No. _____

In the Supreme Court of the United States

_____

Jose Luis Sarmiento,
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 grant certiorari, vacate the judgment below, and remand in light of *Erlinger v. United States*, __U.S.__, 144 S. Ct. 1840 (2024), if it does not elect a plenary grant of certiorari?

LIST OF PARTIES

Jose Luis Sarmiento, 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. Sarmiento*, No. 4:23-CR-00165, U.S. District Court for the Northern District of Texas. Judgment entered on September 15, 2023.

- *United States v. Sarmiento*, No. 23-10974, U.S. Court of Appeals for the Fifth Circuit. Judgment entered on June 28, 2024.

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PETITION FOR A WRIT OF CERTIORARI

Jose Luis Sarmiento 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 3219704 and reprinted at Pet.App.A.

JURISDICTION

The Court of Appeals issued its panel opinion on June 28, 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—
>
> (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;

8 U.S.C. § 1326(b). 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 Jose Luis Sarmiento 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.C. This alternative applies "in the case of any alien . . . whose removal was subsequent to a conviction for commission of an aggravated felony." 8 U.S.C. § 1326(b)(2). Mr. Sarmiento's charging information did not allege his prior commission of an aggravated felony. Pet.App.C. He objected at sentencing. This omission, he argued, meant that it alleged only the two-year maximum term of imprisonment and a one-year term of supervised release. He conceded, however, that this claim was foreclosed. (citing *Almendarez-Torres v. United States*, 523 U.S. 224, 235, 239 (1998)). The district court overruled the objection at sentencing and imposed an 60-month term of imprisonment and a three-year term of supervised release. Pet.App.B2.

B. Proceedings on Appeal

Mr. Sarmiento argued on appeal that the district court had erred in imposing a sentence in excess of two years and a term of supervised release in excess of one year. He noted that although that enhanced maximum term of supervised release

depended on a prior conviction, he was not charged and had not admitted it, and no jury had ever found it beyond a reasonable doubt. A three-judge panel affirmed on June 28, 2024. *See* Pet.App.A.

REASONS FOR GRANTING THIS PETITION

I. The decision in *Erlinger v. United States* 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 (2024), however, makes the further co-existence of these two decisions untenable. This Court should grant certiorari and end the confusion surrounding the prior conviction exception to *Apprendi* by overruling *Almendarez-Torres*.

Several aspects of *Erlinger* make it impossible to apply it 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 1851-52. It is hard 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)(2) 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 an aggravated felony." 8 U.S.C. §1326(b)(2). 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)(2). 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 undermined the validity of *Almendarez-Torres*'s holding. After considering the

controlling precedents and historical sources, *Erlinger* repeatedly stated that juries must decide every fact essential to the punishment range, without distinguishing between 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 effect of *Graham v. W. 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 a 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 1862, 1870 (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 U.S.S.G. § 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 that provision's residual clause as well by emergency Amendment, *see* USSG Guideline Manual, Appendix C, Amendment 798 (Aug. 1, 2016), despite 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 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, which only this Court may fully do. *See Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989)

II. *Almendarez-Torres* was wrongly decided. The prior-conviction exception from *Almendarez-Torres* cannot be squared with the text and history of the Sixth Amendment's Notice Clause.

Almendarez-Torres is wrong on the merits. A review of the text of the provision, construed as it would have been at Founding, makes clear that it the historical record likewise shows that the Framers would not have expected a judge to find any fact – recidivism-related or no – that changed the penalty range.

A. *Almendarez-Torres* is inconsistent with the text of the Constitution.

"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. "Constitutional rights are enshrined with the scope they were understood to have *when the people adopted them*," and Founding Era "linguistic [and] legal conventions" clarify such meaning. *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 34 (2022) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 634-35 (2008)). Founding Era dictionaries reveal the prior-conviction exception from *Almendarez-Torres* to be atextual. A crime's "nature" included all allegations necessary to distinguish one statutory alternative from another, and a prior-conviction allegation would be necessary to allow a defendant facing a statutory recidivism enhancement to do so.

Consider first the clause as a whole. The preposition "of" links the noun "accusation" to the preceding nouns "nature" and "cause." The "nature" and "cause" therefore concern or relate to the overarching "accusation" and form its subsidiary parts. *Of*, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785) ("Concerning; relating to."). The Notice Clause obligates the government to "inform[]" the "accused" of all three. U.S. CONST., amend. VI.

Founding Era lexicographers typically defined "nature" to refer to a thing's distinct properties, which allowed an observer to distinguish between things of one nature and things of another. Samuel Johnson defined the term in 1785 as "[t]he native state or properties of any thing, by which it is discriminated from others." *See*

Nature, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785). James Barclay followed suit in 1792 and defined the noun as "a distinct species or kind of being," "the essential properties of a thing, or that by which it is distinguished from all others." *Nature*, A COMPLETE AND UNIVERSAL ENGLISH DICTIONARY (2d ed. 1792). Writing in America, Noah Webster first defined "nature" in 1806 to denote the "sort," "kind," or "the native state of any thing." *Nature*, A COMPENDIOUS DICTIONARY OF THE ENGLISH LANGUAGE (1806). He expanded upon this definition in 1828 and then defined "nature" to mean a thing's "essential qualities or attributes." *Nature*, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828). The phrase "nature of man," he explained, thus captured both "the peculiar constitution of his body or mind" and "the qualities of the species which distinguish him from other animals." *Nature*, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828). Given these contemporary definitions, "those who framed the Bill of Rights," *see Oregon v. Ice*, 555 U.S. 160, 165 (2009)(quoting *Harris v. United States*, 536 U.S. 545, 557 (2002), would have understood the "nature" of an "accusation" to refer to its distinctive properties.

Eighteenth Century lexicographers recognized the noun "cause" as a term of art with a specialized legal meaning. Writing in 1726, Nathan Bailey defined the term as "a Tryal, or an Action brought before a Judge to be Examined and Disputed." *Cause*, AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (3d ed. 1726). Barclay, writing in 1792, recognized the same specialized meaning and defined "[i]n a Law sense" to mean "the matter in dispute, or subject of a lawsuit." *Cause*, A COMPLETE AND UNIVERSAL ENGLISH DICTIONARY (2d ed. 1792). Writing in America, Webster did

not recognize a specialized meaning for the term in 1806, *Cause*, A COMPENDIOUS DICTIONARY OF THE ENGLISH LANGUAGE (1806), but led with the term-of-art definition in 1828, *Cause*, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828). The noun "cause," he wrote, meant "[a] suit or action in court." *Cause*, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828).

As used in the Notice Clause, the noun "accusation" incorporated both an underlying "nature" and "cause." Johnson defined "accusation" in 1785 "[i]n the sense of the courts" as "[a] declaration of some crime preferred before a competent judge, in order to inflict some judgment on the guilty person." *Accusation*, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785). He used the verb "prefer" to mean "[t]o offer solemnly," "to propose publickly," or "to exhibit." *Prefer*, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785). Barclay recognized a similar definition seven years later for the term "accusation" and defined it as "the preferring a criminal action against any one before a judge." *Accusation*, A COMPLETE AND UNIVERSAL ENGLISH DICTIONARY (2d ed. 1792). He then defined the verb "prefer" as "to exhibit a bill or accusation." *Prefer*, A COMPLETE AND UNIVERSAL ENGLISH DICTIONARY (2d ed. 1792). Webster's 1806 definition for the term "accusation" is similar to those offered by Johnson and Barclay: "a complaint" or "charge of some crime." *Accusation*, A COMPENDIOUS DICTIONARY OF THE ENGLISH LANGUAGE (1806). Webster later expanded on this definition. An "accusation," he wrote, could refer to "[t]he act or charging with a crime or offense." *Accusation*, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828). The word also denoted "[t]he charge of an offense or crime;

or the declaration containing the charge." *Accusation*, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828).

From these definitions, the original meaning of the Notice Clause takes shape. The accusation necessarily incorporated "some crime," *Accusation*, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785), or "criminal action," *Accusation*, A COMPLETE AND UNIVERSAL ENGLISH DICTIONARY (2d ed. 1792). That crime had a nature, which constituted its "essential properties." *See, e.g.*, *Nature*, A COMPLETE AND UNIVERSAL ENGLISH DICTIONARY (2d ed. 1792). The nature of the crime alleged would allow the accused to "distinguish[]" the offense charged in his case "from all others." *See, e.g.*, *Nature*, A COMPLETE AND UNIVERSAL ENGLISH DICTIONARY (2d ed. 1792). The term thus incorporated "the 'constituent parts' of" the "crime's legal definition," also known as its elements. *See Mathis*, 579 U.S. at 504 (quoting *Elements*, BLACK'S LAW DICTIONARY (10th ed. 2014)). By contrast, the cause of an accusation would alert the defendant to "the matter in dispute." *See, e.g.*, *Cause*, A COMPLETE AND UNIVERSAL ENGLISH DICTIONARY (2d ed. 1792). At trial, the defendant could not fight about the alleged crime's "native state or properties," *Nature*, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785), but the real-world facts necessary to prove those elements are always at issue. The term "cause" incorporated the "particulars" of the alleged offense with respect to "time, place, and circumstances," and the text of the Notice Clause thereby obligated the government to go beyond the abstract elements of the offense at issue and to allege some of the real-world facts it intended to prove at trial. *See United States v. Cruikshank*, 92 U.S. 542, 558 (1875).

By itself, the plain meaning of the Notice Clause—particularly the word "nature"—strongly supports the interpretation urged by Mr. Sarmiento. A statutory enhancement premised on the fact of a prior conviction differs from the version of the offense applicable to re-entry defendants who lack pre-removal felonies, but without a prior-conviction allegation, the accused cannot "distinguish[]" between the aggravated offense for recidivists and the less serious alternative. *See Nature*, A COMPLETE AND UNIVERSAL ENGLISH DICTIONARY (2d ed. 1792). A prior-conviction allegation was therefore necessary to allow the accused to "discriminate[]" between the potential offenses charged in the indictment. *See Nature*, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785). The historical record and Founding Era charging practices reinforce this interpretation of the Sixth Amendment's text.

B. The historical record is clear. In the Founding Era, the fact of a prior conviction necessary to satisfy a statutory recidivism enhancement was an element of an aggravated crime to be alleged in the indictment and proved to a jury at trial.

The Founders were familiar with statutory recidivism enhancements. Throughout the Colonial Era, Parliament had repeatedly used statutes to set out harsh penalties for repeat offenders. In 1559, Parliament sought to regularize worship throughout the Church of England, and upon a "first offence," a recalcitrant minister could "suffer imprisonment by the space of six months." Uniformity Act 1159 (1 Eliz. 1, c.2). After a "second offence," a recidivist could "suffer imprisonment by the space of one whole year." Uniformity Act 1559 (1 Eliz. 1, c.2). Parliament adopted the same approach roughly 100 years later when it criminalized the printing of "seditious and treasonable Bookes[,] Pamphlets[,] and Papers." Licensing of the Press Act 1662 (14 Cha. 2, c.33). A first-time offender would "be disenabled from exercising his respective Trade"—in that case, operating a printing press—"for the space of three yeare." Licensing of the Press Act 1662 (14 Cha. 2, c.33). "[F]or the second offence," the recidivist offender "shall for ever thence after be disabled to use or exercise the Art or Mystery of Printing or of Founding Letters for Printing and shall alsoe have and receive such further punishment by Fine Imprisonment or other Corporal Punishment not extending to Life or Limb." Licensing of the Press Act 1662 (14 Cha. 2, c.33).

Parliament continued to set enhanced penalties for recidivist offenders well into the Founding Era. A 1783 law classified as "a rogue or vagabond" any defendant

"found in or upon any dwelling-house, warehouse, coach-house, stable, or out-house; or in any inclosed yard, or garden, or area, belonging to any house, with intent to steal any goods or chattels." Rogues and Vagabonds Act 1783 (23 Geo. 3, c.88). The same status applied to any defendant "having upon him any picklock-key, crow, jack, bit, or other implement, with an intent feloniously to break and enter into any dwelling-house, ware-house, coach-house, stable, or outhouse" or "any pistol, hanger, cutlass, bludgeon, or other offensive weapon, with intent feloniously to assault any person." 23 Geo. 3, c.88. An earlier law allowed judges to punish those found to be rogues or vagabonds with a six-month term of imprisonment. Justices Commitment Act 1743 (17 Geo. 2, c.5, s.9). Upon escape, a judge could declare the defendant an "incorrigible rogue" and then impose a two-year sentence. 17 Geo. 2, c.5, s.4. If an "incorrigible rogue" committed a second escape or another offense resulting in rogue or vagabond status following release, he would "be guilty of a felony." 17 Geo. 2, c.5, s.9.

The Counterfeiting Coin Act of 1741 also set out harsh penalties for repeat offenders. That statute made it a crime to "utter, or tender in payment, any false or counterfeit money, knowing the same to be false or counterfeit, to any person or persons," and upon conviction, a first-time offender would "suffer six months imprisonment." Counterfeiting Coin Act 1741 (15 Geo. 2, c.28, s.2). Parliament singled out recidivists for additional punishment: "if the same person shall afterwards be convicted a second time," that defendant "shall, for such second offence,

suffer two years' imprisonment." 15 Geo. 2, c.28, s.2. A third conviction resulted in the death penalty. 15 Geo. 2, c.28, s.2.

During the Founding Era, English prosecutors, defendants, and courts routinely treated the fact of a prior conviction as an element of an aggravated crime. A 1751 prosecution under the Counterfeiting Coin Act resulted in an acquittal after the prosecutor failed to prove the fact of the prior conviction. The defendant, a woman named Elizabeth Strong, "was indicted for being a common utterer of false money." Trial of Elizabeth Strong, (Oct. 16, 1751), Old Bailey Proceedings Online, *https://www.oldbaileyonline.org/browse.jsp?id=t17511016-48-defend352&div=t17511016-48#highlight* (last visited Mar. 13, 2023). To support the charge, the indictment alleged a prior conviction for "uttering a false shilling, at Hicks's Hall, on" May 10, 1747. *Id*. The indictment alleged that Ms. Strong "utter[ed] another piece of false money, in the similitude of a shilling, on" August 1, 1751. *Id*. If proved, these allegations would subject Ms. Strong to a two-year term of imprisonment, *see* 15 Geo. 2, c.28, s.2, but the prosecution fell apart on the prior-conviction allegation. The prosecutor "produced" a "copy of the record of her former conviction, but not being a true copy, and failing in proof of that, she was acquitted." Trial of Elizabeth Strong, *supra*, Old Bailey Proceedings Online.

The record of a 1788 prosecution demonstrates the same charging practice and procedural safeguards. Trial of Samuel Dring, (Sept. 10, 1788), Old Bailey Proceedings Online, *https://www.oldbaileyonline.org/browse.jsp?id=t17880910-129-defend1003&div=t17880910-129#highlight* (last visited Mar. 13, 2023). To

support the recidivist enhancement in that case, the indictment alleged that Samuel Dring "was tried and convicted for being a common utterer of false and counterfeit money" on October 7, 1784. *Id.* The prosecutor called one witness to prove up "the record of the prisoner's former conviction" and another to establish his identity. *Id.* The second witness testified to his presence at the defendant's earlier trial and testified that Mr. Dring "was tried for uttering, and confined one year." *Id.*

The same practice persisted into the Nineteenth Century. In Michael Michael's 1802 prosecution, the indictment alleged the date and jurisdiction of the prior conviction, at which Mr. Michael "was tried and convicted of being a common utterer." Trial of Michael Michael, (Feb. 17, 1802), Old Bailey Proceedings Online, *https://www.oldbaileyonline.org/browse.jsp?id=t18020217-89&div=t18020217-89&terms=common%20utterer#highlight* (last visited Mar. 13, 2023). The prosecutor began the trial by reading into the record the prior conviction and then called two witnesses to establish Mr. Michael's identity as the same man named in the earlier judgment. The first, a "clerk to the Solicitor of the Mint," was present "when the prisoner was tried" on the previous offense and identified Mr. Michael as the same individual. *Id.* The next witness, a jailer, testified to bringing Mr. Michael to the first trial and transporting him back to jail to serve a twelve-month sentence following his conviction. *Id.*

Founding Era prosecutions for those alleged to be incorrigible rogues evidence the same practice. A 1785 indictment charged James Randall with an initial commitment "for being a rogue or vagabond" and a subsequent arrest "with a pistol

and iron crow." Trial of James Randall, (Sept. 14, 1785), Old Bailey Proceedings Online, *https://www.oldbaileyonline.org/browse.jsp?id=t17850914-104&div=t17850914-104&terms=incorrigible%20rogue#highlight* (last visited Mar. 13, 2023). On those facts, the indictment alleged, he "was adjudged to be an incorrigible rogue," but following his commitment to "to the house of corrections for two years," Mr. Randall escaped. *Id*. These allegations put Mr. Randall at risk of a felony conviction, and the prosecution once more began by producing "true copies" of the "record" establishing the prior conviction. *Id*. From there, a witness identified Mr. Randall as the man named in the record of conviction and testified to his escape. *Id.* Another witness testified to apprehending Mr. Randall following his first escape and attending the trial at which he earned the title incorrigible rogue. *Id*. Trial records from 1797 and 1814 establish the same practice for other defendants facing the same charge. Trial of Joseph Powell, (Nov. 30, 1814), Old Bailey Proceedings Online, *https://www.oldbaileyonline.org/browse.jsp?id=t18141130-110&div=t18141130-110&terms=offend%20again#highlight* (last visited Mar. 13, 2023); Trial of John Hughes, (July 12, 1797), Old Bailey Proceedings Online, *https://www.oldbaileyonline.org/browse.jsp?id=t17970712-64&div=t17970712-64&terms=offend%20again#highlight* (last visited Mar. 13, 2023).

Colonial legislators in America followed Parliament's example and routinely set enhanced penalties by statute for repeat offenders. The Delaware Colony passed a larceny statute in 1751. Laws of the State of Delaware 296-98 (1798). A first-time offender could suffer no more than 21 lashes "at the public whipping post." *Id*. at 296.

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.

Congress and state legislatures carried on the same tradition throughout the Founding Era. The First Congress saw fit to regulate coastal trade, and to ensure compliance with the new regulations, 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 Mar. 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 Mar. 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. As for the States,

Kentucky passed a law in 1801 punishing first-time pig thieves with up to a twelve-month term of imprisonment. 2 Laws of Kentucky 150 (1807). A recidivist, by contrast, could serve no less than six months and up to three years. *Id*. The State of New York passed a grand-larceny law seven years later subjecting repeat offenders to life in prison. 5 Laws of the State of New York 338-39 (1808).

Like their English counterparts, Founding Era prosecutors, defendants, and courts in the United States routinely treated the fact of a prior conviction necessary to support an enhanced sentence as an element of an aggravated crime to be charged in the indictment and 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 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 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. A slave prosecuted in 1800 under Delaware's 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 opinions from Virginia and North Carolina issued in 1817, *Commonwealth v. Welsh*, 4 Va. 57, 58, 1817 WL 713 (1817), and 1825, *State v. Allen*, 10 N.C. 614, 614 (1825), respectively.

The text and history point in the same direction. The earliest American authority and pre-Founding Era authority from England reveal a consistent historical practice of treating a prior conviction necessary to support a statutorily enhanced sentence as an element, which distinguished the aggravated recidivist offense from the lesser crime applicable to first-time offenders. Prosecutors charged the prior conviction in the indictment and put on evidence at trial to secure a conviction. Contemporary dictionaries confirm that the Framers used the text of the Notice Clause to incorporate this common-law practice into the Constitution, but

despite their force, *Almendarez-Torres* forecloses these claims in the government's favor.

III. This case is an excellent vehicle to resolve the question presented.

This case is an excellent vehicle to determine the continuing vitality of *Almendarez-Torres*. Mr. Sarmiento received 60 months' imprisonment and three years' supervised release, providing ample time to decide the issue while it offers tangible consequence to the parties. *See* Pet.App.B. The issue is fully preserved in district court and the court below.

IV. Alternatively, this Court may wish to grant certiorari, vacate the judgment below, and remand this case to the Fifth Circuit for further proceedings (GVR) in light of *Erlinger*.

If the Court does not elect a plenary grant, 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 thus to create a reasonable probability of a different result on remand. In such circumstance, this Court will appropriately use the GVR mechanism. *Lawrence*, 516 U.S. at 167.

CONCLUSION

Petitioner asks this Court to grant certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit

Respectfully submitted September 10, 2024.

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