

**FILED**

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MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

AGUSTIN ACOSTA-MAGALLANES,  
AKA Julian Acosta-Padilla,

Defendant-Appellant.

No. 15-10415

D.C. No.

4:15-cr-00249-RM-EJM-1

MEMORANDUM\*

Appeal from the United States District Court  
for the District of Arizona  
Rosemary Marquez, District Judge, Presiding

Submitted November 16, 2016\*\*  
San Francisco, California

Before: GOULD, CLIFTON, and WATFORD, Circuit Judges.

Agustin Acosta-Magallanes challenges the 48-month custodial sentence and 2-year term of supervised release imposed by the district court after his guilty-plea conviction for being found in the United States following deportation, in violation

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\* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

\*\* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

of 8 U.S.C. § 1326, as enhanced by § 1326(b)(2). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

Acosta-Magallanes contends that the district court abused its discretion in imposing non-individualized, contradictory supervised release conditions as he likely will not be in the country to follow the supervised release requirements. A court “ordinarily should not impose a term of supervised release in a case in which supervised release is not required by statute and the defendant is a deportable alien who likely will be deported after imprisonment.” U.S.S.G. § 5D1.1(c). District courts, however, have discretion to impose supervised release in cases where added deterrence is needed. *See United States v. Valdavinos-Torres*, 704 F.3d 679, 693 (9th Cir. 2012); *see also* U.S.S.G. § 5D1.1, cmt. n.5. A district court imposing a term of supervised release for a deportable alien must articulate “a specific and particularized explanation that supervised release would provide an added measure of deterrence and protection based on the facts of [the defendant’s] case.”

*Valdavinos-Torres*, 704 F.3d at 693. Here, the district court gave an adequate and reasoned basis for sentencing Acosta-Magallanes to supervised release. After considering his past history, the court found that supervised release would deter Acosta-Magallanes from returning to the United States. At sentencing, the district court also said that the terms of supervised release would apply only if Acosta-

Magallanes returned to the United States. In our view, the district court acted within its proper discretion by imposing a term of supervised release in the circumstances presented.

Acosta-Magallanes also argues that 8 U.S.C. § 1326(b) is unconstitutional, and as a result, his sentence cannot be more than two years. This court has repeatedly rejected this argument, and we are bound to follow the United States Supreme Court's precedent in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), until it is overruled by the Supreme Court. *See United States v. Leyva-Martinez*, 632 F.3d 568, 569 (9th Cir. 2011) (per curiam); *United States v. Grajeda*, 581 F.3d 1186, 1197 (9th Cir. 2009). We will not engage in anticipatory overruling of a Supreme Court precedent and consider appellant's argument on this issue as a way to preserve the issue should the Supreme Court change its law.

**AFFIRMED.**