No. _____

In the Supreme Court of the United States

NICASIO NEVAREZ-ZAMUDIO, *PETITIONER*,

V.

UNITED STATES OF AMERICA, *RESPONDENT*

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

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QUESTION PRESENTED FOR REVIEW

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

No. _____

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UNITED STATES OF AMERICA, *RESPONDENT*

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

Petitioner Nicasio Nevarez-Zamudio 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 February 24, 2023.

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

- *United States v. Nevarez-Zamudio*, No. 4:21-CR-1067-DC-1 (W.D. Tex.) (judgment entered Apr. 29, 2022)
- *United States v. Nevarez-Zamudio*, No. 22-50374 (5th Cir. Feb. 24, 2023) (per curiam) (unpublished)

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OPINION BELOW

A copy of the unpublished opinion of the court of appeals, *United States v. Nevarez-Zamudio*, No. 22-50374 (5th Cir. Feb. 24, 2023) (per curiam), is reproduced at Pet.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 February 24, 2023. This petition is filed within 90 days after entry of the 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

Nicasio Nevarez-Zamudio was charged in a one-count indictment with illegally reentering the United States 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. *See* 18 U.S.C. § 3559(a)(3) (offense punishable by imprisonment for at least 10 years but less than 25 years is Class C felony), § 3559(a)(5) (offense punishable by imprisonment for more than one year but less than five years is Class E felony), § 3583(b)(2) (three-year maximum supervised release term for Class C felony), § 3583(b)(3) (one-year maximum supervised release term for Class E felony). 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.

Nevarez pleaded guilty to the indictment. A probation officer prepared a presentence report. The PSR stated that the statutory maximum penalty was 20 years' imprisonment and three years'

supervised release, under 8 U.S.C. § 1326(b)(2). Nevarez did not submit any written objections to the PSR.

At sentencing, the district court adopted the PSR without change and sentenced Nevarez to 30 months' imprisonment and three years' supervised release. Nevarez objected to "a sentence of over two years as being unconstitutional for the reasons discussed in the Fifth Circuit case *Armendariz*."[1]

Nevarez appealed. He moved for summary affirmance, arguing 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. Nevarez acknowledged that the argument was foreclosed by *Almendarez-Torres*, but noted that recent decisions from this Court suggested that *Almendarez-Torres* may be reconsidered. The court of appeals, finding itself bound by *Almendarez-Torres*, granted Nevarez's motion and affirmed his sentence. Pet. App. 1a–2a.

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[1] This seems to be either a transcription error or counsel's imprecise pronunciation of *Almendarez*.

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 Nevarez 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).

Since then, this Court has again questioned *Almendarez-Torres*'s reasoning and suggested 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*, 579 U.S. 500, 521–22 (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.

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*, 579 U.S. at 522 ("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, Nevarez asks this Honorable Court to grant a writ of certiorari.

Respectfully submitted.

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