No. 23-370

In the Supreme Court of the United States

PAUL ERLINGER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the Constitution requires that a jury find (or the defendant admit) that a defendant's predicate offenses were "committed on occasions different from one another" before the defendant may be sentenced under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(1).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 77 F.4th 617. The order of the district court is not published in the Federal Supplement but is available at 2021 WL 2915014.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 2023. The petition for a writ of certiorari was filed on October 4, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Indiana, petitioner was convicted of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 18 U.S.C. 924 (2012). Judgment 1. He was sentenced to

180 months of imprisonment, to be followed by one year of supervised release. Judgment 2-3. The district court subsequently granted resentencing under 28 U.S.C. 2255 and reimposed the same sentence. Pet. App. 58a-59a. The court of appeals affirmed. *Id.* at 1a-9a.

1. In 2017, police officers received a report that petitioner had weapons and ammunition at his residence. Presentence Investigation Report (PSR) ¶ 5; Pet. App. 26a. During a subsequent traffic stop, petitioner admitted that multiple firearms were stored at his residence. PSR ¶ 6. After a search of petitioner's residence, officers discovered a safe containing 16 long guns, four pistols, and ammunition. PSR ¶¶ 5, 8.

After waiving indictment, petitioner was charged by information with possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 18 U.S.C. 924 (2012). Pet. App. 10a-11a; D. Ct. Doc. 33 (May 15, 2018). Petitioner pleaded guilty to the charged offense without a plea agreement. Pet. App. 2a.

2. In preparation for sentencing, the Probation Office determined that petitioner qualified for an enhanced sentence under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e). PSR ¶ 20. At the time of petitioner's offense, the default term of imprisonment for possessing a firearm as a felon was zero to ten years. See 18 U.S.C. 924(a)(2) (2012).[1] The ACCA prescribes a penalty of 15 years to life imprisonment if the defendant has at least "three previous convictions * * * for a violent felony or a serious drug offense, or

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[1] For Section 922(g) offenses committed after June 25, 2022, the default term of imprisonment is zero to 15 years. See Bipartisan Safer Communities Act, Pub. L. No. 117-159, Div. A, Tit. II, § 12004(c), 136 Stat. 1329 (18 U.S.C. 924(a)(8) (Supp. IV 2022)).

both, committed on occasions different from one another." 18 U.S.C. 924(e)(1).

The Probation Office determined that petitioner had four prior state-law convictions for offenses that qualified as ACCA predicates: two convictions for distribution of methamphetamine in 2003, one conviction for Illinois residential burglary in 1991, and one conviction for Indiana burglary in 1991, in Pike County. PSR ¶ 20; see PSR ¶¶ 35, 43, 45, 46. The Probation Office further determined that those offenses "were committed on different occasions." PSR ¶ 20. The district court found that petitioner qualified for sentencing under the ACCA and sentenced petitioner to 180 months of imprisonment, to be followed by one year of supervised release. Judgment 2-3; Pet. App. 2a.

3. On July 12, 2021, the district court vacated petitioner's sentence under 28 U.S.C. 2255 because of intervening circuit decisions concluding that Illinois residential burglary is not a violent felony under ACCA, see *United States* v. *Glispie*, 978 F.3d 502, 503 (7th Cir. 2020) (per curiam), and that Indiana methamphetamine convictions are not serious drug offenses under ACCA, see *United States* v. *De La Torre*, 940 F.3d 938, 951-952 (7th Cir. 2019). See Pet. App. 2a, 14a, 15a.

At the resentencing hearing, the government argued that petitioner still qualified for sentencing under the ACCA because he had four burglary convictions in Dubois County, Indiana. Pet. App. 2a-3a. Each burglary took place at a different business, and three of the burglaries occurred on different dates: (1) April 4, 1991 at Mazzio's Pizza; (2) April 8, 1991 at The Great Outdoors, Inc.; (3) April 11, 1991 at Druther's; and (4) April 11, 1991 at Schnitzelbank. *Id.* at 3a. The government

supplied a separate charging document and plea for each conviction. *Ibid.*

Petitioner objected to his ACCA classification. Pet. App. 3a. Petitioner contended (among other things) that, under the Sixth Amendment, he could not be sentenced under the ACCA in the absence of a jury finding that his predicate offenses were committed on different occasions. *Ibid.*; see *id.* at 23a, 37a, 41a-42a, 45a-48a.

The district court refused to adopt that approach, concluding that circuit precedent foreclosed it. Pet. App. 56a-57a ("I don't believe that [petitioner's] Sixth Amendment rights are violated by me finding that these occurred on separate occasions," but "you have done a tremendous job preserving this issue for appellate review."); see *id.* at 55a. And, even declining to count the two April 11th burglaries as separate, the court found that petitioner qualified for sentencing under the ACCA because his record included three burglary convictions occurring in different "locations on three different dates." *Id.* at 55a; see *id.* at 55a-56a.

4. The court of appeals affirmed. Pet. App. 1a-9a.

On appeal, the government agreed with petitioner that "the Sixth Amendment requires a jury to determine whether predicate offenses were committed on different occasions." Gov't C.A. Br. 7 (discussing this Court's articulation of the nature of the different-occasions inquiry in *Wooden* v. *United States*, 595 U.S. 360 (2022)). The government explained, however, that "the error was harmless" in this case, "because [petitioner]'s burglaries—committed on different days at different locations—occurred on separate occasions." *Ibid.*

Citing decisions that both predated and postdated *Wooden*, the court of appeals observed that it had consistently held "that a sentencing judge may make a

'separate occasions' finding when deciding the ACCA enhancement." *Id.* at 6a (citing *United States* v. *Elliott*, 703 F.3d 378, 382 (7th Cir. 2012), cert. denied, 569 U.S. 982 (2013); *United States* v. *Hatley*, 61 F.4th 536, 542 (7th Cir. 2023), petition for cert. pending, No. 22-1190 (filed June 2, 2023)). The court further observed that "*Wooden* explicitly did not address whether the 'separate occasions' determination must be made by a jury rather than a judge." Pet. App. 7a (citing *Wooden*, 595 U.S. at 365 n.3). And the court noted that "earlier this year," it had "affirmed an ACCA sentence" where the sentencing judge made the "'separate occasions'" finding. *Ibid.* (quoting *Hatley*, 61 F.4th at 542).

The court of appeals accordingly concluded that it was "bound by [circuit] precedent." Pet. App. 7a; see *id.* at 7a n.3 ("[T]he parties' position is foreclosed by current precedent."). And it made clear that under that precedent, "[t]he government was not required to prove to a jury beyond a reasonable doubt that [petitioner] committed the Indiana burglaries on separate occasions"; rather, "[t]he government could prove its position to the sentencing judge." *Id.* at 8a.

DISCUSSION

Petitioner renews his contention (Pet. 14-18) that the Sixth Amendment requires a jury to find (or a defendant to admit) that predicate offenses were committed on different occasions under the ACCA. In light of this Court's recent articulation of the standard for determining whether offenses occurred on different occasions in *Wooden* v. *United States*, 595 U.S. 360 (2022), the government agrees with that contention. Although the government has opposed previous petitions raising this issue, recent developments make clear that this Court's intervention is necessary to ensure that the

circuits correctly recognize defendants' constitutional rights in this context. This case presents a suitable vehicle for deciding the issue this Term and thereby providing the timely guidance that the issue requires.[2]

1. The Sixth Amendment guarantees the right to a "jury" "[i]n all criminal prosecutions," and the Fifth Amendment entitles criminal defendants to "due process of law." U.S. Const. Amends. V, VI. This Court has read those rights in conjunction in finding that, as a general matter, "[j]uries must find any facts that increase either the statutory maximum or minimum" beyond a reasonable doubt. *Alleyne* v. *United States*, 570 U.S. 99, 113 n.2 (2013); see *Apprendi* v. *New Jersey*, 530 U.S. 466, 476 (2000).

In *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998), the Court recognized a "narrow exception to this general rule for the fact of a prior conviction." *Alleyne*, 570 U.S. at 111 n.1. Accordingly, this Court has repeatedly confirmed that "the fact of a prior conviction" does not need to be submitted to a jury and proven beyond a

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[2] The same question is additionally presented in the petitions for writs of certiorari in *Thomas* v. *United States*, No. 23-5457 (filed Aug. 22, 2023) and *Valencia* v. *United States*, No. 23-5606 (filed Sept. 12, 2023), either of which would be an adequate alternative vehicle if the Court perceives any problem with this petition. A similar question is also presented in *McCall* v. *United States*, No. 22-7630 (filed May 22, 2023), which the Court appears to be holding pending the disposition of *Jackson* v. *United States*, No. 22-6640 (oral argument scheduled for Nov. 27, 2023), and *Brown* v. *United States*, No. 22-6389 (oral argument scheduled for Nov. 27, 2023). While the pendency of the *Brown/Jackson* question in *McCall* would make it an unsuitable vehicle for further review of the question presented here, if the Court grants certiorari in this case, *Thomas*, or *Valencia*, it should hold the petition in *McCall* pending its decision on the question presented here and then dispose of *McCall* as appropriate.

reasonable doubt, even when it increases the penalty for a crime beyond the statutory maximum or minimum that would otherwise apply. *Apprendi*, 530 U.S. at 490; see, *e.g.*, *United States* v. *Haymond*, 139 S. Ct. 2369, 2377 n.3 (2019) (plurality opinion); *Mathis* v. *United States*, 579 U.S. 500, 511 (2016); *Descamps* v. *United States*, 570 U.S. 254, 269 (2013); *Alleyne*, 570 U.S. at 111 n.1; *Southern Union Co.* v. *United States*, 567 U.S. 343, 358-360 (2012); *Carachuri-Rosendo* v. *Holder*, 560 U.S. 563, 567 n.3 (2010); *James* v. *United States*, 550 U.S. 192, 214 n.8 (2007), overruled on other grounds by *Johnson* v. *United States*, 576 U.S. 591 (2015); *Cunningham* v. *California*, 549 U.S. 270, 274-275 (2007); *United States* v. *Booker*, 543 U.S. 220, 244 (2005); *Blakely* v. *Washington*, 542 U.S. 296, 301-302 (2004).

2. The ACCA increases both the statutory minimum and maximum sentence for a violation of 18 U.S.C. 922(g) if the defendant has at least "three previous convictions * * * for a violent felony or a serious drug offense, or both, committed on occasions different from one another." 18 U.S.C. 924(e)(1). The determination of whether a prior conviction qualifies as an ACCA predicate involves a "categorical approach" that focuses on "the elements of the crime" underlying that conviction. *Mathis*, 579 U.S. at 504. And this Court has permitted a sentencing judge to make that determination, which may include consultation of certain formal documents associated with the prior convictions. See *id.* at 511; *Shepard* v. *United States*, 544 U.S. 13, 16 (2005).

In *Wooden*, this Court considered the proper test for determining whether prior convictions were committed on different occasions for purposes of the ACCA. See 595 U.S. at 364. The government advocated an elements-based approach to determining whether two offenses

occurred on different occasions, which it viewed as consistent with judicial determination of a defendant's ACCA qualification. See Gov't Br. at 46, *Wooden*, *supra* (No. 20-5279); see also, *e.g.*, Gov't Br. in Opp. at 5-11, *Walker* v. *United States*, 141 S. Ct. 1084 (2021) (No. 20-5578). The decision in *Wooden*, however, rejected the government's elements-based approach to the different-occasions inquiry. 595 U.S. at 366.

The Court held instead that the inquiry is "holistic" and "multi-factored," and that "a range of circumstances may be relevant to identifying episodes of criminal activity." *Wooden*, 595 U.S. at 365, 369. The Court explained that:

> Offenses committed close in time, in an uninterrupted course of conduct, will often count as part of one occasion; not so offenses separated by substantial gaps in time or significant intervening events. Proximity of location is also important; the further away crimes take place, the less likely they are components of the same criminal event. And the character and relationship of the offenses may make a difference: The more similar or intertwined the conduct giving rise to the offenses—the more, for example, they share a common scheme or purpose—the more apt they are to compose one occasion.

Id. at 369.

In light of the holistic and multi-factored standard adopted in *Wooden*, the government now acknowledges that the Constitution requires the government to charge and a jury to find beyond a reasonable doubt (or a defendant to admit) that ACCA predicates were committed on occasions different from one another. See Gov't Br. at 47, *Wooden*, *supra* (No. 20-5279) (observing

that "a Sixth Amendment claim * * * would potentially become more viable if this Court were to adopt [a fact-intensive] approach") (citation omitted). The different-occasions inquiry, as explicated by *Wooden*, goes beyond the "simple fact of a prior conviction," *Mathis*, 579 U.S. at 511, and instead requires consideration of factual circumstances surrounding a defendant's prior convictions, which will rarely be reflected in the elements of the crime and may not even be contained in the documents that a sentencing judge is permitted to consult. Thus, under this Court's precedents, such facts must be found by a jury or admitted by the defendant. See, *e.g.*, *ibid.* (observing that "a judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed that offense"); *Descamps*, 570 U.S. at 270 (holding that a district court cannot "rely on its own finding about a non-elemental fact to increase a defendant's maximum sentence").

3. It has recently become clear, however, that the courts of appeals will not embrace that analysis without this Court's intervention. The question presented—which is important to the administration of criminal law—accordingly warrants this Court's review this Term.

a. Prior to *Wooden*, the courts of appeals had uniformly held that sentencing courts could undertake the different-occasions inquiry under the ACCA. See, *e.g.*, *United States* v. *Ivery*, 427 F.3d 69, 75 (1st Cir. 2005), cert. denied, 546 U.S. 1222 (2006); *United States* v. *Santiago*, 268 F.3d 151, 156-157 (2d Cir. 2001), cert. denied, 535 U.S. 1070 (2002); *United States* v. *Blair*, 734 F.3d 218, 227-228 (3d Cir. 2013), cert. denied, 574 U.S. 828 (2014); *United States* v. *Thompson*, 421 F.3d 278, 284-287 (4th Cir. 2005), cert. denied, 547 U.S. 1005 (2006);

United States v. *White*, 465 F.3d 250, 254 (5th Cir. 2006) (per curiam), cert. denied, 549 U.S. 1188 (2007); *United States* v. *Burgin*, 388 F.3d 177, 184-186 (6th Cir. 2004), cert. denied, 544 U.S. 936 (2005); *United States* v. *Morris*, 293 F.3d 1010, 1012-1013 (7th Cir.), cert. denied, 537 U.S. 987 (2002); *United States* v. *Evans*, 738 F.3d 935, 936-937 (8th Cir. 2014) (per curiam); *United States* v. *Walker*, 953 F.3d 577, 580-582 (9th Cir. 2020), cert. denied, 141 S. Ct. 1084 (2021); *United States* v. *Michel*, 446 F.3d 1122, 1132-1133 (10th Cir. 2006); *United States* v. *Spears*, 443 F.3d 1358, 1361 (11th Cir.) (per curiam), cert. denied, 549 U.S. 916 (2006); *United States* v. *Thomas*, 572 F.3d 945, 952 n.4 (D.C. Cir. 2009), cert. denied, 559 U.S. 986 (2010).

The decision in *Wooden* expressly declined to address "whether the Sixth Amendment requires that a jury, rather than a judge, resolve whether prior crimes occurred on a single occasion" because the petitioner in that case "did not raise" the issue. 595 U.S. at 365 n.3; see *id.* at 397 n.7 (Gorsuch, J., concurring in the judgment) (observing that "[a] constitutional question simmers beneath the surface of today's case," because "only judges found the facts relevant to Mr. Wooden's punishment under the Occasions Clause"). As a result, the court of appeals in this case deemed itself "bound" by its precedent, under which a "sentencing judge may make a 'separate occasions' finding when deciding the ACCA enhancement." Pet. App. 6a-7a (citation omitted).

Every court of appeals to address the issue since *Wooden* has adhered to its prior precedent permitting judicial determination of the different-occasions inquiry. The Fourth, Fifth, Sixth, Eighth, and Tenth Circuits have issued published decisions similar to the

decision below. See *United States* v. *Brown*, 67 F.4th 200, 215 (4th Cir. 2023), reh'g denied, 77 F.4th 301 (4th Cir. 2023); *United States* v. *Valencia*, 66 F.4th 1032, 1032 (5th Cir. 2023), petition for cert. pending, No. 23-5606 (filed Sept. 12, 2023); *United States* v. *Belcher*, 40 F.4th 430, 432 (6th Cir. 2022), cert. denied 143 S. Ct. 606 (2023); *United States* v. *Robinson*, 43 F.4th 892, 896 (8th Cir. 2022); *United States* v. *Reed*, 39 F.4th 1285, 1295-1296 (10th Cir. 2022), cert. denied, 143 S. Ct. 745 (2023). And the Ninth and Eleventh Circuits have issued non-precedential decisions that do the same. See *United States* v. *Barrera*, No. 20-10368, 2022 WL 1239052, at *2 (9th Cir. Apr. 27, 2022), cert. denied, 143 S. Ct. 1043 (2023); *United States* v. *McCall*, No. 18-15229, 2023 WL 2128304, at *7 (11th Cir. Feb. 21, 2023) (per curiam), petition for cert. pending, No. 22-7630 (filed May 22, 2023).[3]

b. The courts of appeals have largely declined to reconsider en banc their pre-*Wooden* different-occasions precedents—in several cases, without even calling for a response from the government. See, *e.g.*, Order, *United States* v. *Williams*, No. 21-5856 (6th Cir. Oct. 26, 2022); Order, *Barrera*, *supra*, No. 20-10368 (9th Cir. Sept. 21, 2022); Order, *Reed*, *supra*, No. 21-2073 (10th Cir. Sept. 1, 2022).

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[3] The Ninth Circuit has also, however, issued an unpublished memorandum opinion vacating and remanding a defendant's ACCA sentence after "assum[ing], without holding, that an * * * error occurred" based on the government's "conce[ssion] that following [*Wooden*] a jury must find, or a defendant must admit, that a defendant's ACCA predicate offenses were committed on different occasions." *United States* v. *Man*, No. 21-10241, 2022 WL 17260489, at *1 (Nov. 29, 2022).

The Eighth Circuit agreed last year to reconsider the question presented en banc, after the government acquiesced to rehearing. Order, *United States* v. *Stowell*, No. 21-2234 (Nov. 15, 2022). But in a decision issued last month, the en banc court ultimately declined to resolve whether a sentencing court could undertake the different-occasions inquiry under the ACCA, instead resolving the case on harmless-error grounds. *United States* v. *Stowell*, No. 21-2234, 2023 WL 6168341, at *2 (8th Cir. Sept. 22, 2023) ("Whatever our views are on any Sixth Amendment error, we conclude that it was harmless beyond a reasonable doubt."). Four judges dissented, criticizing the majority for "bypass[ing]" the question of "whether the Sixth Amendment requires a jury, rather than a judge, to determine if prior crimes occurred on a single occasion." *Id.* at *4 (Erickson, J., dissenting). The dissent observed that this question is "one of 'exceptional importance,'" which the en banc court should not have "sidestep[ped]." *Id.* at *4-*5 (citation omitted). And the dissent expressed "hope" that "the Supreme Court will soon resolve" this "important constitutional issue." *Id.* at *4.

Meanwhile, the Fourth Circuit recently denied en banc review in a case in which the government likewise acquiesced to it. *United States* v. *Brown*, 77 F.4th 301 (2023). Seven judges concurred in that denial on the view that "an inferior court is poorly positioned to resolve" the scope of *Almendarez-Torres* post-*Wooden*. *Id.* at 302 (statement of Heytens, J., concerning the denial of rehearing en banc). They "hope[d]," however, that this Court "will step in to illuminate the path soon." *Ibid.* And six of the seven other active judges similarly "urg[ed] the Supreme Court to give the courts of appeals guidance in this important matter," *ibid.* (Niemeyer, J.,

concurring in part in Judge Heytens' statement), or "agree[d] that the Supreme Court should take up" the question, *id.* at 303 (Wynn, J., dissenting from the denial of rehearing en banc).

c. Through both their actions and their words, the courts of appeals have made the need for this Court's review apparent. The Fourth Circuit's denial of rehearing en banc—premised on the insufficiency of review by a lower court—means that the underenforcement of defendants' constitutional rights will persist there. The Eighth Circuit's refusal to resolve the Sixth Amendment question, after granting en banc rehearing, suggests that its pre-*Wooden* precedent is also likely to endure. And despite more than a year having passed since *Wooden*, no other circuit has reconsidered its pre-*Wooden* approach.[4]

As judges of the Fourth and Eighth Circuits have recognized, the issue warrants this Court's review. The frequency with which the issue has arisen in the appellate courts since this Court decided *Wooden* is illustrative of the substantial number of cases that it affects. At present, the government is attempting to comply with its view of the Constitution's proper application, notwithstanding circuit precedent, through such measures as requesting advisory sentencing juries. But

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[4] The Sixth Circuit recently directed the government to respond to a petition for rehearing en banc that raises the Sixth Amendment question. See Letter, *United States* v. *Campbell*, No. 22-5567 (Oct. 2, 2023). But regardless of how the Sixth Circuit disposes of that rehearing petition, the need for this Court's intervention will persist. If the Sixth Circuit either denies rehearing or grants rehearing and adheres to its prior precedent, the courts of appeals will remain intractably unanimous in incorrectly answering the question presented; if the Sixth Circuit changes course and departs from its sister circuits, the circuits would be intractably conflicted.

district courts have often rejected the government's proposals, noting that circuit law does not require them.

The Court need not await further percolation. At this point, the issue and the arguments are well-developed, as reflected in the numerous judicial opinions discussing the question. See, *e.g.*, *Stowell*, 2023 WL 6168341, at *4-*5 (Erickson, J., dissenting); *Brown*, 77 F.4th at 301 (statement of Heytens, J., concerning the denial of rehearing en banc); *Brown*, 67 F.4th at 215-218 (Heytens, J., concurring in the judgment); *Barrera*, 2022 WL 1239052, at *3 (Feinerman, J., concurring); *United States* v. *Dudley*, 5 F.4th 1249, 1273-1278 (11th Cir. 2021) (Newsom, J., concurring in part and dissenting in part), cert. denied, 142 S. Ct. 1376 (2022); *United States* v. *Hennessee*, 932 F.3d 437, 446-455 (6th Cir. 2019) (Cole, C.J., dissenting), cert. denied, 140 S. Ct. 896 (2020); *United States* v. *Perry*, 908 F.3d 1126, 1134-1136 (8th Cir. 2018) (Stras, J., concurring), cert. denied, 140 S. Ct. 90 (2019); *Thompson*, 421 F.3d at 287-295 (Wilkins, C.J., dissenting).

At this juncture, further delay would serve only to increase the number of convictions that might later be called into question on Sixth Amendment grounds and impose substantial litigation burdens on the courts and the parties. Only this Court can finally resolve the question presented, and it should do so now.

4. Unlike many previous petitions raising the same question, see, *e.g.*, Gov't Br. in Opp. at 12-13, *Buford* v. *United States*, No. 22-7660 (Aug. 14, 2023); Gov't Mem. at 2-4, *Enyinnaya* v. *United States*, No. 22-5857 (Dec. 19, 2022); Gov't Br. in Opp. at 8, *Reed* v. *United States*, No. 22-336 (Dec. 12, 2022); Gov't Br. in Opp. at 11-12, *Daniels* v. *United States*, No. 22-5102 (Nov. 21, 2022),

this case provides a suitable vehicle for resolving the question presented this Term.

First, the decision below is published and definitively addresses the question presented. See pp. 4-5, *supra*. Second, although this case does not involve a trial, petitioner's plea did not include a knowing waiver of a right to have a jury, rather than the district court, make the separate-occasions determination necessary to impose an ACCA sentence, see D. Ct. Doc. 67, at 7:13-12:5, 15:19-17:17 (Oct. 24, 2018), and petitioner adequately preserved his Sixth Amendment objection to his ACCA classification at resentencing in both lower courts, Pet. C.A. Br. 10-17; Pet. App. 23a, 37a-42a, 48a-54a. The government likewise briefed the issue, disagreeing with petitioner in the district court, Sent. Tr. 36:1-40:21, but agreeing in substance with petitioner in the court of appeals, Gov't C.A. Br. 9-11, and both courts below specifically analyzed and resolved the issue, Pet. App. 6a-8a, 55a-57a.[5]

Finally, while the government argued in the court of appeals that the error in this particular case was harmless, and that petitioner would therefore not be entitled

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[5] Petitioner also asserts that "the existence of three qualifying offenses committed on different occasions must be alleged in the indictment." Pet. 3; see Pet. 2, 14 n.5, 23. The question presented, however, asks only "[w]hether the Constitution requires a jury trial and proof beyond a reasonable doubt" to determine that prior convictions were committed on different occasions. Pet. i. Moreover, petitioner waived his right to indictment and was instead charged by information. See D. Ct. Doc. 33; Pet. C.A. Br. 3. In any event, given that the indictment requirement has tracked the jury-trial requirement in this context, see, *e.g.*, *United States* v. *Cotton*, 535 U.S. 625, 627 (2002), a decision on the jury-trial issue—as presented here, and as incorporated into the questions presented in *Thomas* and *Valencia*—should suffice to decide the indictment issue as well.

to relief even if the question presented were resolved in his favor, Gov't C.A. Br. 16-19, the court did not decide the case on that ground, see Pet. App. 6a-9a. Nothing would preclude this Court from likewise addressing the merits. And because prejudice will be similarly lacking in many other cases raising the question presented, its absence here does not warrant declining review of a question that the government agrees that the lower courts are currently answering incorrectly in the first instance, thereby denying defendants important rights in cases involving a common criminal charge.

CONCLUSION

The petition for a writ of certiorari should either be granted or held pending this Court's disposition of the petitions for writs of certiorari in *Thomas* v. *United States*, No. 23-5457 (filed Aug. 22, 2023) and *Valencia* v. *United States*, No. 23-5606 (filed Sept. 12, 2023). Because the court of appeals adopted a position that the government considers incorrect, if this Court grants review, it may wish to consider appointing an amicus to defend the holding of the court of appeals.

Respectfully submitted.

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