amendment, “when calculating the guideline range, a court may consider any evidence of the total loss within the scope of the conspiracy, even if a jury acquitted a defendant of some conduct accounting for some specific losses”); *United States v. Brooks*, No. CR JKB-18-0408, 2024 WL 4803406, at *3 (D. Md. Nov. 15, 2024) (“while Amendment 826 prohibits the consideration of acquitted conduct in

determining the Guidelines range, nothing in Amendment 826 precludes the Court's consideration of conduct in assessing the § 3553(a) factors").

The Guidelines amendment thus has not resolved the constitutional problems with sentencing based on acquitted or dismissed conduct. Despite the U.S. Sentencing Commission's sound effort to address one problematic aspect of acquitted-conduct sentencing, this Court will continue to receive petitions from both federal and state defendants asserting their constitutional rights were violated by judicial sentencing based on judge-found facts related to charges for which a defendant was not convicted. It is time for this Court to take up these issues, and Ghanem's case provides a fitting and timely opportunity to do so.

III. By Empowering Prosecutors and Impacting All Indictments and Pleas, Acquitted-Conduct Sentencing Continues to Distort the Operation of the Entire Federal Justice System.

Allowing significant sentencing variances based on dismissed or acquitted conduct undermines the Framers' vision of American criminal justice values by taking liberty-protecting authority away from the people and giving it to the state and its agents. See *Blakley*, 542 U.S. at 306 ("Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.") From Ghanem's and similar defendants' perspectives, the jury trial right does not "prevent oppression by the Government," *Duncan*, 391 U.S. at 155, but is rather a mere

formality that can be disregarded if the prosecutors manage to convince another government agent to severely punish a defendant for dismissed or acquitted conduct. When a sentence can be based on conduct for which a jury never convicted the defendant, a jury trial regarding disputed allegations serves merely as a dress rehearsal for a prosecutor to show a judge why an individual should be punished regardless of the jury verdict on various counts, and regardless of whether a conviction withstands an appeal. Not only does allowing acquitted-conduct and dismissed-conduct sentencing degrade a fundamental constitutional right, it also undermines confidence in the entire criminal justice system.

Indeed, this sentencing practice provides prosecutors with significant benefits (and no obvious costs) by allowing them to allege and pursue any and every charge at their disposal among “the sprawling scope of most criminal codes,” and pursue the presentation of all manner of allegations without real concern for legal or procedural trial rules intended to prevent illegal and wrongful convictions. *Blakely*, 542 U.S. at 311. Even a wholly inadequate charge rejected by a jury or a completely invalid conviction successfully challenged on appeal will provide a criminal defendant no relief from prosecutorial overreach if sentencing doctrines pay no heed to jury verdicts and appellate reversals. The opportunity to circumvent both a jury’s work and appellate review enables overzealous prosecutors to run roughshod over the traditional democratic checks of the adversarial and law-based criminal process the Framers built into the U.S. Constitution. Prosecutors can brazenly charge any and all offenses for which there is a sliver of evidence, then pursue those

charges throughout trial, even a fundamentally unfair trial, without fear of any consequences when later seeking to make their case to a sentencing judge. This enhances prosecutorial power at each major stage of a criminal prosecution.

First, at the outset of criminal cases, prosecutors can allege and pursue every possible statutory charge in order to increase plea bargaining leverage because they know there will be no real sentencing consequences even upon a jury acquittal or appellate reversal of most charges. See Clark Neily, *A Distant Mirror: American-Style Plea Bargaining Through the Eyes of a Foreign Tribunal*, 27 Geo. Mason L. Rev. 719, 730 (2020) (“American prosecutors possess a wide array of levers that they can—and routinely do—bring to bear on defendants to persuade them to waive their right to trial and simply plead guilty instead[,] . . . [including] threatening to use uncharged or even acquitted conduct to enhance a defendant’s sentence”). Prosecutors are functionally encouraged to over-charge defendants and even have little concern for legally or factually suspect charges, knowing that if they obtain a conviction on at least one count that will withstand appeal, they can “ask[] the judge to multiply a defendant’s sentence many times over based on conduct for which the defendant was just acquitted” *United States v. Bell*, 808 F.3d 926, 932 (2015) (Millett, J, concurring).

Indeed, the prospect of future sentences based on dismissed or acquitted conduct requires competent federal defense attorneys in multi-count cases to inform their clients that securing a jury acquittal on many charges at trial or vacatur of convictions on appeal may produce little or no sentencing benefit,

but likely will preclude the defendant from receiving any sentencing credit for accepting responsibility. It is little wonder plea bargaining now “*is the criminal justice system,*” *Missouri v. Frye*, 566 U.S. 134, 144 (2012) (emphasis in original), when sentencing rules require defense attorneys to advise clients that pleading guilty even to the most questionable of government charges may result in a better sentencing outcome than if a jury were to reject those charges at trial. *See generally* Human Rights Watch, *An Offer You Can’t Refuse: How US Federal Prosecutors Force Drug Defendants to Plead Guilty*, Human Rights Watch, 78–90 (Dec. 5, 2013), <https://www.hrw.org/report/2013/12/05/offer-you-cant-refuse/how-us-federal-prosecutors-force-drug-defendants-plead> (noting that “analysis of trial data suggests that even defendants with strong cases and good chances of acquittal at trial are choosing to plead because of the enormous sentencing benefit of doing so compared to the sentencing risks they face should they lose at trial”).

Second, at criminal trials, prosecutors can continue to pursue any and every possible charge, and try their case without regard for procedural or legal safeguards, knowing that acquittals or vacatur on appeal carry no real sentencing consequences. Doing so, even if the evidence supporting many charges may be weak or becomes legally suspect, enables prosecutors to increase the chances that a jury will be drawn into “making a determination that the defendant at some point did something wrong.” *Blakely*, 542 U.S. at 307. In this arrangement thanks to acquitted or dismissed conduct sentencing, the prosecution does not really need to prove, beyond a reasonable doubt, “the facts of the crime the State

actually seeks to punish.” *Blakely*, 542 U.S. at 306–07. So long as it secures a conviction on *something*—even if only a relatively minor charge to which the defendant pled guilty—the prosecution can achieve its intended sentence simply by persuading the judge of the defendant’s conduct by a preponderance of the evidence.

Third, as criminal cases reach sentencing, prosecutors can and often will become even more aggressive in the presentation of offense allegations and related accusations. Prosecutors can persistently tell judges (and the authors of a presentence report) that they must disregard any and all jury acquittals and appellate reversals, rather than reflect upon and respect the democratic judgment and legal norms. This practice diminishes the fairness of a criminal justice system in many respects and affords the Government two bites at the apple. *See Canania*, 532 F.3d at 776 (Bright, J., concurring) (“We have a sentencing regime that allows the Government to try its case not once but twice. The first time before a jury; the second before a judge.”). This “undermines the defendant’s fundamental interest in verdict finality, exposing the defendant to a second mini-trial on conduct underlying the count of acquittal in contravention of principles underlying the Fifth and Sixth Amendments.” Barry L. Johnson, *If at First You Don’t Succeed—Abolishing the Use of Acquitted Conduct in Guidelines Sentencing*, 75 N.C. L. Rev. 153, 180 (1996).

Finally, the allowance of sentences based on conduct rejected or never fairly considered by a jury not only marginalizes the work of one of the criminal justice system’s most critical participants—jurors—

but it also risks leading jurors to no longer take their work seriously. Jurors, who are called on to put their lives on hold for public service to advance justice, are unlikely to be dedicated to their task when their supposedly significant constitutional role in our system is regularly undermined at sentencing.³

As this and similar cases demonstrate, the practice of judges significantly increasing sentences based on judge-found facts related to acquitted or dismissed conduct “has gone on long enough.” *Jones v. United States*, 574 U.S. 948, 949 (2014) (Scalia, J., dissenting, joined by Thomas, J., and Ginsburg, J.). *Amici* believes this Court should grant certiorari in

³ Take, for instance, the experience of a juror in the trial of Antwaun Ball, who was sentenced to 225 months in prison based on an acquitted-conduct Guidelines range after the jury acquitted him of all but one charge, the Guidelines range for which would have been 57–71 months. See *United States v. Jones*, 744 F.3d 1362 (D.C. Cir. 2014). Upset to learn of the heightened sentence, the juror wrote to the judge to comment that it was a “tragedy that one is asked to serve on a jury, serves, but then finds their work may not be given the credit it deserves,” and lamented that the “defendants are being sentenced not on the charges for which they have been found guilty but on the charges for which the District Attorney’s office would have liked them to have been found guilty.” See Jim McElhatton, *A \$600 drug deal, 40 years in prison*, The Washington Times (June 29, 2008), <https://www.washingtontimes.com/news/2008/jun/29/a-600-drug-deal-40-years-in-prison/>; Jim McElhatton, “*Juror No. 6*” *stirs debate on sentencing*, The Washington Times (May 3, 2009) <https://www.washingtontimes.com/news/2009/may/3/juror-no-6-questions-rules-of-sentencing/>. He detailed the toll of jury service, and the disappointment when the result of that toll falls on deaf ears: “What does it say to our contribution as jurors when we see our verdicts, in my personal view, not given their proper weight.” *Canania*, 532 F.3d at 778 n.4 (Bright, J., concurring) (quoting Letter from Juror No. 6, citation omitted).

Petitioner’s case in order to again ensure that the “right of jury trial [will] be preserved, in a meaningful way guaranteeing that the jury [will] still stand between the individual and the power of the government.” *Booker*, 543 U.S. at 237.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

KEITH BRADLEY
Counsel of Record
SQUIRE PATTON BOGGS
717 17th Street, Ste. 1825
Denver, Colorado 80202

CORRINE A. IRISH
SQUIRE PATTON BOGGS
1211 Avenue of the
Americas, 26th Floor
New York, NY 10036
corrine.irish@squirepb.com

ELLEN H. PHILLIPS
SQUIRE PATTON BOGGS
201 E. Fourth St., Ste. 1900
Cincinnati, OH 45202
ellen.phillips@squirepb.com

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