No. _____

In the

Supreme Court of the United States

_____

Gilberto Salvador Cortez-Garcia,

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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QUESTION PRESENTED

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 Gilberto Salvador Cortez-Garcia who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

RELATED PROCEEDINGS

- *United States v. Cortez-Garcia*, No. 4:22-cr-00328-P, U.S. District Court for the Northern District of Texas. Judgment entered on March 31, 2023.

- *United States v. Cortez-Garcia*, No. 23-10349, U.S. Court of Appeals for the Fifth Circuit. Judgment entered on October 3, 2023.

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OPINIONS BELOW

The Fifth Circuit's unpublished opinion is available at *United States v. Cortez-Garcia*, No. 23-10349, 2023 WL 6442597 (5th Cir. Oct. 3, 2023). It is reprinted in Appendix A to this Petition. The district court judgment is reprinted in Appendix B.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on October 3, 2023. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

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

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.

8 U.S.C. § 1326(a)–(b).

STATEMENT OF THE CASE

Petitioner Cortez-Garcia pleaded guilty to one count of illegally re-entering the country, violating 8 U.S.C. § 1326. A Presentence Investigation Report ("PSR") found that Mr. Cortez-Garcia's prior felony conviction elevated his statutory maximum from the default two years' imprisonment. The district court imposed a sentence of 63 months' imprisonment and three years of supervised release.

On appeal, Mr. Cortez-Garcia contended that his terms of imprisonment and supervised release should be limited to a maximum of ten years and one year respectively because the indictment did not allege, and he did not admit, that he had been convicted of a felony or aggravated felony prior to his removal. The Fifth Circuit rejected this claim. *See* Appendix A.

REASONS FOR GRANTING THIS PETITION

I. This Court should reconsider whether all facts that affect the statutory maximum must be pleaded in the indictment and proven to a jury beyond a reasonable doubt.

Petitioner was subjected to an enhanced statutory maximum under 8 U.S.C. §1326(b) (and an increased term of supervised release) because the district court found that the removal charged in the indictment followed a prior qualifying conviction. His 63-month term of imprisonment and three-year term of supervised release thus depend on a 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 a judge's power to enhance a defendant's sentence beyond the statutory maxima based on 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(b) 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*, 570 U.S. 254, 281 (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, 25 (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 (2006) (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).

The Court has also 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) and 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) and 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 115-16. In its opinion, the Court 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 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 … includ[ing] any fact that annexes a higher degree of punishment") (internal quotation marks and citations omitted); *id.* at 111 ("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. *Id.* 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*, 544 U.S. at 26 n.5 (acknowledging that the 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 this Court should revisit *Almendarez-Torres*. *See Alleyne*, 570 U.S. at 118-22 (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 continued vitality of *Almendarez-Torres* is accordingly subject to reasonable doubt. If *Almendarez-Torres* is overruled, the result will obviously undermine the use of Mr. Cortez-Garcia's prior conviction to increase his statutory maximum, which paved the way for the imposition of a 63-month sentence and three-year term of supervised release. At minimum, this Court should hold the instant petition and remand in the event *Almendarez-Torres* is overruled. *See Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 166-7 (1996).

CONCLUSION

Gilberto Salvador Cortez-Garcia 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 2nd day of January 2024.

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