NO. 10-1017

IN THE
Supreme Court of the United States

BRICE M. GEORGE, ROBERT STEVENSON, IVORY GRACE, PETITIONERS,

V.

STATE OF LOUISIANA, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE FOURTH CIRCUIT COURT OF APPEAL
STATE OF LOUISIANA

AMICUS BRIEF OF THE *NATIONAL ASSOCIATION OF CRIMINAL DEFENSE ATTORNEYS* (NACDL) IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit corporation with more than 11,200 members nationwide and 28,000 affiliate members in fifty states, including private attorneys, public defenders, and law professors. NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the fair and proper administration of criminal justice.

The majority of American citizens who interface with the criminal justice system do so through a vast web of petty offenses — such as driving under the influence (DUI), possession of marijuana, or simple battery — for which the Constitution does not guarantee a jury trial. At issue in Petitioners's cases is whether convictions for such non-jury triable misdemeanors may be used as essential elements of subsequent serious felony offenses, consistent with the Sixth and Fourteenth Amendments.

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[1] Pursuant to this Court's Rule 37, *Amicus* states that no counsel for any party authored this brief in whole or in part, and no person or entity other than *Amicus* made a monetary contribution to the preparation or submission of the brief. Counsel of record for all parties were given ten days notice of the filing of this brief and have consented to its filing.

NACDL suggests that certiorari be granted to address this pressing question, expressly left open by this Court in *Blanton v. North Las Vegas*, 489 U.S. 538, 545 n.12 (1989). The question is of widespread importance to many accused persons: in many jurisdictions citizens charged with misdemeanors have no jury trial right, and courts around the country are upholding the use of such adjudications to increase the maximum punishment of later convictions. The question thus arises with regularity, and a vibrant split of authority has fully percolated in the lower courts.

INTRODUCTION

Few protections are of more "surpassing importance" than the proscription against the deprivation of liberty without due process of law and the guarantee that the accused in all criminal prosecutions shall enjoy the right to a speedy and public trial by an impartial jury. *Apprendi v. New Jersey*, 530 U.S. 466, 476–77 (2000); U.S. Const. amends. XIV, VI. This Court has reaffirmed not only that "the historical foundation for our recognition of these principles extends down centuries into the common law," but also that these protections were instituted principally "to guard against a spirit of oppression and tyranny on the part of rulers" and stand "as the great bulwark of [our] civil liberties and political liberties." *Apprendi*, 530 U.S. at 477 (citations omitted). Thus, "trial by jury has been understood to require that '*the truth of every accusation*, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours . . . .'" *Id.* (citing 4 W. Blackstone, Commentaries on the Laws of England 343 (1769) (emphasis in original)).

But as noted in *Jones v. United States*, 526 U.S. 227, 246 (1999) (quoting Blackstone*, supra*) "countervailing measures to diminish the juries' power" arise:

> not only from all open attacks, (which none will be so hardy as to make) but also from all secret machinations, which may sap and undermine it; by introducing new and arbitrary methods of trial, by justices of the peace, commissioners of the revenue, and courts of conscience.

The Louisiana statute at issue exemplifies the concern expressed by Blackstone and quoted in *Jones* because it provides a much-exploited route around the jury trial guarantee. Misdemeanor convictions are first obtained without juries — which accords with the Sixth Amendment because of the lower stakes involved in misdemeanor proceedings — and then used to establish essential elements increasing the maximum punishment for a subsequent felony offense. *See State v. Jefferson*, 26 So.3d 112 (La. 2009). As a result, these essential elements are prevented from ever being passed upon by jurors. Though this Court has held that prior convictions used as sentence enhancements need not be proven to a jury, *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), that limited exception was premised on the certainty that "a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, *and jury trial guarantees." Jones*, 526 U.S. at 249 (emphasis added). What is at stake in these cases is the precipitous "diminution" of the

jury trial right, where elements of an offense were found in the past against defendants by hired magistrates. *See Lewis v. United States*, 518 U.S. 322, 335 (1996) (Kennedy, J., concurring) (right to a jury trial provides an "inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." (citing *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968))).

SUMMARY OF THE ARGUMENT

Amicus agrees with Petitioners's identification of the split within the circuit and state courts concerning whether non-jury triable adjudications can be used as elements of subsequent felonies. *Compare United States v. Tighe*, 266 F.3d 1187 (9th Cir. 2001) *with Welch v. United States,* 604 F.3d 408, 426 (7th Cir. 2010). *See also id.* at 432 (Posner J. dissenting). This split alone is an important factor in favor of review.

Amicus, whose members are criminal defense practitioners around the country, writes separately to emphasize the profound importance of the question presented. Like Louisiana, a significant number of jurisdictions provide non-jury demandable adjudications for misdemeanor or petty offenses. This is understandable. The stakes are lower in these petty offenses, and thus the level of procedural protections may be appropriately reduced as well. As a group of practitioners, *Amicus* is aware of the significant and obvious differences between the formality of a petty misdemeanor proceeding and a felony proceeding in courts throughout the country.

But recidivist rules like Louisiana's alter this understanding entirely. If misdemeanor convictions are regularly permitted to "morph" into elements of a felony without ever having been passed upon by jurors, then the entire rationale for reduced

procedural safeguards in the misdemeanor proceedings vanishes. Likewise, the recidivist felony proceeding becomes infected by the blanket adoption of a conviction that was rendered with fewer procedural protections — most importantly the right to trial by jury — than tolerable in any other felony setting. *Amicus* suggests that the combination of these two trends results in a significant diminution of the jury trial right.

This practice finds no support in our Nation's traditions or history. For centuries, juries have served as safety valves to check unfair applications of criminal laws. But the statutory scheme at issue in these cases removes from a jury's judgment facts essential to increasing punishment and therefore prevents the jury from performing its important historical role.[2]

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[2] *Amicus* observes that the stark possibility of a twenty year sentence such as the one at issue, *see* La. Rev. Stat. § 40:966, leads all but the most quixotic defendant to plead guilty to the felony charge to secure a reduced sentence. As such, the scheme cuts off "the only anchor yet imagined by man by which government can be held to the principles of its constitution." Robert C. Walters, et al., *Jury of Our Peers: An Unfulfilled Constitutional Promise*, 58 SMU L. Rev. 319, 322 (2005) (quoting Thomas Jefferson). *See also* Alexis de Tocqueville, *Democracy in America*, 282–83 (Knopf 1951) (noting the essential check that a jury plays on executive, legislative, and judicial power).

Finally, these cases present an ideal vehicle for the Court to correct a long-percolating misinterpretation of the Constitution's fundamental guarantee of the right to trial by jury. The Louisiana Supreme Court squarely held that misdemeanor convictions obtained without the benefit of trial by jury are constitutionally indistinguishable from felony convictions for sentence-enhancing purposes. *See Jefferson*, 26 So.3d at 124.

REASONS FOR GRANTING THE WRIT

I. THE USE OF NON-JURY TRIABLE MISDEMEANORS AS ESSENTIAL ELEMENTS OF SUBSEQUENT FELONY OFFENSES IS A MATTER OF SIGNIFICANT CONCERN

The trend of allowing non-jury triable misdemeanors as elements of felony offenses has recently been endorsed by the courts and arises in part from the common practice of adjudicating misdemeanor cases without juries. *See, e.g., United States v. Nachtigal*, 507 U.S. 1 (1993) (per curiam) (upholding denial of jury trial right for DUI under 36 C.F.R. § 4.23(a)(1)); *Brown v. United* States, 675 A.2d 953 (D.C. 1996) (upholding constitutionality of District of Columbia's nonjury triable possession of cocaine statute); N.Y. Crim. Proc. Law § 340.40(2) (no right to trial by jury in New York City for misdemeanor offenses punishable by less than six months and charged by information); N.M. Stat. §§ 34-8A-5B(1) and (2) (no right to a trial by jury in New Mexico criminal cases where penalty does not exceed ninety days); *State v. Owens*, 254 A.2d 97 (N.J. 1969) (limiting sentence to six months where non-jury triable conviction for multiple misdemeanors arising from the same set of circumstances resulted in sentence of thirty-six months); *State v. Stanton*, 820 A.D.2d 637 (N.J. 2003); *Stoudamire v. Simon*, 141 P.3d 776 (Ariz. Ct. App. 2006) (noting Arizona scheme under Az. Rev.

Stat. § 13-702(G), which rendered a first offense of possession of marijuana a non-jury triable misdemeanor); *State v. Wilson*, 856 P.2d 1240, 1243 (Haw. 1993) (right to jury trial under Hawaii constitution limited to non-petty offenses); *Bruce v. State*, 614 P.2d 813, 814 (Ariz. 1980) (holding that in Arizona "where a defendant is charged with several petty offenses, factually related or arising out of a single event, there is no constitutional requirement of a jury trial but the actual punishment may not exceed that which would be permissible without a jury trial in case of a single offense."). *See also* Colleen P. Murphy, *The Narrowing of the Entitlement to Criminal Jury Trial*, 1997 Wis. L. Rev. 133, 171–74 (1997) (cataloging whether states allow jury trials for petty offenses).

Standing alone, adjudicating petty misdemeanors without juries raises no constitutional concerns. *See Blanton v. North Las Vegas*, 489 U.S. 538 (1989). What is constitutionally questionable, however, is the recent practice of a number of jurisdictions permitting these misdemeanor convictions to serve as facts that increase the maximum punishment of a later offense — often dramatically, as in these cases. *See, e.g., Goodson v. State*, 991 P.2d 472 (Nev. 1999) (upholding use of non-jury triable conviction before a non-lawyer justice of the peace to enhance subsequent DUI to a felony); *People v. Palmer*, 47

Cal. Rptr.3d 864 (Cal. Ct. App. 2006) (non-jury triable out-of-state misdemeanor convictions allowed as sentencing enhancements to increase maximum punishment from six months to one year); N.M. Stat. §§ 66-8-102(F)–(I) (sentence enhanced from ninety days to three years for subsequent driving while intoxicated convictions); D.C. Code § 50-2201.05(b)(1) (sentence enhanced from ninety days to one year for subsequent driving while intoxicated convictions); N.Y. Penal Law § 265.02(1) (enhancing criminal possession of a weapon to a felony if the defendant "has previously been convicted of any crime"); *People v. Kittell*, 135 A.D.2d 1021, 1023 (N.Y. App. Div. 1987) (twenty-five year old misdemeanor conviction allowed to enhance criminal possession of a weapon to a felony).[3]

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[3] Moreover, even in states that provide jury trials for misdemeanor convictions, the full faith and credit given to adjudications from other states may generate circumstances where non-jury triable adjudications are used as elements of serious felony offenses. *See Palmer, supra* (using a Nevada non-jury triable misdemeanor as essential element of a California felony)*; State v. Pecora*, 928 A.2d 479 (Vt. 2007); *State v. Graves*, 947 P.2d 209, 211 (Org. Ct. App. 1997). *But see State v. Peel*, 843 P.2d 1249 (Alaska Ct. App. 1992) (forbidding non-jury triable Louisiana misdemeanor DUI conviction from being used to enhance sentence in Alaska, which provides jury trials for petty offenses).

Whether this practice — increasing the maximum punishment using a misdemeanor conviction adjudicated without the jury trial right — is allowed by the Constitution is a question of significant dispute in the lower courts. In *People v. Palmer*, the California appellate court — like the Louisiana court in the underlying case here, as well as Judge Posner dissenting in *Welch* — noted the well-developed split in the courts concerning whether a non-jury triable misdemeanor could be used as an element of a felony offense:

> We respectfully decline to follow the *Tighe*, *supra*[] 266 F.3d 1187, majority opinion and follow the reasoning of *Bowden*. Similar reasoning applicable to the use of a prior juvenile adjudication to which no right to a jury trial attached applies here to the use of a prior Nevada misdemeanor driving-under-the-influence conviction to which no right to a jury trial attached.

People v. Palmer, supra at 870. *See also People v. Nguyen*, 209 P.3d 946, 954–58 (Cal. 2009) (describing the split in the circuits on the issue).

This trend has, at times, played out on the federal level. For example, the Armed Career Criminal Act (ACCA) specifically identifies prior juvenile adjudications as elements of a subsequent

offense.[4] Moreover, under ACCA, a state conviction qualifies as a "violent felony" if it can be punished by a term of imprisonment exceeding one year and "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i). A Louisiana conviction for third-offense domestic abuse battery — enhanced via a prior non-jury triable domestic abuse conviction, *see* La. Rev. Stat. § 14:35.3(F) — therefore constitutes a "violent felony" for purposes of ACCA.

Similarly, in *United States v. Hayes*, this Court noted that a prior conviction for "a misdemeanor crime of violence" is an element of a violation of the federal Gun Control Act, 18 U.S.C. §§ 922(g)(9) and 924(a)(2). *United States v. Hayes,* 129 S. Ct. 1079, 1080 (2009) (noting that domestic violence aspect of offense need not be part of the offense but could be proven subsequently at trial).[5]

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[4] *See* 18 U.S.C. § 924 (e)(2)(B) ("the term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm . . ."); and § 924 (e)(2)(C) ("the term 'conviction' includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.")

[5] The issue present in these cases did not arise in *Hayes* because, in part, the defendant had been entitled to a jury trial on his misdemeanor battery offense in West Virginia. *See*

Finally, under federal drug laws, simple possession of narcotics may be enhanced from a misdemeanor to a felony with double the punishment if a defendant has "a prior conviction for any drug, narcotic, or chemical offense chargeable under the law of any State." 21 U.S.C. § 844(a). Without clarification by this Court, a non-jury triable misdemeanor drug offense — such as first-possession marijuana convictions from Louisiana or Arizona — would qualify. *See United States v. Martin*, 149 Fed. App'x 838, 839 n.1 (11th Cir. 2005) (noting that a prior state misdemeanor conviction for simple marijuana possession allowed a subsequent simple marijuana possession to be treated as a felony under 21 U.S.C. § 844(a)).

In short, the issues raised by Petitioners reach far beyond Louisiana and rise to a level of national importance worthy of this Court's intervention.

Gapp v. Friddle, 382 S.E.2d 568, 570 (W. Va. 1989) (under West Virginia constitution, if "the Legislature has provided for possible incarceration . . . the right to a jury trial attaches as soon as the defendant is charged."). This is not the case for all misdemeanor battery offenses. *See*, *e.g.*, La. Rev. Stat. §14:35 (misdemeanor battery); *id.* § 14:35.1(C) (misdemeanor domestic abuse battery).

II. ALLOWING NON-JURY TRIABLE MISDEMEANORS AS SENTENCING ENHANCEMENTS DIMINISHES THE JURY'S LONG-HELD ROLE AS THE ULTIMATE CHECK ON THE CRIMINAL JUSTICE SYSTEM

Allowing non-jury triable misdemeanor convictions to increase the maximum punishment in a later proceeding — a practice condoned by numerous courts even after this Court decided *Apprendi* — is antithetical to the Constitution's conception of the jury right.

The jury's "historic function" is "as a check against arbitrary or oppressive exercises of power." *United States v. Powell*, 469 U.S. 57, 65 (1984). The "jury trial in criminal cases had been in existence in England for several centuries and carried impressive credentials traced by many to Magna Carta. Its preservation and proper operation as a protection against arbitrary rule were among the major objectives of the revolutionary settlement." *Duncan v. Louisiana*, 391 U.S. 145, 151 (1968); *see also Blakely v. Washington*, 542 U.S. 296, 306 (2004) ("jury trial is meant to ensure [the people's] control in the judiciary"); *Schriro v. Summerlin*, 542 U.S. 348, 355 (2004) (Framers installed jury trial right because of the jury's perceived independence).

The jury functions as an "equitable safety valve in criminal cases" and exists "to check the law in a particular case to ensure justice." Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. Pa. L. Rev. 33, 57, 61 (2003). A "jury interposes between the accused and his accuser the judgment of laymen who are less tutored perhaps than a judge or panel of judges, but who at the same time are less likely to function or appear as but another arm of the Government that has proceeded against him." *Baldwin v. New York*, 399 U.S. 66, 72 (1970).

The right to a jury trial "is no mere procedural formality, but a fundamental reservation of power in our constitutional structure." *Blakely*, 542 U.S. at 305–06. This power, as Judge Friendly explained, gives juries the authority to issue verdicts "in the teeth of both law and facts . . . to prevent punishment from getting too far out of line with the crime." *United States v. Maybury*, 274 F.2d 899, 902 (2d Cir. 1960) (quotation marks omitted). *See also Apprendi*, 530 U.S. at 479 n.5 (juries historically have "devised extralegal ways of avoiding . . . the more severe form of the offense alleged, if the punishment associated with the offense seemed to them disproportionate to the seriousness of the conduct").

The Constitution, however, sets these important considerations aside for petty offenses because "the benefits that result from speedy and inexpensive nonjury adjudication" outweigh the burden of relatively minor periods of imprisonment. *Blanton*, 489 U.S. at 543 (quotation marks omitted). But when a misdemeanor conviction is used to enhance the penalties for a subsequent felony, the constitutional balance is upset. Once a serious criminal penalty attaches to a finding of guilt — be it at the initial or any subsequent sentencing — the jury must be granted its corrective power over each fact allowing the sentence. *See Blakely*, 542 U.S. at 306–07 (noting that the jury "could not function as circuitbreaker in the State's machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State actually seeks to punish.").

III. THESE CASES ARE AN IDEAL VEHICLE FOR CLARIFYING THE BOUNDARIES OF *ALMENDAREZ-TORRES* AND *APPRENDI*

Beyond the constitutional significance of the issue presented here, these cases provide this Court with an excellent vehicle for addressing the post-*Apprendi* scope of *Almendarez-Torres* — namely,

must a prior conviction used to enhance a sentence have been jury triable?

That question — explicitly left open by this Court in *Blanton*, 489 U.S. at 545 n.12 — was precisely the Louisiana Supreme Court's target in *Jefferson*:

> "the Sixth and Fourteenth Amendments, as construed in *Apprendi* and its progeny, do not preclude the sentence-enhancing use, against an adult of a prior valid, fair and reliable conviction of a misdemeanor, obtained as an adult, where the misdemeanor proceedings included all the constitutional protections applicable to such proceedings, even though these protections do not include the right to a jury trial."

26 So.3d at 122. *See also People v. Huber*, 139 P.3d 628, 633 (Colo. 2006) (noting that though "the United States Supreme Court has not delineated the precise scope of the prior-conviction exception" non-jury triable convictions can serve as sentencing enhancements).

The split in the circuit courts is well developed, and further percolation is unlikely. *See Nguyen*, 209 P.3d at 954 & n. 10 (noting full split in the circuits concerning the issue and that "[t]he

United States Supreme Court has denied all petitions for certiorari arising from these cases.") (citing denials of certiorari in eight California cases, eight other state courts, and six federal circuit courts). The explicit framing of the issue in *Jefferson* ensures that these cases present only a pure question of the scope of the federal jury trial right uncomplicated by any question of Louisiana state law or deference required under the Antiterrorism and Effective Death Penalty Act.[6]

At stake here is whether states and Congress can formulate felony criminal statutes in which essential elements are findings of fact made by hired magistrates in proceedings where a defendant has no right to trial by jury.[7] *See United*

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[6] The Louisiana Supreme Court could not have been clearer that it was interpreting *Apprendi*. That court held that non-jury misdemeanor convictions are "sentence-enhancing" and "may be employed to increase the maximum punishment for a subsequent offense without the need for jury findings in the later case." *Jefferson*, 26 So.2d at 112, 119.

[7] Observers have long noted that the vast majority of petty offenses are adjudicated in "assembly-line justice." *Argersinger v. Hamlin*, 407 U.S. 25, 35-36 (1972) ("The misdemeanor trial is characterized by insufficient and frequently irresponsible preparation on the part of the defense, the prosecution, and the court. Everything is rush, rush. . . . There is evidence of the prejudice which results to misdemeanor defendants from this 'assembly-line justice.'") (quotation marks omitted).

States v. Mendoza-Lopez, 481 U.S. 828, 838 n.15 (1987) (noting that "the use of the result of an administrative proceeding to establish an element of a criminal offense is troubling."). *Amicus* suggests that to do so vitiates the core protection of the jury trial right, creating hybrid proceedings in which some elements are passed upon by juries and others are not. *See* Barkow, *supra* at 73 (role of jury is to prevent "the government alone [from] determin[ing] guilt or innocence about a fact that will affect punishment").

Allowing non-jury triable misdemeanor convictions to enhance subsequent punishment squarely implicates the Sixth Amendment's jury trial guarantee. The time has come for this Court to decide whether the Constitution permits this now widespread yet ahistorical practice. These cases provide an excellent vehicle for doing so.

CONCLUSION

Amicus respectfully suggests that this Court grant certiorari.

Respectfully submitted,

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