No. 23-____

IN THE
Supreme Court of the United States

CONSTANCE EILEEN CASWELL,
Petitioner,

v.

THE PEOPLE OF THE STATE OF COLORADO,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a prior misdemeanor conviction that elevates a subsequent offense from a misdemeanor to a felony is an element of the subsequent offense that must be found by a jury beyond a reasonable doubt under *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000).

2. Whether this Court should overrule *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998), as inconsistent with the Sixth Amendment as understood in *Apprendi* and its progeny.

PARTIES TO THE PROCEEDING

Constance Eileen Caswell, petitioner on review, was the petitioner below.

The People of the State of Colorado, respondent on review, was the respondent below.

RELATED PROCEEDINGS

Supreme Court of Colorado:

- *Caswell* v. *People*, No. 21SC749 (Colo. Oct. 3, 2023) (reported at 536 P.3d 323).

Court of Appeals of Colorado:

- *People* v. *Caswell*, No. 18CA0464 (Colo. App. Aug. 19, 2021) (reported at 499 P.3d 361).

District Court, Lincoln County, Colorado:

- *People* v. *Caswell*, No. 16-CR-32 (Colo. D. Ct. Nov. 29, 2017) (not reported).

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PETITION FOR A WRIT OF CERTIORARI

Constance Eileen Caswell respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Colorado in this case.

OPINIONS BELOW

The Colorado Supreme Court's opinion is available at 536 P.3d 323. *See* Pet. App. 1a-42a. The Colorado Court of Appeals' decision is available at 499 P.3d 361. *See* Pet. App. 43a-57a.

JURISDICTION

The Colorado Supreme Court entered judgment on October 3, 2023. On November 17, 2023, this Court extended Petitioner's deadline to petition for a writ of

certiorari to January 31, 2024. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution provides in relevant part:

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

The Fourteenth Amendment to the Constitution provides in relevant part:

> No State shall * * * deprive any person of life, liberty, or property, without due process of law.

Section 18-9-202 of the Colorado Revised Statutes provides in relevant part:

> (2)(a) Except as otherwise provided in subsection (2)(b) of this section, cruelty to animals * * * is a class 1 misdemeanor.
>
> * * *
>
> (2)(b)(I) A second or subsequent conviction under the provisions of paragraph (a) of subsection (1) of this section [i.e., cruelty to animals] is a class 6 felony.

INTRODUCTION

This case deepens an already deep and acknowledged split over whether the prior-conviction exception to *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), applies to a prior misdemeanor conviction that elevates a subsequent offense from a misdemeanor to a felony.

In *Apprendi*, this Court reaffirmed the Sixth Amendment's guarantee that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. There is one exception to that rule: "the fact of a prior conviction." *Id.* This Court carved out that exception to preserve *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998), which held that the fact of a prior felony conviction need not be charged in an indictment for a defendant to receive an enhanced sentence based on that prior conviction.

For years, the state and federal courts have been split on whether that exception applies to the fact of a prior *misdemeanor* conviction that transforms a subsequent offense from a misdemeanor into a felony. The federal and state criminal codes are replete with criminal recidivist statutes that make first offenses a misdemeanor and repeat offenses a felony. In so doing, these provisions use the fact of a misdemeanor to create an entirely new crime. The consequences of the shift from misdemeanor to felony are severe: Felons lose the right to own firearms, face severe restrictions on their right to vote, can struggle to find housing, and can be barred from employment.

On one side of the split, the Ninth Circuit and the high courts of four States correctly hold that because misdemeanors and felonies are fundamentally different crimes, when the fact of a prior misdemeanor conviction elevates an offense to a felony, it is an element of the offense. In these jurisdictions, the fact of a prior misdemeanor conviction must be submitted to the jury and found beyond a reasonable doubt.

Until this case, the Colorado courts agreed. But in the decision below, the divided Colorado Supreme Court—after acknowledging the division of authority on this issue—joined four other state high courts and the Fifth Circuit on the other side of the split. In these jurisdictions, the fact of a prior misdemeanor conviction can be found by a preponderance of the evidence by the sentencing judge, even where it elevates the current offense from a misdemeanor to a felony. After applying this prior-conviction exception, the Colorado Supreme Court affirmed the felony convictions of Constance Caswell, who was convicted as a felon after the sentencing judge found for himself that she had a prior misdemeanor conviction for the same offense.

As Justice Gabriel explained in dissent, the decision below erred in expanding the narrow prior-conviction exception to facts that elevate misdemeanors to felonies. *Almendarez-Torres* is grounded in the principle that recidivism provisions merely increase the length of a defendant's sentence, and therefore establish facts that can be found by a judge at sentencing. But a misdemeanor-to-felony recidivism provision does more than enhance a defendant's sentence: It uses the fact of a prior conviction to define "a new, aggravated crime." *Alleyne* v. *United States*, 570 U.S. 99, 113 (2013). Even under the logic of *Almendarez-Torres*, such misdemeanor-to-felony recidivism provisions define *elements* that must be submitted to the jury and found beyond a reasonable doubt. Moreover, this Court in *Apprendi* justified preserving *Almendarez-Torres* on the ground that the constitutional concerns at issue in that case were tempered because the prior conviction was for a "*serious* crime" that had "been entered pursuant to proceedings with substantial procedural safeguards of their own." 530 U.S. at 488. Prior

misdemeanor convictions do not carry the same safeguards; in many States, misdemeanors need not even be tried to a jury.

In any event, it is time for this Court to overrule *Almendarez-Torres*. *Apprendi* itself recognized that *Almendarez-Torres* "represents at best an exceptional departure from the historic practice" underpinning the Sixth Amendment as construed in *Apprendi*. *Id.* at 487. Time has only made the exception more anomalous; in the two decades since this Court decided *Apprendi*, this Court has overruled a slew of precedents conflicting with that rule. It should do the same here: *Almendarez-Torres* was wrong when it was decided, it is fundamentally inconsistent with the *Apprendi* doctrine, and there is no good reason to keep it in place. This Court should finish what it started twenty years ago and require that *all* elements of a crime—including the fact of a prior conviction—be submitted to the jury and be found beyond a reasonable doubt.

The questions presented are incredibly important. Misdemeanor-to-felony recidivism statutes are common at both the state and federal level, which means that judges rather than juries routinely convict defendants of new, enhanced crimes without any finding of guilt beyond a reasonable doubt. And this case is an excellent vehicle to resolve these questions, because the Sixth Amendment issues were preserved at every stage and resolution of the issues was dispositive in the decision below.

As Justice Gabriel recognized below in his dissent, this Court's jurisprudence "has resulted in some uncertainty in this area, not only in Colorado, but also in federal and state courts throughout the country." Pet. App. 42a. Justice Gabriel accordingly urged this

Court "to clarify whether the prior conviction exception remains viable and, if so, whether it applies in cases like this one, in which the fact of a prior conviction elevates a misdemeanor to a felony." *Id.* This Court should accept that invitation, grant the petition, and reverse.

STATEMENT

1. In the spring of 2016, the State of Colorado charged Caswell with various "class 6 felony counts of cruelty to animals." Pet. App. 7a; *see* Colo. Rev. Stat. § 18-9-202. In Colorado, the crime of cruelty to animals is generally "a class 1 misdemeanor." Colo. Rev. Stat. § 18-9-202(2)(a). The presumptive sentencing range for a class 1 misdemeanor is six to eighteen months in county jail. *See id.* § 18-1.3-501(1)(a); Pet. App. 23a-24a. But a defendant's "second or subsequent conviction" of cruelty to animals "is a class 6 felony." Colo. Rev. Stat. § 18-9-202(2)(b)(I). The relevant presumptive sentencing range for a class 6 felony is twelve to eighteen months in the state penitentiary, followed by an additional twelve months of mandatory parole. *See id.* § 18-1.3-401(V)(A); Pet. App. 22a. Caswell had a prior misdemeanor cruelty-to-animals conviction, which the State identified "as a fact that elevated the classification of the charge from a misdemeanor to a felony and enhanced the applicable sentence." Pet. App. 8a.

At Caswell's jury trial, she requested that the jury determine whether she had a prior animal-cruelty conviction. *See* Pet. App. 61a. As Caswell explained, the fact of her prior conviction is an element of the charged offenses that must be found by a jury beyond a reasonable doubt under *Apprendi*. *See id.* The trial court denied this request, concluding that her prior

conviction was a sentencing factor the court could find for itself after trial. *See* Pet. App. 62a-63a.

The jury found Caswell guilty on all counts. *See* Pet. App. 8a. At sentencing, because Caswell had previously been convicted of cruelty to animals, the court "entered forty-three class 6 felony convictions." *Id.* The court "sentenced Caswell to eight years of probation, forty-three days in jail, and forty-seven days of in-home detention." *Id.*

2. The Colorado Court of Appeals affirmed. In relevant part, the appellate court concluded that "the language and structure of the statute clearly signal the General Assembly's intent to designate prior convictions as penalty enhancers" that "need not be found by a jury," as opposed to elements of the offense that must be submitted to the jury. Pet. App. 49a, 52a; *see United States* v. *O'Brien*, 560 U.S. 218, 224-225 (2010) (whether a given fact is an element or a sentencing factor is generally a question for the legislature). The court held that this interpretation of the statute allowed it to "leave aside the Sixth Amendment issue." App. 52a.

3. After granting certiorari, the Colorado Supreme Court affirmed. The court agreed with the intermediate appellate court that the state legislature intended the fact of a prior misdemeanor conviction to be a sentencing factor. *See* Pet. App. 5a. The court explained, however, that the court of appeals erred in "bypass[ing]" the Sixth Amendment question. *Id.* The court then held that allowing a judge to find the fact of a prior misdemeanor conviction that elevates the current offense from a misdemeanor to a felony does not "violate[] the Sixth Amendment." Pet. App. 6a.

The Colorado Supreme Court recognized that courts are split on whether the fact of a prior conviction that elevates a misdemeanor to a felony is an element that must be submitted to the jury. *See* Pet. App. 23a-24a. The court also recognized that the Colorado Court of Appeals had, in 2020, sided with the Ninth Circuit in holding that such facts *are* elements under *Apprendi*. *See* Pet. App. 23a-24a (citing *People* v. *Viburg*, 477 P.3d 746 (Colo. App. 2020)). But the court nonetheless "join[ed] the majority of jurisdictions" and "overrule[d]" contrary precedent. Pet. App. 25a.

According to the Colorado Supreme Court, the serious "collateral consequences" that attach to a felony conviction—which include "the loss of the right to vote while incarcerated, the loss of the right to own firearms, the possibility of habitual criminal charges upon the subsequent commission of a felony, impeachment while testifying in a future proceeding, and the inability to obtain certain employment"—"in no way nullify the holdings in *Almendarez-Torres* and *Apprendi*." *Id.* Moreover, the court saw "no basis in the law to question the validity of a conviction simply because it is a misdemeanor and not a felony." Pet. App. 26a. The court also observed that "neither *Almendarez-Torres* nor *Apprendi* excluded non-felony convictions from the criminal-history carveout." *Id.* The court finally noted that any fairness concerns in using a misdemeanor conviction to secure a felony conviction were "tempered" because Caswell was on notice that her prior conviction would be used to enhance her sentence. Pet. App. 26a-27a. The court accordingly concluded that "the Sixth Amendment did not require the People to prove Caswell's prior cruelty-to-animals conviction to the jury beyond a reasonable doubt." Pet. App. 27a.

Justice Gabriel dissented. *See* Pet. App. 31a-42a. "[B]ecause elevating a criminal offense from a misdemeanor to a felony changes the very nature of the offense (with significant consequences for the defendant)," Justice Gabriel "believe[d] that in this circumstance, the Sixth Amendment requires that a jury, and not the trial judge, find the fact of a prior conviction beyond a reasonable doubt." Pet. App. 31a.

Justice Gabriel explained that this Court "has *never* extended the prior conviction exception to a case in which the fact of a prior conviction elevates a misdemeanor to a felony." Pet. App. 37a. And given this Court's "repeated and consistent acknowledgement of the historic importance of the Sixth Amendment right to a jury trial * * * , as well the Court's steadfast protection of that right," he disagreed with the majority's expansion of that exception to cover cases like this one. *Id.*

Justice Gabriel identified several reasons why, "when the fact of a prior conviction elevates a misdemeanor to a felony, the Sixth Amendment requires that a jury find that beyond a reasonable doubt." Pet. App. 42a. For one thing, "the entire nature of the crime changes" when it transforms from a misdemeanor into a felony. Pet. App. 38a. "Moreover, precisely because the consequences of a felony conviction far exceed those of a misdemeanor conviction, felony defendants are afforded procedural protections beyond those afforded to misdemeanor defendants," including a larger jury, more peremptory strikes, and certain preliminary hearings. Pet. App. 38a-39a. "Finally, and not least important, felony convictions have significant collateral consequences that do not follow from misdemeanor convictions." Pet. App. 39a.

Justice Gabriel concluded by emphasizing the "uncertainty in this area, not only in Colorado, but also in federal and state courts throughout the country." Pet. App. 42a. He accordingly "urge[d]" this Court "to clarify whether the prior conviction exception remains viable and, if so, whether it applies in cases like this one, in which the fact of a prior conviction elevates a misdemeanor to a felony." *Id.*

This petition follows.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD RESOLVE THE SPLIT OVER WHETHER THE FACT OF A PRIOR CONVICTION THAT ELEVATES AN OFFENSE FROM A MISDEMEANOR TO A FELONY MUST BE FOUND BY A JURY BEYOND A REASONABLE DOUBT.

Federal and state courts are sharply split over whether a prior misdemeanor conviction that elevates a misdemeanor to a felony is an element of the offense that must be found by a jury beyond a reasonable doubt.

The five courts that say *yes* are correct: The narrow *Almendarez-Torres* prior-conviction exception does not extend to prior convictions that define a new crime by transforming the offense from a misdemeanor into a felony. Even if it did, this Court has interpreted the exception to reach only prior convictions for *serious* crimes that were secured in proceedings with adequate safeguards. The Colorado Supreme Court misapplied this Court's precedents when it extended the prior-conviction exception to these circumstances. This Court should grant certiorari and reverse.

A. Federal And State Courts Are Split Six-To-Five.

As the Colorado Supreme Court recognized, federal and state courts are deeply split on whether a prior misdemeanor conviction that elevates a subsequent offense to a felony is an element of the offense that must be found by a jury beyond a reasonable doubt. *See* Pet. App. 23a-24a. The Ninth Circuit and the supreme courts of Washington, Florida, Ohio, and North Dakota hold that the answer is *yes*, on the ground that such a fact fundamentally transforms the offense into a new crime and thus must be found by a jury. The Colorado courts previously agreed with these courts. *See* Pet. App. 24a; *Viburg*, 477 P.3d at 751. But the decision below overruled that precedent and in so doing joined the Fifth Circuit and the high courts of Kansas, Delaware, Louisiana, and New Hampshire in holding that a prior misdemeanor conviction that elevates a subsequent offense to a felony can be found by a judge by a preponderance of the evidence. *See* Pet. App. 24a-25a. This Court's intervention is needed to resolve this split.

1. In *United States* v. *Rodriguez-Gonzales*, 358 F.3d 1156 (9th Cir. 2004), the Ninth Circuit held that a prior misdemeanor conviction that "transforms a second conviction * * * from a misdemeanor to a felony" is an element of the subsequent offense that "must be charged explicitly." *Id.* at 1160. The defendant in that case had been charged with two counts of improper entry in violation of 8 U.S.C. § 1325(a), *see* 358 F.3d at 1158; under the statute, a first conviction is a misdemeanor, while a "subsequent" conviction is a felony, 8 U.S.C. § 1325(a). The Ninth Circuit concluded that, because the government did not charge the defendant

with a "subsequent" entry, the defendant "had pleaded guilty to two" misdemeanor counts. 358 F.3d at 1158.

The court explained that "[t]he existence of a prior conviction under 8 U.S.C. § 1325(a) substantively transforms a second conviction under the statute from a misdemeanor to a felony," and is "therefore more than a sentencing factor." *Id.* at 1160. Under *Apprendi*, then, such a fact is an element that must be charged explicitly and found by a jury. *See id.* The court rejected the government's argument that the *Almendarez-Torres* prior-conviction exception applied, explaining that the prior conviction in that case affected "merely the sentence" the defendant faced; in contrast, "the nature of the crime changes" when a defendant has a prior misdemeanor conviction. *Id.* For support, the Ninth Circuit catalogued the "serious ramifications" flowing from a felony conviction that do not attach to a misdemeanor conviction: the loss of "the right to vote[and] the right to bear arms," as well as "significant difficulty in finding gainful employment." *Id.* The Ninth Circuit accordingly declined to "expand *Almendarez-Torres*" to cover prior misdemeanor convictions that elevate a subsequent offense to a felony. *Id.* at 1161. Contrary to the Colorado Supreme Court's suggestion in its decision below, *see* Pet. App. 24a, *Rodriguez-Gonzalez* remains the law of the Ninth Circuit.

The Washington Supreme Court has likewise recognized that a prior conviction that elevates an offense from a misdemeanor to a felony "is an essential element that must be proved beyond a reasonable doubt." *State* v. *Roswell*, 196 P.3d 705, 707 (Wash. 2008). That is because "[t]he prior conviction is not used to

merely increase the sentence beyond the standard range but actually alters the crime that may be charged." *Id.* Thus, "a defendant charged with *felony* communication with a minor for immoral purposes can never be convicted of that crime if the State is unable to prove that the defendant has a prior felony sexual offense conviction," a fact that elevates that crime from a "misdemeanor." *Id.* at 708, 709 (emphasis added). The Washington Court of Appeals has since applied this rule to a misdemeanor-to-felony recidivism provision that uses prior *misdemeanor* convictions to elevate a subsequent offense to a felony. *See State* v. *Santos*, 260 P.3d 982, 984 (Wash. Ct. App. 2011) ("Driving under the influence rises from a gross misdemeanor to a felony if the defendant 'has four or more prior offenses within ten years' * * * . The fact that the defendant has four or more prior offenses is, then, an essential element of felony DUI that the State must prove.") (citation omitted).

The Florida Supreme Court agrees. In Florida, driving under the influence is generally a misdemeanor; a defendant's fourth or subsequent offense, however, is "a felony." Fla. Stat. § 316.193(2)(b)(3). This graduation from misdemeanor to felony has led the Florida Supreme Court to conclude "that '[f]elony DUI is * * * a completely separate offense from misdemeanor DUI, *not simply a penalty enhancement*.'" *State* v. *Finelli*, 780 So. 2d 31, 33 (Fla. 2001) (quoting *State* v. *Woodruff*, 676 So. 2d 975, 977 (Fla. 1996)). "Instead, the requirement of three prior misdemeanor DUI offenses is considered an *element* of felony DUI." *Id.* (emphasis added). As such, the fact of a defendant's prior misdemeanor convictions is subject to "[t]he requirement of a jury trial." *Johnson* v. *State*, 994 So. 2d 960, 963 (Fla. 2008) (citing *Finelli*, 780 So. 2d at 33). Applying

similar principles, a Florida District Court of Appeals recently recognized that the prior-conviction exception to *Apprendi* "is not absolute," because when a prior conviction "raises" a misdemeanor to a felony, "the fact of a prior conviction is an element of the offense" that must be "determined by a jury." *Simmons* v. *State*, 332 So. 3d 1129, 1131 (Fla. Dist. Ct. App. 2022), *review denied*, No. SC22-256, 2022 WL 1747765 (Fla. May 31, 2022).

The Ohio Supreme Court follows the Florida Supreme Court's reasoning. Ohio has a similar misdemeanor-to-felony DUI recidivism provision, leading the Ohio high court to conclude that a defendant's three earlier misdemeanors convictions "are elements of [her] fourth-degree felony" that "must be proved beyond a reasonable doubt." *State* v. *Brooke*, 863 N.E.2d 1024, 1027 (Ohio 2007). That is because, the court explained, the "existence of a prior conviction does not simply enhance the penalty but transforms the crime itself by increasing its degree." *Id.* (citing *State* v. *Allen*, 506 N.E.2d 199, 201 (Ohio 1987)). "[T]he prior conviction is [therefore] an essential element of the crime and must be proved by the state." *Id.*

The North Dakota Supreme Court has reached the same conclusion. *See State* v. *Mann*, 876 N.W.2d 710 (N.D. 2016), *cert. granted, judgment vacated on other grounds*, 580 U.S. 801 (2016). That case concerned whether a state law making it a felony to refuse to submit to DUI-related chemical testing based on prior misdemeanor convictions made those prior convictions "an essential element" of the felony that must be proven to a jury. 876 N.W.2d at 713; *see* N.D. Cent. Code § 39-08-01(3). The North Dakota Supreme Court concluded that, because the prior convictions

"enhance[d] a class A misdemeanor to a class C felony," those "prior convictions constituted an essential element of the class C felony charge, which required proof of the offenses." 876 N.W.2d at 713-714. The court further explained that allowing a court "to take judicial notice" of prior convictions—as the trial court there had—"would cause serious questions concerning the Fifth and Sixth Amendments of the United States Constitution." *Id.* at 715 (citing *Alleyne*, 570 U.S. at 104). Although this Court vacated *Mann* and remanded for further consideration in light of a Fourth Amendment case concerning DUI testing, *Mann*'s "essential element" holding remains the law in North Dakota.

2. Until the decision below, the Colorado courts agreed that, "under *Apprendi*, when prior convictions transform a misdemeanor * * * into a felony," "they are elements of the offense rather than a mere sentence enhancer," and thus "must be proved to a jury beyond a reasonable doubt." *Viburg*, 477 P.3d at 750, 751. But the decision below "overruled" *Viburg* and joined the Fifth Circuit and the supreme courts of Kansas, Delaware, Louisiana, and New Hampshire in holding that a prior misdemeanor conviction that defines a new crime by elevating a subsequent offense to a felony is a fact that can be found by a judge by a preponderance of the evidence. *See* Pet. App. 24a-25a.

In *State* v. *Kendall*, 58 P.3d 660 (Kan. 2002), the Kansas Supreme Court invoked the prior-conviction exception to conclude that a misdemeanor-to-felony DUI recidivism provision did not implicate an element that must be found by a jury under *Apprendi*. *See id.* at 662, 668. The court held that "[t]he use of the prior convictions" to elevate a misdemeanor DUI to a felony

DUI "falls squarely within the prior conviction exception of *Apprendi*." *Id.* at 668.

The Delaware Supreme Court reached the same conclusion regarding the same type of recidivism provision in *Talley* v. *State*, 841 A.2d 308, 2003 WL 23104202 (Del. Dec. 29, 2003). The defendant in that case argued that because his prior convictions for misdemeanor DUI "changed the crime with which he was charged from a misdemeanor to a felony DUI," "the State was required to prove his prior DUI convictions as elements of the DUI offense at trial." *Id.* at *2. The Delaware Supreme Court rejected that argument as "misread[ing] *Apprendi*." *Id.* Stressing the prior-conviction exception, the court concluded that "because the increase in [the defendant's] sentence was occasioned solely by his prior convictions, *Apprendi* is inapplicable." *Id.*

State v. *Jefferson*, 26 So. 3d 112 (La. 2009), is similar. That case concerned a state law that criminalized a first offense for marijuana possession as a misdemeanor and a second offense as a felony. *See id.* at 114 (citing LSA-R.S. 40:966(E)). The Louisiana Supreme Court held that, under the prior-conviction exception, a jury need not find the fact of a defendant's prior misdemeanor conviction for the defendant to be convicted of felony possession. *See id.* at 120, 122. The court so held even though there is no right to a jury trial for misdemeanors in Louisiana. *See id.* at 122. After tracing the history of the prior-conviction exception, the court concluded that "[p]rior nonjury misdemeanor convictions substantially satisfy all the reasons set forth in *Almendarez-Torres* * * * and *Apprendi* as to why prior convictions may be employed to increase the maximum punishment for a subsequent

offense without the need for jury findings in the later case." *Id.* at 118.

The New Hampshire Supreme Court is in accord. In *State* v. *LeBaron*, 808 A.2d 541 (N.H. 2002), the court concluded that a state law making it a felony to drive with a suspended license based on a prior misdemeanor conviction for that offense set forth a "sentencing factor and not an element of the offense." *Id.* at 543. Citing the prior-conviction exception, the court held that such a recidivism provision did not violate the state constitution, which "affords at least as much protection as the Federal Constitution in this area." *Id.* at 545. Looking primarily to this Court's *Apprendi* jurisprudence, the New Hampshire Supreme Court found it "[s]ignificant[]" that "the sentencing factor at issue here—a prior conviction—is explicitly excepted from *Apprendi*'s requirement of proof before a jury beyond a reasonable doubt." *Id.*[1]

Finally, the Fifth Circuit has held that it is not plain error for a judge to find the fact of a prior misdemeanor conviction when that fact has the effect of transforming a subsequent offense "from a misdemeanor into a felony." *United States* v. *McAtee*, 538 F. App'x 414, 422 (5th Cir. 2013). *McAtee* concerned a defendant convicted for a third time of simple possession of a controlled substance. Although that offense is "presumptively a misdemeanor[,] * * * [i]t qualifies as a felony offense where the defendant has at least one prior drug offense conviction." *Id.* at 417; *see* 21 U.S.C. § 844(a). On plain-error review, the Fifth

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[1] Other courts have recognized *LeBaron* as speaking to the federal constitutional issue at issue here. *See* Pet. App. 24a; *State* v. *Palmer*, 189 P.3d 69, 76 (Utah Ct. App. 2008).

Circuit held that the trial court rightly found for itself the fact of the defendant's prior convictions. 538 F. App'x at 422. As the court explained, "the language of *Apprendi* is unequivocal in creating a prior-conviction exception to the rule that otherwise requires a fact that increases the statutory maximum to be proved to a jury beyond reasonable doubt." *Id.*

As Justice Gabriel recognized, the federal and state courts are in disarray. *See* Pet. App. 42a (Gabriel, J., dissenting) (acknowledging the "uncertainty in this area, not only in Colorado, but also in federal and state courts throughout the country"). The legal issues here have been thoroughly ventilated on both sides by multiple appellate courts; additional percolation will simply exacerbate the lack of uniformity across the States on a matter with grave implications for defendants. Only this Court can restore uniformity.

B. The Decision Below Is Wrong.

1. The Sixth Amendment provides those "accused" of a "crime" with the right to a "trial" "by an impartial jury." U.S. Const. amend. VI. This Court has said that the Amendment, "in conjunction with the Due Process Clause, requires that each element of a crime be proved to the jury beyond a reasonable doubt." *Alleyne*, 570 U.S. at 113; *accord Apprendi*, 530 U.S. at 477. "'Elements' are the 'constituent parts' of a crime's legal definition—the things the 'prosecution must prove to sustain a conviction.'" *Mathis* v. *United States*, 579 U.S. 500, 504 (2016) (citation omitted). As this Court has explained, "a fact is by definition an element of the offense and must be submitted to the jury if it increases the punishment above what is otherwise legally prescribed." *Alleyne*, 570 U.S. at 107-

108; *see also id.* at 113 (when "the core crime and the fact triggering the mandatory minimum sentence together constitute a new, aggravated crime, each element of [that new crime] must be submitted to the jury").

Facts that define a new crime by transforming a misdemeanor into a felony clearly fall within this general rule. Such facts both define a new aggravated crime and increase the punishment beyond the legally prescribed range applicable to misdemeanors.

The *Apprendi* rule is subject to one "narrow" exception: the fact of a prior conviction. *Apprendi*, 530 U.S. at 490. Under this Court's precedents, such facts can be found by a judge by a preponderance of the evidence at sentencing. *See id.* But this Court has never extended the prior-conviction exception to convictions that transform a crime from a misdemeanor to a felony. For two reasons, the fact of a prior misdemeanor conviction that elevates a misdemeanor to a felony does not fall within the narrow exception to the *Apprendi* rule.

First, a prior misdemeanor conviction that is used to elevate a misdemeanor to a felony does not merely enhance a defendant's sentence—the lynchpin of the exception's rationale. It instead defines "a new, aggravated crime." *Alleyne*, 570 U.S. at 113. It is therefore like any crime-defining element that must be found by a jury beyond a reasonable doubt.

The prior-conviction exception is rooted in *Almendarez-Torres*. That case concerned a recidivism provision authorizing an enhanced sentence for a defendant convicted of improper reentry into the United States based on the defendant's prior felony convictions. *See* 523 U.S. at 226 (citing 8 U.S.C.

§ 1326(a), (b)). The issue was whether the government must charge the defendant with the prior conviction in the indictment for the defendant to receive an enhanced sentence. Looking to similar recidivism provisions, this Court explained that "recidivism 'does not relate to the commission of the offense, but goes to the punishment only.'" 523 U.S. at 244 (quoting *Graham* v. *West Virginia*, 224 U.S. 616, 624 (1912)) (emphasis omitted); *see also id.* at 230 (listing statutes). The provision, in other words, "did not creat[e] a separate offense calling for a separate penalty," or "change a pre-existing definition of a well-established crime." *Id.* at 243, 246 (quotation marks omitted). It merely increased the punishment based on the defendant's criminal history, which the Court deemed to be a long-recognized "basis for a sentencing court's increasing an offender's sentence." *Id.* at 243-244 (quotation marks and emphasis omitted). The Court accordingly concluded that the recidivism provision "simply authorizes a court to increase the sentence for a recidivist," as opposed to "defin[ing] a separate crime." *Id.* at 226. "Consequently," the Court held that "neither the statute nor the Constitution requires the Government to charge the * * * earlier conviction[] in the indictment. *Id.* at 226-227.

In stark contrast, the recidivism provision at issue here *does* "define a separate crime." *Id.* at 226. Unlike the crimes at issue in and cited in *Almendarez-Torres*, the predicate crime here is a misdemeanor, not a felony. *See* Colo. Rev. Stat. § 18-9-202(2)(a), (2)(b)(I). Misdemeanors and felonies are entirely different "class[es] of crimes." *Lange* v. *California*, 141 S. Ct. 2011, 2023 (2021) (distinguishing between "felonies as a class" and misdemeanors). The difference between the two is not simply a matter of "sentencing," as is

the case when a recidivism provision enhances a convicted felon's sentencing range based on prior convictions. *Almendarez-Torres*, 523 U.S. at 228. This is clear by the fact that misdemeanors are defined *in contrast to* felonies. *See Misdemeanor*, Black's Law Dictionary (11th ed. 2019) ("A crime that is less serious than a felony."); *United States* v. *Stevenson*, 215 U.S. 190, 199 (1909) ("This term 'misdemeanor' has been generally understood to mean the lower grade of criminal offense as distinguished from a felony.").

"The line between felonies and misdemeanors is an ancient one" that is deeply rooted in the common law. *United States* v. *Graham*, 169 F.3d 787, 792 (3d Cir. 1999). The distinction was central to Blackstone's Commentaries. *See* 4 William Blackstone, *Commentaries on the Laws of England* 5 (1769) (distinguishing misdemeanors, which comprise "smaller faults," from felonies, which "denote such offenses as are of a deeper and more atrocious dye"); *see also* 2 Matthew Hale, *The History of the Pleas of the Crown* 88 (1736) (noting that misdemeanors are crimes "less than felony"). This Court has likewise highlighted the bedrock distinction between felonies and misdemeanors and the "ancient common law rule" it reflects. *United States* v. *Watson*, 423 U.S. 411, 418 (1976) (collecting common-law sources). The distinction between "felony and misdemeanor" is "[t]he most important classification of crime in general use in the United States" today. 1 Wayne R. LaFave, *Substantive Criminal Law* § 1.6(a) (3d ed. Oct. 2023 update).

This Court has long recognized that misdemeanors and felonies are distinct classes of crimes that are accorded different constitutional protection. For example, "[t]he Sixth Amendment's guarantee of the right

to a jury trial does not extend to petty offenses," which are a type of misdemeanor punishable by less than six months in prison. *Lewis* v. *United States*, 518 U.S. 322, 324 (1996). And the Fourth Amendment's protection against unreasonable searches can apply differently depending on whether a police officer is pursuing a suspected felon or a suspected misdemeanant. *See Lange*, 141 S. Ct. at 2023-2024, 2022.

When a misdemeanor transforms into a felony, moreover, the defendant faces a host of new "collateral consequences" that can last a lifetime. Pet. App. 39a (Gabriel, J., dissenting). These include "the loss of the right to vote while incarcerated, the loss of the right to own firearms, the possibility of habitual criminal charges * * * , impeachment while testifying in a future proceeding, and the inability to obtain certain employment." Pet. App. 25a; *accord Rodriguez-Gonzalez*, 358 F.3d at 1160. Moreover, "[c]ertain felony convictions can be predicate offenses for purposes of a habitual criminal designation," which can have substantial sentencing consequences. Pet. App. 40a (Gabriel, J., dissenting). In short, the "very nature of [the] crime" changes—not merely its penalty—when it transforms from a misdemeanor into a felony. *Rodriguez-Gonzalez*, 358 F.3d at 1161.

The transformative function of misdemeanor-to-felony recidivism provisions places them in *Apprendi*'s heartland. The *Apprendi* rule grew out of a common-law concern with ensuring that the defendant is made aware of—and the jury is instructed on—the constituent elements defining "the species of offense." *Alleyne*, 570 U.S. at 111. Here, "the species of offense" is *fundamentally different* depending on whether the defendant has a prior misdemeanor conviction. That

fact is therefore like any other element that "defines a separate crime," *Almendarez-Torres*, 523 U.S. at 226, and accordingly must be found by a jury beyond a reasonable doubt.

Second—even if Colorado's misdemeanor-to-felony recidivism provision could be understood merely to enhance a defendant's sentence—the prior-conviction exception still would not apply because that exception is limited to convictions for prior *serious* crimes that were secured in proceedings protected by the full panoply of constitutional safeguards.

This Court has repeatedly recognized this limitation on the prior-conviction exception. The *Apprendi* Court itself highlighted this limitation when carving out the "narrow" exception from its general rule. This Court explained that "our conclusion in *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.'" 530 U.S. at 488 (quoting *Almendarez-Torres*, 523 U.S. at 230). Such prior convictions, this Court elaborated, had "been entered pursuant to proceedings with substantial procedural safeguards of their own." *Id.* These "procedural safeguards" helped to "mitigate[] the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a 'fact' increasing punishment beyond the maximum of the statutory range." *Id.*

Similarly, in *Jones* v. *United States*, 526 U.S. 227 (1999), this Court explained that the "constitutional distinctiveness" of the prior convictions discussed in *Almendarez-Torres* "is not hard to see," because "unlike virtually any other consideration used to enlarge the possible penalty for an offense, * * * a prior

conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." *Id.* at 249.

Misdemeanor proceedings, by contrast, are not accorded the same level of "procedural safeguards" governing felony proceedings. *Apprendi*, 530 U.S. at 488. As Justice Gabriel explained, in Colorado, "felony defendants are tried by juries of twelve, whereas misdemeanor defendants are tried by a jury of six." Pet. App. 38a-39a (Gabriel, J., dissenting). "Also, most felony defendants are entitled to five peremptory challenges, whereas misdemeanor defendants are allowed only three." *Id.* (Gabriel, J., dissenting). "And some felony defendants are entitled to preliminary hearings, which gives the court the opportunity to screen out cases in which prosecution is unwarranted, whereas misdemeanor defendants are not entitled to preliminary hearings." *Id.* (Gabriel, J., dissenting). And that's just Colorado; in many States, "an offense punishable by imprisonment of six months or less does not trigger a right to jury trial." Colleen P. Murphy, *The Narrowing of the Entitlement to Criminal Jury Trial*, 1997 Wisc. L. Rev. 133, 173 (1997).

Accordingly, by this Court's own interpretation of *Almendarez-Torres*, the absence of sufficient safeguards underlying a prior misdemeanor conviction places the fact of that conviction beyond the scope of the prior-conviction exception. Caswell's prior misdemeanor conviction is like any other fact that increases the statutory maximum penalty, and accordingly must be found by a jury beyond a reasonable doubt.

2. The Colorado Supreme Court erred in extending the prior-conviction exception to cover prior

misdemeanor convictions that elevate a subsequent offense to a felony.

The court justified expanding the prior-conviction exception because it saw "no basis in the law to question the validity of a conviction simply because it is a misdemeanor and not a felony." Pet. App. 26a. But this Court's decisions in *Apprendi* and *Jones* reconciled *Almendarez-Torres*'s "exceptional departure from the historic practice" undergirding the *Apprendi* rule on the ground that prior convictions for "serious" crimes are secured with sufficient safeguards. *Apprendi*, 530 U.S. at 487-488; *accord Jones*, 526 U.S. at 249. The same cannot be said for prior misdemeanor convictions.

The court "recognize[d] that elevating a conviction from a misdemeanor to a felony carries collateral consequences," but held that those collateral consequences are comparable to the "enhanced imprisonment" levied by the recidivism provision in *Almendarez-Torres*. Pet. App. 25a. That is wrong. As Justice Gabriel explained, the consequences that attach to a felony conviction do not relate merely to punishment; they "change[]" "the entire nature of the crime." Pet. App. 38a. These are "fundamental" differences that make a misdemeanor different in kind from a felony. Pet. App. 40a-41a (Gabriel, J., dissenting). A fact that transforms a misdemeanor into a felony is therefore not a "factor[] relevant only to the sentencing of an offender," and thus capable of being found by a judge by a preponderance of the evidence under *Almendarez-Torres*. 523 U.S. at 228. It is a crime-defining element that must be found by a jury beyond a reasonable doubt.

The state high court finally reasoned that "includ[ing] notice in the charging document of the prior conviction" and treating the subsequent offense "as a felony throughout the proceedings" mitigates "the unfairness associated" with elevating a misdemeanor to a felony. Pet. App. 26a-27a. That is not enough. This Court's decision in *Apprendi* identified the minimum constitutional safeguards for crime-defining facts: a finding by the jury beyond a reasonable doubt.

* * *

The Colorado Supreme Court's conclusion that a prior misdemeanor conviction that elevates a subsequent offense to a felony can be found by a judge by a preponderance of the evidence extends the prior-conviction exception past its breaking point and in so doing violates the Sixth Amendment. This Court should grant certiorari and reverse.

II. THIS COURT SHOULD OVERRULE *ALMENDAREZ-TORRES*.

Alternatively, this Court should grant certiorari to overrule *Almendarez-Torres* and thereby bring consistency to the *Apprendi* doctrine. *Almendarez-Torres* was wrong when it issued, and this Court's careful attention to the *Apprendi* rule over the past two decades has made *Almendarez-Torres* an anomalous exception. This Court should accordingly grant certiorari to overrule *Almendarez-Torres* and close the prior-conviction loophole to the *Apprendi* rule.

1. Under *Apprendi*, prior convictions that enhance a defendant's sentence are elements of the offense that must be found by a jury beyond a reasonable doubt. *Apprendi*'s rule is straightforward: "[F]acts that increase the prescribed range of penalties to

which a criminal defendant is exposed' are elements of the crime" that must be found by a jury "beyond a reasonable doubt." *Alleyne*, 570 U.S. at 111 (quoting *Apprendi*, 530 U.S. at 490). Recidivism provisions that enhance a defendant's sentence by elevating a misdemeanor to a felony based on the fact of a prior conviction—by definition—"increase the prescribed range of penalties to which a criminal defendant is exposed." *Apprendi*, 530 U.S. at 490. No less than the sentence-enhancer at issue in *Apprendi*, such provisions establish elements that must be found by a jury beyond a reasonable doubt.

Almendarez-Torres reached a contrary conclusion by applying a framework this Court has since rejected, citing cases this Court has since overruled, and invoking history Members of this Court found dubious from the outset.

Almendarez-Torres is predicated on a distinction between sentencing factors—which are "relevant only to the sentencing of an offender found guilty of the charged crime"—and a crime's "element[s]." 523 U.S. at 228. *Apprendi*, however, held that "*[a]ny* possible distinction between an 'element' of a felony offense and a 'sentencing factor' was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding." 530 U.S. at 478 (emphasis added) (footnote omitted). Instead, "[a]t common law, the relationship between crime and punishment was clear"; crimes were defined to "consist[] of every fact which 'is in law essential to the punishment sought to be inflicted.'" *Alleyne*, 570 U.S. at 108, 109 (emphasis added). Based on this historical practice, *Apprendi* and its progeny recognize that "'facts that increase the

prescribed range of penalties to which a criminal defendant is exposed' are elements of the crime" that must be found by a jury "beyond a reasonable doubt." *Id.* at 111 (quoting *Apprendi*, 530 U.S. at 490). "[O]ne of the chief errors of *Almendarez-Torres*" is its failure to grasp this bedrock principle. *Apprendi*, 530 U.S. at 521 (Thomas, J., concurring).

This Court's Sixth Amendment jurisprudence has undermined *Almendarez-Torres* in other respects as well. *Almendarez-Torres*'s holding "was based in part on [the] application of the criteria [this Court] had invoked in *McMillan* [v. *Pennsylvania*, 477 U.S. 79 (1986)]." *Apprendi*, 530 U.S. at 488. But in *Alleyne*, this Court "expressly overruled" *McMillan* as inconsistent with "the principle applied in *Apprendi*." *United States* v. *Haymond*, 139 S. Ct. 2369, 2378 (2019) (plurality op.) (quoting *Alleyne*, 570 U.S. at 112).

The *Almendarez-Torres* Court also based its rule in part on a trifecta of death-penalty cases holding that judges, as opposed to juries, can find death-sentence-qualifying facts. *See* 523 U.S. at 247 (citing *Walton* v. *Arizona*, 497 U.S. 639 (1999); *Hildwin* v. *Florida*, 490 U.S. 638 (1989) (per curiam); and *Spaziano* v. *Florida*, 468 U.S. 447 (1984)). This Court has since overruled those cases as irreconcilable with *Apprendi*. *See Ring* v. *Arizona*, 536 U.S. 584, 588 (2002) (overruling *Walton*); *Hurst* v. *Florida*, 577 U.S. 92, 101 (2016) (overruling *Spaziano* and *Hildwin*).

Almendarez-Torres placed special emphasis on the fact that the case concerned *recidivism*, and highlighted that it "found no statute that clearly makes recidivism an offense element." 523 U.S. at 230; *see also id.* at 243-244. But as Justice Scalia recognized in

dissent, this claim is refuted by "many such" statutes doing so. *Id.* at 261-262 (Scalia, J., dissenting). The "rule at common law," as well as the "near-uniform practice among the States at the time of the most recent study," was that a "prior conviction is 'typically' treated * * * as an element of a separate offense." *Id.* (Scalia, J., dissenting). This rule accords perfectly with the *Apprendi* doctrine.

Finally, that this Court grandfathered *Almendarez-Torres* into the *Apprendi* doctrine by recognizing it as "a narrow exception to the general rule," *Apprendi*, 530 U.S. at 490, does not cement *Almendarez-Torres* as good law. The *Apprendi* Court recognized that *Almendarez-Torres* "depart[ed] from the historic practice" underpinning the *Apprendi* rule. *Id.* at 487. It conceded that "it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested." *Id.* at 489-490 (footnote omitted). But the Court nonetheless preserved *Almendarez-Torres* because the *Apprendi* petitioner did "not contest the decision's validity" and because the Court concluded that it "need not revisit it." *Id.* at 490. *Apprendi* did not bless *Almendarez-Torres*; it grudgingly accepted it.

Almendarez-Torres, in short, is a relic. *See, e.g.*, *Shepard* v. *United States*, 544 U.S. 13, 27-28 (2005) (Thomas, J., concurring in part and concurring in the judgment) ("*Almendarez-Torres* * * * has been eroded by this Court's subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided."); *Mathis*, 579 U.S. at 522 (Thomas, J., concurring) ("I continue to believe that the exception in *Apprendi* was

wrong."). This Court should grant certiorari and overrule it.

2. Stare decisis does not save *Almendarez-Torres*. When considering whether to overrule a precedent, this Court considers "the quality of the decision's reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision." *Ramos* v. *Louisiana*, 140 S. Ct. 1390, 1405 (2020) (citation omitted). Here, every factor "points in the same direction." *Id.* *Almendarez-Torres* should be overruled.

The quality of *Almendarez-Torres*'s reasoning has been suspect from the start. Four Justices dissented on the ground that it is "genuinely doubtful whether the Constitution permits a judge (rather than a jury) to determine by a mere preponderance of the evidence * * * a fact that increases the maximum penalty to which a criminal defendant is subject." 523 U.S. at 251 (Scalia, J., dissenting). Justice Scalia lambasted the majority's "feeble[] * * * contention that here there is no serious constitutional doubt" on that issue, and charged the majority with "ignor[ing] or distort[ing] the analysis of *McMillan*." *Id.* at 253. Recidivism is a "red herring," according to Justice Scalia, and "there is no rational basis for *making* recidivism an exception." *Id.* at 258, 262.

Legal developments since *Almendarez-Torres* not only reveal that case as inconsistent with *Apprendi*, they have rendered *Almendarez-Torres* an anomalous departure from an otherwise uniform rule. Since *Apprendi*, which concerned a "hate crime" enhancer that increased the defendant's maximum potential sentence, this Court has applied that case's rule to: aggravating factors necessary to impose a death

sentence, *see Ring*, 536 U.S. at 589; *Hurst*, 577 U.S. at 94; state sentencing laws that increase imprisonment above the "standard range," *Blakely* v. *Washington*, 542 U.S. 296, 303-304 (2004); *Cunningham* v. *California*, 549 U.S. 270, 274-275 (2007) (same); mandatory federal sentencing guidelines that increase the imprisonment range, *see United States* v. *Booker*, 543 U.S. 220, 226-227 (2005); facts necessary to impose criminal fines, *Southern Union Co.* v. *United States*, 567 U.S. 343, 346 (2012); and facts that increase the defendant's mandatory minimum sentence, *see Alleyne*, 570 U.S. at 102; *accord Haymond*, 139 S. Ct. at 2378-79 (2019) (plurality op.); *id.* at 2386 (Breyer, J., concurring in the judgment). Moreover, this Court recently granted certiorari to consider whether *Apprendi* requires a jury to find that a defendant's prior convictions occurred on different occasions under the Armed Career Criminal Act (ACCA). *See Erlinger* v. *United States*, No. 23-370 (U.S. Nov. 20, 2023). The fact of a prior conviction is thus the last holdout of the pre-*Apprendi* "sentence enhancer" regime.

Finally, reliance interests do not favor allowing *Almendarez-Torres* to limp on. A requirement that prosecutors prove to a jury beyond a reasonable doubt that a defendant had a prior conviction—when the fact of that conviction enhances the defendant's sentence—simply treats that fact the same as any other element. And until this Court overrules *Almendarez-Torres*, "countless criminal defendants will be denied the full protection afforded by the Fifth and Sixth Amendments." *Rangel-Reyes* v. *United States*, 547 U.S. 1200, 1203 (2006) (mem.) (Thomas, J., dissenting). "There is no good reason to allow such a state of affairs to persist." *Id.*

III. THE QUESTIONS PRESENTED ARE RECURRING AND EXCEPTIONALLY IMPORTANT.

"[O]ne of the Constitution's most vital protections against arbitrary government" is the guarantee that "[o]nly a jury, acting on proof beyond a reasonable doubt, may take a person's liberty." *Haymond*, 139 S. Ct. at 2373 (plurality op.). This principle, which traces its roots to the common law, applies to "any fact that 'annexes a higher degree of punishment.'" *Id.* at 2376 (plurality op.) (quoting John Archbold, *Pleading and Evidence in Criminal Cases* *106 (5th Am. ed. 1846)). The Sixth Amendment serves to protect these principles by ensuring that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490.

The decision below strikes at the heart of these bedrock principles. Instead of requiring a jury to find the fact of a prior misdemeanor conviction beyond a reasonable doubt to elevate an offense to a felony, the Colorado Supreme Court allowed a judge to find the fact by a preponderance of the evidence. Defendants in Colorado can now be convicted of a felony without ever putting the decisive fact underlying their conviction to a jury. Judges, not juries, can now make a person a felon.

The decision below implicates a federal constitutional question of extraordinary significance. Misdemeanor-to-felony recidivism provisions are common across the state and federal levels. In most States, for example, driving under the influence is generally a misdemeanor—unless the defendant has at least one

prior misdemeanor conviction for that offense, in which case it becomes a felony.[2] About one million arrests are made each year for driving under the influence.[3] And at the federal level, one of the most commonly charged crimes—improper entry into the United States—includes a misdemeanor-to-felony recidivism provision. *See* 8 U.S.C. § 1325(a). In 2023, the Department of Justice charged 5,777 noncitizens with improper entry under § 1325(a).[4] More than a million individuals every year are exposed to a crime whose severity—misdemeanor or felony—turns on the existence of a prior conviction.

When a recidivist enhancement transforms a misdemeanor into a felony, moreover, the enhancement not only affects the current conviction, but can also have serious follow-on consequences. Misdemeanor-to-felony recidivism provisions can later subject defendants to enhanced mandatory minimums under various state and federal recidivism provisions that require the existence of a prior *felony*. *See* Eric S. Fish, *The Paradox of Criminal History*, 42 Cardozo L. Rev. 1373, 1383-90 (2021) (detailing the prevalence of recidivist enhancements across federal law, as well as other

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[2] *See* Mothers Against Drunk Driving, *DUI Felony Laws* (rev. Aug. 2017), *available at* https://perma.cc/54EM-GXPL.

[3] *See* Centers of Disease Control and Prevention, National Center for Injury Prevention and Control, *Impaired Driving: Get the Facts* (Dec. 2022), *available at* https://perma.cc/WL6M-ZT3V.

[4] *See* Offices of the U.S. Attorneys, *Prosecuting Immigration Crimes Report (PICR)*, 8 USC § 1325MG FY23 Monthly Defs Filed (5,193 defendants charged before magistrate judges), *available at* https://perma.cc/TCJ3-WL22; *id.*, 8 USC § 1325DC FY23 Monthly Defs Filed (583 defendants charged before district judges), *available at* https://perma.cc/DUK6-QZBM.

follow-on effects for defendants with prior convictions); Hon. Jane Kelly, *The Power of the Prior Conviction*, 97 N.Y.U. L. Rev. 902, 906-913, 925-930 (2022) (similar). Under ACCA, for example, when a misdemeanor becomes a felony, it can qualify as a "serious drug offense" or "violent felony" that in turn subjects the defendant to ACCA's 15-year mandatory minimum sentence. *See* 18 U.S.C. § 924(e); *see also United States* v. *Walker*, 293 F. App'x 991, 992 (4th. Cir. 2008) (defendant's prior conviction under North Carolina's habitual misdemeanor assault statute, which applied after defendant committed prior misdemeanors, amounted to a "violent felony" under ACCA, thereby subjecting defendant to 180 months' imprisonment).

Under the rule applied below, courts can convict defendants of an entirely new judge-imposed crime without any finding of guilt beyond a reasonable doubt. This misdemeanor-to-felony transformation deprives defendants of their core Sixth Amendment rights and can have reverberating repercussions if the conviction is later used to impose yet another sentence enhancement under ACCA or similar statutes. "Innumerable criminal defendants have been unconstitutionally sentenced under the flawed rule of *Almendarez-Torres*, despite the fundamental imperative that the Court maintain absolute fidelity to the protections of the individual afforded by the notice, trial by jury, and beyond-a-reasonable-doubt requirements." *Shepard*, 544 U.S. at 27-28 (Thomas, J., concurring in part and concurring in the judgment) (quotation marks omitted).

Finally, this is a clean vehicle to address the questions presented. Caswell faced an enhanced felony

punishment because she had a prior misdemeanor conviction, and the trial court found that fact for itself at sentencing. The Colorado Supreme Court affirmed that decision on the theory that this Court's precedents "allow the fact of prior convictions to be proved to a judge by a preponderance of the evidence." Pet. App. 25a. Caswell preserved her Sixth Amendment arguments at every stage, *see* Pet. App. 5a-6a, 49a, 61a-63a, and those arguments were thoroughly addressed in majority and dissenting opinions. The Court's intervention is needed to correct the Colorado Supreme Court's error and bring uniformity to this important area of federal law.

CONCLUSION

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

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