

No.

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**In the Supreme Court of the United States**

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ANDREW BURGESS GREGG,

*Petitioner,*

v.

COLORADO,

*Respondent.*

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

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**PETITION FOR A WRIT OF CERTIORARI**

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**QUESTION PRESENTED**

In *Monge v. California*, 524 U.S. 721, 728 (1998), the Court addressed the nature of an “offense” under the Fifth Amendment’s Double Jeopardy Clause, in the context of a prosecution that sought to apply a recidivism enhancement to the defendant’s sentence. There, in a five-to-four decision, the Court rejected “an absolute rule that a[] [sentence] enhancement constitutes an element of the offense any time that it increases the maximum sentence.” *Id.* at 729. But two years later, in a decision that followed the approach advocated by the *Monge* dissent, the Court held in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), 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.” Such facts, the Court later explained, “are elements of the crime.” *Alleyne v. United States*, 570 U.S. 99, 111 (2013). In subsequent years, the Court has overruled at least four decisions because they were inconsistent with *Apprendi*.

In this case, the Colorado Supreme Court reasoned that *Monge* remains good law, holding that “double jeopardy protections do not apply to habitual criminal sentencing proceedings because those proceedings ‘do not place a defendant in jeopardy for an ‘offense.’” App., *infra*, 18a (quoting *Monge*, 524 U.S. at 728).

The question presented is:

Whether *Monge* should be overruled.

**PARTIES TO THE PROCEEDING**

The parties in the Colorado Supreme Court are identified in the case caption.

**STATEMENT OF RELATED PROCEEDINGS**

There are no related proceedings in state or federal courts, or in this Court.

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## PETITION FOR A WRIT OF CERTIORARI

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Petitioner Andrew Burgess Gregg respectfully petitions for a writ of certiorari to review the judgment of the Colorado Supreme Court in this case.

### OPINIONS BELOW

The opinion of the Colorado Supreme Court (App., *infra*, 2a-34a) is reported at 576 P.3d 725 (Co. 2025). The opinion of the Colorado District Court (App., *infra*, 35a-46a) is not reported.

### JURISDICTION

The judgment of the Colorado Supreme Court was entered on September 29, 2025. On December 16, 2025, Justice Gorsuch extended the time within which to file a petition for a writ of certiorari to January 27, 2026. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

### CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the U.S. Constitution provides in relevant part:

[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb[.]

### STATEMENT

“[T]he Fifth and Sixth Amendments sought to ensure that a judge's power to punish would ‘deriv[e] wholly’ from, and remain always ‘control[led]’ by, the jury and its verdict.” *Erlinger v. United States*, 602 U.S. 821, 831 (2024) (quoting *Blakely v. Washington*, 542 U.S. 296, 306 (2004)). The question in this case is whether the same standard for what constitutes an “offense” subject to such punishment applies under each of those Amendments.

In *Monge v. California*, the Court held that double jeopardy protections do not apply to sentencing proceedings, and thus do not prevent retrial even of factual determinations that would raise the defendant's penalty. 524 U.S. 721, 724, 728-29 (1998). The Court reasoned that facts that raise the penalty to which a defendant is subject are not "element[s] of the offense" for purposes of the Fifth Amendment. *Id.* at 729. Two years later, however, the Court held that facts that raise the penalty to which a defendant is subject *are* elements of an offense that must be tried to a jury under the Sixth Amendment. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

These two decisions are irreconcilable, and the reasoning in *Monge* is wrong. Facts that trigger sentence enhancements that raise the statutory penalty range are elements of an offense, for the reasons the Court explained in *Apprendi* and has reaffirmed repeatedly in subsequent decisions. The Fifth Amendment prohibition against double jeopardy must apply to sentencing proceedings that determine these facts.

In this case, a jury convicted petitioner of substantive offenses, after which the jury was discharged by the trial court. The State then sought to empanel a new jury to determine whether petitioner had committed prior offenses that would subject him to enhanced punishment as a "habitual criminal." Petitioner objected that this proceeding would try him twice for the same "offense" and therefore would violate his double jeopardy rights. The trial court agreed and dismissed the habitual criminal counts. But the Colorado Supreme Court reversed. Relying entirely on *Monge*, which the court below noted has not been set aside by this Court, it held: "[D]ouble jeopardy protections do not apply to habitual criminal sentencing proceedings

because those proceedings ‘do not place a defendant in jeopardy for an ‘offense.’” App., *infra*, 18a (quoting *Monge*, 524 U.S. at 728).

That decision was incorrect. This Court should grant review to overrule *Monge* and apply to the Double Jeopardy Clause the principle recognized in *Apprendi*, *Erlinger*, and the many other decisions invoking the *Apprendi* rule.

### A. Legal background

This case involves the treatment of the elements of a criminal offense by the Fifth Amendment’s Double Jeopardy Clause—which provides protection against being “twice put in jeopardy” for the “same offence”—and the Sixth Amendment’s guarantee of a right to a jury trial “in all criminal prosecutions.” The Court has emphasized that these constitutional provisions “provide a defendant with entirely complementary protections at a different stage of the proceedings.” *Erlinger*, 602 U.S. at 845. Thus, as a plurality of the Court noted in *Sattazahn v. Pennsylvania*, there is “no principled reason to distinguish \* \* \* between what constitutes an offense for purposes of the Sixth Amendment’s jury-trial guarantee and what constitutes an ‘offence’ for purposes of the Fifth Amendment’s Double Jeopardy Clause.” 537 U.S. 101, 111 (2003); see also *Texas v. Cobb*, 532 U.S. 162, 173 (2001) (endorsing a consistent reading of “offense” across the Fifth and Sixth Amendments “in the contexts of double jeopardy and of the right to counsel”). Nevertheless, the Court’s decisions in this area are not wholly consistent.

In *Monge*, the Court addressed the nature of an “offense” under the Double Jeopardy Clause, in the

context of a prosecution that sought to apply a recidivism enhancement to the defendant's sentence. There, in a five-to-four decision, the Court rejected "an absolute rule that a[] [sentence] enhancement constitutes an element of the offense [under the Fifth Amendment] any time that it increases the maximum sentence." 524 U.S. at 729. In *Monge*, the defendant was convicted of drug offenses and given an enhanced sentence as a recidivist under California's "three-strikes" law. The state supreme court found the evidence insufficient to support the enhanced sentence but remanded for a new trial to establish recidivism, rejecting the defendant's argument that double jeopardy principles barred a new trial. See 524 U.S. at 725-27. This Court agreed, reasoning that the fact of prior convictions under California's three-strikes law was a "sentencing factor" and not an "element of the offense," even though a jury finding of recidivism on retrial would increase the defendant's sentence. *Id.* at 724, 728-29, 734.

Justice Scalia dissented. In his view, the Court's decision was inconsistent with the Double Jeopardy Clause because the facts that had to be found to support a sentence enhancement were elements of the "offense." 524 U.S. at 737 (Scalia, J., dissenting). Grounding his view in the original understanding of the Fifth Amendment, Justice Scalia noted that a "[c]onviction of an 'offence' renders the defendant eligible for a range of potential punishments," between which the sentencer may then decide. *Id.* at 737-38. He concluded that any fact that increases the sentencing range is part of the same crime for purposes of the Fifth Amendment, such that trying a defendant on that fact again would provide "the State a second chance to prove him guilty of that same crime" and

“would violate the very core of the double jeopardy prohibition.” *Id.* at 741.

Two years later, Justice Scalia’s reasoning in *Monge* became the basis of the Court’s holding, under the Sixth Amendment, 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. Concurring, Justice Thomas expanded on this reasoning, maintaining that the Constitution demanded the rule that “[e]ach fact necessary [to the kind, degree, or range of punishment] is an element.” *Id.* at 499, 501 (Thomas, J., concurring). Surveying Founding-era cases, he reasoned that “a crime includes every fact that is by law a basis for imposing or increasing punishment,” including recidivism. *Id.* at 501-09 (collecting cases).

As predicted by Justice O’Connor, author of the Court’s opinion in *Monge* but a dissenter in *Apprendi*, *Apprendi* marked a “watershed change in constitutional law.” *Apprendi*, 530 U.S. at 524 (O’Connor, J., dissenting). In subsequent years, the Court has expressly noted that the facts that must be found to enhance a sentence “are elements of the crime” (*Alleyne v. United States*, 570 U.S. 99, 111 (2013)) that, under the Sixth Amendment, must be submitted to the jury. And the Court has repeatedly applied and expanded *Apprendi*, most recently in *Erlinger*, where it held that a jury must find the facts supporting a sentence enhancement under the federal Armed Career Criminal Act (ACCA). 602 U.S. at 835, 849. As the Court added in *Erlinger*:

The principles *Apprendi* and *Alleyne* discussed are so firmly entrenched that [the Court] ha[s] now overruled several decisions

inconsistent with them. See, e.g., *Hurst v. Florida*, 577 U.S. 92, 101-102 (2016) (overruling *Hildwin v. Florida*, 490 U.S. 638 (1989) (per curiam), and *Spaziano v. Florida*, 468 U.S. 447 (1984)); *Alleyne*, 570 U.S., at 107 (overruling *Harris v. United States*, 536 U.S. 545 (2002)); *Ring v. Arizona*, 536 U.S. 584 (2002) (overruling *Walton v. Arizona*, 497 U.S. 639 (1990)).

*Erlinger*, 602 U.S. at 833-34.<sup>1</sup>

Lower courts have noted that *Monge*, too, appears to have been “undermined” by *Apprendi*. *United States v. Rosales*, 516 F.3d 749, 757-58 (9th Cir. 2008). To date, however, this Court has not had occasion to address the consistency of *Monge* with the *Apprendi* line of decisions.

## **B. Factual background and proceedings below**

1. Petitioner was charged in Colorado state court with several criminal offenses (the “substantive counts”), as well as four “habitual criminal counts” alleging that he had committed prior felonies. App., *infra*, 4a. Under Colorado law, if a jury convicted petitioner of the substantive offenses, a further finding that he had been “three times previously convicted,

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<sup>1</sup> The Court has recognized only one exception to the requirement that the jury find all facts leading to a sentence enhancement, that resting on the simple fact of a prior conviction. The Court has described that rule as “‘an exceptional departure’ from ‘historic practice,’” which it repeatedly and recently has called into question. *Erlinger*, 602 U.S. at 837 (quoting *Apprendi*, 530 U.S. at 487); see, e.g., *id.* at 850 (Thomas, J., concurring) (“[W]e should revisit [that exception] and correct [it] \* \* \* .”).

upon charges separately brought and tried, and arising out of separate and distinct criminal episodes” (C.R.S. 18-1.3-801(2)(a)(I)), would expose him to a substantial additional penalty as a habitual offender. See App., *infra*, 8a-9a. The jury did return a conviction on the substantive offenses. Applying then-existing Colorado procedure, the trial court proceeded to discharge the jury and set a hearing so that the judge could himself make the fact-finding necessary to resolve the habitual-criminal counts. *Id.* at 4a-5a, 45a.

Before the trial court could hold that hearing, however, this Court decided *Erlinger*. The Court there held that the U.S. Constitution’s Sixth Amendment requires that a jury make the determination whether a defendant had committed prior crimes triggering enhanced punishment under the ACCA, a federal statute that in relevant part is substantially identical to Colorado’s habitual-criminal sentencing scheme. The trial court in this case therefore held that, under *Erlinger*, the determination of petitioner’s habitual offender status would have to be made by a jury, a point conceded by the State. App., *infra*, 36a, 42a.

The trial court went on to find that, because jeopardy had already attached, the “Double Jeopardy Clause prohibits empaneling a second jury to decide Defendant’s habitual criminal counts when a jury has already been lawfully empaneled and returned verdicts on Defendant’s criminal charges.” App., *infra*, 44a. The court relied for this conclusion on pre-*Monge* decisions of the Colorado Supreme Court, which had held that “double jeopardy ‘safeguards the accused’s “valued right to have his trial completed by a particular tribunal.””’ *Id.* at 41a (quoting *Ortiz v. District Court*, 626 P.2d 642, 646 (Colo. 1981)). The trial court added that, “[i]f there was any doubt, *Erlinger* makes

clear that, once a jury *is* lawfully empaneled, the government must prove beyond a reasonable doubt to a unanimous jury the facts necessary to sustain the punishment it seeks.” *Id.* at 44a. And, the court concluded, “[g]iven *Erlinger’s* rationale, and plain language from *Erlinger* that ‘[t]he Double Jeopardy Clause protects a defendant by prohibiting [the judge] from even *empaneling* a jury when the defendant has already faced trial on the charged crime[,]’ jeopardy has attached and [the judge] cannot empanel a second jury to sustain the punishment the prosecution seeks—habitual criminal sentencing.” *Id.* at 45a (quoting *Erlinger*, 602 U.S. at 845). The trial court therefore ordered the habitual offender counts dismissed. *Id.* at 45a.

The Colorado Supreme Court reversed, in an original proceeding initiated by the State. App., *infra*, 2a-34a.<sup>2</sup> The court acknowledged that, before *Monge*, Colorado courts had held that empaneling a new jury to address sentence enhancement is a double jeopardy violation. App., *infra*, 14a-15a (citing *People v. Mason*, 643 P.2d 745, 754-55 (Colo. 1982)). But the court noted that, after *Monge*, it had adopted the categorical rule that “double jeopardy law does not apply to noncapital sentencing proceedings.” *Id.* at 15a (quoting *People v. Porter*, 348 P.3d 922, 923 (Colo. 2015)).

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<sup>2</sup> The court below also concluded that Colorado’s habitual criminal statute could be applied in a constitutional manner under *Erlinger* through use of a procedure in which the jury first determines whether the defendant’s prior convictions arose out of separate and distinct criminal episodes and, if the jury so finds, the trial judge then reviews that same evidence. App., *infra*, 7a-13a. Chief Justice Márquez dissented on this point. *Id.* at 20a-34a. That holding is not at issue here.

And here, too, the court below relied exclusively on *Monge* in rejecting petitioner’s double jeopardy claim: “[D]ouble jeopardy protections do not apply to habitual criminal sentencing proceedings because those proceedings ‘do not place a defendant in jeopardy for an ‘offense.’” App., *infra*, 18a (quoting *Monge*, 524 U.S. at 728). The court added, citing pre-*Apprendi* decisions, that “the Supreme Court has consistently affirmed” *Monge*’s holding. *Ibid.* (citing *Graham v. West Virginia*, 224 U.S. 616 (1912); *Parke v. Raley*, 506 U.S. 20 (1992); and *Almendarez-Torres v. United States*, 523 U.S. 224 (1998)). The court below found, in particular, that *Erlinger* did not “revisit[]” *Monge* and thus “does not disrupt the well-settled precedent that double jeopardy protections do not apply in habitual criminal sentencing proceedings.” *Id.* at 18a-19a (citing *Monge*, 524 U.S. at 728). The court therefore reinstated petitioner’s habitual-criminal charges to be resolved by a new jury. *Id.* at 19a.

### REASONS FOR GRANTING THE PETITION

There is no doubt that the facts establishing habitual criminal status in Colorado are elements of the offense within the meaning of *Apprendi* that, under the Sixth Amendment, must be found by a unanimous jury. But the court below held that a different rule applies to the determination of habitual criminal status for purposes of the Fifth Amendment’s Double Jeopardy Clause, relying expressly and only on *Monge*—which, that court noted, this Court has not yet revisited post-*Apprendi*.

The Court should take that step now. The *Monge* rule determined the outcome below. And that rule is inconsistent with the Court’s more recent and better-considered holdings. Further review in this case

would allow the Court to bring Fifth Amendment doctrine in line with constitutional principle.

**I. THE DECISION BELOW IS WRONG BECAUSE *MONGE* IS WRONG.**

The Colorado Supreme Court relied exclusively on *Monge* to support its holding that “double jeopardy protections do not apply in habitual criminal sentencing proceedings.” App., *infra*, 18a. The decision below therefore rests solely on the assumption that *Monge* remains good law. But *Monge* is incorrect. Its holding cannot be reconciled with the *Apprendi* line of decisions. And *Apprendi*, not *Monge*, is correctly decided, for two reasons. First, unlike *Monge*, *Apprendi* is grounded in and supported by common law and constitutional history. Second, the distinction *Apprendi* draws between elements of an offense (which must be proved to a jury) and sentencing factors (which need not be) finds support in the policy of the Fifth and Sixth Amendments—unlike *Monge*’s distinction, which invites manipulation and inconsistency. Because *Monge* is wrong, the decision below is wrong.

**A. *Monge*’s holding is insupportable.**

1. *The reasoning of Monge and of the Apprendi line of decisions cannot be reconciled.*

To begin with, there is no serious doubt that the reasoning of *Monge* and of *Apprendi* is in conflict. As noted above (at 3-4), *Monge* was premised on rejection of “an absolute rule that a[] [sentence] enhancement constitutes an element of the offense any time that it increases the maximum sentence.” 524 U.S. at 729. But in *Apprendi*, the Court endorsed just such an “absolute” rule. *Apprendi* held that, “[o]ther 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”—precisely because such facts constitute elements of the offense for purposes of the Sixth Amendment. 530 U.S. at 490 (emphasis added); see also *Sattazahn*, 537 U.S. at 111 (“*Apprendi* \* \* \* clarified what constitutes an ‘element’ of an offense for purposes of the Sixth Amendment[] \* \* \*. Put simply, if the existence of *any* fact (other than a prior conviction) increases the maximum punishment that may be imposed on a defendant, that fact—no matter how the State labels it—constitutes an element \* \* \* .”) (emphasis added); *Alleyne*, 570 U.S. at 111 (“[C]onsistent with common-law and early American practice, *Apprendi* concluded that *any* ‘facts that increase the prescribed range of penalties to which a criminal defendant is exposed’ are elements of the crime.”) (emphasis added).

The *Apprendi* Court explained this rule as “a matter of simple justice.” 530 U.S. at 476. It noted that New Jersey “threatened Apprendi with certain pains if he unlawfully possessed a weapon and with additional pains if he selected his victims with a purpose to intimidate them because of their race \* \* \* . [T]he procedural safeguards designed to protect Apprendi from unwarranted pains should apply equally to the two acts \* \* \* singled out for punishment.” *Ibid.* The Court continued: “Merely using the label ‘sentence enhancement’ to describe the latter surely does not provide a principled basis for treating them differently.” *Ibid.* Just the same reasoning applies to the habitual-criminal enhancement at issue here, which is triggered by a finding of particular acts (commission of separate crimes at separate times) that are singled out for punishment. See *Erlinger*, 602 U.S. at 834, 842

(addressing ACCA). But *Monge*—and thus the court below—held that “merely using the label ‘sentence enhancement’” *does* provide a basis for treating substantive offenses and recidivism enhancements differently for double jeopardy purposes.

To be sure, *Monge* involved the Fifth and *Apprendi* the Sixth Amendment. But the Court repeatedly has recognized that the same understanding of the acts that constitute elements of an offense must apply to both provisions. As we have noted (at 3), a plurality of the Court recognized in *Sattazahn* that there is “no principled reason to distinguish, in this context, between what constitutes an offense for purposes of the Sixth Amendment’s jury-trial guarantee and what constitutes an ‘offence’ for purposes of the Fifth Amendment’s Double Jeopardy Clause.” 537 U.S. at 111. Indeed, as we also have noted (at 3), the Court recognizes that this consistent understanding of what constitutes an “offense” applies to *all* the clauses of those Amendments, reaching, for example, “the contexts of double jeopardy and of the right to counsel.” *Cobb*, 532 U.S. at 173.

Moreover, the intertwined nature of these Amendments and their understanding of what constitutes an “offense” is consistent with the original understanding of the Amendments. At the Founding, some States actually “conjoined [the double jeopardy] provision to its criminal jury trial guarantee.” Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1190 n.261 (1991) (citing N.H. Const. of 1784, pt. I, art. I, § XVI.). The Maryland ratifying convention also combined these protections, proposing that “there shall be a trial by jury in all criminal cases . . . and that there be no appeal from matter of fact, or second

trial after acquittal.” *Ibid.* Justice Story similarly described the “jury trial guarantee” together with other “auxiliary rights” secured by the “fifth and six articles of the amendments.” 1 J. Story, COMMENTARIES ON THE CONSTITUTION §§ 926, 930, 934 (1833). The overlapping protections of these amendments necessarily require that they incorporate the same definition of an “offense.” Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 YALE L.J. 1807, 1841 (1997) (noting in a similar context what is considered an “acquittal” under the Sixth Amendment is adopted by the Fifth Amendment in “specifying the legal effect of these acquittals in future proceedings”).

The two Amendments also must adopt the same concept of an “offense” if the jury-trial right is to be realized. The jury trial was an essential part of the Bill of Rights and was considered fundamental by the Founders. Amar, 100 YALE L.J. at 1190 (discussing the “[c]entrality of the [j]ury” and noting that it is referenced in the Fifth, Sixth, and Seventh Amendments). But if the offense that *must* be tried to a jury under the Sixth Amendment is different from the offense that *may not* be retried under the Fifth Amendment, the two Amendments together lose their force. Prosecutors could retry an acquitted defendant on whatever elements of the offense are distinct between the Fifth and Sixth Amendments, which would mean that the Amendments do not offer “complementary protections at a different stage of the proceedings.” *Erlinger*, 602 U.S. at 845.

This tension between *Monge* and *Apprendi* has been widely noted. For example, the Ninth Circuit has recognized that “in *Monge* \* \* \* the Court had rejected ‘an absolute rule that an enhancement constitutes an element of the offense any time that it increases the

maximum sentence to which a defendant is exposed.’ \* \* \* But in *Apprendi* the Court embraced precisely that rule.” *United States v. Blanton*, 476 F.3d 767, 772 (9th Cir. 2007). And in the Fourth Circuit, Judge King similarly noted that *Apprendi* “undermined” *Monge*’s distinction between sentencing factors and elements of an offense, observing that, “[w]hen *Monge* was decided in 1998, the distinction between a sentencing factor and an offense element rested largely on the formal definition provided by the legislature \* \* \*. In *Apprendi*, decided two years after *Monge*, the Court redefined the constitutional distinction between sentencing factors and elements \* \* \* .” *United States v. Fitzgerald*, 435 F.3d 484, 490 n.1 (4th Cir. 2006) (King, J., dissenting).

Commentators have likewise pointed out the conflict between *Monge* and *Apprendi*, suggesting that the former decision’s reasoning is now dubious or “defunct.” See, e.g., Kendall C. Burman, *Firearm Enhancements Under the Federal Sentencing Guidelines*, 71 U. CHI. L. REV. 1055, 1070 (2004) (“The Court’s more recent decision in *Apprendi v. New Jersey* supports Justice Scalia’s [dissent] in *Monge*, and has called into question the majority’s reasoning in that case.”); Alex Ricciardulli, *The U.S. Supreme Court’s Surprise Ruling on Sentence Enhancements*, L.A. LAW., Feb. 2001, at 15, 16-17 (“[*Monge*’s] holding is contrary to *Apprendi*’s new rule” and “was based on a now-defunct definition of what are the elements of an offense.”); Meleah Burch, *False Hope for Prisoners: The Dangers of Making Apprendi v. New Jersey Retroactively Applicable to Felony Drug Convictions*, 8 TEX. WESLEYAN L. REV. 49, 64 (2001) (“*Apprendi* contradicts the precedent in *Monge v. California* where the court clearly ‘rejected an absolute rule that an enhancement constitutes . . . element[s] of the offense

any time that it increases the maximum sentence to which [the] defendant is exposed.”).

2. *The Court should follow Apprendi, not Monge.*

It therefore is clear that *Monge* and *Apprendi* cannot both be correct. Of the two, *Apprendi* is the better reasoned, in two respects. First, unlike *Monge*, *Apprendi*'s reasoning is grounded in and supported by history. Second, *Monge*'s distinction between elements and sentencing factors undermines the values reflected in the Fifth Amendment.

a. *Monge's holding is not supported by history, tradition, or original meaning.*

As Justice Scalia noted in his *Monge* dissent, “the Bill of Rights [including] the Double Jeopardy Clause[,] makes sense only against the backdrop of traditional principles of Anglo-American criminal law.” *Monge*, 524 U.S. at 737 (Scalia, J., dissenting). And at common law, “the truth of *every accusation* \* \* \* [was] confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours.” 4 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 343 (1769) (emphasis added). Thus, crimes were “sanction-specific” and “prescribed a particular sentence for each offense.” *Alleyne*, 570 U.S. at 108 (quoting John H. Langbein, *The English Criminal Trial Jury on the Eve of the French Revolution*, in THE TRIAL JURY IN ENGLAND, FRANCE, GERMANY 1700-1900, at 36 (A. Schioppa, ed. 1987)). After the jury found a defendant guilty, “he [wa]s then said to be convicted of the crime whereof he stands indicted” and “the court must pronounce that judgment, which the law hath annexed to the crime \* \* \*.” 4 Blackstone, at 355, 369.

This view that all facts that go to punishment are elements of a crime is consistent with early treatises defining a “crime” as consisting of every fact which “is in law essential to the punishment sought to be inflicted.” *Alleyne*, 570 U.S. at 109 (quoting 1 J. Bishop, *CRIMINAL PROCEDURE* 50 (2d ed. 1872)).

This formalist view—under which offense elements include all facts that increase the sentencing range—applied to double jeopardy at common law. Blackstone described the plea of *autrefois convict*, which reflected the “principle \* \* \* that no man ought to be twice brought in danger of his life for one and the same crime.” 4 Blackstone at 330. This rule prevented the prosecution from trying a defendant for an aggravated offense after a conviction. As Blackstone noted, “a conviction of manslaughter \* \* \* is a bar \* \* \* of murder; for the fact prosecuted is the same in both, though the offences differ in colouring and in degree.” *Ibid.* These statements encompass the common-law principle underlying double jeopardy that, once convicted of an offense, a defendant could not be tried again to establish aggravating facts. Once a jury was empaneled to try an offense, which included all facts that contributed to the possible sentence, “the jury cannot be discharged till they have given in their verdict.” *Id.* at 354.

Early American tradition confirms this practice, as “there were no sentence enhancements at common law” and “[m]any of these cases [from the 1840s through the 1890s] did indeed treat aggravating facts as elements to be charged in indictments and proved to juries.” Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 *YALE L.J.* 1097, 1124, 1128 (2001). This rule also is consistent with criminal statutes that

“have long specified both the floor and ceiling of sentence ranges.” *Alleyne*, 570 U.S. at 112 (discussing early state criminal statutes that changed the penalty range based on aggravating factors).

Consequently, “[t]he fundamental distinction between facts that are *elements* of a criminal offense and facts that go only to the *sentence* provides the foundation for our entire double jeopardy jurisprudence \* \* \* The same distinction also delimits the boundaries of \* \* \* the Sixth Amendment right to trial by jury \* \* \* .” *Monge*, 524 U.S. at 738 (Scalia, J., dissenting). Or, as Justice Thomas put it in *Apprendi*, “constitutional protections [of the Fifth and Sixth Amendments] turn on determining which facts constitute the ‘crime’—that is, which facts are the ‘elements’ or ‘ingredients’ of a crime.” 530 U.S. at 500 (Thomas, J., concurring). Common-law history and tradition thus confirm that the Fifth Amendment incorporated a definition of “offense” that included all “elements” that were “essential to the punishment to be inflicted”—the understanding that the Court held to apply under the Sixth Amendment in *Apprendi*. 530 U.S. at 490 (majority opinion) (explaining that a “reexamination of our cases” and “the history upon which they rely” support its rule). The holding of *Monge* disregarded that understanding.

*b. Monge’s holding departs from the purpose of the Double Jeopardy Clause.*

In addition, *Monge’s* distinction between elements and sentencing factors is untenable. If that distinction is “simply a matter of the label affixed to each fact by the legislature,” as Justice Scalia took *Monge* to suggest, a State could “repeal[] all of the violent crimes in its criminal code and replace[] them with only one offense, ‘knowingly causing injury to another,’ bearing

a penalty of 30 days in prison, but subject to a series of ‘sentencing enhancements’ authorizing additional punishment up to life imprisonment or death \* \* \*.” *Monge*, 524 U.S. at 738 (Scalia, J., dissenting). The State could then “grant the defendant a jury trial, with requirement of proof beyond a reasonable doubt, solely on the question whether he ‘knowingly cause[d] injury to another,’ but leave it for the judge to determine by a preponderance of the evidence whether” the sentencing factors applied. *Ibid.* This is, in the words of Justice Scalia’s *Monge* dissent, a “sinister” proposition. *Id.* at 738, 739.

Justice Scalia’s hypothetical suggests another sinister idea, specific to the double jeopardy context: if a sentencing factor is identified by its label, a State could convict a defendant of “knowingly causing injury to another” and then retry the defendant, as many times as it liked, on each of the sentencing factors. Needless to say, this result would frustrate the purpose of the Double Jeopardy Clause to protect a defendant by denying the government a “second bite at the apple” after a trial is concluded. *Burks v. United States*, 437 U.S. 1, 17 (1978). As Justice Scalia wrote, “[i]f the protections extended to criminal defendants by the Bill of Rights can be so easily circumvented, most of them would be \* \* \* ‘vain and idle enactment[s] \* \* \* ’” *Monge*, 524 U.S. at 738-39 (Scalia, J., dissenting) (quoting *Slaughter-House Cases*, 83 U.S. 36, 96 (1872)). It is hardly likely that the Framers intended the Fifth and Sixth Amendments to work together in that manner. Unlike *Monge*’s rule, *Apprendi*’s functional line between sentencing factors and elements cannot be manipulated to thus “eviscerate” constitutional protections. See *id.* at 740.

And separately, *Monge* presents a workability and line-drawing problem. If the Fifth and Sixth Amendments do not treat the elements of an offense identically, courts will be forced to draw arbitrary distinctions between them, unmoored from the original meaning of the Amendments. In *Apprendi*, the Court drew a clear and easily intelligible Sixth Amendment distinction between sentencing factors and elements, resting on identification of “facts that increase the prescribed range of penalties.” 530 U.S. at 490 (quoting *Jones v. United States*, 526 U.S. 227, 252–53 (1999) (Stevens, J., concurring)). If that same distinction is inapplicable under the Fifth Amendment, it is not at all clear what rule would take its place.

**B. Empaneling a second jury in this case would violate the Double Jeopardy Clause.**

As noted above, the Colorado Supreme Court relied *only* on *Monge* in rejecting petitioner’s double jeopardy claim; that court did not deny that, absent the *Monge* rule, retrying petitioner would violate double jeopardy principles. In that, at least, the court below was correct: once it is recognized that habitual-sentencing enhancements may trigger double jeopardy, it is plain that empaneling a new jury to hear petitioner’s case would place him twice in jeopardy for the same offense.

Jeopardy attaches when a jury is empaneled, and empaneling a new jury to try the same “offence” violates the Double Jeopardy Clause. As this Court noted in *Erlinger*, “[t]he Double Jeopardy Clause protects a defendant by prohibiting a judge from even *empaneling* a jury when the defendant has already faced trial on the charged crime.” 602 U.S. at 845. This rule pro-

pects a “defendant’s ‘valued right to have his trial completed by a particular tribunal’ \* \* \* within the protection of the constitutional guarantee against double jeopardy, since it is that ‘right’ that lies at the foundation of the federal rule that jeopardy attaches when the jury is empaneled and sworn.” *Crist v. Bretz*, 437 U.S. 28, 36 (1978) (quoting *Wade v. Hunter*, 336 U.S. 684, 689 (1949)).

Although a second jury may be empaneled in cases of “manifest necessity” (*United States v. Jorn*, 400 U.S. 470, 487 (1971)), that narrow exception does not apply here. The manifest necessity rule allows a judge to declare a mistrial and empanel a new jury if “there is a manifest necessity’ for doing so.” *Renico v. Lett*, 559 U.S. 766, 774 (2010) (quoting *United States v. Perez*, 22 U.S. 579-80 (1824)). The “classic example” of manifest necessity is when a jury deadlocks, and in that circumstance the exception allows retrial when the jury “was discharged without reaching a verdict and without the defendant’s consent.” *Downum v. United States*, 372 U.S. 734, 736 (1963). But otherwise, allowing retrial after the judge terminates the proceeding “deprive[s] [the defendant] of his ‘valued right to have his trial completed by a particular tribunal.’” *Jorn*, 400 U.S. at 484 (quoting *Wade*, 336 U.S. at 689). This rule is consistent with the common-law understanding that “the jury cannot be discharged till they have given in their verdict.” 4 Blackstone at 354. It also aligns with Colorado’s own jurisprudence pre-*Monge*, which recognized that empaneling a new jury to determine a habitual-criminal status “deprived the defendant of his valued right to a jury verdict on the prior conviction counts by that particular jury impaneled and sworn to try the case.” *People v. Mason*, 643 P.2d at 755.

That principle governs here: Empaneling a new jury, after the previous jury was discharged by the judge without the defendant's consent, would violate petitioner's "valued right to have his trial completed by a particular tribunal." *Wade*, 336 U.S. at 689.

## II. *MONGE* SHOULD BE OVERRULED.

For the reasons we have explained, the decision below rests on *Monge*; the Court has rejected *Monge*'s doctrinal underpinnings; but the *Monge* holding prevents lower courts from bringing double jeopardy doctrine in line with the *Apprendi* line of cases, as this case illustrates. Consequently, the Court should grant review to reconsider and overrule *Monge*.

Of course, it goes without saying that the Court does not overrule its decisions lightly. Even so, however, *stare decisis* is "not an inexorable command." *Pearson v. Callahan*, 555 U.S. 223, 233 (2009) (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997)). And *stare decisis* "is at its weakest when [the Court] interpret[s] the Constitution." *Agostini v. Felton*, 521 U.S. 203, 235 (1997). As the Court explained in *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 264 (2022), "when one of our constitutional decisions goes astray, the country is usually stuck with the bad decision unless we correct our own mistake. \* \* \* Therefore, in appropriate circumstances we must be willing to reconsider and, if necessary, overrule constitutional decisions."

In determining whether to overrule a decision, the Court looks to "a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case." *Planned Parenthood of*

*Se. Pennsylvania v. Casey*, 505 U.S. 833, 854 (1992). These considerations include a precedent’s consistency with related decisions (*Patterson v. McLean Credit Union*, 491 U.S. 164, 173-74 (1989)); the reliance interests the precedent implicates (*Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 917 (2018)); the precedent’s age (*Montejo v. Louisiana*, 556 U.S. 778, 793 (2009)); and the quality of its reasoning (*Janus*, 585 U.S. at 917). All these considerations counsel in favor of overruling *Monge*.

*First*, and perhaps most important, *Monge* is inconsistent with related decisions—namely, *Apprendi* and the many decisions in its line. “Where \* \* \* changes [in the law] have removed or weakened the conceptual underpinnings from the prior decision \* \* \* or where the later law has rendered the decision irreconcilable with competing legal doctrines or policies \* \* \* the Court has not hesitated to overrule an earlier decision.” *Patterson*, 491 U.S. at 173. And it is hard to imagine a clearer case for the application of that principle than this one: “[I]n the *Apprendi* context,” the Court *already* has “found that ‘*stare decisis* does not compel adherence to a decision whose ‘underpinnings’ have been ‘eroded’ by subsequent developments of constitutional law.” *Hurst v. Florida*, 577 U.S. at 102 (quoting *Alleyne*, 570 U.S. at 119 (Sotomayor, J., concurring)). In fact, as noted above, the Court has overruled at least four of its precedents solely because they were inconsistent with *Apprendi*. See *Ring*, 536 U.S. at 609 (“[W]e hold that *Walton* and *Apprendi* are irreconcilable; our Sixth Amendment jurisprudence cannot be home to both. Accordingly, we overrule *Walton* \* \* \* .”); *Alleyne*, 570 U.S. at 116 (“Because there is no basis in principle or logic to distinguish facts that raise the maximum from those that increase the minimum, *Harris* was inconsistent with *Apprendi*. It is,

accordingly, overruled.”); *Hurst*, 577 U.S. at 102 (“Time and subsequent cases have washed away the logic of *Spaziano* and *Hildwin*. The decisions are overruled \* \* \* .”).

Just like *Walton*, *Harris*, *Spaziano*, and *Hildwin*, the holding of *Monge* is inconsistent with *Apprendi*. It, too, should be overruled. In so doing, the Court would restore “a greater measure of coherence” to Fifth and Sixth Amendment jurisprudence. *Janus*, 585 U.S. at 925-26.

*Second*, although *Monge*’s inconsistency with *Apprendi* is sufficient reason for this Court to overrule it, other considerations also support overturning *Monge*. Notably, *Monge* implicates minimal reliance interests. *Monge* addressed procedural rules that “do not govern primary conduct and do not implicate the reliance interests of private parties.” *Alleyne*, 570 U.S. at 119 (Sotomayor, J., concurring). As for the reliance interests of the federal and state governments, they are insubstantial in this context. Governments are “perfectly able” to prove sentencing factors on their first go, without the unfair advantage of a second bite at the apple. *Ibid.* “[P]articularly in a case where the reliance interests are so minimal, and the reliance interests of private parties are nonexistent, *stare decisis* cannot excuse a refusal to bring ‘coherence and consistency[]’ \* \* \* to our Sixth Amendment law.” *Id.* at 121; see also *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). (“Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved \* \* \*; the opposite is true in cases \* \* \* involving procedural and evidentiary rules.”).

*Third, Monge*, which is not yet three decades old, is not an especially long-standing decision. See *Montejo*, 556 U.S. at 793 (citing the fact that *Michigan v. Jackson*, 475 U.S. 625 (1986), was “only two decades old” as a consideration that cut in favor of overruling); *cf. Gamble v. United States*, 587 U.S. 678, 691 (2019) (explaining, by contrast, that “the strength of the case for adhering to \* \* \* decisions grows in proportion to their ‘antiquity’” (quoting *Montejo*, 556 U.S. at 792)).

*Fourth, Monge* is poorly reasoned. For the reasons addressed above, *Monge* cannot be reconciled with the analysis of *Apprendi* and related decisions. Its understanding of the Double Jeopardy Clause takes account of neither the common law nor of the approach taken by the Court in construing related constitutional provisions. And it offers no real response to the concerns raised by Justice Scalia in dissent, where he noted that, if the distinction between sentencing factors and elements of an offense is “simply a matter of the label affixed to each fact by the legislature,” then “the California Legislature \* \* \* may have stumbled upon the El Dorado sought by many in vain since the beginning of the Republic: a means of dispensing with inconvenient constitutional ‘rights.’ \* \* \* [I]f the Court is right today, [many of defendants’ constitutional] protections could be withdrawn tomorrow.” 524 U.S. at 738, 740.

And one additional consideration supports overruling *Monge* now. Because lower courts are bound to follow *Monge*, further percolation below of the issue presented here is pointless. Lower courts must apply *Monge*: the Court has long been clear that the courts below must follow this Court’s on-point precedent, even if that precedent contradicts or is inconsistent with the Court’s other decisions.

Indeed, in *Mallory v. Norfolk S. Ry. Co.*, this Court reprimanded the Pennsylvania Supreme Court for disregarding on-point precedent on the assumption that this Court’s intervening decisions “implicitly overruled” that precedent. 600 U.S. 122, 136 (2023). The Court wrote: “If a precedent of this Court has direct application in a case,’ as [the precedent at issue] does here, a lower court ‘should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.’” *Ibid.* (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)). The Court continued: “This is true even if the lower court thinks the precedent is in tension with ‘some other line of decisions.’” *Ibid.* (quoting *Am. Express*, 490 U.S. at 484). In *Loper Bright Enterprises v. Raimondo*, the Court similarly noted that lower courts are “bound by even our crumbling precedents.” 603 U.S. 369, 406 (2024). And in the *Apprendi* context specifically, the Court wrote: “Although [the Arizona Supreme Court] agreed with the *Apprendi* dissent’s reading of Arizona law, the Arizona court understood that it was bound by the Supremacy Clause to apply *Walton*, which this Court had not overruled.” *Ring*, 536 U.S. at 596 (overruling *Walton*). Because lower courts must apply *Monge*, which has not yet been overruled, further percolation will not be helpful in resolving the *Monge-Apprendi* tension.

As Justice Kavanaugh recently explained,

[W]hen the question is whether to narrow or overrule one of this Court’s precedents rather than how to resolve an open or disputed question of federal law, further percolation in the lower courts is not particularly useful because lower courts cannot alter or overrule this Court’s precedents. In that situation, the

downsides of delay in definitively resolving the status of the precedent sometimes tend to outweigh the benefits of further lower-court consideration.

*Trump v. Boyle*, 145 S. Ct. 2653, 2655 (2025) (Kavanaugh, J., concurring). Because that is true here, the Court should intervene promptly to resolve the *Monge-Apprendi* tension by overruling *Monge*.

### III. THIS CASE PRESENTS ISSUES OF NATIONAL IMPORTANCE.

Finally, the question presented here is of substantial importance, both practically and doctrinally. Recidivist sentencing enhancements like Colorado’s are imposed in all fifty States and, when applied, can drastically increase the length of a defendant’s sentence. It therefore is essential that the constitutional rules governing such proceedings be sound. It also is imperative that the applicable rules preclude legislative and prosecutorial manipulation, of the sort that concerned Justice Scalia in *Monge*. And the Court often has recognized that consistency in the law is *itself* a supremely important value—which now is undermined by the tension between *Monge* and the *Apprendi* line of decisions. For all these reasons, further review is warranted.

#### A. Sentence enhancements are a common part of criminal prosecutions.

Sentence enhancements allow judges to “issue a sentence that exceeds the maximum penalty authorized by a jury’s findings” or “to increase a defendant’s minimum punishment.” *Erlinger*, 602 U.S. at 832 (emphasis omitted). Many defendants, like petitioner here, face sentence enhancements based on prior

criminal conduct. All fifty States have laws in place to enhance the sentences of recidivist offenders.<sup>3</sup>

Although comprehensive data is not available regarding the number of defendants nationwide who face or are sentenced under such enhancements, individual state studies indicate that the number is substantial. In Colorado, information from the Colorado State Court Administrator's Office indicates that the Habitual Criminal Act was charged in 14,131 separate criminal cases between January 1, 2000 and November 12, 2024. According to a study done in California in 2022, "26.4% of admissions to prison since 2015 (around 58,000 admissions) carried a longer sentence due to a strike enhancement \* \* \*." Mia Bird, Omar Gill, Johanna Lacoé, Molly Pickard, Steven Raphael,

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<sup>3</sup> See Ala. Code § 13A-5-9; Alaska Stat. § 12.55.125; Ariz. Rev. Stat. § 13-703; Ark. Code Ann. § 16-90-803; Cal. Penal Code § 667; Colo. Rev. Stat. § 18-1.3-801; Conn. Gen. Stat. § 53a-40; Del. Code Ann. tit. 11, § 4214; Fla. Stat. Ann. § 775.084; Ga. Code Ann. § 17-10-7; Haw. Rev. Stat. Ann. § 706-606.5; Idaho Code § 19-2514; 730 Ill. Comp. Stat. Ann. 5/5-4.5-95; Ind. Code Ann. § 35-50-2-8; Iowa Code § 902.8; Kan. Stat. Ann. § 21-6706; Ky. Rev. Stat. § 532.080; La. Rev. Stat. Ann. § 15:529.1; Me. Rev. Stat. tit. 17-A, § 1604; Md. Code Ann., Crim. Law § 14-101; Mass. Ann. Laws ch. 279, § 25; Mich. Comp. Laws Serv. § 769.12; Minn. Stat. Ann. § 609.1095; Miss. Code Ann. § 99-19-81; Mo. Rev. Stat. § 558.016; Mont. Code Ann. § 46-18-303; Neb. Rev. Stat. Ann. § 29-2221; Nev. Rev. Stat. Ann. § 207.012; N.H. Rev. Stat. Ann. § 651:6; N.J. Stat. § 2C:43-7.1; N.M. Stat. Ann. § 31-18-17; N.Y. Penal Law § 70.10; N.C. Gen. Stat. § 14-7.6; N.D. Cent. Code § 12.1-32-09; Ohio Rev. Code Ann. § 2929.13; Okla. Stat. tit. 21, § 51.1; Or. Rev. Stat. Ann. § 161.725; 42 Pa. Cons. Stat. Ann. § 9714; R.I. Gen. Laws Section 12-19-21; S.C. Code Ann. § 17-25-45; S.D. Codified Laws § 22-7-7; Tenn. Code Ann. § 40-35-107; Tex. Penal Code § 12.42; Utah Code Ann. § 76-3-203.5; Vt. Stat. Ann. tit. 13, § 11; Va. Code Ann. § 19.2-297.1; Wash. Rev. Code Ann. § 9.95.040; W. Va. Code § 61-11-18; Wis. Stat. Ann. § 939.62; Wyo. Stat. Ann. § 6-10-201.

& Alissa Skog, *Three Strikes in California*, CAL. POL'Y LAB (2022). Similarly, nearly 4,000 people were serving time under Louisiana's habitual offender statute as of April 2021. Eman Boyd, *KATC Investigates: Worthy of Redemption? Part III*, KATC 3 ABC (Apr. 7, 2021).

The impact of these enhancements on individual defendants can be enormous. Under Colorado's Habitual Criminal Act, with three prior qualifying felony convictions a recidivist's sentence increases to four times the maximum of the presumptive range for the charged offense. C.R.S. §§ 18-1.3-401.5, 18-1.3-801(2)(a)(I)(A)-(B). Indeed, recidivists may receive a life sentence for which non-recidivists convicted of the same substantive charged offense are not eligible, in Colorado as in other States. See, e.g., Ala. Code § 13A-5-9; C.R.S. § 18-1.3-801(1)(a); Del. Code Ann. tit. 11, § 4214.

Given the prevalence and significance of such sentence enhancements, the need for clear—and constitutionally supportable—rules to govern their imposition is manifest. And in this context, clarity is valuable not only for defendants but also for prosecutors, who can both pursue recidivism sentence enhancements and satisfy clearly stated constitutional requirements by adjusting their procedures accordingly (for example, using bifurcated proceedings to address first substantive charges and then sentence enhancements). See generally *Erlinger*, 602 U.S. at 847-48.

**B. Rejection of the *Monge* rule would advance double jeopardy policies.**

In addition, double jeopardy protections are just as relevant and important in the sentence-enhancement context as they are when a defendant faces a

substantive charge: Proceedings on sentence enhancements are “sufficiently analogous to a determination of guilt or innocence” that the risks against which the Double Jeopardy Clause protects are acutely present in these proceedings. *United States v. DiFrancesco*, 449 U.S. 117, 146 (1980) (Brennan, J., dissenting). Double jeopardy jurisprudence recognizes two types of risks that emerge when “the State with all its resources and power” is “allowed to make repeated attempts to convict an individual for an alleged offense.” *Green v. United States*, 355 U.S. 184, 187-88 (1957). Both are present in proceedings on sentence enhancements.

1. *Without the protection of the Double Jeopardy Clause, the risk of an inaccurate verdict on a sentence enhancement increases.*

At the core of the Double Jeopardy Clause’s prohibition on repeated trials is the idea that the prosecution should not be allowed a “second bite at the apple” (*Burks*, 437 U.S. at 17), as “there would be an unacceptably high risk that the Government, with its superior resources, would wear down a defendant, thereby ‘enhancing the possibility that even though innocent he may be found guilty.’” *DiFrancesco*, 449 U.S. at 30 (quoting *Green*, 355 U.S. at 188); see *Arizona v. Washington*, 434 U.S. 497, 504 (1978). That is just as true of proceedings aimed at sentence enhancements as it is of prosecutions for substantive offenses. Because prosecutors are required to prove facts necessary for sentence enhancements to a jury beyond a reasonable doubt and may introduce evidence or witnesses to do so, the risk of an inaccurate finding increases with repeated attempts by the prosecution after failure to win on a first try. See *Erlinger*, 602 U.S.

at 835 (requiring that a factual finding of separate occasions be resolved by a jury “unanimously and beyond a reasonable doubt”).

But under *Monge*, “a prosecutor may take as many bites at the apple as required to prove a sentencing enhancement \* \* \*.” Erwin Chemerinsky, *Making Sense of Apprendi and Its Progeny*, 37 MCGEORGE L. REV. 531, 539 (2006). Nothing in *Monge* prevents the prosecution from repeatedly asking different juries for the same sentencing enhancement, “honing its trial strategies and perfecting its evidence through successive attempts” at convincing a jury of the fact needed for the enhancement. *Tibbs v. Florida*, 457 U.S. 31, 41 (1982). With these repeated attempts comes an increased likelihood that the jury will conclude incorrectly that a sentence-enhancing fact has been proven. This clearly contravenes the purpose of the Double Jeopardy Clause.

2. *Without the protection of the Double Jeopardy Clause, defendants will be subject to unfair emotional and financial burdens caused by repeated proceedings on sentencing enhancements.*

In addition, the Double Jeopardy Clause protects interests of the defendant that are “wholly unrelated to the propriety of any subsequent conviction.” *Abney v. United States*, 431 U.S. 651, 661 (1977). The Clause protects defendants, regardless of innocence, from “embarrassment, expense and ordeal and [being] compell[ed] \* \* \* to live in a continuing state of anxiety and insecurity \* \* \*.” *Green*, 355 U.S. at 187; see *Abney*, 431 U.S. at 661. This is no less true in the context of sentence-enhancement proceedings than it is of trials for substantive offenses. Defendants will certainly face embarrassment when juries are presented with

arguments and evidence related to sentence enhancements, particularly when enhancements are based on prior convictions.

Subsequent proceedings, even if the first trial is not completed, also “may be grossly unfair” because they “increase the financial and emotional burden on the accused, [and] prolong the period in which he is stigmatized by an unresolved accusation of wrongdoing \* \* \*.” *Arizona v. Washington*, 434 U.S. at 503-04. Certainly, presenting counter-arguments on factual issues underlying a sentence enhancement will incur some “expense and ordeal”; it follows that allowing repeated proceedings on such an issue will multiply the expenses incurred and the financial and emotional burdens of the ordeal on the defendant. *Green*, 355 U.S. at 187.

Beyond preventing inaccurate verdicts and protecting defendants from the financial and emotional tolls of repeated prosecutions, the Double Jeopardy Clause prevents unfair treatment of a defendant *after* a trial court’s ruling. If a defendant is acquitted of one offense but found guilty of another at trial, he should be able to appeal the conviction without “surrender[ing] his valid defense of former jeopardy” on the “offense for which he was not convicted.” *Green*, 355 U.S. at 193. The Court has explained that “[c]onditioning an appeal of one offense on a coerced surrender of a valid plea of former jeopardy on another offense exacts a forfeiture in plain conflict with the constitutional bar against double jeopardy.” *Id.* at 193-94. In just the same way, allowing prosecutors to retry a sentence enhancement previously rejected by the court following a defendant’s successful appeal of an underlying conviction would “place the defendant in \* \* \* an incredible dilemma,” which contravenes the purpose

of the Double Jeopardy Clause. *Id.* at 193. But *Monge* allows for that unfair outcome.

**C. The Court should promote consistency in constitutional jurisprudence.**

There is one additional significant consideration here: consistency in the law is itself an important value that the Court strives to maintain—and that would be furthered by granting review to resolve the vitality of *Monge*.

Although the doctrine of *stare decisis* reflects the weight the Court places on stability in the law over time, the instances in which the Court has overcome *stare decisis* to overturn precedent indicate the value that the Court places on ensuring consistency across cases that define *current* jurisprudence. As suggested above, when deciding whether to overrule precedent, the Court has considered “the consistency of overruling a prior decision with the ideal of the rule of law” (*Casey*, 505 U.S. at 854); the decision’s “consistency with related decisions” (*Franchise Tax Bd. v. Hyatt*, 587 U.S. 230, 248 (2019)); whether the “precedent may be a positive detriment to coherence and consistency in the law” (*Patterson*, 491 U.S. at 173); and whether overruling the prior decision would “bring a measure of greater coherence to” constitutional jurisprudence. *Janus*, 585 U.S. at 926. In all, these considerations mean, as the Court has put it, that “the same respect for the rule of law that requires us to seek consistency over time also requires us, if with somewhat more caution and deliberation, to seek consistency in the interpretation of an area of law at any given time.” *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm’n*, 461 U.S. 375, 391 (1983).

Here, consistency in the treatment of what constitutes an “offense” for constitutional purposes is not possible so long as *Monge* and *Apprendi* both stand. The holding of *Monge* can be maintained only by drawing irrational distinctions between the same principle as it applies in the Fifth and Sixth Amendments, or by retreating dramatically from the reasoning of *Apprendi* and the many decisions that apply it. Because *Apprendi* was correctly decided and *Monge* was not, the Court should grant review and overturn *Monge*.

### CONCLUSION

The petition for a writ of certiorari should be granted.

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