No. _____

In the

Supreme Court of the United States

_____

Apolonio Hernandez Ruiz,

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

_____

Loui Itoh
Assistant Federal Public Defender
Northern District of Texas
PO Box 17743
819 Taylor Street Room 9A10
Fort Worth, Texas 76102
(817) 978-2753
Loui_Itoh@fd.org

Attorney for Petitioner

QUESTIONS PRESENTED

This petition presents two questions.

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

Second, whether this Court should grant certiorari, vacate the judgment below, and remand in light of *Erlinger v. United States*, 602 U.S. 821 (2024), if it does not elect a plenary grant of certiorari?

PARTIES TO THE PROCEEDING

Petitioner is Apolonio Hernandez Ruiz, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

RELATED PROCEEDINGS

- *United States v. Apolonio Hernandez Ruiz*, No. 3:23-CR-000125-M, U.S. District Court for the Northern District of Texas. Judgment entered on September 12, 2024.

- *United States v. Apolonio Hernandez Ruiz*, No. 24-10865, U.S. Court of Appeals for the Fifth Circuit. Judgment entered on March 13, 2025.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Apolonio Hernandez Ruiz seeks 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 at *Apolonio Hernandez Ruiz*, No. 24-10865, 2025 WL 801357 (5th Cir. Mar. 13, 2025). 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 March 13, 2025. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

This Petition involves 8 U.S.C. § 1326, which states:

> **(a) In general.**
>
> Subject to subsection (b), any alien who—
>
> (1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter
>
> (2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this or any prior Act, shall be fined under title 18, United States Code, or imprisoned not more than 2 years or both.

(b) Criminal penalties for reentry of certain removed aliens.

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, United States Code, 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;

(3) who has been excluded from the United States pursuant to section 235(c) [8 U.S.C. § 1225(c)] because the alien was excludable under section 212(a)(3)(B) [8 U.S.C. § 1182(a)(3)(B)] or who has been removed from the United States pursuant to the provisions of title V [8 U.S.C. § 1531 et seq.], and who thereafter, without the permission of the Attorney General, enters the United States, or attempts to do so, shall be fined under title 18, United States Code, and imprisoned for a period of 10 years, which sentence shall not run concurrently with any other sentence.[] or

(4) who was removed from the United States pursuant to section 241(a)(4)(B) [8 U.S.C. § 1231(a)(4)(B)] who thereafter, without the permission of the Attorney General, enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be fined under title 18, United States Code, imprisoned for not more than 10 years, or both.

For the purposes of this subsection, the term "removal" includes any agreement in which an alien stipulates to removal during (or not during) a criminal trial under either Federal or State law.

8 U.S.C. § 1326(a)–(b).

STATEMENT OF THE CASE

Petitioner Apolonio Hernandez Ruiz pleaded guilty to one count of illegally re-entering the country, violating 8 U.S.C. § 1326. A Presentence Investigation Report ("PSR") found that his prior felony conviction elevated his statutory maximum from the default two years' imprisonment and one year of supervised release. The district court imposed a sentence of 21 months' imprisonment and two years of supervised release.

On appeal, Petitioner contended that at most, he could only have been sentenced to a one-year term of supervised release because the indictment did not allege, and he did not admit, that he had been convicted of a felony or aggravated felony prior to his removal. The Fifth Circuit rejected this claim. *See* Appendix A.

REASONS FOR GRANTING THIS PETITION

I. The decision in *Erlinger v. United States* shows that *Almendarez-Torres v. United States* can no longer be reconciled with *Apprendi v. New Jersey*. Only this Court can 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 489-90 ("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*, 602 U.S. 821 (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*, 602 U.S. 834-35. 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 one another." 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 qualifying 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.

Certainly ACCA presents the factfinder with a more complicated sequencing question than does § 1326(b)(1) or (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*, 602 U.S. at 839 (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 allowed." *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 her 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*, 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)). "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*, 602 U.S. at 844 (footnote omit-

ted). 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 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*, 602 U.S. at 852, 866 (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. 13, 26 (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 fact-finding 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. 575, 601 (1990) ("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: (1) of ACCA, *see Johnson v. United States*, 576 U.S. 591

(2015); (2) of 18 U.S.C. § 16 (in the context of immigration law), *see Sessions v. Dimaya*, 584 U.S. 148 (2018); (3) and of 18 U.S.C. § 924(c), *see United States v. Davis*, 588 U.S. 445 (2019), all to be declared unconstitutionally vague.

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. 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. The 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, it should 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 create a reasonable probability of a different result on remand. In such a circumstance, this Court will appropriately use the GVR mechanism. *Id*.

CONCLUSION

Apolonio Hernandez Ruiz respectfully asks this Court to grant certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 11th day of June, 2025.

JASON D. HAWKINS
Federal Public Defender
Northern District of Texas

/s/ Loui Itoh
Loui Itoh
Assistant Federal Public Defender
Northern District of Texas
PO Box 17743
819 Taylor Street Room 9A10
Fort Worth, Texas 76102
(817) 978-2753
Loui_Itoh@fd.org

Attorney for Petitioner