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 OF COURT-APPOINTED *AMICUS CURIAE* IN SUPPORT OF THE JUDGMENT BELOW

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QUESTION PRESENTED

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

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INTEREST OF *AMICUS CURIAE*

This Court invited Nick Harper to brief and argue this case as *amicus curiae* in support of the judgment below.

INTRODUCTION

The Armed Career Criminal Act imposes enhanced penalties on particularly dangerous recidivists. Decades of unbroken precedent require sentencing judges to make the two determinations necessary to apply ACCA: (1) that the defendant has three prior qualifying convictions, and (2) that the prior offenses occurred on different "occasions." 18 U.S.C. § 924(e)(1). Yet in this case, Petitioner Paul Erlinger and the government ask this Court to construct a constitutional Berlin Wall within ACCA. According to them, the Constitution permits judges to find the facts needed to determine whether the defendant committed the predicate offenses triggering ACCA, but only juries may find the closely related facts needed to determine whether those offenses occurred on different "occasions." The Court should reject that novel approach.

Nothing in the Constitution requires it. Although the Fifth and Sixth Amendments generally require sentence-enhancing facts to be treated as offense elements and proved to a jury, this Court held in *Almendarez-Torres v. United States* that the Constitution gives legislatures flexibility to treat recidivism-related facts as sentencing factors instead. Recidivism, the Court said, "is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence"—a practice dating "back to colonial times." 523 U.S. 224, 243 (1998).

History reinforces that holding. As *Almendarez-Torres* recognized, there have long been diverse approaches for imposing recidivism-based penalties. Some States required recidivism to be pleaded in charging documents and proved to a jury. But others permitted or required raising recidivism issues for the first time at sentencing and assigned factfinding to judges—including on issues beyond the existence or elements of the prior conviction. The lack of any uniform historical practice dooms the constitutional rule that Erlinger and the government press.

Precedent leads to the same result. *Almendarez-Torres* consciously established a rule about recidivism, not the mere "fact of a prior conviction," as Erlinger and the government claim. They cannot even agree on what findings fall within the "fact of a prior conviction," let alone reconcile either of their definitions with what *Almendarez-Torres* actually held. They claim instead that *Apprendi* and this Court's categorical-approach cases have limited *Almendarez-Torres*. But *Apprendi* expressly declined to revisit that decision, and the categorical-approach cases avoided deciding *any* constitutional question. Here, the Court should reaffirm, consistent with history and precedent, that the Constitution permits legislatures to assign recidivism determinations to judges.

Even if the Constitution did bar *some* judicial recidivism determinations, however, it would not bar factfinding for purposes of the occasions clause. As this Court has explained, in determining whether a defendant has ACCA-qualifying offenses, judges may find the elements of those crimes and a host of subsidiary facts. Those facts—including when and where the offenses were committed and who committed them—*also* decide most occasions-clause cases, as this

Court acknowledged in *Wooden v. United States*, 595 U.S. 360, 369-70 (2022). They certainly decide that question in Erlinger's case: Each of his relevant burglaries undisputedly occurred multiple days apart. There is no basis in law or logic for allowing judges to make findings under the first half of ACCA while blinding them to those same facts in applying the second half.

Erlinger's and the government's rules would have seriously disruptive consequences as well. Treating the occasions clause as a "classic element of a greater offense," Petr. Br. 9, would require juries to hear devastating propensity evidence concerning the details of a defendant's prior violent felonies or serious drug crimes. Erlinger's and the government's unrealistic proposals to mitigate that problem only underscore how untested and unworkable their positions would be in practice. Their preferred solution—bifurcated jury trials—would turn ACCA upside down by forcing judges to make predicate-felony determinations before trial, while upending many established state sentencing schemes as well.

The Court should affirm the judgment below.

STATEMENT OF THE CASE

A. The Armed Career Criminal Act of 1984 imposes a sentencing enhancement on recidivists. It mandates longer sentences for felons convicted of possessing a firearm if they: (1) have three prior convictions for violent felonies or serious drug offenses (the predicate-felony clause) that (2) were "committed on occasions different from one another" (the occasions clause). 18 U.S.C. § 924(e)(1).

Congress added the occasions clause to ACCA in 1988. In the following decades, the government argued and the courts of appeals unanimously held that judges must make ACCA's occasions determination, along with the predicate-felony determination, at sentencing. Govt. Br. 23-24 nn.3-4 (collecting cases). Sentencing judges have done so in thousands of ACCA cases over the years.

This Court's ACCA jurisprudence has focused on the predicate-felony clause and its "categorical approach." *E.g.*, *Taylor v. United States*, 495 U.S. 575, 600 (1990). But two years ago, the Court addressed ACCA's occasions clause for the first time in *Wooden*, 595 U.S. 360. *Wooden* held that prior offenses are not committed on different occasions if they "aris[e] from a single criminal episode." *Id.* at 363. Although identifying an occasion can be "multi-factored," *Wooden* said, it is usually "straightforward and intuitive." *Id.* at 369. "In many cases, a single factor—especially of time or place—can decisively differentiate occasions." *Id.* at 369-70. "Courts, for instance, have nearly always treated offenses as occurring on separate occasions if a person committed them a day or more apart, or at a significant distance." *Id.* at 370 (quotation marks omitted).

After *Wooden*, the government abandoned its prior position and argued that the Sixth Amendment requires juries to make the occasions determination. *See* Govt. Br. 8-9. Thus far, however, the courts of appeals have uniformly rejected the government's new position. They have instead held that *Wooden* does not undermine their precedent requiring judges to make ACCA's occasions determination. *See, e.g.*, *United States v. Brown*, 67 F.4th 200, 208 (4th Cir. 2023); *see also* Govt. Br. 24 n.4 (collecting cases).

B. Petitioner Paul Erlinger committed nine felonies—seven burglaries and two drug offenses—in Illinois and Indiana between 1990 and 2003. Govt. Br. 4. In 2017, police learned that Erlinger had recently purchased a firearm and was storing additional weapons and ammunition at his home. Pet. App. 26a. A search of the home's garage revealed 20 guns and ammunition, leading the government to charge Erlinger with possessing a firearm as a felon under 18 U.S.C. §§ 922(g)(1) and 924(e). *Id.* at 10a-11a, 26a.

Erlinger pleaded guilty. As relevant here, the government sought to impose ACCA's 15-year mandatory minimum sentence based on Erlinger's four 1991 burglaries in Jasper, Indiana: (1) his April 4 burglary of Mazzio's Pizza at North Newton Street; (2) his April 8 burglary of the Great Outdoors at the Southgate Shopping Center; (3) his April 11 burglary of Druther's Restaurant at 122 Patoka Bridge Road; and (4) his April 11 burglary of Schnitzelbank at 393 Third Avenue. D.Ct. ECF 105-1 to 105-4. To prove the convictions, the government offered charging documents listing the dates and locations of the crimes, Erlinger's state-court plea agreement in which he expressly admitted that the facts alleged in the charging documents were "true and correct," and the combined judgment of conviction. D.Ct. ECF 105-1 to 105-5.

Erlinger did not dispute that the burglaries occurred at the times and places listed in those documents. Instead, he argued that the burglaries nonetheless took place on the same "occasion" under ACCA and that the Sixth Amendment required a jury to answer that question. Pet. App. 3a.

The district court rejected Erlinger's constitutional argument and imposed the ACCA enhancement. Based on the charging documents, it concluded

that Erlinger committed at least three of the four burglaries on different occasions. D.Ct. ECF 120, at 48-50. The court reasoned that "there is no possible way" convictions separated by multiple days "could be the same occasion." *Id.* at 48-49. It also noted that the offenses took place at different locations. *Id.* at 48.

Erlinger renewed his Sixth Amendment argument before the Seventh Circuit. The government joined his argument but requested affirmance on harmless-error grounds. Like the district court, the Seventh Circuit rejected Erlinger's argument and concluded that his burglaries occurred on different occasions because they "took place on three different dates and at three different businesses." Pet. App. 7a-8a. It found that the record materials underlying Erlinger's prior convictions described the offenses in "unequivocal" terms, and that Erlinger had "supplied no … evidence" to "cast doubt on" those documents. *Id.* at 9a.

SUMMARY OF ARGUMENT

The Constitution permits judges to determine whether a defendant's prior offenses occurred on different occasions when imposing an enhanced sentence under ACCA.

I.A. This Court held in *Almendarez-Torres* that the Constitution permits legislatures to treat a defendant's "recidivism" as a sentencing factor to be resolved by judges rather than an offense element to be proved to a jury. 523 U.S. at 243-44. The Court grounded its recidivism rule in longstanding precedent and traditional sentencing practices. Some subsequent decisions of this Court have questioned whether *Almendarez-Torres* was correctly decided.

But the Court has consistently declined to revisit *Almendarez-Torres*, and the decision has become entrenched in this Court's jurisprudence. Given that Erlinger does not seek to overrule *Almendarez-Torres*, the only question here is that decision's scope. And that decision, properly understood, permits judges to make recidivism determinations.

I.B. *Almendarez-Torres*'s recidivism rule has deep historical roots. From the early 19th century, several States assigned judges the task of making recidivism determinations that increased a defendant's statutory penalty. Other States allowed prosecutors to omit sentence-enhancing recidivism allegations from the indictment on the ground that they were not elements of the offense. Although other States presumptively treated recidivism as an offense element as a matter of common law, few held that the rule was inalterable by the legislature. As *Almendarez-Torres* recognized, the lack of a uniform practice on this issue belies any federal constitutional requirement that legislatures treat recidivism as an offense element to be proved to a jury.

History further demonstrates that the *Almendarez-Torres* principle extends to all recidivism-related issues—not only the existence and nature of a prior conviction but also the circumstances of the offense and the punishment imposed. Courts historically have made sequencing, identity, and other determinations regarding prior offenses. And the two traditional justifications for treating recidivism as a sentencing factor—that it relates to punishment, not guilt, and is highly prejudicial to the defendant—apply with equal force to all facts about a defendant's recidivism.

I.C. ACCA's occasions clause fits comfortably within that tradition, as all courts of appeals and many state courts applying similar statutes have recognized. It clearly calls for a recidivism determination. It implicates the two traditional justifications for treating recidivism as a sentencing factor. And the inquiry is analogous to historical sequencing determinations and double jeopardy issues that courts have long resolved.

I.D. Erlinger's and the government's attempts to limit *Almendarez-Torres* are meritless. They seek to recast it as a narrow decision about the bare "fact of a prior conviction." Yet they cannot even agree on a definition of that term. Erlinger says it means that judges are strictly limited to finding only the elements of the prior offense, whereas the government argues that it sweeps more broadly to cover non-elemental facts "encapsulated" in the record of conviction.

Neither definition accurately describes what *Almendarez-Torres* held. *Almendarez-Torres* and the Court's subsequent predicate-felony cases have approved numerous findings beyond the elements and record of conviction. For instance, judges must be able to find the date and venue of a prior offense—undisputedly non-elemental facts—in order to identify the elements that were in force when and where the offense occurred. *Almendarez-Torres* therefore must be taken at its word when it said (repeatedly) that it embodied a rule about "recidivism."

Neither *Apprendi* nor this Court's categorical-approach cases narrowed *Almendarez-Torres*. *Apprendi* expressly declined to do so, and the categorical-approach cases rest principally on the distinctive text of

the predicate-felony clause. Although those cases expressed constitutional concerns with judicial factfinding beyond the elements of a previous conviction, they never actually reached that constitutional question. In deciding the question here, the Court should reaffirm as a matter of precedent and history that judges may resolve all recidivism determinations.

I.E. Applying *Almendarez-Torres* to the occasions question here is straightforward, as the courts below recognized. Erlinger's predicate burglaries undisputedly occurred multiple days apart and at different locations. The timing of the burglaries alone differentiates the occasions.

II. Affirmance would be required even if *Almendarez-Torres* were confined to "the fact of a prior conviction." That concept must encompass (at least) the basic facts about a prior offense that the Court has permitted judges to find in making predicate-felony determinations—namely, the *who* (identity), *what* (prior crime), *when* (date of offense), and *where* (venue).

There is no sound reason to bar judges from relying on those very same facts in resolving whether offenses occurred on different occasions. As *Wooden* explained, most occasions determinations will turn on the dates or locations of prior offenses. It would be exceedingly arbitrary to permit judges to find those facts under the first half of ACCA but bar them from using those same facts to apply the second half.

III. Accepting Erlinger's or the government's rule would radically alter ACCA's design and overturn longstanding sentencing practices nationwide. Treating the occasions clause as an offense element would

allow prosecutors to parade the details of a defendant's prior felonies before the jury, inducing defendants to waive the very rights that Erlinger and the government seek to vindicate. Erlinger, the government, and their amici provide no good reason to think that stipulation or waiver, much less bifurcation—an exceedingly uncommon, burdensome, and discretionary procedure—will be realistic solutions.

Requiring juries to decide occasions questions also would warp ACCA, upend longstanding sentencing schemes in federal and state courts, and invalidate numerous state statutes. Courts around the country would be forced to implement major untested changes to their well-established sentencing practices in recidivism cases—practices often developed in reliance on *Almendarez-Torres*.

IV. At a minimum, the Seventh Circuit's judgment should be affirmed on harmless-error grounds, as the government argued below. The Court could provide important guidance on an issue that is certain to recur frequently if Erlinger prevails. And the Court could make clear that an alleged occasions error typically will be harmless, as any error was here.

ARGUMENT

I. THE CONSTITUTION PERMITS JUDGES TO MAKE RECIDIVISM DETERMINATIONS UNDER ACCA'S OCCASIONS CLAUSE

This Court held in *Almendarez-Torres* that the Constitution permits judges to enhance a defendant's sentence based on recidivism-related facts. That principle is firmly rooted in history, precedent, and the unique role of recidivism in sentencing. And it easily

encompasses ACCA's occasions determination, as the courts of appeals have uniformly held.

A. *Almendarez-Torres* Held That The Constitution Permits Judges To Make Recidivism Determinations

This Court upheld the constitutionality of recidivism-based sentencing enhancements in *Almendarez-Torres*. In approving judicial factfinding under 8 U.S.C. § 1326, the Court rejected the argument that the "Constitution requires Congress to treat recidivism as an element of the offense—irrespective of Congress' contrary intent." 523 U.S. at 239. The Court reasoned that "recidivism" "is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence." *Id.* at 243. And it recognized the "significant prejudice" that would result from requiring recidivism to be treated as an offense element. *Id.* at 235 (citing *Spencer v. Texas*, 385 U.S. 554, 560 (1967)).

Almendarez-Torres grounded its recidivism rule in part in *Graham v. West Virginia*, 224 U.S. 616, 624 (1912). As *Almendarez-Torres* explained, *Graham* concluded "that a State need *not* allege a defendant's prior conviction in the indictment or information that alleges the elements of an underlying crime, even though the conviction was 'necessary to bring the case within the statute.'" 523 U.S. at 243 (quoting *Graham*, 224 U.S. at 624). *Graham*'s conclusion followed from "the fact that recidivism 'does not relate to the commission of the offense, but goes to the punishment only, and therefore may be subsequently decided.'" *Id.* at 243-44 (emphasis and ellipsis omitted) (quoting *Graham*, 224 U.S. at 629).

Almendarez-Torres took *Graham*'s reasoning to its logical endpoint: "[T]o hold that the Constitution requires that recidivism be deemed an 'element' of [the] offense would mark an abrupt departure from a longstanding tradition of treating recidivism as going to the punishment only." 523 U.S. at 244 (quotation marks and brackets omitted). Even Justice Scalia's dissenting opinion acknowledged that "if the basis for *Graham*'s holding were accepted"—as it was by the *Almendarez-Torres* majority—then "one would have to conclude that recidivism need not be tried to the jury and found beyond a reasonable doubt." *Id.* at 258 (emphasis omitted).

Almendarez-Torres also grounded its rule in historical sentencing practices. The Court recognized that the "'method for determining prior convictions varies … between jurisdictions affording a jury trial on this issue … and those leaving that question to the court.'" 523 U.S. at 246 (quoting *Spencer*, 385 U.S. at 566). The lack of any "uniform" historical practice precluded converting recidivism into an offense element as a constitutional matter. *Id.* at 246-47.

Almendarez-Torres thus held unequivocally that the Constitution's jury-trial right does not extend to determinations regarding recidivism, and that legislatures have freedom to assign those determinations to judges.

Since *Almendarez-Torres*, the Court sometimes has questioned its correctness. *See, e.g.*, *Apprendi v. New Jersey*, 530 U.S. 466, 489 (2000). But the Court has never revisited *Almendarez-Torres*; instead, this Court has repeatedly applied it. *See id.* at 490; Govt. Br. 14. Erlinger and the government do not ask the Court to revisit *Almendarez-Torres* here, either. So

the only question in this case is the scope of *Almendarez-Torres* as it stands—which turns on what that decision held and the historical tradition it embodies.

B. *Almendarez-Torres*'s Recidivism Rule Has Deep Historical Roots

Almendarez-Torres's recidivism rule has deeply rooted historical and conceptual underpinnings. "Statutes that punish recidivists more severely than first offenders have a long tradition in this country that dates back to colonial times." *Parke v. Raley*, 506 U.S. 20, 26 (1992). "With recidivism the major problem that it is," there has always been "a spectrum of … procedures" for identifying and punishing recidivists. *Spencer*, 385 U.S. at 566, 568. One procedure that legislatures historically adopted was "leaving that question to the court." *Id.* at 566.

1. Going back to the early 19th century, States have permitted judges to make recidivism findings that increased a defendant's statutory penalty. An early decision from South Carolina, for example, held that "the Court, not the jury," must determine whether the defendant had a prior conviction. *State v. Smith*, 42 S.C.L. 460, 460-61 (1832); *see also State v. Allen*, 42 S.C.L. 448, 449 (1832) (citing *Smith*); *State v. Parris*, 71 S.E. 808, 809 (S.C. 1911) (applying *Smith* and *Allen*).

As Erlinger acknowledges (at 35 n.8), Louisiana also recognized that "previous convictions … were not essential ingredients constituting the offense charged, upon which the jury had to pass." *State v. Hudson*, 32 La. Ann. 1052, 1053 (1880). Instead, judges "ha[d] the right, after verdict," to "act upon the existence of such facts." *Id.* And although Louisiana departed from this

practice in 1910, the State returned to it less than twenty years later. *See State v. Compagno*, 51 So. 681, 682 (La. 1910) (overruling *Hudson*); *State v. Guidry*, 124 So. 832, 835 (La. 1929) ("There is no provision in the Constitution that we have been able to find which authorizes or requires questions of fact not pertaining to the guilt or innocence of a defendant to be submitted to a jury.").

At least two more States had the same practice from an early period. In Alabama, which has imposed recidivist penalties by statute since the early 1800s, the "settled" practice was that "when the indictment or complaint does not contain the statutory allegation as to a second or subsequent conviction, no issue is made for the jury." *Yates v. State*, 17 So. 2d 777, 779 (Ala. 1944).[1] It was instead left to "the trial judge" "to make inquiry into that question in a supplementary manner in order to apply the increased" penalty. *Id.*; *accord, e.g.*, *Willingham v. State*, 64 So. 544, 544 (Ala. Ct. App. 1914). And it "has never been the rule in Kansas that a defendant in a criminal action must be apprised by the State prior to conviction that the State intends to invoke the habitual criminal act." *Chance v. State*, 408 P.2d 677, 681 (Kan. 1965) *accord State v. Woodman*, 272 P. 132, 134-35 (Kan. 1928) (recidivism enhancement "is no concern of the jury"); *see also* 1868 Kan. Sess. Laws 380-81 (ch. 31, § 289) (increasing punishment for "subsequent offense[s]").

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[1] *See, e.g.*, Harry Toulmin, *Digest of the Laws of the State of Alabama* 209 (1823) (tit. 17, ch. 1, § 22) (increasing punishment for "every succeeding offence" of animal stealing); Ala. Penal Code § 73 (1866) ("second, or any subsequent offense" of Sabbath breaking).

Starting in the early 19th century, other States enacted supplemental-information statutes that necessarily rejected treating recidivism as an offense element. Those statutes allowed enhanced recidivist penalties to be charged by a supplemental, post-conviction information, rather than a pre-conviction indictment. *See, e.g.*, 1818 Mass. Acts 603-04 (ch. 176, § 6); 1 Rev. Code of the Laws of Va. 619-20 (ch. 171, § 16) (1819); 1824 Me. Laws 1009 (ch. 282, § 19); W. Va. Code 733-34 (ch. 165, §§ 2-9) (1868).

Because the States that adopted these statutes required serious offenses to be charged by an indictment that included all offense elements, the use of an information to charge the recidivist penalty necessarily meant that recidivism was not understood to be an offense element. *See, e.g.*, *Jones v. Robbins*, 74 Mass. 329, 350 (1857) (constitutional right to "indictment by the grand jury" for felonies); *Commonwealth v. Barrett*, 108 Mass. 302, 304 (1871) (indictment "sufficient" if it "alleges … all the facts which constitute the offence intended to be punished"). And although these statutes authorized jury trials in the supplemental proceeding, some limited the trial to establishing the defendant's identity, leaving the sentencing court to find all other relevant facts. *See, e.g.*, 1 Rev. Code of the Laws of Va. 620 (ch. 171, § 16) (1819) ("jury … shall be impannelled … to enquire and say, whether such convict be or be not the same identical person"); *State v. Graham*, 69 S.E. 1010, 1011 (W. Va. 1910) ("for identification only").

Courts uniformly rejected challenges to the supplemental-information statutes. *See, e.g.*, *In re Ross*, 19 Mass. 165, 169, 171 (1824); *Graham*, 69 S.E. at 1011. One of the first courts to do so held that "[t]here was no need of a presentment by a grand jury"

of the recidivism allegations, "for no offence was to be inquired into." *Ross*, 19 Mass. at 171. Irrespective of whatever may have been required "at common law," the court explained, the "legislature had … a right to prescribe a different mode." *Id.*; *cf. Brooks v. Commonwealth*, 41 Va. 845, 849-50 (1843) (recidivism is "collateral" to issue of "guil[t]").

This Court settled the constitutionality of the supplemental-information procedure in *Graham*, adopting the reasoning of earlier cases. 224 U.S. at 625-31. After *Graham*, several additional States adopted the procedure, despite simultaneously requiring all elements of serious offenses to be included in an indictment. *See, e.g.*, 1926 N.Y. Laws 805-06 (ch. 457, § 3); *People v. Erickson*, 99 N.E. 2d 240, 242 (N.Y. 1951) (constitutional right to grand jury indictment for "infamous" crimes); *People v. Farson*, 155 N.E. 724, 725 (N.Y. 1927) ("indictment … sufficient … if it contains all that is essential to constitute the crime").[2]

To be sure, some States presumptively treated prior convictions as offense elements that needed to be included in an indictment and proved to a jury. *See* Petr. Br. 34-35 & n.8 (collecting cases and treatises); *Apprendi*, 530 U.S. at 507-09 (Thomas, J., concurring). But that presumption typically rested on what courts viewed as a common-law principle, not on the federal or state constitutions. *E.g.*, *Hines v. State*, 26 Ga. 614, 616 (1859); *Johnson v. People*, 55 N.Y. 512, 514 (1874). As a result, and as evidenced by the widely adopted supplemental-information procedure,

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[2] *See also, e.g.*, 1927 Or. Laws 432-33 (ch. 334, § 4); 1929 Colo. Sess. Laws 310-11 (ch. 85, § 4); 1929 Pa. Laws 854-55 (No. 373, § 4).

courts often acknowledged that "the matter was subject to legislative control." *People v. Gowasky*, 155 N.E. 737, 741 (N.Y. 1927); *see also Massey v. United States*, 281 F. 293, 297 (8th Cir. 1922) ("unless the statute designates a different mode").

The few cases resting on constitutional grounds at most prove that there were varying views on the issue—indeed, views that sometimes differed *within* States. *See supra* 14 (Louisiana); *compare Tuttle v. Commonwealth*, 68 Mass. 505, 506 (1854) (suggesting constitutional basis for application of common-law practice), *with Ross*, 19 Mass. at 171 (holding that the practice was subject to legislative control). *Almendarez-Torres* acknowledged this "different 'tradition,'" but the Court concluded that "any such tradition" was "not uniform" and thus could not support a constitutional rule. 523 U.S. at 246-47; *cf. Atwater v. City of Lago Vista*, 532 U.S. 318, 345-46 (2001) (declining to "mint a new rule of constitutional law" based on a "historical practice [that] fails to speak conclusively").

Those varied approaches led a leading treatise to disclaim any requirement that recidivism allegations appear in the indictment or be proved to the jury. To the contrary, "there [was] no reason why the law should not … permit this matter to be withheld from the jury, or even omitted from the indictment, until the prisoner has been convicted of the offence itself, and then brought forward in some proper manner in aggravation of the punishment." 1 Joel Prentiss Bishop, *New Commentaries on the Criminal Law*, § 961.1 (8th ed. 1892) (citing, *e.g.*, *Hudson*, *supra*).

Thus, the historical principle that *Almendarez-Torres* correctly recognized is that nothing in the Constitution *requires* legislatures to "trea[t]" recidivism "as an element of [the] offense." 523 U.S. at 247.

2. The historical practice underlying *Almendarez-Torres* encompassed a wide range of recidivism-related issues beyond the mere existence or elements of a prior conviction.

The *Smith* decision discussed above, for example, involved a South Carolina statute that imposed a recidivist penalty for anyone who committed a "*second* offence" of horse stealing. 6 David J. McCord, *Statutes at Large of South Carolina* 413 (No. 2507, § 1) (1839) (emphasis added); *see Smith*, 42 S.C.L. at 460. That necessarily required the judge to determine the sequencing of the offenses (or at least the convictions), and whether the defendant was the same person who had committed both offenses.

The Louisiana statute under which the *Hudson* court approved judicial factfinding likewise increased punishment for a "second," "third," or "fourth" "offence." U.B. Phillips, *Revised Statutes of Louisiana* 155 (Crimes and Offences § 119) (1856). The defendant also had "an opportunity to show" that his prior convictions and sentences had been "arrested or reversed and annulled, or that he was pardoned"—all determinations that necessarily would have required the judge to look beyond the elements of the prior offense. *Hudson*, 32 La. Ann. at 1053; *see also* 1870 La. Acts 206 (No. 90, § 4) (enhanced penalty for "second offense"). Another Louisiana statute authorized a recidivist enhancement if "the Judge finds that [the defendant] is the same person" previously convicted. 1928 La. Acts 18-19 (No. 15, § 3); *see Guidry*, 124 So. at 834-36 (upholding the statute).

Early statutes in Alabama and Kansas—other States that authorized judges to make recidivism determinations—similarly required sequencing, identity, and other findings beyond the elements of the prior offense. *See supra* 14 & n.1, 15. An Alabama statute, for example, imposed enhanced penalties on a person "convicted twice under this act for offenses committed within one year." *Borck v. State*, 39 So. 580, 580 (Ala. 1905) (quoting 1903 Ala. Laws 64 (No. 49, § 1)); *see also* Toulmin, *Digest of the Laws of the State of Alabama* 377 (1823) (tit. 1801, ch. 1, § 1) ("guilty of the like offence from and after the space of twenty days" from release from jail).

The recidivism statutes that Erlinger compiles in appendices (which include only some of the statutes cited above) further prove the point. *See* Petr. Br. Appx. 1a-15a. Many of those statutes likewise required judges to make recidivism findings beyond the existence or elements of a prior conviction at sentencing or in supplemental proceedings:

- Several statutes required determining whether the present offense was committed at some point "after" or "subsequent" to one or more previous convictions, thereby requiring sequencing findings. 1840 Ala. Laws 153 (Penal Code, ch. 8, §§ 17-18).[3]
- Others required finding "that the defendant was not pardoned," 1965 N.Y. Laws 2367-68 (ch. 1030, § 70.10), or that the present offense

[3] *See also, e.g.*, 1859 Kan. Sess. Laws 283-84 (ch. 28, §§ 278-279); 1926 N.Y. Laws 805 (ch. 457, §§ 1-2); 1927 Or. Laws 432 (ch. 334, §§ 1-3); 1928 La. Acts 18 (No. 15, §§ 1-2); 1942 La. Acts 142-43 (No. 45, § 1).

occurred after a defendant had "escaped or been pardoned, or otherwise discharged from confinement," 1 Rev. Code of the Laws of Va. 619 (ch. 171, §§ 13-15) (1819).[4]

- Still others mandated a finding that the present offense had occurred "within" a certain amount of time after the prior offense. 1929 Pa. Laws 854 (No. 373, §§ 1-2).[5]

These statutes confirm what *Almendarez-Torres* held: Legislatures have always enjoyed latitude to assign to judges factual inquiries about recidivism—not only the existence and nature of a prior conviction but also the circumstances of the offense and the punishment imposed. *See* 523 U.S. at 243-44.

Sentencing practices over the preceding century have further solidified this tradition. As Erlinger acknowledges, many legislatures in the mid-20th century sought to eliminate harsh sentencing enhancements based solely on the existence of prior convictions in favor of authorizing judges to make more nuanced recidivism findings. Petr. Br. 21-24. The federal courts of appeals have unanimously allowed judges to apply the "recidivist enhancement[s]" like ACCA that resulted from those efforts. *United States v. Winfrey*, 23 F.4th 1085, 1087 (8th Cir. 2022); Govt. Br. 23-24 nn.3-4. State courts, too, have coalesced around the "general rule" "that there is no right to a jury trial on matters related to the broader issue of recidivism." *State v. Stewart*, 791 A.2d 143, 151-52

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[4] *See also, e.g.*, 1840 Ala. Laws 153 (Penal Code, ch. 8, § 17); 1868 Kan. Sess. Laws 380-81 (ch. 31, § 289).

[5] *See also, e.g.*, 1939 Pa. Laws 1029 (No. 375, § 1108); 1942 La. Acts 143 (No. 45, § 2); 1947 Or. Laws 1101-02 (ch. 585, §§ 1-3).

(Md. 2002); *see also, e.g.*, *State v. Jones*, 149 P.3d 636, 641 (Wash. 2006) (collecting cases).

3. The two conceptual justifications that courts traditionally have offered for declining to treat recidivism-related determinations as offense elements further support *Almendarez-Torres*'s reasoning and result.

First, this Court and others have explained that legislatures are not required to make recidivism an offense element because it does not relate to "whether an offence has been committed" but instead goes only to punishment. *Ross*, 19 Mass. at 171.

This Court in *Graham* adopted that very reasoning in upholding West Virginia's supplemental-information statute. 224 U.S. at 623-29. The statute's validity, the Court explained, "necessarily follows … from the fact, so frequently stated, that" recidivism "does not relate to the commission of the offense, but goes to the punishment only." *Id.* at 629. And *Almendarez-Torres* held that *Graham*'s "punishment only" rationale meant that nothing in the Constitution requires legislatures to assign recidivism determinations to juries. 523 U.S. at 244.

Graham's rationale, adopted by *Almendarez-Torres*, applies equally to all recidivism-related issues. Facts about a defendant's recidivism speak to his past conduct and thus inform only the severity with which his present offense should be punished. That is why recidivism is a quintessential sentencing factor and need not be proved to a jury.

Second, the significant risk of prejudice to the defendant was "long" understood as a principal reason for not treating recidivism as an offense element. *Almendarez-Torres*, 523 U.S. at 235. Commentators

deemed it "specially fair to the prisoner" to withhold prior convictions from the jury, as it "prevent[ed] a prejudice against him by the jury from the former conviction." 1 Bishop, *supra*, § 961.1. Courts agreed, reasoning that "jurors' minds should not be diverted … by facts concerning [the] defendant's prior convictions." *Woodman*, 272 P. at 134-35; *see also, e.g.*, *Hudson*, 32 La. Ann. at 1053 (prior conviction "might prejudice the jury"); *Willingham*, 64 So. at 544 ("doubt[less] … highly prejudicial"). And that concern applies with even greater force when the jury is told not only that the defendant previously was convicted, but also facts *about* the defendant's prior crimes.

Indeed, avoiding prejudice to defendants is why modern legislatures increasingly have required judges to resolve recidivism issues at sentencing. As the American Bar Association explained in its first set of standards for legislative sentencing practices, "[i]nvolvement of the jury" in imposing recidivist penalties "would pose two unattractive alternatives": either the "significant … possibility of prejudice" at trial, or a "too cumbersome" "supplementary proceeding." Am. Bar Ass'n, Project on Minimum Standards for Criminal Justice, Standards Relating to Sentencing Alternatives and Procedures 261-62 (Suppl. Sept. 1968).

The unavoidable prejudice from putting a defendant's prior crimes before a jury is not just a compelling practical reason for assigning recidivism determinations to judges, *see infra* Part III.A, but also a powerful historical justification for that practice. The "general and absolute rule of exclusion" of propensity evidence—particularly prior offenses and convictions—is deeply rooted in Anglo-American law. 1 John Henry Wigmore, *Treatise on the System of Evidence in Trials*

at Common Law: Including the Statutes and Judicial Decisions of All Jurisdictions of the United States §§ 193-194, at 231-35 (1904) (collecting sources). It has long been understood that the jury has a "natural and inevitable tendency … to give excessive weight to [a defendant's] vicious record of crime." *Id.* § 194, at 233. "Courts that follow the common-law tradition" therefore "almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt." *Michelson v. United States*, 335 U.S. 469, 475 (1948).

Interpreting the Constitution to *require* legislatures to assign recidivism determinations to juries would, in effect, invert that longstanding presumption. The better view, and the one this Court has endorsed, is that legislatures can adopt "a spectrum of … procedures" to combat the "major problem" of "recidivism." *Spencer*, 385 U.S. at 566-68. That includes "leaving that question to the court." *Id.* at 566.

C. ACCA's Occasions Clause Fits Well Within The Tradition Embodied By *Almendarez-Torres*

The courts of appeals' unanimous conclusion that judges may resolve ACCA's occasions determination is rooted in *Almendarez-Torres* itself and historical practice.

1. ACCA's occasions clause indisputably mandates a quintessential recidivism determination. It exclusively involves comparing prior offenses to determine whether the defendant is a serial offender. Indeed, the purpose of the clause, as Erlinger concedes, is to ensure that ACCA "applies only to truly habitual offenders." Petr. Br. 23.

The courts of appeals thus have held that "[w]hether prior offenses were committed on different occasions" under ACCA "is among the recidivism-related facts covered by the rule of *Almendarez-Torres*." *United States v. Harris*, 794 F.3d 885, 887 (8th Cir. 2015); *see also* Govt. Br. 23-24 nn.3-4 (collecting cases). And in so holding, they have invoked the two aforementioned justifications for the rule: that recidivism "'goes to the punishment only,'" *e.g.*, *Brown*, 67 F.4th at 214 (emphasis omitted), and that "'the introduction of evidence of a defendant's prior crimes risks significant prejudice,'" *e.g.*, *United States v. Santiago*, 268 F.3d 151, 156 (2d Cir. 2001) (Sotomayor, J.).

ACCA's occasions determination implicates both justifications. That a defendant previously committed multiple separate crimes is a distinct issue from whether he possessed a firearm as a convicted felon. It "goes to the punishment only." *Graham*, 224 U.S. at 629. And requiring the occasions inquiry to be put to juries would cause "overwhelming prejudice," NAFD Br. 29-30, creating conflict with the common-law tradition disfavoring propensity evidence.

2. History and judicial practice likewise support treating the occasions inquiry as a recidivism-related issue that judges can resolve. As discussed, States going back to at least the early 1800s have deemed recidivism-related facts beyond the mere existence or elements of a prior conviction to be sentencing factors rather than offense elements. *See supra* Part I.B.2.

Erlinger argues that "virtually none" of the statutes he compiles required the particular kind of separateness inquiry that ACCA mandates. Petr. Br. 32

& n.7. But his own statutory compilation includes five such laws.[6] And amicus has identified many others.[7]

More fundamentally, however, Erlinger has no explanation for why an exact historical match to ACCA's specific occasions inquiry is required. "[A]nalogical reasoning requires only … identify[ing] a well-established and representative historical *analogue*, not a historical *twin*." *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 30 (2022). The salient point is that the occasions clause calls for a recidivism-related determination that goes beyond identifying the existence or elements of the offense. The many historical examples discussed above are directly analogous in that relevant sense, even if they required the determination of different recidivism-related facts.

Double jeopardy cases provide further support for judicial resolution of the occasions inquiry. As the government acknowledges here, and has argued before in defending ACCA's occasions clause, federal judges have long "determine[d] whether a defendant was previously convicted of the 'same offence' under the Double Jeopardy Clause." Govt. Br. 14-15; *see* Govt. Br. in Opp. at 7, *Walker v. United States*, No. 20-

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[6] *See* Petr. Br. 32 n.7 (identifying three such statutes); *see also* 1976 Miss. Laws 772-73 (ch. 470, §§ 1-2) ("arising out of separate incidents"); 1972 Haw. Sess. Laws 80 (Act 9, § 1, tit. 37, ch. 6, pt. 4, §§ 661-662) ("two felonies committed at different times").

[7] *See, e.g.*, Ill. Pub. Act 80-1099, at 3269 (1977) ("convictions which result from or are connected with the same transaction, or result from offenses committed at the same time" count as "one conviction"); 1978 N.J. Laws 645 ("two crimes, committed at different times"); 1982 Pa. Laws 516 ("[c]onvictions for other offenses arising from the same criminal episode as the instant offense shall not be considered previous convictions"); *see also infra* 49 & n.8.

5578 (U.S. Oct. 28, 2020). In so doing, courts often conduct an analysis closely resembling ACCA's occasions inquiry: a "multifactor standard" that considers the "time" and "location" of the offenses, among other things. *United States v. Cooper*, 886 F.3d 146, 153 & n.4 (D.C. Cir. 2018) (collecting cases); *see also, e.g.*, *Martha v. State*, 26 Ala. 72, 75 (1855) ("it was the duty of the court to declare the legal effect of the record insisted upon by the prisoner as sustaining her [double jeopardy] pleas"). It would be "anomalous," as the government has put it, for the Constitution to *require* judges to conduct the same-offense inquiry for double jeopardy purposes, but to *preclude* judges from conducting substantially the same inquiry for sentencing purposes. Govt. Br. in Opp. at 7, *Walker*, No. 20-5578.

That practice disposes of Erlinger's puzzling claim that treating recidivism as a sentencing factor would be "in serious tension with this Court's double-jeopardy jurisprudence." Petr. Br. 29. In fact, this Court has said exactly the opposite: that requiring recidivism to be treated as an *offense element* would be "difficult to reconcile" with its double jeopardy precedents. *Almendarez-Torres*, 523 U.S. at 247. It is Erlinger's proposed rule that creates tension with double jeopardy principles and practice.

* * *

In sum, historical evidence bears out what *Almendarez-Torres* held: Legislatures have long had discretion to treat recidivism as a sentencing factor

rather than an offense element. ACCA's occasions clause is well within that tradition.

D. Erlinger's And The Government's Attempts To Narrow *Almendarez-Torres* Lack Merit

Rather than grapple with the historical evidence undermining their view of the Constitution, Erlinger and the government principally attempt to narrow *Almendarez-Torres* as a matter of precedent. According to them, subsequent decisions of this Court have clarified that *Almendarez-Torres*'s repeated references to "recidivism" were merely "shorthand" for a far more limited judicial inquiry into the "fact of a prior conviction." Govt. Br. 15 (emphasis omitted); Petr. Br. 13. That limitation, they say, is compelled by constitutional concerns expressed in *Apprendi* and this Court's categorical-approach cases.

Yet Erlinger and the government cannot even agree on what the "fact of a prior conviction" means. Erlinger says it does not extend "one jot" beyond the facts "constituting elements of the previous offense." Petr. Br. 16 (brackets and quotation marks omitted). The government interprets it more broadly to encompass "facts encapsulated in judicial records that are components" of the prior conviction. Govt. Br. 14. Both definitions are irreconcilable with *Almendarez-Torres* and the Court's categorical-approach jurisprudence. And neither is compelled by the constitutional concerns posited—but never decided—in *Apprendi* and later cases.

1. The view that *Almendarez-Torres* established a minute constitutional island allowing judges to find only "the fact of a prior conviction"—whether on Er-

linger's or the government's definition—is inconsistent with the findings the Court approved in that case and later cases.

At a minimum, *Almendarez-Torres* approved judicial recidivism determinations under the statute at issue there, 8 U.S.C. § 1326(b)(2). That statute authorizes sentencing enhancements upon the reentry of a deported alien when the deportation "*was subsequent to* a conviction" for an aggravated felony. *Id.* (emphasis added). The statute thus calls for a determination not merely about whether the defendant had a prior conviction, but also whether the deportation occurred *after* that conviction. The additional finding about the "sequence" in which the conviction and deportation occurred is "essential" to imposing the enhancement. *Brown*, 67 F.4th at 213.

Erlinger and the government try to explain away that reality by arguing that the sequencing finding under Section 1326 inheres in the fact of a prior conviction. Petr. Br. 30; Govt. Br. 15. But that contradicts both of their competing definitions of the concept. The determination requires finding not just the date of a prior conviction—a non-elemental fact in its own right—but also its relationship to the date of *deportation*. That sequencing determination goes beyond the elements of the offense (Erlinger's definition), and would not necessarily be "encapsulated in judicial records" as a "component" of the prior conviction (the government's, Govt. Br. 14).

In addition, the government (but not Erlinger) concedes that *Almendarez-Torres* and the Court's ACCA cases necessarily permit sentencing judges to find that the defendant being sentenced is the same person previously convicted. Govt. Br. 15. The gov-

ernment is correct that the identity finding is essential to every predicate-felony determination. *Id.* But it is wrong that identity is a "component" of a prior conviction that is "encapsulated in judicial records." *Id.* at 14. Determining identity requires finding that the person *in the courtroom* "is the same defendant" mentioned in the prior judicial record—"a fact that could be quite controversial indeed." *Santiago*, 268 F.3d at 156 (emphasis omitted). That inquiry necessarily goes beyond the record of conviction (and certainly the elements of the prior offense).

Almendarez-Torres and the Court's ACCA cases also necessarily allow sentencing judges to find the date and venue of a prior offense. That is because statutes change over time and elements vary across jurisdictions. *See, e.g.*, *McNeill v. United States*, 563 U.S. 816, 820, 824 (2011); *United States v. Love*, 7 F.4th 674, 678 (7th Cir. 2021) ("We consider the version of the State's criminal statute in effect at the time of the offense."); *Bousley v. United States*, 523 U.S. 614, 633 (1998) (Scalia, J., dissenting) (noting circuit splits "regarding the elements of a crime").

In *McNeill*, for example, the Court had to find the date of a prior drug offense in order to determine whether a change in North Carolina law made the offense ACCA-ineligible. 563 U.S. at 824. Failing to do so would have risked enhancing a defendant's sentence based on a law enacted after the offense occurred—a serious *ex post facto* problem. *See, e.g.*, *Peugh v. United States*, 569 U.S. 530, 545 (2013).

Erlinger's elements-only definition of "the fact of a prior conviction" cannot explain these findings either. Indeed, Erlinger concedes that the location and date of an offense generally are not elements. Petr.

Br. 40. The government's position is less clear. Despite acknowledging that judges can find venue and date, it seems to suggest that judges can find only the date of conviction, not the date of the offense. *See* Govt. Br. 14-15. Yet earlier this Term, the government argued that ACCA *requires* courts to conduct an "inquiry into the law at the time of the prior state crime," in part because a contrary reading "could implicate the Ex Post Facto Clause." Govt. Br. at 38 n.6, 44, *Brown v. United States*, Nos. 22-6389, 22-6640 (U.S. Aug. 21, 2023) (citing *McNeill*); *see also id.* at 25 (courts must look to the "time of … commission"). The government has not explained how it reconciles those two positions.

What *is* clear is that neither Erlinger's nor the government's view of the "fact of a prior conviction" accounts for all of the facts that this Court's cases permit judges to find. The only view that does is the one the Court adopted in *Almendarez-Torres* itself: that judges can make *all* recidivism determinations at sentencing.

2. That the unit of analysis in *Almendarez-Torres* was recidivism—not the bare fact of a prior conviction—also follows from what the Court said in that case and subsequent cases.

At the outset of its opinion in *Almendarez-Torres*, the Court noted that the "subject matter" of the case was "recidivism." 523 U.S. at 230. From there, the Court repeatedly framed its constitutional analysis in terms of recidivism. It styled the question presented as whether "the Constitution requires Congress to treat recidivism as an element of the offense." *Id.* at 239. And it answered that question by "reject[ing] petitioner's constitutional claim that his recidivism must be treated as an element of his offense." *Id.*

at 247. All told, the Court used the words "recidivism" or "recidivist" 28 times. Nowhere did the Court cabin the judicial inquiry to "the fact of a prior conviction," let alone to merely the elements of the prior crime.

The Court's focus on recidivism was not lost on the dissenting opinion either, which used the words "recidivism" or "recidivist" 29 times. Writing for himself and three other Justices, Justice Scalia criticized the majority "for making *recidivism* an exception" to what he understood as an otherwise-applicable requirement that a jury find all facts necessary to increase a statutory penalty. *Almendarez-Torres*, 523 U.S. at 258 (emphasis altered). The majority's rule, as he recognized, would allow "recidivism finding[s] … to be determined by a judge." *Id.* at 260.

Subsequent decisions of this Court have reiterated that *Almendarez-Torres* concerns findings about recidivism. For example, in *Jones v. United States*, decided just one Term after *Almendarez-Torres*, the Court described that case's "precise holding being that recidivism" need not be charged in an indictment or submitted to a jury. 526 U.S. 227, 248 (1999). That holding "rested in substantial part on the tradition of regarding recidivism as a sentencing factor" and on the "distinctive significance of recidivism." *Id.* at 249. Other cases have interpreted *Almendarez-Torres* the same way. *See, e.g.*, *Dretke v. Haley*, 541 U.S. 386, 395 (2004) ("We have not extended *Winship*'s protections to proof of prior convictions used to support recidivist enhancements.") (citing *Almendarez-Torres*).

Decisions of this Court glossing *Almendarez-Torres* as concerning "the fact of a prior conviction" are not to the contrary. *See* Govt. Br. 14 (collecting cases). That phrase derives from *Apprendi*, 530 U.S. at 490,

in which the Court repeatedly recognized that *Almendarez-Torres*'s holding was about "recidivism," *id.* at 474, 488, 496. The Court explained, for example, that although the dissenting Justices in *Almendarez-Torres* disputed "'the legitimacy of the Court's decision to restrict its holding to recidivism, … both sides agreed that the Court had done just that.'" *Id.* at 488 (quoting *Jones*, 526 U.S. at 249 n.10).

Apprendi, of course, rejected the argument that *Almendarez-Torres* stands for something *broader* than a recidivism rule, and it deemed the scope of that holding "narrow" compared to *Apprendi*'s more sweeping rule. 530 U.S. at 490. But *Apprendi* did not narrow *Almendarez-Torres* itself. Indeed, the Court expressly declined to "revisit" *Almendarez-Torres* because the defendant did "not contest the decision's validity." *Id.*

Erlinger and the government therefore get things backwards when they treat *Almendarez-Torres*'s references to "recidivism" as "shorthand" for the "fact of a prior conviction." Govt. Br. 15. This Court's cases describing *Almendarez-Torres* as concerning "the fact of a prior conviction" must be understood as having used *that* phrase to describe what *Almendarez-Torres* actually held—that judicial factfinding about recidivism comports with the Constitution.

3. Unable to refute what *Almendarez-Torres* held, Erlinger and the government stake their case on the proposition that this Court has subsequently narrowed *Almendarez-Torres*. They argue that *Apprendi* retroactively reconceptualized *Almendarez-Torres* as authorizing judges to ascertain only those recidivism facts that were previously found "'pursuant to proceedings with substantial safeguards of their own.'" Petr. Br. 16 (quoting *Apprendi*, 530 U.S. at 488). And

they further argue, citing this Court's categorical-approach cases, that "the only facts the court can be sure the jury … found are those constituting elements of the offense." *Descamps v. United States*, 570 U.S. 254, 269-70 (2013); Petr. Br. 16; Govt. Br. 18. Their effort to transform *Almendarez-Torres* into an elements-only rule lacks merit.

An elements-only rule, if taken seriously, would effectively overrule *Almendarez-Torres* and thereby upend the categorical approach. As discussed above, courts cannot conduct predicate-felony determinations under Section 1326 and ACCA without finding facts beyond the elements of the offense. Only by finding non-elemental facts like offense date, venue, and identity can judges determine what elements composed a prior offense and whether the defendant is the person who committed it. *See supra* 27-30.

That is presumably why the government does not actually embrace an elements-only rule. Although its brief at times refers to the "Court's elements-only approach," Govt. Br. 19, 20, the government's bottom-line position is that sentencing judges can go beyond the elements to find facts "otherwise incorporated" into the record of conviction, *id.* at 14, 22. The government offers no apparent explanation for the delta. Erlinger's more forceful endorsement of the elements-only rule has the virtue of clarity but would topple this Court's settled jurisprudence. That is reason enough to reject it.

Glossing over those problems, Erlinger and the government insist that *Apprendi* and this Court's categorical-approach cases effectively decided the constitutional question presented. But they did no such thing. *Apprendi* expressly declined to "revisit" *Almendarez-Torres* and did not concern recidivism. 530

U.S. at 490. Even the government acknowledges that *Apprendi* merely "suggested" a new justification for *Almendarez-Torres*. Govt. Br. 15.

The categorical-approach cases did not resolve the question either. The principal justification for the elements-based categorical approach has always been statutory. The Court has relied primarily on ACCA's text and history in concluding that "Congress intended the sentencing court to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions." *Taylor*, 495 U.S. at 600; *see id.* at 581-90; *see also Descamps*, 570 U.S. at 267 (categorical approach follows "[f]irst" from "ACCA's text and history"); *Mathis v. United States*, 579 U.S. 500, 510-11 (2016) (similar).

Those decisions also posited "serious Sixth Amendment concerns" as a secondary reason to cabin judicial factfinding under ACCA to the elements. *E.g.*, *Mathis*, 579 U.S. at 511. But all of those cases have avoided, not decided, that constitutional question. *See Taylor*, 495 U.S. at 601 (referencing potential constitutional concerns only in passing); *Descamps*, 570 U.S. at 267, 269-70 (categorical approach "avoids the Sixth Amendment concerns"); *Mathis*, 579 U.S. at 501 (non-categorical approach "would raise serious Sixth Amendment concerns"); *Shepard v. United States*, 544 U.S. 13, 25 (2005) (plurality op.) (applying "rule of reading statutes to avoid serious risks of unconstitutionality"); *see also Nijhawan v. Holder*, 557 U.S. 29, 40 (2009) (positing but not resolving constitutional concerns).

Erlinger and the government nonetheless treat those cases as having articulated a settled constitu-

tional rule. Petr. Br. 40. But *avoiding* a constitutional concern is one thing; *deciding* it is another. That is the entire point of constitutional avoidance. "The canon is not a method of adjudicating constitutional questions by other means." *Clark v. Martinez*, 543 U.S. 371, 381 (2005). "Indeed, one of the canon's chief justifications is that it allows courts to *avoid* the decision of constitutional questions." *Id.*

Because they avoided the question, none of the categorical-approach cases "grappl[ed] with the historical meaning of the Sixth Amendment's jury trial right." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1405 (2020). Nor did any of them consider the scope of *Almendarez-Torres*. Respect for those decisions' holdings does not require elevating the constitutional concerns they posited into an established constitutional infirmity. Instead, now presented with full briefing on the constitutional issue, the Court should adhere to *Almendarez-Torres* and the historical practice it validated, as courts have done for decades.

E. Applying *Almendarez-Torres* Requires Affirmance

Applying *Almendarez-Torres* in this case is straightforward, as the courts below recognized. Reliable and undisputed information in the charging documents and state-court plea agreement shows that Erlinger's relevant burglaries took place "at three different businesses" with multiple days separating each crime. Pet. App. 7a-8a. The timing alone "decisively differentiate[s]" the occasions. *Wooden*, 595 U.S. at 370.

The records, moreover, are "unequivocal," and Erlinger "supplied no … evidence" to cast doubt on them. Pet. App. 9a. Indeed, his state-court plea agreement

expressly admitted that all of the facts in the charging documents were "true and correct." D.Ct. ECF 105-5, at 3. Erlinger's crimes thus indisputably were committed on different occasions.

Because the undisputed record materials are dispositive here, the Court need not address the distinct question whether, under *Almendarez-Torres*, courts may look beyond judicial records in making the occasions determination. *See Shepard*, 544 U.S. at 20-23 (permitting judicial examination of conclusive records under ACCA's predicate-felony clause); *United States v. Hennessee*, 932 F.3d 437, 442-44 (6th Cir. 2019) (extending *Shepard* to the occasions clause). Nor is that issue likely to matter in most occasions cases because, as discussed below, judicial records standing alone will suffice to resolve all but the most unusual cases.

II. At A Minimum, The Constitution Permits Judges To Apply The Occasions Clause Based On Findings They Already Make Under ACCA And In Double Jeopardy Cases

For the reasons already discussed, Erlinger's and the government's attempts to narrow *Almendarez-Torres* are meritless. That resolves this case. But affirmance would be required even if the Constitution limited judges to finding merely "the fact of a prior conviction." That phrase must encompass all facts that courts find when making ACCA's predicate-felony determination. And those very same facts—namely, the "who, what, when, and where" of the prior offense, *Santiago*, 268 F.3d at 156—also resolve most occasions issues. Those facts certainly resolve *this* case, because Erlinger indisputably committed three qualifying offenses multiple days apart.

A. The Fact Of A Prior Conviction Includes The "Who, What, When, And Where" Of The Prior Crime

At a bare minimum, "the fact of a prior conviction" must encompass all facts necessary to implement the Court's categorical approach under ACCA's predicate-felony clause. As discussed above, and as the courts of appeals have recognized, those facts include at least the "who, what, when, and where" of a prior offense. *Santiago*, 268 F.3d at 156. In particular, judges applying ACCA's predicate-felony clause are permitted to find:

- Identity: That the defendant in the courtroom is the same person previously convicted. *Santiago*, 268 F.3d at 156.
- Elements: The elements of the prior crime. *Mathis*, 579 U.S. at 503.
- Date: The date of the offense, to determine which version of a statute applied. *McNeill*, 563 U.S. at 824.
- Location: The State or venue where the offense occurred, to determine the elements. *See Bousley*, 523 U.S. at 633 (Scalia, J., dissenting) (noting circuit splits "regarding the elements of a crime").

So long as those facts are derived from "conclusive … judicial record[s]," sentencing courts can—indeed, must—find them to make the predicate-felony determination. *Shepard*, 544 U.S. at 25 (plurality op.). Courts also have long been able to find those same facts in resolving double jeopardy questions, as discussed above. *See, e.g.*, *Cooper*, 886 F.3d at 153 & n.4.

The government appears largely to agree. It acknowledges that "the fact of a prior conviction" includes "such findings as the venue, date, crime, defendant, and other matters necessarily incorporated into a prior conviction." Govt. Br. 9. It argued earlier this Term that courts *must* look to the dates of prior offenses to determine whether a defendant has committed an ACCA-qualifying "serious drug offense." Govt. Br. at 36, *Brown*, Nos. 22-6389, 22-6640 (urging "a time-of-state-crime interpretation"). And it recognizes here and has argued in the past that courts must make those same findings in double jeopardy cases. *See* Govt. Br. 14-15; *see also, e.g.*, Govt. Br. in Opp. at 7, *Walker*, No. 20-5578.

Erlinger's narrower, elements-only view proves far too much and would gut the categorical approach, as discussed above. *See supra* 29-30. To avoid being self-defeating, this Court's categorical-approach cases must be understood to permit judicial factfinding into not only the elements of the prior offense, but also the who, what, when, and where of the crime.

That makes sense because, as the courts of appeals have recognized, the basic facts underlying a prior crime are "closely interwoven with the essential elements of an offense." *United States v. Elliott*, 703 F.3d 378, 382 (7th Cir. 2012); *see also United States v. Thompson*, 421 F.3d 278, 282 (4th Cir. 2005). Indeed, those facts are often necessary to determine the elements: No one can know which law applies without knowing the particular jurisdiction's law in effect at the time of the offense.

Moreover, unlike the "means" of a crime, these are not "legally extraneous" facts that the defendant had "no incentive to contest." *Mathis*, 579 U.S. at 506, 512 (quotation marks omitted). Instead, facts like location

and date are highly relevant and come with strong incentives for accuracy. Among other things, they "define the scope of a crime, provide notice to the defendant of what precisely he is charged with doing so that he can prepare a defense, and protect him against double jeopardy." *Elliott*, 703 F.3d at 382.

Thus, permitting judicial factfinding of the "who, what, when, and where" of the prior crime is not just consistent with the Court's categorical approach—it is essential to applying it.

B. The "Who, What, When, And Where" Resolve Most Occasions Questions

The who, what, when, and where of the prior offense also will resolve most occasions-clause cases—and certainly this one. As this Court explained in *Wooden*, the occasions inquiry is typically "straightforward and intuitive." 595 U.S. at 369. Courts "have nearly always treated offenses as occurring on separate occasions if a person committed them a day or more apart, or at a 'significant distance.'" *Id.* at 370; *see also, e.g.*, *United States v. Gallimore*, 71 F.4th 1265, 1269 (10th Cir. 2023). Clearer still are cases involving crimes committed months or years apart.

Here, the dates of Erlinger's relevant burglaries alone—each having occurred multiple days apart—"decisively differentiate" his offenses into different occasions. *Wooden*, 595 U.S. at 370. The courts below already found those dates in making the predicate-felony determination, in part because Erlinger argued that "Indiana's burglary statute as it existed in 1991 and 1992 swept more broadly than a generic burglary." D.Ct. ECF 101, at 6; *see* Pet. App. 4a-5a (citing

Ind. Code § 35-43-2-1 (1990)). There is no sound reason to prevent those courts from using the very same facts to resolve the occasions inquiry.

Erlinger and the government counter that the who, what, when, and where of the prior offense will be insufficient to resolve at least *some* occasions questions. Petr. Br. 40; Govt. Br. 21-23. They point out, for example, that the occasions inquiry theoretically could turn on "how similar [the offenses] were in nature, or the relationship between them." Petr. Br. 40.

That is doubtless true, but it does not mean that the Constitution requires the occasions inquiry to be sent to juries. Instead, it means that in a narrow class of cases, the government may fail to establish the ACCA enhancement. *See, e.g.*, *United States v. Span*, 789 F.3d 320, 329 (4th Cir. 2015) (government failed to obtain enhancement where court "lack[ed] reliable information" on the occasions question).

There is nothing anomalous about that. This Court has recognized in the predicate-felony context that the government "will be precluded from establishing that a conviction was for a qualifying offense" in cases where judicial records "do not show that the defendant faced the possibility of a recidivist enhancement." *United States v. Rodriquez*, 553 U.S. 377, 389 (2008). So too with the occasions clause.

What *would* be anomalous is if the Court were to require ACCA's predicate-felony and occasions determinations—two closely connected inquiries in the same statute turning on largely the same facts—to be decided by two "different fact-finders" applying "different burdens of proof." *Santiago*, 268 F.3d at 156-57. Nothing in the Constitution compels that bizarre and arbitrary result.

III. REQUIRING JURIES TO RESOLVE THE OCCASIONS QUESTION WOULD CAUSE SERIOUS HARM AND DISRUPTION

The avulsive consequences of adopting either Erlinger's or the government's rule provide further reason to adhere to *Almendarez-Torres*. Accepting their views apparently would mean that ACCA's occasions clause (but not the predicate-felony clause it modifies) must be treated as an "element of a greater offense." Petr. Br. 9. The government also hints at a different approach in which ACCA's occasions clause retains a chimerical quality—a non-element sentencing factor that nevertheless must be charged in the indictment and proved to a jury beyond reasonable doubt. *See* Govt. Br. 27-28.

Either outcome would cause severe fallout at the federal and state levels. Treating the occasions clause as an element of an aggravated Section 922(g) offense would transform ACCA, to the detriment of defendants, by inviting the government to tell juries vivid details about defendants' prior serious crimes. And both approaches would upend ACCA's design—including by requiring that parties litigate and courts decide predicate-felony determinations *before* trial begins—while causing profound disruption to other federal and state sentencing practices as well.

A. Treating The Occasions Clause As An Offense Element Would Prejudice Defendants

Treating ACCA's occasions clause as an element of a novel aggravated Section 922(g) offense is "far more likely to prejudice rather than protect defendants." *Santiago*, 268 F.3d at 156.

1. If ACCA's occasions inquiry is an offense element, prosecutors would have license to regale juries with the details of a defendant's multiple prior violent felonies or serious drug offenses. No one denies that this would inflict "overwhelming prejudice." NAFD Br. 29-30; *see also Santiago*, 268 F.3d at 156. The threat of that prejudice would give prosecutors additional leverage to pressure defendants into forgoing jury trials altogether. Defendants thus would be "left with trial rights they cannot afford to exercise." Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 Yale L.J. 1097, 1158 (2001).

For that reason, the right that Erlinger and the government assert would be practically *sui generis* in this Court's criminal-procedure canon. Other procedural rights function like "plea-bargaining chips" for defendants. Stephanos Bibas, *Incompetent Plea Bargaining and Extrajudicial Reforms*, 126 Harv. L. Rev. 150, 173 (2012). Because they benefit the *defendant*, he can extract more favorable terms by threatening to exercise those rights. Yet Erlinger and the government would create a new bargaining chip *for prosecutors*, paradoxically prejudicing defendants with a constitutional provision designed to protect them.

2. Erlinger, the government, and their amici try to defuse this problem in four ways, but none is persuasive.

First, Erlinger (but not the government) asserts that defendants can unilaterally waive a jury trial on the occasions issue, leaving it instead for the sentencing judge. Petr. Br. 10. But the government would have to "consen[t]" to waiver. Fed. R. Crim. P. 23(a)(2); *see also Singer v. United States*, 380 U.S. 24, 36 (1965). And prosecutors would have

strong incentives to withhold their consent, thus forcing defendants to choose between pleading guilty across the board or submitting to a trial where their prior convictions will be paraded before the jury.

Erlinger argues that this Court has blessed unilateral waiver, but the passing dicta in the cases he cites did not address Rule 23. Petr. Br. 41 (citing *Shepard*, 544 U.S. at 26 n.5 (plurality op.)); *see also Blakely v. Washington*, 542 U.S. 296, 310 (2004). Nor do those cases bind the States, many of which have comparable recidivism statutes and prohibit unilateral waiver just as Rule 23 does. *See, e.g.*, Ariz. R. Crim. P. 18.1(b)(1); Miss. R. Crim. P. 18.1(b); *see also State v. Leasure*, 43 N.E.3d 477, 487-88 (Ohio Ct. App. 2015).

Second, Erlinger and the government argue that defendants can stipulate to the occasions finding. Petr. Br. 41; Govt. Br. 26. But stipulations would not avoid prejudice because juries still would learn about the prior convictions "from the indictment, the judge, or the prosecutor." *Almendarez-Torres*, 523 U.S. at 235. At a minimum, the judge or "the government must inform the jury of the [stipulated element] at some point." *United States v. Smith*, 472 F.3d 752, 753 (10th Cir. 2006) (McConnell, J.). For example, in one recent ACCA case where a defendant stipulated to the occasions issue, the prosecutor began closing arguments to the jury by referring to the defendant as "a gun toting, drug slinging three time convicted felon." *United States v. Harrell*, No. 22-cr-20245 (S.D. Fla. Mar. 6, 2023), ECF 105, at 33. The prosecutor then explained the parties' "stipulation" that "the defendant was a three time convicted felon." *Id.* at 35. A jury's awareness of three prior felonies—even without knowing the details—is enough to poison the well.

Nor would prosecutors invariably need to agree to stipulations. The government tepidly suggests that *Old Chief* stipulations "could" be required in federal court, but that is far from clear. Govt. Br. 26. The premise of *Old Chief* was that a defendant should be allowed to stipulate to "the fact of the qualifying conviction." 519 U.S. 172, 190 (1997). The Court reasoned that the fact of a prior conviction is divorced from "concrete details of the prior crime" and thus does not unduly inhibit the government from presenting "the full evidentiary force" of its case. *Id.* at 186-87, 190. But the government's and Erlinger's position here is that ACCA's occasions inquiry involves so many details of the prior crime that it falls *outside* the fact of a prior conviction. *E.g.*, Govt. Br. 20. If the occasions inquiry is too factually involved to fit within *Almendarez-Torres*, it is hard to see how it can also be sterile enough to fit within *Old Chief*.

In all events, state courts applying state recidivist statutes are not bound to follow *Old Chief*, and some have rejected it. *See State v. Ball*, 756 So. 2d 275, 278 (La. 1999) ("We conclude that *Old Chief* is not controlling and decline to follow it"); *Commonwealth v. Jemison*, 98 A.3d 1254, 1256-63 (Pa. 2014) (same). Those state courts instead adhere to the default rule that "a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the Government chooses to present it." *Old Chief*, 519 U.S. at 186-87; *see also Ball*, 756 So. 2d at 280.

Third, Erlinger, the government, and their amici propose bifurcating trials into guilt and occasions phases. Petr. Br. 41; Govt. Br. 27; NAFD Br. 25-30. Bifurcation in criminal cases, however, has "never been compelled by this Court as a matter of constitutional law, or even as a matter of federal procedure."

Spencer, 385 U.S. at 568; *see id.* ("Two-part jury trials are rare in our jurisprudence"). It is instead an unusual procedure over which trial judges exercise broad discretion. *See, e.g.*, *United States v. Garcia*, 74 F.4th 1073, 1109 (10th Cir. 2023) (per curiam); Fed. R. Crim. P. 14(a) (allowing, not requiring, bifurcation). Erlinger asserts that bifurcation is "common," but he relies on inapposite civil cases and discrete instances where bifurcation was mandatory (for example, by statute), rather than discretionary. Petr. Br. 41-42 (citing, *e.g.*, *Graham*'s discussion of an English statute requiring bifurcation).

Bifurcating the elements of a single crime, in particular, "is extremely rare." *United States v. Birdsong*, 982 F.2d 481, 482 (11th Cir. 1993) (per curiam). Some courts of appeals prohibit the practice outright on the ground that, "[w]ithout full knowledge of the nature of the crime, the jury cannot speak for the people or exert their authority." *United States v. Gilliam*, 994 F.2d 97, 101 (2d Cir. 1993); *United States v. Barker*, 1 F.3d 957, 959 (9th Cir. 1993), *opinion amended on denial of reh'g*, 20 F.3d 365 (9th Cir. 1994). Several States do the same. *See, e.g.*, *Carter v. State*, 824 A.2d 123, 135 (Md. 2003) (collecting cases).

There is good reason to doubt that courts will widely adopt the disfavored practice of element-by-element bifurcation in ACCA cases. The prejudice from introducing a defendant's prior convictions necessarily would not require bifurcation because, as a strictly formal matter, a defendant cannot claim unfair prejudice from a "prior conviction … when it is an element of the charged crime." *Barker*, 1 F.3d at 959 n.3. And bifurcation will remain burdensome. Courts would have to convene a new jury or reconvene the same jury that just convicted the defendant, both of

which would cause complexity and expense. *See United States v. Durham*, 655 F. Supp. 3d 598, 615 (W.D. Ky. 2023) ("Bifurcating a trial between guilt and ACCA phases is one potential solution—though not without its own costs.").

Erlinger's amicus identifies a few recent district-court cases that bifurcated ACCA trials. *See* NAFD Br. 21 n.15, 26 n.20. But in six of the seven cases, the government did not oppose bifurcation. And in the only case where it did, the district court refused to bifurcate. *Harrell*, No. 22-cr-20245 (S.D. Fla.), ECF 49; *id.*, ECF 57; *id.*, ECF 95, at 10-11. The defendant then stipulated on the occasions issue because he would do "pretty much anything to avoid" allowing "any of the … underlying facts of those priors" to go before the jury. *Id.*, ECF 95, at 11-12. Thus, to the extent this small sample of recent cases proves anything, it is that the fates of similarly situated defendants will turn largely on the proclivities of prosecutors.

Fourth, the government (but not Erlinger) suggests that judges can instruct juries not to consider prior convictions when adjudicating guilt. Govt. Br. 27. But it is an open secret that boilerplate limiting instructions cannot counteract the prejudicial effect of introducing prior convictions. *See, e.g.*, NAFD Br. 30 & n.23 (collecting sources). This is one "'contex[t] in which the risk that the jury will not, or cannot, follow instructions … cannot be ignored.'" *Gray v. Maryland*, 523 U.S. 185, 190 (1998); *see also Burgett v. Texas*, 389 U.S. 109, 115 n.7 (1967) ("'unmitigated fiction'" that "'prejudicial effects can be overcome by instructions to the jury'").

3. Erlinger and the government's last recourse is to suggest that considering the implications of their position is merely irrelevant pragmatism. Petr.

Br. 42; Govt. Br. 26. But as explained above, *see supra* 23, there is a long tradition in this country of prohibiting prosecutors from introducing propensity evidence to juries. Erlinger and the government's reading of the Constitution would effectively overturn that tradition. That is not only a practical concern to which they have no answer; it is a serious historical obstacle to their argument.

Moreover, this Court often evaluates the "systemic effects" of proposed legal rules on defendants' rights. *James v. Illinois*, 493 U.S. 307, 319-20 (1990). And here, the profound systemic effects of adopting Erlinger's or the government's position caution against that course.

B. Requiring Juries To Decide The Occasions Question Would Upend Recidivism Sentencing Nationwide

Requiring juries to resolve the occasions question—whether it is deemed an offense element or a sentencing factor—would have radical, systemic fallout at both the federal and state levels.

1. The first casualty would be ACCA itself. Congress designed ACCA to be a sentencing enhancement applied by judges, not a separate offense tried to a jury. *See Almendarez-Torres*, 523 U.S. at 230 (citing Section 924(e) as "setting forth sentencing factors, not as creating new crimes"). For decades, therefore, judges have made all the findings necessary to impose ACCA at a post-conviction sentencing hearing, after the probation office prepares a pre-sentence investigation report on the defendant's criminal history. *See* Fed. R. Crim. P. 32.

Erlinger and the government would, for the first time, require juries to resolve half of the ACCA inquiry. And that would turn *all* of ACCA upside down in many cases. Defendants will seek to exclude prior convictions from the jury's consideration on the ground that they are not ACCA-qualifying convictions. *See, e.g.*, Def.'s Mot. to Deny Bifurcated Trial, *United States v. Lewis*, No. 22-cr-290 (M.D. Tenn. Aug. 24, 2023), ECF 55 (making that argument). In order to determine whether a jury trial is needed at all and, if so, which felonies the government can put before the jury, judges will need to resolve those sentencing issues *before* trial. To do so, judges will either need to forgo the assistance of the probation office or require a time-consuming and costly pre-trial investigation that might turn out to be unnecessary (for example, if the defendant ultimately pleads guilty or is acquitted).

The serious costs and disruption resulting from Erlinger's and the government's rules would not be limited to ACCA, either. For example, the government has argued in one recent case that juries now must find certain non-elemental facts "regarding the recency and length of the prior incarceration" in order to impose an enhanced sentence under 21 U.S.C. § 841(b)(1)(B). Opp'n to Def.'s Mot. in Limine, *United States v. Pennington*, No. 19-cr-455 (N.D. Ga. Aug. 25, 2022), ECF 158, at 7-8 (citing 21 U.S.C. § 802(57)). How much further the collateral damage might spread is uncertain.

2. Requiring juries to decide occasions questions would cause even more serious disruption to state sentencing practices. Many States have enacted statutes that, like ACCA, require courts to impose a sentencing enhancement based in part on whether prior offenses

were committed during different occasions, transactions, or the like. *See, e.g.*, 42 Pa. Cons. Stat. § 9714(a)(2).[8] For decades, courts in those States have relied on *Almendarez-Torres* in authorizing judges to make the occasions findings at sentencing. *See, e.g.*, *Commonwealth v. Gordon*, 942 A.2d 174, 186 n.16 (Pa. 2007) (sentencing factors "related to recidivism, are not to be treated, or proved, as elements of a crime" under *Almendarez-Torres*).[9]

Some States even expressly *forbid* juries from resolving occasions-like questions. Rhode Island's habitual-offender statute, for example, calls for an occasions inquiry and provides that "a hearing shall be held by the court sitting without a jury to determine whether the person so convicted is a habitual criminal." R.I. Gen. Laws § 12-19-21(b); *see also* Colo. Rev. Stat. Ann. §§ 18-1.3-801(2)(a)(I), -803(2)-(6) (similar); 730 Ill. Comp. Stat. 5/5-4.5-95(a)(3), (6) (similar). Erlinger's and the government's positions could render such statutes inoperable, upsetting numerous States' reliance on the longstanding principles affirmed in *Almendarez-Torres*.

At a minimum, Erlinger's and the government's positions would force "substantial changes in trial

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[8] *See also, e.g.*, Colo. Rev. Stat. Ann. § 18-1.3-801(2)(a)(I); 730 Ill. Comp. Stat. 5/5-4.5-95(a)(3); Miss. Code Ann. § 99-19-83; N.J. Stat. Ann. § 2C:44-3(a); R.I. Gen. Laws § 12-19-21; Wash. Rev. Code Ann. § 9.94A.030(37)(a)(i)-(ii).

[9] *See also, e.g.*, *People v. Nunn*, 148 P.3d 222, 224-25 (Colo. App. 2006); *People v. Curry*, 893 N.E.2d 295, 297-303 (Ill. App. Ct. 2008); *Garrison v. State*, 950 So. 2d 990, 994-95 (Miss. 2006); *State v. Pierce*, 902 A.2d 1195, 1200 (N.J. 2006); *State v. Ramirez*, 936 A.2d 1254, 1268-71 (R.I. 2007); *State v. Brinkley*, 369 P.3d 157, 158-61 (Wash. Ct. App. 2016).

procedure in countless local courts around the country." *Spencer*, 385 U.S. at 568. Rather than submit to the unworkable bifurcation procedures that Erlinger and the government would foist upon them, States might well respond by removing defendant-friendly "occasions" requirements from their habitual-offender statutes altogether.

The Court in the past has been "unwilling" to disrupt the "spectrum of state procedures" on recidivism through the imposition of prescriptive constitutional rules. *Spencer*, 385 U.S. at 566, 568. It should likewise refuse to do so here.

IV. ANY ERROR WAS HARMLESS

Irrespective of whether any constitutional violation occurred in Erlinger's case, the harmless-error doctrine independently requires that the judgment be affirmed. *Washington v. Recuenco*, 548 U.S. 212, 220-22 (2006).

Although the Court typically remands for harmless-error analysis, there are sound reasons to decide the question here. Accepting Erlinger's or the government's constitutional argument likely would result in a significant amount of collateral litigation given the uniform, decades-long understanding in the courts of appeals that the occasions issue was for judicial resolution. Clarifying that the harmless-error issue is "straightforward" in "most cases," as the government correctly notes (at 28), would provide important "guidance to … the lower courts" in dealing with those cases. *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 685 (2015).

The harmless-error issue here is straightforward. As the government explained in the court of appeals,

no rational jury could have found that Erlinger's relevant burglaries occurred on the same occasion. C.A. Br. 17-18. The burglaries "were committed on different days" and "at different locations," and Erlinger's state-court plea agreement admitted to each "particular date" and "particular place" set forth in the charging documents. *Id.* Erlinger therefore suffered no prejudice from any purported error.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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