No. 20-437

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

REFUGIO PALOMAR-SANTIAGO.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR PROFESSORS KELLY LYTLE HERNÁNDEZ, MAE NGAI, AND INGRID EAGLY AS AMICI CURIAE SUPPORTING RESPONDENT

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INTEREST OF AMICI CURIAE

Amici are professors who teach and regularly publish scholarship concerning the immigration laws of the United States.[1] As some of the nation's leading scholars

[1] Pursuant to Rule 37.6, amici affirm that no counsel for a party authored this brief in whole or in part; no such counsel or a party made a monetary contribution to fund its preparation or submission; and no person other than amici or their counsel made such a monetary contribution. The parties have consented to the filing of this amicus brief.

on immigration, they have a professional interest in ensuring that the Court is fully and accurately informed regarding the history behind the criminal reentry provision under which Respondent has been indicted.

Amicus Kelly Lytle Hernández is a professor and the Thomas E. Lifka Endowed Chair of History at UCLA. She is a 2019 MacArthur Fellowship recipient and is one of the nation's leading historians of race, policing, immigration, and incarceration in the United States. Her award-winning scholarly works include books entitled *Migra! A History of the U.S. Border Patrol* (University of California Press 2010), which explored the making and meaning of the U.S. Border Patrol in the U.S.-Mexico borderlands; and *City of Inmates: Conquest and the Rise of Human Caging in Los Angeles* (University of North Carolina Press 2017), which discussed the rise of incarceration as a social institution and its effect on racialized populations.

Amicus Mae Ngai is the Lung Family Professor of Asian American Studies and Professor of History at Columbia University, and a U.S. legal and political historian who specializes in studies of immigration, citizenship, and nationalism. She has authored many publications concerning immigration in the United States, including the award-winning *Impossible Subjects: Illegal Aliens and the Making of Modern America* (Princeton University Press 2004), a book tracing the origins of the concept of the "illegal alien" in American law and society.

Amicus Ingrid Eagly is a professor at UCLA School of Law. She is an expert in the intersection between immigration enforcement and the criminal legal system. She has written extensively on the history of federal laws criminalizing migration, including *Prosecuting Immigra-*

tion, published in the Northwestern University Law Review, and *The Movement to Decriminalize Border Crossing*, published in the Boston College Law Review.

SUMMARY OF ARGUMENT

The Government seeks to criminally prosecute Respondent Refugio Palomar-Santiago under 8 U.S.C. 1326, a statutory provision enacted in 1929 for the purpose of solving "the Mexican problem" by criminalizing unauthorized reentry after deportation from the United States. Under the Government's theory, Respondent cannot challenge his felony indictment even though it rests entirely on an improper removal order that should never have been entered. That harsh application is no accident. Like its misdemeanor companion provision codified at 8 U.S.C. 1325, Section 1326 was designed to target people crossing the Southwest border, rather than those from Europe who overstayed their visas. Both statutes still work to authorize extraordinarily harsh results against those who cross the Southwest border, the vast majority of whom are Mexican immigrants.

In this brief, amici describe the blatantly racist intentions of the legislators who drafted Sections 1325 and 1326. That history compels construing any ambiguity in the statute in favor of Respondent. As Justice Kavanaugh recently observed, "this Court has emphasized time and again the 'imperative to purge racial prejudice from the administration of justice.'" See *Ramos* v. *Louisiana*, 140 S. Ct. 1390, 1418 (2020) (Kavanaugh, J., concurring in part) (quoting *Peña-Rodriguez* v. *Colorado*, 137 S. Ct. 855, 867 (2017)). To do so, the Court must acknowledge the most disturbing origins of our laws. *Ibid.*

In Part I, amici explain how Sections 1325 and 1326 resulted from a brokered compromise in 1929 between the Nativists, a political faction organized to oppose non-

white, and particularly Mexican, immigration, and agribusiness, a burgeoning industrialist constituency that depended on a Mexican migrant workforce for the development of the southwestern economy. The two groups struck a deal to pass the Undesirable Aliens Act of 1929 ("1929 Act"). The 1929 Act's criminalization of unauthorized entry and reentry was designed to further the Nativists' racist goal of preventing long-term Mexican immigration to the United States while also preserving agribusiness access to low-cost workers. The Nativists intended that the 1929 Act would form a bulwark to stop Mexican migrants from undermining the "desirable character of citizenship," thus preventing—in the Nativists' minds—a new "social problem" akin to that purportedly created by the arrival of African people during slavery. In other words, their motivations were based on a belief in the inherent inferiority and undesirability of Mexicans as a racial group. The agribusiness constituency shared the Nativists' beliefs, even as they continued to rely on Mexican workers in their businesses.

Congress reenacted Sections 1325 and 1326 in the McCarran-Walter Act of 1952 ("1952 Act"). Part II explains why that reenactment did not purge the racism underlying the statute. On the contrary, the history makes clear that the same racist intent to exclude Mexicans continued to operate during the 1940s and 1950s. Unsurprisingly then, the only material changes in the 1952 reenactment made unauthorized entry *easier* to prosecute. Congress's failure to grapple with the racist history of the 1929 provisions when reenacting them in 1952—and subsequently—renders the 1929 history operative when assessing the relevant legislative intent.

In Part III, amici chart a path for the Court to contend with this racist history within the context of the relatively narrow question before it today. By construing Section

1326(d) to afford additional judicial review in the case of Respondent and defendants like him, the Court could alleviate some of the discriminatory impact flowing from the enforcement of the criminal reentry provision. "[T]he imperative to purge racial prejudice from the administration of justice" requires no less. *Ramos*, 140 S. Ct. at 1418 (Kavanaugh, J., concurring in part) (citation and internal quotation marks omitted).

ARGUMENT

I. RACIAL ANIMUS INFECTS THE ORIGINS OF 8 U.S.C. 1326

To claim that the Undesirable Aliens Act of 1929 was founded in anything but deep-seated racial animus is to ignore the words spoken on the Congressional floor in the 1920s that led to its passage. The congressional debates made clear that legislators saw Mexican immigrants as a "social problem" to be controlled because they were a threat to white hegemony. This perceived threat was the animating motivation behind the eventual passage of the Act and, in particular, the criminal entry and reentry provisions.

A. A "Nativist" Political Coalition Advocated Severe Restrictions On Non-White Immigration In The 1920s

The felony unauthorized reentry after deportation statute codified at 8 U.S.C. 1326, like its misdemeanor counterpart, codified in Section 1325, traces its origins to the 1920s. That era saw increasingly vocal and active white resentment of other racial groups, a period so racially fractious that it earned the moniker the "Tribal Twenties." Kelly Lytle Hernández, *City of Inmates: Conquest, Rebellion and the Rise of Human Caging in Los Angeles, 1771–1965*, at 131 (2017) (*City of Inmates*) (citing

John Higham, *Strangers in the Land: Patterns of American Nativism, 1860–1925*, at 264–299 (1988)). This was "a time when the Ku Klux Klan was reborn, Jim Crow came of age, and public intellectuals preached the science of eugenics." *Ibid.*

Over the course of the decade, a group of white lawmakers known as the "Nativists" increased their political influence by pushing an agenda that demonized all immigrants from anywhere other than certain favored European countries. *City of Inmates* 131. The Nativists warned that freely permitting the inflow of immigrants from around the world would repeat the "tragedy" of the slave trade, though ironically the Nativists used the word "tragedy" to refer not to the evils of slavery but rather to the introduction of African people into the United Sates. *Ibid.*

Meanwhile, Mexican immigrant laborers were making a home for themselves in borderlands and building a "MexAmerica." *City of Inmates* 131–132. These immigrants settled into and created communities, built homes and "established everything from newspapers and businesses to bands and baseball teams." *Id.* at 132. They "made full and permanent lives for themselves and their children—an increasing number of whom were U.S.-born citizens—in the United States." *Ibid.* The Nativist movement saw these burgeoning communities as a threat to its national project of restricting permanent immigration to select Europeans. *Id.* at 134 (discussing how the boom in Mexican immigration "unnerved the Nativists" as it "threatened to degrade the nation's 'Aryan' stock").

B. The National Origins Act Of 1924 Failed To Fully Achieve The Nativists' Anti-Mexican Goals

Faced with the prospect of non-white immigrants settling in the United States, the Nativists resorted to incremental legislative efforts to influence the composition of the immigrant pool according to their racist view of what was desirable. The Nativists secured an early, if partial, legislative victory with Congress's enactment of the National Origins Act of 1924 ("1924 Act"). Pub. L. No. 68-139, 43 Stat. 153. That law banned all Asian immigrants and required other immigrants who were potentially eligible for entry to submit to inspection at a U.S. immigration station. During inspection, aspiring immigrants would take a literacy test and a health exam, and pay $18 in head taxes and visa fees before being granted entry—all requirements that the Nativists believed only certain Europeans could pass. *City of Inmates* 132–133. The 1924 Act also established a system of national quotas limiting the total number of immigrants allowed entry from eastern-hemisphere countries each year; of the total annual quota allotment, 96% was reserved for European immigrants. *Id.* at 133.

While these restrictions on immigration from outside Europe were remarkably stringent, the Nativists had actually been pushing for even greater restrictions on non-European immigration. However, they were stymied by business opposition from representatives from the Western states, which increasingly relied on the Mexican immigrant workforce. Due to "the decline of white male itinerancy, the exclusion of Chinese workers, and the nadir of California's indigenous population," Mexican immigrants had emerged as a significant proportion of the low-wage workforce in the region. *City of Inmates* 132. As the President of the Los Angeles Chamber of Commerce put

it, "[w]e are totally dependent . . . upon Mexico for agricultural and industrial common or casual labor. It is our only source of supply." *Id.* at 131 (quoting Devra Weber, *Dark Sweat, White Gold: California Farm Workers, Cotton, and the New Deal* 35 (1994)). Speaking on behalf of himself and various livestock raisers' associations, rancher Fred Bixby testified before the Senate Committee on Immigration about industrial reliance on Mexican labor. He noted that in California "we have no Chinamen, we have not the Japs. The Hindu is worthless; the Filipino is nothing, and the white man will not do the work." Kelly Lytle Hernández, *Migra! A History of the U.S. Border Patrol* 30 (2010) (*Migra!*) (quoting *Restriction of Western Hemisphere Immigration: Hearings on S. 1296, S. 1437, and S. 3019 Before the Senate Comm. on Immigration*, 70th Cong., 1st Sess. 24, 26 (1928) (statement of Fred Bixby)).

At the time, immigration authorities counted approximately 100,000 Mexicans crossing the border each year. The Nativists' proposed quota would have limited entries to a few hundred. *City of Inmates* 134. Thus, agribusiness opposed any quota system simply because they relied on Mexican laborers.

Because the bloc of pro-business representatives opposed the quota, the Nativists were forced to choose between a Mexican exemption to the quota system and no immigration quotas at all. They chose the former. The law ultimately exempted from the quota all immigrants from the Western hemisphere, whereas all other nations had a combined annual limit of 165,000 immigrants. *City of Inmates* 133; John M. Murrin et al., *Liberty, Equality, Power: A History of the American People, Volume 2:*

Since 1863, at 659 (7th ed. 2015) (*Liberty, Equality, Power*).[2]

The Nativists remained unsatisfied over the following years. Congressman John C. Box, who would later co-sponsor a 1926 bill that would have limited Mexican immigration, opined that "[t]he continuance of a desirable character of citizenship * * * will be violated by increasing the Mexican population of the country." *Migra!* 28 (quoting *Seasonal Agricultural Laborers from Mexico: Hearings Before the House Comm. on Immigration and Naturalization*, 69th Cong., 1st Sess. 124 (1926) (statement of John C. Box)). During the congressional hearings for the 1924 Act, another Congressman questioned the wisdom of exempting the Western hemisphere from the nation-by-nation quota system by asking "[w]hat is the use of closing the front door to keep out undesirables from Europe when you permit Mexicans to come in here by the back door by the thousands and thousands?" *Id.* (quoting David Gutiérrez, *Walls and Mirrors: Mexican Immigrants, and the Politics of Ethnicity* 53–54 (1995)).

With the Western hemisphere not subject to the quota system, Mexicans continued to immigrate in greater numbers. By the end of the 1920s, Mexico became one of the leading sources of immigration to the United States. *Migra!* 28. But the Nativist backlash continued to build, leading to what would become the Undesirable Aliens Act of 1929.

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[2] The quota system capped the number of eligible immigrants from each country based on a percentage of the immigrants from that country who resided in the United States in 1890. *Liberty, Equality, Power* 659. This, too, had a racially disparate impact in that it favored certain European groups (such as British, Germans, and Scandinavians) over others that the Nativists thought less desirable (such as Italians, Greeks, and Poles). *Ibid.*

C. Post-1924 Congressional Debates Over Mexican Immigration Policy Reveal Widespread Racism Against Mexicans

The 1924 Act's foundational compromise did not last long. Congress considered bills designed to curtail Mexican immigration in 1926 and 1928. And although these debates ostensibly pitted Nativists against agribusiness lobbyists, legislators from both groups used openly racist language when describing Mexican immigrants.

The Nativists voiced their usual fears about the effects of the United States' shifting demographic composition due to immigration. For example, the Immigration Restriction League warned the Senate that "[o]ur great Southwest is rapidly creating for itself a new racial problem, as our old South did when it imported slave labor from Africa." *Migra!* 29 (quoting *Restriction of Western Hemisphere Immigration: Hearings on S.1296, S.1437, and S. 3019 Before the Senate Comm. on Immigration*, 70th Cong., 1st Sess. 188 (1928) (statement on Mexican immigration submitted by the Immigration Restriction League)).

While the Southwestern agricultural lobby fought against proposals to curtail Mexican immigration, they accepted the racist premise underlying the Nativists' worldview. In 1926, an agribusiness lobbyist named S. Parker Frisselle testified before Congress that "[w]e, gentlemen * * * are just as anxious as you are not to build the civilization of California or any other Western district upon a Mexican foundation." *City of Inmates* 135 (quoting *Seasonal Agricultural Laborers from Mexico: Hearing on H.R. 6741, H.R. 7559, and H.R. 9036 Before the House Comm. on Immigration and Naturalization*, 69th Cong., 1st Sess. 7 (1926) (statement of S. Parker Frisselle) (*Frisselle Testimony*)). "With the Mexican comes a social problem. . . . It is a serious one. It comes into our schools,

it comes into our cities, and it comes into our whole civilization in California." *Migra!* 29 (quoting *Frisselle Testimony* at 6–7).

Agribusiness disagreed with the Nativists on the question of whether Mexican immigrants were here to stay. The southwestern lobbyists believed that the Mexican migrant is more like a "pigeon," who "goes home to roost" at the end of each season. *City of Inmates* 135 (quoting *Frisselle Testimony* at 6, 10, 14); see also *id.* at 136 (quoting George Clements, "Mexican Indian or Porto Rican Indian Casual Labor?," folder 1, box 62, GPCP (*Clements Testimony*) ("A Mexican would not settle in the United States because 'his homing instincts take him back to Mexico.'")). Even if they were wrong on this point, and the Mexicans stayed, Mexicans could easily be deported if need be, as agribusiness lobbyist George Clements testified in 1928. *Id.* at 135–136 (citing *Clements Testimony*).

Agribusiness also fought racial animus with more racial animus, raising the specter of Black workers from Puerto Rico who might serve their labor needs if Mexicans could not. As Clements warned, "[t]he one problem which should give us pause is the negro problem." *City of Inmates* 136 (quoting *Clements Testimony*). He went on to explain that if Mexicans were denied entry into the United States, the "[Puerto Rican] negro will come." *Ibid.* Clements thus forced Nativists to choose between "Mexico's deportable birds of passage or Puerto Rican Negroes, who, as citizens, would leave the edge of the U.S. empire to settle within the final frontier of Anglo America." *Id.* (citing *Clements Testimony*).

While the two camps had their differences, the congressional debates of 1926 and 1928 make clear that both Nativists and agribusiness industrialists agreed that Mexican immigration presented a "social problem" that had to be managed. A businessman from Texas put it

plainly: "If we could not control the Mexicans and they would take this country it would be better to keep them out, but we can and do control them." *Migra!* 29 (quoting Paul Schuster Taylor, *An American-Mexican Frontier, Nueces County, Texas* 286 (1971)). When questioned about the possibility that Mexicans might permanently settle in the United States, Frisselle offered that "the Mexican pretty well solves that problem himself. He always goes back [to Mexico]." *Frisselle Testimony* 14. But to the extent that more assurances were needed, he promised to keep the Mexican population in check: "We, in California, think we can handle that social problem." *Migra!* 29 (quoting *Frisselle Testimony* at 6). To that end, Frisselle highlighted an ongoing effort to set up labor organizations across the state that could shuffle immigrant workers from region to region throughout the year in accordance with different crops' harvesting periods. *Frisselle Testimony* 13–15. The goal, as he put it, was to get migrants "out of the congested areas" where they were "congregating" (like Los Angeles) and "keep them moving." *Id.* at 14–15.

Yet as time passed, the facts on the ground changed. By 1929, 10% of the Mexican population already lived in the United States, Los Angeles was home to the second-largest Mexican community in the world, and "small Mexican communities were developing as far north as Detroit." *City of Inmates* 136–137. The Nativists may have once been content with the agricultural industry's promises that it could, as Frisselle put it, "handle" the Mexican "problem," but by 1929 agribusiness's assurances of Mexican impermanence looked increasingly illusory.

D. The Criminal Entry And Reentry Provisions Of The Undesirable Aliens Act Of 1929 Were Crafted As A Solution To The "Mexican Problem"

Ultimately, the two sides resolved their differences over how to deal with the "Mexican problem" by creating the unauthorized entry and reentry statutes. As the 1920s wore on, Nativists' patience was wearing thin. But the economy of the Southwestern United States remained critically dependent on Mexican immigrant labor. Crafting a legislative policy that imposed draconian limits on the *number* of Mexicans who could cross the border was politically infeasible, even if both sides of the debate shared a white supremacist disdain for the Mexican immigrant community. The ground was fertile for a compromise, and Senator Coleman Livingston Blease—with the help of Secretary of Labor James Davis—proposed a way to mollify both the Nativists and the agribusiness lobby. His idea would eventually become the Undesirable Aliens Act of 1929, including its provisions criminalizing unauthorized entry and reentry after deportation.

According to one biographer, Senator Blease exhibited a "Negro-phobia that knew no bounds." *City of Inmates* 137 (quoting Kenneth Wayne Mixon, *The Senatorial Career of Coleman Blease* 5 (1967) (*The Senatorial Career*) (M.A. thesis, University of South Carolina)). Blease began his career in government in the South Carolina state assembly, where "his first legislative proposal was a bill to racially segregate all railroad cars in South Carolina." *Ibid.* He later became the state's governor before being elected to the U.S. Senate in 1925. *Ibid.*

Senator Blease telegraphed his views on race openly during his single term in Congress. For example, he spoke out against the establishment of a world court because he could not stand the thought of a "court where we [Anglo-Americans] are to sit side by side with a full

blooded '[n*****].'" *City of Inmates* 137 (quoting *The Senatorial Career* 30).

In another incident, after First Lady Lou Hoover invited the African American wife of a congressman to tea at the White House, Senator Blease attempted to introduce a formal resolution demanding that the president and his wife "remember that the house in which they are temporarily residing is the 'White House.'"[3] Within the resolution was the text of a poem titled "[N******] in the White House," which Senator Blease asked to be read into the congressional record.[4] Upon objection from a fellow legislator, Senator Blease agreed to withdraw it from the record. 71 Cong. Rec. 2946–2947 (1929). But Senator Blease wanted to make his reason very clear: "I have accomplished what I wanted by having it read here[.] * * * [I]n withdrawing it from the record I am doing it because it gives offence to the Senator from Connecticut and not because it may give offence to the [n******]."[5]

As noted above, Senator Blease did not act alone in crafting the 1929 Act. He was assisted by Secretary of Labor James Davis, who was a strong advocate of Dr.

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[3] Isaac Stanley-Becker, *Who's Behind the Law Making Undocumented Immigrants Criminals? An 'Unrepentant White Supremacist.'*, Wash. Post, June 17, 2019, http://www.washingtonpost.com/nation/2019/06/27/julian-castro-beto-orourke-section-immigration-illegal-coleman-livingstone-blease/.

[4] *Offers "[N*****]" Poem*, Providence Evening Trib., June 18, 1929, at 7, 7, https://news.google.com/newspapers?id=hO1gAAAAIBAJ&sjid=uWMNAAAAIBAJ&pg=3029%2C5898411 (*Providence Evening Tribune*).

[5] *Providence Evening Tribune* 7; see also 71 Cong. Rec. 2947 (1929).

Harry H. Laughlin's eugenics theories.[6] See Hans P. Vought, *The Bully Pulpit* 173 (2004). Secretary Davis had previously warned of the "rat-men" coming to the United States via the southern border who would jeopardize the American gene pool. James J. Davis, *The Iron Puddler: My Life in the Rolling Mills and What Came of It* 61 (1922). Like others, he criticized the 1924 Act for closing "the front door to immigration," while leaving the "back door wide open." James J. Davis, *Selective Immigration* 207 (1925).

After the 1924 Act was passed, Davis sponsored a study by Princeton economics professor Robert Foerster on the subject of the "racial problems" of Latin American immigration. Robert F. Foerster, Report Submitted to the U.S. Dep't of Labor, *The Racial Problems Involved in Immigration from Latin America and the West Indies to the United States* (1925). The report was subsequently incorporated into the permanent records of the Committee on Immigration and Naturalization of the House of Representatives as it discussed the potential revision of the 1924 Act. *Immigration from Latin America, the West Indies, and Canada: Hearings Before the House Comm. on Immigration and Naturalization*, 68th Cong., 2d Sess. 303–338 (1925). In his report, Professor Foerster provided a racial analysis of Mexico and every country located south of the U.S. border, finding that most of their inhabitants were Indian, Black, or mixed race, all of which he described as "dubious race factor[s]." *Id.* at 334–335.

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[6] Dr. Laughlin was the director of the Eugenics Record Office, and was well known for designing a model sterilization law that many regimes, including Nazi Germany, had used as a template. Mae M. Ngai, *Impossible Subjects* 24 (2004); *Laughlin's Model Law*, Harry Laughlin and Eugenics: A Selection of Historical Objects from Harry H. Laughlin Papers, Truman State University, https://historyofeugenics.truman.edu/altering-lives/sterilization/model-law/.

He strongly advised that further immigration from south of the border be curtailed because "when an immigrant is accepted by the country, a race element or unit is added into the race stock of the country." *Ibid.*

Senator Blease and Secretary Davis also found allies in the House of Representatives. First there was Representative John C. Box, discussed *supra*, who considered the goal of immigration law to be "the protection of American racial stock from further degradation or change through mongrelization." 69 Cong. Rec. 2817 (1928). The second was Representative Albert Johnson, Chair of the House Immigration and Naturalization Committee, who also headed the Eugenics Research Association. Daniel Okrent, *The Guarded Gate: Bigotry, Eugenics, and the Law that Kept Two Generations of Jew, Italians, and Other European Immigrants out of America* 271, 326 (2019). Turning to legislation that would exclude the "Mexican race" following the 1924 Act, Representative Johnson explained that while prior reform was economically motivated, now "the fundamental reason for it is biological." *Id.* at 3 (quoting Albert Johnson, *Immigration, a Legislative Viewpoint*, Nation's Bus., July 1923, at 26, 26).

In 1929, Senator Blease and Secretary Davis saw an opportunity to broker a legislative compromise that would address the political debate over Mexican immigration. Their idea would not impose any cap on *authorized* immigration—as had been fruitlessly attempted—but instead would regulate so-called "unauthorized" migration. They thus proposed legislation that would criminalize unlawful entry into the United States for the first time in the nation's history. *City of Inmates* 137. "[U]nlawfully entering the country" would become a misdemeanor punishable by a $1,000 fine, up to one year in prison, or both. *Id.* at 138 (quoting Act of March 4, 1929, Pub. L. No. 70-1018, ch.

690, § 2, 45 Stat. 1551). "Unlawfully *returning* to the United States after deportation" was classified as a felony, punishable by a $1,000 fine, up to two years in prison, or both. *Ibid.* (emphasis added). Agribusiness was onboard; they liked the idea of taking advantage of inexpensive labor when they needed it, and making those people disappear at the end of the harvest. See *id.* at 138 (citing *Frisselle Testimony* at 8 ("We, in California, would greatly prefer some set up in which our peak labor demands might be met and upon the completion of our harvest these laborers returned to their country.")).

Notably, the statute did not punish overstaying a visa, only unauthorized entry and reentry after deportation. Thus, it authorized punishment for those who crossed by land—who were overwhelmingly Mexicans—rather than those who overstayed their authorized period of admission—who were overwhelmingly Europeans.

II. THE REENACTMENT AND RECODIFICATION OF THE CRIMINAL ENTRY AND REENTRY STATUTES FAILED TO PURGE THEIR UNDERLYING RACIAL ANIMUS

While Congress recodified and reenacted the unauthorized entry and reentry statutes after 1929, it never purged the racial animus underlying them. The history of the period following 1929 shows that Congress's actions in 1952 and thereafter maintained—rather than cleansed—the original racist intent.

A. Racial Animus Against Mexican Migrants Was Still Pervasive In The Lead-Up To The McCarran-Walter Act of 1952

The history of the years leading up to the 1952 reenactment makes clear that racial animus against Mexicans remained a driving force motivating immigration policy throughout the 1940s and 1950s.

As many United States citizens joined the armed services in the early 1940s, southwestern farmers faced domestic labor shortages. Kelly Lytle Hernández, *The Crimes and Consequences of Illegal Immigration: A Cross-Border Examination of Operation Wetback, 1943 to 1954*, 37 W. Hist. Q. 421, 424 (2006) (*Crimes and Consequences*); Mae M. Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* 135–137 (2004). In fact, in 1942 the U.S. Employment Service officially certified that an extra 6,000 contract laborers were required to meet labor demands. Ngai 137. The shortage would lead to the Bracero Program, a series of agreements between the United States and Mexican governments that enabled the migration of short-term Mexican contract laborers, known as braceros, into and out of the United States. *Crimes and Consequences* 423.

The federal government's embrace of foreign contract labor represented "a momentous break with past policy and practice," Ngai 137, insofar as it adopted a practice previously rejected as inconsistent with the prohibition on slavery. Contract labor in the wake of the Civil War had generally been perceived as "unambiguously unfree" and hence, "like slavery," antithetical to the voluntary labor "upon which democracy depended." *Id.* at 137–138. As a result, foreign contract labor had been outlawed in the mainland United States since 1885. In fact, it had either been abolished or never instituted in the first place in territories like Hawai'i, the Philippines, and Puerto Rico as they came under American colonial rule in the late nineteenth century. *Ibid.*

The fact that "decades later, and in the mainland United States, Americans would turn to a colonial labor practice that they had rejected" shows how "Mexican workers in the Southwest and California were racialized as a foreign people, an 'alien race' not legitimately present

or intended for inclusion in the polity." Ngai 138. That Mexican workers were recruited for an institution deemed unconscionable for others is an "expression of the legacies of slavery and conquest." *Ibid.*

Nevertheless, the Bracero Program found many willing participants in Mexico. The combination of land privatization, mechanization, the export orientation of agricultural production and food shortages compelled rural Mexican laborers to seek survival through migration. *Crimes and Consequences* 424–425.

At the same time, other dynamics conspired to lead to a separate spike in *un*authorized immigration to the United States. *Crimes and Consequences* 425; Ngai 146. First, many Mexicans did not meet the requirements of the Bracero Program, which only accepted young, healthy men with agricultural experience. *Crimes and Consequences* 426. Second, some states that enforced racial segregation were excluded from the Bracero Program based on Mexico's objection to race discrimination against Mexican workers. Ngai 147. As a result, Texas, Arkansas, and Missouri growers who became "ineligible to use braceros[] increasingly resorted to illegal labor during the 1940s." *Ibid.* Third, some braceros deserted their contracts because of inhumane work conditions that violated the terms of the Bracero Program. Such violations included severe underpayment, illegal deductions, threats, mistreatment, and serious safety risks. *Id.* at 137–146. And if they deserted their contracts but did not depart from the United States, the braceros would lose their immigration status. *Id.* at 147.

From Mexico's perspective, the migration of young laborers across its northern border both exposed the failure of the Mexican Revolution to provide economic stability for its citizens and also drained the country of its own cheap labor supply. *Crimes and Consequences* 425–426.

Mexican officials convened meetings with a host of U.S. government agencies and demanded heightened border control in exchange for facilitating authorized immigration through the Bracero Program. They requested, among other things, that the United States return to Mexico anyone who had crossed illegally. *Id.* at 427. In 1944, the United States obliged. *Id.* at 428.

As a result of these bilateral discussions, United States immigration and deportation policies became focused on Mexico and the federal government undertook an "intensive drive on Mexican aliens." *Crimes and Consequences* 428. The resulting shift of resources and personnel ultimately culminated in "Operation Wetback," a harsh immigration enforcement campaign targeting unauthorized Mexican immigrants whose legacy reverberates to this day. See *Crimes and Consequences* 421; Ngai 155–160; Part II.C, *infra*.

Before 1943, the majority of Border Patrol officers worked along the northern, rather than southern, border. *Crimes and Consequences* 427. But Border Patrol now committed to strengthening its presence along the Mexican border by "filling all existing vacancies and detailing approximately 150 Patrol Inspectors from other areas" to the southern border. The number of inspectors working in the south doubled by year end. *Ibid.*

The United States and Mexico also worked in tandem to deploy trains and trucks to deport Mexican immigrants to the interior of Mexico to ensure these immigrants could not easily return to the United States. *Crimes and Consequences* 429–430. Reports of the deportations described inhumane conditions and "indescribable scenes of human misery and tragedy." *Id.* at 432–433.

Additionally, in 1945, INS and the Border Patrol began construction on fencing designed to compel undocumented immigrants to enter the United States through

desert lands and mountains that were extremely dangerous to cross. *Crimes and Consequences* 438–439. One segment of the fence was removed from a demobilized WWII internment camp for Japanese American families to be planted along the U.S.-Mexico border. See *Migra!* 131.

At the same time that the U.S. government was deploying these on-the-ground measures, national sentiment both inside and outside of government coalesced around a stereotype of the "wetback" "as a dangerous and criminal social pathogen [that] fed the general racial stereotype 'Mexican.'" Ngai 149. Within INS, a "conventional view" took hold "that illegal aliens were by definition criminal" because once "the 'wetback' starts out by violating a law * * * it is easier and sometimes appears even more necessary for him to break other laws." *Ibid.*

Gradually, any effort to distinguish between the supposed characteristics of unauthorized entrants and the local population of Mexican descent was lost. An early 1950s sociological study revealed that these groups were "lumped together as 'Mexicans' and the characteristics that are observed among the wetbacks are by extension assigned to the local people." Ngai 149 (quoting Lyle Saunders & Olen Leonard, *The Wetback in the Lower Rio Grande Valley* 70 (1951)).

Meanwhile, the Senate Judiciary Committee convened a subcommittee to conduct a comprehensive study of the nation's immigration policy. It would culminate in the passage of the McCarran-Walter Act of 1952. Ngai 237.

The work of the subcommittee was heavily influenced by the views of Senator Pat McCarran, a so-called "Cold War warrior." Ngai 237. Under his leadership, the subcommittee produced a report that concluded that "the Communist movement in the United States is an alien

movement, sustained, augmented, and controlled by European Communists and the Soviet Union." *Ibid.* Senator McCarran viewed the 1952 Act as a necessary tool to preserve "this Nation, the last hope of Western civilization" against efforts (by foreigners) to "overrun, pervert[], contaminate[], or detroy[]" it. *Ibid.*

B. The 1952 Act Failed to Reconsider, Let Alone Purge, the Racial Animus Of The Criminal Entry and Reentry Provisions

Although the 1952 Act recodified the criminal entry and reentry provisions, with some revisions, the anti-Mexican racist views that underpinned the 1929 legislation remained relevant. Under this Court's precedent, no change in Congress's intent should be inferred from the revision and consolidation of statutes where, as here, there is no "clearly expressed" intention to "change their effect" or "alter[] the scope and purpose" of the enactments. See *Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U.S. 222, 227 (1957). The recodified 1952 Act may have been "free of discriminatory taint" had Congress "actually confront[ed] [the 1929 Act's] tawdry past in reenacting it" and produced a law "untethered to racial bias." *Ramos* v. *Louisiana*, 140 S. Ct. 1390, 1410 (2020) (Sotomayor, J., concurring). But Congress did neither.

The 1952 Act changed immigration law and policy in several ways, but the major changes did not cleanse or even address the anti-Mexican sentiment underpinning the 1929 legislation. First, Congress repealed the complete exclusion of Asian immigrants from naturalization, although it maintained quotas for Asian immigrants. Ngai 238. Second, the 1952 Act codified suspension of deportation for individuals who had been continually present in the country for seven years with spouses or children who were United States citizens. This modification benefited a large number of European immigrants, but

not many Mexicans: Of the approximately 35,000 suspensions of deportation from 1941–1960, nearly three-quarters were of Europeans; only 8% involved Mexicans. Ngai 82–88 & n.120, 239.

The 1952 Act also "brought the many fragments of the nation's immigration and naturalization laws under a single code. Still, it was less an overhaul than a hardening of existing policy, with a few reforms and innovations" calculated to address the new Cold War context. Ngai 237. Indeed, the 1952 Act only reinforced the central view of the 1929 debates: that the arrival and assimilation of "aliens" who could undermine the uniformity of the white "cultural background" of the United States was undesirable and, indeed, a threat to national security. President Truman actually vetoed the Act "principally for its racist features," but Congress overrode his veto. *Id.* at 239. Scholars have noted that the 1952 Act's emphasis on "similarity of cultural background" was an attempt to preserve the United States' "Western" identity through immigration policy. *Id.* at 237.

With respect to the criminal entry and reentry provisions specifically, the 1952 Act made no substantive changes to ameliorate their original racist purpose. See Immigration and Nationality (McCarran-Walter) Act, ch. 477, § 276, 66 Stat. 229 (1952); see also Ingrid V. Eagly, *Prosecuting Immigration*, 104 Nw. U. L. Rev. 1281, 1326–1327 (2010) (*Prosecuting Immigration*); Doug Keller, *Re-Thinking Illegal Entry and Re-Entry*, 44 Loy. U. Chi. L.J. 65, 83 (2012). To the contrary, the 1952 Act's changes made unlawful entry and reentry easier to prosecute, thus exacerbating rather than diminishing their racially discriminatory harm.

As to reentry, Congress took what were previously three scattered provisions (targeting anarchism, prostitution, and general illegal reentry) and combined them into

one provision. The illegal reentry portion of that statute largely tracks Section 1326 to this day. Keller, 44 Loy. U. Chi. L.J. at 84. The revised reentry provision, unlike its predecessor, explicitly penalizes being "found in" the United States after having been deported (if the Attorney General has not granted permission to return). As the relevant committee report explained, "[t]his change [permits prosecution where] it is not possible for the Immigration and Naturalization Service to establish the place of reentry, and hence the proper venue, arising in prosecutions against a deported alien under the 1929 act." See *Joint Hearings on S. 716, H.R. 2379, and H.R. 2816 Before the House and Senate Subcomms. of the Comms. on the Judiciary*, 82d Cong., 1st Sess. 716 (1951). In other words, the change made prosecution *easier* by allowing defendants to be tried in any district in which they were found, rather than requiring the prosecutor to establish the place of reentry to try a defendant consistent with the Sixth Amendment. Keller, 44 Loy. U. Chi. L.J. at 85 & nn.99–100.

Another (seemingly benign) revision also worked to make it easier to prosecute and convict immigrants. The 1952 Act lessened the penalty for a first illegal entry from one year to six months in prison, which made it a petty offense. *Prosecuting Immigration* 1326–1327; Keller, 44 Loy. U. Chi. L.J. at 83–84 & n.94. As a result, after 1952, defendants charged with a first illegal entry lost the right to a jury trial. *Prosecuting Immigration* 1327 & n.268; Keller, 44 Loy. U. Chi. L.J. at 84. At the time it made this change, Congress had been told that grand juries in El Paso in the 1940s refused to indict in more than 90% of cases because the criminal entry laws were "locally unpopular." *Prosecuting Immigration* 1327 & n.269 (quoting *Immigration and Naturalization: Hearing Before the Senate Subcomm. on Immigration of the Senate*

Comm. on the Judiciary, 80th Cong., 1st Sess. 30 (1948)). That diminished process not only endured through subsequent reenactments of the criminal entry provision, but eventually opened the door to having magistrate judges, rather than Article III judges, preside over illegal entry trials. *Id.* at 1326–1327.

These amendments laid the groundwork for the massive use of illegal entry and reentry prosecutions that exists to this day. See *Prosecuting Immigration* at 1281–1282, 1353 & fig.4; Ingrid V. Eagly, *The Movement to Decriminalize Border Crossing*, 61 B.C. L. Rev. 1967, 1984 & fig.2, 1988 & tbl.1 (2020) (*The Movement*). They cannot plausibly be read to contain a clear expression of an intent to purge the criminal entry and reentry provisions of their racist origins. Accordingly, no change in Congress's intent should be inferred from these amendments. See *Fourco Glass Co.*, 353 U.S. at 227. The racist intent that propelled the original enactment of these provisions in 1929 remained operative after the 1952 recodification.

C. Nothing In The Post-1952 History Purged The Racist Intent Of The 1929 Statute

No developments after 1952 served to purge the racist intent behind the 1929 statute. The inhumane treatment of Mexican immigrants at the border continued and intensified in the years after Congress passed the 1952 Act. In 1954, President Eisenhower appointed retired Army General Joseph Swing as the commissioner of INS to focus on the militarization of the INS. *Crimes and Consequences* 442. According to Swing, the "'alarming, ever-increasing, flood tide' of undocumented migrants from Mexico constituted 'an actual invasion of the United States'" that necessitated a reciprocal response. Ngai 155 (quoting typescript, Joseph Swing, Report to the American Section of

the Joint Commission on Mexican Migrant Labor, September 3, 1954, 3, file CO629P, INS-CO).

The government's response came in the form of Operation Wetback, an intensive law enforcement campaign designed to be a "direct attack * * * upon the hordes of aliens facing [the United States] at the border." Ngai 155. Under Operation Wetback, the INS redirected its resources from the northern and eastern districts to the southern border. The INS deployed 750 Border Patrol officers, 300 jeeps, cars, and buses, seven airplanes, and other equipment in an effort to sweep through the southwestern United States, performing raids and mass deportations. *Ibid.* The policy of discouraging illegal reentry by relocating apprehended migrants "far into" the Mexican interior also continued in full force. *Id.* at 156.

Prosecutions under the criminal entry and reentry provisions also surged during this period. *Prosecuting Immigration* 1352–1353. In what were referred to by the Attorney General as the "wet-back" cases, thousands of laborers were criminally charged by the federal government, served little if any jail time, and were sent back across the Southwest border. *Id.* at 1352. And in Arizona, the U.S. Attorney's Office instituted a zero-tolerance policy of prosecuting all unauthorized border crossers. *Ibid.*

Operation Wetback also resulted in mass deportations on an enormous scale. Between 1953 and 1955, the INS reported capturing 801,069 Mexican immigrants—twice the number of apprehensions from 1947 through 1949. Ngai 156 (quoting minutes, meeting of American section, Joint Migratory Labor Commission, September 10–11, 1954, file 56321/448G, box 3299, accession 58A734, INS). General Swing sought to capitalize on Operation Wetback's success and build a fence along sections of the border in California and Arizona to deter "the illegal migration of 'disease-ridden' women and children whom he said

comprised over 60 percent of those entering surreptitiously after Operation Wetback." *Ibid.*

Decades later, during a 2015 debate for the Republican nomination for President, then-candidate Donald Trump praised the operation, saying:

> Dwight Eisenhower, good president, great president, people liked him. I like Ike, right? The expression. I like Ike. Moved a million and a half illegal immigrants out of this country, moved them just beyond the border. They came back. Moved them again, beyond the border, they came back. Didn't like it. Moved them way south. They never came back. Dwight Eisenhower. You don't get nicer, you don't get friendlier. They moved a million and a half people out. We have no choice.

Dara Lind, *Operation Wetback, the 1950s Immigration Policy Donald Trump Loves, Explained*, Vox (Nov. 11, 2015), https://www.vox.com/2015/11/11/9714842/operation-wetback).

Further, Operation Wetback's operational success coincided with a significant increase in prosecutions for unauthorized entry and reentry. *Prosecuting Immigration* 1352–1353. Unauthorized entry quickly became the most prosecuted crime on the entire federal docket, and in the decades since the total number of prosecutions has increased dramatically. *Ibid.*; see also *The Movement* 1984. And unauthorized reentry prosecutions, for their part, have risen steeply since the early 2000s. *The Movement* 1988 & tbl.1.

Given this background, subsequent reenactments and reauthorizations of Sections 1325 and 1326 after 1952[7] do not represent a break with the past. Congress has never taken any action to remove the taint of the racism inherent in their passage in 1929. Although some of the post-1952 enactments made changes to peripheral provisions of the statute, including by adding Section 1326(d), the subject of this case, none of them enacted material changes to the core criminal-liability provisions in Sections 1325 or 1326. Congress's repeated failure to grapple with the "sordid history" of those provisions makes clear that the intent underlying them remains. *Ramos* v. *Louisiana*, 140 S. Ct. 1390, 1410 (2020) (Sotomayor, J., concurring); see also *Espinoza* v. *Montana Department of Revenue*, 140 S. Ct. 2246, 2273 (2020) (Alito, J., concurring) (recognizing that "it emphatically does not matter whether Montana readopted the no-aid provision for benign reasons. The provision's 'uncomfortable past' must still be 'examined'").

III. IN LIGHT OF THE RACIST ORIGINS OF SECTION 1326, THE COURT SHOULD CONSTRUE ANY STATUTORY AMBIGUITY IN FAVOR OF RESPONDENT

Where, as here, a criminal law's original purpose was defined by racial animus, the Court should interpret any ambiguity in a provision in favor of the defendant—in this case, Respondent.

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[7] See Act of Nov. 18, 1988, Pub. L. No. 100-690, Title VII, § 7345(a), 102 Stat. 4471; Act of Nov. 29, 1990, Pub. L. No. 101-649, Title V, § 543(b)(3), 104 Stat. 5059; Act of Sept. 13, 1994, Pub. L. No. 103-322, Title XIII, § 130001(b), 108 Stat. 2023; Act of Apr. 24, 1996, Pub. L. No. 104-132, Title IV, §§ 401(c), 438(b), 441(a), 110 Stat. 1267, 1276, 1279; Act of Sept. 30, 1996, Pub. L. No. 104-208, Div. C, Title III, §§ 305(b), 308(d)(4)(J), (e)(1)(K), (14)(A), 324(a), 110 Stat. 3009-606, 3009-618 to 3009-619, 3009-629.

This Court just recently emphasized, in *Ramos* v. *Louisiana*, 140 S. Ct. 1390 (2020), that where racism infected a law's origins, that uncomfortable history must not be ignored. *Ramos* concerned the constitutionality of Louisiana and Oregon laws permitting non-unanimous jury convictions. These state rules had originally been enacted for racist reasons, but had since been recodified in a non-discriminatory context. The Court struck down the nonunanimous jury laws, in part, because it could not ignore the "racially discriminatory *reasons* that [the state] adopted [its] peculiar rules in the first place." *Ramos*, 140 S. Ct. at 1401. The majority opinion determined that the openly racist purpose of the laws demanded acknowledgement, and pondered how the Court could possibly "ignore the very functions those rules were adopted to serve." *Id.* at 1401 n.44.

Although Louisiana and Oregon recodified the nonunanimous jury laws at issue in *Ramos* "in new proceedings untainted by racism," this Court declined to "supply an excuse for leaving an uncomfortable past unexamined." *Ramos*, 140 S. Ct. at 1401 n.44. As in *Ramos*, the fact that Sections 1325 and 1326 have been reenacted and recodified since their inception does not purge them of their original racist intent. As Justice Kavanaugh emphasized in his concurrence, were courts to turn a blind eye to a statute's disturbing background, "the resulting perception of unfairness and racial bias [could] undermine confidence in and respect for the criminal justice system." *Id.* at 1418. In construing Section 1326(d) here, this Court should likewise be guided by the ever-present "imperative to purge racial prejudice from the administration of justice." *Ibid.* (Kavanaugh, J., concurring in part) (citation and internal quotation marks omitted).

While this case does not present the Court with the occasion to consider the question whether the racist history of Sections 1325 and 1326 renders them unconstitutional, that history can and should inform the Court's approach in the more modest undertaking before it today: narrowly construing Section 1326(d) to afford additional judicial review. Such an interpretation could ameliorate some of the discriminatory impact flowing from the enforcement of the substantive criminal reentry provision.

Adopting a defendant-favorable construction of Section 1326(d) would properly leave for another day the constitutional question whether the criminal reentry provision, like its misdemeanor counterpart, violates the Fifth Amendment because it is infected with racial animus. Holding that Respondent did not satisfy the requirements of Section 1326(d) even though he was deported pursuant to an unlawful removal order would perpetuate the world the Nativists dreamed of: one in which the law facilitates the expulsion of Mexican immigrants to ensure they do not dilute the racial purity of the United States.

Permitting the punishment of Mr. Palomar-Santiago, a Mexican immigrant, even though he should not have been deported in the first place, is precisely the result Senator Blease would have wanted.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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MARCH 2021