NO. 23-831

In the
Supreme Court of the United States

CONSTANCE EILEEN CASWELL,
Petitioner,
v.
STATE OF COLORADO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

Respondent's Brief in Opposition

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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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

In *Almendarez-Torres v. United States*, 523 U.S. 224, 243 (1998), this Court recognized that recidivism is "a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence."[1] This Court therefore refused to adopt a blanket rule treating recidivism as an element of an offense requiring proof to a jury beyond a reasonable doubt. Two years later, this Court squarely held that, "*other than the fact of a prior conviction*, 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 v. New Jersey*, 530 U.S. 466, 466 (2000) (emphasis added).

In the nearly twenty-five years since *Apprendi* was decided, only two federal circuits and ten state courts have considered the question presented by the Petitioner, namely, whether the prior conviction exception applies where a prior misdemeanor conviction elevates a subsequent misdemeanor offense into a felony offense. And of those jurisdictions, the overwhelming majority have held precisely as Colorado did: that the fact of a prior conviction, even where that fact elevates a misdemeanor to a felony, need not be decided by the jury. Petitioner nevertheless asks this

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[1] *See, e.g., Graham v. West Virginia*, 224 U.S. 616, 623 (1912) (recognizing that "inflicting severer punishment upon old offenders has long been recognized in this country and in England"); *In re Ross*, 19 Mass. 165, 165 (1824) (holding constitutional a statute providing for increased punishment for recidivists).

Court to stray from *stare decisis*, overturn *Almendarez-Torres*, or alternatively, to create a significant exception to its scope without any principled basis.

There is no compelling reason for this Court to throw into flux law that is both well-reasoned and well-settled. The prior conviction exception has been in place for 25 years[2] and, especially in light of the pervasiveness of recidivist statues, the dearth of case law suggests criminal defendants' constitutional rights have not been trampled. This track record confirms that *Almendarez-Torres* was correctly decided in the first instance and that this Court has correctly confirmed its application in case after case. A judge's determination of a prior conviction, for which the defendant already received all necessary constitutional protections, does not offend the Sixth Amendment because all that is left for the court to find is identity. More importantly, requiring all prior convictions to be treated as elements of a crime and proven to a jury creates a serious constitutional risk for defendants, namely, the presentation of highly prejudicial evidence to the jury — yet another reason why defendants only rarely challenge the prior conviction exception.

These important considerations drove the *Almendarez-Torres* decision and remain as important today; this case does not present any of the factors that would counsel this Court to abandon *stare decisis*.

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[2] *See Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Almendarez-Torres v. United States*, 523 U.S. 224 (1998).

Nor is there any circuit split for this case to resolve. The only two cases that arguably support Petitioner's view have serious problems — the Ninth Circuit case is not even clearly the law of that circuit,[3] and in the Washington case,[4] the defendant — not the prosecution — sought to enforce the prior conviction exception. By contrast, every other court to give reasoned consideration to whether a prior conviction that converts a misdemeanor to a felony must be proven to a jury has held "no" — just like Colorado.

There is no meaningful circuit split; there is no reason to abandon *stare decisis*; and there is no pattern of criminal defendants complaining about any loss of constitutional rights bearing on the outcome of their cases. This Court should deny certiorari.

STATEMENT OF THE CASE

Prompted by a request from Lakewood Animal Control, a local deputy sheriff conducted a welfare check of the animals on Petitioner's property. App. 6a–7a. The sheriff's office then received an email from an investigator at the Colorado Humane Society regarding animals at the same address. The deputy returned to Petitioner's home with an investigator from the Humane Society and an inspector for the Pet Animal Care and Facilities Act Program. App. 7a.

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[3] *Compare United States v. Rodriguez-Gonzales*, 358 F.3d 1156, 1160 (9th Cir. 2004), *with United States v. Corona-Sanchez*, 291 F.3d 1201, 1208–11 (9th Cir. 2002) (en banc) *superseded on other grounds by* U.S.S.G. § 2L1.2 cmt. n. 4 (2002), *and United States v. McCaney*, 117 Fed. App'x. 704, 709–10 (9th Cir. 2006).

[4] *State v. Roswell*, 196 P.3d 705 (Wash. 2008).

Two weeks later, authorities executed a search warrant at Petitioner's property and seized approximately forty-six dogs, four cats, five birds, and five horses. The animals were underweight and without adequate food, water, shelter, or care. App. 7a.

Under Colorado law, a first offense for animal cruelty is a class-one misdemeanor, but a second offense is elevated to a class-six felony. *See* COLO. REV. STAT. § 18-9-202(2)(b)(I). Because Petitioner had a prior offense — *to which she stipulated at sentencing*, App. 17a — the prosecution charged her with forty-three counts of felony animal cruelty. App 7a–8a. The prosecution "treated Caswell's case as a felony case from beginning to end." (App. 8a.)

A jury convicted Petitioner on all counts, and the trial court, after Petitioner conceded her prior animal cruelty conviction, imposed forty-three felony convictions, sentencing her to eight years of probation. App. 8a.

Petitioner appealed to the Colorado Court of Appeals, arguing that her convictions were improper because the prosecution had not proven beyond a reasonable doubt to the jury that she had a prior conviction for animal cruelty. App. 9a. The court rejected her arguments, finding that the prior conviction provision of Colorado's animal cruelty statute was a sentence enhancer that did not need to be found by the jury. App. 9a–10a.

Petitioner next appealed to the Colorado Supreme Court, arguing first that the prior conviction provision of the animal cruelty statute was an element of the underlying offense, and second, that any fact that

transformed a misdemeanor into a felony needed to be found by a jury beyond a reasonable doubt. App. 11a.

The court disagreed. It assessed the five factors identified in *United States v. O'Brien*, 560 U.S. 218 (2010) — statutory language and structure, tradition, risk of unfairness, severity of the sentence, and legislative history — and concluded that four of the five factors "signal[ed] a legislative intent to designate subsection (2)(b)(I) a sentence enhancer." App. 22a–23a.

The court next addressed Petitioner's constitutional claims and found that the prior conviction exception carved out by this Court in *Almendarez-Torres* and *Apprendi* applied equally to those cases where a prior conviction raises an offense from a misdemeanor to a felony. App. 26a. Specifically, the court held "where, as here, a cruelty-to-animals (second or subsequent offense) case (1) includes notice in the charging document of the prior conviction for cruelty to animals and (2) is treated as a felony throughout the proceedings — including in terms of its prosecution in district court (not county court), the right to a preliminary hearing (if eligible), the number of peremptory challenges, and the number of jurors — the Sixth Amendment doesn't require that the misdemeanor → felony transforming fact in subsection (2)(b)(I) be proved to a jury beyond a reasonable doubt." App. 27a. The court was clear that it was not extending *Apprendi*'s prior conviction carveout: "Instead, we do as we must: We apply it." App. 28a.

REASONS FOR DENYING THE PETITION

I. The Questions Presented Are Not Sufficiently Important or Recurring to Warrant this Court's Review.

Petitioner requests that this Court either overrule entirely, or create a significant exception to, a principle that has governed the determination of the fact of prior convictions for more than twenty-five years. Petitioner's "argument for disrupting … longstanding consensus is essentially a solution in search of a problem." *Great Lakes Ins. SE v. Raiders Retreat Realty Co., LLC*, 601 U.S. 65, 76 (2024). Petitioner does not identify any significant pattern of criminal defendants arguing that prior convictions be proven beyond a reasonable doubt to a jury, or a record of injustice that has developed from allowing judges to determine these narrow and typically straightforward factual issues. That's because the current rule was well-founded and properly balances the competing constitutional interests at stake for criminal defendants. It's also because, as reflected in the cases that have addressed this issue, states have well-developed and robust procedures designed to protect the rights of criminal defendants charged under recidivism statutes — procedures that are specifically tailored to that state's laws. These processes are working, and Petitioner identifies no tangible problem or injustice that would warrant this Court's intervention to fix a problem that has not arisen after twenty-five years.

The issue of whether a judge or jury must determine the fact of a prior conviction has arisen remarkably rarely since this Court's decisions in *Almendarez-Torres* and *Apprendi*. Petitioner and her amicus

acknowledge that habitual offender or recidivist statutes are widely prevalent throughout the federal and state criminal codes. Pet. at 3 ("The federal and state criminal codes are replete with criminal recidivist statutes that make first offenses a misdemeanor and repeat offenses a felony."); Amicus Curiae Nat'l Assoc. for Public Defense, Br. in Support of Pet. at 8–9. And these statutes govern some of the most pervasive criminal conduct in this country — e.g., possession of firearms, possession of drugs, illegal re-entry, and driving under the influence. Case law suggests that complaints from criminal defendants about having a judge determine the fact of a prior conviction are exceedingly rare, at least in part because of the potential prejudicial effect of such evidence. *See United States v. Jackson*, 824 F.2d 21, 25 (D.C. Cir. 1987) (recognizing the "inherently prejudicial" nature of prior conviction evidence and explaining the "strong policy" reasons for keeping such evidence from the jury's view).

As described *infra*, Section III, only a handful of these cases have arisen in the last twenty-five years, and only a subset of those actually challenge *Almendarez-Torres* or seek an exception for convictions that convert subsequent offenses from misdemeanors to felonies.

There are good reasons why these issues arise so infrequently — reasons that are reflected in the original rationale for adopting the rule in the first instance. *First*, proof of a prior conviction typically requires only confirming a defendant's identity and can be done through straightforward documentary evidence. *See infra* at 14. Because these determinations

are simple, criminal defendants rarely contest them — and often stipulate to them. Indeed, none of the cases that have presented this issue involved a challenge to the existence of the prior conviction or an assertion that the defendant was not the actual person involved in the prior conviction, such that having a jury decide the issue could conceivably make a difference. *Id. Second*, requiring the prosecution to prove prior convictions to a jury is a fraught proposition for criminal defendants that risks jeopardizing their other important constitutional interests — namely, the right to *not* have a jury learn of prior bad acts. *See Jackson*, 824 F.2d at 25. Indeed, in one of the very few cases that Petitioner argues supports her view, the criminal defendant was the party arguing *against* having the jury determine his prior convictions. *Roswell*, 196 P.3d at 706 (declining to allow the defendant charged with a misdemeanor-to-felony recidivist sex offense to "waive his right to a jury trial on a prior conviction element and effectively bifurcate the trial"). *Third*, prosecutors must still prove prior convictions to a jury where the prior conviction forms an element of the crime. *Apprendi*, 530 U.S. at 477 ("[A] criminal defendant [is entitled] to a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." (citation omitted; final alteration in original)); *Old Chief v. United States*, 519 U.S. 172, 185 (1997) (discussing proof of the prior conviction element of the felon-in-possession statute). It is only where the prior conviction is a sentence enhancer, and not an element, that the judge may make this determination.

Given these reasons, it is unsurprising that the petition does not identify a pervasive record of defendants asserting Sixth Amendment violations in this context. Indeed, nowhere in the petition or the relevant cases has Respondent located a single example of a defendant who contests the validity of a prior conviction and asserts that he or she might have a different outcome if the issue were decided by a jury rather than a judge. Even Petitioner herself conceded the existence of her prior conviction. Instead, Petitioner's articulation of the importance of this issue reflects nothing more than an abstract recitation of the significance and collateral consequences of a felony conviction.

Protecting the Sixth Amendment rights of criminal defendants charged with felonies is unquestionably vitally important. But with a 25-year track record that reflects no damage to these rights by this narrow exception, these concerns are simply not implicated in any practical way by the issues presented in this case, and do not warrant this Court's review.

II. Petitioner is Unlikely to Prevail on the Merits.

As suggested by this lack of controversy, strong reasoning supports the narrow exception afforded by *Almendarez-Torres*, as well as its application to prior convictions that convert misdemeanors to felonies.

A. The Court Should Not Overrule *Almendarez-Torres*.

To prevail on this issue, Petitioner must first overcome the heavy weight of *stare decisis*. "Time and time again, this Court has recognized that the doctrine of *stare decisis* is of fundamental importance to the rule

of law." *Hilton v. S.C. Pub. Railways Comm'n*, 502 U.S. 197, 202 (1991) (citation omitted). *Stare decisis* "keep[s] the scale of justice even and steady." *June Med. Servs. L.L.C. v. Russo*, 591 U.S. 299, 345–46 (2020) (Roberts, C.J., concurring). It "promotes the even-enhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). "[I]t is not alone sufficient that we would decide a case differently now than we did then." *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 455 (2015).

None of the *stare decisis* factors support overruling *Almendarez-Torres*. Contrary to Petitioner's assertion, the continued application of *Almendarez-Torres* is supported by (1) the quality of its reasoning, (2) its consistency with related decisions, (3) legal developments since it was decided, and (4) reliance on the decision. Pet. at 30–31 (citing *Ramos v. Louisiana*, 140 S. Ct. 1390, 1405 (2020)).

Almendarez-Torres was based on sound legal principles applied to the unique features of recidivism statutes. Unlike other factors that affect the prescribed range of penalties following a conviction, the fact of a prior conviction has already been proved to a jury or a trial court beyond a reasonable doubt or admitted through a plea. Thus, the exception created for this fact does not implicate — much less offend — a defendant's constitutional right to a jury trial or due process. At bottom, as long as the prior proceedings were not constitutionally flawed, the defendant's Sixth Amendment rights were adequately protected in the prior conviction proceeding. *Jones v. United*

States, 526 U.S. 227, 249 (1999) ("[A] prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees."); *Lopez v. People*, 113 P.3d 713, 730 (Colo. 2005) (same).

In addition, unless the legislature has clearly prescribed the prior conviction as an element of the offense, the issue may be resolved by the trial court without offending the Sixth Amendment. This is in part because proving a defendant's prior conviction does not go to guilt or innocence, but only to identity. And this undertaking is largely administrative — the factfinder is asked to determine identity based on a correlation among birthdates, fingerprints, photographs, inmate or social security numbers, names, and aliases. But these facts are undisputed (as here), indisputable, or subject to documentary proof. *See, e.g.*, *Johnson v. United States*, 529 U.S. 694, 700–01 (2000) (following a conviction, subsequent proceedings on point do not implicate the same constitutional protections or evidentiary burdens); *United States v. Black Bear*, 542 F.3d 249, 253 (8th Cir. 2008) (recognizing that a prosecution's burden of establishing identity is reduced for separate proceedings following a conviction); *Rice v. State*, 801 S.W.2d 16, 17 (Tex. Crim. App. 1990) ("[U]nlike a trial on the merits a revocation hearing is administrative in nature, and the burden of proving a probationer's identity is not the same as the burden of proving the identity of an accused in a criminal trial." (citation omitted)); *Simmons v. State*, 332 So. 3d 1129, 1131 (Fla. Dist. Ct. App. 2022) (distinguishing aggravating facts associated with a prior conviction from aggravating facts

pertinent to the underlying offense or the nature of the offender).

Finally, exposing a jury to the fact of prior convictions — when not an element of the offense — presents unavoidable obstacles within a single trial. For instance, the jury would have to be charged that in deciding the fact of the prior conviction, it could not consider the bona fides of the prior convictions and, as in 404(b), that it may consider the priors only as to identity, and for no other purpose. Yet many cases hold that mere mention of a prior conviction — as opposed to an uncharged act — is at best prejudicial and may risk a mistrial. *See, e.g.*, *Old Chief,* 519 U.S. at 185 ("[T]here can be no question that evidence of the name or nature of the prior offense generally carries a risk of unfair prejudice to the defendant."); *Spencer v. Texas* 385 U.S. 554, 560–63 (1967) (recognizing that evidence of prior crimes "is generally recognized to have potentiality for prejudice"); *Jackson,* 824 F.2d at 25 (recognizing the "inherently prejudicial nature of this kind of evidence" and the federal government's "strong policy of avoiding the introduction of this potentially prejudicial evidence in criminal trials"); *People v. Moore*, 701 P.2d 1249, 1252 (Colo. App. 1985) ("Improper reference to a defendant's prior conviction or imprisonment during trial, notwithstanding a cautionary instruction, requires a mistrial."); *see also Salas v. People*, 177 Colo. 264, 266, 493 P.2d 1356, 1357 (1972) (disclosing other crimes results in a "denial of justice," and a cautionary instruction may only compound this effect).

These rationales for the rule of *Almendarez-Torres* continue today. While Petitioner asserts that this

Court's line of cases following *Apprendi* supports eroding the prior conviction exception, the opposite is true. The importance of these principles supporting the continued existence has been acknowledged by this Court. Despite having many opportunities to narrow or abandon it, this Court has continued to adhere to *Almendarez-Torres'*s narrow exception time and again. *Apprendi*, 530 U.S. at 490; *see, e.g., United States v. Haymond*, 139 S. Ct. 2369, 2377 n.3 (2019) (plurality opinion); *Mathis v. United States*, 579 U.S. 500, 511 (2016); *Descamps v. United States*, 570 U.S. 254, 269 (2013); *Alleyne v. United States*, 570 U.S. 99, 111, n.1 (2013); *Southern Union Co. v. United States*, 567 U.S. 343, 358–60 (2012); *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 567 n.3 (2010); *James v. United States*, 550 U.S. 192, 214 n.8 (2007), *overruled on other grounds by Johnson v. United States*, 576 U.S. 591 (2015); *Cunningham v. California*, 549 U.S. 270, 274–75 (2007); *United States v. Booker*, 543 U.S. 220, 244 (2005); *Blakely v. Washington*, 542 U.S. 296, 301–02 (2004).

Finally, and perhaps most importantly, the reliance interests on *Almendarez-Torres* are weighty, and overruling it would create a host of intractable problems regarding the admissibility of evidence of prior crimes for criminal defendants, courts, and prosecutors. Numerous states have carefully designed procedures for handling the proof of prior convictions for habitual offenders, all of which would be upended if *Almendarez-Torres* were overruled.

If all recidivist provisions are to be treated as creating additional elements of the charged offenses, prosecutors would need to introduce such evidence to

the jury even over the defendant's objection. *See*, *e.g.*, *Roswell*, 196 P.3d at 710. Under such a framework, evidence of a prior act — and the corresponding concerns of prejudice — would not only be fair game in a jury trial, but also a necessary component of the prosecution's case-in-chief. *See, e.g.*, *United States v. Jacobs*, 44 F.3d 1219, 1221–23 (3d Cir. 1995).

Whether such proceedings would be subject to bifurcation is an uncertain question but is certain to be hotly litigated. *People v. Kembel*, 2023 CO 5, ¶ 4 (addressing whether a jury trial should be bifurcated when the legislature intended a prior conviction to be an element of the underlying offense); *People v. Fullerton*, 525 P.2d 1166, 1168 (Colo. 1974) (same); *see also Roswell*, 196 P.3d at 710 (citing *Spencer*, 385 U.S. at 565–66) (same). Bifurcating the elements of an offense into two separate jury trials, would change the nature of the crime charged. *United States v. Barker*, 1 F.3d 957, 959 (9th Cir. 1993). Removing an element during the case-in-chief would render the jurors "no more than factfinders," denying them their greater role as representatives of the community's conscience. *United States v. Gilliam*, 994 F.2d 97, 101 (2d Cir. 1993). And doing so would also strain judicial economy as well as jurors' patience by requiring duplicative proceedings. *Cf. United States v. Dean*, 76 F.3d 329, 332 (10th Cir. 1996).

In sum, there are no compelling reasons to stray from *stare decisis* — indeed, doing so will only throw into chaos statutory schemes and criminal procedures that are working just fine.

B. The Court Should Not Create a New Exception for Misdemeanor-to-Felony Recidivist Provisions.

For many of the same reasons that the Court should preserve *Almendarez-Torres*, it must also reject Petitioner's attempt to carve out a substantial exception to the prior conviction exception. There is no dispute that significant collateral consequences flow from elevating a charge from misdemeanor to felony. But these consequences do not justify — much less require — a carve out to the well-founded holdings of *Almendarez-Torres* and *Apprendi*.

First, as the Colorado Supreme Court recognized, the plain language of *Almendarez-Torres* and *Apprendi* does not provide for any exception just because a prior conviction converts a misdemeanor to a felony. Nor is there a logical reason to do so. Although a felony conviction carries certain significant collateral consequences, these consequences are not consistently or categorically more serious or important than the consequences of other sentencing enhancements.

For example, in *Almendarez-Torres*, this Court ruled that a sentence enhancement which increased a defendant's potential term of confinement in prison from *two years to twenty years* based solely on the defendant's prior convictions need not be submitted to the jury. 523 U.S. at 226–27. Since then, other courts have applied this reasoning to instances where a defendant's term of confinement was enhanced to a sentence of life in prison. *See, e.g.*, *United States v. Ceballos*, 302 F.3d 679, 696 (7th Cir. 2002); *United States v. Boone*, 279 F.3d 163, 186, n.16 (3d Cir. 2002); *United States v. Phipps*, 259 F.3d 961, 962–63 (8th

Cir. 2001). Thus, while enhancing a charge from a misdemeanor to a felony may pose consequences involving employment, deportation, voting, and gun possession privileges, Petitioner does not explain — nor could she — why these collateral consequences should be afforded greater weight than the complete loss of freedom — sometimes for life — that was at issue in *Almendarez-Torres* and its progeny.

Unsurprisingly, as discussed below, the majority of jurisdictions that have addressed this issue have rejected the invitation to create an exception for prior convictions that elevate misdemeanors to families. *See, e.g.*, *People v. Braman*, 765 N.E.2d 500, 502–04 (Ill. App. Ct. 2002) (affirming trial court's enhancement of DUI conviction from misdemeanor to felony even though defendant's prior convictions were not submitted to the jury); *State v. Kendall*, 58 P.3d 660, 667–68 (Kan. 2002) (rejecting argument that defendant's "two prior DUI convictions must be proven to a jury beyond a reasonable doubt before that fact can be used to change the classification of [the defendant's] crime from a misdemeanor to a felony"); *State v. Pike*, 162 S.W.3d 464, 470 (Mo. 2005) (holding DUI enhancement from a misdemeanor to a felony based on a prior conviction did not constitute a new offense); *State v. LeBaron*, 808 A.2d 541, 543–45 (N.H. 2002) (holding prior convictions "need not have been … proved to the jury beyond a reasonable doubt" even though they increased defendant's sentence from a misdemeanor to a felony).

In sum, there is no principled basis to carve out misdemeanor-to-felony recidivist provisions. And

such a carve-out would implicate the same problems as overturning *Almendarez-Torres* in its entirety.

III. There is No Significant Circuit Split for the Court to Resolve.

Petitioner contends there is a "deep" split among federal and state courts on the question presented. Pet. 11. But that split is — at best — only six-to-five, and Petitioner overstates not only its magnitude but also the strength of the lower courts' reasoning. Only two circuits have addressed the prior conviction exception in context of elevating a misdemeanor to a felony (one of which — the Ninth — has taken inconsistent positions). The handful of states Petitioner cites to support her position have not even directly confronted the issue. By contrast, the states that have directly confronted the issue have formed a clear consensus in support of Respondent's position.

A. Petitioner Relies on Cases that Only Tangentially Address the Issue.

The Petitioner's view finds support in only one circuit and two states. *See United States v. Rodriguez-Gonzales*, 358 F.3d 1156, 1160 (9th Cir. 2004); *State v. Roswell*, 196 P.3d 705 (Wash. 2008); *State v. Mann*, 876 N.W.2d 710 (N.D. 2016), *cert. granted, judgment vacated on other grounds*, 580 U.S. 801 (2016). But neither *Rodriguez-Gonzales* nor *Roswell* provide as much support as Petitioner asserts.

While *Rodriguez-Gonzalez* held that the fact of a prior conviction must be submitted to the jury and proved beyond a reasonable doubt, that opinion is an anomaly. Both before and after *Rodriguez-Gonzales* was announced, different panels of the Ninth Circuit reached the opposite conclusion. In *United States v.*

Corona-Sanchez, 291 F.3d 1201, 1208–11 (9th Cir. 2002) (en banc) *superseded on other grounds by* U.S.S.G. § 2L1.2 cmt. n. 4 (2002), the court determined that evidence of recidivism need not be treated as an element of an offense. And in *United States v. McCaney*, 117 Fed. App'x. 704, 709–10 (9th Cir. 2006), the court determined that where prior convictions served to increase the sentencing range from twenty years in prison to a mandatory minimum term of life imprisonment, the prior convictions were sentencing factors that did not need to be proved to the jury. Thus, it is unclear whether the Ninth Circuit supports Petitioner's position at all.

In *Roswell*, upon which Petitioner relies heavily, it was the defendant who argued *against* having the jury determine his prior convictions. 196 P.3d at 707–09. There, the defendant was charged with multiple counts of child molestation and communication with a minor for immoral purposes. *Id.* at 706. The latter charge is categorized as a gross misdemeanor, *see* WASH. REV. CODE § 9.68A.090(1); but where the defendant has a prior conviction for a felony sex offense, communication with a minor for immoral purposes becomes a felony offense. *Id.* The defendant in *Roswell* argued against the result Petitioner seeks here, primarily because of the dangers inherent in requiring the jury to hear evidence of his prior convictions. 196 P.3d at 707–09. More specifically, he argued that evidence of prior convictions was "both highly prejudicial propensity evidence and irrelevant" and sought to bifurcate the trial so that the judge would decide the criminal history element. *Id.* at 706, 709. Although Washington's high court determined that a prior conviction that elevates an offense from a misdemeanor

to a felony "is an essential element that must be proved beyond a reasonable doubt," *id.* at 707, the defendant's arguments against that outcome illustrate the practical necessity of the prior conviction exception.

The other authority upon which Petitioner relies is off-point and unpersuasive. The high courts in Florida and Ohio do not even address the questions presented in this case.

Florida: In *State v. Finelli*, 780 So.2d 31 (Fla. 2001), the court did not address — let alone analyze — the question presented here. There, the defendant was not charged with a misdemeanor, the conviction of which would have transformed her offense into a felony. She was instead "charged by information with felony driving while under the influence," which is "a completely separate offense from misdemeanor DUI[.]" *Id.* at 32–33; *see also* FLA. STAT. § 316.193(2)(b) (1997). The court recognized that "the requirement of three prior misdemeanor DUI offenses is considered an element of felony DUI." *Finelli*, 780 So. 2d at 33. The issue on appeal was not whether a jury must determine a prior conviction when it converts a misdemeanor to a felony, but whether a prior conviction that is an element of the current charge must be final when that charge is tried (it need not). *Id.* at 33–34.

Similarly, in *Simmons*, 332 So.3d at 1131, the court was not called upon to answer the question presented here. The defendant in *Simmons* raised a constitutional challenge to a state sentencing statute which mandates enhanced sentencing for a defendant

who commits a new offense within three years of release from prison or jail. *Id.*; *see also* FLA. STAT. § 775.082(9) (2022). Because "establishing the date of release from prison is simply a ministerial act," the appellate court determined that no jury determination was required. In so holding, Florida's intermediate appellate court noted that where a prior conviction *is* an element of the offense, the jury must find that element. *Simmons*, 332 So.3d at 1131. But the court also recognized that "the instant case [did] not involve th[at] scenario." *Id.* Like *Finelli*, *Simmons* also failed to address or analyze the question presented here.

Ohio: In *State v. Brooke*, 863 N.E.2d 1024, 1026 (Ohio 2007), the court did not address or analyze whether the jury must find the fact of a prior conviction. In that case, the defendant was "indicted for two DUI offenses … that are ordinarily misdemeanors." But because the indictment specified the defendant had three prior misdemeanor convictions, "[b]oth counts were charged as fourth-degree felonies." *Id.* The defendant did not dispute the existence of the prior convictions but collaterally attacked them on the grounds that she was not represented by counsel when they were obtained. *Id.* at 1027–28. Although the court acknowledged that "the three earlier convictions are elements of [the defendant's] fourth-degree felony [and] must be proved beyond a reasonable doubt," *id.* at 1027, the resolution of the case did not turn on that pronouncement. Instead, it rested on the validity of the defendant's written waivers of the right to counsel in the three prior cases. *Id.* at 1028–31. Thus, like Florida, Ohio provides no analytical support for Petitioner's position.

B. A Consensus Exists, and the Colorado Supreme Court Followed It.

Every other state and federal court that has addressed this issue to date has rejected the position Petitioner espouses, with varying degrees of analysis. *See United States v. McAtee*, 538 Fed. App'x 414, 422 (5th Cir. 2013); *Talley v. State*, 841 A.2d 308 (Del. 2003); *State v. Schall*, 337 P.3d 647, 653 (Idaho 2014); *Braman*, 765 N.E.2d at 503–04; *Kendall*, 58 P.3d at 667–68; *State v. Jefferson,* 26 So.3d 112 (La. 2009); *Pike*, 162 S.W.3d at 470; *LeBaron*, 808 A.2d at 545; *State v. Palmer*, 189 P.3d 69, 76–77 (Utah Ct. App. 2008); *see also Almendarez-Torres*, 523 U.S. at 242.

In *McAtee*, the defendant argued for the first time on appeal that certain sentencing statutes were unconstitutional because they did not require the fact of a prior conviction to be submitted to the jury where the prior conviction transformed a misdemeanor into a felony. 538 Fed. App'x at 422. The Fifth Circuit held, on plain error review, that because the defendant "could cite no post-*Apprendi* case in which this Court held that the prior conviction exception does not apply where a prior conviction transforms the charged offense from a misdemeanor to a felony," he failed to carry his burden of showing any error that was clear or obvious. *Id.* Removing any doubt, the Fifth Circuit added that "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.*

And in *Jefferson*, the Louisiana Supreme Court engaged in a robust analysis of *Almendarez-Torrez* and

its progeny in concluding that a judgment of criminality which the Sixth and Fourteenth Amendments deem fair and reliable enough, when rendered, to impose criminal penalties upon a defendant is constitutionally adequate for later use to establish the defendant's recidivism. 26 So.2d at 120. The court reasoned that *Apprendi* set limits on judicial factfinding but that "[a] judge has to find no more additional facts when the defendant's prior conviction is for a misdemeanor than when it is for a felony." *Id.*

Similarly, Delaware, Idaho, Illinois, Kansas, Missouri, New Hampshire, and Utah all relied on the plain language of the prior conviction exception in rejecting arguments that the government was required to prove beyond a reasonable doubt prior convictions which elevated a misdemeanor to a felony. *See Talley*, 841 A.2d at 308; *Schall*, 337 P.3d at 653; *Braman*, 765 N.E.2d at 503–04; *Kendall*, 58 P.3d at 667–68; *Pike*, 162 S.W.3d at 470; *LeBaron*, 808 A.2d at 545; *Palmer*, 189 P.3d at 76–77. Like Colorado, none of those states extended *Apprendi*'s prior conviction carveout; rather, they merely found it applied. *See* App. 28a. Thus, a consensus has already formed in favor of Colorado's position.

As demonstrated above, this issue has arisen infrequently nationwide and the question presented does not cry out for this Court's intervention. Among the courts that have considered misdemeanor-to-felony recidivist provisions, the overwhelming majority have not created any exception for them. Thus, there is no significant circuit split for this Court to resolve and the petition should be denied.

IV. This Case is a Poor Vehicle for Deciding the Question Presented.

Finally, the procedural concerns that could otherwise bolster Petitioner's position were not in play here because this case was treated as a felony case from its inception. *See* App. 26a–27a. The prosecution provided notice in the complaint that it intended to rely on Petitioner's prior cruelty-to-animals conviction to transform any conviction on the count charged from a misdemeanor into a felony and to enhance her sentence. App. 26a–27a. And the case never veered off the felony track.

These factors were important to the Colorado Supreme Court's holding:

> We hold that where, as here, a cruelty-to-animals (second or subsequent offense) case (1) includes notice in the charging document of the prior conviction for cruelty to animals and (2) is treated as a felony throughout the proceedings — including in terms of its prosecution in district court (not county court), the right to a preliminary hearing (if eligible), the number of peremptory challenges, and the number of jurors — the Sixth Amendment doesn't require that the misdemeanor → felony transforming fact in subsection (2)(b)(I) to be proved to a jury beyond a reasonable doubt.

See App. 4a, 27a. Because the procedural concerns Petitioner raises did not arise here, this case does not cleanly present the question and is not a good vehicle to resolve it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 2, 2024