No. _____

In the Supreme Court of the United States

NOEMY RAMIREZ-GOMEZ, *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)?

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Petitioner Noemy Ramirez-Gomez 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 October 31, 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

All proceedings directly related to the case are as follows:

- *United States v. Ramirez-Gomez*, No. 5:22-cr-627-1 (W.D. Tex. July 18, 2023) (judgment)

- *United States v. Ramirez-Gomez*, No. 23-50455 (5th Cir. October 31, 2023) (unpublished opinion)

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A copy of the unpublished opinion of the court of appeals, *United States v. Ramirez-Gomez*, No. 23-50455 (5th Cir. Oct. 31, 2023) (per curiam), is attached to this petition as Appendix A.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit was entered on October 31, 2023. This petition is filed within 90 days after entry of judgment or order sought to be reviewed. *See* Sup. Ct. R. 13.1, 13.3. 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 in Appendix C.

STATEMENT

Petitioner Noemy Ramirez-Gomez was charged with illegally reentering the country 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, a conviction under § 1326(b) increases the maximum supervised release term from one year to three years. *See* 18 U.S.C. §§ 3583(b), 3559(a). 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. Ramirez's indictment did not allege a prior conviction. App. B.

Ramirez pleaded guilty as charged. The factual basis for his guilty plea admitted only the elements of § 1326(a); he did not admit to having a prior conviction that would trigger the enhanced penalties in § 1326(b).

A probation officer prepared a presentence report. Although the indictment did not allege that Ramirez had been removed from the United States after an aggravated felony conviction, the presentence report stated that that statutory maximum penalty

was 20 years' imprisonment and up to three years of supervised release, under 8 U.S.C. § 1326(b)(2).

At sentencing, the district court sentenced Ramirez to the top of the Guidelines range, 46 months' imprisonment and three years' supervised release.

Ramirez timely appealed. He moved for summary disposition, 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*, 133 S. Ct. 2151 (2013), increasing the statutory maximum sentence pursuant to 8 U.S.C. § 1326(b) is unconstitutional when 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 he noted that recent decisions from this Court suggested that *Almendarez-Torres* may be reconsidered. The court of appeals noted the foreclosure and affirmed Ramirez's sentence. App. A 2.

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).

Section 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

Ramirez was subject to an enhanced sentence under 8 U.S.C. § 1326(b), which increases the maximum penalty if the removal occurred after a conviction for a felony or an aggravated felony. The district 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) 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. 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. But because the fact that increased

the penalty in *Apprendi* was not 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.

The Court again questioned *Almendarez-Torres*'s reasoning in *Alleyne v. United States*, suggesting that the Court would be willing to revisit the decision. 570 U.S. 99, 111 n.1 (2013). 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.

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").

Indeed, one justice has expressly called for the Court to revisit *Almendarez-Torres*. *See 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, 522–23 (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 *Almendarez-Torres* is constitutionally flawed.

Three concurring justices in *Alleyne* provide additional reasons for revisiting *Almendarez-Torres*. *See Alleyne*, 133 S. Ct. at 2164 (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.*

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. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 264 (2022) (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 236. Reversal of even recent precedent is warranted when "the reasoning of [that precedent] has been thoroughly undermined by intervening decisions." *Alleyne*, 570 U.S. 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).

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 only be resolved in this forum. *Id.* (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, Ramirez asks that this Honorable Court grant a writ of certiorari.

Respectfully submitted.

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