No. 21-50145

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE

v.

MANUEL RODRIGUES-BARIOS,
DEFENDANT-APPELLANT

On Appeal from the United States District Court for the Southern District of California 20CR1684-LAB

ANSWERING BRIEF FOR THE UNITED STATES

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INTRODUCTION

In 1952, following a "complete investigation of our immigration system," S. Rep. No. 81-1515, Congress passed a comprehensive immigration statute that, among other things, made it a crime to attempt to reenter the United States after deportation. Congress has since amended the statute five times over the last 70 years, and no version has ever made distinctions based on race or ethnicity. Nevertheless, Rodrigues-Barios asks this Court to strike down the statute as unconstitutional, based on the statements of a handful of legislators—made two decades before the law's passage—that demonstrate some members of Congress harbored racial animus against non-white immigrants in the 1920s.

This Court should deny his request. As the district court properly held, Congress has broad authority over this country's immigration policy as an incident of its sovereignty, and Section 1326 is subject to rational basis review. It easily meets this test, as Congress plainly has a legitimate interest in deterring reentry after deportation. This Court can affirm on this basis alone.

But even if this Court were to apply a more searching review under the framework of *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977), Section 1326 would still pass constitutional muster. The statements Rodrigues-Barios highlights from the 1920s have little probative value given the passage of time and the nearly complete turnover of Congress between 1929 and 1952. The law is also clear that Congress was not required to affirmatively "purge[] the 'taint'" of any past discriminatory legislation when it passed the new illegal reentry statute. *Abbott v. Perez*, 138 S. Ct. 2305, 2324-25 (2018). And Rodrigues-Barios does not otherwise point to anything in the legislative history of the statute that would support a finding of discriminatory intent on the part of Congress in 1952. Instead, he relies on the reasoning of a single district court decision in *United States v. Carrillo-Lopez*, 555 F. Supp. 3d 996 (D. Nev. 2021), which held that discrimination was a "motivating factor" in the passage of Section 1326. But the

limited facts the court relied on in *Carrillo-Lopez* do not actually support this finding, and the "outlier" decision has "been widely criticized" in the year since its publication. *United States v. Santos-Reynoso*, WL 2274470, at *2 (S.D.N.Y. June 23, 2022). To date, more than three dozen other district court decisions have affirmed the continued constitutionality of Section 1326 in response to similar challenges. This Court should do the same.

JURISDICTION AND BAIL STATUS

The district court had jurisdiction under 18 U.S.C. §3231, as Rodrigues-Barios stood charged with an offense against the United States. Excerpts of Record 2-(ER)-302. On June 15, 2021, the court entered final judgment. 2-ER-21. Rodrigues-Barios timely noticed his appeal on June 23, 2021. Fed. R. App. P. 4(b)(1); 2-ER-304. This Court has jurisdiction under 28 U.S.C. §1291. Rodrigues-Barios is not in custody.

QUESTION PRESENTED

Does the federal statute criminalizing illegal entry after deportation, 8 U.S.C. § 1326, violate the equal protection component of the Fifth Amendment's due process clause?

STATUTORY PROVISIONS

The relevant statutes and guidelines are set forth in the addendum to this brief.

STATEMENT

Rodrigues-Barios is a citizen and national of Mexico who came to the United States without inspection at the age of 20. Supplemental Excerpts of Record (SER)-33, 54. Nine years later, he was arrested in Los Angeles and charged with assault with a deadly weapon and making criminal threats, following an altercation outside a restaurant. SER-34, 54. Rodrigues-Barios pled guilty to one count of making felony threats, and he was sentenced to 28 months in state custody. SER-17, 54. Upon release, he was ordered deported and removed to Mexico. SER-55. Rodrigues-Barios immediately tried to return to the United States, but he was arrested near the border and charged with attempted entry after deportation, in violation of 8 U.S.C. § 1326. *Id*. He pled guilty, received a sentence of probation, and immigration officials removed him to Mexico a second time. SER-55-56.

The following year, Rodrigues-Barios climbed over the border fence "behind a shopping mall, approximately one mile west of the Calexico, California West Port of Entry." SER-56. A Border Patrol agent responded to the area, and Rodrigues-Barios admitted that he had just climbed over the fence and did not have any documents that would allow him to enter the United States legally. SER-61.

He was arrested and charged with attempted entry after deportation in violation of 8 U.S.C. § 1326. SER-59-62.

A few months after his arrest, Rodrigues-Barios filed a motion to dismiss on the grounds that 8 U.S.C. § 1326 was unconstitutional. 2-ER-46. He argued that when Congress first enacted an illegal reentry statute in 1929, it did so with a discriminatory intent against non-white immigrants, and the statute continued to have a disparate impact today. 2-ER-49-69. In response, the United States argued that immigration laws are only subject to rational basis review and Congress had a legitimate interest in deterring the reentry of deported aliens. 2-ER-37. The United States also argued that the court should not examine the 1929 version of the statute but should look instead to the 1952 Immigration and Nationality Act (INA), which enacted the version of the statute that Rodrigues-Barios was actually charged with violating. 2-ER-40-45.

At a hearing on the motion, the court gave a "preliminary finding" that the statute was subject to rational basis review since the government has "great leeway to legislate" in the area of immigration. 1-ER-3-4. The court also noted that "it would be a stretch" to find that the statute was "racially motivated over a hundred years ago, and therefore, the statute has to be struck down

in all its applications." 1-ER-5. The court explained that the statute had been "amended several times since the original enactment," and asked why it would "look back on some original enactment of the statute" rather than studying the "the motives of the Congress at the time of the most recent enactment?" 1-ER-5-6. When Rodrigues-Barios responded that if Congress wanted to cure the discriminatory intent from a prior statute, they would have to have "discussion on the record" at the time of reenactment, the court inquired "[w]ho would require that? . . . [t]he courts would require that? . . . How does that not violate the separation of powers to dictate to Congress what discussion they must have before they enact a law?" 1-ER-8.

As to disparate impact, Rodrigues-Barios argued that the number of criminal prosecutions against Mexican and Central American defendants was much higher and "we don't see that number of convictions apply to or charges brought against Canadians" crossing the northern border, or similar charges against "visa overstays" from Europe. 1-ER-10. In response, the court noted that the difference in numbers was caused by geography as there were simply more people trying to cross along the Southern border "and the government's policy has nothing to do with that." 1-ER-14.

Ultimately, the court agreed that rational basis review should apply, and it found that there was "a rational basis for this [statute]." 1-ER-18. The court also noted that it would be "very surprised," if the Supreme Court were to invalidate a law based on "what we think the motives of the legislature" were at the time of passage, particularly when the law has been "reenacted a number of times," and "there's been an opportunity to look at everything again, and in form and in substance it comes out the same." 1-ER-18.

Following the court's ruling, Rodrigues-Barios agreed to a stipulated-facts bench trial. 2-ER-23. The court found him guilty and imposed a sentence of time served. SER-46. This appeal followed.

SUMMARY OF ARGUMENT

Rodrigues-Barios's conviction should be affirmed. This Court has long recognized that Congress has broad authority over "immigration policy as an incident of sovereignty," *United States v. Hernandez-Guerrero*, 147 F.3d 1075, 1076 (9th Cir. 1998). Indeed, "over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens." *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972). In light of this broad authority, this Court has repeatedly applied an unexacting standard of review

to a range of immigration-related statutes and policies. Here, the district court properly found that Section 1326 is an immigration statute; rational basis review applies; and the government clearly has a legitimate interest in deterring reentry after deportation. Contrary to Rodrigues-Barios' arguments, precedent does not require a more searching inquiry based on the of the nature of his allegations, the fact that Section 1326 is a criminal statute, or the fact that it applies to more than the formal "admission" of aliens. The district court properly found that Section 1326 satisfies rational basis review, and this Court can affirm on that basis alone.

Were this Court to undertake a more searching review under the framework of *Arlington Heights*—an inapposite case about a municipal zoning decision that has nothing to do with national sovereignty—Rodrigues-Barios has still not shown that Congress was motivated by racial discrimination when it passed Section 1326. Rodrigues-Barios focuses much of his argument on the statements of legislators in a different Congress—23 years before Section 1326 was passed—that suggest at least some harbored racial animus towards Hispanic immigrants. But these statements are relevant only as "historical background," and they have little probative value since very few members of the 1929 Congress were even still in office at time Section 1326 was debated and passed.

Moreover, contrary to Rodrigues-Barios's argument, the Supreme Court made clear in *Abbott* that there is no requirement that legislators affirmatively cure the "taint" of past versions of a bill when they make meaningful changes to an existing law. With the focus properly on the Congress that actually passed Section 1326, Rodrigues-Barios offers no real evidence of any discriminatory intent. He cites to no legislative history of the act; no departures from substantive or procedural norms; and no contemporaneous statements of any lawmakers about the statute that would suggest an improper motive. Instead, he follows the reasoning of the district court in *Carrillo-Lopez*, 555 F. Supp. 3d 996, and relies on the "lack of debate" surrounding Section 1326; the statements of President Truman in vetoing the statute; a letter from an administration official summarizing the bill; and certain isolated statements from other members of Congress about different legislation. It takes more than this to overturn a valid, facially neutral act of Congress. As every other district court to have reached the question has held, there is simply not enough evidence that Congress was "motivated" by racial animus when it passed Section 1326 to support striking down the statute as unconstitutional. This Court should reach the same conclusion here.

STANDARD OF REVIEW

The constitutionality of a statute is a question of law that this Court reviews de novo. *United States v. Dowai*, 839 F.3d 877, 879 (9th Cir. 2016). Whether the court applied the correct legal standard when evaluating Rodrigues-Barios's constitutional argument is also reviewed de novo. *United States v. Washington*, 797 F.2d 1461, 1470 n. 12 (9th Cir. 1986).

ARGUMENT

A. The District Court Properly Applied Rational Basis Review and Found That Section 1326 Easily Passes That Test

1. *Legal Principles*

The Fifth Amendment of the U.S. Constitution provides that no person shall be "deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. Unlike the Fourteenth Amendment (which applies to the States), the Fifth Amendment does not contain an express equal protection provision. Since 1954, however, the Supreme Court has construed the Amendment's guarantee of "due process of law" for all "person[s]," U.S. Const. amend. V, to provide analogous protection. See *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). And the Court has generally applied the same equal protection standards in both contexts, see *Wayte v. United States*, 470 U.S. 598, 608 n.9 (1985), meaning that any law

drawing (for example) gender-based lines would have to satisfy heightened scrutiny. See *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1689-90 (2017).

Federal immigration laws are an exception to that general rule. See *Hampton v. Wong*, 426 U.S. 88, 100 (1976). While state statutes that distinguish between citizens and noncitizens remain subject to heightened scrutiny, see *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971), the Supreme Court has taken a different approach to federal laws drawing such distinctions, in deference to the federal government's exclusive authority over immigration matters. "For reasons long recognized as valid," the Court has explained, "the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government." *Mathews v. Diaz*, 426 U.S. 67, 81 (1976). "Because decisions in these matters may implicate 'relations with foreign powers,' or involve 'classifications defined in the light of changing political and economic circumstances,' such judgments 'are frequently of a character more appropriate to either the Legislature or the Executive.'" *Trump v. Hawaii*, 138 S. Ct. 2392, 2418-19 (2018) (quoting *Mathews*, 426 U.S. at 81). Therefore, the Supreme Court "has firmly and repeatedly endorsed the proposition that Congress

may make rules as to aliens that would be unacceptable if applied to citizens." *Demore v. Kim*, 538 U.S. 510, 522 (2003).

"The reasons that preclude judicial review of political questions" thus "also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization," *Mathews*, 426 U.S. at 81-82—including congressional enactments that "regulate the admission and exclusion of aliens." *Fiallo v. Bell*, 430 U.S. 787, 793 n.5 (1977). This Court has equated that narrow standard of review with the rational-basis test applied to other classifications that do not affect "fundamental rights nor proceed along suspect lines," *Heller v. Doe*, 509 U.S. 312, 319 (1993) (quotation marks omitted). See, e.g., *Ledezma-Cosino v. Sessions*, 857 F.3d 1042, 1049 (9th Cir. 2017) (en banc). "Under the rational basis test, a federal policy survives an equal protection challenge if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *United States v. Ayala-Bello*, 995 F.3d 710, 715 (9th Cir.) (quotation marks omitted), cert. denied, 142 S.Ct. 513 (2021). That form of review is deferential. The government need not articulate the purpose underlying its policy, *id.*, or "produce evidence to sustain [its] rationality," *Heller*, 509 U.S. at 320. Rather, "[t]he burden falls on the party" challenging the law "to

disprove the rationality" of the classification made, *United States v. Ruiz-Chairez*, 493 F.3d 1089, 1091 (9th Cir. 2007), including by negating any conceivable basis that could support it, see *Ayala-Bello*, 995 F.3d at 715.

The Supreme Court and this Court have applied this "unexacting" standard, *Reno v. Flores*, 507 U.S. 292, 306 (1993)—or arguably more deferential ones, see *Hawaii*, 138 S. Ct. at 2419—to an array of challenges in civil and criminal cases. The Court in *Fiallo*, for example, applied minimal scrutiny to a law that drew a gender-based distinction by giving special immigration preferences to mothers, but not fathers, of U.S. citizen children. 430 U.S. at 792-99. In *Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 602 (9th Cir. 2002), this Court applied rational basis to a statute that expressly distinguished between individuals based on their national origin to provide more favorable treatment to certain aliens. In *Ledezma-Cosino*, this Court reviewed under the rational basis standard a law that barred "habitual drunkards" from qualifying for cancellation of removal. 857 F.3d at 1048-49. And in the criminal context, this Court has employed that standard in rejecting equal protection challenges to provisions of the Sentencing Guidelines applicable to "illegal reentrants," *Ruiz-Chairez*, 493 F.3d at 1091; to a deportation order that formed the basis for a later illegal-reentry

prosecution under Section 1326, see *United States v. Barajas-Guillen*, 632 F.2d 749, 752 (9th Cir. 1980); and to an Executive Branch policy treating the crime of illegally entering the United States differently from other petty offenses, *Ayala-Bello*, 995 F.3d at 714-15. These decisions, and others, confirm the Supreme Court's recent statement that "a circumscribed [judicial] inquiry applies to any constitutional claim concerning the entry of foreign nationals." *Hawaii*, 138 S. Ct. at 2420 n.5.

2. *Section 1326 Is an Immigration Statute Subject to Rational Basis Review*

Rodrigues-Barios was convicted of attempted illegal reentry, in violation of 8 U.S.C. § 1326. That statue provides in relevant part: "[A]ny alien who (1) has been denied admission, excluded, deported, or removed ... and thereafter (2) enters, attempts to enter, or is at any time found in, the United States," without permission from the Attorney General or an exemption from that requirement, "shall be fined under title 18, or imprisoned not more than 2 years, or both." 8 U.S.C. § 1326(a).

Section 1326 is, on its face, a law that regulates the admission and removal of aliens. *Hernandez-Guerrero*, 147 F.3d at 1078. Long ago, this Court described Section 1326 as "a regulatory statute enacted to assist in the control of unlawful immigration by aliens." *Pena-Cabanillas v. United States*, 394 F.2d 785, 788 (9th Cir. 1968);

see *United States v. Rizo-Rizo*, 16 F.4th 1292, 1298 (9th Cir. 2021) (reaffirming this language). Several aspects of the statute bear out that description. Section 1326 was enacted as part of the INA in 1952. It is codified in Title 8 alongside other immigration provisions. Most important, its "text ... plainly reveals its immigration-regulation purpose." *United States v. Hernandez-Guerrero*, 147 F.3d 1075, 1078 (9th Cir. 1998). "By threatening with criminal prosecution any alien found in the United States who has previously been 'excluded, deported, or removed,'" this Court has explained, "Congress sought in § 1326 to give teeth to civil immigration statutes and to ensure compliance with civil deportation orders." *Id.* (quoting 8 U.S.C. § 1326(a)). The statute is thus "a necessary piece of the immigration-regulation framework." *Id.* And because Section 1326 is part of that framework, equal protection challenges to it are subject to the same standard that applies to other claims in the immigration context: rational basis review.

3. *The District Court Properly Found That Section 1326 Is Constitutional Under Rational Basis Review*

Applying those principles here, the district court properly found that Congress had a rational basis for criminalizing reentry after deportation. 1-ER-8. A statute meets the rational basis test if it "bears some rational relation to a legitimate government interest

or purpose." *Ruiz-Chairez*, 493 F.3d at 1092. In *Ruiz-Chairez*, this Court recognized that "deterring illegal reentry" is such an interest. *Id.*; see also *Hudson v. United States*, 522 U.S. 93, 105 (1997) (calling deterrence "a traditional goal of criminal punishment"); *Ayala-Bello*, 995 F.3d at 715 ("[T]he federal government has a legitimate interest in controlling our borders."). And Section 1326 is rationally designed to advance that interest. "[I]ts clear purpose is to deter aliens who have been forced to leave the United States from reentering the United States." *Hernandez-Guerrero*, 147 F.3d at 1078 (ellipses and quotation marks omitted); see S. Rep. No. 70-1456, at 1-2 (1929). Indeed, "without the threat of criminal prosecution that it provides, Congress's immigration-regulation authority would be fatally undermined—all bark and no bite." *Hernandez-Guerrero*, 147 F.3d at 1078. As every district court to apply rational basis review to analogous challenges has held,[1] Section 1326 is constitutional under that standard.

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[1] See, e.g., *United States v. Barrera-Vasquez*, No. 2:21CR98, 2022 WL 3006773, at *4 (E.D. Va. July 28, 2022); *United States v. Porras*, 2022 WL 1444311, *3 (N.D. Ill. May 6, 2022); *United States v. Ramirez-Aleman*, No. 21CR3403-BEN, 2022 WL 1271139, at *1 (S.D. Cal. Apr. 27, 2022); *United States v. Amador-Bonilla*, No. 21-cr-187, 2021 WL 5349103 (W.D. Okla. Nov. 16, 2021); *United States v. Samuels-Baldayaquez*, No. 4:20-cr-83, 2021 WL 5166488, at *2 (N.D. Ohio Nov. 5, 2021); *United States v. Novondo-Ceballos*, No. 21-cr-383, 2021 WL 3570229, at *4 (D.N.M. Aug. 12, 2021); *United States v. Gutierrez-Barba*, No. 19-cr-1224, 2021 WL 2138801, at *5

4. *Rodrigues-Barios Has Not Shown That Heightened Scrutiny Applies*

Rodrigues-Barios does not meaningfully dispute that Congress had a rational basis for criminalizing reentry after deportation. Instead, he presents three arguments why the district court should never have applied rational basis review in the first place. None has merit.

a. *The Nature of Rodrigues-Barios's Allegations Do Not Dictate the Level of Scrutiny*

First, Rodrigues-Barios argues that his challenge to the statute was based on *race*—not alienage or immigration status—and therefore the court was required to engage in an *Arlington Heights* analysis. As outlined above, however, Courts apply rational basis because of the unique authority that Congress retains over "immigration policy as an incident of sovereignty." *Hernandez-Guerrero*, 147 F.3d 1076 (citation omitted). Indeed, "over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens." *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972) (quotation marks and alteration omitted). That is because the power to exclude or expel is "an

(D. Ariz. May 25, 2021); see also *United States v. Ruiz-Rivera*, No. 3:20-MJ-20306, 2020 WL 5230519, at *4 (S.D. Cal. Sept. 2, 2020) (same for the illegal-entry statute, 8 U.S.C. § 1325).

inherent and inalienable right of every sovereign and independent nation." *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893). It is *this* consideration—not the specific nature the allegations brought by any individual defendant—that dictates the appropriate standard of review.

A contrary conclusion would lead to a stark anomaly. Decisions such as *Fiallo* and *Hawaii* foreclose a searching judicial inquiry into legislative or executive motivations even when the political branches have drawn express distinctions that would trigger close scrutiny outside of the immigration context. It would be strange if courts were nonetheless required to probe deeply into legislative motives—"a substantial intrusion into the workings of" a coequal branch, see *Arlington Heights*, 429 U.S. at 268 n.18—when an immigration law that draws no such distinction on its face is alleged to discriminate based on race or national origin. Applying rational basis review to challenges such as Rodrigues-Barios' avoids that odd result.

Rodrigues-Barios argues that a more searching review is dictated by this Court's decision in *Regents of the Univ. of California v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 518 (9th Cir. 2018), rev'd in part, vacated in part sub nom. *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891 (2020). In

Regents, a panel of this Court applied an *Arlington Heights* framework when reviewing the Attorney General's decision to end the Deferred Action for Childhood Arrivals (DACA) program and concluded that the plaintiffs had a plausible equal protection claim. But the Supreme Court ultimately reversed on that issue and held that the plaintiffs had *not* stated "a plausible equal protection claim." 140 S. Ct. at 1915. In so holding, the Supreme Court only assumed, without deciding, that an *Arlington Heights* framework should have applied. See 140 S. Ct. at 1915. Moreover, the choice in *Regents* was not, as here, between rational basis review and scrutiny of legislative motivation under *Arlington Heights*. Rather, the government had argued in *Regents* that the plaintiffs' claim raised the type of "selective enforcement" challenge that is not cognizable in immigration cases. See *id*. As a result, the choice before the Supreme Court was between *Arlington Heights* and no judicial review at all—a choice the *Regents* plurality avoided by determining that the claim failed even under the standard (*Arlington Heights*) more favorable to the plaintiffs. *Id*. This ambiguous holding is not enough to undermine over a century of consistent caselaw recognizing the broad authority of Congress in the immigration arena.

Moreover, the plaintiffs in *Regents* were not directly challenging an act of Congress. They were merely challenging "an agency procedure under the Administrative Procedure Act." *United States v. Ramirez-Aleman*, No. 21CR3403-BEN, 2022 WL 1271139, at *4 (S.D. Cal. Apr. 27, 2022). This Court has recognized that Congress is "entitled to an additional measure of deference when it legislates as to admission, exclusion, removal, naturalization or other matters pertaining to aliens" *Abebe v. Mukasey*, 554 F.3d 1203, 1206 (9th Cir. 2009) (en banc). The Supreme Court has likewise made clear that "it is not the judicial role … to probe and test the justifications for" Congress's decision-making in this area. *Fiallo*, 430 U.S. at 799. This distinction further undercuts Rodrigues-Barios' reliance on *Regents*.

Finally, Rodrigues-Barios argues that if this court applies rational basis review in this context, courts would be forced to "turn a blind eye to blatant racism that no one factually disputes." Appellant's Opening Brief (AOB) 34. But Rodrigues-Barios does not explain how declining to extend *Arlington Heights* to facially neutral immigration laws would be tantamount to *no* review at all. As the Supreme Court recently reiterated in an immigration case, "a common thread" in its decisions invalidating laws "under rational basis scrutiny . . . has been that the laws at issue lack any

purpose other than a bare desire to harm a politically unpopular group." *Hawaii*, 138 S. Ct. at 2420 (ellipses and quotation marks omitted). Accordingly, an immigration law that drew a distinction for reasons "inexplicable by anything but animus," *id.* (quoting *Romer v. Evans*, 517 U.S. 620, 632 (1996)), would likely be invalid even under the rational basis standard. Cf. *Wong v. United States*, 373 F.3d 952, 974 n.29 (9th Cir. 2004) (suggesting that a noncitizen allegedly denied status adjustment "solely on the basis of her race, ethnicity, or religion, and for no immigration-related reason or other governmental purpose … could prevail even under the 'wholly irrational' standard applied in *Mathews [v. Diaz*, supra]").

b. *The Fact That Section 1326 Is a Criminal Statute Does Not Require Heightened Scrutiny*

Rodrigues-Barios next argues that rational basis review does not apply because section 1326 is a criminal law, not an immigration law. AOB 34. But this Court's decisions refute any suggestion that a standard more searching than rational basis must apply merely because Section 1326 prescribes criminal penalties. As explained above, this Court has applied the rational basis standard to equal protection challenges raised in criminal cases, including a challenge to a Sentencing Guideline that implements Section 1326 and provides for a greater enhancement for "illegal reentrants … than other felons with the same prior criminal

record." *Ruiz-Chairez*, 493 F.3d at 1091; see also *Barajas-Guillen*, 632 F.2d at 752 (applying rational basis standard to defendant's collateral attack on a deportation order in a criminal case); *United States v. Calderon-Segura*, 512 F.3d 1104, 1107 (9th Cir. 2008) (same); *United States v. Lopez-Flores*, 63 F.3d 1468, 1471-75 (9th Cir. 1995) (same standard applies to criminal statute that "classifies offenders on the basis of the offender's and the victim's nationality"). Cf. *United States v. Ferreira*, 275 F.3d 1020, 1025-26 (11th Cir. 2001) (rejecting a civil-criminal distinction).

Moreover, the mere fact that Section 1326 provides for criminal penalties to deter reentry of aliens does not change the fundamental nature of the statute. It is still a "necessary piece of the immigration-regulation framework." *Hernandez-Guerrero*, 147 F.3d at 1078. Whether Congress regulates the initial admission of aliens into the country or the entry or attempted reentry of aliens who have already been deported, it still implicates the "inherent power as sovereign" to control its borders and foreign relations. *Arizona v. United States*, 567 U.S. 387, 394-95 (2012); accord *Carlson v. Landon*, 342 U.S. 524, 534 (1952) (Congress has "plenary" power "under the sovereign right to determine what noncitizens shall be permitted to remain within our borders"). It is

this sovereign interest that requires rational basis review, regardless of whether the challenged statute is civil or criminal.

Rodrigues-Barios argues that the Supreme Court's decision in *Fiallo* "distinguished civil immigration law from border-related crimes for purpose of the standard of review." AOB 35. But *Fiallo* never implied that criminal statutes in the arena of immigration control require closer constitutional scrutiny. In that case, appellants argued that the purpose of the challenged immigration statute was to "to afford rights not to aliens but to United States citizens and legal permanent residents." 430 U.S. at 793. They then relied on the Court's "border search decisions," for the proposition that the courts must scrutinize congressional legislation in the immigration area to protect against violations of the rights of citizens." *Id*. The Court rejected this argument, explaining that the issue in those cases "was the nature of the protections mandated by the Fourth Amendment" and they did not "suggest[] that Congress has anything but exceptionally broad power to determine which classes of aliens may lawfully enter the country." *Id*. The Court never suggested that the border-search cases were subject to heightened scrutiny *because* they were criminal; they just were not relevant to the specific argument that the appellants were making about the rights of U.S. citizens.

Rodrigues-Barios also points to *Wong Wing v. United States*, 163 U.S. 228 (1896), to support "elevated scrutiny of criminal proceedings." AOB 36. *Wong Wing* addressed an 1892 statute providing that certain Chinese immigrants could "be imprisoned at hard labor for a period of not exceeding one year" before they were removed from the United States. 163 U.S. at 235. The Supreme Court held that the period of pre-deportation imprisonment authorized under the statute was a criminal punishment that could be imposed only after a "judicial trial" subject to the protections of the Fifth and Sixth Amendments. *Id*. at 237-38; see also *Hernandez-Guerrero*, 147 F.3d at 1077 (discussing *Wong Wing*). But *Wong Wing* did not involve an equal protection challenge; indeed, it predated by 60 years the Supreme Court's application of equal protection principles to federal action. The Court's decision therefore does not indicate what standard governs in such a challenge, much less mandate exacting scrutiny for immigration statutes that impose criminal penalties.

c. *Judicial Deference to Congress is Not Limited to Cases Involving the Admission of Aliens*

Finally, Rodrigues-Barios argues that rational basis review only applies to immigration decisions involving the *admission* of aliens. But neither the Supreme Court nor this Court has ever made that express distinction. As noted, this Court has applied the

standard to a wide range of statutes and policies based on the unique authority that Congress retains over immigration matters. To support a narrow interpretation, Rodrigues-Barios cites language from this Court's initial decision in *Regents*, which noted "several potentially important" factual differences between that case—which involved termination of DACA benefits to long-time residents of the United States—and the Supreme Court's decision upholding the President's executive order in *Hawaii* that limited entry of aliens from certain countries. 908 F.3d at 520. These distinctions included "the physical location of the plaintiffs within the geographic United States, the lack of a national security justification for the challenged government action, and the nature of the constitutional claim raised." *Id.* (internal citation omitted). But this Court never explained which of these factual differences were in fact "important" rather than "potentially important" to distinguishing *Hawaii*. It certainly never held that rational basis review *only* applies to statutes regulating the "admission" of aliens. In any event, as noted above, the Court's equal protection holding was ultimately reversed by the Supreme Court, which declined to decide the appropriate standard of review. *Regents,* 140 S. Ct. at 1916.

Rodrigues-Barios also cites this Court's decision in *Ramos v. Wolf*, 975 F.3d 872, 895-96 (9th Cir. 2020), to support a narrower view of the deference owed Congress in the immigration context. AOB 40. The Court there considered an Executive Branch policy that applied to the nationals of specific countries, rather than a facially neutral statute enacted by Congress. In so doing, the Court emphasized the "'distinction'" drawn in immigration cases between aliens who have "'effected an entry into the United States'" and those who have not, *id*. at 896 (quoting *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001)), and declined to apply the standards for evaluating executive action regarding the exclusion of foreign nationals to the "administration of a humanitarian relief program established by Congress for foreign nationals who have lawfully resided in the United States for some time." *Id*.

Unlike *Ramos*, this case does not involve challenges brought by a noncitizen who "lawfully resided" in the United States for any time, let alone for a lengthy period and under the auspices of a congressionally sanctioned program. See *Ramos*, 975 F.3d at 896. Section 1326 instead applies to noncitizens (such as Rodrigues-Barios) who may never have been lawfully present in the country, were previously excluded or ordered removed, and are alleged to have returned without authorization. 8 U.S.C. §1326; see also *Dep't*

of Homeland Security v. Thuraissigiam, 140 S. Ct. 1959, 1981-83 (2020) (holding that a noncitizen who had entered the United States unlawfully acquired no procedural rights not conferred by Congress in its exercise of the "'sovereign prerogative,'" and the political branches' "plenary authority," to decide who will be admitted or excluded).

Indeed, Rodrigues-Barios was charged under a specific subsection of Section 1326 that prohibits *attempted* entry after deportation. This necessarily applies only to aliens who are not physically in the United States but who are seeking entry without authorization. Rodrigues-Barios himself was arrested after he tried to climb over a border wall, in the middle of the night, and make his way into the United States without detection. That physical intrusion—certainly no less than an attempt to formally "apply" for entry—has "foreign policy and national security" implications that would counsel in favor of limited judicial review. 975 F.3d at 896; see *Hernandez v. Mesa*, 140 S. Ct. 735, 746 (2020) (noting the national security concerns raised by crossings at the U.S.-Mexico border).

Finally, both *Ramos* and *Regents* applied a more searching standard of review to the actions of the Executive. But, as noted above, courts have routinely given a less searching judicial review

to the acts of Congress regulating immigration. See, e.g., *Abebe v. Mukasey*, 554 F.3d at (because "Congress has particularly broad and sweeping powers when it comes to immigration," it is "entitled to an additional measure of deference…"). Moreover, the Supreme Court has stated that Congress's role in the immigration field stems from "its plenary authority with respect to foreign relations and international commerce," *Plyler v. Doe*, 457 U.S. 202, 225 (1982), as well as its power to "establish an uniform Rule of Naturalization," U.S. Const. art. I., § 8, cl. 4, and that Congress's immigration policies are therefore unsuited for "prob[ing] and test[ing]" by the courts. See *Fiallo*, 430 U.S. at 799. Nothing in *Ramos* (or *Regents*) justifies retreating from those principles and, for the first time, subjecting an Act of Congress in the immigration field to invasive review under *Arlington Heights*. The district court properly applied only rational basis review.

B. Section 1326 Is Constitutional Even Under an *Arlington Heights* Equal Protection Framework

1. *Legal Principles*

The Supreme Court confirmed decades ago that claims based on disparate impact alone are not cognizable under the Equal Protection Clause; instead "[p]roof of racially discriminatory intent or purpose is required to show a violation of" that Clause. *Arlington Heights*, 429 U.S. at 265; see *Washington v. Davis*, 426 U.S. 229,

239-42 (1976). When the law alleged to discriminate against individuals of a particular race or national origin is neutral on its face, courts evaluate the existence of such intent using the framework from *Arlington Heights*, 429 U.S. at 265-68. Under that framework, "[t]he impact of the official action—whether it bears more heavily on one race than another—may provide an important starting point." *Id.* at 266 (quotation marks and citation omitted). But outside of extreme circumstances not alleged here, disparate "impact alone is not determinative," and courts must assess other evidence in deciding whether a racially discriminatory purpose was "a motivating factor in the decision." *Id.* at 265-66. Pertinent evidence includes "[t]he historical background of the decision," "[t]he specific sequence of events leading up to" it, "departures" from "[s]ubstantive" or "procedural" norms, and "[t]he legislative or administrative history ... , especially … contemporary statements by members of the decisionmaking body." *Id.* at 267-68. If the challenger proves that the provision was motivated in part by the prohibited intent, the burden shifts to the government to establish that "the same decision would have resulted even had the impermissible purpose not been considered." *Id.* at 270 n.21.

Several principles inform how courts conduct the "sensitive inquiry" into official motivation required under *Arlington Heights*.

See 429 U.S. at 266. First, discriminatory motive has a particular meaning in the equal protection context. A challenger must show "that the decisionmaker, in this case [the] legislature, selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979). That standard requires more than proof that the legislature had "awareness of [the] consequences" for the affected group, that those consequences were "foreseeable," *id.* at 278-79, or that it acted "with indifference to" the effect on that group, *Luft v. Evers*, 963 F.3d 665, 670 (7th Cir. 2020).

Second, while statements by a bill's proponents may be relevant to the inquiry into intent under *Arlington Heights*, it remains the case that the motives of individual legislators cannot necessarily be equated with the intent of the whole legislature. See, e.g., *United States v. O'Brien*, 391 U.S. 367, 383-84 (1968); see also *Hunter v. Underwood*, 471 U.S. 222, 228 (1985) (noting that "the difficulties in determining the actual motivations of the various legislators that produced a given decision increase" when a larger legislative body is at issue).

Third, a legislature alleged to have acted with discriminatory intent is not automatically saddled with the sins of its predecessors.

See *City of Mobile v. Bolden*, 446 U.S. 55, 74 (1980) (plurality) ("[P]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful."). In conducting the intent inquiry, courts generally presume that the legislature acted in good faith and require a movant to come forward with evidence that the challenged law—not just a prior one—was motivated in part by a discriminatory purpose. See *Abbott*, 138 S. Ct. at 2324-25; see also *City of Mobile*, 446 U.S. at 74 (discriminatory intent must be "proved in a given case"). Such evidence may include proof that earlier legislatures had discriminatory intent when enacting particular laws, *Abbott*, 138 S. Ct. at 2327, but the probative value of such evidence decreases when it is remote in time, see *Regents*, 140 S. Ct. at 1916; *McCleskey v. Kemp*, 481 U.S. 279, 298 n.20 (1987), or attributable to a legislature with "a substantially different composition," *Brnovich v. DNC*, 141 S. Ct. 2321, 2349 n.22 (2021) (quotation marks omitted).

2. *Any Discriminatory Intent on the Part of Congress in 1929 Is of Minimal Probative Value in Evaluating the Motivation of Congress in 1952*

Rodrigues-Barios spends the bulk of his argument focused on the intent of Congress when it passed a statute criminalizing reentry after deportation in 1929. AOB 15-25. But Rodrigues-Barios was not convicted under the 1929 statute; he was convicted

for violating Section 1326, which was not enacted until 1952. It is this statute that comprises the "challenged [legislative] action," *Arlington Heights*, 429 U.S. at 265, where this Court's equal protection analysis must focus. See *United States v. Rodriguez-Arevalo*, No. 1:19-CR-00281, 2022 WL 1542151, at *4 (M.D. Pa. May 16, 2022) ("The threshold question in examining Congress' intent is *which* Congress' intent is subject to review. . . The court finds that the relevant inquiry centers around the intent of the 1952 Congress in enacting § 1326 as part of the INA.") (emphasis added); *United States v. Ponce-Galvan*, No. 21-CR-02227-H-1, 2022 WL 484990, at *3 (S.D. Cal. Feb. 16, 2022) ("The official action being challenged is 8 U.S.C. § 1326, not the repealed 1929 Act.").

Of course, the earlier attempts of Congress to criminalize illegal reentry are still relevant, as "historical background," when evaluating the actions of Congress in 1952. *Arlington Heights*, 429 U.S. at 265. And, as courts have recognized, the earlier immigration legislation has a "dark history," and at least "some members of the 1929 Congress" were motivated to criminalize unlawful entry for overtly racists reasons. *United States v. Hernandez-Lopez*, No. CR H-21-440, 2022 WL 313774, at *3; *Santos-Reynoso*, 2022 WL 2274470, at *4 (same); *United States v. Wence*, No. 3:20-CR-0027, 2021 WL 2463567, at *6 (D.V.I. June 16, 2021) (same).

Nevertheless, this troubling history is of "limited probative value to the evaluation of the constitutionality of Section 1326." *Santos-Reynoso*, 2022 WL 2274470, at *4. "[U]nless historical evidence is reasonably contemporaneous with the challenged decision," it has little value in establishing the motivations of a legislature. *McClesky v. Kemp*, 481 U.S. 279, 298 n.20 (1987). That is, "distant instances of official discrimination in other cases are of limited help," *City of Mobile,* 446 U.S. at 74, and their probative value decreases with time and by context, see *Regents*, 140 S. Ct. at 1916. This is particularly true when bills are passed "by a substantially different composition of legislators." *Brnovich*, 141 S. Ct. at 2349, n.22 (quotation marks omitted); see also *United States v. Price*, 361 U.S. 304, 332 (1960) ("[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.").

Here, twenty-three years elapsed between the passage of the 1929 legislation and the enactment of Section 1326 in the INA. Accordingly, "the historical context leading to the passage of the [1929 statute] is quite 'remote' from the factors leading to the enactment of the INA." *Santos-Reynoso*, 2022 WL 2274470, at *4. Indeed, "to merely count the years between the enactment of the two laws belies the vast historical gulf between the 1920s and the

1950s." *Gonzalez-Nane*, 2022 WL 2987895 at *5. Moreover, by the time Section 1326 was enacted, "only thirty congressmen from the [1929] Congress remained in office." *United States v. Viveros-Chavez*, No. 21 CR 665, 2022 WL 2116598, at *8 (N.D. Ill. June 13, 2022). This was a tiny percentage of the total who ultimately voted on the bill, and the substantial turnover makes the "historical context leading to the passage" of the earlier bill of "limited probative value." *United States v. Maldonado-Guzman*, No. 21 CR 448 (CM), 2022 WL 2704036, at *3 (S.D.N.Y. July 12, 2022); *United States v. Felix-Salinas*, No. 5:21-CR-70-JA-PRL, 2022 WL 815301, at *3 (M.D. Fla. Feb. 2, 2022) ("like virtually every court to decide this issue to date . . . the Court agrees that the 1929 motive is of little weight" and "cannot be imputed to the current law.").

In addition, Congress passed Section 1326 following "a full and complete investigation of our entire immigration system." S. Rep No. 81-1515, at 803. After that investigation Congress made numerous, substantive changes to the original 1929 bill. It created a new "found in" offense that is "distinct" from the two grounds for liability (entry and attempted entry) in the 1929 Act. See *United States v. Corrales-Beltran*, 192 F.3d 1311, 1319 (9th Cir. 1999). It also made Section 1326 serve as a single illegal-reentry statute that applied the same penalties, repealing other provisions that had

prescribed different penalties for defendants deported for subversive or immoral activities. See INA §403, 66 Stat. 279-80; S. Rep. No. 81-1515, at 646-47, 655-56 (1950); *United States v. Mendoza-Lopez*, 481 U.S. 828, 835 & n.10 (1987). In addition, Congress (1) changed the reentry prohibition to reach those "excluded and deported," not just those "arrested and deported," INA §276, 66 Stat. 229; (2) omitted a phrase in the 1929 Act ("in pursuance of law") that the Supreme Court later identified as a potential textual basis for allowing defendants to challenge the validity of their deportation orders in an illegal-reentry prosecution, see *Mendoza-Lopez*, 481 U.S. at 836; and (3) added language "except[ing] those aliens who have either received the express consent of the Attorney General to reapply for admission or who otherwise establish that they were not required to obtain such consent," *id.* at 831 n.2. These significant, substantive alterations to the statute cannot be dismissed as "minor clarifications." AOB 52.[2]

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[2] Rodrigues-Barios cites to *United States v. Rizo-Rizo*, 16 F.4th 1292, 1298 (9th Cir. 2021), which described the 1929 version of the statute as "substantially similar" to the current version. But that discussion came as the Court was considering whether caselaw defining Section 1326 as a "regulatory offense" meant that the misdemeanor illegal entry statute, Section 1325, also qualified as such. *Id.* In that context, the Court noted that both Section 1325 and Section 1326 were passed together as part of the same bill in

In short, the INA represented "the final product of a most intensive and searching investigation and study over a three[-]year period." *Pena-Cabanillas v. United States*, 394 F.2d 785, 790 (9th Cir. 1968). There is no reason to saddle this comprehensive legislative product with statements of past legislators—from decades before—who had nothing to do with it. As the Supreme Court cautioned, "past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." *City of Mobile*, 446 U.S. at 74; *McCleskey v. Kemp*, 481 U.S. 279, 298 n.20 (1987) ("Although the history of racial discrimination in this country is undeniable, we cannot accept official actions taken long ago as evidence of current intent.").

3. *There Is No Requirement That Congress Affirmatively "Cure" the Taint of Its Prior Litigation*

Rodrigues-Barios argues that the addition of Section 1326 as part of the INA did not serve to "cleanse" the discriminatory intent of Congress from 1929. AOB 43. In order to do that, he argued below

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1929. *Id*. The Court's comment about the "substantially similar language" did not have anything to do with whether Congress made substantive changes to the statute in 1952, nor was it part of the Court's ultimate holding that Section 1325 did qualify as a "regulatory offense" and therefore did not include a mens rea element as to alienage. *Id*. at 1299.

that Congress would need to meaningfully "confront" that past discriminatory intent at the time it enacted the new statute. 1-ER-8. That is, to cure the "taint" of the earlier legislation, Congress would need to "discuss this law" and "really affirm" that it still wants "to criminalize [entry after deportation] for nonracially discriminatory reasons." 1-ER-13.

There are several problems with this argument. First, it "is contrary to everything the Supreme Court has instructed lower courts about imputing the motivations of earlier legislatures to later ones." *United States v. Machic-Xiap*, 552 F. Supp. 3d 1055, 1076 (D. Or. 2021). Most notably, in *Abbott*, 138 S. Ct. at 2324, a lower court required a state legislature "to expiate its predecessor's bad intent," "'cure' the earlier Legislature's 'taint," and show that it "had experienced a true 'change of heart.'" 138 S. Ct. at 2325. The Supreme Court reversed and held that discriminatory purpose must be shown as to the actual law being challenged. A finding of past discrimination does not "flip[ ] the evidentiary burden" to the government to prove that the successor statute is free from discriminatory intent, *id.* at 2324-25; and a successor legislature does not have a "duty to expiate its predecessor's bad intent." *Id.* at 2325; see *id.* at 2326 n.18. This is the precise opposite of the rule Rodrigues-Barios now asks this Court to adopt. Where, as here,

Congress substantively alters a law in amending it, *Abbott* "put[s] to rest the idea that a subsequent legislature must 'engage in deliberation' regarding past racism in order to cure its 'taint' or else have the past legislature's discriminatory animus imputed to the contemporary one. *United States v. Calvillo-Diaz*, No. 21 CR 445, 2022 WL 1607525, at *7 (N.D. Ill. May 20, 2022).[3]

Second, as the district court here recognized, imposing an affirmative engagement requirement on Congress would raise significant separation of powers concerns. 1-ER-8 ("Who would require that? . . . [t]he courts would require that? . . . How does that not violate the separation of powers to dictate to Congress what discussion they must have before they enact a law?") 1-ER-8. Rodrigues-Barios does not explain how courts could actually enforce the requirement he envisions—i.e., how a court would assess whether discussion in a committee report, remarks on the floor, a "sense of Congress provision," *Yang v. California Dep't of Soc.*

[3] One Amicus suggests this Court could create three new categories of reenactment; "silent," "benign," and "conscious," with only the latter—in which Congress actively confronts and acknowledges its racist past—serving to ensure the constitutionality of its new legislation. Aoki Center. Br. at 4. But this new framework runs directly counter to the Supreme Court's holding in *Abbott*, and it otherwise has no basis in the law of this Court or the Supreme Court.

Servs., 183 F.3d 953, 958 (9th Cir. 1999), or anything else short of outright repeal suffices to cleanse the taint of an earlier Congress.

Third, as the Eleventh Circuit held, when considering a similar proposal, an "active engagement" requirement would present "an insurmountable burden" for legislatures. *Johnson v. Governor of the State of Florida*, 405 F.3d 1214, 1225 n.21 (11th Cir. 2005) (en banc). As the Court explained, it would be difficult for legislatures to "extinguish" such past discrimination because, with the passage of time, it is "unlikely that the present day legislators would be aware of the past discrimination" that supposedly taints the specific law. *Id.*; *United States v. Calvillo-Diaz*, No. 21-cr-445, 2022 WL 1607525, at *10 (N.D. Ill. May 20, 2022) (finding no evidence that the 1952 Congress was even *aware* "of the history behind the original 1929 criminalization of illegal reentry"). As a result, *Johnson*, like *Abbott*, declined to require the legislature to "demonstrate that it acknowledged" the "racial discrimination [that] tainted" the earlier law. *Id.* at 1225.

Rodrigues-Barios argues that the Supreme Court's decision in *Hunter v. Underwood*, "addressed this situation." AOB 45. But *Hunter* merely rejected the argument that a law originally motivated by discriminatory intent was constitutional in its present form in light of *judicial* decisions that had invalidated "[s]ome of

[its] more blatantly discriminatory" portions. 471 U.S. at 232-33. Yet as *Abbott* confirmed, 138 S. Ct. at 2325, *Hunter* did not address whether legislative revisions to such a law may render it constitutional. *Hunter* therefore does not suggest that significant "legislative changes" like those in Section 1326 are "insufficient to remove an earlier discriminatory intent." *Johnson*, 405 F.3d at 1223 n.20 (11th Cir. 2005) (en banc); accord *Hayden v. Paterson*, 594 F.3d 150, 166 (2d Cir. 2010) ("The *Hunter* Court did not decide, however, "whether [the earlier provision] would be valid if enacted today without any impermissible motivation"); *Machic-Xiap*, 552 F. Supp. 3d at 1077 (noting that, unlike *Hunter*, the original 1929 illegal reentry statute "does not remain on the books").

Finally, Rodrigues-Barios relies on the Supreme Court's recent decisions in *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020) and *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020), to support his active engagement proposal. But "neither case involved an equal protection challenge under an *Arlington Heights* analysis." *Ponce-Galvan*, 2022 WL 484990, at *2. *Ramos* abrogated an earlier case which had upheld the practice of nonunanimous state-jury verdicts. In criticizing the reasoning of the earlier case, the Court in *Ramos* took issue with its acceptance of the proffered benefits of nonunanimous verdicts without

addressing why those states actually enacted such laws. 140 S. Ct. at 1401. *Ramos* did not, however, suggest that a successor law, unmarred itself by racial animus, remains defective. See *id*. at 1401 n.44.

The same is true with *Espinoza*. That case considered whether application of a "no-aid" provision barring religious schools from participating in a state scholarship program violated the Free Exercise Clause of the First Amendment. 140 S. Ct. at 2254. The Court held that it did, reasoning that the provision "plainly exclude[d] schools from government aid solely because of religious status." *Id*. at 2255. But the Court did not find the challenged provision unconstitutional because of its past. That concept appears once in the opinion in response to the argument that a tradition arose in the second half of the 19th century against state support for religious schools. *Espinoza*, 140 S. Ct. at 2258-59. Neither *Ramos*, *Espinoza*, nor any other precedent supports the novel proposition that any bad intent underlying the 1929 Act "infects" Section 1326 unless and until Congress affirmatively addresses its history. "Rather, these decisions confirm that the historical context of legislative enactments are relevant, a point already reflected in the *Arlington Heights* framework." *United States v. Rios-Montano*,

No. 19-CR-2123-GPC, 2020 WL 7226441, at *4 (S.D. Cal. Dec. 8, 2020).

4. *Rodrigues-Barios Has Not Shown That Congress Acted With Discriminatory Intent in Passing the INA in 1952*

With the motivations of the 1929 Congress as minimally probative historical background, and with no affirmative duty on the part of Congress to "cleanse" the statements of past legislators, Rodrigues-Barios is left with the task of demonstrating that Congress was motivated—in 1952—by racial animus when it enacted Section 1326. "Proving that racism 'motivated' a specific congressional act sufficient to strike down that law as unconstitutional . . . is not easy," *United States v. Machic-Xiap*, 552 F. Supp. 3d 1055, 1061 (D. Or. 2021), and Rodrigues-Barios does not come close to meeting that burden here.

In fact, Rodrigues-Barios does not even attempt to apply the factors from *Arlington Heights* to evaluate the motivations of Congress in passing the INA in 1952. He offers no suggestion that the "specific sequence of events leading to the" enactment of 1326 or the "legislative . . . history," support a finding of racial animus. He also fails to cite to any "contemporary statements by members of the decisionmaking body" to support his argument. 429 U.S. at 265-68. In fact, as "[a]n exhaustive reading of the congressional debate indicates that Congress was deeply concerned with many

facets of the Immigration and Nationality Act of June 27, 1952, but §§ 1325 and 1326 were not among the debated sections." *United States v. Ortiz-Martinez*, 557 F.2d 214, 216 (9th Cir. 1977); see also *United States v. Hernandez-Lopez*, No. CR H-21-440, 2022 WL 313774, at *5 (S.D. Tex. Feb. 2, 2022) (even defense experts acknowledged that "Congress remained largely silent with respect to the recodification of the criminal entry and re-entry provisions of the immigration laws in the 1952 Act.").

Rodrigues-Barios likewise provides no evidence that Congress "departed from substantive or procedural norms" when passing the INA. To the contrary, as outlined above, the Senate Judiciary Committee was tasked with making "a full and complete investigation of our entire immigration system" and providing "recommendations for changes in the immigration and naturalization laws as it may deem advisable." S. Rep. No. 81-1515, at 803 (1950). The Judiciary Committee's investigation yielded a 925-page report, which Congress implemented, making numerous substantive changes to the nation's immigration laws. And Congress ultimately passed Section 1326, and the broader INA, with a supermajority of votes. There was nothing irregular about this process. See *Machic-Xiap*, 552 F. Supp. 3d at 1076 (the "evidence reveals the opposite of procedural or substantive

irregularities."); *United States v. Munoz-De La O*, No. 2:20-CR-134-RMP-1, 2022 WL 508892, at *13 (E.D. Wash. Feb. 18, 2022) ("at its core, this evidence . . . fails to sufficiently establish any procedural or substantive departures in the enactment of § 1326 that would suggest a discriminatory motivation by Congress as a whole.").[4]

Instead, to prove discriminatory intent on the part of Congress, Rodrigues-Barios relies almost entirely on the reasoning of the district court in *Carrillo-Lopez*, which found that discrimination was a "motivating factor" in the 1952 enactment. AOB 57. This decision, which has been "widely criticized" since its issuance, *Santos-Reynoso*, 2022 WL 2274470, at *2, based this finding on four factors, taken together: (1) the "lack of debate"

[4] One amicus provides some additional details about the "Bracero Program" and the history of legal and illegal immigration from Mexico in the decades preceding the INA. See Immigration Scholars Br. 19-23. "But these events, while not entirely without relevance, shed little light on the motivations of the congressmen who passed § 1326." *Barrera-Vasquez*, 2022 WL 3006773, at *7. Amicus, like Rodrigues-Barios, provides no legislative history or any other direct evidence that would support a finding of discriminatory intent on the part of the individual Congressmen who voted on the INA, much less discriminatory intent that could be attributed to Congress as a whole. See *Munoz-De La O*, 2022 WL 508892, at *13 (rejecting the idea that "isolated remarks by individual congressmembers provide evidence that the entire congressional sequence of events is replete with discriminatory intent").

surrounding the 1326 provision, (2) the statements of President Truman in vetoing the bill, (3) a letter from a Deputy Attorney General in support of the law, and (4) comments surrounding a different statute passed by the same Congress known as the "Wetback Bill." AOB 57-58. None of these withstand close scrutiny.

First, the "lack of debate" surrounding the section, simply reflects that 1325 and 1326 were relatively uncontroversial and widely supported. The district court's reasoning in *Carrillo-Lopez* on this point contravenes the Supreme Court's warning against "[d]rawing meaning from [Congressional] silence." *Kimbrough v. United States*, 552 U.S. 85, 103 (2007). Just as courts do not lightly treat Congress's "silence [as] tantamount to acquiescence" in judicial or agency decisions, *Zuber v. Allen*, 396 U.S. 168, 185 n.21 (1969), they should not give weight to a legislature's failure to expressly grapple with the history underlying earlier laws—especially when the legislators are unlikely to be aware of that decades-old history. See *Johnson*, 405 F.3d at 1225 n.21 .

Rodrigues-Barios next relies on the fact that President Truman vetoed the INA, on the basis that it "continue[d] practically without change' discriminatory practices first enacted in 1924 and 1929." AOB 57. "Read in context," however, this statement "concerned the INA's retention of the country-quota system, which

President Truman wanted to end." *Viveros-Chavez*, 2022 WL 2116598, at *8. The President "did not mention section 1326 in the veto statement," *id.*, and of course he was not actually a member of Congress, so his views offer "no direct insight into the motivations of the 1952 Congress [who] passed the law." *Santos-Reynoso*, 2022 WL 2274470, at *5; *Machic-Xiap*, 552 F. Supp. 3d at 1075 ("President Truman's full statement reveals that his concern with the INA mostly was about the INA's continued use of the quotas that disfavored immigrants from Asia and southern and eastern Europe.").

Rodrigues-Barios next cites to a letter from Deputy Attorney General Peyton Ford in support of the bill that used the term "wetback" when recommending the addition of a "found-in" provision to the statute. AOB 57-58. But Ford did not actually "propose" the relevant language in his letter. He wrote in "response" to the Senate Committee's request for the Justice Department's views on a draft bill that already contained the "found in" clause. See S. 716, §276, 82nd Cong., 1st Sess. (Jan. 29, 1951); *Viveros-Chavez*, 2022 WL 2116598, at *7 ("Reading this in context, the Court does not agree with [defendant's] interpretation that Ford asked for the phrase 'found in' to be added to section 1326") (internal quotations omitted).

Moreover, the only reference to "wetbacks" in Ford's letter came in quoting language from a Presidential Commission Report that explained that no derogatory meaning was intended by use of that term.[5] And even if it could be inferred that Ford's quotation of that language reflected his discriminatory intent, it is notable that Ford quoted the language "in reference to an entirely different provision of the INA." *Viveros-Chavez*, 2022 WL 2116598, at *7. In any event, the letter from a single member of the administration using an offensive term is not enough to impute discriminatory motive to the entire Congress. At the end of the day, Ford "was not a member of Congress who voted on the INA," and his letter "gives no direct insight into the motivations of the 1952 Congress that passed the law." *United States v. Salas-Silva*, 2022 WL 2119098, at *3 (D. Nev. June 13, 2022).

Finally, Rodrigues-Barios notes that the same Congress passed another bill known as the "Wetback Bill," which was

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[5] Report of the President's Commission on Migratory Labor, *Migratory Labor in American Agriculture* 69 (1951) ("The term wetback is widely accepted and is used without derision; hence for convenience it is used here."), at https://hdl.handle.net/2027/uc1.31822024166522. That the word did not necessarily have the same connotation in 1952 as it does today is also evident from this Court's decisions of the same era, which use the term generically when referring to undocumented workers from Mexico. *See Amaya v. United States*, 247 F.2d 947, 947-48 (9th Cir. 1957); *United States v. Sugden*, 226 F.2d 281, 282 (9th Cir. 1955).

"debated with frequent use of" of that term. AOB 58. But that was "an entirely different piece of legislation from section 1326, with different substantive terms," and it offers little insight into the actual intent of Congress in passing section 1326. *United States v. Viveros-Chavez*, No. 21 CR 665, 2022 WL 2116598, at *6 (N.D. Ill. June 13, 2022). Moreover, even if the "the nonchalance with which Congress used 'wetback' near the time of the INA's passage" did demonstrate that "at least some members of Congress" harbored "racial animus" generally, more than that is required to actually strike down legislation as having been "motivated" by that animus. *Machic-Xiap*, 552 F. Supp. at 1074. For all these reasons, none of the facts relied on by the court in *Carrillo-Lopez*, individually or collectively, support a finding of discriminatory motivation as to Section 1326.

5. *The Disparate Impact of the Statute Does Not Support a Finding of Discriminatory Intent in 1952*

Rodrigues-Barios has also failed to demonstrate that the disparate impact of Section 1326 supports a finding of discrimination on the part of Congress in 1952. He cites contemporary statistics from the Sentencing Commission showing that an overwhelming percentage of section 1326 prosecutions involve Hispanic defendants as evidence "the law is working precisely as the . . . legislators intended." AOB 60-61. But the law

is clear that disparate impact statistics alone cannot be sufficient to support a finding of discriminatory intent when "the disparate impact is explainable on grounds other than race." *United States v. Dumas*, 64 F.3d 1427, 1431 (9th Cir. 1995). It is only when the disparate impact can "not be plausibly explained on a neutral ground," that the "impact itself would signal that the real classification made by the law was in fact not neutral." *Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 275 (1979).

Here, the disparate impact on Hispanic defendants is "explainable on grounds other than race." *Dumas*, 64 F.3d at 1431. As the district court found, one obvious explanation for the higher number of Hispanic defendants charged with illegal reentry is the simple fact that the United States shares a "several thousand mile border" with Mexico, and the overall rate of attempted entry from Mexico and Central America is significantly higher. 1-ER-10-13. See *United States v. Ruiz-Rivera*, No. 3:20-MJ-20306-AHG, 2020 WL 5230519, at *4 (S.D. Cal. Sept. 2, 2020) ("Any disparate impact of § 1325(a)(1) on Mexicans and Latinx persons is more readily explained by the geographic proximity of the border to Mexico and Latin America than by racial animus."); *United States v. Gonzalez-Nane*, No. 1:21-CR-197, 2022 WL 2987895, at *3 (M.D. Pa. July 28,

2022) ("[P]lausible neutral explanations exist for the extreme disparate impact of Section 1326 on Latinos.")

Rodrigues-Barios's statistics also rely on contemporary *prosecution* statistics, which reflect the charging decisions of the executive branch, and have little direct bearing on the intent of Congress in passing the INA. Moreover, his argument that the high percentage of §1326 prosecutions, relative to the "percentage of Hispanics in the undocumented population as a whole," AOB 60, repeats an error this Court found in *United States v. Arenas-Ortiz*, 339 F.3d 1066, 1070 (9th Cir. 2003). There, this Court rejected the idea that Hispanic males were unlawfully targeted for prosecution under Section 1326, based on the statistical difference between the percentage of 1326 prosecutions involving Hispanic males and the statewide incarcerated Hispanic population. *Id.* at 1069. As this Court explained, this data does not reflect the "percentage of incarcerated Hispanic male aliens who have been previously deported or the percentage of incarcerated Hispanic male aliens who have illegally re-entered the United States," both necessary predicates to 1326 prosecution. *Id.* at 1069-70. In addition, since it is much easier to return to the United States by land, it stands to reason that the overall percentage of illegal reentry would be higher among those removed to Mexico and Central America. See *id.* at

1070 (explaining the "common sense" notion "that it would be substantially more difficult for an alien removed to China to return to the United States than for an alien removed to Mexico to do so").

Recent decisions of the Supreme Court further undercut Rodrigues-Barios's statistical arguments. In *Regents*, the Court addressed a claim of discrimination made by beneficiaries of the deferred-action immigration program. The beneficiaries argued that the disparate impact of the program's rescission on "Latinos from Mexico, who represent 78% of" the program's beneficiaries, supported an inference that the rescission was driven by a discriminatory purpose. 140 S. Ct. at 1915-16 (plurality); *id.* at 1919 n.1 (Thomas, J., concurring in part and dissenting in part); *id.* at 1936 (Kavanaugh, J., concurring in part and dissenting in part). The Court's lead opinion rejected that claim. It explained that the disparity did not, "either singly or in concert" with other factors, make out a "plausible equal protection claim." *Id.* at 1915. The opinion reasoned that "because Latinos make up a large share of the unauthorized alien population, one would expect them to make up an outsized share of recipients of any cross-cutting immigration relief program." *Id.* And "[w]ere this fact sufficient to state a claim,

virtually any generally applicable immigration policy could be challenged on equal protection grounds." *Id.* at 1916.[6]

This Court later reached a similar conclusion in *Ramos*, 975 F.3d at 898. The movants there challenged on equal protection grounds the Executive Branch's decision to terminate four countries—Sudan, Nicaragua, Haiti, and El Salvador—from the temporary-protected-status (TPS) program, which affords relief to those who cannot safely return to their home nation for certain reasons. *Id.* at 879, 883. In rejecting that challenge, this Court afforded no weight to the asserted disproportionate impact that the program's termination had on individuals from countries with "predominantly 'non-white' populations." *Id.* at 898. The Court explained that, while the four countries at issue in the case were "'non-European' with predominantly 'non-white' populations, the same [was] true for" most other countries involved in the TPS program since 1990. *Id.* ("[V]irtually every country that has been

[6] Rodrigues-Barios argues that *Regents* merely held that disparate impact was not "sufficient" to make out an equal protection claim, but "it did not hold that it was irrelevant." AOB 59. But we are not arguing that disparate impact is *irrelevant* to the court's analysis, merely that in this context—when the challenge involves a "generally applicable immigration policy," where one group makes up "an outsized share" of the population—disparate impact statistics have far less force and are not indicative of discriminatory intent in the same way they might be in other contexts. *Id.* at 1915.

designated for TPS … has been 'non-European' … and most have majority 'non-white' populations."). Were a disparity of that nature to suffice, this Court continued, "almost any TPS termination in the history of the program would bear 'more heavily' on 'non-white, non-European' populations and thereby give rise to a potential equal protection claim"—which "cannot be the case." *Id.*

Regents and *Ramos* reflect the sensible proposition that outsized effects on certain populations are an expected byproduct of broad-based immigration regulations and do not necessarily give rise to the same inference of discriminatory intent that might exist in other settings. And that principle applies squarely to Rodrigues-Barios's challenge to Section 1326. Because a disproportionate share of the individuals excluded or removed from the U.S. are Hispanic, it stands to reason that a high share of those prosecuted for illegally returning after removal will likewise be Hispanic.

Finally, Rodrigues-Barios argues that the district court "grossly misapplie[d]" the disparate impact analysis of *Arlington Heights*, by focusing on the *current* motivation of law enforcement in enforcing the statute. AOB 59. But Rodrigues-Barios raised that same argument below, noting that the court was "assuming that there needs to be a showing of current discriminatory intent," and the court responded "No, I'm talking about disparate impact . . . I'm

not talking about discriminatory intent." 1-ER-14. The court explained that there has to be "at least some judgment" on the part of the government "which results in a disparate impact." 1-ER-15. This is entirely consistent with *Regents* and *Ramos*. If, as Rodrigues-Barios argued, the court could only look at a purely "mathematical" gauge of disparate impact, 1-ER-15, then "virtually any generally applicable immigration policy could be challenged on equal protection grounds." *Id*. at 1916. The court properly held that, in this context, the claimed disparate impact provided no meaningful evidence of the discriminatory intent needed to establish an equal protection violation.

6. *Congress Would Have Passed Section 1326 Absent the Alleged Animus*

Finally, even if Rodrigues-Barios had met his burden of demonstrating that racial animus was a "motivating factor" of the passage of the INA, that "would not necessarily have required invalidation of the challenged decision." *Arlington Heights*, 429 U.S. at 271, n.21. That would simply shift the burden to the government to show that "the same decision would have resulted even had the impermissible purpose not been considered." *Id*. Here, it is apparent that Congress would have still passed the illegal reentry provision even without any animus. Indeed, "control[ling] unlawful immigration … is a normal regulatory function of the

sovereign." *Rizo-Rizo*, 16 F.4th at 1296. And imposing a sanction on those who repeatedly violate U.S. immigration laws (and territorial boundaries) is a basic feature of a controlled border. That is why this Court described Section 1326 as "a necessary piece of the immigration-regulation framework," without which "Congress's immigration-regulation authority would be fatally undermined." *Hernandez-Guerrero*, 147 F.3d at 1078. It is implausible that, absent racial animus, Congress would have simply left this important provision out of the INA altogether.

Moreover, the repeated amendments to Section 1326 since 1952 obviate any need to speculate about whether Congress would have enacted the statute absent discriminatory motives. "Congress has amended Section 1326 five times since its original enactment in 1952 with the latest amendment occurring in 1996, nearly half a century later." *Salas-Silva*, 2022 WL 2119098, at *4.[7] Rodrigues-Barios has not alleged that any of these amendments was motivated by discriminatory intent. And the fact that Congress has

[7] See Pub. L. 100-690, Title VII, § 7345(a), Nov. 18, 1988, 102 Stat. 4471; Pub. L. 101-649, Title V, § 543(b)(3), Nov. 29, 1990, 104 Stat. 5059; Pub. L. 103-322, Title XIII, § 130001(b), Sept. 13, 1994, 108 Stat. 2023; Pub. L. 104-132, Title IV, §§ 401(c), 438(b), 441(a), Apr. 24, 1996, 110 Stat. 1267, 1276, 1279; Pub. L. 104-208, Div. C, Title III, §§ 305(b), 308(d)(4)(J), (e)(1)(K), (14)(A), 324(a), (b), Sept. 30, 1996, 110 Stat. 3009-606, 3009-618 to 3009-620, 3009-629.

repeatedly expanded Section 1326's scope or penalties without any evidence of discriminatory intent indicates that the law would have passed in the first instance absent any impermissible motive. See *Calvillo-Diaz*, 2022 WL 1607525, at *11; Barrera-Vasquez, 2022 WL 3006773, at *8.[8]

7. *This Court Need Not Remand for an Evidentiary Hearing*

Finally, Rodrigues-Barios requests that this Court remand to the district court to hold an evidentiary hearing, so he can "elicit testimony from his expert witnesses," about the legislative history of the illegal reentry statute. AOB 61. As outlined above, however, the district court properly applied rational basis review to Rodrigues-Barios's claim. The determination of whether a rational connection exists between a statute and legitimate government interests is a question of law, not one on which the reviewing court must conduct an evidentiary hearing. *Heller,* 509 U.S. at 319-20 ("A State has no obligation to produce evidence to sustain the

[8] One amicus does assert that the drafters of *every* amendment to section 1326 since 1952, including members such as Rep. Lawton Chiles (D-Fla.) and Sen. Bob Graham (D-Fla.), were motivated by racial animus. Kang Br. 12-27. But amicus identifies no court to have endorsed that view. And the district courts that heard testimony or received affidavits from Professor Kang have rejected her view. See *Munoz-De La O*, 2022 WL 508892, at *14 n.19, *15 n.20; *Ramirez-Aleman*, 2022 WL 1271139, at *5-6; *Hernandez-Lopez*, 2022 WL 313774, at *5."

rationality of a statutory classification. A legislative choice is not subject to courtroom factfinding . . .") (internal citations and alterations omitted).

Moreover, even if this Court were to conduct an *Arlington Heights* analysis, remand for further fact finding would not be required. Rodrigues-Barios's challenge necessarily centers on legislative materials in the public record that this Court is fully capable of analyzing on its own without the aid of defense experts. See *Anderson v. Holder*, 673 F.3d 1089, 1094 n.1 (9th Cir. 2012) ("Legislative history is properly a subject of judicial notice."). In addition, Rodriguez-Barios already submitted several hundred pages of exhibits and historical materials in support of his motion with the district court. 2-ER-46-302. It was his burden to demonstrate racial animus on the part of Congress, and he failed to present evidence to support that finding. This Court need not remand to allow him to develop the record with additional expert testimony. See *United States v. Irwin*, 612 F.2d 1182, 1187 (9th Cir. 1980) ("[I]f the affidavits show as a matter of law that appellant was or was not entitled to relief, no [evidentiary] hearing was required"); *Barrera-Vasquez*, 2022 WL 3006773, at *1, n.2 (collecting cases where district courts found "no evidentiary hearing necessary" to resolve *Arlington Heights* challenges to Section 1326).

CONCLUSION

Rodrigues-Barios' conviction should be affirmed.

Respectfully submitted,

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AUGUST 10, 2022.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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ADDENDUM

8 U.S.C. § 1326. Reentry of removed aliens

(a) In general

Subject to subsection (b), any alien who--

(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under Title 18, or imprisoned not more than 2 years, or both.

(b) Criminal penalties for reentry of certain removed aliens Notwithstanding subsection (a), in the case of any alien described in such subsection--

(1) whose removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under Title 18, imprisoned not more than 10 years, or both;

(2) whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both;

(3) who has been excluded from the United States pursuant to section 1225(c) of this title because the alien was excludable under section 1182(a)(3)(B) of this title or who

> has been removed from the United States pursuant to the provisions of subchapter V, and who thereafter, without the permission of the Attorney General, enters the United States, or attempts to do so, shall be fined under Title 18 and imprisoned for a period of 10 years, which sentence shall not run concurrently with any other sentence.1 or
>
> (4) who was removed from the United States pursuant to section 1231(a)(4)(B) of this title who thereafter, without the permission of the Attorney General, enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be fined under Title 18, imprisoned for not more than 10 years, or both.

For the purposes of this subsection, the term "removal" includes any agreement in which an alien stipulates to removal during (or not during) a criminal trial under either Federal or State law.

(c) Reentry of alien deported prior to completion of term of imprisonment

Any alien deported pursuant to section 1252(h)(2)2 of this title who enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be incarcerated for the remainder of the sentence of imprisonment which was pending at the time of deportation without any reduction for parole or supervised release. Such alien shall be subject to such other penalties relating to the reentry of deported aliens as may be available under this section or any other provision of law.

(d) Limitation on collateral attack on underlying deportation order

In a criminal proceeding under this section, an alien may not challenge the validity of the deportation order described in subsection (a)(1) or subsection (b) unless the alien demonstrates that--

> (1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;

(2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and

(3) the entry of the order was fundamentally unfair.