No. _____

In the Supreme Court of the United States

_____

Ignacio Leyva-Frayre,
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*, 602 U.S. 821 (2024), if it does not elect a plenary grant of certiorari?

LIST OF PARTIES

Ingacio Leyva-Frayre, 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. Leyva-Frayre*, No. 3:22-cr-00338-K-1, U.S. District Court for the Northern District of Texas. Judgment entered on February 28, 2024.

- *United States v. Leyva-Frayre*, No. 24-10220, U.S. Court of Appeals for the Fifth Circuit. Judgment entered on November 13, 2024.

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PETITION FOR A WRIT OF CERTIORARI

Ingacio Leyva-Frayre 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 4764269 and reprinted at Pet.App.A.

JURISDICTION

The Court of Appeals issued its panel opinion on November 13, 2024. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT 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,
>
> ***
>
> 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[.]

8 U.S.C. § 1326(a)-(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 Ingacio Leyva-Frayre 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. *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 a defendant "whose removal was subsequent to a conviction for commission of . . . a felony." 8 U.S.C. § 1326(b)(1). Mr. Leyva-Frayre's indictment did not allege the prior commission of a 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 a 37-month term of imprisonment and a one-year term of supervised release. Pet.App.B.

B. Proceedings on Appeal

Mr. Leyva-Frayre argued on appeal that the district court had erred in imposing a sentence in excess of two years. He noted that although the enhanced sentence 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 November 13, 2024. *See* Pet.App.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 489-490 ("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, 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 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 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 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), 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*, 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 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. 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.

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 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 February 11, 2025.

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