No. 24-_____

IN THE
Supreme Court of the United States

BRENNARIS MARQUIS JOHNSON,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

On Petition for a Writ of Certiorari
to the Court of Appeals of Washington

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Sixth and Fourteenth Amendments require a jury to find beyond a reasonable doubt that one or more aggravating facts amount to "substantial and compelling reasons" for an upward departure from the presumptive range, as is necessary to impose an enhanced sentence under several states' mandatory guidelines.

STATEMENT OF RELATED PROCEEDINGS

Superior Court for Snohomish County, Washington: *State of Washington v. Brennaris Marquis Johnson*, No. 21-1-00311-31 (February 7, 2022) (Judgment and Sentence)

Court of Appeals of the State of Washington: *State of Washington v. Brennaris Marquis Johnson*, No. 83738-9-I (January 2, 2024) (opinion affirming judgment and sentence)

Supreme Court of the State of Washington: *State of Washington v. Brennaris Marquis Johnson*, No. 102772-9 (May 8, 2024) (order denying petition for review)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Brennaris Johnson respectfully petitions this Court for a writ of certiorari to review the decision of the Washington Court of Appeals.

OPINIONS AND ORDERS BELOW

The opinion of the Washington Court of Appeals is reported at 540 P.3d 831 (Wash. Ct. App. 2024). App. 1a–31a. The order of the Washington Supreme Court denying review is reported at 547 P.3d 899 (Wash. 2024). App. 32a. The Snohomish County Superior Court's Judgment and Sentence and its Findings of Fact and Conclusions of Law for an Exceptional Sentence appear in the Appendix at pages 34a–59a.

JURISDICTION

The judgment of the Washington Court of Appeals was entered on October 16, 2023. App. 60a. The Washington Court of Appeals denied Mr. Johnson's motion for reconsideration, withdrew its opinion, and filed a substitute opinion on January 2, 2024. App. 61a. The Washington Supreme Court denied review on May 8, 2024. App. 32a. On July 30, 2024, the Circuit Justice extended the time within which to file a petition for a writ of certiorari to and including October 5, 2024. Sup. Ct. No. 24A100. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States 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 United States Constitution, section 1, provides, in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

Relevant provisions of the Washington Revised Code are reproduced at App. 64a–77a.

INTRODUCTION

Washington and many other states require trial courts to follow mandatory sentencing guidelines when determining punishment for crimes. Based on the severity of the crime and, in most of these states, the convicted person's criminal history, the trial court selects an appropriate sentence from a predetermined range. The court can depart upward from the presumptive range based on findings that some unique feature of the offense or the offender warrants an enhanced sentence.

The sentencing statutes in each of these states initially called on the judge, not the jury, to find the threshold facts authorizing the court to depart upward. In particular, Washington and three other states required the judge to find "substantial and compelling reasons" to impose a sentence above the presumptive range. Then, in *Blakely v. Washington*, 542 U.S. 296 (2004), this Court held that any fact necessary to allow the court to impose a sentence

above the mandatory guidelines range must be proven to a jury beyond a reasonable doubt.

Even after twenty years, these states still have not brought their sentencing schemes in full compliance with *Blakely*. Washington and three other states continue to allow courts to impose a sentence above the presumptive range based on findings by the judge—not the jury—that there are "substantial and compelling reasons" to do so. Even where the jury finds one or more aggravating facts beyond a reasonable doubt, the trial court still must go on to make the independent finding that these facts are compelling enough to distinguish the offense in question from the typical offense the legislature or sentencing commission had in mind. At least two other states require similar findings.

The right to a jury trial is among the oldest checks against executive and judicial overreach in the Anglo-American tradition and a critical access point for civic participation in the administration of justice. The Sixth Amendment permits no judicial encroachment on the jury's traditional role in finding the facts necessary to authorize punishment. This Court should grant Brennaris Johnson's petition and hold that conditioning a trial court's discretion to sentence above the guidelines range on a judge-made finding of "substantial and compelling reasons" violates the right to a jury trial.

STATEMENT OF THE CASE

A. Legal Framework

1. Washington law requires trial courts to impose sentences for felony offenses according to mandatory guidelines. First, the court calculates an "offender score" based on the number and type of prior and other current convictions. Wash. Rev. Code § 9.94A.525. Second, the court looks up the offense's "seriousness level." *Id.* §§ 9.94A.515, 9.94A.520. Finally, the court chooses a term of confinement from within the "standard sentence range" corresponding to the seriousness level and offender score. *Id.* §§ 9.94A.505(1), (2)(a)(i), 9.94A.510, 9.94A.530(1).

Washington's sentencing statute used to permit the trial court to impose a sentence above the standard range "if it f[ound], considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence." Former Wash. Rev. Code § 9.94A.120(2) (1984). A fact concerning the convicted person or the offense is "substantial and compelling" if it "distinguish[es] the crime in question from others in the same category." *State v. Grewe*, 813 P.2d 1238, 1240 (Wash. 1991). Formerly, if the trial court found such a fact, it could impose a sentence up to a maximum defined by statute for each of three classes of felony. *State v. Gore*, 21 P.3d 262, 276–77 (Wash. 2001), *overruled by State v. Hughes*, 110 P.3d 192 (Wash. 2005); Wash. Rev. Code § 9A.20.021(1).

In 2000, this Court declared that the Sixth and Fourteenth Amendments guarantee a convicted person the right to have any fact necessary to increase the punishment beyond the statutory maximum

proven to the jury beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). *Apprendi* occasioned no change in sentencing practice in Washington—courts reasoned the "statutory maximum" for Sixth Amendment purposes was the maximum for the pertinent felony class, not the top of the presumptive range from which the statute required the trial court to select a sentence. *Gore*, 21 P.3d at 276–77.

Then, in 2004, this Court held the "'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Blakely*, 542 U.S. at 303. In Washington, that meant the top of the standard sentence range. *Id.* at 303–04. Because the trial court could acquire authority to impose a greater sentence "only upon finding some additional fact," the sentencing scheme violated the Sixth Amendment. *Id.* at 305.

Following *Blakely*, the Washington Legislature altered the felony sentencing statute. Wash. Laws of 2005, ch. 68, §§ 2–4. The statute now provides an exclusive list of aggravating circumstances upon which a trial court may impose an upward exceptional sentence. Wash. Rev. Code § 9.94A.535(3). Before the court may rely on one or more of these facts, the prosecution must give notice of its intent to request an exceptional sentence based on them, and the jury must find the facts beyond a reasonable doubt. *Id.* § 9.94A.537(1), (3). The statute also includes a shorter list of aggravating circumstances premised on prior convictions that the judge may find. *Id.* § 9.94A.535(2).

However, neither the jury's finding of one or more aggravating facts nor the judge's finding of a fact premised on a prior conviction is alone enough to authorize a sentence above the standard range. The statute retains the provision that the court may not depart upward unless the judge "finds . . . that there are substantial and compelling reasons justifying an exceptional sentence." Wash. Rev. Code § 9.94A.535; *accord id.* § 9.94A.537(6). The court must enter "written findings of fact and conclusions of law" in support of the enhanced sentence. *Id.* § 9.94A.535.

2. Before and after *Blakely*, this Court has reaffirmed the *Apprendi* rule as to a variety of enhanced sentences. *See, e.g.*, *Erlinger v. United States*, 144 S. Ct. 1840, 1851–52 (2024) (federal recidivist sentencing); *Alleyne v. United States*, 570 U.S. 99, 112–13 (2013) (mandatory minimum sentences); *United States v. Booker*, 543 U.S. 220, 243–44 (2005) (federal sentencing guidelines); *Ring v. Arizona*, 536 U.S. 584, 609 (2002) (capital sentencing). This Court also held that the sole category of facts a judge may find without the jury—the fact of a prior conviction—consists only of the crime of conviction and its legal elements. *Erlinger*, 144 S. Ct. at 1853–54.

This Court clarified recently that *every* fact necessary to increase the maximum sentence must be found by a jury—if the sentencing scheme delegates to the judge any factual finding other than a prior conviction, it violates the Sixth Amendment. *Hurst v. Florida*, 577 U.S. 92, 98–99 (2016). Under the capital sentencing scheme at issue in *Hurst*, the jury's advisory sentence of death was not alone enough to authorize the trial court to impose a death sentence. *Id.* at 95–96. Instead, the judge could impose a death

sentence only after "weighing the aggravating and mitigating circumstances" and setting forth the judge's "findings." *Id.* a 96. Because the statute also premised the convicted person's eligibility for a death sentence on findings by the court, it violated the right to a jury trial. *Id.* at 99–100.

In combination, then, *Blakely*, *Hurst*, and the rest of the *Apprendi* line of cases require that every fact apart from a prior conviction necessary to authorize a sentence above a presumptive sentence range must be found by the jury—and *only* the jury—beyond a reasonable doubt. Any requirement that the trial court independently find additional facts violates the Sixth Amendment.

B. Proceedings Below

1. The government charged Mr. Johnson with second-degree assault and violating a no-contact order. App. 4a. Second-degree assault is a class B felony with a statutory ceiling of ten years' imprisonment. Wash. Rev. Code §§ 9A.36.021(2)(a); 9A.20.021(1)(b). As charged in this case, a violation of a no-contact order is a class C felony with a maximum penalty of five years in prison if the accused person was twice previously convicted of similar violations. Wash. Rev. Code §§ 7.105.450(1)(a), (5), 9A.20.021(c). The jury found Mr. Johnson guilty of both offenses. App. 5a.

As to the assault count, the jury found true the statutory aggravating fact that Mr. Johnson committed the offense "shortly after being released from incarceration." App. 58a–59a; Wash. Rev. Code § 9.94A.535(3)(t).

Based on an offender score of 11 and a seriousness level of IV, the standard sentence range Mr. Johnson faced for the second-degree assault conviction was 63 to 84 months. App. 37a. The prosecution requested an upward exceptional sentence of 120 months, or ten years. App. 38a. The standard range for the violation of a no-contact order was 60 months, or five years, the statutory maximum. App. 37a. The government requested that the sentences for both counts run consecutively. App. 38a.

The trial court imposed an exceptional sentence of 108 months on the second-degree assault count—24 months above the high end of the standard range. App. 39a. As the government requested, the court ordered this term to run consecutively with the five-year term for the count of violating a no-contact order. App. 39a.

In its findings in support of the exceptional sentence, the trial court noted three aggravating facts. First, it noted the jury's finding of "rapid recidivism." App. 56a. Second, it noted that Mr. Johnson had three prior domestic violence misdemeanor convictions that did not count toward his offender score, and concluded a standard-range sentence would be "clearly too lenient" in light of these unscored offenses. App. 56a; *see* Wash. Rev. Code § 9.94A.535(2)(b). Finally, the court determined a standard-range sentence would result in the no-contact order violation going "unpunished" because, even without it, Mr. Johnson's offender score would be 9 or higher. App. 56a; *see* Wash. Rev. Code § 9.94A.535(2)(c), 9.94A.510 (offender score axis maxes out at "9 or more").

Under a heading titled "Conclusions of Law," the court wrote, "The court finds substantial and compelling reasons justify an exceptional sentence in this case." App. 57a.

2. Mr. Johnson appealed. He argued, and the government conceded, that the trial court erred in finding a standard-range sentence would be "clearly too lenient" when the jury's verdict does not reflect this fact. App. 26a. The Court of Appeals held the trial court would have imposed the same sentence based on either or both of the other two aggravating facts. App. 27a–28a. This holding is not at issue in this petition.[1]

Mr. Johnson also argued the trial court engaged in impermissible judicial fact-finding when it increased his sentence by two years based on its finding that the aggravating facts added up to "substantial and compelling reasons" for an exceptional sentence. App. 28a. He observed that, under the statute, the findings of aggravating circumstances were not enough on their own to authorize the trial court to depart upward. App. 28a. Instead, the trial court had to make the additional finding that these facts were substantial and compelling enough to warrant a sentence above the standard range established by the Legislature. App. 28a.

The Court of Appeals rejected this argument as well. According to the Court, whether a given aggravating fact is a substantial and compelling reason to

[1] Mr. Johnson also raised—and the state court of appeals rejected—arguments concerning his convictions, which are not at issue in this petition. App. 5a–23a.

depart from the standard range is a "legal, not factual, determination." App. 30a (emphasis omitted) (quoting *State v. Sage*, 407 P.3d 359, 371 (Wash. Ct. App. 2017)). Having labeled the "substantial and compelling" finding a legal determination, the Court held the judge may make the finding without violating Mr. Johnson's right to a jury trial. App. 30a–31a.

The Washington Supreme Court denied review. App. 32a.

REASONS FOR GRANTING THE PETITION

Both before and after *Blakely*, Washington's felony sentencing scheme has permitted trial courts to increase a person's sentence above the presumptive range only if the judge—not the jury—finds there are "substantial and compelling reasons" to do so. To be sure, Washington law now requires the jury to find one or more "aggravating circumstances" beyond a reasonable doubt, or the judge to find one of a handful of facts premised on prior convictions. But these findings, though necessary, are not sufficient. Because a trial court cannot acquire the authority to increase a person's sentence without finding additional facts, Washington's sentencing scheme continues to violate the Sixth Amendment.

Washington is not alone. At least five other states also condition the availability of an upward departure on judicial fact-finding, even after a jury has found one or more aggravating facts beyond a reasonable doubt. Of these, three require the same judge-found fact as Washington: "substantial and compelling reasons" for an enhanced sentence.

Only this Court can settle the important question these sentencing schemes raise. Sup. Ct. R. 10(c). Mr. Johnson's case is an ideal vehicle to do so because the issue is preserved, the Court of Appeals decided the issue on the merits, and the answer will have a concrete effect on Mr. Johnson's sentence. This Court should grant Mr. Johnson's petition.

A. Washington's sentencing scheme continues to violate the Sixth Amendment.

1. In *Blakely*, this Court struck down Washington's felony sentencing scheme because it permitted judges to increase the maximum potential sentence based on judge-found facts. 542 U.S. at 304–05. The statute allowed a court to sentence above the standard range if the judge found "substantial and compelling reasons justifying an exceptional sentence," and included a non-exclusive, "illustrative" list of aggravating facts. Former Wash. Rev. Code § 9.94A.535 (2004). Because Washington's sentencing scheme allowed a trial court to impose a sentence higher than the jury's verdict authorized, it violated the Sixth Amendment. *Blakely*, 542 U.S. at 305.

The Washington Legislature responded as follows. First, it changed the "illustrative," non-exclusive list of aggravating factors to an "exclusive list" of aggravating circumstances. Wash. Rev. Code § 9.94A.535(3); Wash. Laws of 2005, ch. 68, § 3. Second, it required that the government prove at least one of these facts to the jury beyond a reasonable doubt. Wash. Rev. Code § 9.94A.537(3); Wash. Laws of 2005, ch. 68, § 4. The Legislature retained a separate list of factors that a judge may find without a

jury, most of which are premised on prior convictions. Wash. Rev. Code § 9.94A.535(2).

Even after *Blakely*, however, Washington's sentencing statute does not yield all fact-finding to the jury. The statute still provides that a judge may not impose a sentence above the standard range, even where the jury found an aggravating fact beyond a reasonable doubt, unless the judge "*finds*, considering the purposes of this chapter, that the facts found are *substantial and compelling reasons* justifying an exceptional sentence." Wash. Rev. Code § 9.94A.537(6) (emphasis added). The purposes to which the statute refers include to "[e]nsure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history" and "commensurate with the punishment imposed on others committing similar offenses," as well as to "[p]rotect the public" and "[p]romote respect for the law by providing punishment which is just." Wash. Rev. Code § 9.94A.010(1)–(4).

In *Blakely*, this Court did not address the question whether, once an aggravating fact is found, the Sixth Amendment requires a jury to make the further finding that the fact is substantial and compelling. 542 U.S. at 305 n.8.

Hurst makes clear the answer is yes. That case concerned Florida's capital sentencing scheme, which required the trial court to hold an evidentiary hearing before a jury on the question of punishment for a capital offense. *Hurst*, 577 U.S. at 95. Without stating specific findings as to aggravating or mitigating circumstances, the jury rendered an "advisory sentence" of either death or life in prison. *Id.* at

95–96. Whatever the jury's recommendation, the judge went on to weigh the aggravating and mitigating facts and select one of the two sentences. 577 U.S. at 96. The scheme did not permit the judge to impose a death sentence without stating the judge's own findings supporting the sentence. *Id.*

Because the jury's verdict alone did not suffice to authorize a death sentence without additional, judge-made findings, Florida's capital sentencing scheme violated the Sixth Amendment. *Id.* at 99–100.

Hurst's holding applies equally to exceptional sentencing in Washington. Though the statute requires the jury to find one or more aggravating facts beyond a reasonable doubt, those findings alone do not authorize the trial court to depart above the standard range. Wash. Rev. Code § 9.94A.537(3). Instead, the judge must *also* find that those aggravating facts, in light of the purposes of the sentencing statute, are "substantial and compelling reasons" for an exceptional sentence. Wash. Rev. Code § 9.94A.537(6).

To be sure, Washington's scheme and the Florida scheme at issue in *Hurst* are not identical. The jury recommendation in *Hurst* was explicitly "advisory," and neither authorized nor required the judge to impose a death sentence. 577 U.S. at 95–96. In Washington, by contrast, the jury plays no role in selecting the sentence—it merely determines whether the government proved any alleged aggravating facts beyond a reasonable doubt. Wash. Rev. Code § 9.94A.537(1), (3).

These differences are of no moment because, as in *Hurst*, the jury's findings are not enough to authorize an enhanced sentence. The additional requirement that the judge find the aggravating facts are "substantial and compelling reasons" to depart upward violates the Sixth Amendment right to a jury trial.

2. Pre-*Blakely* Washington case law holds an aggravating fact amounts to "substantial and compelling reasons" if (1) the state legislature necessarily did not account for the fact when it set the standard range; and (2) the fact differentiates the crime from typical crimes in the same category. *Grewe*, 813 P.2d at 1240. The legislature obviated the first determination by enacting an exclusive list of potential aggravating facts. RCW 9.94A.535(3). The second determination remains—whether the crime the convicted person committed is more culpable than the typical offense to a degree warranting enhanced punishment.

Washington courts address the Sixth Amendment question by labeling the "substantial and compelling reasons" determination as something other than a factual finding. Once the jury finds the existence of aggravating facts, the Washington Court of Appeals has reasoned, it falls to the trial court "to make the *legal, not factual*, determination" that those facts "are sufficiently substantial and compelling to warrant an exceptional sentence." *Sage*, 407 P.3d at 371 (emphasis added). In Mr. Johnson's case, the Court of Appeals repeated this reasoning. App. 30a.

In concluding the "substantial and compelling reasons" determination is legal rather than factual, the Washington Court of Appeals did not analyze the demands of the Sixth Amendment. Instead, it cited Washington authority holding that, in the context of appellate review of an exceptional sentence, "whether a court's stated reasons are sufficiently substantial and compelling to support an exceptional sentence is a question of law." *Sage*, 407 P.3d at 708 n.80 (quoting *State v. Suleiman*, 143 P.3d 795, 800 n.3 (Wash. 2006)).

Contrary to the state court's decisions in *Sage* and in Mr. Johnson's case, the jury must find any factual proposition that increases the maximum sentence—"no matter how the State labels it." *Ring*, 536 U.S. at 602. Whether a given aggravating fact amounts to "substantial and compelling reasons" to depart from the standard range is a factual question to its core.

First, whether substantial and compelling reasons exist is a fact question subject to the Sixth Amendment because its effect is to increase the potential sentence. The question "is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's verdict?" *Apprendi*, 530 U.S. at 494. This rule flows from the understanding at the time of our nation's founding that "all the facts and circumstances which constitute the offence" would be alleged in an indictment, such that the accused could "predict with certainty" what punishment would follow should the jury find those contentions proven. *Id.* at 478–79 (quoting J. Archbold, Pleading and Evidence in Criminal Cases 44 (15th ed. 1862)).

After conviction, the judge's task was limited to imposing the sentence corresponding to the jury's verdict. *Id.* at 479–80.

Because the "effect" of Washington's sentencing statute is to restrain the trial court's sentencing discretion to the presumptive range unless the finding is made that substantial and compelling reasons exist, the Sixth Amendment requires the jury to make that finding. *Apprendi*, 530 U.S. at 494. Washington cannot define this consequence out of existence by fixing a label. *Id.* at 476.

Second, Washington's felony sentencing statute calls the determination a finding. The statute says that the court can impose a sentence "outside the standard sentence range" only "if it *finds*, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence." Wash. Rev. Code § 9.94A.535 (emphasis added). It goes on to specify that, even after the jury finds one or more aggravating facts, an exceptional sentence is not available unless the judge "*finds*" that, given the statute's purposes, those facts "are substantial and compelling reasons." Wash. Rev. Code § 9.94A.537(6) (emphasis added).

Washington courts ordinarily assume that an unambiguous act of the state legislature means what it says. *State v. J.P.*, 69 P.3d 318, 320 (Wash. 2003). Yet, when it comes to the implications of the Sixth Amendment, the state Court of Appeals dismisses the clear, repeated use of the word "finds"—rather than "concludes," "determines," or the like—as "imprecise." App. 30a.

The sentencing statute continues to require the trial court to enter "written findings of fact and conclusions of law" when it imposes an exceptional sentence. Wash. Rev. Code § 9.94A.535; *see State v. Friedlund*, 341 P.3d 280, 282 (Wash. 2015) (holding, post-*Blakely*, that written findings are "essential" to an exceptional sentence). If the court is not finding facts to justify an exceptional sentence, then there is no need to require the entry of written findings.

Third, even setting aside that the effect of the finding is to increase the maximum potential sentence, whether substantial and compelling reasons exist is the kind of question of "degree of criminal culpability" that the Sixth and Fourteenth Amendments require the jury to resolve beyond a reasonable doubt. *Apprendi*, 530 U.S. at 494–95. An accused person's right to proof beyond a reasonable doubt "is concerned not only with guilt or innocence in the abstract but also with the degree of criminal culpability." *Mullaney v. Wilbur*, 421 U.S. 684, 697–98 (1975). Just as the Constitution does not permit a state to shift to the accused the burden of disproving a greater degree of culpability, it also does not permit the judge to increase the maximum penalty by finding a greater degree of culpability than the jury's verdict supports. *Apprendi*, 530 U.S. at 494–95.

As explained, a finding that substantial and compelling reasons exist to depart upward is equivalent to a finding that the convicted person's act was more culpable than the typical offense to a degree that calls for an enhanced sentence. *Grewe*, 813 P.2d at 1240. That the court must consider the purposes of the statutory sentencing guidelines, including the goal of ensuring that punishment is "proportionate"

and "commensurate with the punishment imposed on others committing similar offenses," highlights that the determination consists of weighing relative culpability. Wash. Rev. Code §§ 9.94A.010(1), (3), 9.94A.535, 9.94A.537(6).

Washington courts know this. The state appellate courts have already determined that two statutory aggravating circumstances requiring the judge to weigh relative culpability are matters of fact for the jury to decide. *Hughes*, 110 P.3d at 202, *overruled on other grounds*, *Washington v. Recuenco*, 548 U.S. 212 (2006); *State v. Saltz*, 154 P.3d 282, 285 (Wash. Ct. App. 2007). Specifically, the courts held the jury must determine whether an offender score far above the maximum in the sentence grid or a large number of unscored misdemeanors made a standard-range sentence "clearly too lenient in light of the purpose of this chapter." *Hughes*, 110 P.3d at 201–02 (quoting former Wash. Rev. Code § 9.94A.535 (2)(i) (2004)); *Saltz*, 154 P.3d at 284–85 (quoting Wash. Rev. Code § 9.94A.535(2)(b)).

The same conclusion follows for the "substantial and compelling reasons" question. Because the determination concerns the degree of culpability, it belongs among the traditional propositions of fact the government must prove to the jury beyond a reasonable doubt. *Apprendi*, 530 U.S. at 494–95.

Washington's felony sentencing scheme predicates an increase in the maximum punishment on a judge-made finding, however Washington courts choose to label it. This arrangement violates the Sixth Amendment. *Hurst*, 577 U.S. at 99–100; *Blakely*, 542 U.S. at 304–05.

3. On their own, the jury's finding that Mr. Johnson was guilty of second-degree assault, its finding of the aggravating fact of rapid recidivism, and the court's finding Mr. Johnson's high offender score would cause a standard-range sentence to leave some crimes unpunished authorized only a sentence between 63 and 84 months for that conviction. *See* Wash. Rev. Code § 9.94A.510 (standard-range sentence grid), § 9.94A.515 (second-degree assault's seriousness level is IV), § 9.94A.535(2)(c), 3(t) (aggravating facts); App. 37a (Mr. Johnson's offender score is 11). To gain the authority to impose the 108-month sentence the trial court handed down on that count, the judge had to find the aggravating facts added up to "substantial and compelling reasons" for an exceptional sentence. Wash. Rev. Code §§ 9.94A.535, 9.94A.537(6). Because the jury's findings alone did not authorize the departure from the standard range, Mr. Johnson's sentence violates the Sixth Amendment.

B. Other states persist in enhancing sentences based on judge-made findings.

Washington is not the only state that has yet to bring its determinate sentencing scheme in full compliance with *Blakely* and *Hurst*. At least five other states' felony sentencing statutes also provide that a jury's finding of aggravating facts—or some other fact not subject to the right to a jury trial—does not alone authorize a sentence above what would otherwise be the maximum unless the judge makes some additional finding. In three of those states, that finding is the same as in Washington—that the aggravating facts the jury found amount to "substantial and compelling reasons" for an enhanced sentence.

It is far from the case, however, that *all* states with determinate sentencing schemes provide for enhanced sentences based on judicial fact finding. Statutes in at least five states make clear a jury's finding that one or more aggravating facts exist alone suffices to increase the maximum sentence the judge may impose. These states illustrate this Court's observation in *Blakely*—determinate sentencing itself is not unconstitutional, but the manner in which states implement it may or may not violate the Sixth Amendment.

1. Like Washington, Minnesota, Oregon, and Kansas enacted determinate sentencing laws allowing the trial court to impose a sentence above the presumptive range only if the judge finds "substantial and compelling reasons" to do so. Also like Washington, these states continue to allocate this factual question to the judge, even after a jury has found one or more aggravating facts beyond a reasonable doubt.

Minnesota requires trial courts to sentence persons convicted of felonies according to mandatory guidelines. *State v. Shattuck*, 704 N.W.2d 131, 140–41 (Minn. 2005); Minn. Stat. § 244.09, subd. 5. The court must impose a sentence within a presumptive range selected from a grid "unless there exist identifiable, substantial, and compelling circumstances to support a departure." Minn. Sent. Guidelines §§ 2.D.1, 4.A (2023). This threshold determination contains "two distinct requirements": a finding of aggravating facts "not reflected in the guilty verdict or guilty plea," and the court's "explanation . . . why those circumstances create a substantial and compelling reason to impose a sentence outside the

range on the grid." *State v. Rourke*, 773 N.W.2d 913, 919 (Minn. 2009).

Following *Blakely*, both the guidelines and Minnesota statute require a jury to find any alleged aggravating facts beyond a reasonable doubt. Minn. Stat. § 244.10 subd. 5; Minn. Sent. Guidelines § 2.D.1 cmt. 2.D.102. However, the question whether those facts are sufficiently "substantial and compelling" to authorize an enhanced sentence still belongs to the judge. *Rourke*, 773 N.W.2d at 920–21. Minnesota courts justify this adherence to a pre-*Blakely*, judicial fact-finding procedure by insisting any "additional fact" the jury finds alone suffices to allow an upward departure, and the judge's substantial and compelling finding is merely a "reason" why that fact justifies punishing the offense more harshly than its typical incarnation. *Id.*

This split between "fact" and "reason" is as artificial as that between "fact finding" and "legal determination" in Washington. As in Washington, the court cannot sentence above the presumptive range without finding the existence of substantial and compelling reasons. And the question concerns the degree of culpability—whether the particular facts of the convicted person's case elevate it to a higher category of culpability than the typical offense the commission had in mind when it developed the guidelines. Where the alleged aggravating factor is particular cruelty, for example, the trial court determines whether "the facts found by the jury made the defendant's offense more serious than that typically involved in the commission of the crime." *Rourke*, 773 N.W.2d at 921 n.8. That Minnesota statute requires the trial court to "make *written findings of*

fact as to the reasons for departure from the Sentencing Guidelines" further underscores that the court's inquiry is factual. Minn. Stat. § 244.10 subd. 2 (emphasis added).

Like Minnesota, Oregon law requires trial courts to impose sentences according to mandatory sentencing guidelines. Or. Rev. Stat. § 137.669. Oregon also centers its guidelines on a two-dimensional grid with axes representing the seriousness of the crime and the convicted person's criminal history. Or. Admin. R. 213-004-0001. The court may depart from the presumptive range only "if it finds there are substantial and compelling reasons justifying a deviation." Or. Rev. Stat. § 137.671(1). Administrative rules set forth a "nonexclusive list" of "aggravating factors" that "may be considered in determining whether substantial and compelling reasons for a departure exist." Or. Admin. R. 213-008-0002(1).

Though, after *Blakely*, Oregon's legislature enacted a statute requiring a jury to find any alleged "aggravating factor" beyond a reasonable doubt, Oregon law still requires the judge to find whether that factor is "a substantial and compelling reason" to impose a sentence higher than the sentence deemed appropriate for the typical version of the offense. *State v. Speedis*, 256 P.3d 1061, 1064 (Or. 2011). "There is a difference," Oregon courts reason, "between the determination by a jury of aggravating factors and the determination by the court of whether those facts provide substantial and compelling reasons to impose a sentence that exceeds the presumptive range." *State v. Upton*, 125 P.3d 713, 718 (Or. 2005). "Nothing in *Blakely* precludes" the judge from making this determination, in the courts' estimation. *Id.*

Finally, Kansas's sentencing statute, like Washington's, includes a grid of presumptive sentence ranges defined by the seriousness of the crime "and the offender's criminal history." *State v. Gould*, 23 P.3d 801, 811 (Kan. 2001); Kan. Stat. Ann. § 21-6804. The statute allows the trial court to impose a sentence above the presumptive range based on "substantial and compelling reasons to impose a departure sentence." Kan. Stat. Ann. § 21-6815(a).

After *Apprendi*, Kansas's legislature amended the statute to provide that "any fact that would increase the penalty for a crime beyond the statutory maximum, other than a prior conviction, shall be submitted to a jury and proved beyond a reasonable doubt." Kan. Stat. Ann. § 21-6815(b); *see Blakely*, 542 U.S. at 309–10 (noting this amendment). However, the statute also retains the pre-*Apprendi* provision that the judge cannot impose an upward departure "unless *the judge finds* substantial and compelling reasons" to do so. *Id.* § 21-6815(a); *see Gould*, 23 P.3d at 812 (quoting former statute). As in Washington, then, Kansas courts may not depart upward, even after the jury has found aggravating facts beyond a reasonable doubt, unless the judge makes an independent finding that those aggravating facts are substantial and compelling. *See State v. Brown*, 387 P.3d 835, 851 (Kan. 2017).

Kansas case law makes clear the "substantial and compelling" question is as factual in that state as it is in Washington. A fact is a "substantial" reason for departure if it is "something with substance and not ephemeral," and "compelling" if "the court is forced, *by the facts of a case*, to leave the status quo or go beyond what is ordinary." *State v. Jolly*, 342

P.3d 935, 943 (Kan. 2015) (quoting *State v. Seward*, 217 P.3d 443, 448 (2009). The threshold determination of whether the aggravating facts are sufficiently "substantial and compelling" turns on the facts of each case, *Brown*, 387 P.3d at 852–53, underscoring that it is a question of fact.

2. Though they do not use the phrase "substantial and compelling reasons," Colorado and New York persist in permitting a court to impose a sentence above what would otherwise be the maximum—even where the jury finds one or more aggravating facts beyond a reasonable doubt—only if the judge makes certain additional findings.

Colorado's sentencing statute provides the court must impose a "definite sentence" within a statutory range defined by the offense class. Colo. Rev. Stat § 18-1.3-401(1)(a)(V.5), (6). The court may not impose a sentence above (or below) this range "unless it concludes that extraordinary mitigating or aggravating circumstances are present." *Id.* § 18-1.3-401(6). Facts "extraordinary" enough to warrant a departure sentence include "unusual aspects of the defendant's character, past conduct, habits, health, [or] age, the events surrounding the crime, [a] pattern of conduct which indicates whether [the defendant] is a serious danger to society, past convictions, and [the] possibility of rehabilitation." *Lopez v. People*, 113 P.3d 713, 730–31 (Colo. 2005) (third alteration in original).

The Colorado Supreme Court held this scheme complies with *Blakely* as long as the aggravating facts on which the court relies are "*Blakely*-compliant"—meaning "facts admitted by the defendant,

found by the jury, or found by a judge when the defendant has consented to judicial fact-finding for sentencing purposes"—or "*Blakely*-exempt"—meaning facts pertaining to prior convictions. *Lopez*, 113 P.3d at 723, 731. Even where such facts are present, however, the threshold question whether those facts are "extraordinary" is committed to the court. *Id.* at 726 n.11.

In response to *Hurst*, the state court drew the "extraordinary" finding outside the scope of the Sixth Amendment in the same manner as the Washington court in *Sage*—by labeling the finding a "legal determination." *Mountjoy v. People*, 430 P.3d 389, 395 (Colo. 2018). This holding follows the court's earlier pronouncement that the finding "is a conclusion of law that remains within the discretion of the trial court." *Lopez*, 113 P.3d at 726 n.11. And it assigned the "legal determination" label notwithstanding that, except for "past convictions," each of the examples of what may make a fact "extraordinary" are plainly factual. *Id.* at 730–31.

Likewise, New York law premises an enhanced sentence on judicial fact-finding in some circumstances. New York's sentencing statute provides for "three increasingly harsh levels of sentencing" based on the convicted person's number of prior convictions. *Besser v. Walsh*, 601 F.3d 163, 169–70 (2d Cir.), *reversed sub nom. Portalatin v. Graham*, 624 F.3d 69 (2d Cir. 2010) (en banc). For a person with no prior convictions, the court imposes an indeterminate sentence whose minimum and maximum terms must fall within ranges set according to the offense's class. N.Y. Penal Law § 70.00. For a person with one prior felony conviction, based solely on the court's

determination the prior conviction exists, the court must select the sentence from an enhanced set of ranges. *Id.* § 70.06. For a person with *two* prior felony convictions—a so-called "persistent felony offender"—the court may impose any sentence authorized for "a class A-I felony," whatever the third offense's actual class. *Id.* § 70.10.[2]

However, that the convicted person has two prior felony convictions is not alone enough to authorize the enhanced sentence. The statute provides that the court may sentence "a persistent felony offender" as if the crime were a class A-I felony only if the court "is of the opinion that the history and character of the defendant and the nature and circumstances of his criminal conduct indicate that extended incarceration and life-time supervision will best serve the public interest." N.Y. Penal Law § 70.10(2).

New York's Court of Appeals has held the required judicial findings about "the 'nature and circumstances' of defendant's criminal conduct and defendant's 'history and character'" do not violate the Sixth Amendment. *People v. Quinones*, 906 N.E.2d 1033, 1041–42 (N.Y. 2009). According to the court, the fact of the convicted person's prior convictions alone makes the person "eligible to be sentenced as a persistent felony offender." *Id.* at 1041. The court's "qualitative judgment" about the person's "criminal

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[2] The statute's requirement that the prior conviction be sentenced "prior to the commission of the present felony" likely runs afoul of this Court's opinion in *Erlinger*, but it is not at issue here. N.Y. Penal Law § 70.10(1)(b)(ii); *see* 144 S. Ct. at 1851–52.

history and the circumstances surrounding a particular offense" merely guide the court's exercise of discretion in selecting a sentence within the enhanced range. *Id.* at 1041–42.

As the Second Circuit correctly reasoned in *Besser*, *Quinones* does not square with the statute's plain language. The persistent felony offender statute predicates an enhanced sentence not only on the existence of two prior convictions, but also on the court's "factual findings related to a defendant's criminal history, character, and nature of the criminal conduct." *Besser*, 601 F.3d at 186–87. Without this finding by the court, the court has no discretion to exercise within the enhanced range. *Id.* Unfortunately, a divided en banc Second Circuit reversed this straightforward conclusion, holding *Quinones* and other New York decisions were not unreasonable applications of clearly established federal law. *Portalatin*, 624 F.3d at 93.

3. As this Court predicted in *Blakely*, at least five states have enacted determinate sentencing schemes with provisions for upward departures that fully comply with the Sixth Amendment. Alaska, Arizona, California, Illinois, and New Mexico each authorize the trial court to impose a sentence above the presumptive term or range based only on a jury's finding of one or more aggravating facts, with no additional, judicial findings necessary. Alaska Stat. § 12.55.155(h); *see Frankson v. State*, 518 P.3d 743, 751 (Alaska 2022) (discussing statutory amendments in response to *Blakely*); Ariz. Rev. Stat. § 13-702(C); Cal. Penal Code § 1170(b)(1)–(3); Ill. Comp.

Stat. 5/111-3(c-5), 5/5-8-2(a); N.M. Stat. §§ 31-18-15, 31-18-15.1(A).[3]

Whether a person convicted of a crime receives the full benefit of the Sixth Amendment right to a jury trial should not vary according to state lines. Only this Court can steer those states that persist in resisting *Blakely*'s full implications onto a course that complies with the Sixth Amendment. This Court should grant Mr. Johnson's petition and hold that no state may premise an increase in the maximum sentence on a finding by the judge—not the jury—that the circumstances of the crime were sufficiently "substantial and compelling" to warrant enhanced punishment.

C. This case is an ideal vehicle to address the critical question presented.

Mr. Johnson's case presents an excellent opportunity to correct several states' continuing deviation from the Sixth Amendment's requirements. Mr. Johnson preserved the issue in the Washington courts, whose rules of procedure allow a person to raise a "manifest error affecting a constitutional right" for the first time on appeal. Wash. R. App. P. 2.5(a)(3). Moreover, Washington law recognizes convicted persons may challenge unlawful sentences for

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[3] Some other states responded by following this Court's example in *Booker* and severing the provision that made their sentencing guidelines mandatory. *State v. Foster*, 845 N.E.2d 470, 498 (Ohio 2006), *abrogated on other grounds*, *Oregon v. Ice*, 555 U.S. 160 (2009); *State v. Natale*, 878 A.2d 724, 741 (N.J. 2005); *see Anglemyer v. State*, 868 N.E.2d 482, 487–88 (Ind. 2007) (noting Indiana's legislature excised mandatory presumptive terms following *Blakely*).

the first time on appeal. *State v. Ford*, 973 P.2d 452, 454 (Wash. 1999). The government appropriately has never suggested otherwise, and the Washington Court of Appeals decided the issue on the merits. App. 28a–31a.

The state court's published opinion cleanly presents the issue. The court considered Mr. Johnson's argument that, under Washington's felony sentencing scheme, the jury's finding that one or more aggravating facts exist is not enough to authorize an exceptional sentence—the judge must go on to find those facts are substantial and compelling enough to warrant a sentence higher than the sentence the typical version of the offense would merit. App. 28a And it obscured this arrangement from *Blakely*'s view by affixing the artificial label of "legal . . . determination" to the substantial and compelling question. App. 29a–30a (emphasis omitted) (quoting *Sage*, 407 P.3d at 371).

The question is also outcome-determinative in Mr. Johnson's case. The state Court of Appeals upheld Mr. Johnson's exceptional sentence for second-degree assault based on two aggravating facts—one found by the jury and one found by the court. App. 25a–26a. However, these aggravating facts alone did not justify the sentence without the court's additional finding that the facts were "substantial and compelling" enough to "justify an exceptional sentence in this case." App. 57a. Because the jury's finding of rapid recidivism and Mr. Johnson's high offender score alone did not permit an upward departure, the court was authorized only to impose a sentence within the standard range of 63 to 84 months for second-degree assault, at least two years shorter

than the 108-month term it imposed in fact. App. 37a.

Relatedly, though the 168-month total term of Mr. Johnson's confinement resulted from the 108-month term he received on the second-degree assault charge and the 60-month term for violating a no-contact order, the total would be at least two years shorter if not for the exceptional sentence on the assault count. *See Oregon v. Ice*, 555 U.S. 160, 168 (2009) (facts permitting imposition of consecutive sentences not subject to the Sixth Amendment).

It is far from obvious that the aggravating facts identified in Mr. Johnson's case place his crime so far outside the typical offense that an enhanced sentence is justified. Mr. Johnson's offender score for the assault conviction was eleven, only two points above the highest score in the standard-range sentence grid. App. 37a. A jury could reasonably find that a high-end, seven-year sentence would not result in the no-contact order violation "going unpunished," especially where the trial court imposed a consecutive five-year term on that count. App. 39a; Wash. Rev. Code § 9.94A.535(2)(c). Such a jury could also find that, though the offense occurred several days after the local jail released Mr. Johnson, he did not commit it so soon after his release that an enhanced sentence was warranted. App. 2a; Wash. Rev. Code § 9.94A.535(3)(t). In any event, as a matter of independent state law, a sentence beyond what the jury's verdict authorizes is never harmless error in Washington. *State v. Williams-Walker*, 225 P.3d 913, 919 (Wash. 2010); *State v. Recuenco*, 180 P.3d 1276, 1282–83 (Wash. 2008).

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The right to a jury trial is "a fundamental reservation of power" to the people, every bit as critical to the health of our democratic republic as the right to vote. *Blakely*, 542 U.S. at 305–06. The jury serves as a check on the executive branch by limiting "the risk of prosecutorial overreach and misconduct," and it checks the judicial branch by ensuring sentences are based on "laws adopted by the people's elected representatives and facts found by members of the community." *Erlinger*, 144 S. Ct. at 1850. A state sentencing statute that withholds from the jury *some* of the facts needed to increase the maximum punishment is as much an affront to the jury's role as one that withholds all necessary facts.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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