NO. _____

In the Supreme Court of the United States

HUGO PEREZ-MENDOZA,

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

Whether this Court should overrule its decision in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998).

DIRECTLY RELATED PROCEEDINGS

United States v. Hugo Perez-Mendoza, No. 4:21-CR-23 (N.D. Tex. April 27, 2022)

United States v. Hugo Perez-Mendoza, No. 22-10423 (5th Cir. Jan. 17, 2023)

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PETITION FOR A WRIT OF CERTIORARI

Hugo Perez-Mendoza respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's opinion below was not selected for publication. It can be found at 2023 WL 234155 and 2023 U.S. App. LEXIS 1036. The decision is reprinted at pages 1a–2a of the Appendix. The sentencing court did not issue any written opinions.

JURISDICTION

The Fifth Circuit entered its judgment on January 17, 2023. This petition is timely under S. Ct. R. 13.3. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the interpretation and application of the Fifth and Sixth Amendments to the U.S. Constitution, 8 U.S.C. § 1326, and 18 U.S.C. §§ 3559 and 3583.

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger.

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Title 8, Section 1326, Subsections (a) and (b)(1), of the United States Code provide:

> (a) In general
>
> Subject to subsection (b), any alien who--

(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under Title 18, or imprisoned not more than 2 years, or both.

(b) Criminal penalties for reentry of certain removed aliens

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 . . .

Title 18, Section 3583(b) provides, in pertinent part:

> (b) Authorized Terms of Supervised Release.—Except as otherwise provided, the authorized terms of supervised release are—
>
> * * * *
>
> (2) for a Class C or Class D felony, not more than three years; and
>
> (3) for a Class E felony, or for a misdemeanor (other than a petty offense), not more than one year.

Section 3559(a) of Title 18 provides, in pertinent part:

> (a) Classification.—An offense that is not specifically classified by a letter grade in the section defining it, is classified if the maximum term of imprisonment authorized is—
>
> * * * *
>
> (3) less than twenty-five years but ten or more years, as a Class C felony;
>
> (4) less than ten years but five or more years, as a Class D felony;
>
> (5) less than five years but more than one year, as a Class E felony.

STATEMENT

Petitioner Hugo Perez-Mendoza pleaded guilty to a single-count federal indictment charging him with illegal reentry after removal. The indictment—reprinted on pages 3a–4a of the Appendix—alleged all

the elements of the "simple" form of the crime, 8 U.S.C. § 1326(a), but did not allege that his May 8, 2020 removal was "subsequent to" a felony conviction. App. 3a; *see* 8 U.S.C. § 1326(b)(1). When he pleaded guilty, he signed a stipulation admitting all the facts alleged in the indictment. App. 6a. He did not admit that he was a convicted felon at the time of his removal. App. 6a.

The Probation Office prepared a Presentence Investigation Report suggesting that the district court should sentence Mr. Perez under 8 U.S.C. § 1326(b)(1). 5th Cir. ROA 164 ¶ 63.[1] The PSR asserted that he had pleaded guilty to a felony drunk driving offense in Texas court on September 23, 2019; that the state court had imposed a sentence of six months in jail; and that these events preceded his subsequent removal on January 3, 2020. 5th Cir ROA 158. Mr. Perez lodged a detailed objection. 5th Cir. ROA 168–173. He argued that recidivism was an element like any other at common law, and that it must be pleaded in the indictment and proven to a jury. That meant the indictment charged, at most, an offense under § 1326(a), because the prior felony "conviction" was an element of an enhanced offense defined § 1326(b)(1). He conceded that the issue was foreclosed against him in the Fifth Circuit. The Government likewise argued that the issue was foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). 5th Cir. ROA 175–176.

[1] The PSR and related documents were filed under seal in the district court.

At sentencing, the district court overruled the objection "for the reasons set out in the government's response." 5th Cir. ROA 134. The court imposed a sentence of 57 months' imprisonment followed by three years of supervised release. App. 8a; 5th Cir. ROA 143.

On appeal, Mr. Perez renewed his argument that the maximum lawful sentence that could be imposed on his indictment and plea was two years in prison and one year of supervised release. App. 1a–2a. The Fifth Circuit summarily affirmed the aggravated conviction and enhanced sentence. App. 2a.

This timely petition follows.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD OVERRULE *ALMENDAREZ-TORRES*.

In *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), this Court rejected the petitioner's argument that the existence of a pre-removal aggravated felony conviction was an "element" of an enhanced offense under 8 U.S.C. § 1326(b)(2): "We conclude that the subsection is a penalty provision, which simply authorizes a court to increase the sentence for a recidivist. It does not define a separate crime." *Id.* at 226.

That holding stands as an outlier in this Court's Fifth and Sixth Amendment jurisprudence. The Court has repeatedly held that *any* fact that aggravates the statutory punishment range is, for constitutional purposes, an "element" of an aggravated crime that must be pleaded in the indictment and proven to a jury

beyond a reasonable doubt. See, e.g., *Alleyne v. United States*, 570 U.S. 99, 108 (2013). The Court has recognized two narrow exceptions" to this "general rule": "Prosecutors need not prove to a jury the fact of a defendant's prior conviction . . .or facts that affect whether a defendant with multiple sentences serves them concurrently or consecutively." *United States v. Haymond*, 139 S. Ct. 2369, 2377 (2019) (plurality op.) (citing *Almendarez-Torres* for the first narrow exception and *Oregon v. Ice*, 555 U.S. 160 (2009), for the second).

Thus far, the Court has resisted calls to overrule *Almendarez-Torres*'s "narrow exception" to what the Fifth and Sixth Amendment require for every other kind of fact that aggravates the punishment. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); see also *United States v. Haymond*, 139 S. Ct. 2369, 2377 n.4 (2019) (Gorsuch, J., plurality opinion).

Even so, many current and former Justices have expressed doubt about the continuing vitality of the *Almendarez-Torres* exception. See, e.g., *Descamps v. United States*, 570 U.S. 254, 280 (2013) (Thomas, J., concurring) ("Under the logic of *Apprendi*, a court may not find facts about a prior conviction when such findings increase the statutory maximum."); *Dretke v. Haley*, 541 U.S. 386, 395–396 (2004) (describing the vitality of the exception as a "difficult constitutional question[ ]"); *Rangel-Reyes v. United States*, 547 U.S. 1200, 1200–1201 (2006) (Thomas, J., dissenting from denial of certiorari) ("[I]t has long been clear that a majority of this Court now rejects that exception."); cf. *United States v. Smith*, 640 F.3d 358, 369 (D.C. Cir. 2011) (Kavanaugh, J.) ("Smith protests that the

reasoning of *Almendarez-Torres* is in tension with the reasoning of later sentencing cases from the Supreme Court. . . . Perhaps so."); *United States v. Santiago*, 268 F.3d 151, 155 (2d Cir. 2001) (Sotomayor, J.) ("*Almendarez-Torres* remains good law, at least for now.").

As Justice Sotomayor—joined by Justices Ginsburg and Kagan—explained in her concurring opinion in *Alleyne*, 570 U.S. at 121, stare decisis does not require adherence to decisions where "the reasoning of those decisions has been thoroughly undermined by intervening decisions and because no significant reliance interests are at stake that might justify adhering to their result." The Fifth and Sixth Amendment principles reaffirmed by *Apprendi* are "now firmly rooted in our jurisprudence." *Id.* Those principles cannot logically coexist with the *Almendarez-Torres* exception.

A. This Court has thoroughly undermined most, if not all, of the decisions upon which *Almendarez-Torres* relied for its constitutional holding.

Almendarez-Torres first held, as a matter of statutory interpretation, that Congress *intended* to create mere "sentencing factors," rather than true elements, when it enacted § 1326(b)(1) & (b)(2). 523 U.S. at 229–239. That may well be, but it is irrelevant to the constitutional question resolved by part III of the opinion. *Id.* at 239–247.

The Court then rejected Almendarez's argument "that the Constitution requires Congress to treat recidivism as an element of the offense—irrespective

of Congress' contrary intent." *Id.* at 239. The Court then went through a series of reasons for rejecting that argument. Every one of those reasons was subsequently rejected.

1. Almendarez argued that the Constitution set limits on a legislature's ability to classify some punishment-enhancing facts as mere sentencing factors. This Court rejected that claim in light of *McMillan v. Pennsylvania*, 477 U.S. 79 (1986). See *Almendarez-Torres*, 523 U.S. at 242–246. This Court subsequently overruled the holding and reasoning of *McMillan* in *Alleyne*, 570 U.S. at 112, and *Apprendi*, 530 U.S. at 490. See *Haymond*, 139 S. Ct. at 2378 (plurality) (recognizing that *Alleyne* overruled *McMillan*).

2. The Court also mused that it would be "anomalous" to require the full "elements" treatment for facts that lead to "a significant increase" in the statutory punishment range "in light of existing case law that permits a judge, rather than a jury, to determine the existence of factors that can make a defendant eligible for the death penalty." *Almendarez-Torres*, 523 U.S. at 247 (citing *Walton v. Arizona*, 439 U.S. 639 (1990), *Hildwin v. Florida*, 490 U.S. 638 (1989), and *Spaziano v. Florida*, 468 U.S. 447 (1984)). The Court overruled those decisions in *Ring v. Arizona*, 536 U.S. 584, 609 (2002), and *Hurst v. Florida*, 577 U.S. 92, 102 ("Time and subsequent cases have washed away the logic of *Spaziano* and *Hildwin*. The decisions are overruled."). Today, *Almendarez-Torres* is the anomaly.

B. At the time of ratification, recidivism was no different than any other element of an aggravated crime.

"[T]he scope of the constitutional jury right must be informed by the historical role of the jury at common law." *S. Union Co. v. United States*, 567 U.S. 343, 353 (2012). "At common law, the fact of prior convictions *had* to be charged in the same indictment charging the underlying crime, and submitted to the jury for determination along with that crime." *Almendarez-Torres*, 523 U.S. at 261 (Scalia, J., dissenting) (citing Spencer v. Texas, 385 U.S. 554, 566 (1967); *Massey v. United States*, 281 F. 293, 297 (8th Cir. 1922); *Singer v. United States*, 278 F. 415, 420 (3d Cir. 1922); and *People v. Sickles*, 51 N.E. 288, 289 (N.Y. 1898).

A review of Founding Era prosecutions confirms that recidivism was treated as an element of an aggravated offense; prosecutors had to provide notice of the specific prior disposition on which they intended to rely and to provide the defendant an opportunity to context that allegation before the jury. The Founders were intimately familiar with recidivism enhancements. Throughout the Colonial Era, Parliament 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 1559 (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 yeares." 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. For example, 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.

An accused "incorrigible rogue" in Founding Era England enjoyed the right to *notice* of the specific allegations of recidivism. Under the status quo, Petitioner does not. 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).[2] 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

[2] Old Bailey Proceedings Online, https://www.oldbaileyonline.org/browse.jsp?id=t17850914-104&div=t17850914-104&terms=incorrigible%20rogue#highlight (last visited March 9, 2023)

defendants alleged to be incorrigible rogues.[3] Mr. Perez was not afforded the right to notice of an alleged prior conviction in his indictment. As a result, he could not contest the prior-conviction allegation at trial.

Accused counterfeiters in Founding Era England also enjoyed greater rights to notice than modern day federal defendants. A 1741 statute frequently invoked by prosecutors during the Founding Era 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 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.

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[3] *See*, e.g., 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 July 1, 2022); and 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 July 1, 2022).

In fact, a 1751 prosecution 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).[4] 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*.

The record of a 1788 prosecution demonstrates the same charging practice and procedural safeguards. Trial of Samuel Dring, (Sept. 10, 1788).[5] 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

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[4] Old Bailey Proceedings Online, https://www.oldbaileyonline.org/browse.jsp?id=t17511016-48-defend352&div=t17511016-48#highlight (last visited July 1, 2022)

[5] Old Bailey Proceedings Online, https://www.oldbaileyonline.org/browse.jsp?id=t17880910-129-defend1003&div=t17880910-129#highlight (last visited July 1, 2022)

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).[6] 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*.

Colonial legislators in America followed Parliament's example and routinely set enhanced penalties by statute for repeat offenders. The Delaware Colony, for example, passed a larceny statute in 1751. Laws of the State of Delaware 296–98

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[6]), Old Bailey Proceedings Online, https://www.oldbaileyonline.org/browse.jsp?id=t18020217-89&div=t18020217-89&terms=common%20utterer#highlight (last visited July 1, 2022)

(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 March 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 March 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 nevertheless 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. An enslaved person prosecuted in 1800 under Delaware's 1751 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, *Welsh*, 4 Va. at 58, and 1825, *State v. Allen*, 10 N.C. 614, 614 (1825), respectively.

In sum, the available evidence of history and tradition at the time of ratifying the Fifth and Sixth Amendments confirms that a prior conviction is no different than any other element of an enhanced crime. It must be pleaded in the indictment and proven to a jury beyond a reasonable doubt. Without those safeguards, the defendant is (in reality) convicted only of the simple or unenhanced form of the same crime.

C. The Court has already recognized that recidivism provisions can give rise to a jury requirement.

In *Nijhawan v. Holder*, 557 U.S. 29 (2009), this Court construed a part of the "aggravated felony" definition in 8 U.S.C. § 1101(a)(43)(M)(i) to require proof that a defendant's prior fraud conviction in fact involved loss exceeding $10,000, even if that loss amount was not an element necessary to the fraud conviction. *Id.* at 40. The Government agreed that, in a later federal prosecution under § 1326(b)(2), the federal jury "would have to find loss amount" associated with the prior conviction "beyond a reasonable doubt." *Id.* Acknowledging that concession, the Court adopted a circumstance-specific interpretation of the loss-amount requirement.

Even if the fact that a defendant was previously convicted of a particular crime is somehow exempted from the Constitutional demands of indictment and verdict that apply to every other fact that aggravates a statutory punishment range, that would not save the

so-called recidivism enhancements in § 1326(b)(1) and (b)(2). Those statutory provisions depend on other facts, in addition to the existence of a prior conviction, that surely require an allegation in a grand jury indictment and finding in a trial jury's verdict. For example, § 1326(b)(1) requires proof that the felony conviction *preceded* the removal. *See* 8 U.S.C. § 1326(b)(1). That requires consideration of non-elemental real-world facts about *when* the defendant was convicted and *when* the defendant was removed. And this Court has repeatedly recognized that a federal sentencing court cannot "rely on its own finding about a non-elemental fact to increase the defendant's maximum sentence." *Descamps v. United States*, 570 U.S. 254, 270 (2013).

Recently, the Court held that another recidivism-related sentencing law required the factfinder to engage in a "multi-factored" inquiry to determine whether prior convictions could be counted separately. *Wooden v. United States*, 142 S. Ct. 1063, 1071 (2022) (discussing the Armed Career Criminal Act's "different" "occasions" requirement, 18 U.S.C. § 924(e)(1)). Respondent has conceded "that the Constitution requires a jury to find (or a defendant to admit) that the defendant's ACCA predicates were committed on occasions different from one another." U.S. Br. in Opp., *Reed v. United States*, No. 22-336 (Dec. 12, 2022). The same logic applies to § 1326(b)(1)—the provision cannot be applied without an indictment alleging one or more felony convictions that preceded removal, and a jury verdict as to the same. In this case, the indictment did not assert and Mr. Perez's plea did not admit the facts necessary to trigger (b)(1).

II. THIS CASE IS AN IDEAL VEHICLE TO OVERRULE *ALMENDAREZ-TORRES*.

Without the *Almendarez-Torres* exception, Mr. Perez's 57-month prison sentence and three-year term of supervised release would be unlawful. Based only on the facts alleged by the grand jury and admitted during the plea, the district court was authorized to sentence him to up to two years in prison. *See* 8 U.S.C. § 1326(a). That would be a Class E felony under 18 U.S.C. § 3559(a)(5), and the maximum term of supervised release would be one year. *See* 18 U.S.C. § 3583(b)(3).

Even so, the *Almendarez-Torres* exception allowed the district court to make additional findings at sentencing that opened the door to a sentence of up to ten years in prison, 8 U.S.C. § 1326(b)(1), which is a Class C felony punishable by up to three years of supervised release. 18 U.S.C. § 3559(a)(3) & § 3583(b)(2). If the removal-followed-felony-conviction allegation is an element, then this sentence is unlawful.

Mr. Perez fully preserved this argument in district court and in the Fifth Circuit. App. 1a–2a.

Finally, Mr. Perez's federal sentence has not yet commenced. According to the Texas Department of Criminal Justice, he will likely remain in state custody until December of 2025. Once he is released from Texas custody, and absent relief from this Court, he will serve 57 months in federal custody, followed by a three-year term of supervised release. This Court will have plenty of time to grant him real and effective relief if it overrules *Almendarez-Torres*.

CONCLUSION

This Court should grant the petition and set this case for a decision on the merits.

Respectfully submitted,

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