No. _____

In the

Supreme Court of the United States

_____

Eduardo Garcia Briseno,

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

_____

Kevin Joel Page
Assistant Federal Public Defender

Federal Public Defender's Office
Northern District of Texas
525 S. Griffin Street, Suite 629
Dallas, TX 75202
(214) 767-2746
Joel_page@fd.org

QUESTION PRESENTED

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 Eduardo Garcia Briseno, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

Federal Statutes

Rules

Constitutional Provisions

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner Eduardo Garcia Briseno 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The unpublished opinion of the Court of Appeals is reported at *United States v. Garcia Briseno*, No. 23-10548, 2023 WL 8014355 (5th Cir. November 20, 2023)(unpublished).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 November 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.

STATEMENT OF THE CASE

I. Facts and Proceedings in District Court

The government obtained an indictment against Petitioner Eduardo Briseno Garcia for one count of illegally re-entering the country. *See* (Record in the Court of Appeals, at 8). That document did not allege any prior criminal history. *See* (Record in the Court of Appeals, at 8).

He 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 28-31). A Presentence Report (PSR) concluded that his Guideline range should be 37-46 months imprisonment, the product of an offense level of 17 and a criminal history category of IV. *See* (Record in the Court of Appeals, at 98). It determined that the statutory range should be zero to ten years imprisonment. *See* (Record in the Court of Appeals, at 98). The district court imposed a 42-month sentence. *See* (Record in the Court of Appeals, at 48).

II. Appellate Proceedings

Petitioner appealed, contending 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.

Because he did not preserve the issue by objection in district court, he conceded that the claim must be review only for plain error. *See* Fed. R. Crim. P. 52(b).

The court of appeals rejected this constitutional challenge as foreclosed by *Almendarez-Torres*, 523 U.S. 224 (1998). *See* [Appendix A]; *United States v. Garcia Briseno*, No. 23-10548, 2023 WL 8014355 (5th Cir. November 20, 2023)(unpublished).

REASONS FOR GRANTING THE PETITION

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 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 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. Petitioner would stand to benefit from the proper construction of the Fifth and Sixth Amendments.

The district court here imposed a sentence of 42 months imprisonment. (Record in the Court of Appeals, at 48). If *Almendarez-Torres* is wrong, that means Petitioner is serving a sentence 18 months longer than the Constitution allows. Although the plain error standard of review is applicable, the "plain-ness" of error may be established at any point while the case is on direct review. *Henderson v. United States*, 568 U.S. 266 (2013). For that reason, if this Court decides to grant certiorari and address the viability of *Almendarez-Torres*, the result may well be relief for Petitioner. This Court should accordingly hold the instant Petition pending resolution of the issue in the appropriate case. *See Lawrence v. Chater*, 516 U.S. 163 (1996).

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 20th day of February, 2024.

JASON D. HAWKINS
Federal Public Defender
Northern District of Texas

/s/ Kevin Joel Page
Kevin Joel Page
Assistant Federal Public Defender
Federal Public Defender's Office
525 S. Griffin Street, Suite 629
Dallas, Texas 75202

Telephone: (214) 767-2746
E-mail: joel_page@fd.org

Attorney for Petitioner