NO. _____

In the Supreme Court of the United States

LORENZO VAZQUEZ-ALBA,

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

J. Matthew Wright
Counsel of Record
FEDERAL PUBLIC DEFENDER'S OFFICE
600 South Tyler Street
Suite 2300
Amarillo, Texas 79101
(806) 324-2370
Matthew_Wright@fd.org

Counsel for Petitioner

March 31, 2025

QUESTION PRESENTED

Did the district court properly enter judgment under both 8 U.S.C. § 1326(a) and (b)(2)?

DIRECTLY RELATED PROCEEDINGS

United States v. Vazquez-Alba, No. 3:22-cr-356 (N.D. Tex. Nov. 3, 2023)

United States v. Vazquez-Alba, No. 23-11135 (5th Cir. Dec. 30, 2024)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Rules

In the Supreme Court of the United States

No. _____

LORENZO VAZQUEZ-ALBA

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

Lorenzo Vazquez-Alba respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion below is published at 124 F.4th 373. The district court did not issue any written opinions, but its judgment is reprinted at pages 14a–20a of the Appendix.

JURISDICTION

The Fifth Circuit entered its judgment on December 30, 2024. This petition is timely under S. Ct. R. 13.1 and 30.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the interpretation and application of the Fifth and Sixth Amendments to the U.S. Constitution; 8 U.S.C. §§ 1101(a)(43)(A), (a)(43)(O), & § 1326; and Texas Penal Code § 22.021(a)(1)(B)(iii) & (a)(2)(B).

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> 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 be deprived of life, liberty, or property, without due process of law.

The Sixth Amendment 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 defence.

Title 8, United States Code, Section 1101(a)(43)(A) defines "aggravated felony" as follows:

> (43) The term "aggravated felony" means …
>
> (A) murder, rape, or sexual abuse of a minor.
>
> * * * *
>
> (O) an offense described in section 1325(a) or 1326 of this title committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph.

Title 8, Section 1326, Subsections (a) and (b)(1)–(2), of the United States Code provide:

> (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 chapter or any prior Act,

> shall be fined under Title 18, 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, 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.

Texas Penal Code, Section 22.021 provides, in pertinent part:

> (a) A person commits an offense:
>
> (1) if the person:
>
> * * * *
>
> (B) regardless of whether the person knows the age of the child at the time of the offense, intentionally or knowingly:
>
> * * * *
>
> (iii) causes the sexual organ of a child to contact or penetrate the mouth, anus, or

sexual organ of another person, including the actor;

* * * *

(2) if:

* * * *

(B) the victim is younger than 14 years of age, regardless of whether the person knows the age of the victim at the time of the offense.

Tex. Pen. Code § 22.021(a)(1)(B)(iii) & (a)(2)(B).

STATEMENT

Petitioner Lorenzo Vazquez-Alba was working as a freelance tire repairman when a jack failed and a car fell on top of him, breaking his collarbone. 5th Cir. Sealed ROA.144. A couple of days later, he returned to the hospital for surgery. An automated license plate reader alerted security that the car he was driving had been reported stolen. App., *infra*, 2a–3a & n.1. Subsequent investigation revealed that Mr. Vazquez was not at fault for stealing the car—one of his customers had given him the car as partial payment, promising to return with the title and additional cash. App., *infra*, 2a–3a & n.1. Though he was innocent of auto theft, the investigation led to the current federal charges.

A federal grand jury charged Mr. Vazquez with two offenses: illegal reentry after removal (8 U.S.C. § 1326(a)) and failure to register as a sex offender (18 U.S.C. § 2250(a)). App., *infra*, 29a–30a. He pleaded guilty to both offenses, and the district court imposed

concurrent terms of 45 months' imprisonment. App., *infra*, 15a.

On the immigration offense, the district court decided that Mr. Vazquez's removal from the United States followed a conviction for an aggravated felony. The court thus entered judgment under "8 U.S.C. § 1326(a) *& (b)(2)*," App., *infra*, 14a, but "did not specify" the predicate for that finding. App., *infra*, 5a. According to the Presentence Investigation Report, Mr. Vazquez had two prior felony convictions: for aggravated assault and for aggravated sexual assault of a child under 14. App., *infra*, 5a & n.2; *see also* 5th Cir. Sealed ROA.140–42.

Under Fifth Circuit precedent, illegal-reentry defendants must challenge an erroneous "aggravated felony" finding on direct appeal, even where the error played no obvious role in calculating the sentence. *See United States v. Gamboa-Garcia*, 620 F.3d 546, 549 (5th Cir. 2010) ("[D]efendants had a right to counsel in the prior convictions and could avail themselves of professional advice and the appellate process to correct any infirmities."); *see also United States v. Piedra-Morales*, 843 F.3d 623, 324–25 (5th Cir. 2016); *United States v. Huerta-Rodriguez*, 64 F.4th 270, 280 (5th Cir. 2023).

Mr. Vazquez therefore argued that the district court was wrong to enter judgment under 8 U.S.C. § 1326(b)(2). He argued that the aggravated assault conviction was not an aggravated felony because it could be committed recklessly; the Fifth Circuit agreed. App., *infra*, 5a n.2. But the Fifth Circuit held that his conviction for aggravated sexual assault of a child under 14 was aggravated felony under 8 U.S.C.

§ 1101(a)(43)(A). App., *infra*, 4a–8a. This timely petition follows.

REASONS FOR GRANTING THE PETITION

I. THE CIRCUITS ARE DIVIDED.

The question presented implicates two different divisions of authority. First, the lower courts have adopted three different approaches to the propriety and preclusive effect of entering judgment under 8 U.S.C. § 1326(b)(2). Second, the circuits are divided over the proper interpretation of "sexual abuse of a minor" in 8 U.S.C. § 1101(a)(43)(A).

A. The Circuits are divided over the propriety and effect of entering judgment under both 8 U.S.C. § 1326(a) and (b)(2).

According to 8 U.S.C. § 1326(a), the default punishment range for illegal reentry after removal is up to two years' imprisonment. Where the defendant's removal followed conviction for a felony, the statutory maximum becomes ten years; where the removal followed an *aggravated* felony conviction, the statutory maximum becomes twenty years. 8 U.S.C. § 1326(b)(1)–(2).

In *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), this Court rejected the defendant's argument that § 1326(b)(2) was a separate, aggravated offense. In the wake of that decision, the lower courts have disagreed about whether is appropriate for a sentencing court to enter judgment against a defendant under both § 1326(a) and § 1326(b)(2). The circuits that allow judgment under

(b)(2) are further divided as to the effect of that notation.

1. In the Ninth Circuit, a district court commits error if it enters judgment under "both § 1326(a) and § 1326(b)(2)." *United States v. Rivera-Sanchez*, 222 F.3d 1057, 1061–63 (9th Cir. 2000). Relying on *Almendarez-Torres*, the court held that § 1326(a) and § 1326(b)(2) are one punishable offense rather than two, and it was therefore error for the sentencing court to enter judgment under both subsections: "We hold that the proper procedure under these circumstances is to direct the district court to enter a corrected judgment striking the reference to § 1326(b)(2) so that the judgment will unambiguously reflect that the defendant was convicted of only one punishable offense pursuant to § 1326(a)." *Rivera-Sanchez*, 222 F.3d at 1062.

2. As illustrated by the decision below, the Fifth Circuit allows judgments invoking both § 1326(a) and § 1326(b)(2). App., *infra*, 4a. What's more, the Fifth Circuit treats a judgment invoking § 1326(b)(2) as *forever preclusive* on the aggravated felony issue, "regardless of the present status of the predicate conviction." *United States v. Huerta-Rodriguez*, 64 F.4th 270, 278 (5th Cir. 2023). The court reads § 1101(a)(43)(O) as reaching any "illegal reentry offense committed by one who has previously been deported following an aggravated felony conviction." *Piedra-Morales*, 843 F.3d at 624.[1] And therefore a

[1] *Piedra-Morales* overlooked one important distinction between § 1101(a)(43)(O) and § 1326(b)(2). The latter provision

§ 1326 judgment reflecting removal after an aggravated felony is *itself* an aggravated felony.

In other words, illegal reentry defendants in the Fifth Circuit *must* "avail themselves of professional advice and the appellate process" to dispute a judgment's erroneous citation to § 1326(b)(2), even if that provision played no obvious role in determining the sentence. *Gamboa-Garcia*, 620 F.3d at 549. These rulings give rise to a now-or-never situation: a defendant may challenge the aggravated felony finding on direct appeal, but he is forever stuck with the ruling once the case is over. In *Huerta-Rodriguez*, the appellate court even amended the judgment to *add* a citation to § 1326(b)(2) to reflect an earlier aggravated felony finding in a previous judgment. 64 F.4th at 277.

3. The Eighth Circuit allows a district court to enter judgment reflecting application of the aggravated-felony provision, but does not assign any preclusive weight to that judgment. In *Lopez-Chavez v. Garland*, 991 F.3d 960 (8th Cir. 2021), the defendant pleaded guilty, in 2006, to "Illegal Reentry into the United States Subsequent to an Aggravated Felony Conviction." *Id.* at 964. At the time, his previous marijuana conviction was believed to be an aggravated felony. Later, immigration officials determined that the § 1326 conviction was an aggravated felony. The Eighth Circuit reversed: "[F]ailing to conduct an independent inquiry into

---

applies if the defendant was removed "subsequent to" an aggravated felony conviction; the former applies only if the defendant was removed "on the basis of" an aggravated felony.

whether Lopez-Chavez's deportation was" *on the basis of* an aggravated felony would make that language "meaningless" in § 1101(a)(43)(O). *Id.* at 965. Each court (or immigration official) making an aggravated felony determination must independently decide whether any of the defendant's previous convictions were aggravated felonies. *Id.*

B. The Circuits are also divided over the meaning of "sexual abuse of a minor."

In *Esquivel-Quintana v. Sessions*, 581 U.S. 385, 390–91 (2017), this Court held, "in the context of statutory rape offenses that criminalize sexual intercourse based solely on the age of the participants, the generic federal definition of sexual abuse of a minor requires that the victim be younger than 16." The Court recognized that the laws "of many States and of the Federal Government include a minimum age differential (in addition to an age of consent) in defining statutory rape," but reserved judgment on whether generic "sexual abuse of a minor" "includes an additional element of that kind." *Id.* at 397. That question has divided the Fifth and the Eleventh Circuits.

1. The Eleventh Circuit has held that the generic definition of sexual abuse of a minor requires proof of an age differential "of at least one year." *Leger v. Attorney Gen.*, 101 F.4th 1295, 1305 (11th Cir. 2024). The immigration courts terminated Leger's asylee status after he was convicted of a Florida crime prohibiting sexual activity with victims who are between 12 and 15 years old. The Florida statute—like the Texas statute at issue here—"does not require any

age differential between the perpetrator and the victim." *Leger*, 101 F.4th at 1301. Applying the categorical approach, the Eleventh Circuit determined that the least culpable conduct was sexual activity between adolescents" who were close to the same age. *Id.* at 1302. This crime did not meet the definition of "sexual abuse of a minor," so it was not an aggravated felony. The court "vacated" the decision of the Board of Immigration Appeals. 101 F.4th at 1302.

2. In the decision below, the Fifth Circuit reached the opposite conclusion. App., *infra*, 7a–8a. Before this Court decided *Esquivel-Quintana*, the Fifth Circuit had held that the generic definition of "sexual abuse of a minor" did not require any age differential. *United States v. Rodriguez*, 711 F.3d 541, 562 n.28 (5th Cir. 2013) (en banc). This Court did not address the issue in *Esquivel-Quintana*, and the Fifth Circuit continues to adhere to its earlier view. App., *infra*, 7a–8a.

II. THIS COURT SHOULD GRANT THE PETITION TO SETTLE THE DISPUTES.

Mr. Vazquez asked the Fifth Circuit to "reform" his judgment to "eliminate any reference to 8 U.S.C. § 1326(b)(2). If he had been convicted and sentenced in the Ninth Circuit, he would have been entitled to that remedy. *Rivera-Sanchez*, 222 F.3d at 1062. In the Eighth Circuit, he would suffer no harm from the judgment's erroneous invocation of § 1326(b)(2) because future decisionmakers would be allowed to make an independent inquiry about whether he had been convicted of any aggravated felony. In the Eleventh Circuit, the court would recognize that the crime was *not* an aggravated felony because it does not

require any age differential between perpetrator and victim.

But because he was convicted in the Fifth Circuit (a) he was required to litigate the issue on direct appeal and (b) the court upheld the aggravated felony determination. If that ruling is allowed to stand, he could be forever barred from returning to the United States. Those consequences are too severe to depend on the haphazard accident of geography.

III. ALTERNATIVELY, THE COURT SHOULD OVERRULE *ALMENDAREZ-TORRES*.

In *Almendarez-Torres*, this Court rejected the argument that a pre-removal conviction was an "element" of an aggravated offense under 8 U.S.C. § 1326(b)(2): "We conclude that the subsection is a penalty provision, which simply authorizes a court to increase the sentence for a recidivist. It does not define a separate crime." *Id.* at 226. That ruling authorizes application of § 1326(b)(2) in cases like this, where the indictment did not allege, the guilty plea did not admit, and no jury ever found the existence of a pre-removal aggravated felony conviction.

Today, the *Almendarez-Torres* holding stands as an *ad hoc* outlier—one of "two narrow exceptions to the general rule" that otherwise governs whether a necessary fact is an element of a separate offense. *United States v. Haymond*, 588 U.S. 634, 644 n.3 (2019) (Gorsuch, J., plurality op.). The Court has repeatedly criticized the exception and thoroughly undermined its alleged justifications. It is time to correct the mistake.

A. Multiple members of the Court admit that *Almendarez-Torres* was wrongly decided.

If conviction or punishment depends on proof of a particular fact, that fact is an "element" of the crime. In a federal prosecution for an "infamous" crime, every element must be alleged in the grand jury's indictment. And every element of a crime must be proven to a unanimous jury beyond a reasonable doubt.

The Constitution also constrains a legislature's authority to avoid those protections by artificially labeling elements as something non-elemental. If a fact is *legally necessary* to conviction or to statutory punishment range, that fact is (for constitutional purposes) an *element*, no matter what the legislature calls it. *Alleyne v. United States*, 570 U.S. 99, 107–08 (2013).

The Court has identified only two "exceptions" to that rule: prior convictions, and facts that determine whether a sentence should run consecutive to another. *Haymond*, 588 U.S. at 644 n.3 (plurality op.) (citing *Almendarez-Torres* for the first narrow exception and *Oregon v. Ice*, 555 U.S. 160 (2009), for the second).

The prior-conviction exception is a stark outlier in this Court's Fifth and Sixth Amendment jurisprudence and represents "an exceptional departure" from "historic practice." *Erlinger v. United States*, 602 U.S. 821, 837 (2024) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 487 (2000)).

Thus far, the Court has avoided or resisted calls to overrule *Almendarez-Torres*'s "narrow exception." E.g., *Erlinger*, 602 U.S. at 838 (finding no need to

revisit *Almendarez-Torres*); *Haymond*, 588 U.S. at 646 n.4 (plurality op.) (same). Even so, many current and former Justices "have criticized *Almendarez-Torres* … and Justice Thomas, whose vote was essential to the majority in that case, has called for it to be overruled." *Erlinger*, 602 U.S. at 837 (citing *Mathis v. United States*, 579 U.S. 500, 522 (2016) (Thomas, J., concurring); *Descamps v. United States*, 570 U.S. 254, 280 (2013) (Thomas, J., concurring in judgment); *Shepard v. United States*, 544 U.S. 13, 27 (2005) (Thomas, J., concurring in part and concurring in judgment); *Jones v. United States*, 526 U.S. 227, 252–53 (1999) (Stevens, J., concurring); and *Monge v. California*, 524 U.S. 721, 741 (1998) (Scalia, J., joined by Souter and Ginsburg, JJ., dissenting)).

As Justice Sotomayor—joined by Justices Ginsburg and Kagan—explained in her concurring opinion in *Alleyne*, 570 U.S. at 121, stare decisis does not require adherence to decisions where "the reasoning of those decisions has been thoroughly undermined by intervening decisions and because no significant reliance interests are at stake that might justify adhering to their result." The Fifth and Sixth Amendment principles reaffirmed by *Apprendi* are "now firmly rooted in our jurisprudence." *Id.* Those principles cannot logically coexist with the *Almendarez-Torres* exception.

B. This Court has thoroughly undermined the decisions upon which *Almendarez-Torres* relied for its constitutional holding.

Almendarez-Torres first held, as a matter of statutory interpretation, that Congress *intended* to create mere "sentencing factors," rather than true elements, when it enacted 8 U.S.C. § 1326(b)(1) & (b)(2). 523 U.S. at 229–239. That may well be, but it is irrelevant to the constitutional question resolved by part III of the opinion. *Id.* at 239–247.

The Court rejected Almendarez's argument "that the Constitution requires Congress to treat recidivism as an element of the offense—irrespective of Congress' contrary intent." *Id.* at 239. The Court went through a series of reasons for rejecting that argument. Every one of those reasons was subsequently rejected.

1. Almendarez argued that the Constitution set limits on a legislature's ability to classify some punishment-enhancing facts as mere sentencing factors. At the time, this Court rejected that argument in light of *McMillan v. Pennsylvania*, 477 U.S. 79 (1986). See *Almendarez-Torres*, 523 U.S. at 242–246. This Court subsequently overruled the holding and reasoning of *McMillan* in *Alleyne*, 570 U.S. at 112, and *Apprendi*, 530 U.S. at 490. *See Haymond*, 588 U.S. at 645 (plurality op.) (recognizing that *Alleyne* found "no basis in the original understanding of the Fifth and Sixth Amendments" to support the holding in *McMillan*).

2. In *Almendarez-Torres*, the Court also mused that it would be "anomalous" to require the full

"elements" treatment for facts that lead to "a significant increase" in the statutory punishment range "in light of existing case law that permits a judge, rather than a jury, to determine the existence of factors that can make a defendant eligible for the death penalty." *Almendarez-Torres*, 523 U.S. at 247 (citing *Walton v. Arizona*, 439 U.S. 639 (1990), *Hildwin v. Florida*, 490 U.S. 638 (1989), and *Spaziano v. Florida*, 468 U.S. 447 (1984)). The Court later overruled those three decisions in *Ring v. Arizona*, 536 U.S. 584, 609 (2002), and *Hurst v. Florida*, 577 U.S. 92, 102 (2016) ("Time and subsequent cases have washed away the logic of *Spaziano* and *Hildwin*. The decisions are overruled.").

Today, *Almendarez-Torres* is the anomaly. "Time and subsequent cases have washed away" its logic, too.

C. At the Founding, recidivism was no different than any other element of an aggravated crime.

"[T]he scope of the constitutional jury right must be informed by the historical role of the jury at common law." *S. Union Co. v. United States*, 567 U.S. 343, 353 (2012). "At common law, the fact of prior convictions *had* to be charged in the same indictment charging the underlying crime, and submitted to the jury for determination along with that crime." *Almendarez-Torres*, 523 U.S. at 261 (Scalia, J., dissenting) (citing *Spencer v. Texas*, 385 U.S. 554, 566 (1967); *Massey v. United States*, 281 F. 293, 297 (8th Cir. 1922); *Singer v. United States*, 278 F. 415, 420 (3d Cir. 1922); and *People v. Sickles*, 51 N.E. 288, 289 (N.Y. 1898)).

Founding Era prosecutors, defendants, and courts in the United States routinely treated recidivism-related facts as elements of an aggravated crime to be charged in the indictment and proved at trial to a jury. In *People v. Youngs*, 1 Cai. 37 N.Y. Sup. Ct. 1803), the Supreme Court of New York considered a grand-larceny statue passed in 1801 and held that enhanced punishment for a recidivist could not be imposed without an indictment alleging the existence of a prior conviction. *Id.* at 37. 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 nevertheless 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. An enslaved person prosecuted in 1800 under Delaware's 1751 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 early opinions from Virginia and North Carolina. *See Commonwealth v. Welsh*, 4 Va. 57, 58 (1817); *State v. Allen*, 10 N.C. 614, 614 (1825).

The available evidence of history and tradition at the time of ratifying the Fifth and Sixth Amendments confirms that a prior conviction is no different than any other element of an enhanced crime. It must be pleaded in the indictment and proven to a jury beyond a reasonable doubt. Without those safeguards, the defendant is (in reality) convicted only of the simple or unenhanced form of the same crime.

D. The Court has already recognized that the Constitution assigns elemental status to some recidivism-related facts.

In *Erlinger*, the Court held that the Armed Career Criminal Act and the Fifth and Sixth Amendments together require proof beyond a reasonable doubt that the defendant committed three violent felonies or serious drug offenses on different occasions. The same logic applies to § 1326(b)(1)—the provision cannot be

applied without an indictment alleging one or more felony convictions that preceded removal, and a jury verdict as to the same. In this case, the indictment did not assert and Petitioner's plea did not admit the facts necessary to trigger (b)(1) or (b)(2). App., *infra*, 26a–27a, 29a.

Even if the fact that a defendant was previously convicted of a particular crime is somehow exempted from the Constitutional demands of indictment and verdict that apply to every other fact that aggravates a statutory punishment range, that would not save the so-called recidivism enhancements in § 1326(b)(1) and (b)(2). Those statutory provisions depend on other facts, in addition to the existence of a prior conviction, that surely require an allegation in a grand jury indictment and finding in a trial jury's verdict. For example, § 1326(b)(2) requires proof that the felony conviction *preceded* the removal. That requires consideration of non-elemental real-world facts about *when* the defendant was convicted and *when* the defendant was removed. And this Court has repeatedly recognized that a federal sentencing court cannot "rely on its own finding about a non-elemental fact to increase the defendant's maximum sentence." *Descamps*, 570 U.S. at 270.

E. THIS CASE IS AN IDEAL VEHICLE TO OVERRULE *ALMENDAREZ-TORRES*.

Without the *Almendarez-Torres* exception, the district court never would have applied § 1326(b)(2). Based only on the facts charged in the indictment and admitted during his guilty plea, Mr. Vazquez could have been convicted and sentenced to two years in prison under 8 U.S.C. § 1326(a).

CONCLUSION

This Court should grant the petition and set this case for a decision on the merits.

Respectfully submitted,

J. Matthew Wright
Counsel of Record
FEDERAL PUBLIC
DEFENDER'S OFFICE
600 South Tyler Street
Suite 2300
Amarillo, Texas 79101
(806) 324-2370
Matthew_Wright@fd.org

March 31, 2025