

No. _____

In the Supreme Court of the United States

JOSE FERNANDO OCHOA-FABIAN, *PETITIONER*,

v.

UNITED STATES OF AMERICA, *RESPONDENT*

**PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

MAUREEN SCOTT FRANCO
Federal Public Defender

KRISTIN L. DAVIDSON
Assistant Federal Public Defender
Western District of Texas
727 E. César E. Chávez Blvd., B-207
San Antonio, Texas 78206-1205
(210) 472-6700
(210) 472-4454 (Fax)

Counsel of Record for Petitioner

QUESTION PRESENTED FOR REVIEW

Should the Court overrule *Almendarez-Torres v. United States*,
523 U.S. 244 (1998)?

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Petitioner Jose Fernando Ochoa-Fabian asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on April 8, 2022.

PARTIES TO THE PROCEEDING

The caption of this case names all parties to the proceeding in the court whose judgment is sought to be reviewed.

RELATED PROCEEDINGS

All proceedings directly related to the case are as follows:

- *United States v. Ochoa-Fabian*, Nos. 21-51100 and 21-51121 (5th Cir. April 8, 2022) (granting motion for summary affirmation of conviction)
- *United States v. Ochoa-Fabian*, No. 4:21-cr-00502-DC-1 (W.D. Tex. Nov. 9, 2021) (judgment of conviction)
- *United States v. Ochoa-Fabian*, 4:21-cr-00638-DC-1 (W.D. Tex. Nov. 3, 2021) (order revoking supervised release and re-sentencing defendant)

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW.....	i
PARTIES TO THE PROCEEDING	ii
RELATED PROCEEDINGS.....	iii
TABLE OF AUTHORITIES	v
OPINION BELOW.....	1
JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.....	1
CONSTITUTIONAL PROVISIONS INVOLVED	1
FEDERAL STATUTE INVOLVED.....	1
STATEMENT.....	2
REASONS FOR GRANTING THE WRIT	4
The Court Should Grant Certiorari to Consider Whether to Overrule <i>Almendarez-Torres v. United States</i> , 523 U.S. 224 (1998).....	4
CONCLUSION.....	11
APPENDIX	

TABLE OF AUTHORITIES

Cases

<i>Agostini v. Felton</i> , 521 U.S. 203 (1997)	10
<i>Alleyne v. United States</i> , 570 U.S. 99 (2013)	<i>passim</i>
<i>Almendarez-Torres v. United States</i> , 523 U.S. 224 (1998)	<i>passim</i>
<i>Apprendi v. New Jersey</i> , 530 U.S. 466 (2000)	<i>passim</i>
<i>Cunningham v. California</i> , 549 U.S. 270 (2007)	8
<i>Descamps v. United States</i> , 570 U.S. 254 (2013)	6
<i>Marbury v. Madison</i> , 5 U.S. (1 Cranch) 137 (1803)	11
<i>Mathis v. United States</i> , 136 S. Ct. 2243 (2016)	6, 9
<i>Rangel-Reyes v. United States</i> , 547 U.S. 1200 (2006)	10
<i>Seminole Tribe v. Florida</i> , 517 U.S. 44 (1996)	10
<i>Sessions v. Dimaya</i> , 138 S. Ct. 1204 (2018)	6, 9
<i>Shepard v. United States</i> , 544 U.S. 13 (2005)	8
<i>State Oil Co. v. Khan</i> , 522 U.S. 3 (1997)	10

<i>United States v. Contreras-Rojas</i> , 16 F.4th 479 (5th Cir. 2021)	6
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<i>United States v. Garza-De La Cruz</i> , 16 F.4th 1213 (5th Cir. 2021)	6
---	---

<i>United States v. Pineda-Arrellano</i> , 492 F.3d 624 (5th Cir. 2007)	5, 6
--	------

Constitutional Provisions

U.S. Const. amend. V	1
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U.S. Const. amend. VI	1, 7, 9
-----------------------------	---------

Statutes

8 U.S.C. § 1326	1, 2
-----------------------	------

8 U.S.C. § 1326(a)	2, 4
--------------------------	------

8 U.S.C. § 1326(b)	2, 3, 4, 5
--------------------------	------------

8 U.S.C. § 1326(b)(1)	2
-----------------------------	---

28 U.S.C. § 1254(1)	1
---------------------------	---

Rules

Sup. Ct. R. 13.1	1
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OPINION BELOW

A copy of the unpublished opinion of the court of appeals, *United States v. Ochoa-Fabian*, Nos. 21-51100 and 21-51121 (5th Cir. April 8, 2022) (per curiam), is reproduced at Pet. App. 1a–2a.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit were entered on April 8, 2022. This petition is filed within 90 days after entry of judgment. *See* Sup. Ct. R. 13.1. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides, in pertinent part: “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, ... nor be deprived of life, liberty, or property, without due process of law”

The Sixth Amendment to the U.S. Constitution provides, in pertinent part: “In all criminal prosecutions, the accused shall enjoy the right to ... trial, by an impartial jury”

FEDERAL STATUTE INVOLVED

The text of 8 U.S.C. § 1326 is reproduced at Pet. App. 3a–5a.

STATEMENT

Jose Fernando Ochoa-Fabian was charged with illegally reentering the country after having been removed, in violation of 8 U.S.C. § 1326. Under § 1326(a), the maximum penalty for illegal reentry is two years' imprisonment. Under § 1326(b), the maximum increases to 10 years if the defendant was removed from the United States after having been convicted of a felony, and to 20 years if he was removed after having been convicted of an aggravated felony. Also, the maximum supervised release term increases from one year to three years. In *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), this Court held that the enhancement-qualifying conviction under § 1326(b) is a sentencing factor, not an element of a separate offense.

Ochoa pleaded guilty to the indictment. A probation officer prepared a presentence report. The report stated that the statutory maximum penalty was 10 years' imprisonment and three years' supervised release, under 8 U.S.C. § 1326(b)(1). Ochoa did not object to the report.

The district court adopted the presentence report without change and sentenced Ochoa to 16 months' imprisonment, to be followed by three years' supervised release.¹

Ochoa appealed. He argued that, under the reasoning of this Court's decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Alleyne v. United States*, 570 U.S. 99 (2013), 8 U.S.C. § 1326(b) is unconstitutional, insofar as it permits a sentence above the otherwise-applicable statutory maximum based on facts that are neither alleged in the indictment nor found by a jury beyond a reasonable doubt. He acknowledged that the argument was foreclosed by *Almendarez-Torres*, but noted that recent decisions from this Court suggested that *Almendarez-Torres* may be reconsidered. Because the argument was foreclosed, Ochoa moved for summary affirmance. The court of appeals, finding itself bound by *Almendarez-Torres*, affirmed Ochoa's sentence. Pet. App. 2a.

¹ On the same day as the sentencing hearing for the illegal reentry offense, the district court also revoked the supervised release that Ochoa was serving for illegal reentry. The court imposed a within-Guidelines sentence of 14 months to run consecutive to the 16-month sentence in the new illegal reentry case. Ochoa separately appealed from the revocation, and the cases were consolidated. He did not challenge any aspect of the revocation in the court below, nor does he do so here.

REASONS FOR GRANTING THE WRIT

The Court Should Grant Certiorari to Consider Whether to Overrule *Almendarez-Torres v. United States*, 523 U.S. 224 (1998).

Title 8 U.S.C. § 1326(a) punishes illegal reentry after removal with a maximum term of two years' imprisonment and one year's supervised release. The district court determined, however, that Ochoa was subject to an enhanced sentence under § 1326(b), which increases the maximum penalty if the removal occurred after a conviction for a felony or an aggravated felony. The court's decision accorded with this Court's decision in *Almendarez-Torres v. United States*, which held that § 1326(b)'s enhanced penalty is a sentencing factor, not a separate, aggravated offense. 523 U.S. 224, 235 (1998). The Court further ruled that this construction of § 1326(b) does not violate due process; a prior conviction need not be treated as an element of the offense, even if it increases the statutory maximum penalty. *Id.* at 239–47.

However, the continued validity of *Almendarez-Torres* is questionable. Just two years after it was decided, the Court appeared to cast doubt on it. *See Apprendi v. New Jersey*, 530 U.S. 466 (2000). In *Apprendi*, the Court announced that facts that increase the maximum sentence must be proved to the jury beyond a rea-

sonable doubt. *Id.* at 490. The Court acknowledged that this general principle conflicted with the specific holding in *Almendarez-Torres* that a prior conviction need not be treated as an element under § 1326(b). The Court found it “arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply” to prior convictions as well. *Id.* at 489. But because *Apprendi* did not involve a prior conviction, the Court considered it unnecessary to revisit *Almendarez-Torres*. *Id.* at 490. Instead, the Court framed its holding to avoid expressly overruling the earlier case. *Id.* at 489.

Relying on *Apprendi*, and later indications from the Court and individual justices that *Almendarez-Torres* should be reversed, defendants preserved for possible review the contention that their reentry sentences exceeded the punishment permitted by statute and should be reversed. The Court did not grant certiorari on this issue and, in 2007, a panel of the Fifth Circuit opined, in dictum, that a challenge to *Almendarez-Torres* is “foreclosed from further debate.” *United States v. Pineda-Arrellano*, 492 F.3d 624, 625 (5th Cir. 2007). Recently, a panel of the Fifth Circuit reiterated that “arguments seeking reconsideration of *Almendarez-Torres* will be viewed with skepticism,” and cautioned that “appellants and their

counsel [should] not damage their credibility with this court by asserting non-debatable arguments.” *United States v. Contreras-Rojas*, 16 F.4th 479, 480 (5th Cir. 2021) (quoting *Pineda-Arrellano*, 492 F.3d at 626).

But this Court has continued to question *Almendarez-Torres*’s reasoning and suggest that the Court would be willing to revisit the decision. *See Alleyne v. United States*, 570 U.S. 99, 111 n.1 (2013); *see also Sessions v. Dimaya*, 138 S. Ct. 1204, 1253 (2018) (Thomas, J., dissenting) (opining that *Almendarez-Torres* should be reconsidered); *Mathis v. United States*, 136 S. Ct. 2243, 2258–59 (2016) (Thomas, J., concurring) (same; *Descamps v. United States*, 570 U.S. 254, 280–81 (2013) (Thomas, J., concurring) (same). These opinions reveal concern that the opinion is constitutionally flawed. *See United States v. Garza-De La Cruz*, 16 F.4th 1213, 1215 (5th Cir. 2021) (Costa & Ho, JJ., joined by King, J., concurring) (noting that members of the Supreme Court have criticized *Almendarez-Torres* as wrongly decided and that “it is well within reason for litigants to ask whether the Supreme Court would reconsider *Almendarez-Torres* today.”)

In *Alleyne*, the Court applied *Apprendi*’s rule to mandatory minimum sentences, holding that any fact that produces a higher

sentencing range—not just a sentence above the statutory maximum—must be pleaded in the indictment and either admitted by the defendant or proved to a jury beyond a reasonable doubt. *Alleyne*, 570 U.S. at 115–16. In the opinion, the Court apparently recognized that *Almendarez-Torres* remains subject to Sixth Amendment attack. The Court characterized that decision as a “narrow exception to the general rule” that all facts that increase punishment must be alleged and proved beyond a reasonable doubt. *Id.* at 111 n.1. But because the parties in that case did not challenge *Almendarez-Torres*, the Court said it would “not revisit it for purposes of our decision today.” *Id.*

Nonetheless, the Court’s reasoning in *Alleyne* strengthens the challenge to *Almendarez-Torres*’s recognition of a recidivism exception. *Alleyne* traced the treatment of the relationship between crime and punishment, beginning in the eighteenth century, repeatedly noting how “[the] linkage of facts with particular sentence ranges ... reflects the intimate connection between crime and punishment.” *Id.* at 109 (“[i]f a fact was by law essential to the penalty, it was an element of the offense”); *see id.* (historically, crimes were defined as “the whole of the wrong to which the law affixes punishment ... including any fact that annexes a higher degree of punishment”); *id.* at 111 (“the indictment must contain an allegation of

every fact which is legally essential to the punishment to be inflicted”). *Alleyne* concluded that, because “the whole of the” crime and its punishment cannot be separated, the elements of a crime must include any facts that increase the penalty. The Court recognized no limitations or exceptions to this principle.

Alleyne’s emphasis that the elements of a crime include the “whole” of the facts for which a defendant is punished seriously undercuts the view, expressed in *Almendarez-Torres*, that recidivism is different from other sentencing facts. *See Almendarez-Torres*, 523 U.S. at 243–44; *see also Apprendi*, 530 U.S. at 490 (“Other 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.”) The *Apprendi* Court later tried to explain this difference by pointing out that, unlike other facts, recidivism “does not relate to the commission of the offense itself.” *Apprendi*, 530 U.S. at 496. But the Court has since acknowledged that *Almendarez-Torres* might have been “incorrectly decided.” *Id.* at 489; *see also Shepard v. United States*, 544 U.S. 13, 26 n.5 (2005) (acknowledging that Court’s holding in that case undermined *Almendarez-Torres*); *Cunningham v. California*, 549 U.S. 270, 291 n.14 (2007) (rejecting invitation to distinguish between “facts concerning the offense,

where *Apprendi* would apply, and facts [like recidivism] concerning the offender, where it would not,” because “*Apprendi* itself ... leaves no room for the bifurcated approach”).

Three concurring justices in *Alleyne* provide additional reasons for revisiting *Almendarez-Torres*. See *Alleyne*, 570 U.S. at 118 (Sotomayor, Ginsburg, Kagan, J.J., concurring). Those justices noted that the viability of the Sixth Amendment principle set forth in *Apprendi* was initially subject to some doubt, and some justices believed the Court “might retreat” from it. *Id.* at 120. Instead, *Apprendi*’s rule “has become even more firmly rooted in the Court’s Sixth Amendment jurisprudence.” *Id.* Reversal of even recent precedent is warranted when “the reasoning of [that precedent] has been thoroughly undermined by intervening decisions.” *Id.* at 121; see also *Dimaya*, 138 S. Ct. at 1253 (“The exception recognized in *Almendarez-Torres* for prior convictions is an aberration, has been seriously undermined by subsequent precedents, and should be reconsidered.”) (Thomas, J., dissenting); *Mathis*, 136 S. Ct. at 2259 (“I continue to believe that the exception in *Apprendi* was wrong, and I have urged that *Almendarez-Torres* be reconsidered.”) (Thomas, J., concurring).

The growing view among members of this Court that *Almendarez-Torres* was wrongly decided is good reason to clarify

whether *Almendarez-Torres* is still the law. Stare decisis “is at its weakest” when the Court interprets the Constitution. *Agostini v. Felton*, 521 U.S. 203, 235 (1997); *see also Seminole Tribe v. Florida*, 517 U.S. 44, 63 (1996). When “there has been a significant change in, or subsequent development of, our constitutional law,” stare decisis “does not prevent ...overruling a previous decision.” *Agostini*, 521 U.S. at 236. Even if the Court were ultimately to reaffirm *Almendarez-Torres*, review is warranted. While lower court judges—as well as prosecutors, defense counsel, and criminal defendants—are forced to rely on the decision, they must speculate as to the ultimate validity of the Court’s holding. “There is no good reason to allow such a state of affairs to persist.” *Rangel-Reyes v. United States*, 547 U.S. 1200, 1201 (2006) (Thomas, J., dissenting from denial of certiorari).

The question of *Almendarez-Torres*’s validity can be resolved only in this forum. *Rangel-Reyes*, 547 U.S. at 1201 (citing *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997)). *Almendarez-Torres* is a decision of this country’s highest court on a question of constitutional dimension; no other court, and no other branch of government, can decide if it is wrong. Regarding the Constitution, it is ultimately this Court’s responsibility “to say what the law is.” *Marbury v.*

Madison, 5 U.S. (1 Cranch) 137, 177 (1803). The Court should grant certiorari to say whether *Almendarez-Torres* is still the law.

CONCLUSION

FOR THESE REASONS, Ochoa asks this Honorable Court to grant a writ of certiorari.

Respectfully submitted.

MAUREEN SCOTT FRANCO
Federal Public Defender
Western District of Texas
727 E. César E. Chávez Blvd., B-207
San Antonio, Texas 78206
Tel.: (210) 472-6700
Fax: (210) 472-4454

s/ Kristin L. Davidson
KRISTIN L. DAVIDSON
Assistant Federal Public Defender

Counsel of Record for Petitioner

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