No.

In the Supreme Court of the United States

YONELL ALLUMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ANDREW FREIFELD
P.O. Box 3196
New York, NY 10008
(917) 553-6030

JOHN P. ELWOOD
ANDREW T. TUTT
Counsel of Record
AMANDA CLAIRE HOOVER
REBECCA A. CARUSO
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000
andrew.tutt@arnoldporter.com

QUESTION PRESENTED

In *United States v. Booker*, 543 U.S. 220 (2005), this Court held that the United States Sentencing Guidelines violated the Sixth Amendment because they required judges to impose harsher sentences if they found certain facts at sentencing. The Court invalidated two provisions of the Sentencing Reform Act of 1984 that had had the effect of making the Guidelines mandatory, concluding that making the Guidelines advisory would remedy the Sixth Amendment violation while still allowing the Guidelines scheme to operate in a manner consistent with congressional intent. Specifically, the Court held that judges had flexibility to deviate from the recommended Guidelines sentence as long as the sentence remained "reasonable."

In *Rita v. United States*, 551 U.S. 338 (2007), four concurring Justices recognized that *Booker*'s reasonable-sentence requirement sometimes leads to a different kind of Sixth Amendment issue: an "as-applied" violation. Namely, when a judge imposes a sentence that is reasonable *only* because the judge found an aggravating fact at sentencing, that sentence violates the Sixth Amendment. That is because, in those instances, the Guidelines sentencing scheme unconstitutionally delegates to sentencing judges the power to increase the maximum sentence by finding a qualifying aggravating fact. Yet in the years since *Rita*, every court of appeals with criminal jurisdiction has held that these sorts of as-applied Sixth Amendment challenges are categorically unavailable.

The question presented is whether a criminal sentence violates the Sixth Amendment when the sentencing court relies on its factual findings about a criminal defendant's conduct to impose a sentence longer than otherwise would have been reasonable.

PARTIES TO THE PROCEEDING

Dean Jones, Maxwell Suero, Troy Williams, Dequan Parker, Richard Graham, Darnell Frazier, Malik Saunders, Kaheim Allums, and Ralph Hooper were defendants in the district court. Kaheim Allums and Ralph Hooper were appellants in the court of appeals.

RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii).

United States District Court (S.D.N.Y):

- *United States v. Jones*, No. 1:15-cr-00153-VSB-1 (Dec. 11, 2018)
- *United States v. Williams*, No. 1:15-cr-00153-VSB-3 (Jan. 17, 2018)
- *United States v. Hooper*, No. 1:15-cr-00153-VSB-4 (May 7, 2018)
- *United States v. Parker*, No. 1:15-cr-00153-VSB-5 (Oct. 14, 2017)
- *United States v. Saunders*, No. 1:15-cr-00153-VSB-6 (Feb. 16, 2018)
- *United States v. Graham*, No. 1:15-cr-00153-VSB-7 (Jan. 2, 2018)
- *United States v. Allums* (Yonell), No. 1:15-cr-00153-VSB-8 (June 13, 2018)
- *United States v. Allums* (Kaheim), No. 1:15-cr-00153-VSB-9 (Sept. 17, 2018)
- *United States v. Frazier*, No. 1:15-cr-00153-VSB-10 (Aug. 8, 2019)

United States District Court (D. Vt.):

- *United States v. Suero*, No. 2:15-cr-00089-WKS (Apr. 17, 2017)

United States Court of Appeals (2d Cir.):

- *United States v. Jones*, No. 18-3800 (Dec. 16, 2020)
- *United States v. Hooper*, No. 18-3734 (pending)
- *United States v. Saunders*, No. 18-491 (July 30, 2021)
- *United States v. Allums* (Kaheim), No. 18-2761 (Sept. 3, 2021)
- *United States v. Allums*, Nos. 18-1794, 20-2289 (June 4, 2021; reh'g denied Aug. 13, 2021)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases—Continued Page(s)

Cases—Continued Page(s)

Cases—Continued Page(s)

Statutes

Statutes—Continued Page(s)

Petitions for Certiorari

Other Authorities

Other Authorities—Continued Page(s)

PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The opinion of the court of appeals (App. 1a-11a) is available at 858 F. App'x 420.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 2021. On October 25, 2021, Justice Sotomayor extended the time for filing a certiorari petition to January 10, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury[.]

U.S. Const. amend. VI.

STATEMENT OF THE CASE

This petition asks the Court to address a regularly recurring question of exceptional importance: whether the courthouse doors remain open to an as-applied Sixth Amendment challenge in cases where the sentence imposed would not be reasonable if based entirely on jury-found facts.

This Court's cases appear already to answer this question in the affirmative. This Court held in *United States v. Booker*, 543 U.S. 220 (2005), that "[a]ny 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.* at 244 (emphasis added). The necessary result of that holding "under a system of

substantive reasonableness review," as Justice Scalia explained in his concurrence in *Rita v. United States*, 551 U.S. 338 (2007), is that "there will inevitably be some constitutional violations . . . because there will be some sentences that will be upheld as reasonable *only because of the existence of judge-found facts*." *Id.* at 374 (Scalia, J., concurring in part and concurring in the judgment).

Yet, despite the recognition by multiple Justices that these as-applied Sixth Amendment violations will sometimes occur, in the 14 years since *Rita*, no circuit court of appeals has held a sentence to violate the Sixth Amendment on that basis. The stark incongruity between *Booker*'s holding, on the one hand, and the law applied in the courts of appeals, on the other, has led to dozens of petitions for certiorari in the past decade, even in the face of unanimity in the federal courts of appeals rejecting these challenges. In opposing certiorari in *Jones v. United States*, 574 U.S. 948 (2014) (13-10026), the United States identified thirteen petitions that this Court had denied between 2008 and 2013 raising such challenges. U.S. Br. at 7 n.1, 9 n.2. The United States identified a half dozen more in its brief in opposition in *Daugerdas v. United States*, 138 S. Ct. 62 (2017) (16-1149). U.S. Br. at 12 n.5. And criminal defendants continue to press this Court to review this question every year. *See, e.g.*, Pet., *Asaro v. United States*, 140 S. Ct. 1104 (2020) (19-107). Countless more preserve the claim but never make it to this Court. The disconnect between this Court's cases and the doctrine in the lower courts puts defendants in the difficult position of having to preserve an issue on which only this Court can grant relief, substantially burdening courts, prosecutors, and defense counsel.

But while such claims have languished in the lower courts, there is growing recognition among distinguished jurists and scholars that Sixth Amendment rights are infringed when a sentence's reasonableness depends on

judicial factfinding. *See, e.g.*, *United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in the denial of rehearing en banc); *United States v. Sabillon-Umana*, 772 F.3d 1328, 1331 (10th Cir. 2014) (Gorsuch, J., for the court); Erwin Chemerinsky, *Making Sense of* Apprendi *and Its Progeny*, 37 MCGEORGE L. REV. 531, 537-39 (2006).

This case is an attractive vehicle to review this recurring question. Petitioner Yonell Allums was tried for several drug crimes and acquitted of the most serious charges. He ultimately was convicted of participation in a low-level, non-violent drug conspiracy. Based on the conduct for which the jury convicted him, his federal Sentencing Guidelines range would have been 57 to 71 months, with a mandatory minimum of 10 years because of a prior conviction. But at sentencing, the judge found that petitioner probably *had* committed the more serious crimes for which a jury had just acquitted him: possessing higher drug quantities and possessing a firearm in furtherance of a drug trafficking conspiracy. Accordingly, petitioner's Guidelines range shot up from 57 to 71 months to *30 years to life*. In the end, the judge sentenced petitioner to 20 years in prison, a sentence nearly quadruple that of the Guidelines range applicable for the conduct for which the jury actually found him guilty and exactly double the sentence that lawfully could be imposed based on the jury's factfinding. As this Court recognized in *Apprendi v. New Jersey*, "the potential doubling of one's sentence—from 10 years to 20 . . . is unquestionably of constitutional significance." 530 U.S. 466, 495 (2000).

The issue here is not that the trial judge reached those factual conclusions. The judge is entitled to find facts at sentencing relevant to determining the appropriate sentence within the range supported by the jury's verdict. The issue is that petitioner's sentence is

substantively unreasonable without the judge's factual conclusions: it is harsher than the harshest reasonable sentence the jury-found facts support. That violates the cardinal rule enshrined in *Apprendi*, *Blakely*, and *Booker* that judicial factfinding must not expose the defendant to a harsher sentence than the jury's verdict standing alone permits. But the Second Circuit would not even entertain such a challenge.

The Sixth Amendment requires that petitioner's sentence be a lawful sentence when measured solely against jury-found or admitted facts. But petitioner's sentence is not one. No reasonable jurist could conclude that petitioner should be sentenced to 20 years in prison based only on the facts proven in his criminal trial and his prior conviction. Because the reasonableness (and hence the lawfulness) of petitioner's sentence turns on a judge's finding of aggravating facts, it violates the Sixth Amendment, and the Second Circuit erred in holding otherwise. The Court should grant the petition.

1. In June 2017, a federal grand jury indicted petitioner, his nephew, and another individual for conspiring to traffic various drugs. App. 33a-36a. The government alleged in Count One that petitioner conspired to distribute 5 kilograms or more of cocaine, 280 grams or more of crack cocaine, and small amounts of heroin and marijuana. App. 33a-34a. The government also alleged in Count Two that petitioner used a firearm in furtherance of the conspiracy. App. 34a-35a. According to the government, petitioner ran a large-scale drug distribution conspiracy out of the deli he owned and managed in Yonkers, New York, out of the upstairs apartment where his nephew resided, and out of the basement apartment where petitioner resided. App. 5a; Gov't C.A. Br. 4-6. Petitioner's nephew pleaded guilty before trial and admitted to operating a small-scale crack operation. Pet. C.A. Br. 2.

After a multi-week trial, a jury found petitioner guilty of some charges but acquitted him of the high quantities alleged by the government in Count One and acquitted him entirely of the firearms charge in Count Two. App. 26a-28a, 31a. The government's case for the higher quantities had relied on one cooperating witness, who testified at trial that petitioner handed him over 50 kilograms of cocaine on dozens of occasions and that there were multiple firearms at the property used for this alleged drug operation. Pet. C.A. Br. 5-7; Gov't C.A. Br. 5-7. But other witness testimony contradicted this cooperator's account. The jury's verdict shows that the jury did not credit the cooperator's testimony regarding drug quantities and the presence of guns to further the conspiracy. App. 27a-28a, 31a; Pet. C.A. Br. 5-7.

Specifically, while the government alleged that petitioner conspired to distribute 5 kilograms or more of cocaine, the jury rejected the government's allegation and found the quantity proven beyond a reasonable doubt was 500 grams or more. App. 27a. And while the government alleged petitioner conspired to distribute 280 grams or more of crack, the jury rejected the government's allegation and found the quantity of crack proven beyond a reasonable doubt was 28 grams or more. App. 28a. The jury also found petitioner guilty of conspiring to distribute marijuana but acquitted him of the charge of conspiring to distribute heroin. App. 28a. Thus, the only crimes for which petitioner was convicted were conspiracy to distribute: (1) 500 grams or more of cocaine; (2) 28 grams or more of crack; and (3) marijuana. The jury's acquittals for the higher drug quantities establish that the jury had reasonable doubt that petitioner distributed more than 5 kilograms of cocaine and more than 280 grams of crack. The jury's acquittal of the firearms charge establishes that the jury had reasonable doubt that petitioner possessed a firearm in furtherance of the conspiracy.

2. At sentencing, however, petitioner was sentenced using a Sentencing Guidelines range based on the higher quantities of drugs and the firearm possession. *See* App. 64a-69a. The judge made the following findings by a preponderance of the evidence based upon the testimony of the cooperating witness: (1) petitioner distributed "at least 50 kilograms" of cocaine, App. 42a; (2) he distributed at least 2.6 kilograms of crack, App. 42a; and (3) he possessed a firearm in furtherance of the conspiracy, App. 43a. Based solely upon the jury's verdict, petitioner's sentencing range would have been between 57 and 71 months' imprisonment.[1] Based upon the judge-found facts after petitioner's trial, however, the judge calculated a Guidelines range of 360 months to life imprisonment. App. 64a. The judge sentenced petitioner to 240 months' imprisonment, a downward variance from the Guidelines range. App. 70a.

3. Petitioner appealed his conviction and sentence, arguing in relevant part that that the judicial factfinding in his case violated the Sixth Amendment because, "but for the district court's findings of fact," courts would "deem []his sentence substantively unreasonable." Pet. C.A. Br. 68. The government opposed, arguing that petitioner's challenge is "foreclosed by binding precedent," citing *United States v. Watts*, 519 U.S. 148 (1997), and *United States v. Martinez*, 525 F.3d 211 (2d Cir. 2008). Gov. C.A. Br. 57-58.

---

[1] Again, due to an earlier conviction, petitioner's mandatory minimum would have been 10 years (120 months) notwithstanding the unadjusted Guidelines range, and the Guidelines sentence would have been automatically adjusted to make the mandatory minimum the Guidelines sentence. *See* U.S.S.G. § 5G1.1(b) ("Where a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence.").

The court of appeals affirmed by summary order, stating without further reasoning that petitioner's Sixth Amendment argument was "without merit." *See* App. 11a. Petitioner petitioned for panel rehearing or rehearing en banc to address his Sixth Amendment claim. *See* Rehearing Pet. 1-5. The court of appeals denied rehearing without opinion. App. 24a-25a.

REASONS FOR GRANTING THE PETITION

This case provides the Court an opportunity to review a recurring and exceptionally important question arising out of this Court's decision in *United States v. Booker*, 543 U.S. 220 (2015). *Booker* held that federal judges must impose reasonable sentences in relation to the facts found at trial and sentencing. That reasonableness requirement creates no Sixth Amendment problem in most cases, but in a subset of cases—like the case at bar—it results in a Sixth Amendment violation when the judge's factfinding is necessary for the resulting sentence to be reasonable and, therefore, lawful. The court below rejected this argument as "without merit" on the basis of its precedent holding that such Sixth Amendment violations, in fact, never happen. App. 11a; *see, e.g.*, *United States v. Martinez*, 525 F.3d 211, 215 (2d Cir. 2008). For three reasons, this Court's review is warranted.

First, the decision below is wrong. This Court's precedents establish that "[a]ny 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 (emphasis added). This rationale applies not only to the statutory maximum sentence, but also to the maximum reasonable sentence under the "reasonableness review" set forth in *Booker*'s remedial opinion. As Justice Scalia explained, joined by Justices Thomas and Ginsburg, "any fact

necessary to prevent a sentence from being substantively unreasonable—thereby exposing the defendant to the longer sentence—is an element that must be either admitted by the defendant or found by the jury. It *may not* be found by a judge." *Jones v. United States*, 574 U.S. 948, 949 (2014) (Scalia, J., joined by Thomas and Ginsburg, JJ., dissenting from the denial of certiorari). The Second Circuit thus erred in rejecting petitioner's as-applied Sixth Amendment challenge to his sentence.

Second, the question presented is important. The Sixth Amendment preserves the "jury's historic role as a bulwark between the State and the accused at the trial for an alleged offense." *S. Union Co. v. United States*, 567 U.S. 343, 350 (2012) (quotation marks omitted). Its guarantee of trial by jury is a constitutional protection "of surpassing importance." *Apprendi*, 530 U.S. at 476-77. Since the Founding, the jury "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). The absence of an "as-applied" Sixth Amendment check on federal sentencing leaves criminal punishment for numerous federal crimes essentially at the mercy of federal judges, "mak[ing] the jury a mere gatekeeper to the more important trial before a judge alone." *Rita*, 551 U.S. at 386 (Souter, J., dissenting). The decision below allows a sentencing judge using a much lower evidentiary standard to take the place of a jury on a question that often is more important to a criminal defendant than whether he is found not guilty, namely, whether he committed a sufficiently serious crime to warrant a multi-decade punishment. *See id.* This issue also recurs frequently, as shown by the numerous court of appeals cases and dozens of petitions for certiorari that have raised the question presented.

Third, this case is an excellent vehicle to resolve this question. This issue was squarely presented, fully litigated, and is outcome determinative. Petitioner raised this issue at sentencing, on appeal, and in his petition for rehearing en banc. And though the court of appeals summarily rejected petitioner's claim—because as-applied Sixth Amendment challenges are foreclosed by circuit precedent—petitioner's sentence would be substantively unreasonable in the absence of the judge-found facts. This case is essentially the mirror image of *Jones*, 574 U.S. 948, a case in which three members of this Court opined that the petitioners had "present[ed] a strong case that, but for the judge's finding of fact, their sentences would have been 'substantively unreasonable' and therefore illegal." *Id.* at 948. Here, the doubling of petitioner's sentence—from 10 years to 20 years—on the basis of the judge's factfinding is strikingly similar to the enhancements in *Jones*. And as the Court said in *Apprendi*, "it can hardly be said that the potential doubling of one's sentence—from 10 years to 20—has no more than a nominal effect. Both in terms of absolute years behind bars, and because of the more severe stigma attached, the differential here is unquestionably of constitutional significance." 530 U.S. at 495.

The Court should grant certiorari.

I. The Second Circuit's Decision Is Wrong

The decision below cannot be squared with this Court's precedents. Under the Sixth Amendment, the facts that the jury finds beyond a reasonable doubt are the basis for the maximum sentence a judge may impose. At sentencing, judges may sentence below that maximum, but they cannot, consistent with the Sixth Amendment, be delegated the power to find facts that increase the maximum sentence.

Yet, under the federal Sentencing Guidelines and the system of substantive reasonableness review the Court

announced in *Booker*, judges are explicitly delegated the authority to find facts that increase the maximum sentence a person may lawfully receive in some cases. 543 U.S. at 258-65 (holding that sentences must be "reasonable" in relation to specified factors in 18 U.S.C. § 3553(a), as reflected in the 1994 edition of § 3742(e)(3)). The "maximum" sentence under federal law is the harshest sentence that can "reasonably" be imposed pursuant to § 3553. But § 3553 is a delegation of factfinding authority to *judges*, not *juries*. As a consequence, in some cases—those where the sentence would be unreasonable but for judge-found facts—sentences imposed under this scheme violate the Sixth Amendment.

1. To protect the fundamental role of the jury at the center of the criminal justice system, the Court held in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Blakely v. Washington*, 542 U.S. 296 (2004), and *United States v. Booker*, 543 U.S. 220 (2005), that judicial factfinding that increases the maximum punishment that a defendant can lawfully receive violates the Sixth Amendment. *See Booker*, 543 U.S. at 244. Any other rule would permit legislatures to circumvent the Sixth Amendment's guarantees by making what would otherwise be "elements" of crimes, for juries to decide, into mere sentencing "factors," for judges to determine. Aggravated assault could be redefined as assault with aggravating circumstances to be determined at sentencing. Possession with intent to distribute could be redefined as simple possession, with an intent to distribute enhancement to be determined at sentencing. That scheme would eviscerate the Sixth Amendment.

In *Booker*, this Court recognized that the mandatory Sentencing Guidelines had just this forbidden consequence. The Guidelines, calculated on the basis of the judge's findings and not the jury verdict, determined

the severity of sentences. In *Booker*, the jury verdict supported a sentence of 210 to 262 months, but the facts found by the judge at sentencing required a sentence between 360 months and life. *Id.* at 227. The Court held that this made the mandatory Guidelines unconstitutional: the factfinding at sentencing violated the cardinal rule that *jury-found facts* must establish the upper limit of the sentence. *Id.* at 232, 244.

But there was the further issue of remedy. The Court confronted the question of how to modify Guidelines sentencing to make the system constitutional. One option would have been to require the Government to prove to the jury beyond a reasonable doubt those facts upon which the judge would need to rely to impose a heightened Guidelines sentence. *Id.* at 271-303 (Stevens, J., dissenting in part). A second remedial alternative, similar (but not identical) to the one that the Court chose, would be to make the Guidelines entirely advisory, so that judicial factfinding was not necessary to enhance or diminish a sentence under the Guidelines. Under this alternative, a judge who found facts that resulted in a high range could still impose a low sentence; a judge who found facts sufficient to warrant only a low sentence could still impose a sentence near the maximum. *Rita*, 551 U.S. at 389-90 (Souter, J., dissenting) (discussing *Booker*'s remedial alternatives).

But making the Guidelines *completely* advisory would have undermined Congress's goal of greater uniformity in sentencing. *Booker*, 543 U.S. at 263-65. So the Court adopted a hybrid model: A judge would be required to impose a sentence that is substantively reasonable on the basis of the facts found by the jury and by the judge at sentencing. *See id.* at 262-65. Under *Booker*'s remedial approach, a judge cannot impose a sentence that is unreasonable in light of the facts the judge finds at sentencing. In adopting that remedy,

Booker resolved the concern with completely eliminating the role of the Guidelines in assuring uniformity in sentencing, while also eliminating the categorical Sixth Amendment problem that mandatory guidelines posed. Judges retained substantial, but not unlimited, discretion to deviate from the sentence the Guidelines advised.

But *Booker*'s remedy opened the door to a real problem: cases where the sentencing judge finds a fact that permits (or even *requires*) the judge to impose a sentence that the facts found by the jury do not support.[2] This reasonableness requirement means that certain judicial factfinding may still violate the Sixth Amendment right to a jury trial, as Justice Scalia explained in a series of separate opinions following *Booker*. *See Rita*, 551 U.S. at 370-84 (Scalia, J., concurring); *Gall v. United States*, 552 U.S. 38, 60 (2007) (Scalia, J., concurring); *Kimbrough v. United States*, 552 U.S. 85, 112-14 (2007) (Scalia, J., concurring); *Jones*, 574 U.S. 948 (Scalia, J., dissenting from denial of certiorari). The gravamen of Justice Scalia's objection was that in some cases, judges will

---

[2] The requirement that sentences be reasonable means that it is unlawful for sentencing judges to disclaim reliance on factual findings—including a finding that a Defendant in fact engaged in acquitted conduct—if those facts are relevant to the reasonableness of the ultimate sentence. *See United States v. Ibanga*, 271 F. App'x 298, 300-01 (4th Cir. 2008) (per curiam) (reversing for resentencing because sentencing court refused to consider acquitted conduct on the grounds that considering such conduct at sentencing "makes the constitutional guarantee of a right to a jury trial quite hollow"); U.S. Br. at 14, *United States v. Dickel*, 294 F. App'x 16 (4th Cir.) (No. 08-9231), 2008 WL 2563430 ("Defendant argued that it was error for the court to consider conduct for which defendant was acquitted, however it actually would have been error for the court not to consider such evidence."). *But see United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in denial of rehearing en banc) (explaining "judges have power in individual cases to disclaim reliance on acquitted or uncharged conduct" and would "do well" to do so in appropriate cases).

impose sentences that are reasonable in light of the judge-found facts but that are so much higher than what would be reasonable in light of the facts found by the jury that they are *substantively unreasonable* when measured solely against the jury-found facts. As appeals judges, Justices Gorsuch and Kavanaugh also expressed this concern.[3]

In extreme cases, this could lead to extraordinary Sixth Amendment violations, and indeed it has. For example, *United States v. Hebert*, 813 F.3d 551 (5th Cir. 2015), *cert. denied*, 137 S. Ct. 37 (2016), where the defendant was convicted of theft and bank fraud, resulting in a Guidelines range of 6 to 7 years, but the court imposed a 92-year sentence based on the court's finding that the defendant had probably committed a murder in connection with the bank fraud. *Id.* at 554. And *United States v. Fitch*, 659 F.3d 788 (9th Cir. 2011), where the defendant received a nearly 22-year (262-month) sentence, based *not* on the jury conviction of financial crimes (which supported a Guidelines range of 41-51 months), but on the sentencing judge's finding that it was more likely than not that the defendant murdered his wife to perpetrate the crimes. *Id.* at 795. And *United States v. Dickel*, 294 F. App'x 16 (4th Cir. 2008) (per curiam), *cert. denied*, 556 U.S. 1197 (2009), where the defendant received a 15-year sentence for pled-to convictions of making a false statement when purchasing a firearm and being an unlawful user of a controlled substance in possession of a firearm because the sentencing judge found that the defendant had probably committed a murder. *Id.* at 17. And *United States v. Davis*, 753 F.3d 1361 (8th Cir. 2014) (per curiam), where the defendant

---

[3] *See United States v. Sabillon-Umana*, 772 F.3d 1328, 1331 (10th Cir. 2014) (Gorsuch, J., for the court); *United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in the denial of rehearing en banc).

was convicted of possessing a firearm while a felon in violation of 18 U.S.C. § 922(g), and the government secured a 10-year (120-month) sentence well above the Guidelines range because of the judge's finding that the defendant had probably played a role in a fatal shooting. *Id.* at 1361-62.

Four members of this Court, writing separately, appeared to endorse the proposition in *Rita*, 551 U.S. 338, that defendants would be able to bring "as-applied" Sixth Amendment challenges to judicial factfinding in instances where a defendant's sentence would not be reasonable in the absence of the judge-found facts. *See id.* at 366 (Stevens, J., joined by Ginsburg, J., concurring) ("Such a hypothetical case should be decided if and when it arises."); *id.* at 375 (Scalia, J., joined by Thomas, J., concurring) ("The one comfort to be found in the Court's opinion . . . is that it does not rule out as-applied Sixth Amendment challenges to sentences that would not have been upheld as reasonable on the facts encompassed by the jury verdict or guilty plea."). And in *Jones v. United States*, three of those same Justices[4] unequivocally concluded that only *jurors* could find "fact[s] necessary to prevent a sentence from being substantively unreasonable—thereby exposing the defendant to a longer sentence." 574 U.S. 948, 949 (2014) (Scalia, J., joined by Thomas and Ginsburg, JJ., dissenting from denial of certiorari).

This case involves the kind of clear as-applied Sixth Amendment violation contemplated by the separate opinions in *Rita* and the dissenting opinion in *Jones*. Petitioner should have received a 10-year sentence, a mandatory minimum that already doubled the (51- to 71-month) Sentencing Guidelines range for his jury-found conduct. But instead the judge imposed *twice that*

[4] Justice Stevens retired between *Rita* and *Jones*.

because the judge determined facts that made 20 years not only permissible but substantively reasonable, when it otherwise would not have been. This is precisely the kind of Sixth Amendment violation that these Justices identified.

2. Every court of appeals with criminal jurisdiction has foreclosed such as-applied Sixth Amendment challenges, but the reasons they have given for rejecting these challenges are unpersuasive and contravene this Court's precedents. The First Circuit's reasoning in *United States v. Zapata*, 589 F.3d 475 (2009), is representative of lower courts' approach. The defendant "argue[d] that his sentence violated the Sixth Amendment because it was based on a drug quantity that the court determined by a preponderance of the evidence." *Id.* at 482-83. "He contend[ed] that, under *Blakely v. Washington*, 542 U.S. 296 (2004), as clarified in *Cunningham v. California*, 549 U.S. 270 (2007), a sentencing judge may not exceed the … term of imprisonment that applies 'solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.'" *Id.* at 483 (quoting *Blakely*, 542 U.S. at 303). The First Circuit rejected this argument, reasoning that "so long as the sentence remains within the bounds set by Congress [in the U.S. Code], no constitutional violation occurs." *Id.* at 484. The reasoning of the other courts of appeals is essentially identical. *See, e.g.*, *id.* (noting "[o]ther courts have reached similar conclusions" and collecting authorities); *United States v. Medina*, 642 F. App'x 59, 62 (2d Cir. 2016); *United States v. White,* 551 F.3d 381, 384 (6th Cir. 2008) (en banc) ("In the *post-Booker* world, the relevant statutory ceiling is … the

maximum penalty authorized by the United States Code."), *cert. denied*, 556 U.S. 1215 (2009).[5]

That tautological reasoning is impossible to square with this Court's precedents. In *Apprendi*, the Court rejected any arbitrary legislative distinction between "elements" of a crime and mere "sentencing factors," noting that no distinction existed around the time of the Founding. 530 U.S. at 478. In *Blakely*, the Court rejected the argument that "the jury need only find whatever facts the legislature chooses to label elements of the crime, and that those it labels sentencing factors—no matter how much they may increase the punishment—may be found by the judge." 542 U.S. at 306. As the Court concluded, "the jury could not function as circuitbreaker in the State's machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish." *Id.* at 306-07.

This Court's precedents establish that no matter what it is labelled, the relevant maximum for Sixth Amendment purposes is the maximum sentence the law authorizes a court to impose based solely on the jury-found facts, not the maximum sentence authorized by the specific statute for the crime for which the defendant was convicted. *Blakely*, 542 U.S. at 303-04. The statutory

---

[5] *Accord United States v. Freeman*, 763 F.3d 322, 339 n.6 (3d Cir. 2014); *United States v. Benkahla,* 530 F.3d 300, 312 (4th Cir.2008); *United States v. Setser*, 568 F.3d 482, 498 (5th Cir. 2009); *United States v. Roberts*, 919 F.3d 980, 987 (6th Cir. 2019); *United States v. Ashqar*, 582 F.3d 819, 824-25 (7th Cir. 2009); *United States v. Briggs*, 820 F.3d 917, 921 (8th Cir. 2016); *United States v. Butcher*, 377 F. App'x 628, 629 (9th Cir. 2010); *United States v. Redcorn*, 528 F.3d 727, 745-46 (10th Cir. 2008); *United States v. Smith*, 741 F.3d 1211, 1226-27 (11th Cir. 2013); *United States v. Jones*, 744 F.3d 1362, 1369 (D.C. Cir. 2014).

maximum for many crimes is ten years or more. 21 U.S.C. § 841 (life); 18 U.S.C. § 924(e) (life); 18 U.S.C. § 1344 (30 years); 18 U.S.C. § 1341/1343 (20 years/30 years); 18 U.S.C. § 471 (20 years); 18 U.S.C. § 472 (20 years); 18 U.S.C. § 473 (20 years); 18 U.S.C. § 483 (20 years); 18 U.S.C. § 545 (20 years); 18 U.S.C. § 1864 (20 years); 18 U.S.C. § 227 (15 years); 18 U.S.C. § 485 (15 years); 18 U.S.C. § 487 (15 years); 18 U.S.C. § 1831 (15 years); 18 U.S.C. § 2322 (15 years); 18 U.S.C. § 332 (10 years); 18 U.S.C. § 549 (10 years); 18 U.S.C. § 552 (10 years); 18 U.S.C. § 220 (10 years); 18 U.S.C. § 641 (10 years); 18 U.S.C. § 642 (10 years); 18 U.S.C. § 2312 (10 years). For many crimes the statutory maximum sentence is not a lawful sentence. As this Court explained in *Booker*, 18 U.S.C. § 3553 requires district courts to tailor sentences to the facts and circumstances specific to each individual defendant and their crime(s). 543 U.S. at 258-65 (section 3553(a) in conjunction with 1994 edition of § 3742(e)(3) requires sentences to be "reasonable" in relation to the factors listed there). The sentence must be "sufficient, but not greater than necessary, to comply with the purposes" of punishment. 18 U.S.C. § 3553(a). The relevant "maximum" sentence for constitutional purposes is the harshest sentence that a court can "reasonably" impose pursuant to 18 U.S.C. § 3553. To most defendants, this is the *real* sentencing cap, and it depends critically on facts found by judges, in direct violation of *Booker* and *Blakely*.

In refusing to recognize such as-applied claims, several courts of appeals have pointed to the Court's conclusion that some level of judicial sentencing discretion is consistent with the Sixth Amendment, *see Booker*, 543 U.S. at 233. *E.g.*, *United States v. Freeman*, 763 F.3d 322, 339 n.6 (3d Cir. 2014); *United States v. Jones*, 744 F.3d 1362, 1369 (D.C. Cir. 2014). But the notion of judicial factfinding that permits or even compels

increased sentences under substantive reasonableness review is different in kind from the historical exercise of sentencing discretion by judges.

As an initial matter, at common law sentences were typically *determinate* and thus put responsibility for punishment entirely in the jury verdict. The common law made "the relationship between crime and punishment . . . clear." *Alleyne v. United States*, 570 U.S. 99, 101 (2013). "The substantive criminal law tended to be sanction-specific" and "prescribed a particular sentence for each offense." John H. Langbein, *The English Criminal Trial Jury on the Eve of the French Revolution*, *in* THE TRIAL JURY IN ENGLAND, FRANCE, GERMANY 1700-1900 15, 36 (Antonio P. Schioppa ed., 1987). In early American treatises, the concept of "crime" was described as "acts to which the law affixes . . . punishment," 1 J. Bishop, *Criminal Procedure* §§ 80, 84, pp. 51-53 (2d ed. 1872), or any fact that "annexes a higher degree of punishment," J. Archbold, *Pleading and Evidence in Criminal Cases* *106 (5th Am. Ed. 1846). The common law system "left judges with little sentencing discretion: once the facts of the offense were determined by the jury, the 'judge was meant simply to impose [the prescribed] sentence.'" *Alleyne*, 570 U.S. at 108 (quoting Langbein, *supra*, at 36-37 and citing 3 W. Blackstone, *Commentaries on the Laws of England* 396 (1768)).

To the extent judges exercised discretion in sentencing at common law, the judge was free to choose *any* sentence within the range as long as it was *below* the maximum sentence established by the jury-found facts. *See id.* at 124-27 (Roberts, C.J., dissenting) (canvassing this history). Thus, some early American criminal statutes provided ranges of permissible sentences that were linked to particular facts constituting elements of the crime. *E.g.*, *Lacy v. State*, 15 Wis. 13, 13 (1862) (arson statute providing sentence of 7 to 14 years if house was

occupied at time of offense, but 3 to 10 years if unoccupied); Ga. Penal Code §§ 4324-4325 (1867) (robbery "by open force or violence" was punishable by 4 to 20 years, whereas robbery "by intimidation, or without using force and violence" was punishable by 2 to 5 years). But the judge was still constrained to choose a sentence within the range.

The requirement that sentences be "reasonable" does not operate that way, however, because it allows the judge to effectively *increase* the sentencing range by finding an additional fact. That is a significant difference. The substantial power of juries to determine the crime, relevant facts, and therefore the punishment formed the backdrop of the Sixth Amendment right at the Founding. While "trial practices ca[n] change in the course of centuries and still remain true to the principles that emerged from the Framers" design, "the Constitution's guarantees cannot mean less today than they did the day they were adopted." *United States v. Haymond*, 139 S. Ct. 2369, 2376-77 (2019) (quoting *Apprendi*, 530 U.S. at 483).

3. Finally, the existence of as-applied Sixth Amendment violations does not mean *Booker* was wrong to select the remedy that it did, or that any aspect of *Booker* must be overruled for petitioner's as-applied claim to succeed. The *Booker* remedy solved the Sixth Amendment problem of mandatory Sentencing Guidelines while honoring Congress's intent to enhance uniformity in federal sentencing. The majority of Guidelines sentences imposed post-*Booker* are Sixth Amendment compliant. But the Sixth Amendment imposes an independent constitutionally mandated upper limit that means that judicial factfinding is impermissible if those facts are necessary for the sentence to be reasonable. *Booker* did not purport to eliminate this class

of Sixth Amendment challenges to sentences under the Sentencing Guidelines and it should not be read to do so.

II. The Issue Is Exceptionally Important

The question presented is important and warrants this Court's review. Three members of the Court voted to grant review to decide this very question in *Jones v. United States*, 574 U.S. 948 (2014) (Scalia, J., dissenting from denial of certiorari), showing the question's pressing national significance. As Justice Scalia explained in *Jones* (joined by Justices Thomas and Ginsburg), "[f]or years . . . we have refrained from saying" that "any fact necessary to prevent a sentence from being substantively unreasonable—thereby exposing the defendant to the longer sentence—is an element that must be either admitted by the defendant or found by the jury." *Id.* at 949. As those three dissenters wrote nearly a decade ago, this "has gone on long enough." *Id.* This unanswered question is no less urgent now.

The question's importance is confirmed by the separate opinions of many appellate judges suggesting that the Court should resolve this question. As court of appeals judges, Justices Gorsuch and Kavanaugh expressed their reservations about basing sentencing enhancements on judge-found facts—in the commonly recurring context of sentencing criminal defendants on the basis of acquitted or uncharged conduct. *See United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in the 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."); *United States v. Sabillon-Umana*, 772 F.3d 1328, 1331 (10th Cir. 2014) (Gorsuch, J.) (observing that "[i]t is far from certain whether the Constitution allows" a sentencing judge to increase a sentence "based on facts the judge finds

without the aid of a jury or the defendant's consent." (citing *Jones,* 574 U.S. 948 (Scalia, J., dissenting)). Many other appellate judges have similarly questioned the practice and called for clarification.[6]

The question presented is also important because of the frequency with which it recurs, as shown by the sheer

---

[6] *See United States v. Brown*, 892 F.3d 385, 408 (D.C. Cir. 2018) (Millett, J., concurring) ("I write separately to put an exclamation on a point I have previously expressed: the constitutionally troubling use of *acquitted* conduct as the specific basis for increasing a defendant's prison sentence above the Sentencing Guidelines range."); *United States v. White*, 551 F.3d 381, 393 (6th Cir. 2008) (Merritt, J., dissenting) ("[I]t has long been required that all offense-related facts underlying the sentence first be 'stated with . . . certainty and precision' in the indictment and then proved beyond a reasonable doubt to the jury. To permit facts rejected by the jury to serve as the basis for the sentence would sever 'the invariable linkage of punishment with crime.'"); *United States v. Canania*, 532 F.3d 764, 776 (8th Cir. 2008) (Bright, J., concurring) ("Rather than pretending as if [*Apprendi*, *Ring v. Arizona*, 536 U.S. 584 (2002), *Blakely*, and *Booker*] were never decided, we federal judges should acknowledge their clear implication: A judge violates a defendant's Sixth Amendments right by making findings of fact that either ignore or countermand those made by the jury and then relies on these factual findings to enhance the defendant's sentence."); *United States v. Mercado*, 474 F.3d 654, 664-65 (9th Cir. 2007) (B. Fletcher, J., dissenting) ("To hold that any sentence beneath the statutory maximum is acceptable is not enough: *Apprendi* requires examination 'not of form, but of effect.' And here the effect was to expose defendants to a dramatic increase in punishment based upon conduct for which the jury refused to authorize punishment in the only way it could-by acquitting defendants of the most serious conduct with which they were charged. Neither *Jones*, nor *Apprendi*, nor *Ring*, nor *Blakely*, nor *Booker* countenance this result." (internal citation omitted)); *United States v. Faust*, 456 F.3d 1342, 1350 (11th Cir. 2006) (Barkett, J., concurring) ("There is a vital constitutional difference between sentencing a defendant for 100 grams of cocaine where he was convicted of possessing 50 grams, and punishing a defendant for 90 grams of ecsta[s]y where the jury refused to convict him of possessing even a milligram of that substance.").

number of petitions for certiorari criminal defendants have filed raising this issue in the last decade and a half. *See supra* p. 2 (citing petitions). And even as criminal defendants continue to raise this issue in numerous criminal cases every year, it becomes less and less likely that there will be any further percolation in the lower courts in the foreseeable future. Not only has every federal court of appeals with criminal jurisdiction foreclosed these claims, *Jones*, 574 U.S. 948, every court of appeals has been asked to take the question presented en banc,[7] including the court below in this case, and each one has declined to do so. As a result, this issue is unlikely to be revisited, let alone resolved, in the lower courts. Even if the Court ultimately concludes that it is permissible for judge-found facts to be used to increase a sentence above that which the jury-found facts would

---

[7] *See* Appellant Southern Union Company's Petition for Rehearing En Banc, *United States v. S. Union Co.*, 630 F.3d 17 (1st Cir. 2010) (No. 09-2403); Defendant-Appellant's Petition for Panel Rehearing or Rehearing En Banc, *United States v. Allums*, 858 F. App'x 420 (2d Cir. 2021) (No. 18-1794); Appellee Carolyn Jackson's Petition for Rehearing En Banc, *United States v. Jackson*, 862 F.3d 365 (3rd Cir. 2017) (No. 16-1200); Petition for Rehearing and Petition for Rehearing En Banc, *United States v. Benkahla*, 530 F.3d 300 (4th Cir. 2008) (No. 07-4778); Petition for Rehearing En Banc of Appellant Starsky Darnell Redd, *United States v. Redd*, No. 06-60806, (5th Cir. 2009), 2009 WL 348831; Defendant-Appellant's Petition for Rehearing and Suggestion for Rehearing En Banc, *United States v. Baquedano*, 535 F. App'x 487 (6th Cir. 2013) (No. 13-1007); Petition for Rehearing with Suggestion of a Rehearing En Banc, *Ashqar*, 582 F.3d 819 (7th Cir. 2009) (No. 07-3879); Appellants' Joint Petition for Rehearing En Banc, *United States v. Shield*, 831 F.3d 1079 (8th Cir. 2016) (No. 15-2341); Petition for Rehearing and Suggestion for Rehearing En Banc, *United States v. Fitch*, 659 F.3d 788 (9th Cir. 2011) (No. 07-10607); Petition for Rehearing En Banc, *United States v. Ray*, 699 F.3d 1172 (10th Cir. 2012) (No. 11-3383); Petition for Rehearing En Banc, *United States v. Bell*, 808 F.3d 926 (D.C. Cir. 2015) (No. 08-3037).

support as reasonable, that holding would still be valuable to criminal defendants because it would permit them to focus on preserving other issues for appeal.

The interaction of as-applied Sixth Amendment violations with consideration of acquitted conduct at sentencing magnifies the importance of the question presented. Numerous courts have held that judges may find that a criminal defendant actually engaged in conduct for which the defendant was acquitted because an acquittal shows only that the State failed to prove its case beyond a reasonable doubt, not that the defendant did not engage in the conduct. Any concerns arising out of the consideration of acquitted conduct at sentencing would be reduced substantially, however, if the ultimate sentence were at least cabined by the facts established by the jury's verdict. The fact that so many petitions for certiorari involving as-applied Sixth Amendment violations have *also* involved use of acquitted conduct at sentencing (including this one) shows that recognizing the existence of as-applied Sixth Amendment violations could ameliorate the extraordinary unfairness that inheres in using acquitted conduct at sentencing. *See* Pet., *Osby v. United States*, 142 S. Ct. 97 (2021) (20-1693) (challenging use of acquitted conduct at sentencing); Pet., *Asaro v. United States*, 140 S. Ct. 1104 (2020) (19-107) (same).

The question presented is also important because of the two critically important rights that are at stake. The right to trial by jury enshrined in the Sixth Amendment is of paramount importance. The jury's "preservation and proper operation as a protection against arbitrary rule were among the major objectives of the revolutionary settlement which was expressed in the Declaration and Bill of Rights of 1689." *Duncan v. Louisiana*, 391 U.S. 145, 152 (1968). At the First Congress of the American Colonies in 1765, one resolution declared: "trial by jury is the inherent and invaluable right of every British subject

in these colonies." *Id.* The First Continental Congress in 1774 specifically objected to the practice of trials by judges. *See id.* They sought to protect the accused against both "the corrupt and overzealous prosecutor" and "the compliant, biased, or eccentric judge." *Id.* at 157. To that end, the right to trial by jury requires that "the truth of *every accusation*, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours . . . ." 4 W. Blackstone, *Commentaries on the Laws of England* 343 (1769) (emphasis added).

The right to demand that the State establish its entitlement to impose criminal punishment by proof beyond a reasonable doubt is equally important. "The demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times . . . . [The standard] 'beyond a reasonable doubt' . . . is now accepted in common law jurisdictions as the measure of persuasion by which the prosecution must convince the trier of all the essential elements of guilt." C. McCormick, *Evidence* § 341 (2020). The "reasonable doubt" requirement "has a vital role in our criminal procedure for cogent reasons," as a criminal defendant faces "the possibility that he may lose his liberty upon conviction." *In re Winship*, 397 U.S. 358, 363 (1970).

Absent review, the government will retain the leeway in federal cases to use its power in a manner that offends these twin jury trial guarantees. The Government will retain the unfettered ability to link a factually weak charge of a serious offense with a relatively strong charge of a modest offense—or perhaps not even formally charge the more serious offense—knowing that so long as it prevails at trial on the lesser charge that it still can in effect punish the defendant for the far more severe offense. The Government need only persuade a trial

judge under a lesser standard of proof that the defendant committed a different offense with different elements. As a result, the crime for which the defendant will actually be punished is something substantially different from the offense of conviction. The defendant's ultimate sentence will bear no relationship to the sentencing range that is supposed to result from committing the offense of conviction.

A decade and a half of experience since *Booker* has shown this is not a hypothetical concern. The sentences in *Hebert*, *Davis*, *Fitch*, and *Dickel*, *see supra* p. 13—and the sentence in this case—show that prosecutors all-too-frequently use sentencing as an opportunity to prove the case they should have made to the jury.

III. This Case Is The Right Vehicle To Resolve The Question Presented

This case is an attractive vehicle to resolve this issue. *First*, the issue is outcome determinative. The judge's drug quantity finding changed petitioner's applicable Guidelines range and the substantive reasonableness of his sentence. Petitioner's 10-year mandatory minimum sentence would already have been double the 57 to 71 months of imprisonment the Guidelines prescribed based on the jury's finding. The judge's finding that petitioner actually engaged in the conduct for which he was acquitted then increased the Guidelines range to 360 months to life imprisonment, a sentence that clearly would have been unreasonable without those judicial findings. That the sentence of 240 months represents a downward variance from the Guidelines range does not change the importance of the judge considering the acquitted conduct; instead, it confirms it. The judge still imposed a sentence far above what was reasonable based on the jury findings alone; and the fact that the judge thought a below-Guidelines sentence was warranted

suggests that had he not considered the acquitted conduct, he might have imposed a still-lower sentence.

Second, petitioner has squarely and timely raised this issue at every stage of this case. In petitioner's brief on appeal, he argued that the trial judge's factfinding violated the Sixth Amendment because, "but for the district court's findings of fact," courts would "deem []his sentence substantively unreasonable." Pet. C.A. Br. 68. The government identified no procedural shortcomings, instead addressing the argument on the merits and arguing that petitioner's challenge was "foreclosed by binding precedent." Gov't C.A. Br. 57. The Second Circuit panel and en banc court summarily rejected petitioner's claim on that basis.

Third, this case's fact pattern and its severe consequences for petitioner make it an especially good vehicle to address the question presented. The jury's use of a verdict form leaves no ambiguity about its factual findings. But, notwithstanding the verdict, the judge found petitioner guilty of additional conduct at sentencing that vastly increased the sentence under the Sentencing Guidelines. The judge relied on the Guidelines range to impose a sentence four times as severe as the jury-found facts supported. The judge's factfinding here increased petitioner's sentence by *10 years* in prison. This is a prototypical as-applied Sixth Amendment violation, *Jones*, 574 U.S. at 948 (Scalia, J., joined by Thomas and Ginsburg, JJ., dissenting from the denial of certiorari); *see Rita*, 551 U.S. at 371-72 (Scalia, J., joined by Thomas, J., concurring in part and concurring in judgment), and it provides an ideal fact pattern with which to address the boundaries and dimensions of such challenges. *See Apprendi v. New Jersey*, 530 U.S. at 495 (noting that "potential doubling of one's sentence—from 10 years to 20 . . . is unquestionably of constitutional significance").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ANDREW FREIFELD
P.O. Box 3196
New York, NY 10008
(917) 553-6030

JOHN P. ELWOOD
ANDREW T. TUTT
Counsel of Record
AMANDA CLAIRE HOOVER
REBECCA A. CARUSO
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000
andrew.tutt@arnoldporter.com

JANUARY 10, 2022

APPENDIX