No._____

IN THE SUPREME COURT OF THE UNITED STATES

SELVYN GUSTAVO MEJIA-MARROQUIN, PETITIONER

V.

UNITED STATES OF AMERICA

_____

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

_____

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QUESTION PRESENTED FOR REVIEW

Whether *Almendarez-Torres v. United States,* 523 U.S. 224 (1998) should be overruled.

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Selvyn Mejia 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 July 1, 2024.

PARTIES TO THE PROCEEDING

The caption of the case names all the parties to the proceedings in the courts below.

RELATED PROCEEDINGS

United States v. Wilson Castro (TN Selvyn Gustavo Mejia Marroquin), U.S. District Court for the Western District of Texas, Number 2:22 CR 02981-DC-1, Judgment entered October 31, 2023.

United States v. Mejia-Marroquin, U.S. Court of Appeals for the Fifth Circuit, Number 23-50796, Judgment entered July 1, 2024.

OPINION BELOW

The unpublished opinion of the court of appeals is attached as Appendix A.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the court of appeals were entered on July 1, 2024. This petition is filed within 90 days after entry of judgment. *See* Supreme Court Rule 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 that "No person shall be held to answer for a capital, or other infamous crime, unless on presentment or indictment from 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 that "In all criminal prosecutions, the accused shall enjoy the right to . . . trial by impartial jury . . . ."

STATUTORY PROVISION INVOLVED

Title 8 U.S.C. § 1326 criminalizes unlawful reentry into the United States after removal. The text of the statute is attached to this petition as Appendix B.

STATEMENT

Petitioner Selvyn Mejia Marroquin was charged with unlawful reentry after removal in violation of 8 U.S.C. § 1326.[1] The indictment did not allege that Mejia had been convicted of a felony offense before his reentry into the United States. Appendix C. Unlawful reentry carries a maximum sentence of two years' imprisonment. 8 U.S.C. § 1326(a).

Mejia pleaded guilty to the reentry charge. The district court determined that Mejia had been convicted of aggravated robbery before his removal and reentry and that therefore the maximum sentence he faced was not two years imprisonment under § 1326(a), but twenty years' imprisonment under § 1326(b)(2). The court sentenced Mejia to 51 months' imprisonment. It also imposed a three-year term of supervised release, a length of supervision that was not available under § 1326(a).

Mejia appealed his sentence on two grounds. First, he challenged the substantive reasonableness of his sentence, contending it was greater than necessary to achieve the purposes of sentencing set out in 18 U.S.C. § 3553(a). Second, he argued that his sentence was limited to two years of imprisonment and one year of supervised release because the indictment against him had failed to allege the maximum-sentence enhancing fact that he had a prior aggravated-felony conviction.

[1] The district court exercised jurisdiction under 18 U.S.C. § 3231.

The Fifth Circuit affirmed Mejia's sentence. It rejected his argument that his sentence exceeded the maximum sentence permitted under § 1326(a), ruling that the argument was foreclosed by the decision in *Almendarez-Torres v. United States,* 523 U.S. 224 (1998). Appendix A.

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER TO OVERRULE *ALMENDAREZ-TORRES V. UNITED STATES.*

Title 8 U.S.C. § 1326 criminalizes unlawful reentry into the United States by a person who has been removed from the country. Section § 1326(a) states that a person who reenters after removal may be punished by a sentence of up to two years of imprisonment. Section 1326(b)(1) increases the maximum sentence to 10 years of imprisonment if the reentering person had been removed after being convicted of a felony offense. Section 1326(b)(2) increases the maximum sentence further, to 20 years of imprisonment, if the reentering person had been removed after being convicted of an aggravated-felony offense.[2]

In *Almendarez-Torres*, the Court construed 8 U.S.C. § 1326(b) as a statutory penalty-enhancement provision. 523 U.S. at 235. The Court further ruled that when a penalty-enhancement provision is triggered by the existence of a prior conviction,

[2] The finding of a prior felony or aggravated felony under § 1326(b) also increases a defendant's sentence by permitting the imposition of a three-year term of supervised release under § 3559 and 3583(b)(2). A § 1326(a) offense carries only a one-year term of supervised release. 18 U.S.C. §§ 3559, 3583(b)(3).

the prior conviction is not an element of the offense, even when the existence of the prior conviction increases the statutory-maximum penalty. *Id.* at 239–47.

Two years after these rulings, in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Court cast significant doubt on the constitutional reasoning it used in *Almendarez-Torres.* The *Apprendi* Court explained that, under the Sixth Amendment, facts that increase the maximum sentence must be proved to the jury beyond a reasonable doubt. 530 U.S. at 490. The Court acknowledged that this general principle, which it found well-established in the "uniform course of decision during the entire history of our jurisprudence," conflicted with the specific holding in *Almendarez-Torres* that a prior conviction need not be treated as an element of a § 1326(b) offense. *Id.* at 489-90. The Court conceded it was "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 and because the litigants did not challenge *Almendarez-Torres*'s holding, the Court declined to overrule *Almendarez-Torres*. *Id.* at 490. Instead, the *Apprendi* Court framed its holding to leave *Almendarez-Torres* as an outlier: "*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." *Id.* (emphasis added).

Since then, the Court's opinions and individual justices have repeatedly questioned *Almendarez-Torres*'s holding and suggested that holding should be revisited. *See, e.g., Alleyne v. United States*, 570 U.S. 99, 111 n.1 (2013); *Sessions v.*

Dimaya, 138 S. Ct. 1204, 1253 (2018) (Thomas, J., dissenting) (*Almendarez- Torres* should be reconsidered); *Descamps v. United States*, 570 U.S. 254, 281 (2013) (Thomas, J., concurring) (same).

Alleyne applied *Apprendi*'s rule to mandatory-minimum sentences. The *Alleyne* Court held that any fact that produces a higher sentencing range—not just a sentence above the mandatory maximum—must be alleged in a federal indictment and proved to a jury beyond a reasonable doubt. 570 U.S. at 114–16. In its opinion, the Court recognized that *Almendarez-Torres*'s constitutional holding poses potential Fifth and Sixth Amendment susceptibilities. *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, as in *Apprendi,* the parties in *Alleyne* did not challenge *Almendarez- Torres*, the Court said that it would "not revisit [that decision] for purposes of our decision today." *Id.*

Alleyne's reasoning, however, provided support for a challenge to *Almendarez-Torres*'s continued existence. *Alleyne* traced the treatment of the relationship between crime and punishment back to the eighteenth century, noting the consistent and "intimate connection between crime and punishment" and the "linkage of facts with particular sentence ranges[.]" 570 U.S. at 109. Historically, the Court observed, 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[.]" *Id.* at 109. The Court pointed to authorities teaching that "the indictment must contain an

allegation of every fact which is legally essential to the punishment to be inflicted[.]") *Id.* (quoting 1 J. Bishop, Criminal Procedure 50 (2d ed. 1872)). The 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.* at 109, 114–15.

Alleyne's explanation 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*, *see* 523 U.S. at 243–44, that recidivism is different from other sentencing facts. *Alleyne* thus joined *Apprendi, Shepard v. United States*, 544 U.S. 13, 26 n.5 (2005), and *Cunningham v. California*, 549 U.S. 270, 291 n.14 (2007), in calling *Almendarez-Torres* into question. Justice Thomas has long warned that overruling *Almendarez-Torres* is necessary to prevent injustice. *See, e.g., Rangel-Reyes v. United States,* 547 U.S. 1200, 1203 (2006) (Thomas, J., dissenting from denial of certiorari). The concurring justices in *Alleyne* appeared to join that view when they observed that that firm foundation of the *Apprendi* principle made precedent irreconcilable with that principle subject to reevaluation. *Alleyne,* 570 U.S. at 118-121 (Sotomayor, Ginsburg, Kagan, J.J., concurring).

The most recent statements by the Court suggesting that *Almendarez-Torres* needs to be revisited came this June in *Erlinger v. United States,* 144 S. Ct. 1840 (2024). In *Erlinger,* the Court held that a judge could not increase a defendant's sentence through its own finding that the defendant's prior offenses occurred on separate occasions. 144 S. Ct. at 1850-53. The Court again observed that *Almendarez-*

Torres rested on a shaky constitutional foundation but noted that Erlinger's case could be resolved without overruling *Almendarez-Torres.* 144 S. Ct. at 1850-54. Justice Thomas wrote separately to express again "my view that we should revisit *Almendarez-Torres* and correct" its error. 144 S. Ct. at 1861 (Thomas, J., concurring).

The apparent view among members of this Court that *Almendarez-Torres* was wrongly decided is good reason to revisit that decision. 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, and continue to litigate, about the ultimate validity of the Court's holding. "There is no good reason to allow such a state of affairs to persist." *Rangel-Reyes*, 547 U.S. at 1201 (2006) (Thomas, J., dissenting from denial of certiorari).

Petitioner Mejia's case squarely presents the *Almendarez-Torres* question. Indeed, Mejia was convicted and had his sentence enhanced by the district court under the same statute as Almendarez-Torres's sentence was enhanced. History and the Court's post-*Apprendi* jurisprudence strongly suggest that the increase to Mejia's sentence through judicial fact-findings violated the Fifth and Sixth Amendments. The Court should grant certiorari to determine whether *Almendarez-Torres* is still the law

or whether it must yield to the principle that all facts that raise the maximum sentence are elements of the offense and thus must be included in the indictment and found by a jury.

Conclusion

FOR THESE REASONS, Petitioner asks that the Court grant a writ of certiorari and review the judgment of the court of appeals.

/s/ PHILIP J. LYNCH
Counsel of Record for Petitioner

DATED: July 18, 2024.