No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ELEUTERIO COVARRUBIAS-MARTINEZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR WRIT OF CERTIORARI

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas

MICHAEL HERMAN
First Assistant Federal Public Defender
Attorneys for Appellant
440 Louisiana Street, Suite 1350
Houston, Texas 77002-1056
Telephone: (713) 718-4600

QUESTION PRESENTED

Whether the Court should overrule *Almendarez-Torres v. United States*, 523 U.S. 224 (1998).

PARTIES TO THE PROCEEDINGS

All parties to petitioner's Fifth Circuit proceedings are named in the caption of the case before this Court.

DIRECTLY RELATED PROCEEDINGS

- *United States v. Covarrubias-Martinez*, No. 7:22CR01932, U.S. District Court for the Southern District of Texas. Judgment entered June 28, 2023.
- *United States v. Covarrubias-Martinez*, No. 23-40368, U.S. Court of Appeals for the Fifth Circuit. Judgment entered November 17, 2023.

TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Page

CASES

CONSTITUTIONAL PROVISIONS

STATUTES AND RULE

TABLE OF CITATIONS – (cont'd)

Page

STATUTES AND RULE – (cont'd)

TABLE OF CITATIONS – (cont'd)

Page

STATUTES AND RULE – (cont'd)

MISCELLANEOUS

PRAYER

Petitioner Eleuterio Covarrubias-Martinez prays that a writ of certiorari be granted to review the judgment entered by the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in Mr. Covarrubias-Martinez's case is attached to this petition as Appendix A. The district court did not issue a written opinion.

JURISDICTION

The Fifth Circuit issued its opinion and judgment on November 17, 2023. *See* Pet. App. A. This petition is filed within 90 days after the entry of judgment. Sup. Ct. R. 12.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution, amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

***

8 U.S.C. § 1326 – Reentry of removed aliens

(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 chapter or any prior Act,

shall be fined under Title 18, 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, 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 1225(c) of this title because the alien was excludable under section 1182(a)(3)(B) of this title or who has been removed from the United States pursuant to the provisions of subchapter V, 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 and imprisoned for a period of 10 years, which sentence shall not run concurrently with any other sentence. [*sic*] or
>
> **(4)** who was removed from the United States pursuant to section 1231(a)(4)(B) of this title 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, imprisoned for not more than 10 years, or both.

For the purposes of this subsection, the term "removal" includes any agreement in which an alien stipulates to removal during (or not during) a criminal trial under either Federal or State law.

(c) Reentry of alien deported prior to completion of term of imprisonment

Any alien deported pursuant to section 1252(h)(2) [*sic*] of this title who 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 incarcerated for the remainder of the sentence of imprisonment which was pending at the time of deportation without any reduction for parole or supervised release. Such alien shall be subject to such other penalties relating to the reentry of deported aliens as may be available under this section or any other provision of law.

(d) Limitation on collateral attack on underlying deportation order

In a criminal proceeding under this section, an alien may not challenge the validity of the deportation order described in subsection (a)(1) or subsection (b) unless the alien demonstrates that—

(1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;

(2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and

(3) the entry of the order was fundamentally unfair.

STATEMENT OF THE CASE

Petitioner Eleuterio Covarrubias-Martinez was charged 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 the offense of 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 conviction of an aggravated felony. The maximum supervised-release term also increases, from one year under § 1326(a) to three years under § 1326(b). *See* 18 U.S.C. §§ 3559(a)(3), (a)(5), 3583(b)(2)-(3). In *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), this Court held that the enhancement-qualifying conviction under 8 U.S.C. § 1326(b) is a sentencing factor, not an element of a separate offense. Petitioner's indictment did not allege a prior conviction. Pet. App. B.

Petitioner pleaded guilty to the indictment, which did not reference the penalty provision applied under 8 U.S.C. §1326(b)(2). Pet. App. B. The factual basis for his guilty plea did not contain any reference to a prior conviction, and Petitioner did not otherwise admit such prior conviction at the plea hearing.

Petitioner was sentenced to serve 151 months in the custody of the Bureau of Prisons. The district court entered a written judgment reflecting that sentence. Petitioner timely appealed.

On appeal, petitioner 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. The court of appeals, finding itself bound by *Almendarez-Torres*, affirmed the district court's judgment. Pet. App. A.

BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

The district court had jurisdiction pursuant to 8 U.S.C. § 1329 and 18 U.S.C. § 3231.

REASONS FOR GRANTING THE PETITION

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 of supervised release. The district court determined that petitioner 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 district court made this determination even though the indictment did not charge that petitioner had previously been convicted of any criminal offenses and petitioner did not admit any such conviction in entering his plea of guilty. The district court's decision to apply the statutory sentencing enhancement, however, 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) did 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. One recent commentator described it as "a case that is a dead man walking." Rachel Kunjummen Paulose, *Power to the People: Why the Armed Career Criminal Act Is Unconstitutional*, 9 Va. J. Crim. L. 1, 73-77 (2021). 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 reasonable 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 (footnote omitted). 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 489-90.

The Court again questioned *Almendarez-Torres*'s reasoning and suggested that the Court would be willing to revisit the decision. *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, 522 (2016) (Thomas, J., concurring) (same); *Shepard v. United States*, 544 U.S. 13, 27-28 (2005) (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* reinforces the impropriety of *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") (internal quotation marks, citations, and ellipsis omitted); *id.* at 111 ("the indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted") (citation omitted). *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. *Id.* at 109-16. The Court recognized no historical 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 acknowledged that *Almendarez-Torres* might have been "incorrectly decided." *Id.* at 489; *see also 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. *Alleyne*, 570 U.S. at 118-22. Instead, *Apprendi*'s rule "has become even more firmly rooted in the Court's Sixth Amendment jurisprudence." *Id.* at 120. 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 (Thomas, J., dissenting) ("The exception recognized in *Almendarez-Torres* for prior convictions is an aberration, has been seriously undermined by subsequent precedents, and should be reconsidered."); *Mathis*, 579 U.S. at 522 (Thomas, J., concurring) ("I continue to believe that the exception in *Apprendi* was wrong, and I have urged that *Almendarez-Torres* be reconsidered.").

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. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1405 (2020) (quoting *Agostini v. Felton*, 521 U.S. 203, 235 (1997)). 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 235-36. Even if the Court were ultimately to reaffirm *Almendarez-Torres*, review is warranted. *See, e.g.*, *Gamble v. United States*, 139 S. Ct. 1960, 1962 (2019) (reconsidering but ultimately declining to overturn the dual-sovereignty doctrine). 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 Court should grant certiorari to say whether *Almendarez-Torres* is still the law. 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).

CONCLUSION

The petition for a writ of certiorari should be granted.

Date: December 27, 2023

Respectfully submitted,

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas

By _____
MICHAEL HERMAN
First Assistant Federal Public Defender
Attorneys for Petitioners
440 Louisiana Street, Suite 1350
Houston, Texas 77002-1056
Telephone: (713) 718-4600