NO. _____

In the Supreme Court of the United States

OMAR ALONSO PAZOS-MONTES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the existence of a pre-removal felony conviction under 8 U.S.C. § 1326(b) is an element of an enhanced offense that must be proven to a jury beyond a reasonable doubt or admitted during a defendant's guilty plea.

DIRECTLY RELATED PROCEEDINGS

United States v. Pazos-Montes, No. 3:23-cr-00308-S-(01) (N.D. Tex. Jan. 8, 2025)

United States v. Pazos-Montes, No. 24-50293 (5th Cir. July 29, 2025)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Omar Alonso Pazos-Montes asks the Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion below was not selected for publication. It is reprinted at Appendix A.

JURISDICTION

The Fifth Circuit entered its judgment on July 29, 2025. This petition is timely under S. Ct. R. 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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, Section 1326, Subsections (a) and (b)(1) and (b)(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[.]

Title 18, Section 3583(b) provides, in pertinent part:

> (b) Authorized Terms of Supervised Release.— Except as otherwise provided, the authorized terms of supervised release are—
>
> * * * *
>
> (2) for a Class C or Class D felony, not more than three years; and
>
> (3) for a Class E felony, or for a misdemeanor (other than a petty offense), not more than one year.

Section 3559(a) of Title 18 provides, in pertinent part:

> (a) Classification.—An offense that is not specifically classified by a letter grade in the section defining it, is classified if the maximum term of imprisonment authorized is—
>
> * * * *
>
> (3) less than twenty-five years but ten or more years, as a Class C felony;
>
> (4) less than ten years but five or more years, as a Class D felony;

(5) less than five years but more than one year, as a Class E felony.

STATEMENT

Petitioner pleaded guilty to a single-count federal indictment charging him with illegal reentry after removal in violation of 8 U.S.C. § 1326. *See* (App. C.) The indictment alleged all the elements of the simple form of the crime, 8 U.S.C. § 1326(a), including a prior removal on September 4, 2019. *See* (App. C.) The prosecutor did not allege this removal followed a felony conviction. *See* 8 U.S.C. § 1326(b)(1). When he pleaded guilty, Petitioner signed a stipulation admitting all the facts alleged in the indictment. *See* (App. D). He did not admit that he was a convicted felon at the time of his removal. *See* (App. D).

Before he was sentenced, Petitioner failed to object to the application of § 1326(b)(1). At sentencing, the district court imposed 57 months in prison and three years of supervised release. *See* (App. B).

But on direct appeal to the circuit court, Petitioner argued that the existence of a pre-removal conviction was an element of an aggravated offense that must be pleaded in the indictment and either admitted by the defendant or proven to a jury beyond a reasonable doubt. He acknowledged that the issue was foreclosed against him by this Court's decision in *Almendarez-Torres v. United States*, 523 U.S. 224, 239–47 (1998), but he preserved the argument for further review by this Court.

On appeal and by way of summary disposition, the Fifth Circuit affirmed the sentence. *See* (App. A). The appellate court concluded that Petitioner's challenge to 8

U.S.C. § 1326(b)(1) remained foreclosed by *Almendarez-Torres*. App., See (App. A).

This timely petition follows.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD OVERRULE *ALMENDAREZ-TORRES*.

In *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), 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.

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

A. Multiple members of the Court recognize 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 indictment or information. Fed. R. Crim. P. 7(c)(1). And every element of a crime must be proven to a unanimous jury beyond a reasonable doubt or admitted by the defendant as part of his guilty plea.

The Constitution 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 the 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 one 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)).

And yet, thus far the Court has avoided or resisted calls to overrule the *Almendarez-Torres* 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 decision 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.* The vitality of these principles is sapped by—and cannot logically coexist with—the *Almendarez-Torres* exception. And blind adherence to *Almendarez-Torres* only increases that depletion and continues to offend Constitutional logic.

B. This Court has 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. Be that as it may, 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. And yet, this Court later rejected every one of *those* reasons.

Almendarez argued that the Constitution set limits on a legislature's ability to classify some punishment-enhancing facts as mere sentencing factors. In initial response, this Court rejected that argument as inconsistent with its decision in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986). *See Almendarez-Torres*, 523 U.S. at 242–246. But, in *Alleyne*, 570 U.S. at 112, and *Apprendi*, 530 U.S. at 490, this Court subsequently overruled *McMillan*'s holding and reasoning. *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*).

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)). But 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. Respectfully, it is past time for the Court to wash away *Almendarez-Torres*'s stain.

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." *Southern 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)).

Colonial legislatures routinely set statutorily-enhanced penalties for recidivists. For example, in 1751, the Delaware Colony passed a larceny statute. *See* An Act Against Larceny to the Value of Five Shillings and Upwards, ch. 120, 1 Del. Acts 296 (1797). A first-time offender could suffer no more than 21 lashes "at the public whipping post." *Id.* at 296. But 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.

Similarly, the Georgia Colony enacted a law in 1765 to regulate the sale or distribution of "strong liquors," "Spirituous Liquors," or "beer" to "any slave." Act of Dec. 24, 1768, in 19 Colonial Records of the State of Georgia 75, 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 the state legislatures continued in this vein after achieving independence. The First Congress saw fit to regulate coastal trade and, to ensure compliance with the new regulations, it criminalized the willful neglect or refusal to perform acts required by the new statute. Act of Sept. 1, 1789, 1 Cong. ch. 11, sec. 34, 1 Stat. 64-65. "[O]n being duly convicted thereof," the Act specified, a first-time offender would "forfeit the sum of five hundred dollars." Act of Sept. 1, 1789, *supra*, 1 Stat. 65. A recidivist, by contrast, would forfeit "a like sum for the second offence and shall from thence forward be rendered incapable of holding any office of trust or profit under the United States." Act of Sept. 1, 1789, *supra*, 1 Stat. 65.

The Second Congress adopted similar language in a pair of statutes criminalizing the failure to carry out other duties involving coastal trade. Act of Feb. 18, 1793, 2 Cong. ch. 8, sec. 29, 1 Stat. 315–16; Act of Dec. 31, 1792, 2 Cong. ch. 1, sec. 26, 1 Stat. 298. In 1799, the Fifth Congress followed suit for those entrusted to inspect cargo in the new Nation's ports. Act of March 2, 1799, 5 Cong. ch. 22, art. 53, 1 Stat. 667. In each instance, Congress set a maximum fine for first-time offenders but specified disqualification as an enhanced punishment for recidivists. *See* Act of March 2, 1799, *supra*, 1 Stat. 667; Act of Feb. 18, 1793, *supra*, 1 Stat. 315-16; Act of Dec. 31, 1792, *supra*, 1 Stat. 298.

In New York, non-capital felonies other than robbery or burglary were punishable by up to 14 years in prison, but recidivists could be sentenced to imprisonment for life. Act of Mar. 21, 1801, ch. 58, 5 N.Y. Laws 97 (1887).

Thus, across the newly formed nation, Founding Era prosecutors, defendants, and courts routinely treated these recidivism-related facts as elements of an aggravated crime to be charged in the indictment or information 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 an indictment alleging 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 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, the defendant 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.*

In response, New York's Supreme Court agreed, 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 established 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).

In sum, the available evidence of legal history and legal tradition at the time of the Fifth and Sixth Amendments' ratification confirms the Founders' and Americans' understanding of the law, namely, that a prior conviction is no different than any other element of an enhanced crime. Such prior-convictions-as-elements must be pleaded in the charging document and proven to a jury beyond a reasonable doubt. Without those safeguards, the defendant stood convicted only of the simple or unenhanced form of the same crime. That was the law then; no logical reason suggests that it should not be the law now.

D. Section 1326(b)(1) requires a factfinder to analyze the sequential relationship between a conviction and a removal.

In *Erlinger*, this 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 occasions different from one another." The same logic applies to § 1326(b)(1)—the provision cannot be applied without a charging document 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 the subsection (b)(1) provision. *See* Apps (C and D).

Even if the *existence* of a prior conviction 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). Why? Because those provisions depend on *a chronological and sequential relationship between two past events*—a conviction and a removal. It is not enough to say simply that a defendant had previously been convicted.

Consider that Section 1326(b)(1) requires proof of a removal that "was subsequent to" a felony conviction. 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. Thus, that matter must at the outset

be set out in the charging document, the allegation to be later pleaded to with an accompanying sufficient confession of facts or to be contested before the factfinder and the Government put to its proofs.

II. This case is an appropriate vehicle for overruling *Almendarez-Torrez*.

A. Without the exception, Petitioner's sentence is unlawful.

The district court ordered Petitioner to serve 57 months' imprisonment followed by 3 years supervised release. *See* (App. B). Based only on the facts charged in the Indictment and admitted during his guilty plea, Petitioner could have been sentenced to no more than 24 months in prison. *See* 8 U.S.C. § 1326(a); *see also* Fed. R. Crim. P. 7(c)(1) (insisting upon an indictment or information that alleges all "the essential facts constituting the offense charged"). Such a felony conviction would amount to a Class E felony under 18 U.S.C. § 3559(a)(5), and the maximum term of supervised release would be one year. *See* 18 U.S.C. § 3583(b)(3). But as it stands, Petitioner is on the hook for an extra 33 months in prison to be followed by an extra 24 months of supervised release.

But, relying on *Almendarez-Torres*, the district court filled the evidentiary void by finding that Petitioner's November 2019 removal was "subsequent to" a felony conviction. That additional fact opened the door to a sentence of up to ten years in prison, 8 U.S.C. § 1326(b)(1), which is a Class C felony punishable by up to three years of supervised release. 18 U.S.C. § 3559(a)(3) & § 3583(b)(2). Under a correct interpretation of the law, the fact of a pre-removal felony conviction is an element of an aggravated offense. That fact was not charged in the Indictment and was never

admitted by Petitioner. Petitioner's sentence—the additional 33 months and the additional 24 months supervised release—was and is simply unlawful.

B. Petitioner preserved his objection at the Fifth Circuit.

Petitioner's trial counsel did not preserve this challenge for de novo appellate review by pressing these same arguments before his sentencing. (ROA 181–83). But even if trial counsel had done so, it wouldn't have mattered: the district court would have been bound by *Almendarez-Torres* and could not have afforded Petitioner's requested relief. To stigmatize Petitioner's proposed case-vehicle now for a formulaic oversight then would be to raise form over substance to an impermissible degree.

Undoubtedly, this Court is aware of the numerous challenges made to *Almendarez-Torres*; this case demonstrates the harm occasioned by this constitutional outlier case. Even if Petitioner would have received a maximum 24-month sentence below—a grand assumption because he could have received less—Petitioner's 57-month sentence of imprisonment is over twice what the law should have permitted as a maximum. Similarly, Petitioner's 36-month supervised release term is 3 times the term which would otherwise have been the case.

Understandably, this is why Petitioner's appellate counsel immediately raised the *Almendarez-Torres* argument on appeal. After all, a wrong must be righted.

C. In the absence of relief, the harmful effects of the error will persist for years.

Petitioner's case cries out for certiorari because, unlike in many other cases, the controversy over *Almendarez-Torres* impacts him here and now. His sentences

will endure well past the time necessary for the Court to decide the issue on the merits and grant meaningful relief.

CONCLUSION

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

Respectfully submitted,

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