No. _____

In the

Supreme Court of the United States

_____

Julio Cesar De La Rosa-De La Cerda,

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. Whether all facts—including the fact of a prior conviction—that increase a defendant's statutory maximum must be pleaded in the indictment and either admitted by the defendant or proven to a jury beyond a reasonable doubt?

PARTIES TO THE PROCEEDING

Petitioner is Julio Cesar De La Rosa-De La Cerda, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Julio Cesar De La Rosa-De La Cerda seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals was not published but is available at *United States v. Julio Cesar De La Rosa-De La Cerda*, No. 22-10952, 2023 WL 3179217 (5th Cir. May 1, 2023). It is reprinted in Appendix A to this Petition. The district court's judgment and sentence is attached as Appendix B.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on May 1, 2023.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND RULES 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 USCS § 1225(c)] because the alien was excludable under section 212(a)(3)(B) [8 USCS § 1182(a)(3)(B)] or who has been removed from the United States pursuant to the provisions of title V [8 USCS §§ 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 USCS § 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.

8 U.S.C. § 1326.

LIST OF PROCEEDINGS BELOW

1. *United States v. Julio Cesar De La Rosa-De La Cerda*, 4:22-CR-133-P, United States District Court for the Northern District of Texas. Judgment and sentence entered on September 29, 2022. (Appendix B).

2. *United States v. Julio Cesar De La Rosa-De La Cerda*, No. 22-10952, 2023 WL 3179217 (5th Cir. May 1, 2023), Court of Appeals for the Fifth Circuit. Judgment affirmed on May 1, 2023. (Appendix A).

STATEMENT OF THE CASE

On December 15, 2021, Julio Cesar De La Rosa-De La Cerda was indicted on one charge of illegal re-entry after deportation, in "Violation of 8 U.S.C. § 1326(a) and (b)(1)/(2)." (ROA.15–16). The indictment alleged that on or about February 26, 2022, Mr. De La Rosa was an alien who was found in the United States of America after having been deported and removed therefrom on or about December 19, 2019, and that he had not received the express consent of the Attorney General of the United States and the Secretary of Homeland Security to reapply for admission to the United States. (ROA.15). There were no allegations of any of the enhancement provisions under the statute that would raise the statutory maximum above two years or to allow for a term of supervised release in excess of one year. *See* (ROA.15). In a factual resume, Mr. De La Rosa stipulated to the following facts:

> Julio Cesar De La Rosa-De La Cerda (De La Rosa) is a citizen and national of Mexico, born in Nueva Rosita, Coahuila, Mexico. On December 19, 2014, De La Rosa was deported and removed to Mexico through San Ysidro, California. On February 26, 2022, De La Rosa was encountered by immigration authorities at the Dublin Police Department in Dublin, Texas, within the Federal Northern District of Texas. De La Rosa had re-entered the United States illegally, and he had not applied for nor received permission from the Attorney General of the United States or the Secretary of the Department of Homeland Security to reapply for admission to the United States at any time after being deported.

(ROA.21).

On April 20, 2022, Mr. De La Rosa pleaded guilty to the single count of the information, (ROA.18, 29), without a plea agreement. *See* (ROA.138). The factual resume noted that the statutory maximum was 20 years of imprisonment and that the term of supervised release maximum was three years. (ROA.20). The

admonishments at the rearraignment warned Mr. De La Rosa similarly. (ROA.103). The magistrate did not advise that the felony provision of 8 U.S.C. § 1326(b) stated an essential element of the offense to which Mr. De La Rosa was pleading guilty. *See* (ROA.84–85).

Mr. De La Rosa objected to the Presentence Report, arguing that the indictment did not allege a prior conviction that would increase the maximum punishment for an offense under 8 U.S.C. § 1326(a) above two years of imprisonment and one year of supervised release, although he conceded that the argument is foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224, 235, 239 (1998). (ROA.154–57). The court overruled this objection at the sentencing hearing, (ROA.124), and it sentenced Mr. De La Rosa to a term of 63 months' imprisonment and three years of supervised release. (ROA.32, 35).

On appeal, Petitioner argued that the district court erred by imposing a sentence that included a term of imprisonment greater than two years and a term of supervised release exceeding one year because the fact of his prior conviction was not alleged in the indictment and proven beyond a reasonable doubt, although he admitted that the position was foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224, 235 (1998). The Fifth Circuit rejected the argument because it is foreclosed by controlling precedent. [Appendix A].

REASON FOR GRANTING THIS PETITION

I. This Court should reconsider *Almendarez-Torres v. United States.*

Petitioner was subjected to an enhanced statutory maximum under 8 U.S.C. §1326(b) because the removal charged in the indictment followed a prior aggravated felony conviction. Petitioner's sentence thus depends on the judge's ability to find the existence and date of a prior conviction and to use that date to increase the statutory maximum. It further depends on the judge's power to enhance a defendant's sentence beyond the statutory maximum on the basis of facts that have not been pleaded in the indictment. This power was affirmed in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), which held that the enhanced maximums of 8 U.S.C. § 1326 represent sentencing factors rather than elements of an offense and that they may be constitutionally determined by judges rather than juries. *See Almendarez-Torres*, 523 U.S. at 244.

This Court, however, has repeatedly limited *Almendarez-Torres*. *See Alleyne v. United States*, 570 U.S. 99, 111 n.1 (2013) (characterizing *Almendarez-Torres* as a narrow exception to the general rule that all facts that increase punishment must be alleged in the indictment and proved to a jury beyond a reasonable doubt); *Descamps v. United States*, 576 U.S. 254, 133 S. Ct. 2276, 2295 (2013) (Thomas, J., concurring) (stating that *Almendarez-Torres* should be overturned); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (stressing that *Almendarez-Torres* represented "a narrow exception" to the prohibition on judicial fact-finding to increase a defendant's sentence); *United States v. Shepard*, 544 U.S. 13 (2005) (Souter, J., controlling plurality opinion) ("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."); *Dretke v. Haley*, 541 U.S. 386, 395–96 (2004) (concluding that the application of *Almendarez-Torres* to the *sequence* of a defendant's prior convictions represented a difficult constitutional question to be avoided if possible); *Nijhawan v. Holder*, 557 U.S. 29, 40 (2009) (agreeing with the Solicitor General that the loss amount of a prior offense would represent an element of an 8 U.S.C. §1326(b) offense, to the extent that it boosted the defendant's statutory maximum).

Further, any number of opinions, some authored by Justices among the *Almendarez-Torres* majority, have expressed doubt about whether it was correctly decided. *See Apprendi*, 530 U.S. at 490; *Haley*, 541 U.S. at 395–96; *Shepard*, 544 U.S. at 26 & n.5 (Souter, J., controlling plurality opinion); *Shepard*, 544 U.S. at 26–28 (Thomas, J., concurring); *Rangel-Reyes v. United States*, 547 U.S. 1200, 1201 (Stevens, J., concurring in denial of certiorari); *Rangel-Reyes*, 547 U.S. at 1202–03 (Thomas, J., dissenting from denial of certiorari); *James v. United States*, 550 U.S. 192, 231–32 (2007) (Thomas, J., dissenting). And this Court has repeatedly cited authorities as exemplary of the original meaning of the Constitution that do not recognize a distinction between prior convictions and facts about the instant offense. *See Blakely v. Washington*, 542 U.S. 296, 301–02 (2004) (quoting W. Blackstone, Commentaries on the Laws of England 343 (1769), 1 J. Bishop, Criminal Procedure

§ 87, p 55 (2d ed. 1872)); *Apprendi*, 530 U.S. at 478–79 (quoting J. Archbold, Pleading and Evidence in Criminal Cases 44 (15th ed. 1862), 4 Blackstone 369–70)).

In *Alleyne*, this 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 mandatory maximum—must be proved to a jury beyond a reasonable doubt. 570 U.S. at 114-16. In its opinion, the Court apparently recognized that *Almendarez-Torres*'s holding remains subject to Fifth and Sixth Amendment attack. *Alleyne* characterized *Almendarez-Torres* as a "narrow exception to the general rule" that all facts that increase punishment must be alleged in the indictment and proved to a jury beyond a reasonable doubt. *Id.* at 111 n.1. But because the parties in *Alleyne* did not challenge *Almendarez-Torres*, this Court said that it would "not revisit it for purposes of [its] decision today." *Id.*

The Court's reasoning nevertheless demonstrates that *Almendarez-Torres*'s recidivism exception may be overturned. *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 111 ("[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 … includ[ing] any fact that annexes a higher degree of punishment") (internal quotation marks and citations omitted); *id.* ("the indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted")

(internal quotation marks and citation omitted). This Court 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."). *Apprendi* tried to explain this difference by pointing out that, unlike other facts, recidivism "'does not relate to the commission of the offense' itself[.]" 530 U.S. at 496 (quoting *Almendarez-Torres*, 523 U.S. at 230). But this Court did not appear committed to that distinction; it 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 reason to believe that the time is ripe to revisit *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 precedent is warranted when "the reasoning of [that precedent] has been thoroughly undermined by intervening decisions." *Id.* at 121.

The validity of *Almendarez-Torres* is accordingly subject to reasonable doubt. If *Almendarez-Torres* is overruled, the result will obviously undermine the use of Petitioner's prior conviction to increase his statutory maximum terms of imprisonment and supervised release. He has received a 46-month sentence and a three-year term of supervised release; thus, the matter cannot become moot during the pendency of the case. This Court should grant certiorari to decide whether *Almendarez-Torres* should be overruled.

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 28th day of July, 2023.

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