No. _____

In the Supreme Court of the United States

_____

OSCAR OLALDE-GARCIA,
Petitioner,

v.

United States of America,
Respondent

_____

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

_____

PETITION FOR A WRIT OF CERTIORARI

_____

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QUESTION PRESENTED

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

LIST OF PARTIES

Oscar Olalde-Garcia, 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. Olalde-Garcia*, No. 4:24-CR-42, U.S. District Court for the Northern District of Texas. Judgment entered on June 28, 2024.

- *United States v. Olalde-Garcia*, No. 24-10397, U.S. Court of Appeals for the Fifth Circuit. Judgment entered on February 20, 2025.

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PETITION FOR A WRIT OF CERTIORARI

Oscar Olalde-Garcia 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 2025 WL 560225 and reprinted as Appendix A.

JURISDICTION

The Court of Appeals issued its panel opinion on February 20, 2025. 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 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;

8 U.S.C. § 1326(b)(1). This petition also involves the Fifth and Sixth Amendments to the United States Constitution:

> 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.

U.S. CONST. amend. V.

> 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.

U.S. CONST., amend. VI.

STATEMENT OF THE CASE

A. Facts and District Court Proceedings

Petitioner Oscar Olalde-Garcia is a citizen of Mexico. He was most recently deported from the United States in 2021. On February 5, 2024, Mr. Olalde-Garcia was found in the United States. Prior to his reentry, he had not obtained the permission of the Attorney General or the Secretary of the Department of Homeland Security to reapply for admission. Consequently, the government charged him for illegally reentering the United States after having been removed, in violation of 8 U.S.C. § 1326. The Information – Mr. Olalde-Garcia waived indictment -- references 8 U.S.C. § 1326(b)(1) but does not allege that Mr. Olalde-Garcia had a prior conviction for a felony. Mr. Olalde-Garcia pled guilty as charged.

Although a prior conviction was not alleged in the Information, the presentence report stated that the statutory maximum was ten years of imprisonment and three years of supervised release, citing § 1326(b)(1).

The district court sentenced Mr. Olalde-Garcia to 46 months imprisonment and three-years supervised release.

B. Proceedings on Appeal

Mr. Olalde-Garcia argued on appeal that the district court had erred in treating the maximum sentence as ten years imprisonment and three years supervision. He noted that although that enhanced maximum term of supervised release depended on a prior conviction, the indictment had not included it, he had not admitted it, and no jury had ever found it beyond a reasonable doubt. The government moved for summary affirmance, and a three-judge panel granted that request on February 20, 2025.

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 decision in *Erlinger v. United States*, 602 U.S. 821 (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*.

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*, 602 U.S. at 834-835. 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*, 602 U.S. at 839 (quoting *Descamps v. United States*, 570 U.S. 254, 260 (2013)); *id*. at 838 (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 allowed." *Id*. at 839 (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 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*, 602 U.S. at 832 (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*, 602 U.S. at 844. 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 846.

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*, 602 U.S. at 838, 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*, 602 U.S. at 855 (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 that provision'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 in an appropriate case, which only this Court may fully do. *See Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989).

II. This Court should grant certiorari to decide the precedential status of *Almendarez-Torres* in an appropriate case and hold the instant Petition pending the result.

Petitioner did not object in district court to the sentence on the constitutional grounds discussed herein. This probably represents an insurmountable obstacle to a plenary grant of certiorari. *See* Sup. Ct. R. 10. The issue is nonetheless worthy of certiorari, for the reasons discussed above, and it is frequently presented to this Court. This Court should grant certiorari in a case presenting the issue and hold the instant Petition until its resolution. *See Lawrence on behalf of Lawrence v. Chater*, 516 U.S. 163 (1998).

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 May 19th, 2025.

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