No. _____

In the Supreme Court of the United States

_____

Edgar Alonso Esparza-Rodriguez,
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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QUESTIONS PRESENTED

I. Should *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), be overruled?

II. Should this Court should grant certiorari, vacate the judgment below, and remand in light of *Erlinger v. United States*, 144 S.Ct. 1840 (June 21, 2024), or any other case more directly addressing the vitality of *Almendarez-Torres v. United States*?

LIST OF PARTIES

Edgar Alonso Esparza-Rodriguez, petitioner on review, was the Defendant-Appellant below. The United States of America, respondent on review, was Plaintiff-Appellee. No party is a corporation.

RELATED PROCEEDINGS

- *United States v. Esparza-Rodriguez*, No. 4:23-CR-151, U.S. District Court for the Northern District of Texas. Judgment entered on August 31, 2023.

- *United States v. Esparza-Rodriguez*, No. 23-10973, U.S. Court of Appeals for the Fifth Circuit. Judgment entered on May 8, 2024.

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PETITION FOR A WRIT OF CERTIORARI

Edgar Alonso Esparza-Rodriguez respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's unreported opinion is available on Westlaw's electronic database at 2024 WL 2044628 and reprinted at Pet.App.a1-a3.

JURISDICTION

The Court of Appeals issued its panel opinion on May 8, 2024. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS

This Petition involves a penalty provision found in 8 U.S.C. § 1326:

> (b) Notwithstanding subsection (a), in the case of any alien described in such subsection—
>
> … . .
>
> (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;

8 U.S.C. § 1326(b)(2). This petition also involves the Notice Clause of the Sixth Amendment to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation.

U.S. CONST., amend. VI.

STATEMENT OF THE CASE

A. Facts and District Court Proceedings

Petitioner Edgar Alonso Esparza-Rodriguez pleaded guilty to illegally reentering the United States following deportation. The statutes governing this offense set a default maximum of two-years imprisonment and one-year supervised release as the default maximum. *See* 8 U.S.C. §1326(a), 18 U.S.C. §§3559(e), and 3583(b). But based on a prior conviction, the district court applied a 10-year maximum of imprisonment and a three-year maximum term of supervised release instead. *See* 8 U.S.C. § 1326(b)(1); 18 U.S.C. §§3559(e), and 3583(b); Pet.App. a3-5. This alternative applies "in the case of any alien . . . whose removal was subsequent to a conviction for commission of a felony." 8 U.S.C. § 1326(b)(1). Mr. Esparza-Rodriguez's indictment did not allege his prior commission of a felony. Pet.App.a8-a9. He objected in writing before sentencing to a heightened maximum term of imprisonment. Pet.App.a11. The district court overruled the objection at sentencing, and imposed a 24-month term of imprisonment and a three-year term of supervised release. Pet.App.a5.

B. Proceedings on Appeal

Mr. Esparza-Rodriguez challenged his term of imprisonment on appeal, which challenge the court below rejected. *See* Pet.App.a1-a3.

REASONS FOR GRANTING THIS PETITION

I. *Erlinger* shows that *Almendarez-Torres* can no longer be reconciled with *Apprendi*. Only this Court can finally resolve the inconsistency by overruling *Almendarez-Torres*.

"In all criminal prosecutions," the Sixth Amendment states, "the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation." U.S. CONST., amend. VI. This Court has held for a quarter century 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." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). The opening caveat in this rule -- "other than the fact of a prior conviction" -- reflects the holding of *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). *Almendarez-Torres* permits an enhanced sentence under 8 U.S.C. §1326(b), even if the defendant's prior conviction is not placed in the indictment and treated as an element of the offense.

From the very outset, this Court has questioned whether *Apprendi* and *Almendarez-Torres* can be reconciled. *See Apprendi*, 530 U.S. at 489-490 ("Even though it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested, *Apprendi* does not contest the decision's validity…"); *Dretke v. Haley*, 541 U.S. 386 (2005)(Whether …*Almendarez-Torres* should be overruled" is a "difficult constitutional question[]… to be avoided if possible."). This Court's recent decision in *Erlinger v. United States*, __U.S.__, 144 S.Ct 1840 (June 21, 2024), however, makes the further co-existence of these two decisions untenable. This Court should grant

certiorari in an appropriate case and end the confusion surrounding the prior conviction exception to *Apprendi* by overruling *Almendarez-Torres*. If it does not plan to do so immediately, it should remand the instant case in light of *Erlinger*.

Several aspects of *Erlinger* make it impossible to apply that decision in a principled way while recognizing the vitality of *Almendarez-Torres*. *Erlinger* holds that the Sixth Amendment requires a jury to decide whether a defendant's prior convictions occurred on separate occasions if he or she receives an enhanced sentence under 18 U.S.C. §924(e), the Armed Career Criminal Act (ACCA). *See Erlinger*, 144 S.Ct. at 1851-1852. It is difficult to draw a principled distinction, however, between the sequencing determination required by ACCA's separate occasions requirement and that set forth in §1326(b).

ACCA requires a 15-year mandatory minimum, and permits a life sentence, when the defendant's three prior qualifying felonies were "committed on occasions different from each other." 18 U.S.C. §924(e)(1). The "occasions" inquiry is a fact-specific one, encompassing consideration of the offenses' timing, character, relationship, and motive. *See Wooden v. United States*, 595 U.S. 360, 369 (2022). Section 1326(b)(1) requires a similar inquiry: a re-entry defendant may receive an enhanced statutory maximum only if his or her "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)…" 8 U.S.C. §1326(b)(1). If the Sixth Amendment requires a jury to resolve the sequencing issue in the ACCA context, it likely must do so in the §1326 context as well.

It is arguable, maybe likely, that ACCA presents the factfinder with a modestly more complicated sequencing question than does §1326(b)(1). Unlike §1326(b), ACCA asks when the defendant committed a prior offense, not when the conviction occurred; it asks about an offense's purpose and character, not merely its timing. *See Wooden*, 595 U.S. at 369. But none of this implicates the constitutional line identified by *Erlinger*: whether the factfinder exceeds the "'limited function' of determining the fact of a prior conviction and the then-existing elements of that offense." *Erlinger*, 144. S.Ct at 1854 (quoting *Descamps v. United States*, 570 U.S. 254, 260 (2013)); *id.* (finding constitutional error because "[t]o determine whether Mr. Erlinger's prior convictions triggered ACCA's enhanced penalties, the district court had to do more than identify his previous convictions and the legal elements required to sustain them."). Under *Erlinger*, a judge may perform this limited function, but "'[n]o more' is permitted." *Id.* (quoting *Mathis v. United States*, 579 U.S. 500, 511 (2016)). Complicated or simple, deciding whether a defendant's prior conviction preceded or post-dated the date of his or removal from the country does not merely ask whether the defendant has a conviction, nor what its elements are. The line between judge and jury is not drawn between the complex and the simple, but at the fact and elements of a prior conviction.

And it is not merely *Erlinger*'s direct discussion of *Almendarez-Torres* that undermines the validity of *Almendarez-Torres*'s holding. After considering the controlling precedents and historical sources, *Erlinger* repeatedly states that juries must decide every fact essential to the punishment range, without distinguishing

between those facts that pertained to prior offenses and those that did not. Canvassing several founding era original sources, the *Erlinger* court concluded that "requiring a unanimous jury to find ***every fact essential to an offender's punishment***" represented to the Founders an "'anchor' essential to prevent a slide back toward regimes like the vice-admiralty courts they so despised.'" *Erlinger*, 144 S.Ct. at 1850 (emphasis added)(quoting *Letter from T. Jefferson to T. Paine* (July 11, 1789), *reprinted in* 15 *Papers of Thomas Jefferson* 266, 269 (J. Boyd ed. 1958), and citing *The Federalist No. 83*, p. 499 (C. Rossiter ed. 1961); *accord*, *Federal Farmer, Letter XV* (Jan. 18, 1788), *reprinted in* 2 *The Complete Anti-Federalist* 320 (H. Storing ed. 1981)). "Every fact" means "every fact," not "every fact save one."

This Court called *Almendarez-Torres* into even further doubt when considering the sources and precedents offered by the Court Appointed *Amicus*. Considering the impact of *Graham v. West Virginia*, 224 U.S. 616 (1912), cited by the *Amicus*, this Court observed that *Graham* "provides perhaps more reason to question *Almendarez-Torres*'s narrow exception than to expand it." *Erlinger*, 144 S.Ct. at 1857. And considering state laws offered by the *Amicus* in support of a broad *Almendarez-Torres* exception, the Court observed that "it is not clear whether these four States always allowed judges to find even the fact of a defendant's prior conviction." *Id.* at 1858.

This Court has now spent almost a quarter century trying to reconcile *Apprendi* and *Almendarez-Torres*. In doing so, it has repeatedly narrowed *Almendarez-Torres* until it now serves very little useful purpose outside the context of §1326 itself. *See Erlinger*, 144 S.Ct. at 1854, n.2. In the ACCA context, the

exception no longer saves the court the trouble of assembling a jury to decide matters associated with prior convictions, nor the defendant the prejudice of having the jury exposed to prior convictions. *See Erlinger*, 144 S.Ct. at 1863 (Kavanagh, J., dissenting).

On the other hand, the prior conviction exception has wreaked profound havoc in this Court's statutory construction. To avoid constitutional issues associated with the scope of *Almendarez-Torres*, this Court has slathered elaborate procedural gloss on the text of ACCA. *See Mathis*, 579 U.S. at 511 (constitutional avoidance required court to ignore those parts of prior charging documents as to which defendant lacked right to unanimous jury determination); *Descamps*, 570 U.S. at 267 (constitutional avoidance required court to assume defendant convicted of burglary had been convicted of shoplifting because statute did not distinguish between them). Indeed, the entire categorical approach to criminal history enhancements exists to confine judicial fact-finding to the limits of *Almendarez-Torres*. *See Mathis*, 579 U.S. at 511 ("Sixth Amendment concerns" give rise to categorical approach); *Descamps*, 570 U.S. at 267 (same); *Shepard v. United States*, 544 U.S. 1, 16 (2005)(plurality op.)("While the disputed fact here can be described as a fact about a prior conviction, it is too far removed from the conclusive significance of a prior judicial record, and too much like the findings subject to *Jones* and *Apprendi, to say that Almendarez-Torres* clearly authorizes a judge to resolve the dispute. The rule of reading statutes to avoid serious risks of unconstitutionality ... therefore counsels us to limit the scope of judicial factfinding on the disputed generic character of a prior plea, just as Taylor

constrained judicial findings about the generic implication of a jury's verdict.") (internal citations omitted); *Taylor v. United States*, 495 U.S. 570, 601 (1991)("Third, the practical difficulties and potential unfairness of a factual approach are daunting. In all cases where the Government alleges that the defendant's actual conduct would fit the generic definition of burglary, the trial court would have to determine what that conduct was. … If the sentencing court were to conclude, from its own review of the record, that the defendant actually committed a generic burglary, could the defendant challenge this conclusion as abridging his right to a jury trial?").

That approach -– borne of a need to reconcile *Almendarez-Torres and Apprendi* – has generated extensive criticism in the lower courts. *See United States v. Lewis*, 720 F. App'x 111, 118 (3d Cir. 2018)(unpublished)(Roth, J., concurring)("Indeed, the categorical approach has of late received its share of deserved criticism."). And it has caused the residual clauses of ACCA, *see Johnson v. United States*, 576 U.S. 591, 598 (2015), of 18 U.S.C. §16 (important to immigration law), *see Sessions v. Dimaya*, 584 U.S. 148 (2018), and of 18 U.S.C. §924(c), *see United States v. Davis*, 588 U.S. 445 (2019), all to be declared unconstitutionally vague. Because the language of ACCA so resembles USSG §4B1.2, the categorical approach – which, again, largely exists to police the line between *Almendarez-Torres* and *Apprendi* -- has confounded the interpretation of the Sentencing Guidelines as well, *see United States v. Mata*, 869 F.3d 640, 644 (8th Cir. 2017) (choosing to "construe 'violent felony' under [the ACCA] and 'crime of violence' under the Guidelines as interchangeable."), ultimately causing the Sentencing Commission to strike §4B1.2's residual clause as well by emergency

Amendment, *see* USSG Guideline Manual, Appendix C, Amendment 798 (Aug. 1, 2016), notwithstanding its constitutionality, *see Beckles v. United States*, 580 U.S. 256 (2017).

In short, the tension between *Apprendi* and *Almendarez-Torres* has generated cascading waves of confusion and uncertainty, whose consequences reach well beyond even those provisions that might be constitutionally problematic under *Apprendi.*

Fortunately, *Erlinger* makes it all but impossible to imagine that *Apprendi* and *Almendarez-Torres* may be reconciled by narrowing the holding of *Almendarez-Torres.* The scope of the *Almendarez-Torres* exception has now shrunk to a size that will no longer contain even §1326 itself. Its rules of decision, moreover, simply contradict that of *Almendarez-Torres*. The time has come to overrule it. It should quickly grant certiorari in an appropriate case to decide the validity of *Almendarez-Torres*, and hold this Petition pending its resolution. Alternatively, it should grant certiorari in the instant case, vacate, and remand for reconsideration in light of *Erlinger*.

II. This Court should quickly grant certiorari to decide the continuing validity of *Almendarez-Torres*, holding this Petition until it resolves the issue. Alternatively, it should vacate the judgment below, and remand the instant case to the Fifth Circuit for further proceedings (GVR) in light of *Erlinger v. United States.*

As discussed above, *Erlinger* marks an appropriate time to decide finally the validity of *Almendarez-Torres*. Because the validity of Petitioner's three-year term of supervised release depends on *Almendarez-Torres*, this Court should hold the instant Petition until it resolves that issue, and remand in the event that *Almendarez-Torres* is overruled.

In the event that the Court does not quickly address *Almendarez-Torres* in a merits grant of certiorari, however, it should at least grant *certiorari*, vacate the judgment below, and remand for reconsideration in light of *Erlinger*. Doing so will "assist[] this Court by procuring the benefit of the lower court's insight" into the relationship between *Almendarez-Torres* and *Erlinger*, "before [it] rule[s] on the merits." *Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 167 (1996). Further, the damage done to *Almendarez-Torres* by *Erlinge*r may be sufficient for the court below to recognize on remand that these precedents cannot be reconciled, and hence to create a reasonable probability of a different result on remand. In such circumstance, this Court may appropriately use the GVR mechanism. *Lawrence*, 516 U.S. at 167.

It is true that Petitioner omitted any challenge to the statutory maximum terms of imprisonment or supervised release in the briefing below. The court below, however, may consider issues raised for the first time in a Petition for Certiorari in

extraordinary or exceptional circumstances, though not otherwise. *See United States v. Taylor*, 409 F.3d 675, 676 (5th Cir. 2005)(citing *United States v. Hernandez–Gonzalez*, 405 F.3d 260 (5th Cir.2005); *United States v. Sutherland*, 428 F.2d 1152, 1158 (5th Cir.1970) (per curiam); *United States v. Ardley*, 273 F.3d 991 (11th Cir.2001) (en banc)).

It is at least reasonably possible that a sentence exceeding the statutory maximum punishment may constitute extraordinary or exceptional sentences. Some authority below recognizes such sentences as automatic plain error. *United States v. Del Barrio*, 427 F.3d 280, 282 (5th Cir. 2005)(citing *United States v. Ferguson*, 369 F.3d 847, 849 (5th Cir.2004), and *United States v. Sias*, 227 F.3d 244, 246 (5th Cir.2000))("A defendant's failure to contemporaneously object to an alleged error generally results in plain error review. However, [this Court] review(s) de novo a sentence that allegedly exceeds the statutory maximum term."). This establishes, at least, that the court below treats such errors as especially grave, and potential candidates for reversal without preservation. Further, the requested relief – reduction of the term of release from three to one years – can be so easily accomplished by reforming the judgment, that there would be little reason to deny relief.

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit

Respectfully submitted August 6, 2024.

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