

IN THE SUPREME COURT OF THE UNITED STATES

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JOSE MANUEL SALAZAR-HERNANDEZ, PETITIONER

v.

UNITED STATES OF AMERICA

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

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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ELIZABETH B. PRELOGAR  
Solicitor General  
Counsel of Record  
Department of Justice  
Washington, D.C. 20530-0001  
SupremeCtBriefs@usdoj.gov  
(202) 514-2217

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No. 22-7319

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Petitioner contends (Pet. 4-10) that this Court should overrule Almendarez-Torres v. United States, 523 U.S. 224 (1998). In Almendarez-Torres, this Court held, in the context of a constitutional claim arising from a prosecution under 8 U.S.C. 1326, that a defendant's prior conviction may be found by the sentencing court, rather than charged in the indictment and found by the jury as an element of the offense. 523 U.S. at 239-247. The Court has repeatedly and recently denied numerous petitions

for writs of certiorari asking this Court to revisit Almendarez-Torres, including this Term.<sup>1</sup> The same result is warranted here.<sup>2</sup>

For the reasons set forth more fully in the government's brief in opposition in Dominguez-Morales v. United States (No. 22-6475) (cert. denied June 12, 2023), petitioner's contention (Pet. 4-9)

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States, 143 S. Ct. 336 (2022) (No. 22-5511); Gonzalez-Ruiz v. United States, 143 S. Ct. 332 (2022) (No. 22-5459); Lujan-Madrid v. United States, 143 S. Ct. 328 (2022) (No. 22-5445); Molina-Rodriguez v. United States, 143 S. Ct. 324 (2022) (No. 22-5389); Islas-Macias v. United States, 143 S. Ct. 324 (2022) (No. 22-5387); Salazar-Munoz v. United States, 143 S. Ct. 321 (2022) (No. 22-5353); Pacheco-Apodaca v. United States, 143 S. Ct. 319 (2022) (No. 22-5349).

<sup>2</sup> Several other pending petitions for writs of certiorari raise the same question. See Conde-Herrera v. United States, No. 22-6823 (filed Feb. 16, 2023); Martin-Andres v. United States, No. 22-6826 (filed Feb. 16, 2023); Dominguez v. United States, No. 22-6873 (filed Feb. 23, 2023); Hernandez-Correa v. United States, No. 22-6897 (filed Feb. 27, 2023); Ortiz-Castillo v. United States, No. 22-7114 (filed Mar. 23, 2023); Ordonez-Mendoza v. United States, No. 22-7183 (filed Mar. 29, 2023); Ajualiip-Pablo v. United States, No. 22-7179 (filed Mar. 29, 2023); Valdivia-Gonzalez v. United States, No. 22-7205 (filed Mar. 31, 2023); Martinez-Saucedo v. United States, No. 22-7207 (filed Mar. 31, 2023); Macias-Torres v. United States, No. 22-7209 (filed Mar. 31, 2023); Tomas-Antonio v. United States, No. 22-7218 (filed Apr. 3, 2023); Juarez-Medellin v. United States, No. 22-7220 (filed Apr. 3, 2023); Encarnacion-Pascual v. United States, No. 22-7224 (filed Apr. 3, 2023); Cejudo-Mancinas v. United States, No. 22-7259 (filed Apr. 10, 2023); Escobedo-Duenas v. United States, No. 22-7260 (filed Apr. 10, 2023); Tovar-Zamarripa v. United States, No. 22-7287 (filed Apr. 12, 2023); Perez-Mendoza v. United States, No. 22-7316 (filed Apr. 17, 2023); Mora-Rodriguez v. United States, No. 22-7377 (filed Apr. 24, 2023); Morquecho-Sanchez v. United States, No. 22-7420 (filed Apr. 27, 2023); Marquez-Calzadilla v. United States, No. 22-7423 (filed Apr. 27, 2023); Chairez-Avila v. United States, No. 22-7479 (filed May 4, 2023); Manriquez-Gutierrez v. United States, No. 22-7636 (filed May 23, 2023); Nevarez-Zamudio v. United States, No. 22-7647 (filed May 24, 2023); Gallegos-Hernandez v. United States, No. 22-7653 (filed May 24, 2023); Romero Torres v. United States, No. 22-7689 (filed May 30, 2023).

that Almendarez-Torres was wrongly decided is incorrect.<sup>3</sup> In addition, as Justice Stevens recognized, "there is no special justification for overruling" that decision. Rangel-Reyes v. United States, 547 U.S. 1200, 1201 (2006) (Stevens, J., respecting the denial of the petitions for writs of certiorari).

Finally, this case would be a poor vehicle for reconsidering Almendarez-Torres even if the Court were inclined to do so. Petitioner has acknowledged that he did not raise his constitutional objection to his recidivist enhancement in the district court. Pet. C.A. Ltr. Br. 3; see C.A. ROA 128-129, 133, 147. Accordingly, his claim would be reviewed only for plain error. See Fed. R. Crim. P. 52(b). And petitioner, who does not dispute that he has a prior qualifying conviction under Section 1326(b) (2), cannot demonstrate that the courts below plainly erred in adhering to this Court's precedent or that any error affected his substantial rights.<sup>4</sup>

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<sup>3</sup> We have served petitioner with a copy of the government's brief in opposition in Dominguez-Morales.

<sup>4</sup> The government waives any further response to the petition for a writ of certiorari unless the Court requests otherwise.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR  
Solicitor General

JUNE 2023