No. _____

In the

Supreme Court of the United States

_____

David Earl Boyd,

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. Whether 18 U.S.C. §§ 2251 and 2252A exceed Congressional commerce authority in authorizing conviction based only upon proof that materials – such as a cell phone – used to produce child pornography once crossed state lines on an unspecified prior occasion.

II. Whether *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), should be overruled, or alternatively, 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)?

PARTIES TO THE PROCEEDING

Petitioner is David Earl Boyd, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner David Earl Boyd seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished opinion of the court of appeals is reported at *United States v. Boyd*, No. 23-10695, 2024 WL 3427053 (5th Cir. July 16, 2024). It is reprinted in Appendix A to this Petition. The district court's judgment is attached as Appendix B.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on July 16, 2024. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

RELEVANT STATUTE AND CONSTITUTIONAL PROVISION

Section 2251 of Title 18 reads:

> (a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, . . ., any sexually explicit conduct for the purpose of producing any visual depiction of such conduct . . . shall be punished as provided under subsection (e), if such person knows or has reason to know that such visual depiction . . . was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means. . ..
>
> ***
>
> (e) Any individual who violates, or attempts or conspires to violate, this section shall be fined under this title and imprisoned not less than 15 years nor more than 30 years, but if such person has one prior conviction under this chapter, section 1591, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, abusive sexual contact involving a minor or ward, or sex

trafficking of children, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 25 years nor more than 50 years, but if such person has 2 or more prior convictions under this chapter, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to the sexual exploitation of children, such person shall be fined under this title and imprisoned not less than 35 years nor more than life. Any organization that violates, or attempts or conspires to violate, this section shall be fined under this title. Whoever, in the course of an offense under this section, engages in conduct that results in the death of a person, shall be punished by death or imprisoned for not less than 30 years or for life.

Section 2252A(a)(5)(B) of Title 18 reads:

(a) Any person who— (5)(B) knowingly possesses, or knowingly accesses with intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other material that . . . was produced using materials that have been mailed, or shipped or transported in or affecting interstate or foreign commerce by any means, including by computer.

Section 2252A(b)(2) of Title 18 reads:

Whoever violates, or attempts or conspires to violate, subsection (a)(5) shall be fined under this title or imprisoned not more than 10 years, or both, but, . . . if such person has a prior conviction under this chapter, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 10 years nor more than 20 years.

Article I, Section 8, clause 3 of the United States Constitution provides

in relevant part:

> The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

The Sixth Amendment to the United States Constitution provides:

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

STATEMENT OF THE CASE

A. Facts and Proceedings in District Court

On February 23, 2023, Mr. Boyd was found guilty on four counts of an indictment charging him with sexual exploitation of a child, in violation of 18 U.S.C. §§ 2251(a) & (e) (Counts 1 and 2); possession of child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B) (Count 3); and penalties for registered sex offenders, in violation of 18 U.S.C. § 2260A (Count 4).

The two counts charging violations of § 2251(a) involved production of visual depictions taken using the personal cellphone camera of Mr. Boyd. The count charging a violation of § 2252A(5)(B) involved possession of a visual depiction taken using the personal cellphone camera. There was no evidence of distribution. For the interstate commerce nexus on these charges, a government witness testified that the cellular telephone was manufactured in China.

The statutes governing the offenses of conviction set default statutory ranges of 15 to 30 years' imprisonment for Counts 1 and 2 (18 U.S.C. §2251(e)) and up to 10 years' imprisonment for Count 3 (18 U.S.C. §2252A(b)(2)).

Nevertheless, the court adopted enhanced statutory ranges based on Mr. Boyd having been previously convicted of certain types of offenses. The statutory range on

Counts 1 and 2 was increased to 35 years to life based on Mr. Boyd having two prior convictions for violating "the laws of any State relating to the sexual exploitation of children," as set forth in 18 U.S.C. §2251(e). The statutory range on Count 3 was increased to 10 years to 20 years based in part on a prior conviction for possession of child pornography as listed in 18 U.S.C. §2252A(b)(2).

Mr. Boyd objected to the statutory enhancements at sentencing. 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 a sentence of life imprisonment for each of Counts 1 and 2, and 240 months' imprisonment for Count 3.

B. Appellate Proceedings

Petitioner appealed, arguing that the Congressional power to regulate interstate commerce did not permit it to criminalize Petitioner's conduct: production and possession of a sexually explicit visual depiction of a minor on a personal cellphone camera manufactured out of state at an unknown time. See 18 U.S.C. §2251(a) (prohibiting production of such an image "using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means"); 18 U.S.C. §2252A(a)(5)(B) (prohibiting possession of such an image).

Petitioner further argued that the district court had erred in imposing a sentence on each count in excess of the default statutory ranges based on prior convictions where he was not charged with said priors and no jury had ever found them beyond a reasonable doubt.

Petitioner conceded that these claims were foreclosed by circuit precedent and the court of appeals agreed. Pet.App.A at 3, n.2; *United States v. Boyd*, No. 23-10695, 2024 WL 3427053 (5th Cir. July 16, 2024) (unpublished).

REASONS FOR GRANTING THE PETITION

I. This Court should grant certiorari to make clear that Congress exceeds its authority under the Commerce Clause in authorizing a federal prosecution of intrastate conduct based only upon proof that materials – such as a cell phone camera – used in the offense once crossed state lines on an unspecified prior occasion.

Section 2251 of Title 18 authorizes conviction when the defendant produces a sexually explicit visual depiction of a minor, "if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer...." 18 U.S.C. §2251(a). Section 2252A of Title 18 authorizes conviction when a defendant possesses material "that was produced using materials that have been mailed, or shipped or transported in or affecting interstate or foreign commerce by any means, including by computer."

Courts have repeatedly held that "the Commerce Clause authorizes Congress to prohibit local, intrastate production of child pornography where the materials used in the production were moved in interstate commerce." *United States v. Bailey*, 924 F.3d 1289, 1290 (5th Cir. 2019) (per curiam). *See, e.g., United States v. Wehrle*, 985 F.3d 549, 557 (7th Cir. 2021) (use of device "mailed, shipped, or transported" sufficient to exercise Commerce Clause power); *United States v. Fortier*, 956 F.3d 563, 570 (8th Cir. 2020) (sufficient that phone was "mailed, shipped, or transported" in "interstate or foreign commerce" before purchase); *United States v. Humphrey*, 845 F.3d 1320, 1323 (10th Cir. 2017) (rejecting challenge based on NFIB); *United States v. Lively*, 852 F.3d 549 (6th Cir. 2017) (memory card made in China); *United States*

v. Burdulis, 753 F.3d 255, 263 (1st Cir. 2014) (thumb drive made in China sufficient); *United States v. Randolph*, 364 F.3d 118, 121 (3d Cir. 2004) (section 2251(a) a constitutional exercise of commerce authority); *United States v. Holston*, 343 F.3d 83, 88 (2d Cir. 2003) (same).

The reasoning in these cases derive from this Court's jurisprudence in *Scarborough v. United States*, 431 U.S. 563, 577 (1963), finding federal commerce authority over items that at any point moved across state lines, and *Gonzales v. Raich*, 545 U.S. 1, 17 (2005), finding the same for purely intrastate activity part of a class of activity that has substantial effect on interstate commerce. *See United States v. Smith*, 545 U.S. 1125 (2006) (vacating and remanding for reconsideration in light of *Raich*, the Eleventh Circuit's decision that 18 U.S.C. 2251(a) did not survive Commerce Clause scrutiny).

These cases stand in tension with more recent precedents on the scope of Commerce Clause authority, that is *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012) ("*NFIB*") and *Bond v. United States*, 572 U.S. 844 (2014).

A. Powers of the federal government.

"In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder." *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 533. Powers outside those explicitly enumerated by the Constitution are denied to the National Government. *See id.* at 534 ("The Constitution's express conferral of some powers makes clear that it does not grant others.") There is no general federal police power. *See United States v. Morrison*, 529 U.S. 598, 618-619 (2000). Every exercise of Congressional power must be justified by reference to a

particular grant of authority. *See Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 535 ("The Federal Government has expanded dramatically over the past two centuries, but it still must show that a constitutional grant of power authorizes each of its actions."). A limited central government promotes accountability and "protects the liberty of the individual from arbitrary power." *Bond*, 572 U.S. at 863.

The Constitution grants Congress a power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art. I, § 8, cl. 3. But this power "must be read carefully to avoid creating a general federal authority akin to the police power." *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 536.

B. The authority to regulate commerce

Despite these limitations, and the text of Article I, Section 8, this Court has held that "[t]he power of Congress over interstate commerce is not confined to the regulation of commerce among the states," and includes a power to regulate activities that "have a substantial effect on interstate commerce." *United States v. Darby*, 312 U.S. 100, 118-119 (1941). Relying on this expansive vision of Congressional power, this Court held in *Scarborough* that a predecessor statute to 18 U.S.C. §922(g) reached every case in which a felon possessed firearms that had once moved in interstate commerce. 431 U.S. at 577. It turned away concerns of lenity and federalism, finding that Congress had intended the interstate nexus requirement only to insure the constitutionality of the statute. *See id*. Later, in *Raich*, the Court held that provisions of the Controlled Substances Act criminalizing manufacture, distribution, or possession of marijuana by intrastate growers and users of marijuana for medical purposes did not violate the Commerce Clause. 545 U.S. at 17.

C. The expansive holdings in *Scarborough* and *Raich* cannot be squared with *NFIB* and *Bond*.

It is these same expansive interpretations on which courts have upheld statutes such as those here, which similarly punish intrastate conduct involving any "materials" that have at some point crossed state lines. But more recent holdings of the Court in this area undermine *Scarborough* and *Raich*. In NFIB, five members of this Court found that the individual mandate component of the Affordable Care Act could not be justified by reference to the Commerce Clause. *See Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 557-558 (Roberts, C.J. concurring). Although this Court recognized that the failure to buy health insurance affects interstate commerce, five Justices did not think that the constitutional phrase "regulate Commerce ... among the several States," could reasonably be construed to include enactments that compelled individuals to engage in commerce. *See id.* at 550 (Roberts, C.J. concurring). Rather, they understood that phrase to presuppose an existing commercial activity to be regulated. *See id.* (Roberts, C.J. concurring).

The majority of this Court in *NFIB* thus required more than a demonstrable effect on commerce: the majority required that the challenged enactment itself *be* a regulation of commerce – that it affect the legality of preexisting commercial activity. Possession and use of a cell phone camera, or any material that travelled interstate at some point of in the past, like the refusal to buy health insurance, may conceivably "substantially affect commerce." But such use is not, without more, a commercial act.

To be sure, *NFIB* does not explicitly repudiate the "substantial effects" test. Indeed, the Chief Justice's opinion quotes *Darby*'s statement that "[t]he power of

Congress over interstate commerce is not confined to the regulation of commerce among the states..." *Nat'l Fed'n of Indep. Bus.,* 567 U.S. at 549 (Roberts, C.J. concurring); *see also id.* at 552-553 (Roberts., C.J. concurring)(distinguishing *Wickard v. Filburn*, 317 U.S. 111 (1942)). It is therefore perhaps possible to read *NFIB* narrowly: as an isolated prohibition on affirmatively compelling persons to engage in commerce. But it is hard to understand how this reading of the case would be at all consistent with *NFIB*'s textual reasoning.

This is so because the text of the Commerce Clause does not distinguish between Congress's power to affect commerce by regulating non-commercial activity (like using a camera), and its power to affect commerce by compelling people to join a commercial market (like health insurance). Rather, it simply says that Congress may "regulate ... commerce between the several states." And that phrase either is or is not limited to laws that affect the legality of commercial activity. Five justices in *NFIB* took the text of the Clause seriously and permitted Congress to enact only laws that were, themselves, regulations of commerce. *NFIB* thus allows Congress only the power "to prescribe the rule by which commerce is to be governed." *Gibbons v. Ogden*, 22 U.S. 1, 196, 9 Wheat. 1 (1824).

And indeed, much of the Chief Justice's language in *NFIB* adheres to this view. The opinion rejects the government's argument that the uninsured were "active in the market for health care" because they were "not currently engaged in any *commercial* activity involving health care..." *id.* at 556 (Roberts, C.J. concurring) (emphasis added). The Chief Justice significantly observed that "[t]he individual

mandate's regulation of the uninsured as a class is, in fact, particularly divorced from any link to existing *commercial* activity." *Id.* (Roberts, C.J. concurring)(emphasis added). He reiterated that "[i]f the individual mandate is targeted at a class, it is a class whose *commercial* inactivity rather than activity is its defining feature." *Id.* (Roberts, C.J. concurring)(emphasis added). He agreed that "Congress can anticipate the effects on commerce of an *economic* activity," but did not say that it could anticipate a *non-economic* activity. *Id.* (Roberts, C.J. concurring)(emphasis added). And he finally said that Congress could not anticipate a future activity "in order to regulate individuals not currently engaged *in commerce*." *Id.* (Roberts, C.J. concurring)(emphasis added). Accordingly, *NFIB* provides substantial support for the proposition that enactments under the Commerce Clause must regulate commercial or economic activity, not merely activity that affects commerce.

Here, the government did not need to assert that Petitioner's use or possession of the material (the cellphone camera) was an economic activity, but only that the phone was at some point manufactured in another country. Under the reasoning of *NFIB*, this should have been fatal to the conviction. As explained by *NFIB*, the Commerce Clause permits Congress to regulate only activities, *i.e.*, the active participation in a market. But 18 U.S.C. § 2251 criminalizes use of "any material," *without* reference to economic activity. Accordingly, it sweeps too broadly.

Further, conviction under the statute requires no showing that Petitioner was engaged in the relevant market at the time of the regulated conduct. The Chief Justice has noted that Congress cannot regulate a person's activity under the

Commerce Clause unless the person affected is "currently engaged" in the relevant market. 567 U.S. at 557. As an illustration, the Chief Justice provided the following example: "An individual who bought a car *two years ago* and may buy another in the future is not 'active in the car market' in any pertinent sense." *Id.* at 556 (emphasis added). As such, *NFIB* brought into serious question the long-standing notion that a firearm which has previously and remotely passed through interstate commerce should be considered to indefinitely affect commerce without "concern for when the [initial] nexus with commerce occurred." *Scarborough*, 431 U.S. at 577. So too, with an offense involving purely intrastate conduct such as in *Raich*.

These cases are similarly in direct tension with *Bond*. Bond was convicted of violating 18 U.S.C. §229, a statute that criminalized the knowing possession or use of "any chemical weapon." *Bond*, 572 U.S. at 853; 18 U.S.C. §229(a). Bond placed toxic chemicals on the doorknob of a romantic rival. *See id.* This Court reversed her conviction, holding that any construction of the statute that could reach such conduct would compromise the chief role of states and localities in the suppression of crime. *See id.* at 865-866. It instead construed the statute to reach only the kinds of weapons and conduct associated with warfare. *See id.* at 859-862.

Section 229 defined the critical term "chemical weapon" broadly as "any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. The term includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere."

18 U.S.C. §229F(8)(A). It also criminalized the use or possession of "any" such weapon, not of a named subset. 18 U.S.C. §229(a). This Court nonetheless applied a more limited construction of the statute, reasoning that statutes should not be read in a way that sweeps in purely local activity:

> The Government's reading of section 229 would "'alter sensitive federal-state relationships,'" convert an astonishing amount of "traditionally local criminal conduct" into "a matter for federal enforcement," and "involve a substantial extension of federal police resources." [*United States v.*]*Bass*, 404 U.S. [336] 349-350, 92 S. Ct. 515, 30 L. Ed. 2d 488 [(1971)]. It would transform the statute from one whose core concerns are acts of war, assassination, and terrorism into a massive federal anti-poisoning regime that reaches the simplest of assaults. As the Government reads section 229, "hardly" a poisoning "in the land would fall outside the federal statute's domain." *Jones* [*v. United States*], 529 U.S. [848,] 857, 120 S. Ct. 1904, 146 L. Ed. 2d 902 [(2000)]. Of course Bond's conduct is serious and unacceptable—and against the laws of Pennsylvania. But the background principle that Congress does not normally intrude upon the police power of the States is critically important. In light of that principle, we are reluctant to conclude that Congress meant to punish Bond's crime with a federal prosecution for a chemical weapons attack.

Bond, 572 U.S. at 863

As in *Bond*, it is possible to read § 2251 to reach the conduct admitted here: intrastate use of an object that once moved across state lines, without proof that the defendant's conduct caused the object to move across state lines, nor even proof that it moved across state lines in the recent past. But to do so would intrude deeply on the traditional state responsibility for crime control. Such a reading would assert the federal government's power to criminalize virtually any conduct anywhere in the country, with little or no relationship to commerce, nor to the interstate movement of commodities.

This Court should grant certiorari to make clear that Congress exceeds its authority under the Commerce Clause in authorizing a federal prosecution of intrastate conduct based only upon proof that materials – such as a cell phone camera – used in the offense once crossed state lines on an unspecified prior occasion.

II. *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), should be overruled, or alternatively, this Court grant certiorari, vacate the judgment below, and remand in light of *Erlinger v. United States*, __U.S.__, 144 S. Ct. 1840 (2024).

The recent decision in *Erlinger v. United States* shows that *Almendarez-Torres* can no longer be reconciled with *Apprendi v. New Jersey*, 530 U.S. 466 (2000). 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*, 530 U.S. at 490. 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), permitting 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 § 2252A and § 2251.

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). The statutes at issue here require a similar inquiry. If the Sixth Amendment requires a

jury to resolve the sequencing issue in the ACCA context, it likely must do so in these contexts as well.

As in *Erlinger*, the court here was required to exceed 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 offense does not merely ask whether the defendant has a conviction, nor what its elements are.

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. *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).

Erlinger makes it all but impossible to imagine that *Apprendi* and *Almendarez-Torres* may be reconciled by narrowing the holding 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).

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*. 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 *Erlinger* 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

For the above-stated reasons, Petitioner asks this Court to grant certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 10th day of October, 2024.

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