No. _____

In the Supreme Court of the United States

_____

Kevin Ariel Garcia-Archaga,
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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QUESTIONS PRESENTED

I. The Sixth Amendment protects the right "to be informed of the nature and cause of the accusation." In *Apprendi v. New Jersey*, this Court held that "fact[s] that increase[] the penalty for a crime beyond the prescribed statutory maximum" were elements that must be charged in an indictment but carved out an exception for prior convictions. 530 U.S. 466, 490 (2000). It rooted the general rule in common-law historical practices, *see id.* at 477-83, but relied on an earlier opinion—*Almendarez-Torres v. United States*—to support the prior-conviction exception, *see id.* at 489 (citing 523 U.S. 224, 230 (1998)).

The first question presented is:

Whether the prior-conviction exception from *Almendarez-Torres* can be squared with the text of the Sixth Amendment's Notice Clause and the historical practices it codified.

II. The text and history are clear. In the Founding Era and immediately afterward, courts, prosecutors, and defendants in England and America treated the fact of a prior conviction necessary to satisfy a statutory recidivism enhancement as an element of an aggravated crime to be alleged in the indictment and proved to a jury at trial. The text of the Notice Clause codified this common-law practice, and a crime's "nature" included all allegations necessary to distinguish one statutory offense from another.

The second question presented is:

Whether, in light of the historical record, *Almendarez-Torres* should be overruled.

LIST OF PARTIES

Kevin Ariel Garcia-Archaga, petitioner on review, was the Defendant-Appellant below. The United States of America, respondent on review, was Plaintiff-Appellee. No party is a corporation.

RELATED PROCEEDINGS

- *United States v. Garcia-Archaga*, No. 4:21-CR-241-Y, U.S. District Court for the Northern District of Texas. Judgment entered on June 16, 2022.

- *United States v. Garcia-Archaga*, No. 22-10615, U.S. Court of Appeals for the Fifth Circuit. Judgment entered on December 14, 2022.

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PETITION FOR A WRIT OF CERTIORARI

Kevin Ariel Garcia-Archaga respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's unreported opinion is available on Westlaw's electronic database at 2022 WL 17713111 and reprinted at Pet.App.a1-a2.

JURISDICTION

The Court of Appeals issued its panel opinion on December 14, 2022. 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—
>
> . . .
>
> (2) whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both;

8 U.S.C. § 1326(b)(2). 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.

STATEMENT OF THE CASE

A. Introduction

At both the district-court level and on appeal, Mr. Garcia argued that his indictment's failure to allege a prior conviction necessary to satisfy a statutory sentencing enhancement rendered his sentence unconstitutional. That claim, he conceded, was foreclosed in the government's favor, but he nevertheless filed a lengthy, complex brief attacking the authority foreclosing his claim. He addressed both the original meaning of the Notice Clause, Appellant's Initial Brief at 15-19, *United States v. Garcia-Archaga*, No. 22-10615 (5th Cir. Sept. 26, 2022), and historical evidence of Founding Era charging practices in both United States and England, *id*. at 5-15. Despite those efforts, the result was preordained. This Court's authority foreclosed the sole issue advanced in the government's favor. The government moved for summary affirmance, and a three-judge of the Fifth Circuit Court of Appeals panel granted the motion on December 14, 2022. Pet.App.a2

B. Legal Framework

1. *Almendarez-Torres v. United States*

In *Almendarez-Torres v. United States*, the petitioner challenged a district court's power 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)). The prior conviction affected the statutory maximum, and on that basis, Mr. Almendarez argued that it was an element of an aggravated offense. *Id*. 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.

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 immense, but legislative caprice 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 sentencing scheme would necessarily "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 8 U.S.C. § 1326, *see 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

congressional intent, this Court "look[ed] to" § 1326'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 the Supreme 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. Justice Scalia 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). On this basis, he and the other three justices 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).

2. *Apprendi v. New Jersey*

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,'" it 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, this 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. This 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.

The general rule from *Apprendi*, unlike *McMillan*, turned on what the Constitution "sa[id]," not what a majority of the Supreme Court thought "it ought to mean." *Id*. at 499 (Scalia, J., concurring). The Sixth Amendment rests 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. "[C]riminal 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 served several important purposes. For one, it "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 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 "held true when indictments were issued pursuant to statute." *See id*. at 480 (citing citing ARCHBOLD, *supra*, at 51).

Despite that analysis, the *Apprendi* majority saw no need to overrule *Almendarez-Torres*. Mr. Apprendi had "not contest[ed] the . . . validity" of *Almendarez-Torres*, so the five-justice majority was able to sidestep its result for the time being. *See id*. at 489-90. It nevertheless recognized "that a logical application of" *Apprendi*'s "reasoning . . . should apply if the recidivist issue were contested." *Id*. The majority then characterized the rule from *Almendarez-Torres* as "arguabl[y] . . . incorrectly decided," *id*., and "at best an exceptional departure from the historic practice" codified in the Sixth Amendment, *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 come together to create a new, aggravated crime.

Id. at 507-08 (Thomas, J., concurring). "The consequences" of this evidence on an *Apprendi* exception rooted in *Almendarez-Torres*, Justice Thomas concluded, "should be plain enough." *Id.* at 518 (Thomas, J., concurring).

In her *Apprendi* dissent, Justice O'Connor responded to Justice Thomas. She criticized his call to overrule *Almendarez-Torres* 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." *Id.* at 528 (O'Connor, J., dissenting). Then-professor Stephanos Bibas echoed this argument in a contemporary law-review article:

> 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 [E]ighteenth [C]entury 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).

3. Post-*Apprendi* Developments

Despite Justice O'Connor's reservations, this Court has since applied *Apprendi*'s methodology in multiple cases and repeatedly 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*, this 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 *Southern Union Company* on the merits, *id.* at 358, and in *Oregon v. Ice*, this Court conducted the same analysis but came out the other way concerning a judge's decision to impose consecutive, rather than concurrent,

terms of imprisonment, 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.

Justice Stevens and Justice Thomas briefly addressed whether to overrule *Almendarez-Torres* in 2006. In a terse statement respecting the denial of various petitions for certiorari, Justice Stevens indicated his belief that *Almendarez-Torres* had been wrongly decided but explained that "[t]he denial of a jury trial on the narrow issues of fact concerning a defendant's prior conviction history . . . will seldom create any significant risk of prejudice to the accused." *Rangel-Reyes v. United States*, 126 S. Ct. 2873, 2874 (2006). He also noted that "countless judges in countless cases have relied on *Almendarez-Torres* in making sentencing determinations." *Id*. "The doctrine of *stare decisis*," he concluded, "provides a sufficient basis for the denial of certiorari in these cases." *Id*. Justice Thomas disagreed: "[T]he exception to trial by jury for establishing 'the fact of a prior conviction' finds its basis not in the Constitution, but in a precedent of this Court." *Id*. (Thomas, J., dissenting from denial of certiorari). On top of that, he noted, "[t]he Court's duty to resolve this matter is particularly compelling, because [it] is the only court authorized to do so." *Id*. (citing *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997)) (Thomas, J., dissenting from denial of certiorari). Justice Thomas then noted the stakes. The prior-conviction exception from *Almendarez-Torres* meant that

"countless criminal defendants will be denied the full protection afforded by the Fifth and Sixth Amendments." *Id.* (Thomas, J., dissenting from denial of certiorari). "There is no good reason to allow such a state of affairs to persist." *Id.* (Thomas, J., dissenting from denial of certiorari).

Despite Justice Thomas's concerns, the tension between *Apprendi* and *Almendarez-Torres* persists to this day. This Court has repeatedly applied *Apprendi*'s historical methodology in other Sixth Amendment contexts. It has so far shielded *Almendarez-Torres* from similar analysis. As a result, the Court continues to recognize the validity of the prior-conviction exception. *See, e.g.*, *United States v. Haymond*, 139 S. Ct. 2369, 2377 n.3 (2019) (citing *Almendarez-Torres*, 523 U.S. 224 (1998)).

C. Factual and Procedural History

Mr. Garcia, an alien, recently pleaded guilty to illegally reentering the United States following deportation. Pet.App.a3. 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 conviction, the district court applied a 20-year maximum instead. *See* Pet.App.a3 (citing 8 U.S.C. § 1326(b)(2)). This alternative applies "in the case of any alien . . . whose removal was subsequent to a conviction for commission of an aggravated felony." 8 U.S.C. § 1326(b)(2). Mr. Garcia's indictment did not allege his prior commission of an aggravated felony. Pet.App.a6. He objected at sentencing. Pet.App.a9. The indictment's omission, he argued, meant that it alleged only the two-year offense applicable to first-time offenders.

Pet.App.a9. He conceded, however, that this claim was foreclosed. Pet.App.a9 (citing *Almendarez-Torres*, 523 U.S. at 235, 239). The district court overruled the objection at sentencing, Pet.App.a16, and imposed a 42-month term of imprisonment, Pet.App.a4. Mr. Garcia advanced the same argument on appeal but again conceded that the claim was foreclosed. Pet.App.a1-a2. Despite this concession, he advanced a lengthy, complex attack on *Almendarez-Torrez*, which addressed both the original meaning of the Notice Clause, Appellant's Initial Brief at 15-19, *United States v. Garcia-Archaga*, No. 22-10615 (5th Cir. Sept. 26, 2022), and historical evidence of Founding Era charging practices in both United States and England, *id*. at 5-15. Mr. Garcia even advanced an argument on the issue of *stare decisis*. *Id*. at 28-30. The government moved for summary affirmance, and a three-judge panel granted the motion on December 14, 2022. *See* Pet.App.a1.

REASONS FOR GRANTING THIS PETITION

I. The prior-conviction exception from *Almendarez-Torres* cannot be squared with the text and history of the Sixth Amendment's Notice Clause.

a. The text is clear. In 1791, a crime's "nature" included all allegations necessary to distinguish one statutory offense from another.

"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. "Constitutional rights are enshrined with the scope they were understood to have *when the people adopted them*," and Founding Era "linguistic [and] legal conventions" shed light on such meaning. *New York State*

Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2136 (2022) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 634-35 (2008)). Founding Era dictionaries reveal the prior-conviction exception from *Almendarez-Torres* to be atextual. A crime's "nature" included all allegations necessary to distinguish one statutory alternative from another, and a prior-conviction allegation would be necessary to allow a defendant facing a statutory recidivism enhancement to do so.

Consider first the clause in its entirety. The preposition "of" links the noun "accusation" to the preceding nouns "nature" and "cause." The "nature" and "cause" therefore 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.

Founding Era lexicographers typically defined the term "nature" to refer to a thing's distinct properties, which allowed an observer to distinguish between things of one nature and things of another. Samuel Johnson defined the term 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 "nature" 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, thus 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). Given these contemporary definitions, "those 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 understood the "nature" of an "accusation" to refer to its distinctive properties.

Eighteenth Century lexicographers recognized the noun "cause" 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).

As used in the Notice Clause, the noun "accusation" incorporated 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). 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. 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 definitions, the original 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 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 could not 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 at issue. The term cause accordingly 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).

By itself, the plain meaning of the Notice Clause—particularly the word "nature"—strongly supports the interpretation urged by Mr. Garcia. A statutory enhancement premised on the fact of a prior conviction differs from the version of the offense applicable to first-time offenders, but without a prior-conviction allegation, the accused cannot "distinguish[]" between the aggravated offense for

recidivists and the less serious alternative. *See Nature*, A COMPLETE AND UNIVERSAL ENGLISH DICTIONARY (2d ed. 1792). A prior-conviction allegation was therefore 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). The historical record and Founding Era charging practices provide further support for this interpretation of the Sixth Amendment's text.

b. The historical record is clear. In the Founding Era, the fact of a prior conviction necessary to satisfy a statutory recidivism enhancement was an element of an aggravated crime to be alleged in the indictment and proved to a jury at trial.

The Founders were familiar with statutory recidivism enhancements. Throughout the Colonial Era, Parliament had repeatedly used statutes to set out harsh penalties for repeat offenders. In 1559, Parliament sought to regularize worship throughout the Church of England, and upon a "first offence," a recalcitrant minister could "suffer imprisonment by the space of six months." Uniformity Act 1159 (1 Eliz. 1, c.2). After a "second offence," a recidivist could "suffer imprisonment by the space of one whole year." Uniformity Act 1559 (1 Eliz. 1, c.2). Parliament adopted the same approach roughly 100 years later when it criminalized the printing of "seditious and treasonable Bookes[,] Pamphlets[,] and Papers." Licensing of the Press Act 1662 (14 Cha. 2, c.33). A first-time offender would "be disenabled from exercising his respective Trade"—in that case, operating a printing press—"for the space of three yeare." Licensing of the Press Act 1662 (14

Cha. 2, c.33). "[F]or the second offence," the recidivist offender "shall for ever thence after be disabled to use or exercise the Art or Mystery of Printing or of Founding Letters for Printing and shall alsoe have and receive such further punishment by Fine Imprisonment or other Corporal Punishment not extending to Life or Limb." Licensing of the Press Act 1662 (14 Cha. 2, c.33).

Parliament continued to set enhanced penalties for recidivist offenders well into the Founding Era. 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 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 sentence. 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.

The Counterfeiting Coin Act of 1741 also set out harsh penalties for repeat offenders. That 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). Parliament singled out recidivists 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.

During the Founding Era, English prosecutors, defendants, and courts routinely treated the fact of a prior conviction as an element of an aggravated crime. A 1751 prosecution under the Counterfeiting Coin Act resulted in an acquittal after the prosecutor failed to prove the fact of the prior conviction. The defendant, a woman named Elizabeth 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 Mar. 13, 2023). 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*. If proved, these allegations 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*, Old Bailey Proceedings Online.

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 Mar. 13, 2023). To support the recidivist enhancement in that case, 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 same practice persisted into the 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 Mar. 13, 2023). 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 prosecutions for those alleged to be incorrigible rogues evidence the same practice. A 1785 indictment charged James 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 Mar. 13, 2023). 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 conviction. *Id*. From there, a witness identified Mr. Randall as the man named in the 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*. Trial records from 1797 and 1814 establish the same practice for other defendants facing the same charge. Trial of Joseph Powell, (Nov. 30, 1814), Old Bailey Proceedings Online, https://www.oldbaileyonline.org/browse.jsp?id=t18141130-110&div=t18141130-

110&terms=offend%20again#highlight (last visited Mar. 13, 2023); Trial of John Hughes, (July 12, 1797), Old Bailey Proceedings Online, https://www.oldbaileyonline.org/browse.jsp?id=t17970712-64&div=t17970712-64&terms=offend%20again#highlight (last visited Mar. 13, 2023).

Colonial legislators in America followed Parliament's example and routinely set enhanced penalties by statute for repeat offenders. The Delaware Colony passed a larceny statute in 1751. Laws of the State of Delaware 296-98 (1798). A first-time offender could suffer no more than 21 lashes "at the public whipping post." *Id*. at 296. The statute then singled out recidivists for additional punishment. "[I]f any such person or persons shall be duly convicted of such offence as aforesaid, a second time," the law stated, the recidivist "shall . . . be whipped at the public whipping-post of the county with any number of lashes not exceeding [31], and shall stand in the pillory for the space of two hours." *Id*. at 297. In similar fashion, the Georgia Colony passed a law in 1765 to regulate the sale or distribution of "strong liquors," "Spirituous Liquors," or "beer" to "any slave." 19 Colonial Records of the State of Georgia 79 (Allen D. Candler ed. 1911 (pt. 1)). "[F]or the first offense," the law specified, "every person so offending shall forfeit a sum not exceeding five pounds sterling." *Id*. A "second Offence" carried more severe penalties: the forfeiture of ten pounds sterling and a three-month term of imprisonment. *Id*.

Congress and state legislatures carried on the same tradition throughout the Founding Era. The First Congress saw fit to regulate coastal trade, and to ensure

compliance with the new regulations, criminalized the willful neglect or refusal to perform acts required by the new statute. Act of Sept. 1, 1789, 1 Cong. ch. 11, sec. 34, 1 Stat. 64-65. "[O]n being duly convicted thereof," the Act specified, a first-time offender would "forfeit the sum of five hundred dollars." Act of Sept. 1, 1789, *supra*, 1 Stat. 65. A recidivist, by contrast, would forfeit "a like sum for the second offence and shall from thence forward be rendered incapable of holding any office of trust or profit under the United States." Act of Sept. 1, 1789, *supra*, 1 Stat. 65. The Second Congress adopted similar language in a pair of statutes criminalizing the failure to carry out other duties involving coastal trade. Act of Feb. 18, 1793, 2 Cong. ch. 8, sec. 29, 1 Stat. 315-16; Act of Dec. 31, 1792, 2 Cong. ch. 1, sec. 26, 1 Stat. 298. In 1799, the Fifth Congress followed suit for those entrusted to inspect cargo in the new Nation's ports. Act of Mar. 2, 1799, 5 Cong. ch. 22, art. 53, 1 Stat. 667. In each instance, Congress set a maximum fine for first-time offenders but specified disqualification as an enhanced punishment for recidivists. *See* Act of Mar. 2, 1799, *supra*, 1 Stat. 667; Act of Feb. 18, 1793, *supra*, 1 Stat. 315-16; Act of Dec. 31, 1792, *supra*, 1 Stat. 298. As for the States, Kentucky passed a law in 1801 punishing first-time pig thieves with up to a twelve-month term of imprisonment. 2 Laws of Kentucky 150 (1807). A recidivist, by contrast, could serve no less than six months and up to three years. *Id*. The State of New York passed a grand-larceny law seven years later subjecting repeat offenders to life in prison. 5 Laws of the State of New York 338-39 (1808).

Like their English counterparts, Founding Era prosecutors, defendants, and courts in the United States routinely treated the fact of a prior conviction necessary to support an enhanced sentence as an element of an aggravated crime to be charged in the indictment and proved at trial to a jury. In *People v. Youngs*, the Supreme Court of New York considered a grand-larceny statue passed in 1801 and held that the enhanced punishment could not be imposed without the prior-conviction allegation. 1 Cai. 37, 37 (N.Y. Sup. Ct. 1803). There, an indictment charged the defendant with grand larceny, and upon a second conviction, a statute required "imprisonment for life." *Id.* The indictment "did not," however, "set forth the record of the former conviction." *Id.* The defendant objected when the government asked the trial court to impose a life sentence following his conviction. *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.

Opinions from elsewhere in the United States establish the same procedural safeguard. A slave prosecuted in 1800 under Delaware's larceny statute avoided time in the pillory, a punishment set for repeat offenders, because his indictment did not allege the crime "as a second offense." *State v. David*, 1 Del. Cas 252, 1800 WL 216, at *1 (Apr. 1, 1800). In 1802, the Circuit Court for the District of Columbia chided prosecutors for charging a second offense "before the defendant was convicted of a first." *United States v. Gordon*, 25 F. Cas. 1371, 1371 (D.C. 1802). Evidence of the same practice appears in opinions from Virginia and North Carolina issued in 1817, *Commonwealth v. Welsh*, 4 Va. 57, 58, 1817 WL 713 (1817), and 1825, *State v. Allen*, 10 N.C. 614, 614 (1825), respectively.

The text and history point in the same direction. The earliest American authority and pre-Founding Era authority from England reveal a consistent historical practice of treating a prior conviction necessary to support a statutorily enhanced sentence as an element, which distinguished the aggravated recidivist offense from the lesser crime applicable to first-time offenders. Prosecutors charged the prior conviction in the indictment and put on evidence at trial to secure a conviction. Contemporary dictionaries confirm that the Framers used the text of the Notice Clause to incorporate this common-law practice into the Constitution, but despite their force, *Almendarez-Torres* forecloses these claims in the government's favor. There are nevertheless good reasons to raise the issue here. The nature of the error at the heart of *Almendarez-Torres* weighs strongly in favor

of its overruling. On top of that, *Almendarez-Torres* is egregiously wrong as to both methodology and result

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

At the district court and Fifth Circuit, Mr. Garcia argued against the application of a statutorily enhanced sentence based on the fact of a prior conviction and faulted the government for failing to allege the prior conviction in his indictment. As it stands, the prior-conviction exception recognized in *Apprendi* and rooted in *Almendarez-Torres* foreclosed that dispute in the government's favor. This Court should change that. Despite multiple decisions applying a historical and textual analysis to tease out the precise meaning of the Sixth Amendment in other contexts, this Court has not yet tested the result from *Almendarez-Torres* against the common law. That reticence is puzzling. *Almendarez-Torres* is out of line with Founding Era charging practices and the plain meaning of the Sixth Amendment. To make matters worse, *Almendarez-Torres* depends on flawed legal premises, and no substantial reliance interests justify its continued existence. In short, *Almendarez-Torres* is an ahistorical and atextual blight on this Nation's Sixth Amendment jurisprudence. It should be overruled.

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

Begin with the obvious—*Almendarez-Torres* is "egregiously wrong" as to both methodology and result. *See Ramos v. Louisiana*, 140 S. Ct. 1390, 1414 (2020). The methodological point is obvious. Rather than looking to history to discern Founding Era charging practices, the *Almendarez-Torres* majority focused on the statute of conviction—8 U.S.C. § 1326—and issued an opinion based on its "language,

structure, subject matter, context, and history." 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 and 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." *Apprendi*, 530 U.S. at 478.

Bad methodology leads to bad results. Despite *Apprendi*'s historical approach, this Court has not yet tested the prior-conviction exception against common-law practices. The "best" it could do in *Apprendi* was to characterize *Almendarez-Torres* as "an exceptional departure from the historic practice" guiding its newly minted Sixth Amendment analysis. *See id.* at 487. Looking ahead, 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)). The textual and historical evidence in this petition goes even further.

The same evidence provides persuasive answers to critiques of Justice Thomas's *Apprendi* concurrence. Responding in dissent, Justice O'Connor attacked Justice Thomas's position 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 2001 law-review article. Bibas, *supra*, 110 Yale L.J. at 1128. In his *Apprendi* concurrence, Justice Thomas responded to Justice O'Connor by noting her failure to prove her own conclusion. "[T]he very idea of a sentencing enhancement was foreign to the common law of the time of the founding," Justice Thomas explained, 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). In fact, the textual and historical evidence cited above clearly cuts the other way and provides additional support for Justice Thomas.

The time has come for this Court to consider that evidence. Founding Era appellate authority from the United States and Eighteenth Century trial records from England establish a consistent tradition of alleging a prior conviction as an element of an aggravated offense aimed at recidivist offenders. The parties tested this allegation like any other, and if 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. The practice extended well into the Founding Era in both the United States and England. Were that not enough, the Founders codified the common-law approach by obligating the government to inform the defendant of "the nature and cause of the accusation." U.S. CONST., amend. VI. *Almendarez-Torres* skirted the text of the Sixth

Amendment and the practices it incorporated. The result is a prior-conviction exception that is not just wrong but "egregiously" so. *See Ramos*, 140 S. Ct. at 1414

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 this Nation's 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, however, this Court remains handcuffed to an opinion that never seriously considered historical practice at all. *Apprendi*, 530 U.S. at 489-90. The "underpinnings" that support the prior-conviction exception have been seriously "eroded," *see Janus*, 138 S. Ct. at 2482-83 (quoting *Gaudin*, 515 U.S. at 521), and the solution is obvious. Overruling *Almendarez-Torres* and finally 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. That step is long past due.

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. Garcia 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 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 questions presented.

This 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. Garcia 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 42-month term of imprisonment. Pet.App.a4. If *Almendarez-Torres* is wrong, that means Mr. Garcia is serving a sentence 18-months longer than the Constitution allows. His lengthy sentence also provides this Court with sufficient time to issue an opinion before his release from prison. Those opportunities are rare. "The average sentence for all illegal reentry offenders was 13 months" in fiscal year 2021, the most recent year on record. *Quick Facts FY 2021 – 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 Mar. 13, 2023). That means *Almendarez-Torres* is effectively inapplicable in the average case, and as a result, this Court will have few opportunities to reconsider its prior-conviction exception. Mr. Garcia'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 March 13, 2023.

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