No. 23-831

IN THE
Supreme Court of the United States

CONSTANCE EILEEN CASWELL,
Petitioner,

v.

THE PEOPLE OF THE STATE OF COLORADO,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Colorado

REPLY BRIEF IN SUPPORT OF CERTIORARI

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INTRODUCTION

The State concedes that federal and state courts are split. The State tries to minimize the fracture as "at best * * * only six-to-five." Opp. 17. But a massive split across eleven courts is the archetype of a dispute that "cr[ies] out for this Court's intervention." Opp. 22.

The State's merits arguments illustrate how far the decision below strayed from this Court's precedents and the Sixth Amendment. The decision below allowed a *judge* to find by a *preponderance of the evidence* the existence of a *fact* that not only increased Petitioner's maximum penalty, but subjected her to

an entirely new felony crime. As the State concedes, this Court has never considered whether the prior-conviction exception applies to misdemeanor-to-felony recidivism provisions like the one at issue here. The State's argument that the exception applies because the "plain language" of this Court's precedents does not distinguish between misdemeanors and felonies can be easily rejected. The question is not whether this Court has announced an exception to an exception; it is whether *Almendarez-Torres*'s reasoning extends here. As the State only nominally contests, it does not.

The State's argument that stare decisis saves *Almendarez-Torres* fares no better. "[I]n the *Apprendi* context," this Court has "found that *stare decisis* does not compel adherence to a decision whose underpinnings have been eroded by subsequent developments of constitutional law." *Hurst* v. *Florida*, 577 U.S. 92, 102 (2016) (quotation marks omitted). The State barely defends *Almendarez-Torres*'s underpinnings, and the State's retrojections cannot rehabilitate a case this Court's intervening precedent has repudiated. Nor can the State's policy arguments overcome the Sixth Amendment's command.

Members of this Court have been calling *Almendarez-Torres* into doubt for more than two decades. The time has come to settle the question, and this is an excellent vehicle to do so. This Court should grant certiorari and reverse.

ARGUMENT

I. THE STATE CONCEDES THE SPLIT.

1. The State concedes that the decision below splits from the Ninth Circuit, the North Dakota Supreme Court, and the Washington Supreme Court.

The State admits (at 17) that *State* v. *Mann*, 876 N.W.2d 710 (N.D. 2016), *cert. granted, judgment vacated on other grounds*, 580 U.S. 801 (2016), "support[s]" "Petitioner's view."

The State likewise admits (at 18-19) that the Washington Supreme Court in *State* v. *Roswell*, 196 P.3d 705, 707 (Wash. 2008), "determined that a prior conviction that elevates an offense from a misdemeanor to a felony 'is an essential element that must be proved beyond a reasonable doubt.'" The State's only argument against *Roswell* (at 18) is that it was the defendant in that case "who argued against having the jury determine his prior convictions." But what matters is the legal rule applied by the Washington Supreme Court, not the parties' positions.

The State also concedes (at 17) that the Ninth Circuit in *United States* v. *Rodriguez-Gonzalez*, 358 F.3d 1156, 1160 (9th Cir. 2004), "held that the fact of a prior conviction must be submitted to the jury and proved beyond a reasonable doubt." Because the prior conviction "substantively transforms" an offense "from a misdemeanor to a felony," the prior conviction "changes the nature of the crime" such that the "narrow exception" of *Almendarez-Torres* does not apply. 358 F.3d at 1160. The State errs in suggesting (at 17) that *Rodriguez-Gonzalez* is an "anomaly" because other Ninth Circuit cases have reached "the opposite conclusion," relying principally on *United States* v.

Corona-Sanchez, 291 F.3d 1201, 1209-11 (9th Cir. 2002) (en banc). But that decision, which predated *Rodriguez-Gonzalez* and has been superseded by an amendment to the Sentencing Guidelines, applied "the categorical approach" to hold that a prior conviction was not an aggravated felony for purposes of imposing a sentence enhancement. And *United States* v. *McCaney*, 177 F. App'x 704, 709-710 (9th Cir. 2006), is an unpublished decision concerning whether the defendant's two "prior convictions for a *felony* drug offense" had to be found by a jury to enhance the defendant's sentence. (Emphasis added). Neither case undermines *Rodriguez-Gonzalez*.

Contrary to the State's contention (at 19-20), Florida and Ohio are also on this side of the split. *See* Pet. 13-14. In *Johnson* v. *State*, 994 So. 2d 960, 963 (Fla. 2008), the Florida Supreme Court explained that, where prior misdemeanor convictions elevate a subsequent offense to a felony, the fact of those prior convictions is subject to "[t]he requirement of a jury trial." While the State claims (at 19-20) that neither of the other two Florida cases discussed in the petition "address[ed]" this issue, the State does not even mention *Johnson*.

The State recognizes (at 20) that the Ohio Supreme Court in *State* v. *Brooke*, 863 N.E.2d 1024, 1027 (Ohio 2007), "acknowledged" that prior misdemeanor convictions that elevate a subsequent offense to a felony "'are elements'" that "'must be proved beyond a reasonable doubt.'" The State contends (at 20) that *Brooke* "did not turn on that pronouncement." But the State does not contest that *Brooke* reflects the Ohio Supreme Court's longstanding view on this issue. *See* *State* v. *Allen*, 506 N.E.2d 199, 201 (Ohio 1987)

(articulating same rule); *Brooke*, 863 N.E.2d at 1027 (citing *Allen*).

2. The State concedes (at 21-22) that the Fifth Circuit and the high courts of Louisiana, Kansas, Delaware, and New Hampshire, in addition to the Colorado Supreme Court, have reached the opposite conclusion. The State claims that another four courts take this side of the split. Some of the State's cases are dubious, but to the extent they also applied the prior-conviction exception in this context, that only reinforces the need for review, and belies the State's argument (at 22) that "this issue has arisen infrequently nationwide."

II. THE STATE'S ARGUMENTS ON THE MERITS ARE UNPERSUASIVE.

A. The Fact Of A Prior Conviction That Elevates An Offense To A Felony Must Be Found By A Jury Beyond A Reasonable Doubt.

Misdemeanor-to-felony recidivism provisions create new aggravated crimes and increase a defendant's punishment beyond the legally prescribed range applicable to misdemeanors. Such provisions therefore establish elements under *Apprendi*—not mere "sentencing factors" that fall within *Almendarez-Torres*'s exception.

The State recognizes (at 15) that this Court has never applied the prior-conviction exception in this context. The State nonetheless argues that "the plain language of *Almendarez-Torres* and *Apprendi* does not provide for any exception" for misdemeanor-to-felony recidivism provisions. *Id.*

This Court's opinions, however, "must be read with a careful eye to context." *National Pork Producers Council* v. *Ross*, 598 U.S. 356, 373-374 (2023). This is especially true for the "narrow" prior-conviction exception. *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000). The question is not whether this Court *affirmatively* exempted misdemeanor-to-felony recidivism provisions from *Apprendi*, but whether *Almendarez-Torres*'s reasoning extends to such provisions.

It does not. *Almendarez-Torres* addressed a recidivism provision that "simply authorizes a court to increase the sentence for a recidivist," as opposed to one that "define[s] a separate crime." 523 U.S. 224, 226 (1998). Misdemeanor-to-felony recidivism provisions, however, *do* define separate crimes, as evidenced by the longstanding common-law tradition distinguishing misdemeanors from felonies. *See* Pet. 20-22. Similarly, the prior convictions in *Almendarez-Torres* were for "serious crime[s]" and were "entered pursuant to proceedings with substantial procedural safeguards." *Apprendi*, 530 U.S. at 488. Misdemeanors lack the same safeguards. *See* Pet. 24. Either distinction renders *Almendarez-Torres* inapposite.

The State concedes (at 15) that "[t]here is no dispute that significant collateral consequences flow from elevating a charge from misdemeanor to felony." But the State argues that there is no "logical reason" to not apply *Almendarez-Torres* here because these collateral consequences are not "more serious or important than the consequences of other sentencing enhancements." *Id.* To the contrary, the consequences that attach to a felony conviction change the "very nature" of the crime—not merely its penalty. *Rodriguez-Gonzalez*, 358 F.3d at 1161.

The State is also wrong to downplay the consequences of a felony conviction. Felons are deprived of fundamental constitutional rights, including the right to own a firearm and the right to vote. Felons can also be barred from holding certain jobs and can struggle to find housing. Misdemeanor-to-felony recidivism provisions thus not only increase a defendant's penalty for a crime, they fundamentally change the crime itself.

B. This Court Should Overrule *Almendarez-Torres*.

Almendarez-Torres is irreconcilable with *Apprendi*, relies on an outdated legal framework, and has been rendered an isolated holdout in this Court's otherwise uniform Sixth Amendment jurisprudence. *See* Pet. 26-31. The State barely defends *Almendarez-Torres* on the merits and instead relies on stare decisis to save it. But while stare decisis is important, it does not justify preserving *Almendarez-Torres*.

<u>Quality of reasoning.</u> The State argues (at 10) that the prior-conviction exception does not "implicate" "a defendant's constitutional right to a jury trial or due process" because the prior conviction has already been proved beyond a reasonable doubt. But *Apprendi* recognized that the prior-conviction exception "implicated" "due process and Sixth Amendment concerns." 530 U.S. at 488. *Apprendi* likewise recognized "that a logical application of our reasoning today should apply if the recidivist issue were contested." *Id.* at 489-490. Prior convictions do not fall outside *Apprendi*'s scope simply because they were found beyond a reasonable doubt.

The State contends (at 11) that the prior-conviction exception does not "offend[] the Sixth Amendment"

because "proving a defendant's prior conviction" goes only to "identity" and is "largely administrative." That is incorrect. Proving identity is not always a mere administrative matter. *See, e.g.*, *Gorostieta* v. *People*, 516 P.3d 902, 905 (Colo. 2022) (proving identity may require witnesses "with personal knowledge"); *People* v. *Herold*, No. 22CA1265, 2024 WL 2196200, at *2-5 (Colo. App. May 16, 2024) (records alone were insufficient to prove prior conviction). More important, whatever a fact may concern and however it may be proved, if that fact "increases the punishment above what is otherwise legally prescribed," it must be proved to a jury beyond a reasonable doubt. *Alleyne* v. *United States*, 570 U.S. 99, 107-108 (2013). Allowing the government to avoid its burden because an element may be easy to prove in some cases is like dispensing with confrontation because the testimony seems reliable. *See Crawford* v. *Washington*, 541 U.S. 36, 61 (2004).

The State's speculation (at 12) about "unavoidable obstacles" that would attend "exposing a jury to the fact of prior convictions" can be easily rejected. Myriad state statutes treat the fact of a prior conviction as an element, and the State points to *no* practical problems arising in prosecutions under these statutes. Indeed, the Colorado Supreme Court itself has concluded that the State's proffered "obstacles" are nothing of the sort. *See Gorostieta*, 516 P.3d at 907 (jury can consider "a duly authenticated copy of the record of former convictions" (quotation marks omitted)); *People* v. *Kembel*, 524 P.3d 18, 28 (Colo. 2023) (issues related to jury learning of prior convictions can be "largely neutralized through limiting jury instructions").

The State's concern about prejudice to defendants (at 12, 14) is similarly misplaced. Courts have many tools to limit any potential prejudice. The jury can be given a limiting instruction. *See Samia* v. *United States*, 599 U.S. 635, 646 (2023). Defendants can stipulate, *see Blakely* v. *Washington*, 542 U.S. 296, 310-311 (2004), or "waive the right to have a jury decide questions about [their] prior convictions," *Shepard* v. *United States*, 544 U.S. 13, 26 n.5 (2005). And courts can "bifurcate the trial, with the jury only considering the prior conviction after it has reached a guilty verdict on the core crime." *Apprendi*, 530 U.S. at 521 n.10 (Thomas, J., concurring). These options are not hypothetical: Many States, for example, treat prior misdemeanor DUI convictions as an element of felony DUI, and "the majority" of these jurisdictions "have created procedures" for trying the case "without the jury being informed of the prior convictions." *Ostlund* v. *State*, 51 P.3d 938, 941 & n.22 (Alaska Ct. App. 2002).

The State suggests (at 14) that the possibility of bifurcation is uncertain. But this Court endorsed bifurcation in this context over a century ago. *See Graham* v. *West Virginia*, 224 U.S. 616, 625-626 (1912); *see also Spencer* v. *Texas*, 385 U.S. 554, 567-568 (1967) (suggesting that bifurcation is "the fairest" solution). And the State's concern (at 14) that bifurcation "would change the nature of the crime charged" or undermine the jury is an inadvertent concession: that concern is *exactly* the reason why a jury must find the fact of a prior conviction. *See* Pet. 21-23; *United States* v. *Haymond*, 588 U.S. 634, 646 (2019) (plurality op.) (judicial factfinding of elements "divest[s]" the jury of its "constitutional authority").

Legal developments. The State argues (at 13) that this Court has "acknowledged" the "importance of the[] principles" supporting the prior-conviction exception. The State cites no case for this proposition. In reality, this Court has disparaged the exception as "unusual and arguable." *Pereida* v. *Wilkinson*, 592 U.S. 224, 238 (2021) (quotation marks omitted). That exception becomes even more unusual every time this Court applies *Apprendi* to a "sentence enhancer" case. *See* Pet. 30-31. And although this Court has continued to articulate the exception, the Court has never squarely affirmed it.

Reliance interests. The State does not claim "anything like the prospective economic, regulatory, or social disruption litigants seeking to preserve precedent usually invoke." *Ramos* v. *Louisiana*, 140 S. Ct. 1390, 1406 (2020). The State instead invokes (at 13) only state "procedures." That is not enough. "The force of *stare decisis* is at its nadir in cases concerning procedural rules that implicate fundamental constitutional protections." *Alleyne*, 570 U.S. at 116 n.5. That is especially so here, where any reliance interests must be discounted to account for the doubt surrounding *Almendarez-Torres*. *See Shepard*, 544 U.S. at 27-28 (Thomas, J., concurring in part and concurring in the judgment) ("[A] majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided."); Transcript of Oral Argument at 5, *Erlinger* v. *United States*, No. 23-370 (U.S. Mar. 27, 2024) (first question: "wouldn't it be more straightforward to overrule *Almendarez-Torres*?").

III. THE QUESTIONS PRESENTED ARE RECURRING AND EXCEPTIONALLY IMPORTANT.

1. The State agrees (at 9) that "[p]rotecting the Sixth Amendment rights of criminal defendants charged with felonies is unquestionably vitally important." The prior-conviction exception tramples those rights by replacing "the Framers' paradigm for criminal justice" with "inquisition" by a "lone employee of the State." *Blakely*, 542 U.S. at 313, 314. None of the State's "practical" considerations (at 9) can justify preserving such an unconstitutional anomaly.

The State argues (at 6) that this issue "rarely" comes up. That is false. The Fifth Circuit alone has fielded "hundreds, if not thousands, [of] cases challenging *Almendarez-Torres*." *United States* v. *Contreras-Rojas*, 16 F.4th 479, 480 (5th Cir. 2021) (per curiam); *see also* Brent E. Newton, *Almendarez-Torres* and the *Anders* Ethical Dilemma, 45 Hous. L. Rev. 747, 784 n.192 (2008) (as of 2008, "over 5,200 federal defendants have filed appeals ultimately seeking to have *Almendarez-Torres* overruled"). The only reason the issue does not come up even more often is that this Court's precedent usually forecloses it. *See, e.g.*, *United States* v. *Gibson*, 434 F.3d 1234, 1247 (11th Cir. 2006) ("*Almendarez-Torres* still marches on and we are ordered to follow. We will join the funeral procession only after the Supreme Court has decided to bury it.").

The State contends (at 7-8) that "having a jury decide the" fact of a prior conviction will usually "make [no] difference" because that fact is easy to prove. Even if that were true, the government must be held to its burden. *See Rehaif* v. *United States*, 588 U.S.

225, 227 (2019). Moreover, whether the fact of a prior conviction can be found by a mere preponderance by a judge rather than beyond a reasonable doubt by a jury may often be decisive. The federal government, for example, has conceded that the evidence it used to prove a prior conviction under the preponderance standard "would not suffice" under the beyond-a-reasonable-doubt standard. *United States* v. *McDowell*, 745 F.3d 115, 123 (4th Cir. 2014). Although the court acknowledged that "[t]he rationales justifying the *Almendarez-Torres* exception are entirely absent," the court nevertheless was forced to apply it. *Id.* at 124.

The State argues (at 8) that this Court should leave the prior-conviction exception in place because it concerns only "a sentence enhancer," and "prosecutors must still prove prior convictions to a jury where the prior conviction forms an element of the crime." That "just defines away the real issue." *Apprendi*, 530 U.S. at 521 (Thomas, J., concurring). Whether the State labels them "elements of the offense, sentencing factors, or Mary Jane," because recidivism statutes establish facts that increase the defendant's punishment, those facts "must be found by the jury beyond a reasonable doubt." *Ring* v. *Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring).

2. This is an excellent vehicle. The State does not contest that this issue is preserved and dispositive. *See* Pet. 34-35. While the State observes (at 4) that Petitioner "*stipulated at sentencing*" to the prior conviction, that is because the trial court had already rejected her argument at the guilt phase that the prior conviction was an element that must be proved beyond a reasonable doubt.

The State suggests (at 23) that this case is a poor vehicle because Petitioner was afforded certain procedural protections. But that only highlights the procedural protection missing here—jury determination of the fact of the prior conviction beyond a reasonable doubt.

* * *

There may be no precedent of this Court subject to more doubt than *Almendarez-Torres*. Its validity has been called into question by all levels of the judiciary—including Members of this Court—for a quarter century, and it has been challenged on appeal thousands of times. Every time this Court resolves a case adhering to the correct original meaning of the Sixth Amendment, lower courts are inundated with new efforts to overrule *Almendarez-Torres*, at substantial cost to the judiciary. Whether *Almendarez-Torres* remains good law or not, this Court should settle the matter once and for all.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision reversed.

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