No. _____

In the Supreme Court of the United States

_____

Fredy Zamora-Reyes,
Petitioner,

v.

United States of America,
Respondent

_____

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

_____

PETITION FOR A WRIT OF CERTIORARI

_____

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QUESTION PRESENTED

I. Can a court, consistent with the Sixth Amendment's Notice Clause, impose a statutorily enhanced sentence based on the fact of a prior conviction never alleged in the indictment?

PARTIES TO THE PROCEEDING

Petitioner, Fredy Zamora-Reyes, was the Defendant-Appellant before the Court of Appeals. Respondent, the United States of America, was the Plaintiff-Appellee.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Fredy Zamora-Reyes seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The district court's final judgment is unreported and reprinted at Pet.App.b1-b5. The Fifth Circuit's unreported opinion is available on Westlaw's electronic database at 2021 WL 5579265 and reprinted at Pet. App.a1-a2.

JURISDICTION

The Court of Appeals issued its panel opinion on November 29, 2021. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS

This Petition involves a penalty provision found in 8 U.S.C. § 1326:

> (b) Notwithstanding subsection (a), in the case of any alien described in such subsection—
>
> (1) whose removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under Title 18, imprisoned not more than 10 years, or both;

8 U.S.C. § 1326(b)(1). This petition also involves the Notice Clause of the Sixth Amendment to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation.

U.S. CONST., amend. VI.

LIST OF PROCEEDINGS BELOW

1. *United States v. Fredy Zamora-Reyes*, Case No. 4:20-CR-121-P, United States District Court for the Northern District of Texas. Judgment and sentence entered on February 26, 2021. (Appendix B).

2. *United States v. Fredy Zamora-Reyes*, 2021 WL 5579265 (5th Cir. Nov. 29, 2021), Case No. 20-10210, Court of Appeals for the Fifth Circuit. (Appendix A).

STATEMENT OF THE CASE

The Fifth Circuit recently affirmed Mr. Zamora's statutorily enhanced term of imprisonment. Mr. Zamora, a citizen of Honduras, pleaded guilty to illegally reentering the United States following deportation. *See* Pet.App.b1. The statute defining this offense—8 U.S.C. § 1326(a)—sets a two-year term of imprisonment as the default maximum, but based on a prior felony conviction, Mr. Zamora's presentence report suggested as applicable a ten-year maximum. *See* 8 U.S.C. § 1326(b)(1). This alternative applies "in the case of any alien . . . whose removal was subsequent to a conviction for . . . a felony." 8 U.S.C. § 1326(b)(1). The district court adopted the PSR's legal conclusions at sentencing and went on to impose a 95-month term of imprisonment. Pet.App.b2. Mr. Zamora pointed out the indictment's failure to allege the prior felony conviction and argued that without this allegation the district court could impose no more than a two-year term of imprisonment. He conceded, however, that *Almendarez-Torres v. United States* foreclosed that claim in the government's favor. The district court recognized the effect of *Almendarez-Torres* and overruled the objection at sentencing. Mr. Zamora then raised the same claim on appeal but again conceded the effect of *Almendarez-Torres*. The Fifth Circuit Court of Appeals accepted Mr. Zamora's concession, recognized the effect of *Almendarez-Torres*, and affirmed the 95-month term of imprisonment as constitutional. Pet.App.a1-a2.

REASONS FOR GRANTING THIS PETITION

I. The *Almendarez-Torres* result cannot survive *Apprendi*'s method.

At the district court and Fifth Circuit, Mr. Zamora argued against the application of a statutorily enhanced sentence based on the fact of a prior conviction. He faulted the government for failing to allege the prior conviction in his indictment, but *Almendarez-Torres* foreclosed that dispute in the government's favor. Perhaps it should no longer. Despite multiple decisions applying *Apprendi*'s historical analysis to tease out the precise meaning of the Sixth Amendment in other contexts, this Court has not yet tested the *Almendarez-Torres* prior-conviction exception against the historical record. The earliest American authority and pre-Founding Era authority from England reveal *Almendarez-Torres* as ahistorical. On top of that, Founding Era dictionaries provide additional support for Mr. Zamora's prior-conviction claim. *Almendarez-Torres* is, in short, out of line with common-law practice and the plain meaning of the Sixth Amendment. The prior-conviction exception could not—and should not—survive *Apprendi*.

a. Almendarez-Torres *turned on congressional intent and ignored history*.

In *Almendarez-Torres v. United States*, the defendant challenged the district court's authority to impose a statutorily enhanced sentence based on a prior conviction never alleged in his indictment. 523 U.S. 224, 227-28 (1998) (citing *Hamling v. United States*, 418 U.S. 87, 117 (1974)). "In all criminal prosecutions," the Sixth Amendment states, "the accused shall enjoy the right . . . to be informed of

the nature and cause of the accusation." U.S. CONST., amend. VI. An indictment satisfies this standard if it "directly, and without ambiguity, disclose[s] all the elements essential to the commission of the offense charged." *Burton v. United States*, 202 U.S. 344, 372 (1906). In *Almendarez-Torres*, the prior conviction affected the statutory maximum, and on that basis, the defendant argued that it was an element of an aggravated offense. 523 U.S. at 225. A five-justice majority rejected the claim and instead classified the prior conviction as a "sentencing factor." *Id*. at 235. For support, it looked to congressional intent, rather than historical practice. *See id*. at 228 ("We therefore look to the statute before us and ask what Congress intended.").

What is a "sentencing factor"? In *McMillan v. Pennsylvania*, this Court coined the term as an antonym to "element." 477 U.S. 79, 85-86 (1986). An "element," the Court explained, is a "fact necessary to constitute the crime . . . charged," and must be proved to a jury beyond a reasonable doubt. *See id*. at 84, 93. A "sentencing factor," by contrast, "comes into play only after the defendant has been found guilty" for an underlying offense and may be found by a judge using the preponderance-of-the-evidence standard. *Id*. at 85-86, 91-92. The practical difference between the two was therefore immense, but legislative caprice largely determined which label applied. *Id*. at 86. So long as the "statute" in question gave "no impression of having been tailored to permit the" challenged sentencing factor "to be a tail which wags the dog of the substantive offense," legislatures had wide latitude to specify some things elements and others sentencing factors. *Id*. at 88.

Given this approach, the constitutionality of any particular sentencing scheme would "depend on differences of degree." *Id*. at 91.

The *Almendarez-Torres* majority applied *McMillan* and characterized the fact of a prior conviction as a sentencing factor, not an element. It considered a violation of § 1326, *Almendarez-Torres*, 523 U.S. at 226 (citing 8 U.S.C. § 1326(a)-(b)), and framed the distinction between sentencing factors and elements as "normally a matter for Congress," *id*. at 228. Since the outcome depended on Congress's intent, this Court "look[ed] to the statute's language, structure, subject matter, context, and history." *Id*. at 228-29 (citing *United States v. Wells*, 519 U.S. 482, 490-92 (1997); *Garrett v. United States*, 471 U.S. 773, 779 (1985)). That analysis led a five-justice majority to conclude "that Congress intended" the prior-conviction provision "to set forth a sentencing factor." *Id*. at 235.

The majority briefly considered and rejected an argument premised on historical practice. Mr. Almendarez "point[ed]" to a "'tradition' . . . of courts having treated recidivism as an element of the related crime" and asked this Court to avoid an interpretation of § 1326 that might place its constitutionality in doubt. *Id*. at 246 (citing *Massey v. United States*, 281 F. 292, 297-98 (8th Cir. 1922); *Singer v. United States*, 278 F. 415, 420 (3d Cir. 1922); *People v. Sickles*, 51 N.E. 288, 289 (N.Y. 1898)). The majority rejected the claim and noted that any such tradition was neither "uniform," "modern," nor based "upon a federal constitutional guarantee." *Id*. at 246-47. A dissent authored by Justice Scalia and joined by three other justices contested this point and cited a well-established tradition of treating "a

prior conviction which increases maximum punishment . . . as an element of the offense." *Id*. at 256-57 (Scalia, J., dissenting). Justice Scalia, on this basis, would have opted for an interpretation that did not create "a serious doubt as to whether the statute as interpreted by the Court in the present case is constitutional." *Id*. at 265 (Scalia, J., dissenting).

b. *After* Apprendi*, the Sixth Amendment's protections turn on historical practices at common law*.

Justice Scalia's concerns came to a head two years later. In *Apprendi v. New Jersey*, this Court jettisoned the *McMillan* analysis but preserved the *Almendarez-Torres* result. "Any possible distinction between an 'element' of a felony offense and a 'sentencing factor,'" this Court explained, "was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding." *Apprendi v. New Jersey*, 530 U.S. 466, 478 (2000). In light of this historical guidance, the Court interpreted the Sixth Amendment to encompass a simple rule with an important exception: "*Other than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury, and proved beyond a reasonable doubt." *Id*. at 490. The Court rooted the general rule in common-law historical practices, *see id*. at 477-83, but relied on *Almendarez-Torres* to support the prior-conviction exception, *see id*. at 487.

Apprendi, unlike *McMillan*, turned on what the Constitution "sa[id]," not what a majority of this Court thought "it ought to mean." *Id*. at 499 (Scalia, J., concurring). The Sixth Amendment, and this Court's interpretation of it, rest upon

a "historical foundation . . . extend[ing] down centuries into the common law." *Id*. at 477. The common-law evidence, in turn, established a "historic link between verdict and judgment." *Id*. at 482. This analysis began with the indictment's allegations. "As a general rule, criminal proceedings were submitted to a jury after being initiated by an indictment containing 'all the facts and circumstances which constitute the offence.'" *Id*. at 478 (quoting JOHN ARCHBOLD, PLEADING AND EVIDENCE IN CRIMINAL CASES 44 (15th ed. 1862)). This rule "enabled" the defendant to "prepare his defence." *Id*. (citing ARCHBOLD, *supra*, at 44). A sufficiently precise indictment would also specify "the judgment which should be given, if the defendant be convicted." *Id*. (citing ARCHBOLD, *supra*, at 44). Since "substantive criminal law tended to be sanction-specific," a jury's guilty verdict simply required the judge to impose whatever sentence the law annexed to the offense. *Id*. at 479 (citing 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 14, 36-37 (Antonio Padoa Schioppa ed., 1987)). These charging practices "at common law held true when indictments were issued pursuant to statute," and in similar fashion, "the circumstances mandating a particular punishment" must have been alleged in the indictment and proved to a jury beyond a reasonable doubt. *See id*. at 480 (citing citing ARCHBOLD, *supra*, at 51).

Despite this holding, the *Apprendi* majority saw no need to overrule *Almendarez-Torres*. That ruling, in part, turned on the specific issues advanced by the parties. Mr. Apprendi did "not contest the decision's validity," so this Court was

able to sidestep its result. *See id*. at 489-90. The five-justice majority nevertheless recognized "that a logical application of" *Apprendi*'s "reasoning . . . should apply if the recidivist issue were contested." *Id*. The majority then characterized *Almendarez-Torres* as "arguabl[y] . . . incorrectly decided," *id*., and "at best an exceptional departure from the historic practice" described above, *id*. at 487.

Justice Thomas, writing in a concurrence, would have gone further. The "tradition of treating recidivism as an element," he explained, "stretches back to the earliest years of the Republic." *Id*. at 507 (Thomas, J., concurring) (citing *Commonwealth v. Welsh*, 4 Va. 57, 1817 WL 713 (1817); *Smith v. Commonwealth*, 14 Serg. & Rawle 69, 1826 WL 2217 (Pa. 1826)). Following an exhaustive survey of opinions from the various States, Justice Thomas summarized the Nineteenth Century authority as follows:

> Numerous other cases treating the fact of a prior conviction as an element of a crime take the same view. They make clear, by both their holdings and their language, that when a statute increases punishment for some core crime based on the fact of a prior conviction, the core crime and the fact of the prior crime together create a new, aggravated crime.

Id. at 507-08 (Thomas, J., concurring). "The consequences" of this historical evidence on *Almendarez-Torres*, Justice Thomas concluded, "should be plain enough." (Thomas, J., concurring).

The tension between *Apprendi* and *Almendarez-Torres* nevertheless persists to this day. This Court has repeatedly applied *Apprendi*'s historical methodology and looked to "longstanding common-law practice" to tease out the Sixth

Amendment's precise meaning. *Southern Union Co. v. United States*, 567 U.S. 343, 348 (2012) (quoting *Cunningham v. California*, 549 U.S. 270, 281 (2007)). In *Southern Union Company v. United States*, for example, the Court applied *Apprendi* to the issue of fines. *Id*. at 349. Where the statute in question linked the maximum fine amount "to the determination of specified facts," such as "the value of damaged or stolen property," "the predominant practice" at common law "was for such facts to be alleged in the indictment and proved to the jury." *Id*. at 354-55. The "ample historical evidence" supporting this point resolved the case on the merits, *id*. at 358, and in *Oregon v. Ice*, this Court conducted the same basic analysis but came out the other way concerning a judge's decision to impose consecutive, rather than concurrent, terms of imprisonment following multiple convictions, 555 U.S. 160, 168-69 (2009). "The historical record," the five-justice majority explained, "demonstrates that the jury played no role in the decision to impose sentences consecutively or concurrently." *Id*. at 168. Again, this Court looked to historical practice to resolve the disputed meaning of the Sixth Amendment, *id*. at 168-69, but has so far shielded *Almendarez-Torres* from similar analysis. The Court nevertheless continues to recognize the opinion's validity *See, e.g.*, *United States v. Haymond*, 139 S. Ct. 2369, 2377 n.3 (2019) (citing *Almendarez-Torres*, 523 U.S. 224 (1998)).

c. *The* Almendarez-Torres *exception is ahistorical and clashes with the text of the Sixth Amendment*

i. The text of the Sixth Amendment requires the government to alert each defendant to the "nature" of the "accusation."

"In all criminal prosecutions," the Sixth Amendment states, "the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation." U.S. CONST., amend. VI. The preposition "of" links the noun "accusation" to the preceding nouns "nature" and "cause." The "nature" and "cause" thus concern or relate to the overarching "accusation" and form its subsidiary parts. *Of*, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785) ("Concerning; relating to."). The Notice Clause obligates the government to "inform[]" the "accused" of all three. U.S. CONST., amend. VI.

An accusation's "nature" refers to its "native state or properties." *Nature*, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785). Founding Era lexicographers typically defined the term "nature" to refer to a thing's distinct properties, which necessarily allowed an observer to distinguish between things of one nature and things of another. Samuel Johnson defined the term "nature" in 1785 as "[t]he native state or properties of any thing, by which it is discriminated from others." *See Nature*, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785). James Barclay followed suit in 1792 and defined the noun as "a distinct species or kind of being," "the essential properties of a thing, or that by which it is distinguished from all others." *Nature*, A COMPLETE AND UNIVERSAL ENGLISH DICTIONARY (2d ed. 1792). Writing in America, Noah Webster initially defined the

term in 1806 to denote the "sort," "kind," or "the native state of any thing." *Nature*, A COMPENDIOUS DICTIONARY OF THE ENGLISH LANGUAGE (1806). He expanded upon this definition in 1828 and then defined "nature" to mean a thing's "essential qualities or attributes." *Nature*, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828). The phrase "nature of man," he explained, therefore captured both "the peculiar constitution of his body or mind" and "the qualities of the species which distinguish him from other animals." *Nature*, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828). "[T]hose who framed the Bill of Rights," *see Ice*, 555 U.S. at 165 (quoting *Harris v. United States*, 536 U.S. 545, 557 (2002), would have accordingly understood the nature of an accusation to refer to its distinctive properties.

Contemporary definitions for the word "cause" provide a helpful contrast to the term "nature." Many Eighteenth Century lexicographers recognized the noun as a term of art with a specialized legal meaning. Writing in 1726, Nathan Bailey defined the term as "a Tryal, or an Action brought before a Judge to be Examined and Disputed." *Cause*, AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (3d ed. 1726). Barclay, writing in 1792, recognized the same specialized meaning and defined the term "[i]n a Law sense" to mean "the matter in dispute, or subject of a law-suit." *Cause*, A COMPLETE AND UNIVERSAL ENGLISH DICTIONARY (2d ed. 1792). Writing in America, Webster did not recognize a specialized meaning for the term in 1806, *Cause*, A COMPENDIOUS DICTIONARY OF THE ENGLISH LANGUAGE (1806), but led with the term-of-art definition in 1828, *Cause*, AN AMERICAN DICTIONARY OF THE

ENGLISH LANGUAGE (1828). The noun "cause," he wrote, meant "[a] suit or action in court." *Cause*, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828).

The noun "accusation," whatever its meaning, must then incorporate both an underlying "nature" and "cause." Johnson defined the term "accusation" in 1785 "[i]n the sense of the courts" as "[a] declaration of some crime preferred before a competent judge, in order to inflict some judgment on the guilty person." *Accusation*, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785). There, he used the verb "prefer" to mean "[t]o offer solemnly," "to propose publickly," or "to exhibit." *Prefer*, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785). Barclay recognized a similar definition seven years later for the term "accusation" and defined it as "the preferring a criminal action against any one before a judge." *Accusation*, A COMPLETE AND UNIVERSAL ENGLISH DICTIONARY (2d ed. 1792). He then defined the verb "prefer" as "to exhibit a bill or accusation." *Prefer*, A COMPLETE AND UNIVERSAL ENGLISH DICTIONARY (2d ed. 1792). Webster's 1806 definition for the term "accusation" is similar to those offered by Johnson and Barclay: "a complaint" or "charge of some crime." *Accusation*, A COMPENDIOUS DICTIONARY OF THE ENGLISH LANGUAGE (1806). Webster later expanded on this definition in 1828. An "accusation," he wrote, could refer to "[t]he act or charging with a crime or offense." *Accusation*, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828). The word also denoted "[t]he charge of an offense or crime; or the declaration containing the charge." *Accusation*, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828).

From these various definitions, the precise meaning of the Notice Clause takes shape. The accusation necessarily incorporated "some crime," *Accusation*, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785), or "criminal action," *Accusation*, A COMPLETE AND UNIVERSAL ENGLISH DICTIONARY (2d ed. 1792). That crime had a nature, which constituted its "essential properties." *See, e.g.*, *Nature*, A COMPLETE AND UNIVERSAL ENGLISH DICTIONARY (2d ed. 1792). The nature of the crime alleged would allow the accused to "distinguish[]" the offense charged in his case "from all others." *See, e.g.*, *Nature*, A COMPLETE AND UNIVERSAL ENGLISH DICTIONARY (2d ed. 1792). The term "nature" thus incorporated "the 'constituent parts' of" the "crime's legal definition," also known as its elements. *See Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016) (quoting *Elements*, BLACK'S LAW DICTIONARY (10th ed. 2014)). By contrast, the cause of an accusation would alert the defendant to "the matter in dispute." *See, e.g.*, *Cause*, A COMPLETE AND UNIVERSAL ENGLISH DICTIONARY (2d ed. 1792). At trial, the defendant cannot fight about the alleged crime's "native state or properties," *Nature*, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785), but the real-world facts necessary to prove those elements are always in play. The term "cause" thus incorporated the "particulars" of the alleged offense with respect to "time, place, and circumstances" and would put the accused on notice of the facts the government intended to prove at trial. *See United States v. Cruikshank*, 92 U.S. 542, 558 (1875). As for nature, a statutory enhancement premised on the fact of a prior conviction differs from the version of an offense applicable to first-time offenders. The plain meaning of the term

accordingly suggests that without a prior-conviction allegation the accused could not adequately "distinguish[]" between the aggravated offense and the less serious alternative. *See Nature*, A COMPLETE AND UNIVERSAL ENGLISH DICTIONARY (2d ed. 1792). The prior-conviction allegation is necessary to allow the accused to "discriminate[]" between the potential offenses charged in the indictment. *See Nature*, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785).

ii. The earliest American authority suggests that an offense's "nature" included a prior-conviction allegation when necessary to support a recidivist enhancement that affected the statutory range.

Although scant, the earliest American authority suggests that courts treated prior convictions as part of the charged crime's nature whenever a statute set out a harsher penalty for recidivist offenders. In *People v. Youngs*, for example, the Supreme Court of New York considered an aggravated sentence imposed in 1803. 1 Cai. 37, 37 (N.Y. Sup. Ct. 1803). There, an indictment charged the defendant with grand larceny, and upon a second conviction, the statute defining the crime required "imprisonment for life." *Id*. The indictment "did not," however, "set forth the record of the former conviction." *Id*. The defendant objected to this procedure when the government asked the trial court to impose a life sentence. *Id*. at 39. "[T]he method heretofore adopted," he argued, "has been to make the first offence a charge in the indictment for the second." *Id*. "It is necessary," he continued, "that the previous offence should be made a substantive charge in the indictment for a second, where the punishment is augmented by the repetition, because the repetition is the crime."

Id. at 41. This was true, he concluded, because "the nature of the crime is changed by a superadded fact," and the defendant, "therefore, must have an opportunity to traverse" the allegation. *Id*. The Supreme Court of New York adopted the defendant's position and sustained his objection: "In cases . . . where the first offence forms an ingredient in the second, and becomes a part of it, such first offence is invariably set forth in the indictment for the second." *Id*. at 42.

In *Commonwealth v. Welsh*, Virginia's highest court recognized the same approach and held that a defendant could not receive a statutorily enhanced sentence in the absence of a prior-conviction allegation. 4 Va. 57, 57 (1817). There, a prosecutor charged the defendant in separate instruments with selling "spirituous liquors" on two occasions, and according to the charging documents, both offenses took place on the same day, but the defendant had no prior convictions. *Id*. The statute in question allowed for an enhanced sentence for "'every person having been convicted . . . who shall afterwards be guilty of the same offence, and be thereof convicted again." *Id*. at 58. The government requested an enhanced sentence based on the defendant's second conviction, but the defendant objected since neither information actually alleged the offense as his second. *Id*. "[B]ecause the Information . . . [did] not state that it [was] an information for a second offense," he argued, the trial court could not impose the enhanced sentence. *Id*. The presiding judge certified the question to Virginia's highest court, which sided with the defendant and declared an aggravated sentence off limits in the absence of the prior-conviction allegation. *Id*.

In *State v. Allen*, the Supreme Court of North Carolina likewise noted the necessity of a prior-conviction allegation. 10 N.C. 614, 614 (1825). After a jury voted to convict the defendant for larceny, the prosecutor produced evidence of a prior conviction and asked the trial court to impose the death penalty, an aggravated sentence required upon a second conviction. *Id*. The defendant objected based on his lack of notice, and the Supreme Court of North Carolina resolved the case in his favor: "[i]f the slave is charged with the second offence so as to incur the punishment of death," "it ought to be so stated in the indictment." *Id*.

To be sure, the lessons from *Allen*, *Welsh*, and *Youngs* only go so far. None dealt explicitly with constitutional notice requirements. *Allen* and *Youngs* turned on whether the trial court had jurisdiction to impose the enhanced penalty, and *Welsh* was primarily a matter of statutory interpretation. On top of that, the Sixth Amendment did not even apply to the States when the Supreme Courts of New York, North Carolina, and Virginia issued these opinions. *See Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019) (citing *Barron ex rel. Tiernan v. Mayor of Baltimore*, 7 Pet. 243 (1833)). *Allen*, *Welsh*, and *Youngs* therefore cannot conclusively establish the meaning of the Sixth Amendment's Notice Clause.

The opinions nevertheless shed light on contemporary charging practices. The prosecutors in each case were unable to impose the aggravated sentence based on their failure to charge the recidivist enhancement in an appropriate manner. The parties, this suggests, likely considered prior-conviction allegation an "essential propert[y]" of an aggravated recidivist offense, "by which" the accusation could be

"distinguished from" the offense applicable to first-time offenders. *See Nature*, A COMPLETE AND UNIVERSAL ENGLISH DICTIONARY (2d ed. 1792). The language on this point could be quite strong. In *Youngs*, the earliest of the three decisions, the Supreme Court of New York described the prior-conviction allegation as *inevitable*: "In cases . . . where the first offence forms an ingredient in the second, and becomes a part of it, such first offence is *invariably* set forth in the indictment for the second." 1 Cai. at 42. Virginia and North Carolina would go on to recognize the validity of the same practice. Later courts, in turn, routinely cited *Youngs* and *Welsh* to support the following common-law rule: a trial court could not impose a statutorily enhanced sentence based on a prior conviction unless the indictment alleged the prior conviction as an element of the offense. *See, e.g.*, *Shiflett v. Commonwealth*, 114 Va. 876, 879 (1913) (citing *Welsh*, 4 Va. at 57); *Kilbourn v. State*, 9 Conn. 560, 563 (1833) (citing *Youngs*, 1 Cai. R. at 37).

iii. English trial records from the Founding Era further establish a common-law practice of treating prior offenses as an element.

Are *Allen*, *Welsh*, and *Youngs* old enough to shed light on the beliefs of "those who framed the Bill of Rights?" *Ice*, 555 U.S. at 168 (quoting *Harris*, 536 U.S. at 557). Some say no. In her *Apprendi* dissent, Justice O'Connor attacked Justice Thomas's concurrence and classified it as "notable for its failure to discuss any historical practice, or to cite any decisions, predating (or contemporary with) the ratification of the Bill of Rights." *Apprendi*, 530 U.S. at 528 (O'Connor, J.,

dissenting). Then-professor Stephanos Bibas echoed this argument in a contemporary scholarly work:

> As for the common-law tradition, Justice Thomas cited cases dating mostly from the 1840s through the 1890s. Many of these cases did indeed treat aggravating facts as elements to be charged in indictments and proved to juries. All of his cases, however, were decided well after the Founding, most of them fifty to one hundred years later. To support his argument, Justice Thomas had to point to a common-law tradition at the time of the Founding that the Constitution enshrined. He offered no evidence that the common law in the eighteenth century embodied the elements rule.

Stephanos Bibas, *Judicial Fact-finding and Sentence Enhancements in a World of Guilty Pleas*, 110 Yale L.J. 1097, 1128 (2001). In his *Apprendi* concurrence, Justice Thomas responded to these claims by asking his detractors to prove their own conclusions, rather than taking issue with his. "[T]he very idea of a sentencing enhancement was foreign to the common law of the time of the founding," Justice Thomas noted, and since Justice O'Connor conceded this point in her dissent, she could not credibly "contend that any history from the founding supports her position." *Apprendi*, 530 U.S. at 502 n.2 (Thomas, J., concurring).

Another response would be to point out a Founding Era—and indeed, pre-Founding Era—tradition in England that treated prior convictions as formal elements when necessary to support a recidivist enhancement. Consider, for example, the prosecution of "common utterers" of counterfeit money. A 1741 statute made it a crime to "utter, or tender in payment, any false or counterfeit money, knowing the same to be false or counterfeit, to any person or persons," and upon

conviction, a first-time offender would "suffer six months imprisonment." *See* Counterfeiting Coin Act 1741 (15 Geo. 2, c.28, s.2). The statute singled out recidivists—in that context, "common utterers"—for additional punishment: "if the same person shall afterwards be convicted a second time," that defendant "shall, for such second offence, suffer two years' imprisonment." 15 Geo. 2, c.28, s.2. A third conviction resulted in the death penalty. 15 Geo. 2, c.28, s.2. One could even be convicted as a "common utterer" after a single trial if the evidence proved two offenses on the same day, two offenses "within the space of ten days," or the concurrent possession of other counterfeit coins at the time of the charged passing. 15 Geo. 2, c.28, s.3. An offense along those lines resulted in "a year's imprisonment." 15 Geo. 2, c.28, s.3.

The earliest extant trial record—a 1751 prosecution of a woman named Elizabeth Strong—resulted in an acquittal after the prosecutor failed to prove the fact of the prior conviction. Ms. Strong "was indicted for being a common utterer of false money." Trial of Elizabeth Strong, (Oct. 16, 1751), Old Bailey Proceedings Online, https://www.oldbaileyonline.org/browse.jsp?id=t17511016-48-defend352&div=t17511016-48#highlight (last visited Feb. 25, 2022). To support the charge, the indictment alleged a prior conviction for "uttering a false shilling, at Hicks's Hall, on" May 10, 1747. *Id*. The indictment went on to allege that Ms. Strong "utter[ed] another piece of false money, in the similitude of a shilling, on" August 1, 1751. *Id*. Together, these allegations, if proved, would subject Ms. Strong to a two-year term of imprisonment, *see* 15 Geo. 2, c.28, s.2, but the prosecution fell

apart on the prior-conviction allegation. The prosecutor "produced" a "copy of the record of her former conviction, but not being a true copy, and failing in proof of that, she was acquitted." Trial of Elizabeth Strong, *supra*, (Oct. 16, 1751).

The record of a 1788 prosecution demonstrates the same charging practice and procedural safeguards. Trial of Samuel Dring, (Sept. 10, 1788), Old Bailey Proceedings Online, https://www.oldbaileyonline.org/browse.jsp?id=t17880910-129-defend1003&div=t17880910-129#highlight (last visited Feb. 22, 2022). To support the recidivist enhancement there, the indictment alleged that Samuel Dring "was tried and convicted for being a common utterer of false and counterfeit money" on October 7, 1784. *Id.* The prosecutor called one witness to prove up "the record of the prisoner's former conviction" and another to establish his identity. *Id.* The second witness testified to his presence at the defendant's earlier trial and testified that Mr. Dring "was tried for uttering, and confined one year." *Id.*

The practice persisted into the early Nineteenth Century. In Michael Michael's 1802 prosecution, the indictment alleged the date and jurisdiction of the prior conviction, at which Mr. Michael "was tried and convicted of being a common utterer." Trial of Michael Michael, (Feb. 17, 1802), Old Bailey Proceedings Online, https://www.oldbaileyonline.org/browse.jsp?id=t18020217-89&div=t18020217-89&terms=common%20utterer#highlight (last visited Feb. 25, 2022). The prosecutor began the trial by reading into the record the prior conviction and then called two witnesses to establish Mr. Michael's identity as the same man named in the earlier judgment. The first, a "clerk to the Solicitor of the Mint," was present

"when the prisoner was tried" on the previous offense and identified Mr. Michael as the same individual. *Id*. The next witness, a jailer, testified to bringing Mr. Michael to the first trial and transporting him back to jail to serve a twelve-month sentence following his conviction. *Id*.

Founding Era trial records concerning the prosecution of "incorrigible rogues" provide additional evidence for the common-law tradition attested to in Justice Thomas's *Apprendi* concurrence. A 1783 law classified as "a rogue or vagabond" any defendant "found in or upon any dwelling-house, warehouse, coach-house, stable, or out-house; or in any inclosed yard, or garden, or area, belonging to any house, with intent to steal any goods or chattels." Rogues and Vagabonds Act 1783 (23 Geo. 3, c.88). The same status applied to any defendant "having upon him any picklock-key, crow, jack, bit, or other implement, with an intent feloniously to break and enter into any dwelling-house, ware-house, coach-house, stable, or outhouse" or "any pistol, hanger, cutlass, bludgeon, or other offensive weapon, with intent feloniously to assault any person." 23 Geo. 3, c.88. An earlier law passed in 1743 allowed judges to punish those found to be rogues or vagabonds with a six-month term of imprisonment. Justices Commitment Act 1743 (17 Geo. 2, c.5, s.9). Upon escape, a judge could declare the defendant an "incorrigible rogue" and then impose a two-year term of imprisonment. 17 Geo. 2, c.5, s.4. If an "incorrigible rogue" committed a second escape or another offense resulting in rogue or vagabond status following release, he would "be guilty of a felony." 17 Geo. 2, c.5, s.9. One way or another, the status of "incorrigible rouge" required a defendant to have committed

an earlier offense, and the 1785 prosecution of James Randall establishes the same charging practice used against common utterers of counterfeit money. There, the indictment charged Mr. Randall with an initial commitment "for being a rogue or vagabond" and a subsequent arrest "with a pistol and iron crow." Trial of James Randall, (Sept. 14, 1785), Old Bailey Proceedings Online, https://www.oldbaileyonline.org/browse.jsp?id=t17850914-104&div=t17850914-104&terms=incorrigible%20rogue#highlight (last visited Feb. 25, 2022). On those facts, the indictment alleged, he "was adjudged to be an incorrigible rogue," but following his commitment to "to the house of corrections for two years," Mr. Randall escaped. *Id*. These allegations put Mr. Randall at risk of a felony conviction, and the prosecution once more began by producing "true copies" of the "record" establishing the prior convictions. *Id*. From there, a witness identified Mr. Randall as the man named in the second record of conviction and testified to his escape. *Id*. Another witness testified to apprehending Mr. Randall following his first escape and attending the trial at which he earned the title incorrigible rogue. *Id*.

The 1785 prosecution of George Ballie followed the same procedure. There, the indictment described Mr. Ballie's initial conviction as a rogue "for being found in a certain inclosed ground of one William Seavin," his escape after being sentenced to an initial six-month term of imprisonment, and his subsequent conviction as an incorrigible rogue. Trial of George Ballie, (Sept. 14, 1785), Old Bailey Proceedings Online, https://www.oldbaileyonline.org/browse.jsp?id=t17850914-153&div=t17850914-153&terms=incorrigible%20rogue#highlight (last visited Feb.

25, 2022). He then served a two-year term of imprisonment, but according to the indictment, "was afterwards at large . . . having in his possession a certain instrument called an iron crow, and a pistol, and two leaden bullets, with intent to assault some person or persons against the peace." *Id*. These allegations subjected Mr. Ballie to felony punishment, and the prosecutor began the trial by proving up the earlier convictions. *Id*. The first witness "[p]roduced the records of the convictions of the prisoner" and testified to their validity. *Id*. The prosecutor then called a jailer to identify Mr. Ballie as the same man previously ordered to serve a six-month sentence as a rogue and two-year sentence as an incorrigible rogue. *Id*.

Founding Era trial records from England thus establish the same the traditional practice recognized in *Allen*, *Welsh*, and *Youngs*. When faced with a recidivist enhancement, English prosecutors operating in the latter half of the Eighteenth Century treated the prior conviction as an element formally to be "charged in the indictment" and "submitted to a jury" for resolution. *See Jones v. United States*, 526 U.S. 227, 232 (1999). This practice provides the historical evidence of a tradition "predating" and contemporaneous with "the ratification of the Bill of Rights." *See Apprendi*, 530 U.S. at 528 (O'Connor, J., dissenting). The English trial records also root the rule recited by the Supreme Court of New York in 1803, a mere 15 years after the People ratified the Constitution, to a "common-law tradition" that predated "the time of the Founding." *See* Bibas, *supra*, 110 Yale L.J. at 1128.

II. This Court should overrule *Almendarez-Torres*.

a. *Almendarez-Torres* is wrong and grievously so.

Almendarez-Torres is "egregiously wrong" as to both methodology and result. *See Ramos v. Louisiana*, 140 S. Ct. 1390, 1414 (2020). Rather than looking to history to discern charging practices at common law, the majority focused on § 1326 and issued an opinion based on its "language, structure, subject matter, context, and history." *Almendarez-Torres*, 523 U.S. at 228-29 (citing *Wells*, 519 U.S. at 490-92; *Garrett*, 471 U.S. at 779). That approach may well have allowed the majority to discern congressional intent regarding the elements-versus-sentencing-factors split, but just two years later, this Court abandoned that framework entirely, *Apprendi*, 530 U.S. at 478. It did so because "[a]ny possible distinction between an 'element' of a felony offense and a 'sentencing factor' was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding." *Id*.

Despite *Apprendi*'s new approach, this Court has not yet defended the prior-conviction exception as based on common-law practices. In *Apprendi*, the "best" it could do was to characterize *Almendarez-Torres* as "an exceptional departure from the historic practice" guiding its newly minted Sixth Amendment historical analysis. *See id*. at 487. On top of that, Justice Thomas established in his *Apprendi* concurrence a "tradition of treating recidivism as an element" that "stretches back to the earliest years of the Republic." *Id*. at 507 (Thomas, J., concurring) (citing *Welsh*, 4 Va. 57, 1817 WL 713 (1817); *Smith*, 14 Serg. & Rawle 69, 1826 WL 2217

(Pa. 1826)). Justice O'Connor and then-Professor Bibas nevertheless criticized Justice Thomas for failing to provide authority from the Eighteenth Century. *See id*. at 528 (O'Connor, J., dissenting); Bibas, *supra*, 110 Yale L.J. at 1128.

Enter the English trial records cited above. They establish an Eighteenth Century tradition of alleging a prior conviction as an element of an aggravated offense aimed at recidivist offenders. The parties then tested this allegation like any other, and if the proof of the prior conviction failed, the jury acquitted the defendant. *See* Trial of Elizabeth Strong, *supra*, (Oct. 16, 1751). The earliest trial record to establish this practice is from 1751, and the practice extended well into the Founding Era in both the United States and England. This evidence of historical charging practices reveals *Almendarez-Torres* as ahistorical and thus wrong about the Sixth Amendment.

b. *Almendarez-Torres* depends on flawed legal premises.

Until the Court tests *Almendarez-Torres* against the historical record, the prior-conviction exception will remain a bizarre "outlier" in its Sixth Amendment authority. *See Janus v. AFSCME*, 138 S. Ct. 2448, 2482-83 (2018) (citing *United States v. Gaudin*, 515 U.S. 506, 521 (1995)). In *Apprendi*, this Court moored its interpretation of the Sixth Amendment to what the Constitution "says," rather than what a majority of the Court "think[s] it ought to mean." *Apprendi*, 530 U.S. at 499 (Scalia, J., concurring). It did so by looking to history, *id*. at 478, and in the two decades since, *Apprendi*'s historical analysis "has become . . . firmly rooted in the Court's Sixth Amendment jurisprudence," *see Alleyne v. United States*, 570 U.S. 99, 120 (2013) (Sotomayor, J., concurring). *Almendarez-Torres* thus presents an

"anomaly." *See Janus*, 138 S. Ct. at 2483 (quoting *Harris v. Quinn*, 573 U.S. 616, 627 (2014)). In all other contexts, the meaning of the Sixth Amendment depends on historical practices at common law. *See, e.g.*, *Ice*, 555 U.S. at 168-69. For the fact of a prior conviction, this Court remains handcuffed to an opinion that never seriously considered historical practice. *Apprendi*, 530 U.S. at 489-90. The "underpinnings" that support the prior-conviction exception have therefore been seriously "eroded." *See Janus*, 138 S. Ct. at 2482-83. (quoting *Gaudin*, 515 U.S. at 521). The solution is obvious. Overruling *Almendarez-Torres*, or at the very least subjecting the prior-conviction exception to historical scrutiny, would "bring a measure of greater coherence to" this Court's Sixth Amendment "law." *Id*. at 2484.

c. No substantial reliance interests justify continued adherence to *Almendarez-Torres*.

"[W]hen procedural rules are at issue that do not govern primary conduct and do not implicate the reliance interests of private parties, the force of *stare decisis* is reduced." *Alleyne*, 570 U.S. at 119 (Sotomayor, J., concurring). In fact, "[t]he force of *stare decisis* is at its nadir in cases concerning procedural rules that implicate fundamental constitutional protections." *Id*. at 116 n.5. *Almendarez-Torres* is the source of a procedural rule that robs defendants like Mr. Zamora of their right "to be informed of the nature and cause of the accusation." *See* U.S. CONST., amend. VI. This rule results in confusion concerning the maximum term of imprisonment, *see* 8 U.S.C. § 1326(a)-(b), but does not "govern primary conduct" or "implicate the reliance interests of private parties," *Alleyne*, 570 U.S. at 119 (Sotomayor, J., concurring). In turn, "any reliance interest that the Federal Government and state

governments might have is particularly minimal here because prosecutors are perfectly able to" to allege a prior conviction whenever necessary to support a recidivist sentencing enhancement. *Id*. "[I]n 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,'" *id*. at 121 (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 174 (1989)), to a constitutional right, "the historical foundation" of which "extends down centuries into the common law," *Apprendi*, 530 U.S. at 477.

III. This case is an ideal vehicle to resolve the question presented.

Mr. Zamora's petition provides an excellent opportunity to reconsider and overrule *Almendarez-Torres*. At the outset, the prior-conviction exception had a massive effect in this case. Absent the prior-conviction allegation, Mr. Zamora argued, the district court could impose no more than a two-year term of imprisonment. *See* 8 U.S.C. § 1326(a). Because *Almendarez-Torres* foreclosed this claim in the government's favor, the district court instead applied a recidivist enhancement, which ultimately resulted in a 95-month term of imprisonment. If *Almendarez-Torres* is wrong, that means Mr. Zamora is serving a sentence 71 months longer than the Constitution allows. That amounts to nearly six years. A ruling in Mr. Zamora's favor would accordingly affect the outcome in this case dramatically. Mr. Zamora's lengthy sentence also provides this Court with sufficient time to issue an opinion before his release from prison, and those opportunities are relatively rare. "The average sentence for all illegal reentry

offenders was eight months" in fiscal year fiscal year 2020. *Quick Facts FY 2020 –Illegal Reentry Offenses* at 1, U.S. SENTENCING COMM'N, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Illegal_Reentry_FY20.pdf (last visited Feb. 28, 2022). *Almendarez-Torres* is effectively inapplicable in the average case, and as a result, this Court will have relatively few opportunities to reconsider its prior-conviction exception. Mr. Zamora's petition provides that opportunity, and this Court should take it. The Sixth Amendment's protections either depend on common-law practices or they do not, but until this Court tests *Almendarez-Torres* against the historical record, the answer remains unclear.

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted February 28, 2022.

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