

No. _____

In the Supreme Court of the United States

PAUL LUJAN, *PETITIONER*,

V.

UNITED STATES OF AMERICA, *RESPONDENT*.

*Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit*

PETITION FOR WRIT OF CERTIORARI

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Question Presented

Whether the Fifth and Sixth Amendments permit judges to find the facts necessary to support an otherwise unreasonable sentence.

Parties to the Proceeding

The parties to the proceeding in the court whose judgment is sought to be reviewed are:

- Petitioner Paul Lujan, the defendant in the district court and appellant below.
- Respondent United States of America, the plaintiff in the district court and appellee below.

Related Proceedings

- *United States v. Lujan*, No. 7:25-cr-19-DC-1 (W.D. Tex. Feb. 6, 2025) (order denying motion to revoke magistrate judge's detention order)
- *United States v. Lujan*, No. 25-50117 (5th Cir. Mar. 25, 2025) (affirming denial of motion to revoke detention order)
- *United States v. Lujan*, No. 7:25-cr-19-DC-1 (W.D. Tex. July 30, 2025) (entering judgment of criminal conviction)
- *United States v. Lujan*, No. 25-50608 (5th Cir. June 8, 2026) (per curiam) (unpublished) (denying Government's motion to dismiss appeal based on appeal waiver in Lujan's plea agreement, granting motion for summary affirmance, and affirming judgment of district court)

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PETITION FOR WRIT OF CERTIORARI

Petitioner Paul Lujan respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Opinion Below

A copy of the unpublished opinion of the court of appeals, *United States v. Lujan*, No. 25-50608 (5th Cir. June 8, 2026) (per curiam), is reproduced at Pet. App. 1a–2a.

Jurisdiction

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit were entered on June 8, 2026. Justice Alito granted Lujan’s motion to extend the time for filing a petition for writ of certiorari

to October 6, 2026. *See Lujan v. United States*, No. 26A252. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

The Fifth Amendment provides: “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, ... nor be deprived of life, liberty, or property, without due process of law”

The Sixth Amendment provides: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury”

Statement

1. The instant offenses.

In the last few months of 2024, a federal and state task force used confidential informants to make six controlled buys of cocaine from Lujan. Individual sale amounts ranged from one-half ounce to four ounces. The total amount across all six sales was 281.128 grams.

2. Indictment.

Lujan was indicted on six counts of possessing an unspecified amount of cocaine with the intent to distribute it, corresponding to each of the six sales, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C). The Government also filed a sentencing enhancement information, under 21 U.S.C. § 851, alleging that Lujan had a prior conviction for a “felony drug offense”: a 2010 federal conviction for aiding and abetting possession of

heroin with the intent to distribute. The effect of that prior conviction would be to raise the statutory maximum imprisonment term from 20 years to 30 years and the minimum supervised release term from three years to six years on each count. *See* § 841(b)(1)(C).

3. Plea agreement and appeal waiver.

Lujan initially opted to go to trial. But at the pretrial conference, Lujan announced that he and the Government had reached a plea agreement.

In the written plea agreement, Lujan agreed to plead guilty to all six counts of the indictment. He also admitted the prior felony drug conviction that increased the statutory range of punishment. There was no agreement as to the sentence the district court could impose, nor any promised recommendations, although Lujan acknowledged that he would not receive an acceptance of responsibility reduction at sentencing because of the late timing of his guilty plea. As for the sentence, the plea agreement provided that “the Court has authority to impose any sentence up to the maximum statutory penalty.” Finally, as part of the agreement, Lujan waived his right to appeal his conviction or sentence on any

ground. The only exceptions to the appeal waiver were for ineffective assistance of counsel or prosecutorial misconduct.¹

The district court administered the Rule 11 colloquy (although it did not address the matters contained in the addendum to the plea agreement, a document that Lujan and his counsel apparently reviewed for the first time during the rearraignment) and accepted Lujan's plea.

4. Presentence report and motion for upward departure and variance.

After Lujan pleaded guilty, a probation officer prepared a presentence report. The PSR recounted the details of the six cocaine sales.

¹ A separate addendum to the plea agreement further provided that Lujan would debrief with the Government as to "any and all" criminal activity of which he was aware and in which he was involved, "including cooperation that leads to an indictment and conviction regarding a 2009 Murder in Ector County, for which [he] has knowledge." In exchange, the Government agreed "to consider," in its "sole discretion," whether to move for a "sentence reduction under guidelines section 5K1.1, 18 U.S.C. § 3553(e), or Federal Rule of Criminal Procedure 35." Although the addendum provided that any information Lujan provided would not be used to bring additional charges or to increase his Sentencing Guidelines range, the Government reserved the right to disclose any information it was "obligated to ... as relevant to sentencing." Finally, the addendum provided that, if Lujan failed to cooperate as required—even after pleading guilty—the Government would be "released from all its obligations under this Agreement[,]" but Lujan would not be allowed to withdraw his guilty plea.

Lujan's base offense level, based on the 281.128 grams of cocaine involved, was 18. *See* U.S.S.G. §2D1.1(a)(5), (c)(11) (Nov. 2024). There were no adjustments, so Lujan's total offense level was also 18. Lujan had two prior adult criminal convictions: (1) a 2000 assault with a deadly weapon, for which he initially received six year's deferred adjudication probation, but which was later adjudicated resulting in a seven-year prison sentence; and (2) a 2010 federal conviction for aiding and abetting the possession of heroin with the intent to distribute it and for being a felon in possession of a firearm, for which he received concurrent terms of 15 months' imprisonment and three years' supervised release.² The assault conviction was too old to count for criminal history purposes, but the 2010 conviction scored three points, placing Lujan in criminal history category II. *See* U.S.S.G. Ch.5, Pt.A (Sentencing Table). At total offense level 18, Lujan's advisory Guidelines range was 30 to 37 months' imprisonment. *See* U.S.S.G. Ch.5, Pt.A (Sentencing Table). Neither party objected to the PSR.

Before sentencing, the Government moved for an upward departure for understated criminal history under Guidelines policy statement

² Lujan's supervised release was later revoked and he was sentenced to an additional term of 10 months' imprisonment.

U.S.S.G. §4A1.3³ and an upward variance under the 18 U.S.C. § 3553(a) factors. On the departure front, the Government argued that Lujan’s “lifelong, extensive and extremely violent criminal history is not adequately reflected in his current criminal history category of II (3 points).” As support, the Government recounted, at length, the PSR’s “Other Criminal Conduct” section which listed various occasions on which Lujan had been arrested with the charges later dismissed, and one instance in which Lujan was not charged. Those charges included evading arrest, reckless driving, aggravated assault and aggravated battery with a deadly weapon, obstructing an officer, unlawful possession of a firearm by a felon, murder, robbery, injury to an elderly individual, and terroristic threat. On the § 3553(a) front, the Government argued that Lujan’s criminal history, and his conduct in this case, supported an upward variance to account for the seriousness of the offense and his criminal history, and the need to promote respect for the law and provide just punishment and adequate deterrence, and to protect the public from future crimes.

Lujan filed a sentencing memorandum in which he discussed his cooperation efforts with the Government. According to Lujan, immediately after rearraignment he debriefed for about three-and-a-half hours with

³ Effective November 1, 2025, the Sentencing Commission eliminated departures from the Guidelines Manual, including policy statement §4A1.3. See U.S.S.G. App. C, amend. 836.

the prosecutor and eight law enforcement officers from state and federal agencies. He denied having anything to do with the suspected murder but identified the actual perpetrator and provided information about that offense and others.

5. Sentencing.

At sentencing, the district court adopted the PSR, including the 30-to 37-month Guidelines range. Lujan apologized to the court for his “past mistakes” and, through counsel, asked for a sentence within the Guidelines range for the reasons set forth in his sentencing memorandum. The Government called four witnesses and introduced various exhibits to support its request for an above-Guidelines sentence. Lujan objected to all the exhibits and witness testimony because it would violate his Fifth and Sixth Amendment rights under the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000).⁴ The court overruled the objection but granted Lujan a standing objection to all the witnesses and exhibits.

⁴ Lujan referred to the decision incorrectly as “United States v. Apprendi,” but his objection accurately captured the decision’s holding, which extended to state criminal prosecutions the rule that, “under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.” *Apprendi*, 530 U.S. at 476 (quoting *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999)).

- The first two witnesses testified about an investigation into the 2009 stabbing death of a man outside a bar in Odessa (Ector County), Texas. Odessa Police Detective John Sikes described the circumstances of the stabbing and the recovery of a knife that contained DNA from the victim and Lujan. Amber Miller, a DNA Analyst with the Texas Department of Public Safety Crime Lab, testified about lab reports she prepared that identified Lujan's DNA on the knife believed to be the murder weapon. Through Sikes, the Government admitted as exhibits photographs of the knife, the autopsy report, and a 2011 audio recording and signed statement from a witness identifying Lujan as the perpetrator. The witness's statement led to Lujan's indictment for murder in 2016. The case was dismissed with prejudice in May 2021 when, one week before trial, the witness died in a car crash.
- DEA Agent Derrick Bridger, who was involved in the controlled buys leading to the instant charges, testified about a 2012 incident in Hobbs, New Mexico, in which Lujan allegedly stabbed a man. Although Bridger was not involved in the original investigation, he testified about the account of a witness to the attack whom Bridger interviewed in 2025. Bridger did not know if any charges were brought against Lujan but admitted that if there

had, they had been dismissed as there were no charges currently pending.⁵

- Isaiah Terrell, a detective with the Midland, Texas, police department and a task force officer with the DEA, testified about audio recordings of two of the controlled buys. In the first recording, Lujan talks about Detective Sikes's attempt to obtain a sample of his DNA when he was incarcerated in federal prison in El Reno, Oklahoma. In the second recording, according to Sikes, Lujan discusses an alleged assault he committed on another inmate in the Ector County jail in 2021 several days before dismissal of the murder charge. No charges were filed against Lujan for the alleged assault.
- Detective Terrell also testified about an assault and robbery Lujan allegedly committed in July 2021. According to Terrell, Lujan assaulted a 74-year-old man in an ownership dispute over a vehicle and stole \$300 from him. Lujan was arrested and charged with robbery, injury to an elderly individual, and terroristic threat, but the charges were later dismissed.

⁵ According to the PSR, Lujan was arrested for aggravated battery with a deadly weapon on the night of the alleged attack, but “[t]he case was nolle prosequi.”

After taking the testimony and exhibits, the district court asked Lujan if he had anything further. Lujan's counsel again objected on constitutional grounds to consideration of the evidence and argued that the Government was seeking to punish him for crimes other than those to which he pleaded guilty in this case:

Your Honor, I would. Just in response to the allocution by the Government, what [the Government] is attempting to do is punish Mr. Lujan for crimes—alleged crimes outside of what he pled guilty to, but also crimes that Mr. Lujan was not convicted of. And we'd ask that the Court not consider those because again, that goes against his 5th, 6th Amendment rights, as well as *Apprendi*. And we'd ask the Court to sentence Mr. Lujan based on his criminal record convictions and what's set forth in the guideline range. I would ask the Court again to sentence Mr. Lujan within the guideline range.

The district court then pronounced the sentence. It “f[ou]nd the guideline range in this case to be woefully inadequate, not to mention unfair and unreasonable.” The court sentenced Lujan to concurrent terms of 180 months' imprisonment on each of the six counts—almost five times as long as the top of the 30- to 37-month Guidelines range. The court explained that the sentence was an upward variance due largely to Lujan's criminal history, including the unadjudicated allegations presented by the Government:

The Court varies above the guidelines for a number of reasons: Previous periods of probation, parole and confinement have failed to garner a respect for the law from this Defendant. The

instant offense is a serious offense, shows the Defendant poses a risk to the community, and the public needs to be protected from the further crimes of the Defendant. Criminal history for this Defendant is extensive and violent. That violent history began at around the age of 14 years old, when he was convicted of aggravated assault with a deadly weapon. His violent history has escalated since that time, with an additional conviction for the same or similar charge when he was around 17 years old.

He has a previous Federal conviction in this court for distributing heroin and possessing a firearm and ammunition, this court being the Pecos division, as we talked about. *The Defendant has a number of cases that were dismissed that range from evading arrest, to aggravated robbery with a deadly weapon, to murder. Despite these dismissals, Mr. Lujan has done nothing but continue to break the law, put the public in danger. Criminal history score is severely under-representative of his history.* Taking into consideration the factors pursuant to 18 United States code section 3553(a)2, a sentence above the guideline range is imposed to reflect the seriousness of the offense, to promote respect for the law, afford adequate deterrence to criminal conduct, and most importantly, protect the public from the further crimes of this Defendant. The Court does so taking into consideration the Presentence Report, including the offense conduct stated there, the motion by the Defense *and the Government*.

Transcript of Sentencing (emphasis added).

The court then briefly discussed BOP placement requests with Lujan. In response to a question from counsel, the court confirmed that the 180-month sentence was per count, to run concurrently with each other. Lujan's counsel then said: "And for the record, I would just file an objection as to the sentence imposed in this case. And lastly, if I may have just

a moment after the conclusion to see if he wants to appeal.” The court asked the Government if it had “anything further[?]” The Government answered: “No, Your Honor.”

6. Appeal.

Lujan appealed. He raised two issues.

First, Lujan argued that the appeal waiver in his plea agreement was unenforceable because his sentence was unconstitutional. Pet. App. 1a–2a. He acknowledged that this argument was foreclosed under Fifth Circuit precedent, which held that “defendants can waive the right to challenge both illegal and unconstitutional sentences.” *United States v. Barnes*, 953 F.3d 383, 389 (5th Cir. 2020); *see* Pet. App. 2a. Lujan raised the argument to preserve it for further review because the enforceability of appeal waivers was before this Court in *Hunter v. United States*, No. 24-1063.⁶

Second, Lujan argued on the merits that his sentence is unconstitutional because it violates the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000): the sentence cannot be upheld as substantively reasonable but for facts that Lujan did not admit and that a jury did not find beyond

⁶ *Hunter* had not yet been argued when Lujan filed his brief. *Hunter* later recognized an exception to appeal waivers that the Fifth Circuit had not: “an appeal waiver is unenforceable when it would result in a miscarriage of justice.” 608 U.S. 713, 727 (2026).

a reasonable doubt. *See* Pet. App. 2a. Lujan relied on opinions from Justice Scalia pointing out that, even under the advisory Sentencing Guidelines, substantive reasonableness review “will inevitably [produce] *some* constitutional violations ... because there will be some sentences that will be upheld as reasonable only because of the existence of judge-found facts.” *Rita v. United States*, 551 U.S. 338, 374 (2007) (Scalia, J., concurring); *see also Gall v. United States*, 552 U.S. 38, 60 (2007) (Scalia, J., concurring) (emphasizing that “the Court has not foreclosed as-applied constitutional challenges to sentences” and that “[t]he door therefore remains open for a defendant to demonstrate that his sentence, whether inside or outside the advisory Guidelines range, would not have been upheld but for the existence of a fact found by the sentencing judge and not by the jury”). That happened here because district court’s fact-finding—regarding unadjudicated allegations about Lujan’s criminal history—supplied the essential legal predicate for his 180-month sentence. His 30- to 37-month Guidelines range fully accounted for the offense conduct and his prior convictions. The 180-month sentence—five to six times the Guidelines range—is far greater than the seven-year sentence that he received for his prior *conviction* for aggravated assault with a deadly weapon, and the 25 months that he ultimately received for his prior heroin and felon-in-possession convictions. It is hard to imagine, Lujan argued, that a 180-month sentence—five to six times the 30- to 37-month

Guidelines range—is “not greater than necessary,” 18 U.S.C. § 3553(a), but for the evidence the Government presented at sentencing about alleged crimes he was never convicted of, that he did not admit, and that a jury did not find.

Lujan acknowledged that this issue also was foreclosed by Fifth Circuit precedent. For example, in *United States v. Hernandez*, that Court rejected the same as-applied claim Lujan raised. 633 F.3d 370, 373–74 (5th Cir. 2011). Like Lujan, Hernandez relied on “concurrences by Justice Scalia that state that every federal criminal sentence that is higher than what could be upheld as reasonable, based only on the facts found by the jury or admitted by the defendant, is a violation of the Sixth Amendment right to a jury.” *Id.* at 373–74. *Hernandez* rejected this claim, citing precedent in which this Court has “rejected Sixth Amendment challenges to sentences ... numerous times on the ground that the sentencing court is entitled to find by a preponderance of the evidence all facts relevant to the determination of a sentence below the statutory maximum.” *Id.* at 374. The Fifth Circuit continues to adhere to *Hernandez* in rejecting as-applied substantive reasonableness challenges. *See, e.g., United States v. Shah*, 95 F.4th 328, 384 (5th Cir. 2024), *cert. denied*, 145 S. Ct. 518 (2025); *United States v. Hebert*, 813 F.3d 551, 563–64 (5th Cir. 2015).

The Government moved for summary affirmance based on Lujan’s concession about the state of Fifth Circuit precedent regarding his Fifth

and Sixth Amendment challenge, and alternatively to dismiss the appeal because of the appeal waiver. *See* Pet. App. 2a. The court of appeals “pretermitt[ed] consideration of the applicability of Lujan’s appellate waiver because” his “challenge to the constitutionality of his sentence is foreclosed by” *Hernandez*. Pet. App. 2a. Accordingly, the court denied the Government’s motion to dismiss the appeal based on appeal waiver in Lujan’s plea agreement, granted the Government’s motion for summary affirmance, and affirmed the district court’s judgment. Pet. App. 2a.

Reasons for Granting the Petition

This court should grant review to decide whether the Fifth and Sixth Amendments permit a judge to find the facts necessary to support an otherwise unreasonable sentence.

Courts have broad authority to impose a sentence that reflects the seriousness of a defendant's offense, but courts may not use judge-found facts to impose a sentence that would be unlawful without those facts. As the Court explained in *United States v. Booker*: “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.” 543 U.S. 220, 244 (2005) (applying *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to the United States Sentencing Guidelines).

The panel below affirmed a 180-month sentence that was roughly five to six times the recommended 30- to 37-month Guidelines range based on unadjudicated evidence regarding Lujan’s criminal history—none of which was relevant conduct to his offenses of conviction. The court affirmed based on its precedent “reject[ing] Sixth Amendment challenges to sentences ... numerous times on the ground that the sentencing court is entitled to find by a preponderance of the evidence all facts relevant to the determination of a sentence below the statutory maximum.” *United States v. Hernandez*, 633 F.3d 370 (5th Cir. 2011); *see* Pet. App. 2a.

This case presents the question whether the Fifth and Sixth Amendments permit judges, as opposed to juries, to find facts necessary to render a sentence reasonable. This Court has repeatedly “left [that question] for another day.” *Jones v. United States*, 135 S. Ct. 8, 8–9 (2014) (Scalia, J., dissenting from the denial of certiorari). And as in this case, the courts of appeals have interpreted the Court’s silence as consent to the proposition that an otherwise unreasonable sentence supported by judicial factfinding is constitutional as long as it is within the statutory sentencing range—despite the contrary import of the Court’s sentencing decisions.

“This has gone on long enough.” *Jones*, 135 S. Ct. at 9 (Scalia, J., dissenting from the denial of certiorari). And it is hard to imagine a better example of the consequences of runaway judicial factfinding than this

case. Lujan received a sentence roughly five to six times that recommended by the Sentencing Guidelines based on unadjudicated allegations of years-old criminal activity that was entirely unrelated to the instant offenses of conviction. The Court should finally resolve this long-unsettled question and put an end to unconstitutional sentences such as Lujan's.

A. The question presented is an important one expressly reserved by this court and subject to extensive debate by judges in the lower courts.

1. In *Apprendi v. New Jersey*, the Supreme Court held that, other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond reasonable doubt. 530 U.S. 466, 490 (2000).

A few years later, in *United States v. Booker*, the Court held that this principle applied to the then-mandatory federal Sentencing Guidelines, which required courts to impose a sentence within a range determined by a number of factors determined by the sentencing judge on a preponderance of the evidence standard. 534 U.S. 220, 226–27, 232–35, 243–44 (2005). *Booker* recognized that any within-Guidelines sentence that rested on facts a defendant did not admit and that a jury did not find beyond a reasonable doubt violated the rule of *Apprendi* as applied. *Id.* at 244, 267; *see id.* at 272–73, 278–79 (Stevens, J., dissenting in part); *id.* at 313–318 (Thomas, J., dissenting in part). To align the Guidelines with

what the Court understood to be Congress’s intent, the Court excised the provision of the Sentencing Reform Act (which established the Guidelines regime) that had made the Guidelines mandatory. *Id.* at 245–46, 258–60, 264. The Court also recognized that Congress still would have wanted to provide for appellate review of sentences, as under the original version of the SRA, even under an advisory Guidelines regime. *Id.* at 260–65. To that end, *Booker* excised the portion of the SRA that had established appellate standards of review and declared that sentences would henceforth be reviewed for reasonableness. *Id.*

Shortly thereafter, the Court limned the contours of reasonableness review. In *Rita v. United States*, the Court held that applying a presumption of reasonableness to within-Guidelines sentences is constitutional on the ground that the Sixth Amendment does not “automatically forbid” a judge from taking account of factual matters not determined by the jury. 551 U.S. 338, 352 (2007). Justice Scalia, joined by Justice Thomas, expressed concern that this scheme would lead to “constitutional violations” if a defendant’s sentence is “upheld as reasonable only because of the existence of judge-found facts.” *Id.* at 374 (opinion concurring in part and concurring in the judgment); *see also id.* at 372 (“[F]or every given crime there is some maximum sentence that will be upheld as reasonable based only on the facts found by the jury or admitted by the defendant. Every sentence higher than that is legally authorized only by some judge-

found fact, in violation of the Sixth Amendment.”). The Court’s majority acknowledged that according a presumption of reasonableness to within-Guidelines sentences that depended on substantial judicial fact-finding “raises Sixth Amendment ‘concerns.’” *Id.* at 351. But the majority stated that that question was “not presented by this case.” *Id.* at 353. Justice Stevens, joined by Justice Ginsburg, noted that “[s]uch a hypothetical case should be decided if and when it arises.” *Id.* at 366 (Stevens, J., concurring).

Several months later, in *Gall v. United States*, the Court explained that “reasonableness” review is a two-step process. 552 U.S. 38, 51 (2007). First, the court of appeals “must ... ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range.” *Id.* Second, “the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard.” *Id.* This two-step process applies to all sentences, whether within or outside the Guidelines range. *Id.*

As in *Rita*, Justice Scalia “wrote separately to state [his] view that any appellate review of sentences for substantive reasonableness will

necessarily result in a sentencing scheme constitutionally indistinguishable from the mandatory Guidelines struck down in” *Booker. Gall*, 552 U.S. at 60 (Scalia, J., concurring). He also emphasized, as he had in *Rita*, that “the Court has not foreclosed as-applied constitutional challenges to sentences” and that “the door therefore remains open for a defendant to demonstrate that his sentence, whether inside or outside the advisory Guidelines range, would not have been upheld but for the existence of a fact found by the sentencing judge and not by the jury.” *Id.*

The following year, Justice Scalia dissented from the denial of certiorari in a case where the Sixth Circuit upheld as reasonable a life sentence based on the second-degree murder guideline “solely because of the judge-found fact that [the defendant] had acted with malice aforethought.” *Marlowe v. United States*, 555 U.S. 963, 963 (2008) (Scalia, J., dissenting). As Justice Scalia stated:

This falls far short of what we have held the right to trial by jury demands: “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.”

Id. (Scalia, J., dissenting) (quoting *Booker*, 543 U.S. at 244).

Six years later, Justice Scalia, joined by Justices Thomas and Ginsburg, again noted the pressing need for the Court to resolve the question.

See Jones, 135 S. Ct. at 8–9 (opinion dissenting from the denial of certiorari). Justice Scalia observed that, ever since the question was reserved in *Rita*, the courts of appeals had “uniformly taken our continuing silence” on the question as “suggest[ing] that the Constitution does permit otherwise unreasonable sentences supported by judicial factfinding, so long as they are within the statutory range.” *Id.* at 9. Justice Scalia urged the Court to grant certiorari in an appropriate case in order to “put an end to the unbroken string of cases disregarding the Sixth Amendment—or to eliminate the Sixth Amendment difficulty by acknowledging that all sentences below the statutory maximum are substantively reasonable.” *Id.*

Shortly after Justice Scalia's opinion in *Jones*, then-Judge Gorsuch similarly observed that “[i]t is far from certain whether the Constitution allows” a judge to increase a defendant’s sentence within the statutorily authorized range “based on facts the judge finds without the aid of a jury or the defendant's consent.” *United States v. Sabillon-Umana*, 772 F.3d 1328, 1331 (10th Cir. 2014) (citing *Jones*). Yet even now, two decades after the Court adopted substantive reasonableness review, that question remains unanswered by the Court, despite intervening opportunities to address it.

2. As several members of the Court have now recognized, the lower courts will continue to authorize sentences that would be unreasonable

but for judge-found facts until this Court intervenes. In the decision below, the court of appeals rejected—as it has for years—Justice Scalia’s arguments on that point. Pet. App. 2a (citing *Hernandez*, 633 F.3d at 373–74); *see also, e.g., United States v. Lopez*, 70 F.4th 325, 332 (5th Cir. 2023) (“[J]udicial factfinding by a preponderance of the evidence does not run afoul of the defendant’s constitutional rights ‘where the defendant’s sentence ultimately falls within the statutory maximum term.’” (quoting *United States v. Hebert*, 813 F.3d 551, 64 (5th Cir. 2015) (“Hebert’s Fifth and Sixth Amendment challenges are foreclosed by our precedent ... because we have held that courts can engage in judicial factfinding where the defendant’s sentence ultimately falls within the statutory maximum term.”))). And other courts have declined to adopt similar arguments in the absence of clearer guidance from this Court, despite admitting that “there is room for debate.” *United States v. Briggs*, 820 F.3d 917, 922 (8th Cir. 2016); *United States v. Cassius*, 777 F.3d 1093, 1099 n.4 (10th Cir. 2015) (calling argument about judge-found sentencing facts “precluded by binding precedent” but citing *Jones*); *see also United States v. Settles*, 530 F.3d 920, 923–24 (D.C. Cir. 2008) (noting that “we understand why defendants find it unfair for district courts to rely on acquitted conduct when imposing a sentence,” but ultimately relying on “binding precedent” to affirm the sentence).

Numerous judges in the lower courts have urged a different approach or specifically importuned this Court to provide guidance, noting the importance of the question and the attendant uncertainty surrounding sentencing practices while the question remains open. *See, e.g., United States v. White*, 551 F.3d 381, 390 (6th Cir. 2008) (en banc) (Merritt, J., dissenting) (taking the position on behalf of six judges that, when judge-found enhancements increase the Guidelines range such that the sentence would be unreasonable absent those facts, “those judge-found facts are necessary for the lawful imposition of the sentence, thus violating the Sixth Amendment right to a jury trial”); *United States v. Bell*, 808 F.3d 926, 932 (D.C. Cir. 2015) (en banc) (per curiam) (Millet, J., concurring in denial of rehearing en banc) (noting that “only the Supreme Court can resolve the contradictions in the current state of the law”); *id.* at 927 (Kavanaugh, J., concurring in denial of rehearing en banc) (“shar[ing] Judge Millet’s overarching concern” and observing that a solution “would likely require” intervention by this Court). The Court should accept the recurrent invitation to intervene and finally resolve the question presented.

B. The decision below is wrong.

The Fifth Circuit’s view that the Fifth and Sixth Amendments tolerate any sentence within the statutory maximum, even if based on judge-

found facts that the defendant did not admit and a jury did not find, ignores the development of this Court's jurisprudence and the serious concerns raised by numerous members of this Court.

1. The Sixth Amendment was intended to preserve the “jury’s historic role as a bulwark between the State and the accused at the trial for an alleged offense.” *Southern Union Co. v. United States*, 567 U.S. 343, 350 (2012) (citation omitted). The Sixth Amendment’s guarantee of a trial by jury is a constitutional protection “of surpassing importance,” *Apprendi*, 530 U.S. at 476–477, and it “has occupied a central position in our system of justice by safeguarding a person accused of a crime against the arbitrary exercise of power by prosecutor or judge,” *Batson v. Kentucky*, 476 U.S. 79, 86 (1986).

As is relevant here, the jury trial right is a “fundamental reservation” of jury power that ensures that a judge’s “authority to sentence derives wholly from the jury’s verdict.” *Blakely v. Washington*, 542 U.S. 296, 306 (2004) (emphasis added). In *Apprendi*, this Court held that “facts that increase the prescribed range of penalties to which a criminal defendant is exposed” must either be admitted by the defendant or submitted to a jury. 530 U.S. at 490; see *Blakely*, 542 U.S. at 303. The Court reaffirmed that principle in *Alleyne v. United States*, 570 U.S. 99 (2013), explaining that, “[w]hen a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a

new offense and must be submitted to the jury.” 570 U.S. 99, 114–15 (2013). Most recently, in *Erlinger v. United States*, the Court reiterated that “[j]udges may not assume the jury’s factfinding function for themselves, let alone purport to perform it using a mere preponderance-of-the-evidence standard. To hold otherwise ... would intrude on a power the Fifth and Sixth Amendments reserve to the American people.” 602 U.S. 821, 834–35 (2024) (holding that defendant is entitled to have jury determine beyond a reasonable doubt whether prior offenses occurred on different occasions for purposes of the Armed Career Criminal Act sentence enhancement).

The use of unadjudicated conduct at sentencing not only infringes criminal defendants’ jury-trial rights. It also “undermines respect for the law and the jury system.” *Settles*, 530 F.3d at 924. Increasing a defendant’s sentence based on judicial factfinding deprives the sentence of the legitimacy that follows from a jury verdict and “divest[s] the people at large * * * of their constitutional authority to set the metes and bounds of judicially administered criminal punishments.” *United States v. Haymond*, 588 U.S. 634, 646 (2019) (plurality op.) (cleaned up).

2. The Sixth Amendment’s jury-trial right works in tandem with the Fifth Amendment right to due process, which “protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” *In re*

Winship, 397 U.S. 358, 364 (1970). Increasing a defendant's authorized punishment based on acquitted or uncharged conduct is a manifest violation of these principles.

Relying on acquitted, dismissed, and uncharged conduct to increase a defendant's authorized punishment also violates due process. The Fifth Amendment “protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” *Winship*, 397 U.S. at 364. That standard of proof “provides concrete substance for the presumption of innocence.” *Id.* at 363.

Judicial fact-finding, however, permits a preponderance-of-the-evidence standard. Increasing a defendant's authorized punishment based on findings made by a preponderance causes “unusual and serious procedural unfairness,” *Apprendi*, 530 U.S. at 562–63 (Breyer, J., joined by Roberts, C.J., dissenting)—particularly where that conduct could “constitute entirely free-standing offenses under the applicable law,” *United States v. Faust*, 456 F.3d 1342, 1352 (11th Cir. 2006) (Barkett, J., specially concurring); see *United States v. Fisher*, 502 F.3d 293, 311–12 (3d Cir. 2007) (Rendell, J., concurring) (similar).

Finally, fact-finding by a preponderance of the evidence increases the risk of inaccurate sentencing. Even where a defendant has previously been convicted of a crime, this Court has cautioned that reliance on facts

underlying those prior convictions may raise concerns about “unfairness” and lead to “error.” *Mathis v. United States*, 579 U.S. 500, 501 (2016). Those same concerns obviously apply when the court relies on facts underlying unadjudicated allegations—facts the Government has not proven. “Such a result ... is inconsistent with due process of law.” *Townsend v. Burke*, 334 U.S. 736, 741 (1948).

3. The foregoing principles apply with equal force where, as here, judicial factfinding serves as the basis for an above-Guidelines sentence that would otherwise be substantively unreasonable. Although the Sentencing Guidelines are no longer mandatory, they “remain the starting point for every sentencing calculation in the federal system.” *Peugh v. United States*, 569 U.S. 530, 542 (2013). “[I]f the judge uses the sentencing range as the beginning point” for the sentencing decision, “*then the Guidelines are in a real sense the basis for the sentence*,” even if the ultimate sentence deviates from the Guidelines range. *Id.* (citation omitted). A sentencing court is not free to impose a sentence, even if it falls within the statutory range, without taking account of the Guidelines range and explaining any variance. To do otherwise constitutes procedural error and results in an unlawful sentence. *See id.*

In the absence of a decision by this Court squarely addressing the question presented, however, the Sixth Amendment right to trial by jury is being “lost ... by erosion.” *Apprendi*, 530 U.S. at 483 (citation omitted).

The Government is now frequently permitted a “second bite at the apple” at sentencing when it presents a judge with conduct for which the defendant was not even charged, much less convicted. That strategy—whereby the Government attempts to prove facts the defendant did not admit and no jury had an opportunity to find—is nothing more than an end run around the Fifth and Sixth Amendments.

Even within the statutory range, there are sentences—like Lujan’s—that would be unlawful but for a judge’s factfinding. Under this Court’s Fifth and Sixth Amendment precedents, facts that justify an otherwise unreasonable sentence must be found by a jury or admitted by the defendant before they can be used to increase the defendant’s sentence. This Court should grant review and definitively hold that the practice of sustaining an otherwise unreasonable sentence through judicial factfinding is unconstitutional.

C. Only this Court can resolve the important question presented, and this case is an excellent vehicle for doing so.

1. This case raises exceptionally important constitutional issues that affect the rights of criminal defendants in both federal and state courts. Multiple Justices of this Court have expressed concern over using judge-found facts to increase a defendant’s sentence and have called on the Court to put an end to this practice.

More than a decade ago, Justices Scalia, Thomas, and Ginsburg dissented from denial of certiorari in *Jones*, explaining that “[a]ny fact that increases the penalty to which a defendant is exposed constitutes an element of a crime” that “must be found by a jury, not a judge.” 574 U.S. at 948 (cleaned up). Yet, the Justices observed, “the Courts of Appeals have uniformly taken our continuing silence to suggest that the Constitution does permit otherwise unreasonable sentences supported by judicial fact-finding, so long as they are within the statutory range.” *Id.* at 949. The Justices urged the Court to weigh in and “put an end to the unbroken string of cases disregarding the Sixth Amendment.” *Id.* at 950.

Justices Sotomayor, Kavanaugh, Gorsuch, and Barrett echoed those same concerns just a few terms ago, explaining that the use of acquitted conduct at sentencing raised important issues “that go to the fairness and perceived fairness of the criminal justice system” warranting this Court's review. *McClinton v. United States*, 143 S. Ct. 2400, 2401 (2023) (Sotomayor, J., respecting denial of certiorari); *see id.* at 2403 (Kavanaugh, J., joined by Gorsuch and Barrett, JJ., respecting denial of certiorari) (similar). Justices have consistently raised these concerns—not only as to acquitted conduct, but as to vacated and other uncharged conduct as well. *See Bell*, 808 F.3d at 928 (Kavanaugh, J., concurring in denial of rehearing en banc) (“Allowing judges to rely on acquitted or uncharged conduct to impose higher sentences than they otherwise would

impose seems a dubious infringement of the rights to due process and to a jury trial.”); *Sabillon-Umana*, 772 F.3d at 1331 (Gorsuch, J.) (“It is far from certain whether the Constitution allows” a district judge to increase a defendant’s sentence within the statutorily authorized range “based on facts the judge finds without the aid of a jury or the defendant’s consent.”).

As Justices Scalia, Thomas, and Ginsburg anticipated, federal courts of appeals have continued to understand this Court’s silence regarding the practice as approval of it, holding that the use of judge-found facts to increase a defendant’s authorized punishment is permissible. Every circuit with criminal jurisdiction has blessed this practice.⁷ Thus, there is no prospect that any circuit will change its position absent this Court’s intervention.

⁷ See *United States v. González*, 857 F.3d 46, 58 (1st Cir. 2017); *United States v. Vaughn*, 430 F.3d 518, 526–27 (2d Cir. 2005); *United States v. Ciavarella*, 716 F.3d 705, 735–36 (3d Cir. 2013); *United States v. Grubbs*, 585 F.3d 793, 798–99 (4th Cir. 2009); *United States v. Farias*, 469 F.3d 393, 399–400 & n.17 (5th Cir. 2006); *White*, 551 F.3d at 386 (6th Cir.); *United States v. Waltower*, 643 F.3d 572, 575–78 (7th Cir. 2011); *United States v. Waller*, 689 F.3d 947, 958–60 (8th Cir. 2012); *United States v. Lucas*, 101 F.4th 1158, 1162–63 (9th Cir. 2024); *United States v. Constantine*, 263 F.3d 1122, 1125 n.2 (10th Cir. 2001); *United States v. Siegelman*, 786 F.3d 1322, 1332–33 & n.12 (11th Cir. 2015); *Settles*, 530 F.3d at 923–24 (D.C. Cir.).

Lower-court judges therefore have no choice but to affirm extraordinary sentencing enhancements not because they believe them to be constitutional but because they are compelled to do so by circuit precedent. *See, e.g., United States v. Sikes*, 824 F. App'x 805, 810 (11th Cir. 2020) (per curiam) (affirming a sentence double the Guidelines range for mail fraud based on evidence of uncharged conduct because, “even if th[e] jurists and scholars are correct” that “the Fifth and Sixth Amendments preclude district courts from considering uncharged conduct at sentencing,” “we would not be permitted to overlook” binding precedent); *Hebert*, 813 F.3d at 564–65 (5th Cir.) (upholding a sentence eighty-six years above the Guidelines range because judicial fact-finding did not violate the defendant's “due process right and constitutional right to a jury trial” under the court’s “precedent”). Even district judges cannot “disclaim reliance on acquitted or uncharged conduct,” because circuit courts do not merely permit district judges to increase defendants’ sentences based on judge-found facts; they require them to do so. *Bell*, 808 F.3d at 928 (Kavanaugh, J., concurring in denial of rehearing en bane).

2. This case is an ideal vehicle to resolve these constitutional questions. Lujan’s sentence indisputably rested on the unadjudicated allegations the Government presented at sentencing. His Guidelines range—which fully accounted for the offense conduct and his prior convictions—was 30- to 37-months’ imprisonment. According to statistics compiled by

the Sentencing Commission, 75% of defendants similarly situated to Lujan—sentenced under the drug-trafficking guideline, §2D1.1, for powder cocaine with a total offense level of 18 and a criminal history category of II—received a sentence within the Guidelines range. See Judiciary Sentencing Information, <https://jsin.ussc.gov/analytics/saw.dll?Dashboard>. The median length of imprisonment was 30 months, with an average of 68 months. Yet Lujan’s 180-month sentence was far longer—roughly five to six times the Guidelines range—and the extraneous allegations that were the focus of the sentencing hearing “could, in themselves, constitute entirely free-standing offenses under the applicable law,” *Faust*, 456 F.3d at 1352 (Barkett, J., specially concurring). And the sentence is far greater than the seven-year sentence that Lujan received for his prior *conviction* for aggravated assault with a deadly weapon, and the 25 months that he ultimately received for his prior heroin and felon-in-possession convictions. It is hard to imagine that a 180-month—or 15-year—sentence is “not greater than necessary,” 18 U.S.C. § 3553(a), but for the evidence the Government presented at sentencing about alleged crimes Lujan was never convicted of, that he did not admit, and that a jury did not find.

Also, Lujan’s case involves a clean presentation of the question presented. The unadjudicated allegations that dominated his sentencing

hearing were not relevant conduct to his instant drug offenses. And unlike other cases that have presented this issue to the Court, Lujan's case does not involve acquitted conduct or conduct for which a jury found the defendant guilty but which was later reversed or vacated due to legal error or factual insufficiency.

Finally, there are no prudential or procedural obstacles to granting certiorari. The issue was litigated and ruled on below: Lujan objected on Fifth and Sixth Amendment grounds at sentencing to the consideration of the unadjudicated allegations of other criminal conduct; the district court overruled the objection; and the Fifth Circuit rejected Lujan's argument on appeal because it was foreclosed by circuit precedent.

* * *

More than a decade ago, Justice Scalia concluded that the practice of increasing criminal defendants' authorized punishments based on judge-found facts "has gone on long enough." *Jones*, 135 S. Ct. at 9 (Scalia, J., joined by Thomas and Ginsburg, JJ., dissenting from denial of certiorari). The Court "should grant certiorari to put an end to the unbroken string of cases disregarding" the Constitution and this Court's precedents. *Id.*

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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