No. 23-370

IN THE
# Supreme Court of the United States

PAUL ERLINGER,
*Petitioner*,
v.
UNITED STATES OF AMERICA,
*Respondent*.

**On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## BRIEF FOR PETITIONER


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## QUESTION PRESENTED

Whether the Constitution requires an indictment, jury trial, and proof beyond a reasonable doubt to find that a defendant's prior convictions were "committed on occasions different from one another," as is necessary to impose an enhanced sentence under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1).

## RELATED PROCEEDINGS

*United States v. Erlinger,* No. 2:18-cr-00013-001 (S.D. Ind.)

*United States v. Erlinger*, No. 2:19-cv-00518, 2021 WL 2915014 (S.D. Ind. July 12, 2021)

*United States v. Erlinger*, 77 F.4th 617 (7th Cir. 2023)

## TABLE OF CONTENTS

**TABLE OF CONTENTS**
(continued)

**Page**

## TABLE OF AUTHORITIES

**Page(s)**

**Cases:**

**TABLE OF AUTHORITIES**
(continued)

**Page(s)**

**TABLE OF AUTHORITIES**
(continued)

**Page(s)**

**TABLE OF AUTHORITIES**
(continued)

**Page(s)**

**TABLE OF AUTHORITIES**
(continued)

**Page(s)**

**TABLE OF AUTHORITIES**
(continued)

**Page(s)**

**TABLE OF AUTHORITIES**
(continued)

**Page(s)**



**Rule:**



**Other Authorities:**

**TABLE OF AUTHORITIES**
(continued)

**Page(s)**

**TABLE OF AUTHORITIES**
(continued)

**Page(s)**

## BRIEF FOR PETITIONER

Petitioner Erlinger respectfully requests that this Court reverse the judgment of the U.S. Court of Appeals for the Seventh Circuit.

## OPINIONS BELOW

The opinion of the court of appeals is reported at 77 F.4th 617 and reprinted in the Appendix to the Petition ("Pet. App.") at 1a-9a. The judgment of the district court is available at *United States v. Erlinger*, No. 2:18-cr-00013-001 (S.D. Ind. May 16, 2022), ECF No. 109.

## JURISDICTION

The court of appeals issued its decision on August 10, 2023. Pet. App. 1a. On October 4, 2023, petitioner filed a petition for a writ of certiorari, which this Court granted on November 20, 2023. 144 S. Ct. ___. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

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

The Sixth Amendment provides: "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.

The Armed Career Criminal Act, which is codified in Section 924(e) of Title 18 of the U.S. Code, is reproduced at Pet. App. 62a.

## STATEMENT OF THE CASE

### A. Legal Framework

1. When the offense conduct in this case occurred, the federal crime of unlawful possession of a firearm under 18 U.S.C. § 922(g) was ordinarily punishable by up to ten years' imprisonment. *See* 18 U.S.C. § 924(a)(2) (2017); *Wooden v. United States*, 595 U.S. 360, 364 (2022). But under the Armed Career Criminal Act of 1984 ("ACCA"), a defendant convicted under 18 U.S.C. § 922(g) could (and still can) face far more severe punishment. Specifically, if an individual who violates Section 922(g) has three or more qualifying convictions "committed on occasions different from one another," ACCA increases his prison term to a minimum of fifteen years and a maximum of life. 18 U.S.C. § 924(e)(1); *Welch v. United States*, 578 U.S. 120, 122 (2016).[1]

In *Wooden*, this Court held that the question whether prior convictions were committed on "different occasions" turns on whether the convictions arose

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[1] In the Bipartisan Safer Communities Act, Congress increased the ordinary maximum penalty for a violation of Section 922(g) to "not more than 15 years" of imprisonment. *See* Pub. L. No. 117-159, div. A, tit. II, § 12004(c), 136 Stat. 1313, 1329 (June 25, 2022), *codified at* 18 U.S.C. § 924(a)(8). That amendment has no bearing on the constitutional issue in this case. Under the amended penalty scheme, as in the former one, ACCA significantly enhances both the minimum and the maximum sentence for a violation of Section 922(g).

"from a single criminal episode." 595 U.S. at 363. Rejecting the government's position that "an 'occasion' happens 'at a particular point in time'—the moment 'when [an offense's] elements are established,'"—the Court explained that the proper inquiry is "more multi-factored in nature." *Id.* at 366, 369. "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." *Id.* at 369. "Proximity of location is also important": "[T]he further away crimes take place, the less likely they are components of the same criminal event." *Id.* "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.*

Applying that context-specific inquiry, the Court held that Wooden's ten burglaries occurred "on a single occasion." *Wooden*, 595 U.S. at 370. The Court stressed that they were committed "on a single night, in a single uninterrupted course of conduct," and "all took place at one location." *Id.* "Each offense was essentially identical, and all were intertwined with the others." *Id.* The Court added that Wooden's "burglaries were part and parcel of the same scheme, actuated by the same motive, and accomplished by the same means." *Id.*

The Court did not, however, determine "whether the Sixth Amendment requires that a jury, rather than a judge, resolve whether prior crimes occurred

on a single occasion." *Wooden*, 595 U.S. at 365 n.3. That is the question presented here.

### B. Proceedings Below

1. In 2017, petitioner Paul Erlinger's estranged ex-girlfriend told police officers that he had multiple firearms in his home. During a subsequent traffic stop, police confronted petitioner with this information. Petitioner cooperated with police and admitted that he was storing firearms at his home. During a search of his garage, police officers found several hunting rifles, a few other guns, and ammunition in a gun safe.

2. The government charged petitioner by information in the U.S. District Court for the Southern District of Indiana with being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(e)(1). Pet. App. 10a-11a. The government also alleged that petitioner had three prior convictions that purportedly triggered ACCA. *Id.*

Petitioner pleaded guilty to violating Section 922(g). At sentencing, the district court expressed the view that a fifteen-year term of imprisonment—the mandatory minimum under ACCA—was "too high." Dist. Ct. Dkt. No. 67 at 29 (Oct. 24, 2018). In particular, the court found "no evidence" that petitioner was using the guns stored in his garage "to do anything wrong other than what was represented as being hobby and sport; which is, of course, lawful" in the absence of prior felony convictions. *Id.* Left to its own devices, the court said "a fair sentence in your case, honestly, might be, like, five years." *Id.* at 30.

But the district court also found, based on the government's allegations, that ACCA applied to petitioner. The court conceded that ACCA affords no discretion to deviate below its minimum fifteen-year sentence. Dist. Ct. Dkt. No. 67 at 30. Accordingly, the court sentenced petitioner to a term of fifteen years in prison, to be followed by a one-year term of supervised release. Pet. App. 2a.

A few years later, the district court vacated petitioner's sentence. Based on intervening circuit precedent, the district court that held all but one of the prior convictions upon which it based his ACCA sentence did not actually qualify as predicate offenses. *United States v. Erlinger*, No. 2:19-cv-00518, 2021 WL 2915014, at *1-2 (S.D. Ind. July 12, 2021) (citing *United States v. De La Torre*, 940 F.3d 938, 952 (7th Cir. 2019); *United States v. Glispie*, 978 F.3d 502 (7th Cir. 2020)).

At resentencing, the government argued that petitioner should again be sentenced under ACCA. This time, the government pointed to four different prior convictions: four Indiana nonresidential burglary convictions entered in 1991, committed when petitioner was eighteen years old. Pet. App. 2a-3a. Those four charges had been filed on the same date, alleging that each burglary occurred over the course of eight days within the same county and city. *Id.* 21a-22a; Appellant's CA7 Br. App'x at 43-45, 49. The State had alleged that the first burglary occurred on April 4, 1991 at a pizzeria; the second four days later at an outdoors sporting-goods store; and the other two a few days after that at two chain restaurants. Pet. App. 3a. Petitioner pleaded guilty in a single plea agreement to all

four charges, and the convictions were entered together in a single judgment. *Id.* 8a, 21a. Petitioner also received concurrent sentences for each conviction. *Id.* 21a.

Petitioner objected to the government's suggestion that his 1991 offenses could support an ACCA sentence. Relying on *Wooden*, he argued that his 1991 burglary convictions were not committed on "occasions different from one another." Pet. App. 22a-23a; *see* 18 U.S.C. § 924(e)(1). He further argued that the Sixth Amendment precluded "judicial factfinding" on this point. Pet. App. 23a. At the sentencing hearing, petitioner expanded on his constitutional claim, contending that where the government invokes a sentence enhancement such as ACCA, the district court "is prohibited by the Sixth Amendment and by *Apprendi* [*v. New Jersey*, 530 U.S. 466 (2000)] . . . from engaging in judicial fact finding [necessary to increase the statutory sentencing range] other than finding the simple fact of a prior conviction and the elements of that prior conviction." *Id.* 37a.

The district court rejected petitioner's argument. Citing pre-*Wooden* precedent from the Seventh Circuit, it reasoned that it could rely on the factual information contained in the 1991 charging documents to determine whether the prior convictions were predicate offenses under ACCA. Pet. App. 42a-43a, 55a-57a (citing *Kirkland v. United States*, 687 F.3d 878, 890 (7th Cir. 2012)). The district court then found that they were. Applying ACCA's enhancement, the district court again sentenced petitioner to the statute's mandatory-minimum term of fifteen years' imprisonment. *Id.* 59a.

As before, the district court observed that ACCA's sentence enhancement resulted in an "excessive," "artificially inflate[d]," and "unjust punishment." Pet. App. 57a-58a. On top of the mitigating facts the district court had previously referenced, the court recognized that petitioner had demonstrated "excellent rehabilitation" during his incarceration thus far. *Id.* 59a. So this time, the court stated unequivocally that, if it were not "compelled" to impose the ACCA enhancement, it would have sentenced petitioner to a term of only five years. *Id.* 58a-59a But because ACCA gives a sentencing judge "no discretion," the court had no choice but to impose a prison term three times as long. *Id.* 58a.

3. Petitioner appealed the ACCA enhancement, arguing that the district court engaged in unconstitutional judicial factfinding and erred in concluding that his 1991 burglary convictions qualified for enhanced penalties under ACCA. Appellant's CA7 Br. at 6-18. The government agreed that, "[f]ollowing *Wooden*, . . . the Sixth Amendment requires a jury to determine whether predicate offenses were committed on different occasions." Gov't CA7 Br. at 7, 11.

The court of appeals nevertheless affirmed. It declared itself "bound" by its pre-*Wooden* precedent to hold that the sentencing court itself could find that petitioner committed the 1991 burglaries on different occasions. Pet. App. 7a-8a. The court of appeals also upheld the district court's factual determination that

the 1991 burglaries were committed on occasions different from one another. *Id.* 8a.[2]

## SUMMARY OF ARGUMENT

A finding under ACCA that prior convictions were committed "on occasions different from one another," 18 U.S.C. § 924(e)(1), must be made by a jury beyond a reasonable doubt.

I. A straightforward application of the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), governs this case. Under *Apprendi*, any fact (other than a prior conviction) that increases the range of penalties to which the defendant is exposed must be determined by a jury beyond a reasonable doubt. *Id.* at 490. And the "prior conviction" exception—established in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998)—is strictly limited to just that: the simple fact of a prior conviction. Any fact a previous jury did not have to find concerning the nature of prior offenses or the means of committing them remains subject to the *Apprendi* rule.

ACCA's occasions clause requires a finding beyond the simple fact of a prior conviction. As this Court explained in *Wooden v. United States,* 595 U.S. 360 (2022), the clause requires a "multi-factored" inquiry into whether prior offenses arose "from a single criminal episode." *Id.* at 363. No previous jury typically makes any such finding, nor the relevant subsidiary

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[2] The court of appeals additionally held that Indiana's burglary statute was not overly broad and could properly qualify for an enhanced sentence under ACCA. Pet. App. 4a-6a. Those holdings are not at issue here.

findings such as the location, timing, or specific details of the offense conduct. Moreover, ACCA's statutory history confirms that the whole purpose of the occasions clause is to require *something more* than mere prior convictions before imposing an enhanced sentence. Having concluded that other recidivism statutes enacted earlier in the twentieth century were overbroad and unjust, Congress intended to ensure that ACCA would apply only to truly habitual criminals—those who had reoffended over a substantial span of time in different contexts. An offender characteristic along these lines is a classic element of a greater offense.

II. No reason any court of appeals has given for refusing to apply *Apprendi* in this setting withstands scrutiny.

*First*, *Almendarez-Torres* did not establish an all-purpose "recidivism" exception. Several subsequent decisions—most notably *Descamps v. United States*, 570 U.S. 254 (2013), and *Mathis v. United States*, 579 U.S. 500 (2016)—have made clear that facts relating to the underlying conduct involved in prior offenses fall under *Apprendi*, not the prior-conviction exception. Tradition firmly supports this precedent. Through the mid-twentieth century, recidivist enhancements almost always rested on prior convictions themselves and did not require anything like the different-occasions finding here.

Exempting ACCA's occasions clause from *Apprendi* would also raise serious line-drawing problems. There is no discernable way to distinguish, as one court of appeals has suggested, between the "facts of conduct underlying each prior conviction" and so-

called "recidivism facts." *United States v. Brown*, 67 F.4th 200, 212-23 (4th Cir. 2023).

Lastly, the Court should decline to convert *Almendarez-Torres* into an all-purpose "recidivism" exception because that decision itself rests on extremely shaky ground. It is squarely at odds with history and has been repeatedly criticized by the Court—including by a majority of the Justices on the Court when the case itself was decided. *Stare decisis* is one thing. But there is no good reason to extend such a feeble and limited precedent into new jurisprudential territory.

*Second*, sentencing courts may not use court records referenced in *Shepard v. United States*, 544 U.S. 13 (2005), to determine whether a defendant's prior convictions were committed on different occasions. This Court has repeatedly held that so-called *Shepard* documents may be used for one reason and one reason only: to determine which of the alternative elements within a "divisible" statute served as the basis for the prior conviction. That is not the situation here.

*Third*, practical considerations supply no basis for withholding *Apprendi*'s protections here. Defendants can always stipulate to ACCA's different-occasions criterion or waive the right to jury trial. Courts can also bifurcate criminal cases to avoid any undue prejudice that might arise from advising the jury that the defendant has prior convictions. And even if applying *Apprendi* here did create significant inefficiencies or burdens, that would still not allow this Court to shy away from that constitutional rule. The right to jury trial is an essential aspect of liberty and may not be discarded for mere administrative convenience.

## ARGUMENT

### I. The *Apprendi* Rule Applies To ACCA's Requirement That Prior Convictions Be Committed On Different Occasions.

The rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), applies here because of a straightforward syllogism. Under *Apprendi*, any fact (other than a prior conviction) that increases the maximum or minimum sentence for an offense must be determined by a jury beyond a reasonable doubt. *Id.* at 490; *see also Alleyne v. United States*, 570 U.S. 99, 103 (2013). ACCA increases the maximum and minimum sentence when a defendant has three prior convictions for offenses committed on "occasions different from one another." 18 U.S.C. § 924(e)(1). And this Court's recent decision in *Wooden v. United States,* 595 U.S. 360 (2022)—along with ACCA's text, history, and purpose—make clear that the occasions clause depends on factual determinations beyond simply whether the defendant has prior convictions.

#### A. The *Apprendi* Rule Applies To Any Fact (Other Than A Prior Conviction Itself) That Increases The Maximum Or Minimum Penalty.

The Fifth and Sixth Amendments together "require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *United States v. Gaudin*, 515 U.S. 506, 510 (1995); *see also, e.g.*, *Hurst v. Florida*, 577 U.S. 92, 97 (2016). "The substance and scope" of these constitutional protections thus depend on the "proper

designation of the facts that are elements of the crime." *Alleyne*, 570 U.S. at 104-05.

*Apprendi* established the foundational rule for identifying the factual questions that must be treated as elements: An element is "any fact," other than a prior conviction, that "increase[s] the prescribed range of penalties to which a criminal defendant is exposed." 530 U.S. at 490. A lengthy history and common-law tradition support this rule, as the Court has explained in *Apprendi* and other cases. *See, e.g.*, *id.* at 476-85; *id.* at 502-18 (Thomas, J., concurring) (recounting history from the founding through the 19th century); *Alleyne*, 570 U.S. at 108-09; *Blakely v. Washington*, 542 U.S. 296, 301-02 (2004) (discussing "longstanding tenets of common-law criminal jurisprudence" supporting the *Apprendi* rule); *Jones v. United States*, 526 U.S. 227, 244-48 (1999) (elaborating on the relevant "history bearing on the Framers' understanding of th[is] Sixth Amendment principle").

In a long line of case law since *Apprendi*, this Court has applied its rule to require sentence-enhancing facts in a variety of settings to be proven to juries beyond a reasonable doubt. *See Ring v. Arizona*, 536 U.S. 584 (2002) (aggravating facts necessary to impose death sentence); *Blakely*, 542 U.S. 296 (mandatory state sentencing guidelines); *United States v. Booker*, 543 U.S. 220 (2005) (mandatory federal sentencing guidelines); *Cunningham v. California*, 549 U.S. 270 (2007) (facts necessary to impose heightened sentences under state sentencing system); *S. Union Co. v. United States*, 567 U.S. 343 (2012) (imposition of criminal fines); *Alleyne*, 570 U.S. at 108 (facts necessary to trigger mandatory minimum); *Hurst*, 577

U.S. at 101-02 (facts necessary to impose death sentence).

Indeed, the Court's commitment to *Apprendi* is so strong that it has overruled several decisions—some predating *Apprendi*, and one postdating it—shown to be inconsistent with its reasoning. *See Hurst*, 577 U.S. at 101-02 (overruling *Hildwin v. Florida*, 490 U.S. 638 (1989) (per curiam), and *Spaziano v. Florida*, 468 U.S. 447 (1984)); *Alleyne*, 570 U.S. at 103 (overruling *Harris v. United States*, 536 U.S. 545 (2002)); *Ring*, 536 U.S. at 609 (overruling *Walton v. Arizona*, 497 U.S. 639 (1990)).

### B. The *Almendarez-Torres* Exception Is Strictly Limited To The Fact Of A Prior Conviction.

The "prior conviction" exception to the *Apprendi* rule comes from a case decided three years earlier, *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). This Court has continually stressed that *Almendarez-Torres* is, at best, "a narrow exception to the general rule." *Apprendi*, 530 U.S. at 490; *accord Alleyne*, 570 U.S. at 111 n.1. It is limited to the fact of a prior conviction and nothing more.

1. In *Almendarez-Torres*, a grand jury indicted the defendant with "having been 'found in the United States . . . after being deported,'" in violation of 8 U.S.C. § 1326. 523 U.S. at 227. Although subsection (a) of this "illegal reentry" statute authorizes a maximum prison term of two years, subsection (b)(2) authorizes a prison term of up to 20 years "if the initial 'deportation was subsequent to a conviction for com-

mission of an aggravated felony.'" *Id.* at 226. Almendarez-Torres pleaded guilty, and "admitted that he had been deported, that he had later unlawfully returned to the United States, and that the earlier deportation had taken place 'pursuant to' three earlier 'convictions' for aggravated felonies." *Id.* at 227. But at sentencing, he contended the district court could not sentence him to more than two years because the indictment "had not mentioned his earlier aggravated felony convictions." *Id.*

"An indictment must set forth each element of the crime that it charges," but "it need not set forth factors relevant only to the sentencing of an offender found guilty of the charged crime." *Almendarez-Torres*, 523 U.S. at 228. Accordingly, the legality of Almendarez-Torres' enhanced punishment turned on whether the Fifth and Sixth Amendments required the prior-conviction finding necessary to increase his sentence to be treated as an element.

A bare majority of the Court deemed Section 1326(b)(2) to be a mere "sentencing factor." *Almendarez-Torres*, 523 U.S. at 235. Even when "the fact of an earlier conviction" increases the maximum penalty, the Court held that it need not be treated as an element of an enhanced offense. *Id.* at 226. In so holding, the Court emphasized that "recidivism . . . is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence." *Id.* at 243. Requiring a prior conviction to be an element, therefore, "would mark an abrupt departure from [that] longstanding tradition." *Id.* at 244.

2. A few years later in *Apprendi*, the Court conducted a fuller exploration of the history of sentence-

enhancing facts—focusing on the founding era instead of the more modern sentencing practices that had influenced the *Almendarez-Torres* Court. Justice Thomas's concurrence in particular delved deeply into this history. He explained that cases and treatises "from the founding to roughly the end of the Civil War"—and, indeed, "at least until the middle of the [20th] century"—made clear that "all sorts of facts, including recidivism," had to be proven beyond a reasonable doubt to juries whenever they increased the maximum or minimum permissible sentence. *Apprendi*, 530 U.S. at 499-518 (Thomas, J., concurring). Justice Thomas therefore renounced his decisive vote with the majority in *Almendarez-Torres* and declared that decision erroneous. *Id.* at 520 (Thomas, J., concurring).

The *Apprendi* majority similarly observed that "it is arguable that *Almendarez-Torres* was incorrectly decided." 530 U.S. at 489. But instead of overruling that decision, the *Apprendi* majority was content to call *Almendarez-Torres* "at best an exceptional departure from the historic practice" animating the *Apprendi* rule. *Id.* at 487 (majority opinion). The *Apprendi* Court explained that *Almendarez-Torres* "turned heavily upon the fact that the additional sentence to which the defendant was subject was 'the prior commission of a serious crime'"—and nothing more. *Id.* at 488 (quoting *Almendarez-Torres*, 523 U.S. at 230). Consequently, the very "procedural safeguards" required by the Fifth and Sixth Amendments will have previously "attached to any 'fact'" covered by

*Almendarez-Torres*, thereby mitigating the constitutional concerns with increasing a new sentence based on a prior conviction. *Id.*

In other words, *Apprendi* made clear that the *Almendarez-Torres* exception applies only to facts necessarily found "pursuant to proceedings with substantial safeguards of their own," 530 U.S. at 488—that is, "only facts the court can be sure the jury . . . found [as] constituting elements of the [previous] offense." *Descamps v. United States*, 570 U.S. 254, 269-70 (2013); *see also Jones*, 526 U.S. at 248-49 (declining to extend *Almendarez-Torres* beyond the fact of a prior conviction because "a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees"). So understood, the basis for any judicial fact-finding on the existence of a prior conviction is constrained to constitutionally sanitized information; judges may "merely identif[y] findings or admissions that were previously made under constitutional safeguards." *United States v. Hennessee*, 932 F.3d 437, 449 (6th Cir. 2019) (Cole, C.J., dissenting).

3. Two subsequent cases decided under the very sentence-enhancing statute at issue here confirm that the *Almendarez-Torres* exception does not reach one jot beyond the simple fact of a prior conviction.

First, in *Descamps*, the Court considered whether a prior conviction for burglary qualified under ACCA as a "violent felony." Under ACCA, burglary convictions so qualify only if the statute of conviction required an unlawful entry. *See* 18 U.S.C. §§ 924(e)(1), (2)(B). But the California statute under which Descamps had been convicted was not so limited.

*Descamps*, 570 U.S. at 264-65. The government argued that the district court could simply find at sentencing whether Descamps' actual conduct leading to his conviction involved an unlawful entry.

The Court held that the district judge could not do so. *Descamps*, 570 U.S. at 258. As pertinent here, *Descamps* emphasized that allowing the district court to conduct factfinding in this regard—going "beyond merely identifying a prior conviction"—"would (at the least) raise serious Sixth Amendment concerns." *Id.* at 269. This is because "[t]he Sixth Amendment contemplates that a jury—not a sentencing court—will find" facts "about the defendant's underlying conduct" that resulted in a prior conviction. *Id.* "[T]he only facts the court can be sure the jury . . . found are those constituting elements of the [prior] offense—as distinct from amplifying but legally extraneous circumstances." *Id.* at 269-70.

Second, in *Mathis v. United States*, 579 U.S. 500 (2016), the Court reaffirmed that ACCA cannot be read to allow sentencing courts to find facts beyond "the simple fact of a prior conviction." *Id.* at 511. And again, the Court reiterated that the Sixth Amendment required ACCA to be construed that way:

> [O]nly a jury, and not a judge, may find facts that increase a maximum penalty, except for the simple fact of a prior conviction. *That means a judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed that offense.* . . . He can do no more, consistent with the Sixth Amendment, than determine what crime, with

> what elements, the defendant was convicted of.

*Id.* at 511-12 (emphasis added; internal citations and quotation marks omitted).

The through line from *Apprendi* to the present is consistent and clear: Judges may not enhance sentences based on their own determinations about the "means of commission" of prior offenses, or any other fact a prior jury did not need to find. *Mathis*, 579 U.S. at 519-20. "[A]n ACCA penalty may be based only on what a [previous] jury 'necessarily found' to convict a defendant (or what he necessarily admitted)." *Id.* at 515 (quoting *Descamps*, 570 U.S. at 266 n.3, 272).

### C. The ACCA Occasions Clause Requires Factual Determinations Beyond The Fact Of A Prior Conviction.

ACCA's text, this Court's decision in *Wooden*, and the statute's design all demonstrate that the occasions inquiry turns not on the simple fact of a defendant's prior convictions, but rather on the manner in which he committed the underlying offenses. The *Apprendi* rule therefore requires the occasions determination to be made by a jury beyond a reasonable doubt.

1. ACCA requires an enhanced sentence when a defendant is convicted of unlawful possession of a firearm, in violation of 18 U.S.C. § 922(g), "and has 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) (emphasis added). The primary common meaning of "occasion" is "the totality of circumstances giving rise to

an opportunity." *United States v. Bordeaux*, 886 F.3d 189, 195 (2d Cir. 2018); *see also Occasion*, n.1, Oxford English Dictionary (2d ed. 1989) ("A falling together or juncture of circumstances favourable or suitable to an end or purpose, or admitting of something being done or effected; an opportunity."); *Occasion*, para. 1, Webster's Third International Dictionary (1976) ("[A] situation or set of circumstances favorable to a particular purpose or development: a timely chance."). The statutory language thus prompts not just the question whether the defendant has qualifying previous convictions, but also whether the conduct underlying those offenses involved the same "purpose" or "development."

2. This text prompted the Court in *Wooden* to hold that the inquiry for determining whether offenses were committed on occasions different from one another is "multi-factored." 595 U.S. at 369. Rejecting the government's position that "an 'occasion' happens 'at a particular point in time'—the moment 'when [an offense's] elements are established,'" *id.* at 366—the Court ruled that ACCA's occasions clause asks whether the prior convictions arose "from a single criminal episode," *id.* at 363. That determination turns on a range of factual considerations. "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." *Id.* at 369. Similarly, "[p]roximity of location" matters; "the further away crimes take place, the less likely they are components of the same criminal event." *Id.* In addition, "the char-

acter 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.*

These considerations reach far beyond the simple fact of a prior conviction—an inquiry limited to "what crime, with what elements, the defendant was convicted of." *Mathis*, 579 U.S. at 511-12. Instead, the occasions inquiry requires engaging with the "what, when, and where of a conviction." *Pereida v. Wilkinson*, 141 S. Ct. 754, 765 (2021). All these things "pose questions of fact." *Id.* And rarely, if ever, will a previous jury have had to make any such determination. *See, e.g.*, *Hennessee*, 932 F.3d at 440 (acknowledging "the times and locations on which the government relied [in seeking an ACCA sentence] were not elements of [defendant's] prior offenses"); *United States v. Dantzler*, 771 F.3d 137, 143 (2d Cir. 2014) (similar); *United States v. Thompson*, 421 F.3d 278, 293 & n.8 (4th Cir. 2005) (Wilkins, C.J., dissenting) ("[I]n few, if any cases is a jury required to find that the offense occurred on a particular date.").

What's more, the past facts relevant to ACCA's occasions inquiry may well be "disputed" in a prosecution under Section 922(g), or at least open to various interpretations. *Apprendi*, 530 U.S. at 488. Petitioner's own case exemplifies the point. According to the Government's allegations, each of petitioner's 1991 burglaries occurred within the same county and city over the course of eight days—two on the same day. Gov't CA7 Br. at 3. And petitioner was charged simultaneously for all four offenses. Appellant's CA7

Br. App'x. at 43-45. Petitioner pleaded guilty to all of the charges in one plea agreement; his conviction for each offense was entered in a single judgment; and he received concurrent sentences. *Id*. at 46-49. No significant intervening event appears to separate any of the offenses. All told, this is precisely the sort of case in which a jury could find that, as in *Wooden*, each burglary "arose from a closely related set of acts." 595 U.S. at 375.

3. ACCA's statutory design underscores that the entire purpose of the occasions clause is to require a finding of something *more* than the simple fact of prior convictions.

For much of the twentieth century, recidivism laws typically subjected *all* repeat offenders to severe punishment. *See, e.g.*, W.A. Shumaker, *Life Imprisonment for Habitual Offenders*, 31 L. Notes 106, 106-08 (1927). The laws thus often imposed severe sentences on low-level and non-violent offenders. *See id.* at 106 (discussing a law requiring a life sentence for stealing a dog). But in the middle of the century, these laws met a wave of criticism for being overly punitive and ineffective. "Almost all observers . . . concluded that recidivism legislation [wa]s useless and impractical." Sol Rubin, *The Law of Criminal Correction* 400 (1963). Such legislation, it was thought, did "not catch[] the more important criminals who really should have been prosecuted." George K. Brown, *The Treatment of the Recidivist in the United States*, 23 Can. Bar Rev. 640, 663 (1945). In fact, to avoid "chaotic and unjust" results, prosecutors and judges commonly took to nullifying recidivism laws in practice. Herbert Wechsler, *Sentencing, Correction, and the Model Penal Code*,

109 U. Pa. L. Rev. 465, 483 (1961); *see* Brown, 23 Can. Bar Rev. at 661-63; Paul W. Tappan, *Crime, Justice and Correction* 474 (1960).

By the 1960s, frustration with recidivism laws led to several high-profile reform efforts, including model sentencing statutes, crime commissions, and "more sophisticated studies" of recidivist offenders. William F. McDonald, Repeat Offender Laws in the United States: Their Form, Use and Perceived Value 38-39 (1986); *see also* President's Comm'n on L. Enf't & Admin. of Just., The Challenge of Crime in a Free Society 142 (1967) ("Katzenbach Commission Report") ("About half the States are now undertaking projects to revise their penal laws and sentencing codes."). Most relevant here, in 1963, the Advisory Council of Judges of the National Council on Crime and Delinquency, composed of 48 state and federal judges, issued the Model Sentencing Act ("MSA").[3]

Explaining that traditional recidivism laws had been "glaringly ineffective" at targeting the most dangerous offenders, the MSA's drafters sought to eliminate sentence enhancements based solely on the fact of prior convictions. Alfred P. Murrah & Sol Rubin,

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[3] In addition to the MSA, the American Law Institute adopted the Model Penal Code ("MPC") in 1962; former Attorney General Katzenbach, former American Bar Association ("ABA") President and soon-to-be Justice Powell, and others published the Katzenbach Commission Report in 1967; the ABA's Advisory Committee on Sentencing and Review established its Standards Relating to Sentencing Alternatives and Procedures in 1968; and the National Commission on Reform of Federal Criminal Laws submitted its final report on a Proposed New Federal Criminal Code in 1971.

*Penal Reform and the Model Sentencing Act*, 65 Colum. L. Rev. 1167, 1171-72 (1965). In the place of such automatic enhancements, the MSA proposed a set of "controlling criteria" to identify the most dangerous repeat offenders and sift out those who merely accrued multiple convictions without displaying a need for increased incapacitation. *Id.* at 1171-73. Among these criteria was whether the defendant "has been previously convicted of one or more felonies *not related to the instant crime as a single criminal episode*." *Id.* (emphasis added); MSA § 5. The idea was that if a repeat offender simply committed multiple offenses in a short timeframe, such conduct did not really show he was a persistent, incorrigible offender.

The MSA's "single criminal episode" criterion led directly to ACCA's "occasions" language. Originally, ACCA did not include the phrase "committed on occasions different from one another." *Compare* 18 U.S.C. App. 1202(a)(1) (Supp. 1984), *with* 18 U.S.C. § 924(e)(1). That changed in 1988, when Congress amended the statute to clarify that a "career criminal" of the sort ACCA targets is a person who "*over the course of time* commits three or more of the enumerated kinds of felonies." 134 Cong. Rec. S17370-02 (daily ed. Nov. 10, 1988) (statement of Sen. Biden) (emphasis added). ACCA thereby applies only to truly habitual offenders—those who have proved themselves to be "revolving door felons," *Wooden*, 595 U.S. at 375 (internal quotation marks omitted)—not just

people who have a sufficient number of prior convictions.[4]

Put another way, ACCA's occasions clause is specifically designed to require a finding *beyond* the mere fact of having multiple qualifying convictions. The occasions clause ensures that people saddled with 15-year mandatory-minimum sentences for felon-in-possession convictions committed their prior offenses over substantial periods of time and in different con-

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[4] Congress incorporated the MSA's "criminal episode" concept into two other recidivist statutes as well: (1) 18 U.S.C. § 3575(e)(1), the Organized Crime Control Act of 1970 ("OCCA"), Pub. L. No. 91-452, 84 Stat. 922 (1970) (repealed effective Nov. 1, 1987) (special dangerous offender); and (2) 21 U.S.C. § 849(e)(1), the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (1970) (repealed effective Nov. 1, 1987) (special drug offender). *See* 116 Cong. Rec. H9189 (daily ed. Sept. 24, 1970); 134 Cong. Rec. S17370-02 (statement of Sen. Biden). Congress explained that the occasions language in OCCA was intended to limit OCCA's application to "cases of dangerous habitual offenders." *Organized Crime Control Act: Hearing on S. 30 and Related Proposals Before the H. Comm. on the Judiciary*, 91st Cong. 562, 568 (1970) (statement of Edward L. Wright, President-Elect, ABA); Am. Bar Ass'n, Project on Minimum Standards for Crim. Just., Advisory Comm. on Sent'g & Rev., Standards Relating to Sentencing Alternatives and Procedures 167-68 (1967); *see also* H.R. Rep. No. 91-1549 at 4064-65. That is, as with ACCA, OCCA's occasions requirement targeted "repetition of criminality over a period of time that suggest[ed] the possibility of a special danger, not the number of prosecutions that may be founded on a single episode involving multiple offenses." 91st Cong. at 523 (statement of Herbert Wechsler, reporter of the MPC and member of both the ABA's Advisory Committee on Sentencing and Review and the Katzenbach Commission).

texts. That is precisely the kind of factual determination that *Apprendi* reserves for juries and that falls outside the *Almendarez-Torres* exception.[5]

## II. The Court Should Not Extend *Almendarez-Torres* To Exempt The Occasions Inquiry From The *Apprendi* Doctrine.

Before *Wooden*, several courts of appeals held that *Almendarez-Torres* exempted the occasions inquiry from the constitutional rule recognized in *Apprendi*.[6]

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[5] Instead of ruling here squarely on constitutional grounds, this Court could alternatively hold, as a matter of statutory interpretation (including as a matter of constitutional avoidance), that ACCA's occasions clause sets forth a factual requirement that juries must find beyond a reasonable doubt. "[T]here can be little doubt that granting certiorari to determine whether a statute is constitutional fairly includes the question of what that statute says." *Rumsfeld v. F.A.I.R.*, 547 U.S. 47, 56 (2006). In fact, this Court has previously invoked constitutional considerations in construing ACCA and other statutes providing for increased punishment. *See Shepard v. United States,* 544 U.S. 13, 24-26 (2005) (plurality opinion) (ACCA); *United States v. O'Brien*, 560 U.S. 218, 224-35 (2010) (federal statute requiring enhanced sentence for using a machinegun in relation to a crime of violence or drug-trafficking crime).

[6] *See United States v. Harris*, 794 F.3d 885, 887 (8th Cir. 2015); *United States v. Weeks*, 711 F.3d 1255, 1259 (11th Cir. 2013); *Kirkland v. United States*, 687 F.3d 878, 890 (7th Cir. 2012); *United States v. Harris*, 447 F.3d 1300, 1304 (10th Cir. 2006); *United States v. Burgin*, 388 F.3d 177, 186 (6th Cir. 2004); *United States v. Santiago*, 268 F.3d 151, 156-57 (2d Cir. 2001). Several judges disagreed with these holdings. *See, e.g.*, *United States v. Perry*, 908 F.3d 1126, 1134-36 (8th Cir. 2018) (Stras, J., concurring); *id.* at 1137 (Kelly, J., concurring in part and dissenting in part); *Hennessee*, 932 F.3d at 446-52 (Cole, C.J., dissenting); *Thompson*, 421 F.3d at 291-93 (Wilkins, C.J., dissenting).

More recently, a divided panel of the Fourth Circuit reached the same conclusion. *See United States v. Brown*, 67 F.4th 200 (4th Cir. 2023). In general, these decisions make some combination of three arguments. First, they assert that *Almendarez-Torres* is an all-purpose "recidivism" exception, exempting from the *Apprendi* rule any fact related to a prior conviction. *Id.* at 213. Second, these decisions reason that *Almendarez-Torres* at least allows sentencing courts to consider so-called "*Shepard* documents"—indictments and related records—to determine whether a defendant's prior convictions were committed on different occasions. Third, these courts contend that applying the *Apprendi* rule here would disadvantage defendants by requiring prejudicial evidence to be put in front of juries. None of these arguments withstands scrutiny.

### A. *Almendarez-Torres* Does Not Support An All-Purpose Recidivism Exception.

Treating *Almendarez-Torres* as an all-purpose exception for any fact "based on the defendant's recidivism," *Brown*, 67 F.4th at 212, would contravene precedent, deviate from tradition, create serious line-drawing problems, and significantly enlarge a doctrinal exception this Court has already concluded is at best legally shaky even within its existing confines.

1. To begin, precedent does not permit a broadening of the *Almendarez-Torres* exception to cover the occasions clause. As explained above, this Court held in unambiguous terms in *Descamps* and *Mathis* that the *Almendarez-Torres* exception cannot be stretched to cover the "means" of committing prior offenses. *Supra* at 16-18. Instead, the exception is strictly limited

to the "simple fact" of a prior conviction. *Mathis v. United States*, 579 U.S. 500, 511 (2016); *see also Descamps v. United States*, 570 U.S. 254, 269 (2013) (*Almendarez-Torres* does not allow a sentencing court to go beyond "merely identifying a prior conviction."); *id.* (*Almendarez-Torres* does not allow a sentencing court to "extend[] judicial factfinding beyond the recognition of a prior conviction.").

Treating *Almendarez-Torres* as an all-purpose exception would also contradict other cases in which the Court has recognized that circumstance-specific information about previous convictions must be proven to a jury beyond a reasonable doubt before it can support a prescribed punishment. In *United States v. Hayes*, 555 U.S. 415 (2009), the Court explained that "[t]o obtain a conviction" under 18 U.S.C. 922(g)(9) for possessing a firearm after having been convicted of domestic violence, "the Government must prove beyond a reasonable doubt that the victim of the predicate offense was the defendant's current or former spouse or was related to the defendant in another specified way." *Id.* at 426. The Government bears this burden because such facts would not necessarily be elements of the predicate offense.

Similarly, in *Nijhawan v. Holder*, 557 U.S. 29 (2009), the Court considered whether the amount of the loss caused by a previous fraud offense would have to be proven beyond a reasonable doubt if required in a prosecution for illegal reentry to secure a higher sentence. Even though the amount of loss was not an element of the fraud statute under which the previous conviction occurred, the government conceded that a "jury" would have to find the loss amount "beyond a

reasonable doubt," thereby "eliminating any constitutional concern" that would otherwise arise. *Id.* at 40. And this Court accepted that explanation. *Id.*

In still other cases, the Court has observed that "case-specific" analysis of the conduct underlying previous convictions in the ACCA context is constitutionally forbidden because it would require "a judge, not a jury, [to] make findings about that underlying conduct." *United States v. Davis*, 139 S. Ct. 2319, 2327 (2019); *see also Sessions v. Dimaya*, 138 S. Ct. 1204, 1217 (2018).

To be sure, the Court's opinion in *Almendarez-Torres* sometimes spoke of "recidivism" generally—suggesting, for instance, that "recidivism 'does not relate to the commission of the offense.'" 523 U.S. at 244 (quoting *Graham v. West Virginia*, 224 U.S. 616, 629 (1912)). But *Almendarez-Torres* used the term "recidivism" interchangeably with the phrase "fact of a prior conviction," suggesting it intended no difference between the two. *See* 523 U.S. at 243-44 ("a State need not allege a defendant's *prior conviction* in the indictment or information" because "*recidivism* does not relate to the commission of the offense") (emphasis added; internal citations and quotation marks omitted); *id.* at 230 ("At the outset, we note that the relevant statutory subject matter is *recidivism*. That subject matter—*prior commission of a serious crime*—is as typical a sentencing factor as one might imagine.") (emphasis added). Nor did the Court in *Almendarez-Torres* have any reason to distinguish between the two terms; the sentencing factor there was the simple fact of a prior conviction. *See id.* at 226.

In any event, any suggestion in *Almendarez-Torres* that all facts related to "recidivism" might be categorically exempt from the *Apprendi* rule was squelched in this Court's subsequent holdings in *Mathis*, *Descamps*, and other cases. Time and again, the Court has held that *Apprendi*'s protections apply to sentence-enhancing facts that relate to how prior offenses were committed and that juries did not previously have to find. *See supra* at 16-18, 27-29.

And if all that were not enough, exempting ACCA's occasions inquiry from *Apprendi* on the ground that it "does not relate to the commission of the [instant] offense itself," *Brown*, 67 F.4th at 206 (internal quotation marks omitted), would also be in serious tension with this Court's double-jeopardy jurisprudence. Under that jurisprudence, recidivism enhancements are constitutionally tolerable only because "100% of the punishment is for *the offense of conviction*." *United States v. Rodriquez*, 553 U.S. 377, 386 (2008) (emphasis added). None is for the "the defendant's status as a recidivist." *Id.*; *see also Gryger v. Burke*, 334 U.S. 728, 732 (1948) (A recidivist sentence is not an "additional penalty for the earlier crimes. It is a stiffened penalty for the latest crime."). The ACCA enhancement here thus punishes certain felon-in-possession offenses especially harshly not because the defendant committed *past* crimes in any particular manner, but rather because a person's *current* status as a "career" criminal makes his *present* gun possession particularly blameworthy and threatening to society. That offender characteristic—no less than, say, abusing a position of authority, or depending on criminal activity for one's livelihood—is a new fact

that demands *Apprendi*'s safeguards when used to enhance a sentencing range.

Contrary to the Fourth Circuit's assertion, *Almendarez-Torres* does not suggest otherwise simply because the defendant's previous conviction in that case needed to predate his earlier deportation. *See Brown*, 67 F.4th at 213. A "*prior* conviction," by definition, must occur before something else. It makes no difference whether it must predate the commission of the current offense or some other event. Either way, the existence of the earlier conviction must be established.

Moreover, identifying the date of a prior *conviction* requires no factfinding about the circumstances of the underlying *conduct* involved in a previous offense. Instead, it is part and parcel of establishing that a prior conviction in fact occurred. If one cannot say when a conviction was entered, it is hard to imagine how a court could find it happened at all. Not so with regard to the occasions inquiry here. Simply knowing the *prior convictions'* dates does not resolve whether the *offenses themselves* were committed on "occasions different from one another." The factfinder must also consider "the character and relationship of the offenses," their timing, whether they shared "a common scheme or purpose," and the geographic "[p]roximity" of the offenses. *Wooden*, 595 U.S. at 369.

2. Nor does history support enlarging the *Almendarez-Torres* exception. Insofar as the exception is valid, it purports to rest on a "tradition" of allowing judges to find that defendants are recidivists. *Almendarez-Torres*, 523 U.S. at 243-44. But no felony recidivism enhancement statute enacted from the

founding era into the twentieth century required an inquiry into anything other than the simple fact of a prior conviction—or, at most, a previous period of incarceration for a prior conviction. A compilation of such statutes appears in Appendix A to this brief.

To be sure, *Almendarez-Torres* relied primarily on a comparison to more recent sentencing laws. 523 U.S. at 243. But even assuming this sort of survey could establish a pedigree sufficient to support a constitutional rule, *but see N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 66 (2022), it would not make any difference here. "General" felony recidivism laws—laws that "increase[] penalties when the subsequent crime is any one of certain types," not necessarily the exact same offense as the prior convictions—proliferated in and after the 1920s. Brown, 23 Can. Bar Rev. at 640-42; *see also* McDonald, *supra*, at 27-28, 33-34. By the middle of the century, 43 states and the District of Columbia had enacted such habitual offender laws. Paul W. Tappan, *Habitual Offender Laws in the United States*, 13 Fed. Prob. 28, 28 (1949).

Despite jurisdictions' increasing experimentation with these laws from the 1920s onward, they continued to base their enhanced punishments almost exclusively on the simple fact of previous convictions. (Appendix B to this brief compiles general felony recidivism statutes from 1920 through 1969.) A few jurisdictions required a bit more. *See, e.g.*, 1929 Pa. Laws 854 (No. 373, §§ 1-2) (increased sentences permissible only if the recidivist offense is "committed within five years after the prior offense"); 1931 Cal. Stat. 1052-53 (ch. 482, § 1) (requiring convictions

"upon charges separately brought and tried"). But virtually none required an assessment of the contextual relationship between prior offenses, as ACCA's occasions clause does.[7]

In short, ACCA's "different occasions" requirement sets the statute decidedly apart from typical recidivist provisions. ACCA, in fact, was a deliberate and calculated departure from traditional practice. *See supra* at 21-25. That precludes any extension of *Almendarez-Torres* to cover the occasions clause.

3. Stretching *Almendarez-Torres* beyond the simple fact of a prior conviction would also create serious line-drawing problems. The Fourth Circuit has suggested that *Almendarez-Torres* requires courts to distinguish between the "facts of conduct underlying each prior conviction," which are subject to *Apprendi*, and "recidivism facts," which are not. *Brown*, 67 F.4th at 212-13 (emphasis omitted). But any such distinction is unsustainable.

This Court's *Apprendi* jurisprudence has repeatedly emphasized that a "bright-line rule," rather than a "manipulable standard," is necessary to protect the

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[7] We are aware of only three apparent exceptions through 1969. *See* 1929 Ohio Laws 40 (H.B. No. 8) (convictions "which result from or are connected with the same transaction, or result from offenses committed at the same time, shall be counted . . . as one conviction"); 1955 S.C. Acts 180 (No. 131, § 2) (treating "offenses which have been committed at times so closely connected in point of time that they may be considered as one offense" as a single offense, "notwithstanding under the law they constitute separate and distinct offenses."); 1939 Tenn. Pub. Acts 106 (ch. 22, § 1) ("each of such three convictions shall be for separate offenses, committed at different times, and on separate occasions").

constitutional rights at stake here. *Blakely v. Washington*, 542 U.S. 296, 308 (2004); *see also Cunningham v. California*, 549 U.S. 270, 272 (2007) ("*Apprendi's* bright-line rule was designed to exclude" any inquiry into which "facts essential to punishment are reserved for determination by the judge"). Left to their own devices, judges and legislatures will periodically be tempted to usurp the authority of the jury. *See Blakely*, 542 U.S. at 306, 308. *Apprendi*'s categorical rule—precluding any inquiry into which sentence-enhancing facts increase sentences "too much" to allow judges to find them—guards against such encroachments by "ensuring that the judge's authority to sentence derives *wholly* from the jury's verdict." *Id.* at 301, 306, 308 (emphasis added).

This same basic reasoning applies here. It is essential that judges, lawyers, and defendants know which *types* of sentence-enhancing facts pose questions for juries. Yet no intelligible analytic provides a clear dividing line between "facts of conduct" underlying prior convictions (reserved for juries) and "recidivism facts" (fair game for judges). *Brown*, 67 F.4th at 211-13. If ACCA's different-occasions inquiry falls into the latter category, what about a requirement that prior offenses were committed in different locations, had different victims, or caused increasing harm? What about a requirement that a previous offense was committed "in or on, or within one thousand feet of" a "school or . . . college"? *Cf.* 21 U.S.C. § 860(a).

Add to this morass the fact that *Mathis* directly holds that a jury must determine the fact of the locational aspect of a prior conviction—*e.g.*, whether it

was committed in a "structure" rather than a "vehicle"—if that location can "increase a maximum penalty." 579 U.S. at 507-09, 511. Is there some difference between that fact and the other potential factors just discussed? It is difficult, if not impossible, to discern any distinction among them.

Rather than upsetting clear precedent to create an *Apprendi* loophole for any facts supposedly bearing on "recidivism," this Court should leave *Almendarez-Torres* as it is: a narrowly confined exception limited to "the simple fact of a prior conviction." *Mathis*, 579 U.S. at 511.

4. If for no other reason, this Court should refuse to extend *Almendarez-Torres* because that decision's "prior conviction" exception lacks any firm legal footing. From "the founding" until "well into the twentieth century," courts required juries to find "*every* fact that is by law a basis for imposing or increasing punishment," including "the fact of a prior conviction." *Apprendi v. New Jersey*, 530 U.S. 466, 501-02, 518, 521 (2000) (Thomas, J., concurring) (emphasis added); *see also* Joel Prentiss Bishop, 1 Commentaries on the Criminal Law 332 (ch. 35, § 573) (4th ed. 1868); H.C. Underhill & Samuel Grant Gifford, Treatise on the Law of Criminal Evidence 1085-86 (ch. 48, §§ 778-79) (3d ed. 1923).[8]

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[8] For representative cases, see *People v. Youngs*, 1 Cai. R. 37, 38, 41 (N.Y. Sup. Ct. 1803) (State Attorney General praying that a "jury might be summoned *instanter* to try the fact" that the defendant had prior convictions); *Commonwealth v. Briggs*, 22 Mass. 429, 436-38 (1827) (holding "government must prove every essential allegation," including prior conviction, to the jury); *Brooks v. Commonwealth*, 41 Va. 845, 847 (Va. Gen. Ct. 1843)

In *Apprendi*, therefore, the Court called the prior-conviction exception "at best an exceptional departure" from the historic practice of requiring juries to determine the presence of facts necessary to impose greater punishment. 530 U.S. at 487. Shortly thereafter, the swing vote in *Almendarez-Torres* called the case "wrongly decided." *Shepard v. United States*, 544 U.S. 13, 27 (2005) (Thomas, J., concurring in part and concurring in the judgment). And in the years since, the Court has been willing to say no more than that "'the fact of a prior conviction' supplies an *unusual and 'arguable'* exception to the Sixth Amendment rule

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(jury empaneled to determine identity of alleged recidivist who used aliases); *Hines v. State*, 26 Ga. 614, 616 (1859) (question "whether the offence was a second one" was "beyond a doubt[] a matter for the jury"); *Long v. State*, 36 Tex. 6, 13 (1871) ("[T]he question of his having committed a first offense is to be presented to the jury."); *Johnson v. State*, 55 N.Y. 512, 514 (1874) ("The former conviction . . . must be proved on the trial and passed upon by the jury."); *State v. Lashus*, 11 A. 180, 181 (Me. 1887) ("[T]he identity of the defendant on trial with the person named in the record is a question of fact" for the jury); *State v. Riley*, 110 A. 550, 553 (Conn. 1920) (question whether defendant had "twice before been convicted, sentenced, and imprisoned" was for the jury); *Green Bay Fish Co. v. State*, 202 N.W. 667, 670 (Wis. 1925) ("It is suggested that the court could take judicial notice of the prior conviction. [T]he accused is entitled to a jury trial upon this question. This plain constitutional right is recognized by [state statute]."). The only fleeting deviation we have found from this practice proves the point. In the late nineteenth century, the Louisiana Supreme Court allowed judicial inquiries into previous convictions. *See State v. Hudson*, 32 La. Ann. 1052, 1053 (1880). But a few decades later, the court overruled that decision, finding that it was at odds with the common law right to a jury trial on the fact of prior conviction. *State v. Compagno*, 51 So. 681, 682 (La. 1910).

in criminal cases that 'any fact that increases the penalty for a crime' must be proved to a jury rather than a judge." *Pereida v. Wilkinson*, 141 S. Ct. 754, 765 (2021) (emphasis added) (quoting *Apprendi*, 530 U.S. at 490). In short, the exception recognized in *Almendarez-Torres* for prior convictions is not only "an aberration" but also "has been seriously undermined by subsequent precedents." *Dimaya*, 138 S. Ct. at 1253 (Thomas, J., dissenting).

Given these realities, it is one thing to tolerate *Almendarez-Torres* as a matter of *stare decisis*. It is entirely another to contemplate *extending* that shaky decision to new circumstances. In recent years, in fact, the Court has declined to extend numerous other decisions because they rested on "uncertain" constitutional footing to begin with. *See, e.g.*, *Samia v. United States*, 599 U.S. 635, 653 (2023) (refusing to extend *Bruton v. United States*, 391 U.S. 123 (1968), in part because the *Bruton* exception itself deviated from historical practice); *Egbert v. Boule*, 596 U.S. 482, 491-92 (2022) (refusing to extend *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), to any "meaningful[ly] different" context) (internal citation and quotation marks omitted)); *Cummings v. Premier Rehab Keller, P.L.L.C.*, 596 U.S. 212, 230-31 (2022) (Kavanaugh, J., concurring) (refusing to extend prior decisions allowing Court to imply statutory causes of action).

The Court should follow suit in this case. The Court has "repeatedly rejected efforts to dodge the demands of the Fifth and Sixth Amendments by the simple expedient of relabeling a criminal prosecution a

sentencing enhancement[.]" *United States v. Haymond*, 139 S. Ct. 2369, 2379 (2019); *see also, e.g.*, *Alleyne v. United States*, 570 U.S. 99, 120 (2013) (Sotomayor, J., concurring) (noting that, over time, *Apprendi*'s "rule has become even more firmly rooted in the Court's Sixth Amendment jurisprudence"); *Brown*, 67 F.4th at 215 (Heytens, J., concurring in the judgment) ("In the past 20 years, the Supreme Court has incanted [*Apprendi*'s] constitutional rule no fewer than nine times[.]"). And the basis of the request here to sidestep those constitutional demands is a previous decision that was arguably "incorrectly decided," *Apprendi*, 530 U.S. at 489, and that the Court has repeatedly emphasized must remain tightly constricted. The choice, therefore, is clear: The *Apprendi* rule should prevail over enlarging an exception to it that was ill-conceived from the start and has been cabined in case after case.

### B. Sentencing Courts Cannot Use "*Shepard* Documents" To Determine The Factual Basis Of A Prior Conviction.

Before *Wooden*, some courts of appeals authorized sentencing courts to use certain court records to determine whether a defendant's prior convictions were committed on different occasions. *See, e.g.*, *United States v. Longoria*, 874 F.3d 1278, 1281-83 (11th Cir. 2017); *United States v. Hennessee*, 932 F.3d 437, 442-43 (2019). The district court proceeded in that fashion here. Pet. App. 55a-57a. But attempting to sidestep *Apprendi* in that manner also fails. This Court has repeatedly made clear that so-called *Shepard* documents may be used for one reason and one reason only: to determine which of the alternative elements

within a "divisible" statute served as the basis for the prior conviction. *Descamps*, 570 U.S. at 262-63; *Mathis*, 579 U.S. at 505-06. That is not the situation here.

1. In *Taylor v. United States*, 495 U.S. 575 (1990), the Court first indicated that sentencing courts could look to court records like charging documents and jury instructions to determine whether a state conviction qualified as an ACCA predicate. *Id.* at 599-600, 602. This is because ACCA requires courts to take a "categorical approach" to determining whether a prior state conviction was for criminal conduct covered by ACCA. And a state conviction qualifies under this approach only if its *elements* line up with ACCA's definition of a covered illegality. Where a state statute "list[s] potential offense elements in the alternative," charging documents and the like enable courts applying ACCA to determine the elements of the state-law offense. *Descamps*, 570 U.S. at 260..

In *Shepard v. United States*, 544 U.S. 13 (2005), the Court held that *Taylor*'s logic applied to guilty pleas as well. It confirmed that sentencing courts may "examine a limited class of documents to determine which of a statute's alternative elements formed the basis of the defendant's prior conviction." *Descamps*, 570 U.S. at 262 (describing *Shepard*).

At the same time, *Shepard* indicated that the *Apprendi* rule continued to mark an important boundary: In contrast to discerning the elements underlying a prior conviction, "mak[ing] a disputed finding of fact about what the defendant and state judge must have understood as the *factual basis* for the prior plea"

would violate the Sixth Amendment. *Shepard*, 544 U.S. at 25 (plurality opinion) (emphasis added).

That admonition came home to roost in *Descamps* and *Mathis*. Stressing the "limited function" of the *Shepard* approach, *Descamps*, 570 U.S. at 260, the Court made crystal clear in those cases that courts may use such documents only to determine "what crime, with what elements, a defendant was convicted of," *Mathis*, 579 U.S. at 505-06. The court "is prohibited from conducting" an inquiry into "the manner in which the defendant committed" the previous offense or "making a disputed determination" about the "factual basis" of the previous crime. *Id.* at 511 (quoting *Shepard*, 544 U.S. at 25). In other words, *Shepard* documents are a "tool to identify the elements of the crime of conviction." *Id.* at 513. Nothing more. This tool "is not to be repurposed as a technique for discovering" the underlying facts or means of the conduct that is the subject of the previous conviction. *Id.* at 513-14.

The Court has identified good reasons that go even beyond the formal dictates of *Apprendi* for this strict limitation on the use of *Shepard* documents. To start, "[s]tatements of 'non-elemental fact' in the records of prior convictions are prone to error precisely because their proof is unnecessary." *Mathis*, 579 U.S. at 512 (quoting *Descamps*, 570 U.S. at 270). The defendant "may have no incentive to contest what does not matter under the law; to the contrary, he 'may have good reason not to'—or even be precluded from doing so by the court." *Id.* (quoting *Descamps*, 570 U.S. at 270). "Such inaccuracies should not come back to haunt the

defendant many years down the road by triggering a lengthy mandatory sentence." *Id.*

2. The holdings and reasoning of *Descamps* and *Mathis* apply with full force to ACCA's different-occasions inquiry. Nothing about petitioner's 1991 burglary charges required the jury to determine (or petitioner to say) whether they were committed on "occasions different from one another." Nor did Indiana law require the court that accepted petitioner's guilty pleas to find any subsidiary facts regarding the precise times the offenses were committed, their geographic proximity to one another, how similar they were in nature, or the relationship between them. *See United States v. Cina*, 699 F.2d 853, 859 (7th Cir. 1983); *Weaver v. State*, 583 N.E.2d 136, 141 (Ind. 1991) (variance between allegations in the information and the proof at trial regarding the location of offense was immaterial); *Black v. State*, 287 N.E.2d 354, 356 (Ind. Ct. App. 1972) (charging instrument does not have to state the exact time of a burglary offense, as "[t]ime is not of the essence"). Nor did the court actually find any such facts; the judgment of conviction does not say when the burglaries were committed or address any of these other matters. Appellant's CA7 Br. App'x 6 at 49.

In other words, this is not a scenario in which the state crimes of conviction had alternative elements, and it is therefore necessary to pin down what exactly petitioner was convicted of. Using *Shepard* documents to make a factual finding about the nature of his prior convictions would violate the *Apprendi* doctrine.

### C. There Is No Pragmatic Reason To Shy Away From Applying *Apprendi* Here.

The Fourth Circuit advanced one final justification for withholding *Apprendi*'s protections. In that court's view, applying *Apprendi*'s procedural safeguards to the occasions inquiry could be "far more likely to prejudice rather than protect defendants" because "any defendant who exercise[s] his right to a jury trial could face having certain portions of his criminal history dragged in front of the jury tasked with deciding whether he has committed the instant offense." *Brown*, 67 F.4th at 214-15 (internal citation and quotation marks omitted).

This concern for defendants is unfounded. For one thing, defendants can stipulate to satisfaction of the occasions factor. *See Blakely*, 542 U.S. at 310-11. They can also "waive the right to have a jury decide questions about [their] prior convictions." *Shepard*, 544 U.S. at 26 n.5.

Furthermore, a district court can bifurcate trial to avoid any prospect of prejudice—separating the jury's determination of whether the defendant committed the instant offense from whether his criminal record satisfies ACCA. "[T]he bifurcation of liability and remedy is common" in the federal courts. *Bhd. Ry. Carmen Div., Transp. Commc'ns Int'l Union, AFL-CIO v. Atchison, Topeka & Santa Fe Ry. Co.,* 956 F.2d 156, 160 (7th Cir. 1992); *see also* Fed. R. Civ. P. 42(b). The practice also has a long pedigree in the precise context of jury determinations regarding prior convictions. *See Apprendi*, 530 U.S. at 521 n.10 (Thomas, J., concurring); *Graham*, 224 U.S. at 625-26; David S. Si-

dikman, Note, *The Pleading and Proof of Prior Convictions in Habitual Criminal Prosecutions*, 33 N.Y.U. L. Rev. 210, 213-17 (1958); Harold Dubroff, Note, *Recidivist Procedures*, 40 N.Y.U. L. Rev. 332, 333-34 (1965). And it is already in use throughout the country with respect to ACCA's occasions clause itself. *See* Amicus Br. of NAFD.

At any rate, this Court's decision here "cannot turn on whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice." *Blakely*, 542 U.S. at 313. The Sixth Amendment enshrined "the common-law ideal of limited state power accomplished by strict division of authority between judge and jury." *Id.* Under that system, "every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment." *Id.* "That should be"—indeed, it must be—"the end of the matter," lest the protections in our Bill of Rights devolve into nothing more than a set of policy suggestions that judges can discard whenever they might prove inconvenient or burdensome. *Id.*

## CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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