No. _____

In the

Supreme Court of the United States

_____

Juan Manuel Amaya-Castaneda,

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, after *Holguin-Hernandez v. United States*, __U.S.__, 140 S.Ct. 762 (2020), a party may obtain appellate relief when the district court fails to reference or address substantial arguments for a sentence outside the Guideline range, even if the party had not lodged a specific objection to the court's failure to do so?

Whether a district court errs should reference or address substantial arguments for a sentence outside the Guideline range?

Whether, in light of the historical record, *Almendarez-Torres v. United States,* 523 U.S. 224 (1998), should be overruled?

PARTIES TO THE PROCEEDING

Petitioner is Juan Manuel Amaya-Castaneda, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Juan Manuel Amaya-Castaneda seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished opinion of the Court of Appeals is reported at *United States v. Amaya-Castaneda*, No. 22-10804, 2023 WL 4079983 (5th Cir. June 20, 2023)(unpublished). It is reprinted in Appendix A to this Petition. The district court's judgment and sentence is attached as Appendix B.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on June 20, 2023. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS, RULES AND STATUTE

The Fifth Amendment to the United States Constitution provides:

> 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; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution 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 defense.

Section 3553 of Title 18 reads in relevant part:

(a) Factors To Be Considered in Imposing a Sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and
(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

***

(c) Statement of Reasons for Imposing a Sentence.—The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence—

(1) is of the kind, and within the range, described in subsection (a)(4), and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in a statement of reasons form issued under section 994(w)(1)(B) of title 28, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In

the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission,,[3] and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

Federal Rule of Criminal Procedure 51 provides:

(a) Exceptions Unnecessary. Exceptions to rulings or orders of the court are unnecessary.

(b) Preserving a Claim of Error. A party may preserve a claim of error by informing the court—when the court ruling or order is made or sought—of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection. If a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party. A ruling or order that admits or excludes evidence is governed by Federal Rule of Evidence 103.

STATEMENT OF THE CASE

I. Facts and Proceedings in District Court

Petitioner Juan Manuel Amaya-Castaneda pleaded guilty to one count of re-entering the United States following removal and without authorization, a violation of 8 U.S.C. §1326. *See* (Record in the Court of Appeals, at 34-35). The indictment did not allege, and the factual resume did not admit, that the defendant had been convicted of a felony prior to the removal named in the indictment. *See* (Record in the Court of Appeals, at 6, 34-35). A Presentence Report (PSR) concluded that his Guideline range should be 24 months imprisonment, the product of an offense level of 19 and a criminal history category of III, capped at 24 months because the Magistrate had only admonished him of this possible penalty. *See* (Record in the Court of Appeals, at 68, 113, 118). At sentencing, however, the district court conducted a new rearraignment hearing at which it admonished the defendant of a possible ten-year penalty. *See* (Record in the Court of Appeals, at 67-81). It received a new plea of guilty. *See* (Record in the Court of Appeals, at 67-81).

At the sentencing hearing, defense counsel brought an objection to the application of *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), which the court acknowledged and overruled. *See* (Record in the Court of Appeals, at 82). Counsel also urged leniency on two grounds: 1) that the prior re-entry sentence had only been nine months, so that a sentence in the Guideline range was not demonstrably necessary to achieve deterrence, and 2) that the defendant's concrete plans to obtain employment in Mexico, and his family ties to the area, would make

re-offense unlikely. *See* (Record in the Court of Appeals, at 85-87). The government said that it would not oppose a below-range sentence in recognition of the defendant's cooperation in conserving judicial resources. *See* (Record in the Court of Appeals, at 89-90). The district court instead imposed a 37-month sentence, explaining only that"[a] sentence of 37 months is sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph 2 of Section 3553(a)," which it proceeded to recite. (Record in the Court of Appeals, at 92). The defense objected that the sentence was greater than necessary to achieve these purposes, but the court overruled the objection. *See* (Record in the Court of Appeals, at 92-93).

II. Appellate Proceedings

Petitioner appealed, contending that the district court had erred in failing to address meaningfully his arguments for an out-of-range sentence. Some effort to address his substantial claims in mitigation, he argued, was compelled by this Court's decision in *Rita v. United States*, 551 U.S. 338 (2007). He also contended that the sentence in excess of two years violated the Sixth Amendment, because the fact of a prior conviction had not been placed in the indictment and proven to a jury. Canvassing historical sources, he endeavored to show that the original meaning of the jury trial and Notice provisions of the Sixth Amendment required that any fact essential to the punishment be pleaded in the indictment and proven to a jury, including the fact of a prior conviction.

The court of appeals expressly applied plain error review to the failure to explain claim. *See* [Appx. A]; *United States v. Amaya-Castaneda*, No. 22-10804, 2023

WL 4079983, at *1 (5th Cir. June 20, 2023)(unpublished)("We review this forfeited objection for plain error."). Further, it held that the record reflected a "reasoned basis" for the decision, notwithstanding the court's failure to reference arguments in mitigation:

> The record reflects that the district court considered Amaya-Castaneda's straightforward and simple arguments for a below-guidelines sentence and provided a reasoned basis for rejecting the request. The court explained that a 37-month sentence was necessary to reflect the seriousness of the offense, provide just punishment, promote respect for the law, afford deterrence, and protect the public. Under the circumstances, it did not commit error, plain or otherwise, by failing to explicitly reference Amaya-Castaneda's arguments for a lower sentence.

Amaya-Castaneda, 2023 WL 4079983, at *1 (citing *Rita v. United States*, 551 U.S. 338, 358 (2007), and *United States v. Coto-Mendoza*, 986 F.3d 583, 587 (5th Cir. 2021)). Finally, it rejected the constitutional challenge as foreclosed by *Almendarez-Torres*, 523 U.S. 224 (1998).

REASONS FOR GRANTING THE PETITION

I. The opinion below conflicts with multiple other courts of appeals and of this Court.

A. The decision below conflicts with the decisions of this Court.

1. Conflict with *Rita v. United States*

A federal criminal sentence should be sufficient but not greater than necessary to accomplish the goals of sentencing set forth in 18 U.S.C. §3553(a)(2)(A). This Court has set forth a two-part standard for review of federal sentences. *See Gall v. United States*, 552 U.S. 38, 51 (2007). Assuming a sound process, reviewing courts must decide whether the sentence represents an abuse of discretion as a substantive

matter. *See Gall*, 552 U.S. at 51. But before they reach this question, the reviewing courts:

> must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, **or failing to adequately explain the chosen sentence**—including an explanation for any deviation from the Guidelines range.

Id. (emphasis added).

This Court has provided special guidance regarding the emphasized portion of the passage above: the duty to explain the sentence. It has agreed that a district court's explanation for the sentence may be brief, provided it offers enough to conduct appellate review. *See Rita v. United States*, 551 U.S. 338, 356-357 (2007). And it has noted that a Guideline calculation may help to supply the explanation for a sentence inside the applicable range. *See Rita*, 551 U.S. at 356-357. But more detail is expected under two circumstances: where the sentence imposed falls outside the Guideline range, and where the parties offer nonfrivolous arguments for a sentence outside the range. *See id.* at 357 ("Where the defendant or prosecutor presents nonfrivolous reasons for imposing a different sentence, however, the judge will normally go further and explain why he has rejected those arguments.").

The opinion below, however, holds that a district court need not reference the defendant's arguments for an out-of-range sentence so long as it listens to the defendant's arguments, and the sentence imposed has a "reasoned basis." *See* [Appx. A]; *United States v. Amaya-Castaneda*, No. 22-10804, 2023 WL 4079983, at *1.

That is not consistent with *Rita*. That decision emphasizes the importance of sentence explanation in building public confidence in the legal system, and in facilitating reasonableness review. *See Rita*, 551 U.S. at 356-357. It distinguishes between cases involving the simple selection of a Guideline sentence, and those in which the court is confronted with nonfrivolous arguments for an out-of-range sentence. *See id.* While it emphasizes that the former cases require only a minimal explanation, it requires "more" in the latter. *See id.* This case falls in the latter category. *Rita* tells us the rule for this situation:

> [w]here the defendant or prosecutor presents nonfrivolous reasons for imposing a different sentence, however, the judge will normally go further and explain why he has rejected those arguments.

Id. at 357. The opinion below, by contrast, holds that the district court need not reference arguments for a different sentence so long as the district court hears the arguments from the parties and provides a facially reasonable explanation for the sentence imposed. *See* [Appx. A]; *Amaya-Castaneda*, 2023 WL 4079983, at *1. These are conflicting positions.

2. Conflict with *Holguin-Hernandez*

Nor is the decision below consistent with this Court's teachings as to the standards for preservation. The opinion below applies plain error, thus requiring a separate objection to preserve a failure to respond claim. *See Hernandez-Jimenez*, 2023 WL 166414, at *1. This requirement persists even where, as here, the party requests a sentence outside the range, offers nonfrivolous arguments for a lesser sentence, and challenges only the district court's failure to respond thereto. *See id.*

That approach does not heed the guidance of this Court's decision in *Holguin-Hernandez v. United States*, __U.S.__, 140 S.Ct. 762 (2020), which held that substantive reasonableness review may be preserved without a specific objection. *See Holguin-Hernandez*, 140 S.Ct. at 764. In *Holguin-Hernandez*, this Court explained that a simple request for a lesser sentence adequately communicates that a greater sentence is unnecessary under §3553(a), thus preserving substantive reasonableness claims. *See id.* at 766. Such a request does what Federal Rule of Criminal Procedure 51 demands: tell the court what action the party wishes it to take, and provide the grounds for the request. *See id*. The Rule, emphasized this Court, does not require appealing parties to state the standard of review in an objection, "reasonableness." *See id.* at 766-767.

To be sure, *Holguin-Hernandez* reserved the question of what objections are necessary to preserve claims of procedural error. It said:

> The Government and amicus raise other issues. They ask us to decide what is sufficient to preserve a claim that a trial court used improper procedures in arriving at its chosen sentence. And they ask us to decide when a party has properly preserved the right to make particular arguments supporting its claim that a sentence is unreasonably long. We shall not consider these matters, however, for the Court of Appeals has not considered them. We hold only that the defendant here properly preserved the claim that his 12-month sentence was unreasonably long by advocating for a shorter sentence and thereby arguing, in effect, that this shorter sentence would have proved "sufficient," while a sentence of 12 months or longer would be "greater than necessary" to "comply with" the statutory purposes of punishment. 18 U.S.C. § 3553(a).

Id. at 767 (internal citations omitted).

Nonetheless, the reasoning of *Holguin-Hernandez* provides significant support for the notion that formulaic "procedural reasonableness" objections are not required

by Rule 51, provided the defendant has made some effort to inform the court of the action it wishes to take, and the reasons therefor. In *Holguin-Hernandez*, this Court found that a request for a lesser sentence appraises the trial judge of its "overarching duty" to impose a sentence no greater than necessary under §3553(a). Similarly, an argument for a lesser sentence triggers an "overarching duty" to explain the judge's thinking about the issues presented to it. *See Rita*, 551 U.S. at 556-557. Further, *Holguin-Herrera* states in terms that an appealing party "need not also refer to the standard of review" to preserve error. *See Holguin-Hernandez*, 140 S.Ct. at 766-767. "Procedural reasonableness," like "substantive reasonableness," is not an error but a standard of review. *See Gall*, 552 U.S. at 51. There is no need to mention it in an objection.

Yet the court below has repeatedly and categorically rejected any lessons from *Holguin-Hernandez* beyond the narrow question of how to preserve substantive reasonableness review. *See United States v. Cuddington*, 812 F. App'x 241, 242 (5th Cir. 2020)("But the Supreme Court in *Holguin-Hernandez* explicitly declined to address whether its reasoning applied to procedural reasonableness. … Accordingly, our case law requiring a specific objection to preserve procedural error remains undisturbed, as we have previously held in at least one unpublished decision.")(internal citations and quotations omitted); *United States v. Gonzalez-Cortez*, 801 Fed. Appx. 311, 312, n.1 (5th Cir. 2020)(unpublished)(applying plain error review to a claim of procedural error). Indeed, it has done so in a published opinion

addressing the very kind of claim raised here. *See United States v. Coto-Mendoza*, 986 F.3d 583, 586 (5th Cir. 2021).

Holguin-Hernandez seriously undermines the requirement of a separate objection for certain claims of procedural reasonableness, specifically, a claim of error founded on a district court's failure to respond to arguments for a sentence outside the Guidelines. Because the court below has failed to heed that guidance, this Court should grant review.

B. The decision below conflicts with the law of the Fourth, D.C., and Seventh Circuits.

1. Conflict with the Fourth Circuit

The decision below is contrary to the law of several other circuits, and certainly to the law of the Fourth Circuit. In the Fourth Circuit, Petitioner would have likely received relief in the instant case. The Fourth Circuit has long held, even before *Holguin-Hernandez*, that defendants may preserve a failure-to-respond claim by offering non-frivolous arguments for a lesser sentence. *See United States v. Lynn*, 592 F.3d 572, 578 (4th Cir. 2010). They need not object to the sentence to the explanation after the sentence is pronounced. *See Lynn*, 592 F.3d at 578. The Fourth Circuit has explained that:

> [b]y drawing arguments from § 3553 for a sentence different than the one ultimately imposed, an aggrieved party sufficiently alerts the district court of its responsibility to render an individualized explanation addressing those arguments, and thus preserves its claim.

Id.

The Fourth Circuit has also twice reaffirmed, after *Holguin-Hernandez*, its prior view that some claims of procedural error do not require formal and specific objection. *See United States v. Rivera*, 819 Fed. Appx. 139, 141 (July 20, 2020)(unpublished); *United States v. Myles*, 805 Fed. Appx 184, 188-189 (4th Cir. 2020)(unpublished)("a defendant preserves a claim of inadequate explanation by 'drawing arguments from [18 U.S.C.] §3553 for a sentence different than the one ultimately imposed.'")(quoting *Lynn*, *supra*).

Three relatively recent cases from the Fourth Circuit make clear that it is also in conflict with the court below as to the merits of failure to explain claims. In *United States v. Myles*, 805 Fed. Appx 184 (4th Cir. 2020)(unpublished), the defendant received a Guideline sentence of life imprisonment. *See Myles*, 805 Fed. Appx at 185-186. The district court merely noted the Guidelines and imposed the sentence. *See id.* at 189-190. The Fourth Circuit regarded the explanation as plainly and reversibly insufficient. *See id.* at 185, 188-191. Notably, the court there found that the defendant failed to meet even the relaxed standard of *Lynn*: counsel had not requested a sentence below the Guidelines. *See id*. at 188-189. Yet it also found that the court's explanation should be reversed on plain error review. *See id.* at 185, 188-191.

The government pointed to the district court's statements "that Myles 'was untruthful,' that he 'tried to avoid facing the facts that were clearly established,' and that 'the government's position regarding the drug weight' was 'well supported by the evidence' before pronouncing the sentence." *Id*. at 190. When these statements were coupled with the court's Guideline calculations, argued the government, they

provided adequate reasoning for a Guideline sentence. *See id.* But the Fourth Circuit rejected that argument, finding that the court's reasoning for a Guideline calculation could not be used to explain its choice of sentence under §3553(a). *See id.*

Myles illustrates that the instant case would have qualified for relief in the Fourth Circuit. Myles failed to offer any reason for a lesser sentence, apart from his Guideline objection. *See id*. at 188-189. Yet, the Fourth Circuit reversed on plain error review. *See id.* at 185, 188-191. Petitioner, by contrast, offered perfectly reasonable arguments for a lesser sentence – 1) that his prior immigration sentence had been only nine months, so a dramatically greater sentence might not be necessary to achieve deterrence, *see* (Record in the Court of Appeals, at 85-87), and 2) that he had made concrete plans to build a life in Mexico, reducing the risk of recidivism, *see* (Record in the Court of Appeals, at 89-90) -- yet the court below required no specific response. *See Amaya-Castaneda*, *See Amaya-Castaneda*, 2023 WL 4079983, at *1.

So with the Fourth Circuit's recent published reversal in *United States v. Patterson*, 957 F.3d 426 (4th Cir. 2020). In *Patterson*, the defendant violated the terms of his supervised release, but sought a below Guideline sentence at his revocation. *See Patterson*, 957 F.3d at 430, 432-433. In particular, "Patterson's counsel argued that he (1) had a strong employment record and could continue performing janitorial work; (2) enjoyed extensive family support; and (3) was attempting to address his substance abuse problem." *Id*. at 432.

In *Patterson*, "the district court gave a fulsome explanation of the factors it considered under § 3553(a) in arriving at the revocation sentence." *Patterson*, 957

F.3d at 439. Specifically, it pointed out that the defendant had evaded his drug tests 24 times, it noted that general deterrence supported a harsh sentence, and it explained that most of the sentence was attributable to two particular violations proven by the government. *See id.* Yet in spite of this "fulsome" explanation, the Fourth Circuit reversed because "the district court procedurally erred by failing to acknowledge that it had considered Patterson's arguments for a downward variance or departure." *Id.* at 436.

Patterson, a published case, cannot be reconciled with the decision below. *Patterson* recognizes a duty to respond to arguments in mitigation that is independent of the abstract duty to explain the sentence imposed. *See id.* at 436, 439. Further, it recognizes that duty even when the sentence complies with the Guidelines, and even in supervised release cases like the one at bar. *See id.* at 437 ("This Court has applied these principles to revocation sentences, with the understanding that such sentences are entitled to a more 'deferential appellate posture' in order to 'account for the unique nature of ... revocation sentences.'")(quoting *United States v. Gibbs*, 897 F.3d 199, 203 (4th Cir. 2018)). The court below, however, affirmed where the district court made no reference to the defendant's mitigation arguments. *See Amaya-Castaneda*, 2023 WL 4079983, at *1.

Finally, the conflict between this Court and the Fourth Circuit is illustrated by the Fourth Circuit's decision in *United States v. Hardin*, No. 19-4556, 2021 WL 2096368, at *7–8 (4th Cir. May 25, 2021)(unpublished). In that case, the defendant received a life term of supervised release, which comported with his Guideline range.

See Hardin, 2021 WL 2096368, at *2. Though the defendant argued that he was less culpable than similar offenders, the district court followed the Guidelines, commenting that the term of release could be terminated or modified. *See id.* The Fourth Circuit emphasized that it did "not doubt that the district court heard and understood Hardin on his objection." *Id.* at *7. It nonetheless found the explanation insufficiently responsive to the defendant's request for a variance. *See id.*

Hardin is at odds with the reasoning below. The judge in *Hardin* at least offered *some* response to the defendant's request for a sentence below the Guideline, albeit one that would have applied to every case, namely, that an overlong sentence could be terminated or modified. *See id.* at *2. In the instant case, the court offered no specific response to several arguments offered for a lesser sentence. Yet Hardin received relief, and Petitioner received none.

As can be seen, the Fourth and Fifth Circuits clearly disagree about the means of preserving a district court's failure to acknowledge and respond to a party's argument for a different sentence. They also disagree about the district court's duty to respond at all. The differences have persisted in spite of relevant authority from this Court. This split alone merits review.

2. Conflict with the Seventh Circuit

The decision below also reflects a long-standing conflict with the Seventh Circuit regarding the duty of a district court to respond to substantial arguments for a lesser sentence. In *United States v. Cunningham*, 429 F.3d 673 (7th Cir. 2005), the defendant received a Guideline sentence for brokering sales of crack cocaine. *See*

Cunningham, 429 F.3d at 675-676. He challenged the sentence as procedurally unreasonable due to the district court's failure to explain it. *See id*. at 676. The district court did offer some case-specific reasons for the sentence, such as the number of times the defendant had brokered crack. *See id*. at 677. But because it "passed over in silence" mitigating arguments of some force, such as the defendant's psychiatric condition, the Seventh Circuit vacated for resentencing. *Id.* at 679.

Cunningham thus stands for the proposition that a judge must acknowledge at least a party's chief arguments for an out-of-range sentence if they are not insubstantial. *See id.* A decision issued in 2021 confirms that *Cunningham* remains good law in the Seventh Circuit. *See United States v. Joiner*, 988 F.3d 993, 995 (7th Cir. 2021)("*Cunningham* requires a court to address each of the movant's principal arguments, unless they are 'too weak to require discussion' or 'without factual foundation.'")(quoting *United States v. Rosales*, 813 F.3d 634, 637 (7th Cir. 2016)).

Cunningham decision cannot be reconciled with the decision below. Here, as in *Cunningham*, the defendant offered substantial reasons for a sentence outside the range, yet the district court did not address them. Yet the Seventh Circuit vacated the sentence in *Cunningham*, while the Fifth Circuit affirmed here. The circuits are in clear conflict as to the obligations of a sentencing court.

C. The present case is an appropriate vehicle to address the conflict.

This case well presents the issues that have divided the courts of appeals. The division of authority regarding the standard of review is quite directly presented, as Petitioner clearly offered reasons for a lesser sentence. *See* (Record in the Court of

Appeals, at 85-90). In the Fourth Circuit, and likely under *Rita* and *Holguin-Hernandez*, this preserves error in the district court's failure to respond.

The arguments for a lesser sentence were plainly substantial, clearly implicating the expectation of a response discussed in *Rita* and the precedent of the Fourth and Seventh Circuits. The grounds for a lesser sentence were obviously not frivolous, and required a response under this Court's precedent and the precedent of the Fourth and Seventh Circuits. The division of authority on the merits is squarely implicated, making the case an excellent vehicle.

II. The prior-conviction exception from *Almendarez-Torres* cannot be squared with the text and history of the Sixth Amendment's Notice Clause; this Court should correct its error in that case.

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" incorporated the "particulars" of the alleged offense with respect to "time, place, and circumstances," and the text of the Notice Clause thereby obligated the government to go beyond the abstract elements of the offense at issue and to allege some of the real-world facts it 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. De La Cerda. 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 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 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 June 26, 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 June 26, 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 June 26, 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 June 26, 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 June 26, 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 June 26, 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

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

At the district court and Fifth Circuit, Petitioner 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.

1. *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

2. *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.

3. 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. De La Cerda 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.

D. 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. De La Cerda 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 46-month term of imprisonment. Pet.App.a4. If *Almendarez-Torres* is wrong, that means Mr. De La Cerda is serving a sentence 22-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 June 26, 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. De la Cerda'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 this 14th day of September, 2023.

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