No. 23-370

In the Supreme Court of the United States

PAUL ERLINGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR RESPONDENT SUPPORTING PETITIONER

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The Court-appointed amicus accepts the general rule of *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), that the Sixth Amendment requires any fact that increases a defendant's statutory penalty range to be alleged in an indictment, submitted to a jury, and proved beyond a reasonable doubt. And he does not dispute that this Court has described the exception to that rule recognized in *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998), as limited to "the fact of a prior conviction." *E.g.*, *Alleyne* v. *United States*, 570 U.S. 99, 111 n.1 (2013). Nor does the amicus contest (see Br. 4, 40) that the "multi-factored" different-occasions inquiry under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), as explicated in *Wooden* v. *United States*, 595 U.S. 360 (2022), includes determinations about how a prior offense was committed that go well

beyond "the fact of a prior conviction." That should be the end of the matter: if the *Wooden* inquiry does not fit within the "fact of a prior conviction," then it must be alleged in an indictment and found beyond a reasonable doubt by a jury.

Nearly all of the amicus's contrary arguments rest on a single premise: that notwithstanding the Court's repeated descriptions of *Almendarez-Torres* as concerning "the fact of a prior conviction," that precedent actually allows judges to resolve *any* "recidivism"-related issue. That premise is refuted by *Almendarez-Torres* itself and at least a dozen of this Court's subsequent decisions, whose descriptions of *Almendarez-Torres* cannot lightly be dismissed as shorthand for an all-encompassing "recidivism" exception to the *Apprendi* rule. And the amicus's approach finds no support in the historical practice of any State. *Almendarez-Torres* recognized an important, but limited, exception to a defendant's Sixth Amendment jury-trial right for the fact of a prior conviction. But it did not recognize an exception capacious enough to encompass the different-occasions inquiry under the ACCA.

A. *Almendarez-Torres* Authorizes Judicial Determination Of The Fact Of A Prior Conviction, Not All Facts Related To Recidivism

The amicus reads *Almendarez-Torres* to establish that "judges can make *all* recidivism determinations at sentencing." Br. 30; see, *e.g.*, Br. 12 (asserting that *Almendarez-Torres* "held unequivocally that the Constitution's jury-trial right does not extend to determinations regarding recidivism"). That reading—under which sentencing courts could make any factual determination that increases a defendant's sentencing range, so long as the determination is (in some way) related to

recidivism—cannot be squared with this Court's precedents, including *Almendarez-Torres* itself, and finds no support in the state-law traditions on which he relies.

1. This Court has repeatedly made clear that **Almendarez-Torres** *allows judges to find only "the fact of a prior conviction"*

The amicus asserts that the "unit of analysis in *Almendarez-Torres* was recidivism," not "the mere 'fact of a prior conviction,'" Br. 2, 30. That claim is incorrect.

a. As the government explained in its opening brief (at 15), the Court in *Almendarez-Torres* considered an enhancement that turns on whether a defendant had been deported "subsequent to a conviction for commission of an aggravated felony." 523 U.S. at 226; see 8 U.S.C. 1326(b)(2). Application of that enhancement requires a judicial determination of the date on which the prior conviction was entered, the statutory offense of conviction, and the identity of the defendant who was convicted—all facts encapsulated in judicial records that are components of the prior conviction. Gov't Br. 14-15.[1] But the enhancement considered in *Almendarez-Torres* does not require a wide-ranging inquiry into the real-world facts concerning the prior conviction. And

[1] As the amicus notes (Br. 28), 8 U.S.C. 1326(b)(2) also requires a judicial determination about whether a removal took place after an aggravated felony conviction. But the conviction of a removed defendant requires a specific removal order, see 8 U.S.C. 1326(d), which the judge may consult once the jury has found (or the defendant has admitted) that the defendant reentered after the removal—as the elements of the offense require, see 8 U.S.C. 1326(a); see also p. 7, *infra* (explaining that the fact of a prior conviction includes judicial records that are components of that conviction).

Almendarez-Torres's more general references to "recidivism" cannot justify the expansive rule that the amicus urges.

In the years since *Almendares-Torres*, the Court has repeatedly made clear that it reads the decision more narrowly than the amicus does. At least a dozen times over the past quarter century, the Court has described the "narrow exception" to *Apprendi*'s general rule as limited to "the fact of a prior conviction." *Apprendi*, 530 U.S. at 490; see *Pereida* v. *Wilkinson*, 592 U.S. 224, 238 (2021) ("the fact of a prior conviction") (citation omitted); *United States* v. *Haymond*, 139 S. Ct. 2369, 2377 n.3 (2019) (plurality opinion) ("the fact of a defendant's prior conviction"); *Mathis* v. *United States*, 579 U.S. 500, 511 (2016) ("the simple fact of a prior conviction"); *Descamps* v. *United States*, 570 U.S. 254, 269 (2013) ("the fact of a prior conviction") (citation omitted); *Alleyne*, 570 U.S. at 111 n.1 ("the fact of a prior conviction"); *Southern Union Co.* v. *United States*, 567 U.S. 343, 348 (2012) ("the fact of a prior conviction") (citation omitted); *James* v. *United States*, 550 U.S. 192, 214 n.8 (2007) ("the simple fact of his prior conviction"), overruled on other grounds by *Johnson* v. *United States*, 576 U.S. 591 (2015); *Cunningham* v. *California*, 549 U.S. 270, 275, 282 (2007) ("a prior conviction"); *United States* v. *Booker*, 543 U.S. 220, 244 (2005) ("a prior conviction"); *Blakely* v. *Washington*, 542 U.S. 296, 301 (2004) ("the fact of a prior conviction") (citation omitted); see also *Shepard* v. *United States*, 544 U.S. 13, 24 (2005) (plurality opinion) ("any fact other than a prior conviction * * * must be found by a jury").[2]

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[2] The amicus cites (Br. 31) *Dretke* v. *Haley*, 541 U.S. 386 (2004), in support of his claim that *Almendarez-Torres* "concerns findings

The amicus dismisses (Br. 31-32) all of those descriptions as merely "glossing" a much more wide-ranging "recidivism" exception. But if the Court meant "recidivism," it could easily have used that single word, as opposed to the oft-repeated five-word formulation "fact of a prior conviction." And as just explained, the amicus errs in asserting (Br. 32) that *Almendarez-Torres* "actually held" that all judicial factfinding about recidivism comports with the Sixth Amendment. It had no occasion to do so.

b. Even if some of the language in *Almendarez-Torres* could in isolation be read to support a broader exception, that reading does not survive *Apprendi*. In *Apprendi*, the Court explained that although it did not need to "revisit" the "validity" of *Almendarez-Torres* for "purposes of" articulating the overarching rule of jury determination, *Almendarez-Torres* must be "treat[ed]" as a "narrow exception to [that] general rule" limited to "the fact of a prior conviction." *Apprendi*, 530 U.S. at 490. The Court in *Apprendi* further emphasized that "procedural safeguards attach[] to any 'fact' of prior conviction," *id.* at 488—which would not be true if the *Almendarez-Torres* exception permitted judicial determination of all facts related to recidivism, whether incorporated into the prior conviction or not.

This Court's decisions limiting sentencing courts to a categorical elements-based approach in determining

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about recidivism" more broadly, but *Dretke* described the *Almendarez-Torres* exception in terms of "prior convictions"—not all recidivism-related facts. *Id.* at 395. The amicus's reliance (Br. 31) on *Jones* v. *United States*, 526 U.S. 227 (1999), is similarly misplaced, as *Jones* likewise made clear that "any fact (other than [a] prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Id.* at 243 n.6.

whether a prior crime qualifies as an ACCA predicate (the precursor to the different-occasions inquiry) likewise refute the amicus's contention that the *Almendarez-Torres* exception encompasses all facts related to recidivism. As explained in the government's opening brief (at 16-19), those decisions make clear that *Almendarez-Torres* does not "extend[] judicial factfinding beyond the recognition of a prior conviction," *Descamps*, 570 U.S. at 269, because a more extensive judicial inquiry into "the defendant's actual conduct" or "the facts of the [prior] crime" would raise Sixth Amendment concerns, *Mathis*, 579 U.S. at 504; see *id.* at 511-512.

The amicus suggests (Br. 34) that those decisions "avoided," rather than "decided," the Sixth Amendment question. But the Court's explanations of what the Sixth Amendment requires were both direct and relevant to the Court's holdings in those cases—namely, that in determining whether a crime qualifies as an ACCA predicate, a sentencing judge must "focus solely" on "the elements of the crime of conviction," "while ignoring the particular facts of the [prior] case." *Mathis*, 579 U.S. at 504; see *Shepard*, 544 U.S. at 24 (plurality opinion) (observing that the elements-centric categorical approach adopted in *Taylor* v. *United States*, 495 U.S. 575 (1990), "anticipated the very rule later imposed for the sake of preserving the Sixth Amendment right, that any fact other than a prior conviction sufficient to raise the limit of the possible federal sentence must be found by a jury").

In *Descamps* v. *United States*, for example, the Court emphasized "the categorical approach's Sixth Amendment underpinnings" and explained that "[t]he

Sixth Amendment contemplates that a jury—not a sentencing court—will find" facts "about the defendant's underlying conduct" in a prior offense. 570 U.S. at 269. Similarly, in *Mathis* v. *United States*, the Court stated in no uncertain terms that "a judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed that offense. * * * He can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of." 579 U.S. at 511-512.

The Court presumably meant what it said. And the amicus offers no alternative explanation for such clear statements about the meaning of the Sixth Amendment.

2. A judge's ability to find subsidiary facts inherent in a prior conviction does not imply authority to conduct a wide-ranging inquiry into prior offense conduct

The amicus also argues (Br. 30) that, because *Almendarez-Torres* authorizes judicial determination of *some* facts—the ones necessarily incorporated into a prior conviction—judges must be able to "make *all* recidivism determinations at sentencing." See Br. 27-30. That is incorrect; those permissible determinations of matters inherent in "the fact of a prior conviction," *Alleyne*, 570 U.S. at 111 n.1, bear no resemblance to the findings of real-world facts about a defendant's prior conduct that the amicus seeks to include.

As the government's opening brief explains (at 14-16), this Court has recognized that the "fact of a prior conviction" includes facts encapsulated in judicial records that are components of that conviction. Most obviously, that includes the venue where the conviction was entered, the date on which it was entered, the stat-

utory offense of conviction, and the identity of the convicted person. See p. 3, *supra*. Each of those is part and parcel of the fact of a prior conviction—and necessarily must be capable of judicial determination for the *Almendarez-Torres* exception to have meaning. They are also well-grounded in *Almendarez-Torres*, which upheld an enhancement based on a judicial determination of the date on which the conviction was entered, the statutory offense of conviction, and the identity of the defendant who was convicted. Indeed, for *any* prior-conviction exception to exist, the sentencing court must be able to determine identity—*i.e.*, that the defendant before the court today is the same defendant as the one who committed the prior crime.

The fact of a prior conviction also includes the elements of a prior offense at the time of its commission, see *Mathis*, 579 U.S. at 511-512, and thus necessarily the date of commission itself. Criminal laws are not static, and the version of a law with the elements of a prior crime is the one in force when the defendant committed that crime. See *McNeill* v. *United States*, 563 U.S. 816, 824 (2011). That will often be materially the same version in effect on the date of the prior conviction itself, but not always. See *ibid.* Because the Ex Post Facto Clause requires that a conviction be based on the law at the time of the offense, see, *e.g.*, *Peugh* v. *United States*, 569 U.S. 530, 538 (2013), the prior conviction itself incorporates the information about when it occurred, see *McNeil*, 563 U.S. at 824. And a later judge relying on the prior conviction for sentence-enhancement purposes can readily determine that same information from the indictment, which must sufficiently specify the timing of an offense to provide notice to the defendant, enable a plea, and eliminate the possibility of future

prosecution for the same crime. See *United States* v. *Resendiz-Ponce*, 549 U.S. 102, 108 (2007); *Hamling* v. *United States*, 418 U.S. 87, 117 (1974).

But a judge's ability to determine facts inherent in a prior conviction does not imply authority to make *any* finding related to "recidivism." To the contrary, the Court has made clear that the Sixth Amendment forbids an approach under which a sentencing court would "try to discern what a trial showed, or a plea proceeding revealed, about the defendant's underlying conduct" in a prior criminal case. *Descamps*, 570 U.S. at 269. "[T]he particular facts of the case" are "mere real-world things—extraneous to the [prior] crime's legal requirements," and distinct from the "fact of a prior conviction" itself. *Mathis*, 579 U.S. at 504, 511. Those "amplifying but legally extraneous circumstances," *Descamps*, 570 U.S. at 270, are not necessarily reflected or incorporated in the judgment of conviction, and no procedural safeguards attend such facts, which "a defendant may have no incentive to contest," *Mathis*, 579 U.S. at 512.

3. The amicus's approach lacks historical support

The amicus also asserts that his reinterpretation of *Almendarez-Torres* is supported by "historical practice" in the 19th and 20th centuries. Br. 18; see Br. 13-21. But even if some States had at some point permitted sentencing judges to make findings beyond those inherent in the fact of a prior conviction, that practice would not override this Court's more recent articulation of what the Sixth Amendment requires. Regardless, the historical practice that the amicus identifies does not support the expansive approach that he urges.

The amicus's historical evidence simply reinforces the validity of the *Almendarez-Torres* exception as the Court has always understood it; it does not support an

exception encompassing all facts that might be described as "recidivism-related." Amicus Br. 18. For example, in the early 19th century, a South Carolina appellate court noted that it was unaware of any "precedent * * * of an indictment charging a former conviction for a similar offence"; the court accordingly found it "certainly immaterial whether the first conviction is or is not recited in the record of the second." *State* v. *Smith*, 42 S.C.L. (8 Rich.) 460, 460-461 (1832); see Amicus Br. 13-14 (discussing similar decisions from Louisiana, Alabama, and Kansas).

Those decisions concerned the fact of a prior conviction —*i.e.*, that the defendant had such a conviction on his record—not the underlying offense conduct. The amicus is mistaken in asserting (Br. 18) that the underlying state laws in those cases, or laws in other States, contemplated judicial determination of "a wide range of recidivism-related issues." The only pre-*Almendarez-Torres* "recidivism findings" that he identifies involve the existence, "sequencing," and continued legal validity of prior offenses. Br. 19; see Br. 18-19.[3] As explained above, the existence and date of a prior conviction or offense are part of the "fact of" that prior conviction. And a prior conviction's continuing validity (*e.g.*, whether it has been vacated) is likewise inherent in its existence and legal salience to a later sentence-enhancement.

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[3] Even if more recent cases cast a wider net, see Amicus Br. 20-21, such lower-court misunderstandings of *Almendares-Torres* are outside any relevant historical framework.

B. The ACCA's Different-Occasions Determination, As Explicated in *Wooden*, Goes Well Beyond The Fact Of A Prior Conviction

Wooden's holistic inquiry into the circumstances of each ACCA predicate offense, and the relationships among the three predicates, is outside the limited findings that a sentencing court can make. And because the *Wooden* inquiry requires factual findings beyond what can plausibly be characterized as the "fact of a prior conviction," a jury must make the different-occasions determination.

1. The Wooden *inquiry encompasses real-world facts that a judge cannot find*

As the government explained in its opening brief (at 12, 19-23), this Court held in *Wooden* that the ACCA's different-occasions inquiry is "holistic" and "multi-factored." 595 U.S. at 365, 369. The Court instructed that a determination of whether a defendant's predicate offenses were committed on different occasions depends on, among other things, whether (1) the predicate crimes were "committed close in time"; (2) their "[p]roximity of location"; and (3) the offenses' "character and relationship," *i.e.*, the extent to which the underlying offenses are "intertwined" in "scheme or purpose." *Id.* at 369. The different-occasions determination thus could require a potentially wide-ranging inquiry into the real-world facts underlying a defendant's prior convictions and those facts' relationship to each other—exactly the kind of determination that the Sixth Amendment reserves for the jury, see, *e.g.*, *Mathis*, 579 U.S. at 504; *Apprendi*, 530 U.S. at 490.

The facts relevant to the *Wooden* inquiry are not the same as the ones inherent in a prior conviction, which a

judge may determine. For example, while judicial records of a prior conviction should identify the venue (*e.g.*, Dubois County or the Southern District of Indiana), that is not the same as identifying an offense's precise location (*e.g.*, Schnitzelbank) for the purpose of considering "[p]roximity of location" among the predicate offenses. *Wooden*, 595 U.S. at 369.

This Court has also made clear that facts about an offense's "character," *Wooden*, 595 U.S. at 369, such as "the theory of the crime," are classic examples of "legally extraneous circumstances" that are out of bounds for judicial factfinding. *Descamps*, 570 U.S. at 269-270; *Mathis*, 579 U.S. at 506, 511 (same). Much less could a judge assess the "character" of three crimes to determine their relationship to one another.

2. The Sixth Amendment does not permit judges to make the different-occasions finding in some cases but not others

The amicus suggests (Br. 36-40) that even if *Almendarez-Torres* does not support a sweeping recidivism exception, judges may nonetheless conduct the different-occasions inquiry in most cases—namely, where the inquiry is straightforward and turns on facts that are amenable to judicial determination. That suggestion is misguided.

a. As the amicus observes, *Wooden*'s "occasions inquiry is typically 'straightforward and intuitive.'" Amicus Br. 39 (citation omitted); see *ibid.* (explaining that courts "have nearly always treated offenses as occurring on separate occasions if a person committed them a day or more apart") (quoting *Wooden*, 595 U.S. at 370). But the Sixth Amendment does not allow a judge to take even a "straightforward and intuitive" instance of a jury question and answer it herself.

Notwithstanding *Almendarez-Torres*, a judge cannot, for example, simply instruct the jury in a felon-in-possession case that the defendant is a felon. As simple and obvious as that finding may be, it is ultimately one for the jury. Cf. *Old Chief* v. *United States*, 519 U.S. 172 (1997) (discussing stipulations of that element for submission to the jury, which finds the ultimate fact). The same is true of sentence-enhancing facts like the different-occasions determination.

"The Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged." *United States* v. *Gaudin*, 515 U.S. 506, 522-523 (1995). And *Apprendi* "held that a fact is by definition an element of the offense and must be submitted to the jury if it increases the punishment above what is otherwise legally prescribed." *Alleyne*, 570 U.S. at 107-108 (plurality opinion); see *id.* at 122 (Breyer, J., concurring in part and concurring in the judgment) (acknowledging that *Apprendi* does not draw a "distinction between elements of a crime * * * and sentencing facts").

b. Nor is a regime under which a different-occasions finding is sometimes reserved to the jury, but other times allowed for the judge, practical or administrable.

Even identifying whether a case is simple enough for judicial resolution would present complicated line-drawing problems. Contrary to the amicus's suggestion, *Wooden* did not establish a per se rule that offenses committed at least a day apart occurred on different occasions. While that may in fact be true in nearly all cases, a defendant will remain free to argue—if he so chooses—that other facts concerning, for instance, the relation-

ship among the predicate offenses compel a different result. And the incentive of a defendant to put the more complicated aspects of the inquiry at issue belies the amicus's prediction (Br. 40) that jury determinations would be required only in a "narrow class."

The presumptive predominance of "a single factor," such as "time or place," in "decisively differentiat[ing] occasions," *Wooden*, 595 U.S. at 370, explains why, in most cases, any failure to submit the different-occasions question to the jury will be harmless. But in determining "that the jury verdict would have been the same absent the error" in failing to submit the different-occasions question to the jury, the reviewing court "does not fundamentally undermine the purposes of the jury trial guarantee." *Neder* v. *United States*, 527 U.S. 1, 19 (1999) (addressing harmless-error principles where court improperly found an offense element). Judicial factfinding of the different-occasions question in the first instance, however, would invade the jury's province.

C. The Amicus's Remaining Arguments Lack Merit

The amicus's other arguments—that it would be anomalous to require a jury to conduct the different-occasions inquiry and that doing so would prejudice defendants—cannot alter the dictates of the Sixth Amendment and, in any event, lack foundation.

1. Requiring the jury to find that offenses were committed on different occasions is not anomalous

The amicus suggests (Br. 1, 40) that it would be "anomalous" to require jury factfinding for the different-occasions inquiry, where other relevant determinations can be made by the judge. But that differential treatment, which results from the nature of the inquiry, as

explicated by *Wooden*, has clear analogues in other statutes construed by this Court.

a. As noted above and explained in the government's opening brief, this Court has adhered to an elements-based approach for the ACCA's predicate-classification inquiry—which a judge can perform—precisely to avoid the Sixth Amendment concerns that would otherwise result from judicial factfinding. See pp. 5-7, *supra*; Gov't Br. 17-19. If a similar elements-based approach applied to the different-occasions inquiry, judicial factfinding might be similarly appropriate. Gov't Br. 20. But *Wooden* instead interpreted the different-occasions inquiry to require an exploration of the real-world facts of the predicate offenses and their relationships to each other.

Given the multi-factored inquiry that the Court adopted in *Wooden*, judicial factfinding cannot be reconciled with this Court's decisions in *Apprendi* and its progeny. And there is nothing anomalous about requiring a jury to find facts that are not encompassed within the fact of a prior conviction. See, *e.g.*, *Apprendi*, 530 U.S. at 490. Indeed, if anything, the anomalous outcome would be to adopt the amicus's suggestion—carefully policing the Sixth Amendment limits on judicial factfinding in interpreting the predicate-qualification requirement, see, *e.g.*, *Mathis*, 579 U.S. at 504, 511-512, while eliminating those limits altogether in interpreting the different-occasions requirement.

b. Nor is there anything anomalous about the prospect of different factfinders determining whether different statutory requirements have been satisfied based on the nature of each requirement. To the contrary, this Court's decisions in *United States* v. *Hayes*, 555 U.S. 415 (2009), and *Nijhawan* v. *Holder*, 557 U.S.

29 (2009), make clear that one part of an enhancement can require a judicially determinable categorical approach, while another requires a fact-specific inquiry that in the context of a criminal case, a jury must make.

In *Hayes*, the Court interpreted the phrase "an offense * * * committed by a current or former spouse" in 18 U.S.C. 921(a)(33)(A) to require a circumstance-specific, rather than categorical, inquiry—even though Section 921(a)(33)(A) simultaneously contemplated an elements-based approach in determining whether the prior offense "has, as an element, the use or attempted use of physical force." *Hayes*, 555 U.S. at 420 (citation omitted); see *id.* at 426-429. And the Court made clear that "[t]o obtain a conviction * * * the Government must prove beyond a reasonable doubt that the victim of the predicate offense was the defendant's current or former spouse or was related to the defendant in another specified way." *Id.* at 426.

Likewise, in *Nijhawan*, the Court interpreted an Immigration and Nationality Act provision concerning the classification of a prior conviction as "involv[ing] fraud or deceit in which the loss to the victim or victims exceeds $10,000" to require a categorical approach with respect to the fraud-or-deceit inquiry and a circumstance-specific approach with respect to the amount of loss. 557 U.S. at 38 (citation and emphasis omitted); see *id.* at 36-40; see also 8 U.S.C. 1101(a)(43)(M)(i). And the Court eliminated "potential constitutional problems" in criminal cases that might require a loss-amount determination by noting the government's concession that in such a case a "jury * * * would have to find loss amount." *Nijhawan*, 557 U.S. at 40; see *ibid.* (citing *Hayes*). The different-occasions inquiry works the same way.

c. The amicus similarly errs in asserting (Br. 25-26) that it would be "anomalous" for the Constitution to permit judges to conduct the same-offense inquiry for purposes of the Double Jeopardy Clause, but to preclude judges from performing *Wooden*'s different-occasions inquiry under the ACCA. Those distinct inquiries need not be congruent. The Double Jeopardy Clause is raised pretrial as a bar to even empaneling a jury, see, *e.g.*, *Martinez* v. *Illinois*, 572 U.S. 833, 839 (2014) (per curiam), while the different-occasions inquiry concerns a sentence-enhancing fact that must be treated like an offense element—and thus found by the jury, see, *e.g.*, *Alleyne*, 570 U.S. at 107-108 (plurality opinion).

2. Practical considerations do not override the straightforward application of this Court's precedents

The amicus separately contends (Br. 47) that requiring a jury to make the different-occasions finding will expose defendants to significant risk of prejudice and cause "radical, systemic fallout." See Br. 21-23, 41-50. But the amicus offers no support for the notion that the Sixth Amendment jury-trial right, as set forth in the *Apprendi* line of cases, can be curtailed based on concerns about prejudice to the defendant. In any event, the amicus's concerns are overstated and can be mitigated through familiar procedures, like stipulation, cautionary instructions, and bifurcation. See Gov't Br. 26-27.

In prosecutions for violations of 18 U.S.C. 922(g), the government is already required to prove that the defendant had a prior felony conviction of which he was aware. See *Rehaif* v. *United States*, 139 S. Ct. 2191 (2019). In those prosecutions, defendants often stipulate to the existence of a prior qualifying conviction.

Pursuant to this Court's decision in *Old Chief* v. *United States*, the government is required to accept such a stipulation. 519 U.S. at 174-175. A defendant's offer to stipulate that at least three of his ACCA predicates were committed on occasions different from one another could be handled by stipulation as well.

The amicus suggests (Br. 43-44) that such stipulations are insufficient to protect defendants from prejudice because the government need not invariably agree to them and, where it does, the stipulation still must be placed before the jury. But particularly after *Old Chief*, lower courts are well-versed in drafting anodyne stipulations to be presented to the jury in a manner that minimizes any risk of potential prejudice, including prejudice as to whether the defendant committed the basic violation of Section 922(g) at all, by possessing a firearm following a single felony conviction.

Any potential risk of prejudice can be further diminished by the use of cautionary or limiting instructions to the jury. See, *e.g.*, *Richardson* v. *Marsh*, 481 U.S. 200, 207 (1987) (noting that "evidence of the defendant's prior criminal convictions could be introduced for the purpose of sentence enhancement, so long as the jury was instructed it could not be used for purposes of determining guilt"). While the amicus asserts (Br. 46) that cautionary instructions cannot successfully "counteract the prejudicial effect of introducing prior convictions," this Court has repeatedly recognized that when a jury is properly instructed not to accept statements for their truth, "the almost invariable assumption of the law [is] that jurors follow their instructions." *Richardson*, 481 U.S. at 206; see *id.* at 206-207 (citing cases).

That presumption applies in criminal cases, even in "situations with potentially life-and-death stakes for defendants," and even with respect to statements that are "some of the most compelling evidence of guilt available to a jury." *Samia* v. *United States*, 599 U.S. 635, 646-647 (2023). "The presumption credits jurors by refusing to assume that they are either 'too ignorant to comprehend, or were too unmindful of their duty to respect, instructions' of the court." *Id.* at 647 (quoting *Pennsylvania Co.* v. *Roy*, 102 U.S. 451, 459 (1880)). And the lone exception to that presumption—a narrow set of cases involving the confession of a nontestifying codefendant, see *id.* at 652-653; *Bruton* v. *United States*, 391 U.S. 123 (1968)—is far afield of the circumstances here.[4]

Finally, district courts may also consider whether to bifurcate a trial in appropriate cases. See Gov't Br. 27. Under such a procedure, the jury would first consider the elements of the underlying Section 922(g) charge (and any other charged counts) and then, if it reached a guilty verdict on that charge, consider whether the defendant's predicate offenses occurred on different occasions for purposes of applying the ACCA's sentence enhancement. See, *e.g.*, *United States* v. *Hines*, No. 22-cr-25, 2023 WL 4053013, at *2 (E.D. Tenn. June 16, 2023) (adopting that approach); Nat'l Ass'n of Federal Defenders Amicus Br. 21 n.15, 26 n.20 (collecting cases in which district courts bifurcated ACCA trials). There is

[4] The amicus asserts (Br. 43) only one real-world example of potential prejudice, but the statement he excerpts was made during closing argument, not in a stipulation. In any event, there is no reason to conclude that district courts, in the ordinary course of managing criminal jury trials, will be unable to appropriately instruct counsel as to the limits of permissible argumentation.

no reason to conclude that district courts would be particularly reluctant to bifurcate trials in appropriate cases, or that doing so here would be especially "burdensome." Amicus Br. 45.

The amicus's contention (Br. 45) that "[s]ome courts of appeals prohibit [bifurcation] outright" is incorrect. The decisions cited by petitioner hold only that "bifurcation of the elements of a single-count felon-in-possession trial, *absent the government's consent*, is generally error." *United States* v. *Amante*, 418 F.3d 220, 224 (2d Cir. 2005) (emphasis added); see *United States* v. *Barker*, 1 F.3d 957, 958 (9th Cir. 1993) (pre-*Old Chief* case in which government opposed bifurcation); see also *Amante*, 418 F.3d at 224 ("We do not rule out bifurcation where the facts underlying the prior felony would be presented to the jury and are so heinous as to overwhelm the trial of firearm or ammunition possession.").[5] The cases that the amicus invokes do not preclude a bifurcated sentencing proceeding of the sort that a court might employ in an ACCA case.

The amicus also expresses (Br. 47-50) an overarching concern that requiring a jury to conduct the different-occasions inquiry will cause systemic upheaval. But requiring courts and parties to resolve pre-trial disputes relevant to the different-occasions inquiry presents no insuperable—or unusual—post-*Apprendi* burden. The

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[5] Indeed, the lead case cited by the amicus (Br. 45) involved the government's pre-*Old Chief* refusal to accept a stipulation, not a bifurcated trial. See *United States* v. *Gilliam*, 994 F.2d 97, 100-103 (2d Cir.) ("Where there was an objection by the government, the district court was correct to reject this proposed stipulation, instead utilizing a strongly worded and quite proper curative instruction to prevent the jury from speculating on the nature of Gilliam's prior conviction."), cert. denied, 510 U.S. 927 (1993).

amicus's assertion (Br. 47-48) that Congress did not intend juries to make the different-occasions inquiry is question-begging. And as a practical matter, the government regularly identifies potential ACCA predicate offenses well before trial, enabling it to identify the cases in which it would be appropriate to allege in the indictment that the defendant committed qualifying prior offenses on three separate occasions. See *Resendiz-Ponce*, 549 U.S. at 109 (noting that "an indictment parroting the language of a federal criminal statute is often sufficient"). States that have not already done so can likewise adjust to any state-law implications of the straightforward application of *Apprendi* to the ACCA's different-occasions requirement.

D. The Judgment Below Should Be Vacated And The Case Remanded For Further Proceedings, Including Application Of Harmless-Error Principles

As the government explained in its opening brief (Br. 27-29), and as the amicus agrees (Br. 50-51), harmless-error principles apply with full force to the error at issue here. The amicus and the government likewise agree that the harmless-error analysis will likely be straightforward in most cases.

In the court of appeals, the government contended that the error at issue here was harmless, but the court did not address that contention. See Gov't Br. 29. The amicus contends (Br. 50-51) that this Court should address the harmlessness question in the first instance and conclude that "no rational jury could have found that [petitioner]'s relevant burglaries occurred on the same occasion." While the government does not object to this Court performing that analysis, this Court's typ-

ical practice is to remand for the court of appeals to conduct the harmlessness inquiry in the first instance. See Gov't Br. 29.

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

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