No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

MICHAEL ROMAN BURGHARDT,
Petitioner

v.

UNITED STATES,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATE COURT OF APPEALS FOR
THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a criminal defendant has waived a claim that the indictment failed to charge an element of the offense where the claim arose while his case was on direct appeal, when this Court first recognized the element in *Rehaif v. United States*, --- U.S. --- 139 S. Ct. 2191 (2019), abrogating uniform Circuit decisions defining the elements of the offense?

2. How does plain-error review apply when a criminal defendant argues that his plea colloquy did not explain all of the elements of the offense, and the trial record does not contain relevant information because the omitted element was first recognized while the case was on direct appeal?

3. Whether the First Circuit erroneously applied *Moncrieffe v. Holder*, 569 U.S. 184 (2013), *Mathis v. United States*, --- U.S. ---, 136 S. Ct. 2243 (2016), *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183 (2007), and the rule of lenity when it concluded that where a state law is ambiguous, but can reasonably be construed to criminalize certain conduct that might fall outside of the ACCA, the defendant must show that the state actually has or would prosecute this non-generic conduct?

4. Whether this Court should reconsider the holding of *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), given that it conflicts with other sentencing cases of this Court by permitting sentence enhancements based on prior convictions that were not pled or proven?

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTIONAL PROVISIONS

STATUTES AND RULES

Federal Statutes

Federal Rules

State Statutes

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

The petitioner, Michael Roman Burghardt, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit entered in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at *United States v. Burghardt*, 939 F.3d 397 (1st Cir. 2019), and is found at Appendix A. The district court's memorandum order rejecting Burghardt's argument that he was not subject to the ACCA mandatory-minimum sentence is unreported and is found at Appendix B.

JURISDICTION

The Court of Appeals issued its opinion on October 3, 2019. *See* App. A. [1] Burghardt filed a timely petition for panel rehearing on October 16, 2019, which the First Circuit denied without opinion on November 14, 2019. *See* App. E. This petition is being filed within ninety days of that denial. Burghardt invokes this Court's jurisdiction under 28 U.S.C. §1254(1).

[1] Citations are as follows: App. refers to the appendices to this brief.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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 offense 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 states:

> 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.

Title 18 U.S.C. §922(g)(1) provides that

> It shall be unlawful for any person—who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year…to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

In relevant part, 18 U.S.C. §924(e) states:

> (1) In the case of a person who violates §922(g) of this title and has three previous convictions by any court referred to in §922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years….
> (2) As used in this subsection—
> (A) the term "serious drug offense" means—
> (i) an offense under the Controlled Substances Act (21 U.S.C. §801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. §951 et seq.), or chapter 705 of title 46 for which a

> maximum imprisonment of ten years or more is prescribed by law; or
> (ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. §802)), for which a maximum term of imprisonment of ten years or more is prescribed by law….

New Hampshire Rev. Stat. §318-B:2(I) states:

> It shall be unlawful for any person to manufacture, possess, have under his control, sell, purchase, prescribe, administer, or transport or possess with intent to sell, dispense, or compound any controlled drug, or controlled drug analog, or any preparation containing a controlled drug, except as authorized in this chapter.

New Hampshire Rev. State. §318-B:1(XXX) provides:

> "Sale" means barter, exchange or gift, or offer therefor, and each such transaction made by any person whether as principal, proprietor, agent, servant, or employee.

STATEMENT OF THE CASE

On January 4, 2017, a homeowner in Manchester, New Hampshire reported that someone had stolen some tools and antique newspapers from the house he was renovating. The police found these items at a local pawn shop, and got a warrant to arrest Burghardt for receiving stolen property. When officers arrested him on January 9, 2017, they found an unloaded gun with no magazine under his coat.

Burghardt was charged with violating 18 U.S.C. §922(g)(1). He pled guilty. The critical sentencing issue was whether he was subject to a fifteen-year mandatory-minimum sentence under the Armed Career Criminal Act (ACCA, 18 U.S.C. §924(e)). He had five potential predicates: three convictions for sale of a controlled drug, one for possession of a controlled drug with intent to sell, and one for robbery, all under New Hampshire law. The four controlled-substance predicates arose from a single investigation. The robbery charge involved allegations that Burghardt pushed a Macy's security guard while leaving the store wearing clothes he had not paid for.

Burghardt argued that sale of a controlled substance was not a serious drug offense as defined by the ACCA, because the New Hampshire statute criminalized an offer to sell drugs, without requiring proof of intent or ability to complete the sale (a "mere offer"). *See* N.H. Rev. Stat. §318-B:1(XXX) & §318-B:2(I). The district court rejected this argument. *See* App. B. It concluded that the First Circuit would likely hold that a "mere offer" was still a serious drug offense. App. B at 16-17. In the alternative, it held that New Hampshire law was inconclusive, but suggested

that it did not criminalize a mere offer. App. B at 18-23. It noted that the statute required proof of a "knowing" mental state and that neither party presented a case in which New Hampshire had prosecuted a mere offer. App. B at 19-22.

Burghardt appealed raising this and other grounds. Shortly before oral argument, this Court decided *Rehaif v. United States*, --- U.S. ---, 139 S. Ct. 2191 (2019). In *Rehaif*, this Court held that "in a prosecution under 18 U.S.C. §922(g) and §924(a)(2), the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm." *Id.* at 2200. Burghardt filed supplemental briefing arguing that *Rehaif* invalidated his conviction because this element was not charged in the indictment or explained to him before he pled guilty.

The First Circuit rejected Burghardt's claims. *See* App. A. It held that Burghardt waived any claim of indictment error by pleading guilty. App. A at 6. It applied plain-error review to his claim that his plea was involuntary because the court did not explain this scienter element. App. A at 6-7. It concluded that he could not show prejudice because nothing in the record indicated that he would have gone to trial; he did not present out-of-record evidence that he would have gone to trial (such as his own assertions that he would have, or information from his state court cases tending to support his claim); and assumptions about New Hampshire procedure suggested that he knew he was convicted of a crime punishable by more than a year of incarceration. App. A at 7-10.

The First Circuit explained that it "would have to answer two questions in his favor" to find that New Hampshire sale was not an ACCA predicate. App. A at 11. "First, does New Hampshire law in fact criminalize 'mere' offers? And second, is a 'mere' offer a 'serious drug offense'?" *Id.* It answered the first question in the negative and did not reach the second. *Id.* The First Circuit noted that "New Hampshire law does not explicitly limit sale-by-offer violations of §318-B:2(I) to 'bona fide' offers." *Id.* Nonetheless, it found the law was ambiguous because the text of the statute lacks clarity as to whether it criminalizes mere offers. *Id.* It held that "the fair and likely most reasonable reading of the statute and New Hampshire law, given the law's ambiguity, places on Burghardt the burden of producing authority to suggest that New Hampshire would apply §318-B:2(I) to 'mere' offers." App. A at 13 (citing *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)).

REASONS FOR GRANTING THE PETITION

I. This Court should grant certiorari to establish that a criminal defendant does not waive the claim that his indictment failed to charge an element of the offense where this claim only arose when this Court first announced the existence of this element while his direct appeal was pending.

The indictment charged that Burghardt, "having been convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess in and affecting interstate commerce," a particular Browning firearm. App. C. At his plea colloquy, the judge explained that if he went to trial, the government would have to prove four elements: 1) Burghardt possessed a gun; 2) he knew he possessed a gun; 3) the gun traveled in interstate commerce; and 4) this possession followed his conviction "of a crime punishable by a term of imprisonment exceeding one

year." App. D at 2-3. This indictment and these instructions were consistent with then-applicable First Circuit law. *See, e.g.*, *United States v. Scott*, 564 F.3d 34, 39 (1st Cir. 2009). At the time of Burghardt's plea, the government did not have to prove that he knew that he had the status that made him a prohibited person under 18 U.S.C. §922. *See* App. A at 6, n.3; *Rehaif*, 139 S. Ct. at 2211, n.6 (Alito, J., dissenting).

After Burghardt pled guilty and was sentenced, and while his direct appeal was pending, *Rehaif* upended this First Circuit law by holding that:

> [I]n a prosecution under 18 U.S.C. §922(g) and §924(a)(2), the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm.

139 S. Ct. at 2200. This newly-recognized scienter element was not charged in Burghardt's indictment or explained to him before he pled guilty.

Although this element did not need to be charged or proven at the time of Burghardt's plea, the First Circuit held that by pleading guilty, he waived any claim that his indictment was insufficient. App. A at 6. It cited *United States v. Cotton*, 535 U.S. 625, 630 (2002), in support of this conclusion. *Id.* It rejected Burghardt's contention that he could not have waived an argument that did not exist at the time of his plea, and found no "compelling reason" to excuse this waiver. *Id.* The First Circuit erred by finding that a criminal defendant can waive an argument that the indictment did not charge a crime where that argument did not arise until his direct appeal was pending. In reaching this conclusion, it misapplied *Cotton* and this Court's waiver jurisprudence.

This Court discussed the possible consequences of not raising an argument in the district court in *United States v. Olano*, 507 U.S. 725, 731-36 (1993). It explained that "[w]hereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" *Id.* at 733 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). It held that "[w]hether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake." *Id.*

One of the fundamental purposes of an indictment is to "contain[] the elements of the offense intended to be charged" and to "sufficiently appraise[] the defendant of what he must be prepared to meet." *Russell v. United States*, 369 U.S. 749, 763 (1962) (quotations omitted). The indictment here failed to fulfill this function; it did not allege the scienter element first recognized in *Rehaif*. The error is more serious than the one in *Cotton*, where the indictment failed to allege "a fact that enhances the statutory maximum sentence." *Cotton*, 535 U.S. at 627. In *Cotton*, the indictment charged a complete offense. The parties knew that an additional fact would impact sentencing; the question was whether the existence of that additional fact needed to be alleged in the indictment. In contrast, Burghardt's indictment did not charge a complete offense, so he did not know about one of the elements of the offense. He was, therefore, unaware that the government would have to prove that element to sustain a conviction.

It is fundamentally important that every indictment charge a complete offense. Burghardt's indictment was complete under then-applicable law. His guilty plea did not waive his right to challenge the constitutional sufficiency of the indictment where the error arose only while his case was on direct appeal. By its nature, a guilty plea involves the intentional relinquishment of certain rights. Burghardt, for example, intentionally relinquished any claim that the government could not prove that the firearm traveled in interstate commerce. However, Burghardt's guilty plea did not intentionally relinquish a claim of indictment insufficiency that did not exist at the time of his plea. App. D. at 2-3. At the time of his plea, First Circuit law was clear; the government did not have to prove knowledge of status. *Rehaif* did not overrule that law until Burghardt's case was on direct appeal. By pleading guilty, Burghardt did not, and could not have waived the claim that his indictment failed to charge the element first recognized by *Rehaif*. The First Circuit erred in concluding that it did. This Court should clarify the applicability of the waiver doctrine to claims arising after resolution of a case in the district court.

II. This Court should grant certiorari to clarify the application of plain-error review where the defendant raises a fact-dependent claim that did not arise until his case was pending on direct appeal.

Applying plain-error review, the First Circuit rejected Burghardt's claim that his guilty plea was not knowing and voluntary because the district court did not explain the scienter element first required by *Rehaif*. App. A at 6-10. It explained that to demonstrate the prejudice necessary to satisfy plain-error review, Burghardt

would have to "'show a reasonable probability that, but for the purported error, he would not have pled guilty.'" App. A at 7 (quoting *United States v. Díaz-Concepción*, 860 F.3d 32, 38 (1st Cir. 2017)). It found that he could not meet this standard.

The First Circuit noted that Burghardt could not point to anything "in the record suggesting that he would have insisted on going to trial, even if foolishly, if he had been told of the scienter-of-status element." App. A at 7. The Court wrote that he had not "claim[ed] that he would have testified that he did not know that his prior offenses were punishable by more than a year in prison." App. A at 7-8. In its "own review of the record," it noted that Burghardt did not dispute that he had pled guilty to offenses punishable by more than a year of imprisonment or that New Hampshire law directs a judge to inform the defendant of the maximum sentence during a guilty plea. App. A at 8-9. It acknowledged that there was no evidence that Burghardt had ever "served over a year for a single charge." App. A at 8, n.4.

The First Circuit's analysis then moved outside the record. It assumed that it was "virtually certain that at least one of the two state court judges who accepted Burghardt's guilty pleas in his state court cases…told Burghardt face-to-face what his maximum sentence could be, an inference bolstered by his lack of appeal of those pleas at the time for failure to comply with New Hampshire law." App. A at 8. The Court acknowledged a gap in the record:

> In theory, it is nevertheless possible that the state-court records regarding Burghardt's two prior convictions might reveal no mention of the possible prison terms in either case, or that perhaps the state records may be unobtainable or uninformative, in which case Burghardt might arguably have thought that a prosecutor in this case relying only on an instruction concerning normal state-court practice might fall short of securing his

> conviction, even in the absence of any testimony challenging conformity with that practice in Burghardt's prior cases. That seems to be quite a stretch. In any event, thought, neither side has chosen to present us with the state records from either state court proceeding or to make any representation as to their unavailability. We are therefore presented with an 'unknown variable: the contents of the record of the prior conviction[s].'

App. A at 9 (quoting *United States v. Turbides-Leonardo*,468 F.3d 34, 40 (1st Cir. 2006)). It held that this gap cuts against Burghardt. *Id.*

In rejecting Burghardt's claim, the First Circuit misapplied the third prong of plain-error review. This Court has held that "a defendant who seeks reversal of his conviction after a guilty plea, on the ground that the district court committed plain error under Rule 11, must show a reasonable probability that, but for the error, he would not have entered that plea." *United States v. Dominguez Benitez*, 542 U.S. 74, 83 (2004). As this Court noted, Dominguez Benitez's claim was based on a violation of Rule 11, not due process. Not only does Burghardt's claim raise due process issues, it was not available at the time of his plea.

This Court explained the scope of the inquiry under plain-error review:

> When the defendant has made a timely objection to an error and Rule 52(a) applies, a court of appeals normally engages in a specific analysis *of the district court record*—a so-called "harmless error" inquiry—to determine whether the error was prejudicial. Rule 52(b) normally requires the same kind of inquiry, with one important difference: It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice.

Olano, 507 U.S. at 734 (emphasis added). An appellate court's review is limited to the district court record. *Id.* The record on appeal consists of "papers and exhibits filed in the district court," as well as transcripts and docket entries. Fed.R.App.P. 10(a). There is a limited procedure to supplement this record if something "material

to either party is omitted from or misstated in the record by error or accident." Fed.R.App.P. 10(e)(2). The First Circuit erred in two ways: 1) it considered information outside the record; and 2) it faulted Burghardt for not having record evidence to support a claim that did not arise until after the record was created.

At most, the district court record shows that Burghardt pled guilty to state crimes punishable by more than a year of imprisonment. It shows that in some multi-count cases, he was sentenced to more than a year in jail. App. A at 8 & n.4. However, as the First Circuit acknowledged, it does not show that Burghardt served more than a year in jail on a single charge. *Id.* The Court also recognized that Burghardt had no incentive to object to or to contest the PSR's statements about the length of sentences imposed or served. App. A at 8-9. The record does not show that Burghardt was told that he was pleading guilty to crimes punishable by more than a year in prison or that he had this knowledge through some other source.

The First Circuit erred by inferring that because New Hampshire cases instruct judges to inform defendants of the maximum possible sentence, Burghardt was so informed. App. A at 8 (citing New Hampshire cases). There is no record evidence about how often judges in New Hampshire comply with this direction or about whether they followed it in Burghardt's cases. The Court wrote that "it seems virtually certain that at least one of the two state court judges" who accepted Burghardt's pleas must have told him about the maximum penalties possible. App. A at 8. This conclusion ignores the fact that there is no record evidence about the content of these pleas, not even enough information to conclude that they were

accepted by two different judges. The First Circuit erred by looking beyond the record for confirmation that the government would have been able to prove an element that no one believed existed at the time of Burghardt's plea.

Conversely, the First Circuit faulted Burghardt for not having record evidence that he lacked knowledge of his status. App. A at 7-9. Even if Burghardt must meet the *Dominguez-Benitez* standard despite raising a due process claim that did not exist at the time of his plea, requiring Burghardt to meet this burden misapplies plain-error review. The First Circuit incorrectly required Burghardt to show a reasonable probability that the government would not have been able to prove the new scienter element. He does not have to carry this burden. He need only show that given this new element, there is a reasonable probability that he would have put the government to its proof. *See Dominguez Benitez*, 542 U.S. at 83.

Burghardt met this burden. The scienter element recognized in *Rehaif* is distinct from the other elements of §922, because it requires proof of a mens rea that is not readily provable by direct evidence. Burghardt was arrested with an unloaded gun in his pocket, and he had previously pled guilty to crimes punishable by more than a year in prison. Prior to *Rehaif*, there was essentially no argument he could make to contest this charge. After *Rehaif*, the government must convince a jury, beyond a reasonable doubt, that Burghardt, who never served more than a year in jail on any single charge, knew and understood that he had been convicted of a crime punishable by more than a year in jail. This new element is more difficult for the government to prove, and provides a defense not previously available.

Burghardt was subject to the ACCA, and received no benefit from pleading guilty. These facts are sufficient to satisfy the plain-error standard.

The First Circuit took a step expressly prohibited by *Dominguez Benitez*. Even accepting the constraints of plain-error review, Burghardt did not need to show that he was likely to prevail at trial or that the government was unlikely to be able to prove the new element; he need only show, as he did, that it was reasonably probable that the new element would have altered his decision to plead guilty. *See Dominguez Benitez*, 542 U.S. at 85 ("The point of the question is not to second-guess a defendant's actual decision; if it is reasonably probable he would have gone to trial absent the error, it is no matter that the choice may have been foolish.").

Even accepting, arguendo, that Burghardt cannot meet plain-error review because there is a gap in the record about his previous convictions, the First Circuit should have remanded the case for further proceedings. *See* App. A at 9. Long-standing First Circuit law did not include a scienter-of-status element, so it is unsurprising that the record contains no information about it. *See* App. A at 6, n.3. Until *Rehaif*, this mens rea was irrelevant. *Id.* Any gap in the record arose not because Burghardt failed to raise this claim, but because the claim did not exist. Nor do the Federal Rules permit Burghardt to supplement the record, as the First Circuit suggested, by asserting that he would have testified that he did not know his status. *See* App. A at 7-8. The First Circuit held this gap against Burghardt. App. A at 9. However, because this due process claim arose only while his case was

on direct appeal, the First Circuit should have remanded the case to permit the parties to address any relevant gaps in the record.

The First Circuit misapplied this Court's plain-error jurisprudence by making assumptions that went outside the record, by overstating Burghardt's burden, and by faulting him for a gap in the record that existed by virtue of the fact that his claim did not arise until his case was on direct appeal.

III. This court should grant certiorari to clarify how *Moncrieffe*, *Duenas Alvarez*, and *Mathis* apply when a court is deciding whether an ambiguous state statute is an ACCA predicate.

Burghardt's fifteen-year mandatory-minimum sentence depends on the conclusion that his convictions for sale of a controlled substance (under N.H. Rev. Stat. §318-B:2(I)) are "serious drug offenses" as defined by the ACCA. 18 U.S.C.§924(e)(2). Burghardt argued that they are not serious drug offenses because the New Hampshire statute is broader than the ACCA definition in that it criminalizes an offer to sell drugs without requiring proof of intent or ability to complete the sale (a "mere offer"). *See* N.H. Rev. Stat. §318-B:1(XXX) &§318-B:2(I).

The New Hampshire statute, case law, and jury instructions do not require proof that the defendant had the ability and intent to complete a sale. App. A at 11 ("New Hampshire law does not explicitly limit sale-by-offer violations of section 318-B:2(I) to 'bona fide' offers."). The First Circuit concluded that the statute was nonetheless ambiguous, because the word "offer" could import these elements into the statute. App. A at 11. But, it acknowledged that "it is not unreasonable to read the word 'offer' as including fraudulent or insincere offers" as Burghardt did. *Id.*

The conclusion that the statute was ambiguous should have ended this analysis, because this ambiguity must be resolved in Burghardt's favor. Before applying the ACCA, a sentencing judge must be *certain* that the defendant was convicted of a qualifying offense. *See Mathis v. United States*, --- U.S. ---, 136 S. Ct. 2243, 2257 (2016) ("Of course, such record materials will not in every case speak plainly, and if they do not, a sentencing judge will not be able to satisfy '*Taylor*'s demand for certainty' when determining whether a defendant was convicted of a generic offense." (quoting *Shepard v. United States*, 544 U.S. 13, 21 (2005) and referencing *Taylor v. United States*, 495 U.S. 575 (1990))); *see also Moncrieffe v. Holder*, 569 U.S. 184, 194-95 (2013) ("Moncrieffe's conviction could correspond to either the CSA felony or the CSA misdemeanor. Ambiguity on this point means that the conviction did not 'necessarily' involve facts that correspond to an offense punishable as a felony under the CSA. Under the categorical approach, then, Moncrieffe was not convicted of an aggravated felony."). This approach is consistent with the rule of lenity. *See United States v. Davis*, --- U.S. ---, 139 S. Ct. 2319, 2333 (2019) (noting "the rule of lenity's teaching that ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor").

The First Circuit erred by moving beyond this ambiguity. App. A at 11-13. Having found that the New Hampshire statute was ambiguous, the First Circuit should have gone on to decide whether both interpretations are ACCA predicates. If a state law conviction for sale of a controlled substance may have been based on a

mere offer, a sale conviction can only be an ACCA predicate if a mere offer is. Burghardt argued below that it is not.

The First Circuit also erred in its unnecesssary efforts to resolve this ambiguity. It held that "[T]he fair and likely most reasonable reading of the statute and New Hampshire law, given the law's ambiguity, places on Burghardt the burden of producing authority to suggest that new Hampshire would apply section 318-B:2(I) to 'mere' offers." App. A at 13. The Court concluded that Burghardt had not shown "a 'realistic probability' that New Hampshire would apply section 318-B:2(I) to 'mere' offers to sell drugs." *Id.* (quoting *Duenas-Alvarez*, 549 U.S. at 193). This holding incorrectly expands *Duenas-Alvarez* and *Moncrieffe*, and violates the rule of lenity.

The First Circuit stated that Burghardt's interpretation of the statute was "not unreasonable." App. A at 11. Therefore, it is reasonable to believe that the statute criminalizes offering to sell drugs without requiring proof of intent or ability to complete the sale. A reasonable statutory interpretation is not "legal imagination" as envisaged by *Duenas-Alvarez* and *Moncrieffe*.[2] If Burghardt's

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[2] Neither *Duenas-Alvarez* nor *Moncrieffe* is a criminal case, and a closer consideration of each case illustrates the difference between considering the minimum conduct penalized by a statute, as required by the categorical approach, and applying legal imagination.

In *Duenas-Alvarez*, this Court held that in a federal statute that provided for the removal of a noncitizen convicted of a "theft offense," the term "theft offense" included "'*aiding and abetting* a theft offense." 549 U.S. at 185. Duenas-Alvarez tried to show that California applied aiding and abetting liability more broadly than other states and the federal government. *Id.* at 190-94. Unlike Burghardt, he did not argue that the California statute lacked a necessary element of a predicate offense. Instead, he argued that California applied the known elements of its law more broadly than other states. *Id.* Burghardt does not focus on application, but rather on what the government is actually required to prove. How New Hampshire actually applies its law is irrelevant where the elements of the offense permit a nongeneric prosecution.

In *Moncrieffe*, this Court held that a state statute "that extends to the social sharing of a small amount of marijuana" is not an "aggravated felony" triggering deportation. 569 U.S. at 187. In

interpretation of the statute is reasonable, as the First Circuit held, then there is a realistic probability that the statute criminalizes mere offers. Accepting the First Circuit's analysis, the statute here may allow prosecution for selling drugs without requiring proof of intent and ability to complete an offered sale.

Regardless of whether there is a reported case prosecuting a mere offer, the fact remains that New Hampshire prosecutors may not have to prove these elements and could, at any time, choose to prosecute a case in which they could not. The First Circuit's analysis infringes upon New Hampshire's sovereignty, because it rests on its belief that an ambiguous statute probably will not be applied in a way that criminalizes certain conduct. The scope of the statute is a decision for New Hampshire courts and legislators. This statute may criminalize mere offers, so it cannot be an ACCA predicate unless a mere offer is a serious drug offense.

IV. This Court should grant certiorari to reconsider the rule of *Almendarez-Torres*, which permits, in tension with other sentencing cases of this Court, enhancement of a defendant's sentence based on a prior conviction that was not pled or proven.

Burghardt was convicted of a crime with a a ten-year statutory maximum penalty (18 U.S.C. §922(g)), yet was subject to a fifteen-year mandatory minimum (18 U.S.C. §924(e)). This five-year increase beyond the otherwise applicable statutory maximum was based on prior convictions that were not charged in the

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so holding, the Court cautioned that the "focus on the minimum conduct criminalized by the state statute is not an invitation to apply 'legal imagination' to the state offense…." *Id.* at 191. The statute at issue in *Moncrieffe*, by its terms, permitted prosecution of someone who shared a small amount of marijuana. *Id.* at 194-95. Examining the minimum conduct that violated this statute was not legal imagination. Similarly, considering the minimum conduct proscribed by New Hampshire law does not involve the application of legal imagination. The New Hampshire law cannot be an ACCA predicate unless all reasonable interpretations of that law are serious drug offenses.

indictment or proven beyond a reasonable doubt. The increase violated Burghardt's Fifth and Sixth Amendment rights, and this Court should reconsider its holdings to the contrary. *See, e.g., Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *Almendarez-Torres v. United States*, 523 U.S. 224, 226-27 (1998).

This Court has held that "'[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" *Blakely v. Washington*, 542 U.S. 296, 301 (2004) (quoting *Apprendi*, 530 U.S. at 490 (2000)); *see also United States v. Booker*, 543 U.S. 220, 232 (2005) (discussing "the defendant's right to have the jury find the existence of any particular fact that the law makes essential to his punishment" (internal quotation marks omitted)); *Alleyne v. United States*, 570 U.S. 99 (2013); *Jones v. United States*, 526 U.S. 227, 242-43, n.6 (1999) ("[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.").

Prior to these decisions, this Court held in *Almendarez-Torres* that an unproven prior conviction can increase a defendant's sentence beyond the statutory maximum. 523 U.S. at 226-27. Although *Apprendi*'s progeny seem to undermine *Almendarez-Torres*, this Court has not revisited it. In *Alleyne*, after quoting *Apprendi*, this Court added the following footnote:

> In *Almendarez–Torres v. United States,* 523 U.S. 224 (1998), we recognized a narrow exception to this general rule for the fact of a prior conviction.

> Because the parties do not contest that decision's vitality, we do not revisit it for purposes of our decision today.

Alleyne, 570 U.S. at 111, n.1; *see also Dretke v. Haley*, 541 U.S. 386, 395-96 (2004) ("Respondent contends that *Almendarez-Torres* should be overruled or, in the alternative, that it does not apply because the recidivist statute at issue required the jury to find not only the existence of his prior convictions but also the additional fact that they were sequential. These difficult constitutional questions…are to be avoided if possible.").

The importance of revisiting *Almendarez-Torres* has risen as the rule of *Apprendi*, which some once thought the Court "might retreat" from, "has become even more firmly rooted in the Court's Sixth Circuit jurisprudence." *Alleyne*, 570 U.S. at 120 (Sotomayor, J., concurring). In a concurrence, Justice Thomas wrote that *Almendarez-Torres*

> has been eroded by this Court's subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided. The parties do not request it here, but in an appropriate case, this Court should consider *Almendarez-Torres*' continuing viability. Innumerable criminal defendants have been unconstitutionally sentenced under the flawed rule of *Almendarez-Torres*, despite the fundamental "imperative that the Court maintain absolute fidelity to the protections of the individual afforded by the notice, trial by jury, and beyond-a-reasonable-doubt requirements."

Shepard v. United States, 544 U.S. 13, 28 (2005) (Thomas, J., concurring in part and concurring in the judgment) (quoting *Harris v. United States*, 536 U.S. 545, 581-82 (2002) (Thomas, J., dissenting)).

Stare decisis should not prevent the reconsideration of *Almendarez-Torres* in light of the *Apprendi* line of cases. Stare decisis "is at its weakest" when the Court

interprets the Constitution. *Agostini v. Felton*, 521 U.S. 203, 235 (1997) (when "there has been a significant change in, or subsequent development of, our constitutional law," stare decisis "does not prevent…overruling a previous decision"); *see also Seminole Tribe v. Florida*, 517 U.S. 44, 63 (1996). Its force is also "at its nadir in cases concerning procedural rules that implicate fundamental constitutional protections." *Alleyne*, 570 U.S. at 116, n.5; *see also id.* at 119 (Sotomayor, J., concurring) (noting that "force of *stare decisis* is reduced" "when procedural rules are at issue that do not govern primary conduct and do not implicate the reliance interests of private parties" and that "any reliance interest that the Federal Government…might have is particularly minimal here because prosecutors are perfectly able to 'charge facts upon which a mandatory minimum sentence is based in the indictment and prove them to a jury'" (quoting *Harris*, 536 U.S. at 581 (Thomas, J., dissenting))).

Burghardt's case is illustrative. The indictment did not appraise him of the charges he faced or the potential consequences flowing from conviction—he could have faced charges of possession of a firearm by a felon that carried no minimum sentence and a maximum of ten years in prison, or charges of possession of a firearm by an armed career criminal that carried a minimum sentence of 15 years and a maximum of life imprisonment. Burghardt's situation is not uncommon. Many federal crimes—firearms offenses like the one here, illegal reentry offenses (8 U.S.C. §1326(b)), drug offenses (21 U.S.C. §841(b), and child pornography offenses

(18 U.S.C. §§2252(b) and 2252A(b)—provide for increased minimum and maximum sentences based on facts relating to prior convictions.

Only this Court can resolve the tension between *Almendarez-Torres* and *Apprendi* and its progeny and protect one of the most basic constitutional principles—that a criminal defendant must be informed of the charges he or she faces. *See Monge v. California*, 524 U.S. 721, 741 (1998) (Scalia, J., dissenting) (describing *Almendarez-Torres*'s holding as "a grave constitutional error affecting the most fundamental of rights"). As Justice Thomas wrote: "Regardless of the framework adopted, judicial factfinding increases the statutory maximum in violation of the Sixth Amendment." *Descamps v. United States*, 570 U.S. 254, 281 (2013) (Thomas, J., concurring in the judgment). This Court should grant certiorari to reconsider *Almendarez-Torres* and to prevent further constitutional violations.

CONCLUSION

For the foregoing reasons, petitioner asks this Court to grant this petition, determine that the First Circuit erred in affirming Burghardt's conviction and sentence and remand this case for further proceedings.

Respectfully submitted,

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Date: February 11, 2020