No. 25-970

IN THE
Supreme Court of the United States

RAMI GHANEM,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The Government does not dispute that the question presented is important and recurring in both state and federal criminal proceedings. Nor does the Government dispute that state supreme courts and federal circuits are split. And the Government acknowledges that the Ninth Circuit below upheld a 22-year sentence enhancement even though it recognized the sentence would be "substantively unreasonable" without judge-found facts. Pet. App. 31a-32a.

The Government's principal argument against review is that this Court already resolved this question in *United States* v. *Watts*, 519 U.S. 148 (1997) (per curiam)—a summary decision issued without oral argument that does not mention the jury-trial right and that this Court has since characterized as addressing only "a very narrow question regarding the interaction of the [Sentencing] Guidelines with the Double Jeopardy Clause." *United States* v. *Booker*, 543 U.S. 220, 240 n.4 (2005). The Government does not attempt to reconcile *Watts* with the mountain of historical evidence establishing that juries—not judges—must find all facts necessary to impose punishment. *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000). Nor does the Government explain how *Watts* could comport with precedent squarely holding that a judge may not "issue a sentence that exceeds the maximum penalty authorized by a jury's findings (or a guilty plea)." *Erlinger* v. *United States*, 602 U.S. 821, 833 (2024) (emphasis omitted).

The Government does not and cannot dispute the importance of the question presented. Members of this Court have repeatedly called for this Court to address it. *See McClinton* v. *United States*, 143 S. Ct. 2400, 2401-03 (2023) (Sotomayor, J., respecting

denial of certiorari); *id.* at 2403 (Kavanaugh, J., joined by Gorsuch and Barrett, JJ., respecting denial of certiorari); *Jones* v. *United States*, 574 U.S. 948, 949 (2014) (Scalia, J., joined by Thomas and Ginsburg, JJ., dissenting from denial of certiorari); *United States* v. *Sabillon-Umana*, 772 F.3d 1328, 1331 (10th Cir. 2014) (Gorsuch, J.). Lower courts likewise have decried the use of judge-found facts to increase defendants' authorized punishment. And amicus support from former federal judges, law professors, and the National Association of Criminal Defense Lawyers ("NACDL") underscores the question's importance. *See* Judges' Br. 1, 15-22 (eighteen former federal judges reflecting that "allowing sentencing based on uncharged, dismissed, and acquitted conduct can render a criminal jury utterly irrelevant"); *see also* Professors' Br. 13-19; NACDL's Br. 21-22.

One could hardly imagine a better vehicle to address the question. After Mr. Ghanem's conviction was vacated, the Government persuaded the district court on remand to impose an "admittedly extraordinary departure" of 22 additional years' imprisonment, maintaining that Mr. Ghanem's relevant conduct remained "exactly the same" even though the jury had been cut from the process. Pet. App. 12a, 57a-58a. The panel acknowledged that it placed "loadbearing weight" on "the district court's factual findings" and that the "sentence here would violate the Sixth Amendment" under the proper approach. Pet. App. 31a-32a. And Judge Collins concurred in his own opinion to underscore that Mr. Ghanem's sentence was "patently unlawful" under a proper view of the Sixth Amendment and that "[o]nly the Supreme Court has the authority, if it sees fit, to address this

disquieting anomaly." Pet. App. 37a-38a. The Court should do so now.

ARGUMENT

I. THE DECISION BELOW IS WRONG.

A straightforward constitutional principle resolves this case: "Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *Booker*, 543 U.S. at 244. This Court has reaffirmed that principle time and again in the face of efforts to scale back the Fifth and Sixth Amendments' protections. *E.g.*, *Erlinger*, 602 U.S. at 832; *United States* v. *Haymond*, 588 U.S. 634, 642 (2019) (plurality op.); *Alleyne* v. *United States*, 570 U.S. 99, 108 (2013) (plurality op.); *Cunningham* v. *California*, 549 U.S. 270, 293 (2007); *Blakely* v. *Washington*, 542 U.S. 296, 305-306 (2004).

Mr. Ghanem's sentence violates that constitutional principle for reasons that are equally straightforward. Mr. Ghanem's 30-year sentence was predicated on conduct "that underlay the now-vacated conviction," and his sentence would be "substantively unreasonable" absent those facts. Pet. App. 29a, 31a-32a. Because those facts were "necessary to support" Mr. Ghanem's sentence, the Constitution required them to be "admitted by the defendant or proved to a jury beyond a reasonable doubt." *Booker*, 543 U.S. at 244. The Government's various defenses of the contrary rule do not withstand scrutiny.

First, the Government relies almost entirely on this Court's decision in *Watts*, declaring (at 8-9) that *Watts* "clear[ly]" permits district judges to "take unconvicted

conduct into account at sentencing without offending the Constitution." But *Watts* cannot bear the weight the Government places on it. As *Booker* explained, a Sixth Amendment issue "simply was not presented" in *Watts*. 543 U.S. at 240. *Booker* therefore rejected the same interpretation of *Watts* the Government now asks this Court to embrace, making clear that *Watts* "presented a very narrow question" involving the Double Jeopardy Clause, that *Watts* "did not even have the benefit of full briefing or oral argument," and that it was therefore "unsurprising" that *Watts* "failed to consider fully" any Sixth Amendment implications of its ruling. *Id.* at 240 n.4. The Government ignores all of that, as well as this Court's recent admonition that the "jury trial rights provide a defendant with entirely complementary protections" to the Double Jeopardy Clause, which apply "at a different stage of the proceedings." *Erlinger*, 602 U.S. at 844-845.

Second, the Government observes (at 7) that district judges have discretion to select a sentence within the authorized range. But that does not justify using judge-found facts to increase a defendant's punishment *above* the range that would be authorized absent those facts. As Justice Scalia explained, for each crime, there is a "maximum sentence that will be upheld as reasonable based only on the facts found by the jury or admitted by the defendant"; "*[e]very* sentence higher than that" maximum sentence that is "authorized only by some judge-found fact" violates the Sixth Amendment. *Rita* v. *United States*, 551 U.S. 338, 372 (2007) (Scalia, J., joined by Thomas, J., concurring in part and concurring in the judgment). Thus, a defendant may prevail on an "as-applied" constitutional challenge by demonstrating that his sentence "would not have been upheld but for the

existence of a fact found by the sentencing judge and not by the jury." *Gall* v. *United States*, 552 U.S. 38, 60 (2007) (Scalia, J., concurring). That is precisely the situation here.

Third, the Government asserts (at 10-11) that any sentence below the statutory maximum is constitutionally permissible because it reflects Congress's "policy judgment that a term of imprisonment at or below the maximum of that range is not an unreasonably long sentence for the offense." That contention cannot be reconciled with this Court's precedents, including *Alleyne*, 570 U.S. at 103 (plurality op.), which held that "judicial factfinding that increases the mandatory minimum" violates the Sixth Amendment even when the sentence remains below the statutory maximum, and *Rita*, 551 U.S. at 341, which authorized federal courts of appeals to review all sentences for reasonableness.

Statutory maximums reflect "the greatest period" a judge may "impose for an offense committed under the most egregious of circumstances"; they do not "indicate the actual sentence a judge is expected to impose in each case." S. Rep. No. 98-225, at 114 (1984). Instead, 18 U.S.C. § 3553(a) lists multiple factors courts must consider in imposing "a sentence sufficient, but not greater than necessary." And the Sentencing Guidelines provide even more detailed guidance. That entire sentencing scheme would be senseless if the only consideration making a sentence reasonable was the maximum sentence provided by statute.

Fourth, the Government has no historical argument whatsoever. It does not address the extensive history of jury factfinding at sentencing and identifies no historical support for the proposition that decades-long

sentence enhancements like the one imposed below may be based on facts found by a judge under a preponderance standard. This Court has repeatedly emphasized that the scope of the Fifth and Sixth Amendments must reflect history and tradition, and that the jury-trial right cannot be narrower today than it was at the Founding. *See Blakely*, 542 U.S. at 308 (construing Sixth Amendment based on how "the Framers would have" answered the question); *Cunningham*, 549 U.S. at 281 (construing the Sixth Amendment by reference to the relevant "longstanding common-law practice"); *Erlinger*, 602 U.S. at 843-844 (relying on "the original meaning of the Fifth and Sixth Amendments"). But although the Fifth and Sixth Amendments "placed the jury at the heart of our criminal justice system," *Erlinger*, 602 U.S. at 831, Mr. Ghanem's jury trial in the proceedings below was merely "performative theater that could be dispensed with by going straight to sentencing," Judges' Br. 16.

Finally, the Government resorts to policy, arguing (at 12) that limitations on judicial factfinding would "encourage prosecutors to charge every conceivable crime arising out of a course of activity." To the extent the Government worries that jury factfinding would harm defendants, this Court has already rejected that argument. *See Erlinger*, 602 U.S. at 847 (rejecting contention that defendants were "somehow duped into advocating for a rule that would be unfair" to them (quotation marks and citation omitted)); *see also* NACDL's Br. 21-22 (explaining that "dramatic enhancements based on uncharged, dismissed, and acquitted conduct corrupts the criminal justice system" (capitalization altered)). And to the extent the Government contends that more robust jury protections would increase the prosecution's burden, there is of

course "no efficiency exception to the Fifth and Sixth Amendments." *Erlinger*, 602 U.S. at 842; *accord* 4 William Blackstone, *Commentaries* 344. The Court should grant the petition to reaffirm the original scope of the Fifth and Sixth Amendments.

II. FEDERAL AND STATE COURTS ARE DIVIDED.

The Government does not dispute that while federal courts of appeals permit the use of judge-found facts to impose sentences that would otherwise be substantively unreasonable, the Minnesota, North Carolina, and New Jersey Supreme Courts prohibit that practice. *See* Pet. 17-20 (collecting cases). That is a clear conflict, and it is particularly intolerable for defendants in those three States, whose constitutional protections vary depending on whether they are charged in federal or state court.

The Government conspicuously does not dispute that a split exists, and its attempts to minimize the split fail. The Government claims (at 13) the Minnesota and North Carolina decisions "predate *Watts*." That is wrong. *Taylor* v. *State*, 670 N.W.2d 584 (Minn. 2003), and *State* v. *Simpson*, No. COA24-1092, 2026 WL 40886, at *5-6 (N.C. Ct. App. Jan. 7, 2026), were decided years after *Watts*. More importantly—as explained above and as the New Jersey Supreme Court explained in *State* v. *Melvin*, 258 A.3d 1075 (N.J. 2021)—*Watts* is irrelevant because it "considered the use of acquitted conduct not through the lens of due process, but rather only in the double-jeopardy context." *Id.* at 1090 (quotation marks and citation omitted).

The Government claims (at 13) that some state courts grounded their holdings in state law and thus do not create a conflict on the federal question. That,

too, is wrong. Each state relied on "due process and fundamental fairness." *State* v. *Marley*, 364 S.E.2d 133, 139 (N.C. 1988); *see also State* v. *Barnes*, 313 N.W.2d 1, 3 (Minn. 1981) ("it would be unfair to try to justify the departure on the basis of the police reports suggesting that defendant maybe could have been convicted of violent crimes in two other instances"); *Melvin*, 258 A.3d at 1092 ("To permit the re-litigation of facts in a criminal case under the lower preponderance of the evidence standard would render the jury's role in the criminal justice process null and would be fundamentally unfair."). Neither the Minnesota nor the North Carolina Supreme Court even hinted that the analysis would come out differently under state and federal constitutions. And while the New Jersey Supreme Court noted that the New Jersey "Constitution affords greater protection for individual rights than its federal counterpart," *Melvin*, 258 A.3d at 1091, the court addressed *Watts* and *Blakely* in detail and rejected the argument that *Watts* permits reliance on acquitted conduct—a federal question, *see id.* at 1088-92.

The Government notes (at 12-13) that every federal court of appeals has read *Watts* to allow reliance on acquitted, uncharged, and dismissed conduct. But, as the petition explained (at 22-23), that is a reason to grant review rather than deny it. There is no prospect that any circuit will change its position absent this Court's intervention.

III. The Question Presented Is Exceedingly Important, And This Case Presents An Ideal Vehicle To Resolve It.

The Government does not dispute that the question presented affects countless defendants in state and federal courts across the country. "[O]ur prisons are

full of people imprisoned because judges have found it more likely than not that they committed some uncharged, dismissed, or acquitted conduct." Judges' Br. 22. In addition to violating the rights of defendants who exercise their jury-trial rights, these "dramatic sentencing increases based on judge-found facts under lax procedures give[] prosecutors extraordinary leverage in plea negotiations," thereby discouraging defendants from exercising their jury-trial rights in the first place. NACDL's Br. 14-20. For these reasons, the Justices of this Court and lower court judges have repeatedly called on this Court to resolve the issue. See Pet. 5, 21-22. The Government does not respond.

The Government posits (at 14) that the "Guidelines do not *require*" lower courts to consider vacated conduct. But, as this case illustrates, courts of appeals deem themselves obligated to affirm sentences that would be substantively unreasonable but for judge-found facts. *See* Pet. App. 31a-32a; *United States* v. *Sikes*, 824 F. App'x 805, 810 (11th Cir. 2020) (per curiam) (similar); *United States* v. *Hebert*, 813 F.3d 551, 564-565 (5th Cir. 2015) (similar); *see also, e.g.*, *United States* v. *Vaughn*, 430 F.3d 518, 526-527 (2d Cir. 2005) (Sotomayor, J.) (reading *Watts* to allow a district court to "consider all facts relevant to sentencing it determines to have been established by a preponderance of the evidence," including facts "relating to acquitted conduct"). The Government itself has repeatedly appealed sentences where the district court is alleged to have erred in "refus[ing] to consider" acquitted and uncharged conduct. *United States* v. *Ibanga*, 271 F. App'x 298, 299 (4th Cir. 2008) (per curiam); *see also United States* v. *Hayes*, 322 F.3d 792, 801-802 (4th

Cir. 2003); *United States* v. *Hardwell*, 80 F.3d 1471, 1499 (10th Cir. 1996).

The Government argues (at 14) that review is unwarranted because the Sentencing Commission has recently amended the Sentencing Guidelines to prohibit reliance on *acquitted* conduct. But the amendment does not reach cases like this one, where the sentencing judge relies on conduct underlying a charge that was vacated in a prior appeal. Pet. 25. The Government claims (at 15) that the amendment reflects "the Commission's policy judgment" that reliance on uncharged conduct is permissible. But the Commission's policy judgment cannot overcome the Constitution's command. In any event, the amendment only affects the initial Guidelines calculation; it does not prohibit courts from *varying upwards* under the 18 U.S.C. § 3553(a) factors. Pet. 25-26 (collecting cases from the Third, Sixth, and Eighth Circuits that have circumvented the amendment on that ground). Nor does the amendment reach sentencing determinations in state courts, which impose the vast majority of criminal sentences.

For similar reasons, it does not matter that "Congress currently is considering legislation" prohibiting reliance on acquitted conduct. Opp. 14. This Court routinely grants certiorari notwithstanding pending legislation, sometimes even at the Government's suggestion. *See* Reply of Pet'r United States at 8, *United States* v. *Eurodif S.A.*, No. 07-1059 (U.S. Apr. 2, 2008), 2008 WL 905193 (arguing that "[t]he speculative possibility that Congress might ultimately enact one of the bills that are still pending in committee should not deter the Court from considering the important questions presented" (citation omitted)).

The Government observes that the Court has denied petitions raising similar questions. All but one of the petitions the Government cites were filed while the Sentencing Commission was considering the amendment. *See McClinton*, 143 S. Ct. at 2403 (Kavanaugh, J., joined by Gorsuch and Barrett, JJ., respecting denial of certiorari) (declining to grant the petition while the Sentencing Commission was "considering the issue"). The only other petition had an obvious vehicle problem—it required "complicated inquiries into state law and records" because the underlying acquittal occurred in a state court. *See* Br. in Opp. at 13-15, *Perricone* v. *United States*, No. 24-5339 (U.S. Dec. 23, 2024).

In stark contrast, the Government does not dispute that this case is an unusually strong vehicle. Mr. Ghanem's 22-year sentence enhancement was indisputably based on conduct that underlay a vacated conviction. Pet. App. 12a-13a, 31a-32a. The panel forthrightly acknowledged that it placed "loadbearing weight" on judge-found facts in upholding the sentence and that the sentence would be substantively unreasonable without those facts. Pet. App. 31a-32a. That holding gives this Court a unique opportunity to address whether the Constitution prohibits the use of judge-found facts to impose an otherwise unreasonable sentence.

A related petition pending before this Court in *United States* v. *Pharms*, No. 25-1086, asks this Court to address the constitutionality of acquitted-conduct sentencing. The Court should grant this petition and also consider granting in *Pharms*, which will allow the Court to provide comprehensive guidance to the lower courts based on any potential distinctions between the two cases.

CONCLUSION

The Court should grant the petition for certiorari and reverse the decision below.

Respectfully submitted,

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