

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

United States Court of Appeals  
Fifth Circuit

**FILED**

June 15, 2020

Lyle W. Cayce  
Clerk

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No. 19-51086  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JOSE BENITEZ-CALDERON,

Defendant-Appellant

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Appeal from the United States District Court  
for the Western District of Texas  
USDC No. 7:19-CR-163-1

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Before HIGGINBOTHAM, HO, and ENGELHARDT, Circuit Judges.

PER CURIAM:\*

Jose Benitez-Calderon appeals his conviction and 27-month sentence imposed following his guilty plea conviction for being found unlawfully present in the United States after previous deportation. He argues that his sentence was imposed under an unconstitutional statute, 8 U.S.C. § 1326(b). Specifically, he contends that in order to trigger a sentencing enhancement under § 1326(b), the fact of a prior conviction must be alleged in the indictment

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

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and proven to a jury; therefore, he asserts that § 1326(b) is unconstitutional. He correctly concedes that his argument is foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), but he raises the issue to preserve it for further possible review. *See United States v. Wallace*, 759 F.3d 486, 497 (5th Cir. 2014); *United States v. Pineda-Arrellano*, 492 F.3d 624, 625-26 (5th Cir. 2007).

The Government has filed an unopposed motion for summary affirmance and, alternatively, seeks an extension of time to file its brief. Because the issue is foreclosed, summary affirmance is appropriate. *See Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969).

Accordingly, the Government's motion for summary affirmance is GRANTED, the Government's alternative motion for an extension of time to file a brief is DENIED, and the judgment of the district court is AFFIRMED.