

# United States Court of Appeals for the Fifth Circuit

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No. 23-50295  
Summary Calendar

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United States Court of Appeals  
Fifth Circuit  
**FILED**  
September 29, 2023

Lyle W. Cayce  
Clerk

UNITED STATES OF AMERICA,

*Plaintiff—Appellee,*

*versus*

DONATO LOPEZ-ARELLANO,

*Defendant—Appellant.*

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Appeal from the United States District Court  
for the Western District of Texas  
USDC No. 2:22-CR-2069-1

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Before KING, HAYNES, and GRAVES, *Circuit Judges.*

PER CURIAM:\*

Donato Lopez-Arellano appeals his 27-month, above-guidelines range sentence for illegal entry following deportation, *see* 8 U.S.C. § 1326(a) & (b)(2), contending that it violates *Apprendi v. New Jersey*, 530 U.S. 466 (2000), because it is greater than the two-year statutory maximum sentence of § 1326(a) and is based on a fact—his prior conviction for an aggravated

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\* This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

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felony—that was neither pleaded in the indictment nor found by a jury beyond a reasonable doubt or admitted by him in pleading guilty. Lopez-Arellano concedes that this issue is foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), and he seeks to preserve the issue for possible Supreme Court review. Accordingly, he moves for summary disposition. The Government does not oppose the motion.

Lopez-Arellano is correct that his argument is foreclosed by *Almendarez-Torres*. See *United States v. Pervis*, 937 F.3d 546, 553-54 (5th Cir. 2019); *United States v. Wallace*, 759 F.3d 486, 497 (5th Cir. 2014). Therefore, “there can be no substantial question as to the outcome of the case,” *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969), and summary disposition is proper. Accordingly, Lopez-Arellano’s motion for summary disposition is GRANTED, and the judgment is AFFIRMED.