

United States Court of Appeals for the Fifth Circuit

No. 26-10044
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

July 27, 2026

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

JOSUE OTERO-GARAY,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:25-CR-113-1

Before HIGGINBOTHAM, SMITH, and HO, *Circuit Judges*.

PER CURIAM:*

Josue Otero-Garay appeals following his conviction and sentence under 8 U.S.C. § 1326(a) for illegal reentry after removal from the United States, arguing that the sentencing enhancement in § 1326(b) is unconstitutional. Otero-Garay concedes that his argument is foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), and seeks to preserve the issue for further review. The Government has filed an

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

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unopposed motion for summary affirmance or, alternatively, for an extension of time in which to file a brief.

The parties are correct that Otero-Garay's argument is foreclosed. *See United States v. Pervis*, 937 F.3d 546, 553-54 (5th Cir. 2019); *see also Erlinger v. United States*, 602 U.S. 821, 838 (2024) (explaining that *Almendarez-Torres* "persists as a narrow exception permitting judges to find only the fact of a prior conviction" (internal quotation marks and citation omitted)). Summary affirmance is thus appropriate. *See Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969).

Accordingly, the motion for summary affirmance is GRANTED, the alternative motion for extension of time is DENIED as moot, and the judgment of the district court is AFFIRMED.