No. 22-7316

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

REPLY TO MEMORANDUM IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

I. This Court should grant the petition and overrule *Almendarez-Torres*.

In response to Mr. Perez's petition, the government defends *Almendarez-Torres v. United States* by incorporating arguments advanced in a separate filing before this Court. *See* Memorandum for the United States in Opposition at 3, *Hugo Perez-Mendoza v. United States*, No. 22-7316 (June 20, 2023) (citing Brief for the United States in Opposition at 6-20, *Nohe Dominguez-Morales v. United States*, No. 22-6475 (May 8, 2022)). On those points, the government misreads the historical record and overlooks the pre-*Apprendi* framing of the issue presented and resolved by the Court in *Almendarez-Torres*. From there, it advances separate arguments about harmlessness and the applicable standard of review. It developed neither below. At most, the government raises questions for the Court of Appeals to resolve upon remand. This Court should grant Mr. Perez's petition and overrule *Almendarez-Torres*.

a. *Almendarez-Torres* is ahistorical and atextual.

The historical evidence weighs heavily in favor of Mr. Perez. English trial records from London's Old Bailey establish a common-law tradition of treating a prior conviction necessary to support a statutory recidivist enhancement as an element of an aggravated offense to be alleged in the indictment and proved to the jury at trial. The government criticizes this evidence as insufficiently direct, but that critique misses the point. Independent of any particular claims presented or decided at any individual trial, the records provide ample evidence of common-law

charging practices, and those practices should inform this Court's interpretation of the Sixth Amendment's Notice Clause. The earliest American authority attests to the same common-law tradition. The government attempts to distinguish each case, but in doing so, overlooks two important facts. First, these cases establish a direct relationship between an indictment's allegations and the application of a statutory recidivism enhancement. That the same relationship may have also affected a trial court's jurisdiction is beside the point. The government's remaining quibbles about the authority cited in the petition ignore the contextual evidence each opinion provides concerning contemporary charging practices.

At the outset, the government misinterprets the relevance of the English trial records cited in Mr. Perez's petition. "Constitutional rights are enshrined with the scope they were understood to have *when the people adopted them*," and by revealing Founding Era "legal conventions," contemporary records from London's Old Bailey shed light on the meaning of the Sixth Amendment's text. *See 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)). Rather than address this point, the government chides Mr. Perez for failing to "identif[y] any English case in which the failure to plead the prior conviction prevented a court from imposing a recidivist sentence." Brief for the United States in Opposition for Case No. 22-6475, *supra*, at 12-13. That criticism misses the mark. The records cited by Mr. Perez are helpful independent of the issues presented or decided in any individual case. That is true because the trial records provide evidence of Founding

Era charging practices. Those practices, in turn, provide evidence concerning the scope of the rights codified by the text of the Sixth Amendment.

The government does nothing to rebut the trial-record evidence offered by Mr. Perez. In the Founding Era, prosecutors and defendants at London's Old Bailey routinely 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 evidence marshaled in support of that point spans decades and involves prosecutions under two different statutes. In each case, the indictment alleged the prior conviction, and at trial, the prosecutor attempted to prove both the conviction's existence and the defendant's identity as the individual named in the earlier judgment. The earliest of these trials took place in 1751; the last in 1814. Such common-law consistency should inform this Court's interpretation of the Notice Clause. *Chiafalo v. Washington*, 140 S. Ct. 2316, 2326 (2020) (quoting *The Pocket Veto Case*, 279 U.S. 655, 689 (1929)) ("'Long settled and established practice' may have 'great weight in a proper interpretation of constitutional provisions.'").

The government similarly misinterprets the early American authorities cited in Mr. Perez's petition. It attempts to distinguish the most helpful cases on the basis of their precise holdings, but those holdings reveal the direct relationship between an indictment's allegations and the possibility of an enhanced sentence. The government attacks the remaining evidence as insufficiently direct, but again, this response misses the larger point. Each of the opinions cited has value as

evidence of Founding Era charging practices, and together, they reveal the sole case mentioned in support of the government's contrary position as an unhelpful historical outlier. *See Bruen*, 142 S. Ct. at 2153, 2156.

The government's treatment of *People v. Youngs*, an opinion issued by the Supreme Court of New York in 1803, illustrates its interpretative errors. The State of New York passed a statute in 1801 that set the maximum penalty for first-time grand-larceny defendants at 14 years of imprisonment. 1 Laws of the State of New York 235 (1807) (statute enacted Mar. 21, 1801). "[E]very person who shall be a second time duly convicted or attained," the statute continued, was subject to a life term. *Id.* A jury convicted Mr. Youngs for committing grand larceny, but the indictment "did not set forth the record of the former conviction." *People v. Youngs*, 1 Cai. 37, 37 (N.Y. Sup. Ct. 1803). The prosecutor nevertheless offered the prior conviction as a "counterplea" at sentencing and requested a life sentence. *Id.* at 37-38. This procedure relieved the prosecutor of his burden to prove the prior conviction as part of the case in chief. *Id.* at 38. Through counsel, Mr. Youngs objected and argued "that the proceedings, not setting forth the record of the former conviction, were erroneous." *Id.* at 38-39.

The competing arguments accordingly focused on the appropriate charging practice in light of the statute's alternative sentencing provisions. The prosecutor claimed that "[t]he identity of person and former conviction are circumstances collateral to the offence itself: they do not constitute a part of the crime, and therefore may be pleaded and replied to *ore tenus." Id. at 39.* The prosecutor

nevertheless conceded that, upon a denial of the counterplea, Mr. Youngs would be entitled to a jury determination on the question of his identity as the defendant named in the earlier judgment. *Id*. at 38. Mr. Youngs took the opposite position and referenced contemporary charging practices to support his claim that the prior conviction should be charged in the indictment:

> The practice on the present occasion is not such as has been formerly used; the mode heretofore adopted has been to make the first offence a charge in the indictment for the second, and as this has been the line of conduct in this country, it may be considered as a cotemporaneous exposition of our law.

Id. at 40-41. "[T]he *nature* of the crime," Mr. Youngs concluded, "is changed by a superadded fact; the party, therefore, must have an opportunity to traverse." *Id*. at 41.

By themselves, the parties' arguments provide helpful evidence concerning the scope of the rights codified in the Sixth Amendment. In arguing for his right to a complete indictment, Mr. Youngs echoed the Notice Clause. The recidivism enhancement sought by the prosecutor depended on the existence of a prior conviction, and a prior-conviction allegation—or its absence—would therefore affect "the *nature* of the crime" alleged in the indictment. *See id*. In the Founding Era, a crime's "nature" referred to its distinct properties, and if the crime was properly pled, a defendant could rely on the indictment to distinguish the offense charged in his indictment form all other crimes. *Nature*, A COMPLETE AND UNIVERSAL ENGLISH DICTIONARY (2d ed. 1792) ("[T]he essential properties of a thing, or that by which it is distinguished from all others."); *Nature*, A DICTIONARY OF THE ENGLISH LANGUAGE

(6th ed. 1785) ("[T]he native state or properties of any thing, by which it is discriminated from others."). According to Mr. Youngs, this approach reflected contemporary charging practices. *Youngs*, 1 Cai. at 40-41. The prosecutor, by contrast, attempted to analogize his post-conviction counterplea to one offered at common law to overcome a convicted felon's request for benefit of clergy. *Id.* A first-time felon "could seek 'benefit of clergy,'" which functioned as "a reprieve from execution granted at the discretion of the judge." Nancy J. King, *Sentencing and Prior Convictions: The Past, the Future, and the End of the Prior-conviction Exception to Apprendi*, 97 MARQ. L. REV. 523, 526 (2014). A felon could receive benefit of clergy only once, and in response to a second request, a prosecutor could counterplea the existence of an earlier, disqualifying conviction. *See Youngs*, 1 Cai. at 39. The parties thus advanced competing traditions concerning the effect of a prior conviction upon both the offense charged in the indictment and the possibility of an enhanced sentence.

The Supreme Court of New York sided with Mr. Youngs "[W]here 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," the court explained. *Youngs*, 1 Cai. at 42. In separate paragraphs, the court then addressed and rejected the prosecutor's benefit-of-clergy analogy. *Id*. at 42-43. "[O]n a strict examination," it explained, "there will be found to exist no analogy between them." *Id.* A contrary rule, the court continued, would "depriv[e] the prisoner of an important privilege secured to him by statute." *Id*. at 42. The court then spelled out those privileges,

which included the appropriate number of peremptory strikes and a potential challenge to the trial court's jurisdiction. *Id.* at 42-43. An 1801 statute allowed "every person arraigned for any crime punishable with death[] or with imprisonment for life" 20 peremptory challenges. 1 Laws of the State of New York 261 (1807) (statute enacted Mar. 21, 1801)). Had the indictment appropriately alleged the prior larceny, the court noted, Mr. Youngs could have taken advantage of those challenges "when tried for the principal felony." *Youngs*, 1 Cai. at 43. The indictment's failure to allege the prior conviction likewise affected the trial court's jurisdiction. *Id.* Mr. Youngs had been tried "before a court of sessions," *id.*, but another 1801 statute prohibited that court from trying an indictment alleging "any treason, misprision of treason, murder, or other felony, which is or shall be punishable with death, or with imprisonment in the state-prison for life," *see* 1 Laws of the State of New York 302-03 (1807) (statute enacted Mar. 24, 1801)). "Had it appeared from the indictment that he was to be put upon his trial for a second offence," the court explained, "a plea to the jurisdiction would have tied up the hands of such court, and have carried his cause for trial to a tribunal that could have extended to him all his rights." *Youngs*, 1 Cai. at 43.

The government's attempt to limit the holding in *Youngs* to a pair of specific statutory privileges undoes itself upon inspection. The Supreme Court of New York, it argues, "required the prior conviction to be pleaded in the indictment because this was 'an important privilege secured to [the defendant] by statute.'" Brief for the United States in Opposition for Case No. 22-6475, *supra*, at 13. It then

cites the jurisdictional and peremptory-challenge points advanced by the court to reject the prosecutor's benefit-of-clergy analogy. *See id.* This argument tellingly elides the relationship between those privileges and the maximum punishment, which itself depended on the indictment's allegations. After all, the peremptory-challenge statute applied to "every person arraigned for any crime punishable with death[] or with imprisonment for life." 1 Laws of the State of New York 261 (1807) (statute enacted Mar. 21, 1801)). The jurisdictional statute applied to the same class of offenders. 1 Laws of the State of New York 302-03 (1807) (statute enacted Mar. 24, 1801)). The "important privilege[s] secured . . . by statute" thus turned on the maximum possible penalty, and the maximum penalty, per the Supreme Court of New York, turned on the indictment's allegations. *Youngs*, 1 Cai. at 42-43.

The government's narrow reading of *Youngs* also ignores the court's remedy. In response to the Founding Era trial records cited in his petition, the government faults Mr. Perez for failing to "identif[y] any English case in which the failure to plead the prior conviction prevented a court from imposing a recidivist sentence." Brief for the United States in Opposition for Case No. 22-6475, *supra*, at 12-13. *Youngs* fills that gap. "[T]his court," the opinion concludes, "can give no other judgment in the case than such as the sessions might have done, which exceeds not the punishment of fourteen years' confinement." *Youngs*, 1 Cai. at 43. That was the maximum sentence a first-time offender could receive, 1 Laws of the State of New York 235 (1807) (statute enacted Mar. 21, 1801), and the most severe penalty the

trial court could impose given the indictment's failure to allege the prior conviction, *see Youngs*, 1 Cai. at 43.

The government's interpretation of *State v. Allen*, an opinion issued by the Supreme Court of North Carolina in 1825, fails for the same reason. There, the defendant, a slave, faced an indictment charging grand larceny. *State v. Allen*, 10 N.C. 614, 616 (1825). A 1741 statute "annexe[d] to the first offence the punishment of loss of ears, and discretionary whipping, and to the second offence, death." *State v. Adam*, 10 N.C. 188, 188 (1824) An 1816 statute, in turn, "gave to the Superior Courts jurisdiction of all offences, the punishment whereof may extend to life, leaving still with the County Court the trial of all those where the punishment was confined to limb or member." *Id.* at 188-89. The indictment in *Allen* did not allege a prior conviction but was nevertheless filed in Superior Court. 10 N.C. at 615-16. That was a mistake, as "the County Court alone could take original cognizance of the offence." *Id.* at 616. The Supreme Court of North Carolina, like its New York counterpart, then noted the relationship between an indictment's allegations, the possibility of an enhanced sentence, and the trial court's jurisdiction: "If the slave is charged with the second offence so as to incur the punishment of death under the act, it ought to be so stated in the indictment, that it might appear on the face of the record that the court had jurisdiction." *Id.* The indictment did not charge the prior conviction, and the offense alleged was therefore "confined expressly to the County Courts." *Id.*

The analysis in *Allen* built on a prior opinion that, like *Youngs*, addressed the distinction between benefit of clergy and statutory recidivism enhancements. *Adam*, 10 N.C. at 190-91. In that earlier opinion, the Supreme Court of North Carolina conceded that a disqualifying conviction for benefit-of-clergy purposes was "never stated in the indictment." *Id.* at 190. "[B]ut where the second offence is more penal than the first, at least where it is a capital offence, the first not being so," the fact of the prior conviction "constitutes it a part of the crime, and . . . should be stated in the indictment." *Id.* For this point, the court cited *Youngs* and reiterated the direct relationship between an indictment's allegations, a statutory recidivism enhancement, and the trial court's jurisdiction. *Id.* at 190-91. The prior-conviction allegation would establish the Superior Court's jurisdiction from the start by rendering plain the maximum penalty available in case of a conviction for both first-time offenders and recidivists. *Id.*

Similar interpretive errors lead the government to discount the other American authorities cited. Its dismissal of *State v. David*, for example, ignores legal and linguistic context. The Delaware Colony passed a larceny statute in 1751. *See* 1 Laws of the State of Delaware 296-98 (1797). 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 *State v. David*, the indictment alleged a larceny but not a prior conviction. 1 Del. Cas. 252, 1800 WL 216, at *1 (Apr. 1, 1800). The jury voted to convict, but the Court of Quarter Sessions did not impose time in pillory, as the crime alleged was not "laid as a second offense." *Id*. In the Founding Era, the verb "to lay" in this context meant "[t]o charge" or "impute" some crime or allegation. *Nature*, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828); *Lay*, A COMPLETE AND UNIVERSAL ENGLISH DICTIONARY (2d ed. 1792) ("To charge with; to accuse of; to impute"); *Lay*, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785). The opinion therefore sheds further light on contemporary charging practices and their effect on a court's authority to impose an enhanced punishment set out for recidivist offenders. *See David*, 1 Del. Cas. 252, 1800 WL 216, at *1.

The government's dismissal of *Gordon* and *Welsh* similarly ignores their value as evidence of Founding Era charging practices. In *United States v. Gordon*, the prosecutor alleged the offense as a second conviction. 25 F. Cas. 1371, 1371 (D.C. 1802). That allegation was in error, but the prosecutor's decision to include it at all provides evidence of the same procedural safeguards found in English trial records from the same period. *Id*. As for *Commonwealth v. Welsh*, the General Court of Virginia ultimately resolved the dispute based on the language of the statute at issue, but the defendant framed his objection to the prosecutor's post-conviction motion for an enhanced sentence around the information's failure to allege a prior conviction:

> This motion was opposed by the Defendant, *because the Information in this Case does not state that it is an Information for a second offence*, of retailing spirituous liquors, without license, after having been before convicted of a similar offence.

4 Va. 57, 58 (1817). The opinion is therefore helpful independent of the court's resolution of the precise question presented. That is true because the defendant's argument provides evidence of Founding Era charging practices. Those practices, in turn, provide evidence concerning the scope of the rights codified by the text of the Sixth Amendment.

In response to the historical evidence marshaled in support of Mr. Perez's petition, the government cites to a single South Carolina opinion from 1832. A defendant convicted under an 1830 horse-stealing statute moved to arrest the judgment after a jury voted to convict because his indictment's failed to "state whether" the crime was "the first or second offense." 8 Rich. 460, 460 (Ct. App. 1832). The act in question punished first-time offenders with whipping and recidivists with death. *Id.* The court rejected the defendant's argument and declared the existence of a prior conviction a question of law the sentencing court could decide on its own after the jury voted to convict for the underlying crime. *Id.* at 461. The court went on to claim that this approach was "in conformity with the practice here and every where else." *Id.* According to the government, this opinion proves that *Almendarez-Torres* "is not inconsistent with historical practice." Brief for the United States in Opposition for Case No. 22-6475, *supra*, at 11.

The government dramatically overstates the historical value of this outlier opinion. For one, its precise "holding was somewhat unclear because the court did not state whether the case involved a first or second offense." *Apprendi v. New Jersey*, 530 U.S. 466, 509 n.5 (2000) (Thomas, J., concurring) (citing *Smith*, 8 Rich. at 460). On top of that, the opinion's claim about adherence to contemporary charging practices is demonstrably false. The Supreme Court of New York announced a contrary rule in 1803. *See Youngs*, 1 Cai. at 42-43. North Carolina had done the same in 1824. *See Adam*, 10 N.C. at 188-89. The South Carolina opinion likewise conflicts with the charging practice evidenced in trial records from London's Old Bailey spanning six decades. At any rate, the interpretation of the Notice Clause should not depend on an outlier opinion from a single state. In the Second Amendment context, this Court recently rejected a similar attempt to define a constitutional right with reference to a minority approach reflected in only a "single state statute and a pair of state-court decisions." *Bruen*, 142 S. Ct. at 2154. In an earlier opinion, this Court rejected another interpretation of the Second Amendment that would have tied its meaning to "a single law, in effect in a single city." *Heller*, 554 U.S. at 632. It instead adopted an interpretation in line with the "overwhelming weight of other evidence regarding the right to keep and bear arms for defense of the home." *Id.*

Although the rights at issue differ, the Court should employ the same approach here and recognize that the historical evidence weighs heavily in favor of Mr. Perez. That evidence, in turn, reveals the result from *Almendarez-Torres* to be

"egregiously wrong," *see Ramos v. Louisiana*, 140 S. Ct. 1390, 1414 (2020), but the opinion's failure on the merits makes sense in context. The *Almendarez-Torres* Court was applying a methodology this Court would completely reject just a few years later in *Apprendi*. The government nevertheless relies on historical claims from *Almendarez-Torres* to boost its *stare decisis* arguments. Those claims may have had some force under *McMillian* but are effectively irrelevant to the historical claims advanced in Mr. Perez's petition.

b. The government's defense of *Almendarez-Torres* ignores this Court's subsequent turn to Founding Era charging practices.

The government's defense of *Almendarez-Torres* begins by overlooking its pre-*Apprendi* framing of the issue presented. In *Almendarez-Torres*, the Court asked whether a prior conviction necessary to support a recidivist enhancement functioned as an element of an aggravated crime or a sentencing factor. 523 U.S. 224, 242 (1998) (citing *McMillan v. Pennsylvania*, 477 U.S. 79, 84-91 (1986)). It treated the question presented as one of statutory interpretation and looked to the disputed statute's "language, structure, subject matter, context, and history" for an answer. *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)). An earlier opinion, *McMillan v. Pennsylvania*, required this analysis, and the defendant attempted to distinguish the result from that case from the issue presented in his. *Id*. at 242 (citing 477 U.S. at 84-86). In applying *McMillan*, the Court characterized recidivism as "a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence." *Id*. at 243 (citing *Parke v. Raley*, 506 U.S. 20, 26 (1992)). That

characterization supported the majority's interpretation of the statute before it and played a role in its sentencing-factor-versus-element analysis. *See id.* at 243-44. This Court would reject that framework two years later in *Apprendi*, 530 U.S. at 478, but the government nevertheless relies heavily on this portion of *Almendarez-Torres* to rebut the constitutional claim presented by Mr. Perez's petition. Brief for the United States in Opposition for Case No. 22-6475, *supra*, at 8-9. The excerpt cited, however, addressed a distinct question and therefore says little about the original meaning of the Notice Clause.

The government's reliance on this portion of *Almendarez-Torres* also overlooks an important caveat. The Due Process Clause, this Court held in 1912, did not require a State to "allege a defendant's prior conviction in the indictment or information that alleges the elements of an underlying crime" in order to impose a habitual-offender enhancement following conviction. *Almendarez-Torres*, 523 U.S. at 243 (citing *Graham v. West Virginia*, 224 U.S. 616, 624 (1912)). This Court had reiterated that point a few times since, and those holdings played a role in the *Almendarez-Torres* majority's sentencing-factor-versus-element analysis. *Id.* at 244 (citing *Parke v. Raley*, 506 U.S. 20, 26 (1992); *Oyler v. Boyles*, 368 U.S. 448, 452 (1962)). The majority nevertheless conceded that these opinions "d[id] not foreclose" the constitutional claim presented. *Id.* That was so because "the state statute at issue . . . provided for a jury determination of disputed prior convictions." *Id.*

The post-*Apprendi* relevance of the points cited by the government is unclear. This Court now looks to "longstanding common-law practice" to tease out the Sixth

Amendment's precise meaning. *See, e.g.*, *Southern Union Co. v. United States*, 567 U.S. 343, 348 (2012) (quoting *Cunningham v. California*, 549 U.S. 270, 281 (2007)). On its own terms, however, those practices played no role in *Almendarez-Torres*. The majority, for example, cited the earlier Due Process Clause opinion as establishing "a longstanding tradition of treating recidivism as 'go[ing] to the punishment only,'" *Almendarez-Torres*, 523 U.S. at 243, but that opinion came down in 1912. Given its timing, the analysis therein provides little evidence about the original meaning of the Notice Clause. *See Bruen*, 142 S. Ct. at 2137 (citing *Heller*, 554 U.S. at 614). The tension between *Almendarez-Torres* and *Apprendi* persists to this day. The Court should take this opportunity to finally test the prior-conviction exception from *Almendarez-Torres* against the historical record.

c. The government failed to develop its standard-of-review and harmlessness claims below. They can be addressed, if at all, on remand.

The government's remaining points fail. By objecting at sentencing, Mr. Perez preserved the constitutional claim presented to the Court of Appeals and in his petition to this Court. "A constitutional objection for *Apprendi* purposes is timely if a defendant makes the objection at sentencing." *United States v. Candelario*, 240 F.3d 1300, 1304-06 (11th Cir. 2001) (citing *United States v. Garcia-Guizar*, 243 F.3d 483, 488 (9th Cir. 2000); *United States v. Doggett*, 230 F.3d 160, 165 (5th Cir. 2000)). An earlier objection could have preserved the same issue but "would effectively" require Mr. Perez "to claim that the Government has undercharged him." *Id.* at 1305. "Because it is the Government's duty to ensure

that it has charged the proper offense, a defendant has no responsibility to point out that the Government could have charged him with a greater offense." *Id*. The government's suggestion that plain-error review applies is therefore wrong. Memorandum for the United States in Opposition for Case No. 22-7316, *supra*, at 4.

The Court of Appeals addressed neither the standard of review nor the question of harmlessness. In its response to Mr. Perez initial objection, the government attacked the error alleged as foreclosed, not harmless. C.A. ROA 175-76. It took the same approach on appeal. *See* United States' Unopposed Motion for Summary Affirmance at 2-3, *United States v. Perez-Mendoza*, Case No. 22-10423 (5th Cir. Nov. 29, 2022). The government did not in the alternative address the question of harmlessness or the appropriate standard of review. *See id*.

At most, the government raises questions for the Court of Appeals to resolve upon remand. This Court's "normal practice" is to allow the Court of Appeals to address alternative grounds for affirmance in the first instance following reversal. *See, e.g.*, *Neder v. United States*, 527 U.S. 1, 25 (1999) (citing *Carella v. California*, 491 U.S. 263, 266-67 (1989)). The government suggests no reason to depart from that practice here.

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 July 7, 2023.

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