

April 11, 2006

Charles R. Fulbruge III  
Clerk

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 05-41334  
Conference Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TOMAS LOPEZ-RODRIGUEZ,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Southern District of Texas  
USDC No. 2:05-CR-268-ALL  
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Before JONES, Chief Judge, and JOLLY and DAVIS, Circuit Judges.

PER CURIAM:\*

Tomas Lopez-Rodriguez (Lopez) appeals from his conviction of being illegally present in the United States after having been deported. He challenges the constitutionality of the "felony" and "aggravated felony" provisions of 8 U.S.C. § 1326(b) and contends that his challenge is not barred by the appeal-waiver provision of his plea agreement. The Government seeks enforcement of the waiver provision. Because Lopez's substantive contention is foreclosed, we need not address whether to enforce the waiver provision.

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\* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

The constitutional issue raised by Lopez is foreclosed by Almendarez-Torres v. United States, 523 U.S. 224, 235 (1998). Although Lopez contends that Almendarez-Torres was incorrectly decided and that a majority of the Supreme Court would overrule Almendarez-Torres in light of Apprendi v. New Jersey, 530 U.S. 466 (2000), we have repeatedly rejected such arguments on the basis that Almendarez-Torres remains binding. See United States v. Garza-Lopez, 410 F.3d 268, 276 (5th Cir.), cert. denied, 126 S. Ct. 298 (2005). Lopez properly concedes that his argument is foreclosed in light of Almendarez-Torres and circuit precedent, but he raises it here to preserve it for further review.

The district court's judgment is AFFIRMED.