No. _____

In the

Supreme Court of the United States

_____

Ricardo Fortino Martinez-Munoz,

Petitioner,

v.

United States of America,

Respondent.

_____

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

_____

PETITION FOR A WRIT OF CERTIORARI

_____

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QUESTION PRESENTED

The Sixth Amendment protects the right "to be informed of the nature and cause of the accusation." U.S. Const. amend. VI. "[F]act[s] that increase[] the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt," except for prior convictions. *Apprendi v. New Jersey*, 530 U.S. 466, 488–90 & n.15 (2000). The Court rooted the general rule in common-law historical practices, *see id.* at 477–83, and relied on an earlier opinion — *Almendarez-Torres v. United States* — for the prior-conviction exception, *see id.* at 487–90 (citing *Almendarez-Torres v. United States*, 523 U.S. 224 (1998)).

Can *Almendarez-Torres* be squared with the history undergirding the Sixth Amendment; and if not, should this Court overrule *Almendarez-Torres*?

PARTIES TO THE PROCEEDING

Petitioner is Ricardo Fortino Martinez-Munoz, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below. No party is a corporation.

RELATED PROCEEDINGS

- *United States v. Martinez-Munoz*, No. 4:22-cr-00296-Y, U.S. District Court for the Northern District of Texas. Judgment entered on March 15, 2023.

- *United States v. Martinez-Munoz*, No. 23-10293, U.S. Court of Appeals for the Fifth Circuit. Judgment entered on December 11, 2023.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

Federal Statutes

Constitutional Provisions

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner Ricardo Fortino Martinez-Munoz seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's unpublished opinion is available at *United States v. Martinez-Munoz*, No. 23-10293, 2023 WL 8540019 (5th Cir. Dec. 11, 2023). It is reprinted at Pet.App.a1–a2.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on December 11, 2023. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS

The Sixth Amendment to the United State Constitution, which provides in relevant part:

> 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.

Section 1326 of Title 8 of the United States Code, which states:

> **(a) In general.**
>
> Subject to subsection (b), any alien who—
>
> (1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter
>
> (2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a

place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this or any prior Act, shall be fined under title 18, United States Code, or imprisoned not more than 2 years or both.

(b) Criminal penalties for reentry of certain removed aliens.

Notwithstanding subsection (a), in the case of any alien described in such subsection—

(1) whose removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under title 18, United States Code, imprisoned not more than 10 years, or both;

(2) whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both;

(3) who has been excluded from the United States pursuant to section 235(c) [8 U.S.C. § 1225(c)] because the alien was excludable under section 212(a)(3)(B) [8 U.S.C. § 1182(a)(3)(B)] or who has been removed from the United States pursuant to the provisions of title V [8 U.S.C. § 1531 et seq.], and who thereafter, without the permission of the Attorney General, enters the United States, or attempts to do so, shall be fined under title 18, United States Code, and imprisoned for a period of 10 years, which sentence shall not run concurrently with any other sentence.[] or

(4) who was removed from the United States pursuant to section 241(a)(4)(B) [8 U.S.C. § 1231(a)(4)(B)] who thereafter, without the permission of the Attorney General, enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be fined under title

> 18, United States Code, imprisoned for not more than 10 years, or both.
>
> For the purposes of this subsection, the term "removal" includes any agreement in which an alien stipulates to removal during (or not during) a criminal trial under either Federal or State law.

8 U.S.C. § 1326(a)–(b).

STATEMENT OF THE CASE

Petitioner Ricardo Fortino Martinez-Munoz pleaded guilty to illegally reentering the United States following deportation. Pet.App.c1–c3, b1–b3. The statute defining this offense — 8 U.S.C. § 1326(a) — authorizes a maximum of two years' imprisonment. But the district court found that Martinez-Munoz had a prior felony conviction, triggering the statutorily enhanced penalty for recidivists in 8 U.S.C. § 1326(b)(1). Pet.App.b1–b3. Martinez-Munoz's indictment did not allege the prior commission of a prior felony, and he did not admit one as part of his guilty plea. Pet.App.c1–c3, d1–d2. So, Martinez-Munoz objected to the district court's application of the enhanced statutory maximum, although he conceded precedent foreclosed this claim. ROA.23-10293.162-63, 195-97, 207. The district court ultimately imposed 66 months' imprisonment and three years of supervised release. Pet.App.b1–b3. Martinez-Munoz advanced the same argument on appeal, again acknowledging that precedent foreclosed it. Pet.App.a1–a2. The Fifth Circuit affirmed Martinez-Munoz's 66-month sentence on December 11, 2023. Pet.App.a1–a2.

REASONS FOR GRANTING THIS PETITION

I. *Almendarez-Torres* is an anomaly, and subsequent decisions have severely undermined its reasoning.

A. *Almendarez-Torres* relied on precedent and congressional intent.

In 1995, Hugo Roman Almendarez-Torres pleaded guilty to violating 8 U.S.C. § 1326. *Almendarez-Torres v. United States*, 523 U.S. 224, 227 (1998). At his guilty plea hearing, Almendarez-Torres admitted he had previously been deported "pursuant to three earlier convictions for aggravated felonies." *Id.* (cleaned up). But at sentencing, he argued that "an indictment must set forth all the elements of a crime." *Id.* (citing *Hamling v. United States*, 418 U.S. 87, 117 (1974)). And because his indictment "had not mentioned his earlier aggravated felony convictions," Almendarez-Torres argued that "the court could not sentence him to more than two years imprisonment, the maximum authorized for an offender without an earlier conviction." *Id.* The district court disagreed and sentenced him to 85 months imprisonment. *Id.*

A five-justice majority of the Supreme Court affirmed. *Id.* at 248. "An "indictment must set forth each element of the crime that it charges," but it "need not set forth factors relevant only to the sentencing of an offender found guilty of the charged crime." *Id.* at 228. This dividing line between elements and sentencing factors first arose in *McMillan v. Pennsylvania*, which had distinguished "elements of the offense," which "must be proved beyond a reasonable doubt," from "a sentencing factor that comes into play only after" a finding of guilt. *McMillan v. Pennsylvania*, 477 U.S. 79, 85–86 (1986). Citing *McMillan*, the *Almendarez-Torres* majority explained that "[w]ithin limits," "the question of which factors are which is normally a matter for

Congress." *Almendarez-Torres*, 523 U.S. at 228 (citing *McMillan*, 477 U.S. at 84–91). The majority thus looked "to the statute" to answer whether "Congress intended" the predicate convictions set forth in § 1326(b) to function as elements or sentencing factors. *Id.* at 228–35. The five-justice majority concluded that "Congress intended to set forth a sentencing factor in subsection (b)(2) and not a separate criminal offense." *Id.* at 235.

The majority was unpersuaded that the constitutional avoidance canon dictated a contrary interpretation. *Id.* at 235–37. "[W]e, unlike the dissent, do not gravely doubt" "that Congress may authorize courts to impose longer sentences upon recidivists who commit a particular crime." *Id.* at 238–39. In reaching that conclusion, the majority made short shrift of the historical "tradition" that Almendarez-Torres highlighted "of courts having treated recidivism as an element of the related crime." *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)). *See also Apprendi v. New Jersey*, 530 U.S. 466, 490 n.15 (*Almendarez-Torres*'s "extensive discussion of the term 'sentencing factor' virtually ignored the pedigree of the pleading requirement at issue," which maintains that "'[t]he indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted'" and "'pervades the entire system of the adjudged law of criminal procedure'" (quoting *United States v. Reese*, 92 U.S. 214, 232–33 (1875))).

In dissent, Justice Scalia and three other justices noted that "many State Supreme Courts have concluded that a prior conviction which increases maximum punishment must be treated as an element of the offense under either their State Constitutions, or as a matter of common law." *Id.* at 256–57 (citations omitted). This, in combination with precedent that decided issues at the margins of whether judges may constitutionally enhance statutory maximums based on recidivism findings, led the dissent to avoid "the difficult constitutional issue in this case" by endorsing an interpretation that "that subsection (b)(2) is a separate offense that includes the violation described in subsection (a) but adds the additional element of prior felony conviction." *Id.* at 249.

B. *Apprendi* relied on historical practice and reached an opposite result.

Two years later, *Apprendi* held that the Sixth Amendment required the government to prove facts that increase the maximum sentence to the jury beyond a reasonable doubt. *Apprendi*, 530 U.S. at 490. "[T]he historical foundation" for the Sixth Amendment's guarantees to the accused "extends down centuries into the common law." *Id.* at 477. And albeit *Apprendi* did not squarely address "a constitutional claim based on the omission of any reference to sentence enhancement...in the indictment," *id.* at 477 n.3, *Apprendi*'s venture into history nonetheless touched on historical indictment practices, *see id.* 478–83. "Any 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." *Id.* at 478 (emphasis added).

> As a general rule, criminal proceedings were submitted to a jury after being initiated by an indictment containing "all the facts and circumstances which constitute the offence, ... stated with such certainty and precision, that the defendant ... may be enabled to determine the species of offence they constitute, in order that he may prepare his defence accordingly ... and *that there may be no doubt as to the judgment which should be given*, if the defendant be convicted." J. Archbold, Pleading and Evidence in Criminal Cases 44 (15th ed. 1862) (emphasis added). The defendant's ability to predict with certainty the judgment from the face of the felony indictment flowed from the invariable linkage of punishment with crime. See 4 Blackstone 369-370 (after verdict, and barring a defect in the indictment, pardon, or benefit of clergy, "the court *must pronounce that judgment, which the law hath annexed to the crime*" (emphasis added)).

Id. at 478–79. "This practice at common law" also "held true when indictments were issued pursuant to statute." *Id.* at 480. In short, the "historic link between verdict and judgment and the consistent limitation on judges' discretion to operate within the limits of the legal penalties provided," *id.* at 482, led the *Apprendi* majority to interpret the Sixth Amendment as requiring "any fact that increases the penalty for a crime beyond the prescribed statutory maximum [to] be submitted to a jury, and proved beyond a reasonable doubt," *id.* at 490.

Apprendi endorsed a single exception: "the fact of a prior conviction." *Id.* Albeit "a logical application of" *Apprendi*'s "reasoning . . . should apply if the recidivist issue were contested," the parties did not challenge *Almendarez-Torres*. *Id.* So while acknowledging that *Almendarez-Torres* "represents at best an exceptional departure from the historic practice" and was "arguabl[y]… incorrectly decided," the *Apprendi* majority "need[ed] not revisit it[.]" *Id.* at 487, 489–90.

Justice Thomas, who sided with the majority in both opinions, wrote separately in *Apprendi* to concede that there were "errors" in *Almendarez-Torres* "to which [he] succumbed." *Apprendi*, 530 U.S. at 520 (Thomas, J., concurring). The "tradition of treating recidivism as an element," he explained, "stretches back to the earliest years of the Republic." *Id.* at 506–07. Drawing from Nineteenth Century state court decisions, Justice Thomas discerned a historic legal principle "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 together create a new, aggravated crime." *Id.* at 507–08. "The consequences" of this evidence on an *Apprendi* exception rooted in *Almendarez-Torres*, Justice Thomas concluded, "should be plain enough." *Id.* at 518.

C. *Apprendi*'s rule is firmly rooted in this Court's Sixth Amendment jurisprudence. The precedent on which *Almendarez-Torres* relied, however, is no longer good law.

Since *Apprendi*, this Court has repeatedly applied its rule or methodology to other statutory schemes challenged on constitutional grounds. *See generally Ring v. Arizona*, 536 U.S. 584 (2002); *Blakely v. Washington*, 542 U.S. 296, 299–300 (2004); *United States v. Booker*, 543 U.S. 220 (2005); *Cunningham v. California*, 549 U.S. 270 (2007); *Oregon v. Ice*, 555 U.S. 160, 168 (2009); *Southern Union Co. v. United States*, 567 U.S. 343 (2012). Then came *Alleyne v. United States*, 570 U.S. 99 (2013), which overruled *McMillan* and held that any fact that produces a higher sentencing range must be proven to a jury beyond a reasonable doubt. *Id.* at 115–16. In so doing, *Alleyne* repeatedly noted the historic "intimate connection" between "facts" and "particular sentence ranges." *Alleyne*, 570 U.S. at 109; *see also id.* ("If a fact was by law

essential to the penalty, it was an element of the offense."); *id.* ("crime" was historically defined as "the whole of the wrong to which the law affixes ... punishment" (internal quotes omitted)); *id.* at 111 ("the indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted" (internal quotes omitted)). Because "the whole of the" crime and its punishment cannot be separated, the elements of a crime must include any facts that increase the penalty. *Alleyne* seemingly recognized this tenet's tension with *Almendarez-Torres* but explained the prior conviction exception away as a "narrow" one. *Id.* at 111 n.1. And as in *Apprendi*, there was no reason to revisit that "narrow exception" in *Alleyne* because the parties did not challenge it. *Id.*

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

Despite history dictating the Sixth Amendment's interpretation in *Apprendi* and its progeny, *Almendarez-Torres*'s result remains untested against the common law. But if this Court were to measure up *Almendarez-Torres* to Founding Era charging practices, it would become apparent that *Almendarez-Torres* represents a sharp departure from history. *Stare decisis* also poses no barrier for overruling it. *Almendarez-Torres* sanctions the violations of fundamental constitutional protections, is an outlier in this Court's Sixth Amendment jurisprudence, and its continued adherence is unjustified by reliance interests.

A. The prior conviction exception from *Almendarez-Torres* cannot be squared with historical practice.

The pre-Founding Era English authority and earliest American authority both reveal a consistent practice of treating a prior conviction necessary to support a statutorily enhanced sentence as an element to be set forth in the indictment and proven at trial. For instance, a 1751 prosecution resulted in an acquittal after the prosecutor failed to prove the fact of the prior conviction. Trial of Elizabeth Strong, (Oct. 16, 1751), Old Bailey Proceedings Online, https://www.oldbailey online.org/browse.jsp?id=t17511016-48-defend352&div=t17511016-48#highlight (last visited Mar. 5, 2024). In a 1788 prosecution, the prior conviction was alleged in the indictment, one witness was called to prove up "the record of the prisoner's former conviction," and another witness called to establish identity. Trial of Samuel Dring, (Sept. 10, 1788), Old Bailey Proceedings Online, https://www.oldbailey online.org/browse.jsp?id=t17880910-129-defend1003&div=t17880910-129#highlight (last visited Mar. 5, 2024). In Michael Michael's 1802 prosecution, the indictment also 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.oldbailey online.org/browse.jsp?id=t18020217-89&div=t18020217-89&terms=common%20utterer#highlight (last visited Mar. 5, 2024). The prosecutor then began the trial by reading into the record the prior conviction, and the government called two witnesses to establish Mr. Michael's identity as the same man named in the earlier judgment. *Id.*

Founding Era prosecutions 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 Mar. 5, 2024). 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.* 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. 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 Mar. 5, 2024); 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 Mar. 5, 2024).

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 proven at trial to a jury. In *People v. Youngs*, the Supreme Court of New York considered a grand-larceny statute passed in 1801 and held that the enhanced punishment for recidivists could not be imposed without the prior-conviction allegation in the indictment. 1 Cai. 37, 37 (N.Y. Sup. Ct. 1803). "It is necessary 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. "The time at which the second offence was committed is of the essence of the crime," and "if it be a question, then, whether the second offence was committed after the first conviction, it is a fact not inquirable here, but by a jury." *Id.* at 41. Thus, "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. In short, "the nature of the crime is changed by a superadded fact[.]" *Id.* Opinions from elsewhere in the United States establish the same conception of the prior conviction changing the nature of the crime when a recidivist enhanced penalty was sought. *See State v. David*, 1 Del. Cas 252, 1800 WL 216, at *1 (Apr. 1, 1800) ("Pillory was not inflicted, it not being laid as a second offense."); *State v. Allen*, 10 N.C. 614, 616 (1825) ("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.").

B. *Stare decisis* does not justify continued adherence to *Almendarez-Torres*.

"The force of stare decisis is at its nadir in cases concerning procedural rules that implicate fundamental constitutional protections." *Alleyne*, 570 U.S. at 116 n.5. "[T]he force of stare decisis is [also] reduced" "when procedural rules are at issue that do not govern primary conduct and do not implicate the reliance interests of private parties." *Id.* at 119 (Sotomayor, J., concurring). "[P]rosecutors are perfectly able to charge facts upon which a mandatory minimum sentence is based in the indictment and prove them to a jury," so "any reliance interest that the Federal Government and state governments might have is particularly minimal here" — after all, prosecutors can charge prior convictions in indictments and prove them up at trial just as easily. *Id.* In a context "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 to our Sixth Amendment law." *Id.* at 121 (cleaned up). *See also Ramos v. Louisiana*, 140 S. Ct. 1390, 1419 (2020) (Kavanaugh, J., concurring in part) ("a separate non-retroactivity doctrine," under which "new constitutional rules apply on direct review, but generally do not apply retroactively on habeas corpus review," also "mitigate[s] the disruptive effects of overrulings in criminal cases.").

Simply put, *Almendarez-Torres*'s "exception to trial by jury for establishing 'the fact of a prior conviction' finds its basis not in the Constitution," and this Court is "the only court authorized" "to resolve" the anomaly of *Almendarez-Torres* and align the fact of prior conviction with the rest of its Sixth Amendment jurisprudence. *Rangel-Reyes v. United States*, 547 U.S. 1200 (2006) (Thomas, J., dissenting from the

denial of certiorari); *cf. Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2460 (2018) (overruling precedent where "[f]undamental" constitutional protections were "at stake"; the precedent was "poorly reasoned," "inconsistent" with the rest of the Court's jurisprudence and undermined by more recent decisions"; and "no reliance interests" "justify the perpetuation of the" constitutional "violations"). Currently, "countless criminal defendants" are being denied "the full protection afforded by the Fifth and Sixth Amendments[.]" *Rangel-Reyes v. United States*, 547 U.S. at 1200 (Thomas, J., dissenting from the denial of certiorari). "[S]anction[ing] the conviction at trial or by guilty plea of…defendants…not…convicted under the proper constitutional rule" also "has traditionally supplied…support for overruling an egregiously wrong criminal-procedure precedent." *Ramos v. Louisiana*, 140 S. Ct. at 1417 (Kavanaugh, J., concurring in part) (citing *Malloy v. Hogan*, 378 U.S. 1 (1964)).

CONCLUSION

Petitioner Ricardo Fortino Martinez-Munoz 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 6th day of March, 2024.

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