No. _____

In the Supreme Court of the United States

_____

Ubaldo De La Cruz Leyva,
Petitioner,

v.

United States of America,
Respondent

_____

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

_____

PETITION FOR A WRIT OF CERTIORARI

_____

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QUESTIONS PRESENTED

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

The first question presented is:

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

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

The second question presented is:

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

LIST OF PARTIES

Ubaldo De La Cruz Leyva, petitioner on review, was the Defendant-Appellant below. The United States of America, respondent on review, was Plaintiff-Appellee. No party is a corporation.

RELATED PROCEEDINGS

- *United States v. Ubaldo De La Cruz Leyva*, No. 3:20-CR-405-B, U.S. District Court for the Northern District of Texas. Judgment entered on March 3, 2023.

- *United States v. Ubaldo De La Cruz Leyva*, No. 23-10257, U.S. Court of Appeals for the Fifth Circuit. Judgment entered on September 12, 2023.

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PETITION FOR A WRIT OF CERTIORARI

Ubaldo De La Cruz Leyva respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's unreported opinion is available on Westlaw's electronic database at 2023 WL 5938171 and reprinted at Pet.App.a1-a2.

JURISDICTION

The Court of Appeals issued its panel opinion on September 12, 2023. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS

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

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

8 U.S.C. § 1326(b)(2). This petition also involves the Notice Clause of the Sixth Amendment to the United States Constitution:

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

U.S. CONST., amend. VI.

STATEMENT OF THE CASE

A. Introduction

At both the district-court level and on appeal, Mr. Leyva argued that his indictment's failure to allege a prior conviction necessary to satisfy a statutory sentencing enhancement rendered his sentence unconstitutional. That claim, he conceded, was foreclosed in the government's favor, but he nevertheless filed a lengthy, complex merits brief attacking the authority foreclosing his claim. In the brief, he addressed both the original meaning of the Notice Clause, Appellant's Initial Brief at 21-25, *United States v. Ubaldo De La Cruz Leyva*, No. 23-10257 (5th Cir. June 1, 2023), and historical evidence of Founding Era charging practices in both United States and England, *id*. at 8-21. Despite those efforts, the result was preordained. This Court's authority foreclosed the sole issue advanced in the government's favor. The government accordingly moved for summary affirmance, and a three-judge panel of the Fifth Circuit Court of Appeals granted the motion on September 12, 2023. Pet.App.a1-a2

B. Legal Framework

1. *Almendarez-Torres v. United States*

In *Almendarez-Torres v. United States*, the petitioner challenged a district court's power to impose a statutorily enhanced sentence based on a prior conviction never alleged in his indictment. 523 U.S. 224, 227-28 (1998) (citing *Hamling v. United States*, 418 U.S. 87, 117 (1974)). The prior conviction affected the statutory maximum, and on that basis, Mr. Almendarez argued that it was an element of an

aggravated offense. *Id*. at 225. A five-Justice majority rejected the claim and instead classified the prior conviction as a "sentencing factor." *Id*. at 235. For support, it looked to congressional intent, rather than historical practices at common law. *See id*. at 228.

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

The *Almendarez-Torres* majority applied *McMillan* and characterized the fact of a prior conviction as a sentencing factor, not an element. It considered a violation of 8 U.S.C. § 1326, *see Almendarez-Torres*, 523 U.S. at 226 (citing 8 U.S.C. § 1326(a)-(b)), and framed the distinction between sentencing factors and elements as

"normally a matter for Congress," *id*. at 228. Since the outcome depended on congressional intent, this Court "look[ed] to" § 1326's "language, structure, subject matter, context, and history." *Id*. at 228-29 (citing *United States v. Wells*, 519 U.S. 482, 490-92 (1997); *Garrett v. United States*, 471 U.S. 773, 779 (1985)). That analysis led a five-Justice majority to conclude "that Congress intended" the prior-conviction provision "to set forth a sentencing factor." *Id*. at 235.

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

A dissent authored by Justice Scalia and joined by three other Justices contested the historical point. Justice Scalia cited a well-established tradition of treating "a prior conviction which increases maximum punishment . . . as an element of the offense." *Id*. at 256-57 (Scalia, J., dissenting). On this basis, he and the other three Justices would have opted for an interpretation that did not create "a serious doubt as to whether the statute as interpreted by the Court in the present case is constitutional." *Id*. at 265 (Scalia, J., dissenting).

2. *Apprendi v. New Jersey*

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

The general rule from *Apprendi*, unlike *McMillan*, turned on what the Constitution "sa[id]," not what a majority of the Supreme Court thought "it ought to mean." *Id*. at 499 (Scalia, J., concurring). The Sixth Amendment rests upon a "historical foundation . . . extend[ing] down centuries into the common law." *Id*. at 477. The common-law evidence, in turn, established a "historic link between verdict and judgment." *Id*. at 482. This analysis began with the indictment's allegations. "[C]riminal proceedings were submitted to a jury after being initiated by an indictment containing 'all the facts and circumstances which constitute the

offence.'" *Id*. at 478 (quoting JOHN ARCHBOLD, PLEADING AND EVIDENCE IN CRIMINAL CASES 44 (15th ed. 1862)). This rule served several important purposes. For one, it "enabled" the defendant to "prepare his defence." *Id*. (citing ARCHBOLD, *supra*, at 44). A sufficiently precise indictment would also specify "the judgment which should be given, if the defendant be convicted." *Id*. (citing ARCHBOLD, *supra*, at 44). Since "substantive criminal law tended to be sanction-specific," a jury's guilty verdict required the judge to impose whatever sentence the law annexed to the offense. *Id*. at 479 (citing John H. Langbein, *The English Criminal Trial Jury on the Eve of the French Revolution*, *in* THE TRIAL JURY IN ENGLAND, FRANCE, GERMANY 1700-1900 14, 36-37 (Antonio Padoa Schioppa ed., 1987)). These charging practices "held true when indictments were issued pursuant to statute." *See id*. at 480 (citing citing ARCHBOLD, *supra*, at 51).

Despite that analysis, the *Apprendi* majority saw no need to overrule *Almendarez-Torres*. Mr. Apprendi had "not contest[ed] the . . . validity" of *Almendarez-Torres*, so the five-Justice majority was able to sidestep its result for the time being. *See id*. at 489-90. It nevertheless recognized "that a logical application of" *Apprendi*'s "reasoning . . . should apply if the recidivist issue were contested." *Id*. The majority then characterized the rule from *Almendarez-Torres* as "arguabl[y] . . . incorrectly decided," *id*., and "at best an exceptional departure from the historic practice" codified in the Sixth Amendment, *id*. at 487.

Justice Thomas, writing in a concurrence, would have gone further. The "tradition of treating recidivism as an element," he explained, "stretches back to the

earliest years of the Republic." *Id.* at 507 (Thomas, J., concurring) (citing *Commonwealth v. Welsh*, 4 Va. 57, 1817 WL 713 (1817); *Smith v. Commonwealth*, 14 Serg. & Rawle 69, 1826 WL 2217 (Pa. 1826)). Following an exhaustive survey of opinions from the various States, Justice Thomas summarized the Nineteenth Century authority as follows:

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

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

Not everyone agreed. In her *Apprendi* dissent, Justice O'Connor responded to Justice Thomas. She criticized his call to overrule *Almendarez-Torres* as "notable for its failure to discuss any historical practice, or to cite any decisions, predating (or contemporary with) the ratification of the Bill of Rights." *Id.* at 528 (O'Connor, J., dissenting). Then-professor Stephanos Bibas echoed this argument in a contemporary law-review article:

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

Stephanos Bibas, *Judicial Fact-finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1128 (2001).

3. Post-*Apprendi* Developments

Despite Justice O'Connor's reservations, this Court has since applied *Apprendi*'s methodology in multiple cases and repeatedly looked to "longstanding common-law practice" to tease out the Sixth Amendment's precise meaning. *Southern Union Co. v. United States*, 567 U.S. 343, 348 (2012) (quoting *Cunningham v. California*, 549 U.S. 270, 281 (2007)). In *Southern Union Company v. United States*, this Court applied *Apprendi* to the issue of fines. *Id.* at 349. Where the statute in question linked the maximum fine amount "to the determination of specified facts," such as "the value of damaged or stolen property," "the predominant practice" at common law "was for such facts to be alleged in the indictment and proved to the jury." *Id.* at 354-55. The "ample historical evidence" supporting this point resolved *Southern Union Company* on the merits, *id.* at 358, and in *Oregon v. Ice*, this Court conducted the same analysis but came out the other way concerning a judge's decision to impose consecutive, rather than concurrent,

terms of imprisonment, 555 U.S. 160, 168-69 (2009). "The historical record," the majority explained, "demonstrates that the jury played no role in the decision to impose sentences consecutively or concurrently." *Id*. at 168. Again, this Court looked to historical practice to resolve the disputed meaning of the Sixth Amendment. *Id*. at 168-69.

Justice Stevens and Justice Thomas briefly addressed whether to overrule *Almendarez-Torres* in 2006. In a terse statement respecting the denial of various petitions for certiorari, Justice Stevens indicated his belief that *Almendarez-Torres* had been wrongly decided but explained that "[t]he denial of a jury trial on the narrow issues of fact concerning a defendant's prior conviction history . . . will seldom create any significant risk of prejudice to the accused." *Rangel-Reyes v. United States*, 126 S. Ct. 2873, 2874 (2006). He also noted that "countless judges in countless cases have relied on *Almendarez-Torres* in making sentencing determinations." *Id*. "The doctrine of *stare decisis*," he concluded, "provides a sufficient basis for the denial of certiorari in these cases." *Id*.

Justice Thomas disagreed. "[T]he exception to trial by jury for establishing 'the fact of a prior conviction' finds its basis not in the Constitution, but in a precedent of this Court." *Id*. (Thomas, J., dissenting from denial of certiorari). On top of that, he noted, "[t]he Court's duty to resolve this matter is particularly compelling, because [it] is the only court authorized to do so." *Id*. (citing *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997)) (Thomas, J., dissenting from denial of certiorari). Justice Thomas then noted the stakes. The prior-conviction exception from

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

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

C. Factual and Procedural History

Mr. Leyva, an alien, recently pleaded guilty to illegally reentering the United States following deportation. Pet.App.a3. The statute defining this offense—8 U.S.C. § 1326(a)—sets a two-year term of imprisonment as the default maximum, but based on a prior felony conviction, the district court applied a 10-year maximum instead. *See* Pet.App.a3 (citing 8 U.S.C. § 1326(b)(1)). This alternative applies "in the case of any alien . . . whose removal was subsequent to a conviction for commission of . . . a felony (other than an aggravated felony)." 8 U.S.C. § 1326(b)(1). Mr. Leyva objected at sentencing and pointed out the indictment's failure to allege the prior felony conviction at issue. Pet.App.a7-a9. This omission, he argued,

meant the indictment alleged only the two-year offense applicable to first-time offenders. Pet.App.a7.

He conceded, however, that this claim was foreclosed. Pet.App.a7 (citing *Almendarez-Torres*, 523 U.S. 224, at 239). The government likewise relied on *Almendarez-Torres* to defeat the objection. Pet.App.a13. It did not, for example, argue in the alternative that any error was harmless. Pet.App.a10-a13. Nor did the government fault Mr. Leyva for objecting too late in the game. Pet.App.a10-a13. As a result, the district court addressed neither claim below, and instead, simply overruled the objection as foreclosed by this Court's authority. C.A. R.O.A. 74-75. It then imposed a 50-month term of imprisonment. Pet.App.a4.

Mr. Leyva advanced the same argument on appeal and again conceded that the claim was foreclosed. Pet.App.a1-a2. The government once more relied on *Almendarez-Torres* to defeat the sole claim advanced. United States' Unopposed Motion for Summary Affirmance at 1-2, *United States v. Ubaldo De La Cruz Leyva*, Case No. 23-10257 (5th Cir. June 8, 2023). It did not defend the judgment on the grounds of harmlessness or suggest the application of plain-error review. *See id.* A three-judge panel granted the motion to summarily affirm on September 12, 2023. Pet.App.a2.

REASONS FOR GRANTING THIS PETITION

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

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

"In all criminal prosecutions," the Sixth Amendment states, "the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation." U.S. CONST., amend. VI. "Constitutional rights are enshrined with the scope they were understood to have *when the people adopted them*," and Founding Era "linguistic [and] legal conventions" shed light on such meaning. *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2136 (2022) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 634-35 (2008)). Even without recourse to history, Founding Era dictionaries reveal the prior-conviction exception from *Almendarez-Torres* to be atextual. After all, 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 recidivist 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. The 1785 edition of Samuel Johnson's dictionary defined the term 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 Oregon v. 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's dictionary 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). Here, the dictionary 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's dictionary and Barclay: "a complaint" or "charge of some crime." *Accusation*, A COMPENDIOUS DICTIONARY OF THE ENGLISH LANGUAGE (1806). Webster later expanded on this definition. An "accusation," he wrote, could refer to "[t]he act or charging with a crime or offense." *Accusation*, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828). The word also denoted "[t]he charge of an offense or crime; or the declaration containing the charge." *Accusation*, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828).

From these definitions, the original meaning of the Notice Clause takes shape. The accusation necessarily incorporated "some crime," *Accusation*, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785), or "criminal action," *Accusation*, A COMPLETE AND UNIVERSAL ENGLISH DICTIONARY (2d ed. 1792). That crime had a nature, which constituted its "essential properties." *See, e.g.*, *Nature*, A COMPLETE AND UNIVERSAL ENGLISH DICTIONARY (2d ed. 1792). The nature of the crime alleged would allow the accused to "distinguish[]" the offense charged in his case "from all others." *See, e.g.*, *Nature*, A COMPLETE AND UNIVERSAL ENGLISH DICTIONARY (2d ed. 1792). The term thus incorporated "the 'constituent parts' of" the "crime's legal definition," also known as its elements. *See Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016) (quoting *Elements*, BLACK'S LAW DICTIONARY (10th ed. 2014)). By contrast, the cause of an accusation would alert the defendant

to "the matter in dispute." *See, e.g.*, *Cause*, A COMPLETE AND UNIVERSAL ENGLISH DICTIONARY (2d ed. 1792). At trial, the defendant could not fight about the alleged crime's "native state or properties," *Nature*, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785), but the real-world facts necessary to prove those elements are always at issue. The term cause accordingly incorporated the "particulars" of the alleged offense with respect to "time, place, and circumstances" and would put the accused on notice of the facts the government intended to prove at trial. *See United States v. Cruikshank*, 92 U.S. 542, 558 (1875).

By itself, the plain meaning of the Notice Clause—particularly the word "nature"—strongly supports the interpretation urged by Mr. Leyva. A statutory enhancement premised on the fact of a prior conviction differs from the version of the offense applicable to first-time offenders. Without a prior-conviction allegation, the accused simply could not "distinguish[]" between the aggravated offense for recidivists and the less serious alternative. *See Nature*, A COMPLETE AND UNIVERSAL ENGLISH DICTIONARY (2d ed. 1792). The 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 plain-meaning interpretation of the Sixth Amendment's text.

b. The historical record is clear. During and before the Founding Era, courts, prosecutors, and defendants in England and America treated the fact of a prior conviction necessary to satisfy a statutory recidivism enhancement as an element of an aggravated crime to be alleged in the indictment and proved to a jury at trial.

The Founders were familiar with statutory recidivism enhancements. Throughout the Colonial Era, Parliament had repeatedly used statutes to set out harsh penalties for repeat offenders. In 1559, Parliament sought to regularize worship throughout the Church of England, and upon a "first offence," a recalcitrant minister could "suffer imprisonment by the space of six months." Uniformity Act 1159 (1 Eliz. 1, c.2). After a "second offence," a recidivist could "suffer imprisonment by the space of one whole year." Uniformity Act 1559 (1 Eliz. 1, c.2). Parliament adopted the same approach roughly 100 years later when it criminalized the printing of "seditious and treasonable Bookes[,] Pamphlets[,] and Papers." Licensing of the Press Act 1662 (14 Cha. 2, c.33). A first-time offender would "be disenabled from exercising his respective Trade"—in that case, operating a printing press—"for the space of three yeare." Licensing of the Press Act 1662 (14 Cha. 2, c.33). "[F]or the second offence," the recidivist offender "shall for ever thence after be disabled to use or exercise the Art or Mystery of Printing or of Founding Letters for Printing and shall alsoe have and receive such further punishment by Fine Imprisonment or other Corporal Punishment not extending to Life or Limb." Licensing of the Press Act 1662 (14 Cha. 2, c.33).

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

The Counterfeiting Coin Act of 1741 also set out harsh penalties for repeat offenders. That statute made it a crime to "utter, or tender in payment, any false or counterfeit money, knowing the same to be false or counterfeit, to any person or persons," and upon conviction, a first-time offender would "suffer six months imprisonment." *See* Counterfeiting Coin Act 1741 (15 Geo. 2, c.28, s.2). Parliament singled out recidivists for additional punishment: "if the same person shall

afterwards be convicted a second time," that defendant "shall, for such second offence, suffer two years' imprisonment." 15 Geo. 2, c.28, s.2. A third conviction resulted in the death penalty. 15 Geo. 2, c.28, s.2.

During the Founding Era, English prosecutors, defendants, and courts routinely treated the fact of a prior conviction as an element of an aggravated crime. A 1751 prosecution under the Counterfeiting Coin Act resulted in an acquittal after the prosecutor failed to prove the fact of the prior conviction. The defendant, a woman named Elizabeth Strong, "was indicted for being a common utterer of false money." Trial of Elizabeth Strong, (Oct. 16, 1751), Old Bailey Proceedings Online, https://www.oldbaileyonline.org/browse.jsp?id=t17511016-48-defend352&div=t17511016-48#highlight (last visited Dec. 7, 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 Dec. 7, 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 Dec. 7, 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 Dec. 7, 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 Dec. 7, 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 Dec. 7, 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 March 2, 1799, 5 Cong. ch. 22, art. 53, 1 Stat. 667. In each instance, Congress set a maximum fine for first-time offenders but specified disqualification as an enhanced punishment for recidivists. *See* Act of March 2, 1799, *supra*, 1 Stat. 667; Act of Feb. 18, 1793, *supra*, 1 Stat. 315-16; Act of Dec. 31, 1792, *supra*, 1 Stat. 298. As for the States, Kentucky passed a law in 1801 punishing first-time pig thieves with up to a twelve-month term of imprisonment. 2 Laws of Kentucky 150 (1807). A recidivist, by contrast, could serve no less than six months and up to three years. *Id*. The State of New York passed a grand-larceny law the same year subjecting repeat offenders to life in prison. 1 Laws of the State of New York 235 (1807). A first-time offender, by contrast, could serve no more than 14 years. *Id*.

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. Take, for example, *State v. David*, a Delaware trial record from 1802. There, 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.* Time in the pillory, per the 1751 statute, was a punishment reserved for recidivists. Laws of the State of Delaware 296-98 (1798). Contemporary dictionaries defined the verb "to lay" to mean "[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 trial record 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.

Contemporary appellate authority attests to the same practice. *People v. Youngs*, an opinion issued by the Supreme Court of New York in 1803, provides the earliest example. 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," the court explained, "from the indictment that he was to be put upon his

trial for a second offence, 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.

Despite this reasoning, the holding in *Youngs* cannot be limited to a pair of specific statutory privileges available to certain offenders. That approach would elide the necessary 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 court's remedy likewise counsels against a narrow reading of *Youngs*. "[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 [14] 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.

Two Founding Era opinions from North Carolina provide additional evidence of contemporary charging practices. *State v. Allen*, an opinion issued by the Supreme Court of North Carolina in 1825, follows *Youngs*. 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.*

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 were expected to charge 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 seek its reversal. The nature of the error at the heart of *Almendarez-Torres* weighs strongly in favor

of its overruling. *Almendarez-Torres* is also egregiously wrong as to both methodology and result

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

At the district court and Fifth Circuit, Mr. Leyva 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, it 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 overruled authority and flawed legal premises. Last, no substantial reliance interests justify its continued existence. *Almendarez-Torres* is an ahistorical and atextual blight on this Nation's Sixth Amendment jurisprudence. It should be overruled.

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

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

structure, subject matter, context, and history." 523 U.S. at 228-29 (citing *Wells*, 519 U.S. at 490-92; *Garrett*, 471 U.S. at 779). That approach may well have allowed the majority to discern congressional intent regarding the elements-versus-sentencing-factors split, but just two years later, this Court abandoned that framework entirely and did so because "[a]ny possible distinction between an 'element' of a felony offense and a 'sentencing factor' was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding." *Apprendi*, 530 U.S. at 478.

Bad methodology leads to bad results. Despite *Apprendi*'s historical approach, this Court has not yet tested the prior-conviction exception against common-law practices. The "best" it could do in *Apprendi* was to characterize *Almendarez-Torres* as "an exceptional departure from the historic practice" guiding its newly minted Sixth Amendment analysis. *See id.* at 487. Looking ahead, Justice Thomas established in his *Apprendi* concurrence a "tradition of treating recidivism as an element" that "stretches back to the earliest years of the Republic." *Id.* at 507 (Thomas, J., concurring) (citing *Welsh*, 4 Va. 57, 1817 WL 713 (1817); *Smith*, 14 Serg. & Rawle 69, 1826 WL 2217 (Pa. 1826)). The textual and historical evidence in this petition goes even further.

The same evidence provides persuasive answers to critiques of Justice Thomas's *Apprendi* concurrence. Responding in dissent, Justice O'Connor attacked Justice Thomas's position and classified it as "notable for its failure to discuss any historical practice, or to cite any decisions, predating (or contemporary with) the

ratification of the Bill of Rights." *Apprendi*, 530 U.S. at 528 (O'Connor, J., dissenting). Then-professor Stephanos Bibas echoed this argument in a 2001 law-review article. Bibas, *supra*, 110 Yale L.J. at 1128. In his *Apprendi* concurrence, Justice Thomas responded to Justice O'Connor by noting her failure to prove her own conclusion. "[T]he very idea of a sentencing enhancement was foreign to the common law of the time of the founding," Justice Thomas noted, and since Justice O'Connor conceded this point in her dissent, she could not credibly "contend that any history from the founding supports her position." *Apprendi*, 530 U.S. at 502 n.2 (Thomas, J., concurring). As described above, additional textual and historical evidence cuts against Justice O'Connor's position and in favor of Justice Thomas.

The time has come for this Court to consider that evidence. Founding Era appellate authority from the United States and Eighteenth Century trial records from England establish a consistent tradition of alleging a prior conviction as an element of an aggravated offense aimed at recidivist offenders. The parties tested this allegation like any other, and if proof of the prior conviction failed, the jury acquitted the defendant. *See* Trial of Elizabeth Strong, *supra*, (Oct. 16, 1751). The earliest trial record to establish this practice is from 1751. The practice extended well into the Founding Era in both the United States and England. Were that not enough, the Founders codified the common-law approach by obligating the government to inform the defendant of "the nature and cause of the accusation." U.S. CONST., amend. VI. *Almendarez-Torres* skirted the text of the Sixth

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

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

Until the Court tests *Almendarez-Torres* against the historical record, the prior-conviction exception will remain a bizarre "outlier" in this Nation's Sixth Amendment authority. *See Janus v. AFSCME*, 138 S. Ct. 2448, 2482-83 (2018) (citing *United States v. Gaudin*, 515 U.S. 506, 521 (1995)). In *Apprendi*, this Court moored its interpretation of the Sixth Amendment to what the Constitution "says," rather than what a majority of the Court "think[s] it ought to mean." *Apprendi*, 530 U.S. at 499 (Scalia, J., concurring). It did so by looking to history, *id.* at 478, and in the two decades since, *Apprendi*'s historical analysis "has become . . . firmly rooted in the Court's Sixth Amendment jurisprudence," *see Alleyne v. United States*, 570 U.S. 99, 120 (2013) (Sotomayor, J., concurring). *Almendarez-Torres* presents an "anomaly." *See Janus*, 138 S. Ct. at 2483 (quoting *Harris v. Quinn*, 573 U.S. 616, 627 (2014)). In all other contexts, the meaning of the Sixth Amendment depends on historical practices at common law. *See, e.g.*, *Ice*, 555 U.S. at 168-69. For the fact of a prior conviction, however, this Court remains handcuffed to an opinion that never seriously considered historical practice at all. *Apprendi*, 530 U.S. at 489-90. The "underpinnings" that support the prior-conviction exception have been seriously "eroded," *see Janus*, 138 S. Ct. at 2482-83 (quoting *Gaudin*, 515 U.S. at 521), and the solution is obvious. Overruling *Almendarez-Torres* and finally subjecting the prior-conviction exception to historical scrutiny would "bring a measure of greater

coherence to" this Court's Sixth Amendment "law." *Id*. at 2484. That step is long past due.

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

"[W]hen procedural rules are at issue that do not govern primary conduct and do not implicate the reliance interests of private parties, the force of *stare decisis* is reduced." *Alleyne*, 570 U.S. at 119 (Sotomayor, J., concurring). In fact, "[t]he force of *stare decisis* is at its nadir in cases concerning procedural rules that implicate fundamental constitutional protections." *Id*. at 116 n.5. *Almendarez-Torres* is the source of a procedural rule that robs defendants like Mr. Leyva of their right "to be informed of the nature and cause of the accusation." *See* U.S. CONST., amend. VI. This rule results in confusion concerning the maximum term of imprisonment, *see* 8 U.S.C. § 1326(a)-(b), but does not "govern primary conduct" or "implicate the reliance interests of private parties, *Alleyne*, 570 U.S. at 119 (Sotomayor, J., concurring). In turn, "any reliance interest that the Federal Government and state governments might have is particularly minimal here because prosecutors are perfectly able to allege a prior conviction whenever necessary to support a recidivist sentencing enhancement." *Id*. "[I]n a case where the reliance interests are so minimal, and the reliance interests of private parties are nonexistent, *stare decisis* cannot excuse a refusal to bring 'coherence and consistency,'" *id*. at 121 (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 174 (1989)), to a constitutional right, "the historical foundation" of which "extends down centuries into the common law," *Apprendi*, 530 U.S. at 477.

III. This case is an excellent vehicle to resolve the questions presented.

a. Mr. Leyva preserved the questions presented.

By objecting at sentencing, Mr. Leyva preserved the constitutional claim presented to the Court of Appeals and in his petition to this Court. Were the issue not foreclosed, the Fifth Circuit Court of Appeals would treat his sentencing objection as sufficient to preserve the claim for appeal. *United States v. Doggett*, 230 F.3d 160, 165 (5th Cir. 2000). The Ninth and Eleventh Circuit Courts of Appeals have adopted the same rule. *See 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); *Doggett*, 230 F.3d at 165). This approach makes sense. An earlier objection *could* have preserved the same issue but "would effectively" require Mr. Leyva "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*.

b. No alternative grounds to affirm muddy the record.

The Court of Appeals addressed neither the standard of review nor the question of harmlessness. In its response to Mr. Leyva's initial objection, the government attacked the objection as foreclosed. Pet.App.a10-a13. It did not in the alternative ask the district court to declare any error harmless or untimely. Pet.App.a10-a13. It took the same approach on appeal. United States' Unopposed Motion for Summary Affirmance at 1-2, *United States v. Ubaldo De La Cruz Leyva*,

Case No. 23-10257 (5th Cir. June 8, 2023). As a result, the Fifth Circuit summarily affirmed based on *Almendarez-Torres* but did not rule on any other claims lurking in the record. *See* Pet.App.a1-a2. Nor did the Fifth Circuit *sua sponte* reconsider its authority on the timeliness of Mr. Leyva's sentencing objection. *See* Pet.App.a1-a2. 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)). It should follow that practice here and allow the Court of Appeals an opportunity to address potential grounds for affirmance in the first instance after overruling *Almendarez-Torres*.

c. A 50-month sentence provides sufficient time for this Court to grant certiorari and reverse. Those opportunities are rare.

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. Leyva 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 50-month term of imprisonment. Pet.App.a4. If *Almendarez-Torres* is wrong, that means Mr. Leyva is serving a sentence 26 months longer than the Constitution allows.

Mr. Leyva's 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 2022, the most recent year on record. *Quick Facts FY 2022 – 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_FY22.pdf (last visited Dec. 7, 2023). That means *Almendarez-Torres* is effectively inapplicable in the average case. As a result, this Court will have few opportunities to reconsider its prior-conviction exception.

This petition provides that opportunity. The Court should take it. The Sixth Amendment's protections either depend on common-law practices or they do not. 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 December 7, 2023.

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