No. 21-50145

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MANUEL RODRIGUES-BARIOS,

Defendant-Appellant.

Appeal from the
United States District Court
for the Southern District of California
Honorable Larry A. Burns Presiding

APPELLANT'S OPENING BRIEF

Kara Hartzler
FEDERAL DEFENDERS OF SAN DIEGO, INC.
225 Broadway, Suite 900
San Diego, CA 92101
(619) 234-8467
Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases **Page(s)**

Federal Statutes

Federal Rules

Other

INTRODUCTION

In 1929, Congress enacted the first law criminalizing illegal reentry into the United States. Every historian who has studied this law now agrees that Congress created it for one primary purpose: to keep the "Mexican race" out of the United States.[1]

In the early 20th century, a eugenics movement swept through Congress demanding the "protection of American racial stock from further degradation or change through mongrelization."[2] This movement sought to halt non-white immigration to the U.S. by creating a race-based quota system that favored migrants from northern and western Europe.

But strong opposition to this movement came from southwestern agricultural businesses that were dependent on Mexican labor. These agribusinesses pressured legislators to create an exception to the quota system for countries in the Western hemisphere.

For five years, lawmakers tried to get rid of this exception. They complained that "Mexican peons" were "essentially different from us in

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[1] In the early 20th century, "Mexican" was considered a race, rather than a nationality. Excerpts of Record ("ER") 2-ER-48.

[2] 68 Cong. Rec. 2817 (1928).

character, in social position."[3] They worried that the exception was "breeding another one of those great race questions."[4] They warned that Mexican blood was "poisoning the American citizen."[5]

Finally, Congress hit on a compromise that appeased the agribusinesses. Don't change the nation's *immigration* laws. Change its *criminal* laws. Don't pass immigration quotas restricting the number of Mexicans who can enter the U.S. Let them come and work the harvest, then prosecute them for entering *after* the growing season is over. Within a matter of weeks, Congress created the crime of illegal reentry.

Today, over 99 percent of people prosecuted under this law are Hispanic.[6] Yet in the last century, Congress has never acknowledged—let alone confronted—the ugly history behind this law and reenacted it for non-racial reasons. So the law, now codified at 8 U.S.C. § 1326, continues to have the same effect its drafters intended: convicting,

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[3] 70 Cong. Rec. 3619 (1929).
[4] 70 Cong. Rec. 3620 (1929).
[5] 70 Cong. Rec. 3620 (1929).
[6] United States Sentencing Commission, Quick Facts Illegal Reentry Offenses, Research and Publications (2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Illegal_Reentry_FY20.pdf.

incarcerating, and expelling Mexicans and Latin Americans from the United States.

The Fifth Amendment guarantees everyone in the U.S. equal protection under the law. To realize that guarantee, the Supreme Court held in *Arlington Heights* that Congress cannot pass a law with an intent to discriminate against a particular race. If it does, and if the law's defenders cannot show that it would have passed *without* this discriminatory intent, the law violates equal protection.

In a motion to dismiss, Mr. Rodrigues-Barios presented hundreds of pages of evidence showing that a discriminatory intent motivated Congress's creation of the offense of illegal reentry. The burden then shifted to the government to prove that Congress would have enacted the law in 1929 without a racial motive. But the government did not even attempt to meet this burden. Under *Arlington Heights*, then, § 1326 is unconstitutional. *See United States v. Carrillo-Lopez*, __ F. Supp. 3d __, 2021 WL 3667330 (D. Nev. Aug. 18, 2021). The Court should adopt the well-reasoned analysis in *Carrillo-Lopez* and reverse Mr. Rodrigues-Barios's conviction.

STATEMENT OF JURISDICTION AND BAIL STATUS

The district court had jurisdiction under 18 U.S.C. § 3231 and entered final judgment on June 15, 2021. 2-ER-21. On June 16, 2021, Mr. Rodrigues-Barios filed a timely notice of appeal to this Court. *See* 2-ER-304; Fed. R. App. P. 4(b)(1)(A)(i). Mr. Rodrigues-Barios was sentenced to five years of probation and is no longer in custody. 2-ER-22.

ISSUE PRESENTED FOR REVIEW

Whether Congress acted with a racially discriminatory intent when it created the crime of illegal reentry, thereby violating the Fifth Amendment's guarantee of equal protection under *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment of the United States Constitution provides that no person shall be "deprived of life, liberty, or property, without due process of law[.]" U.S. Const. amend. V.

Section 1326(a) of Title 8 states that "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 or 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[.]

STATEMENT OF THE FACTS

I. Mr. Rodrigues-Barios escapes poverty in Mexico and develops deep ties to the United States.

Mr. Rodrigues-Barios is a sad but typical example of the tens of thousands of people charged with illegal reentry every year. As a child, he lived in crushing poverty in Mexico and eventually made his way to the United States with the hope of finding work. 2-ER-25. For years, he remained in the U.S., where he met his common-law wife. 2-ER-25–26. Together, they have a four-year-old daughter, who lives with his wife in the U.S. 2-ER-26–27.

Mr. Rodrigues-Barios has been deported several times and charged with § 1326 at least once before. 2-ER-24–25. But he has always returned to the U.S. to "be with my family on this side." 2-ER-25.

II. Mr. Rodrigues-Barios is charged with § 1326 and raises an equal protection challenge.

Mr. Rodrigues-Barios reentered the U.S. in May 2020 and was arrested and charged with § 1326. 2-ER-302. Several months later, he filed a motion to dismiss the information alleging that § 1326 violates equal protection under *Arlington Heights*. 2-ER-47–301.

In this motion, Mr. Rodrigues-Barios presented hundreds of pages of evidence showing that Congress acted with a racially discriminatory intent when it created the crime of illegal reentry. 2-ER-72–301. He included a declaration from Dr. Kelly Lytle Hernández, a UCLA history professor, MacArthur Fellow, and one of the nation's leading experts on race and immigration. 2-ER-74–81. He submitted excerpts from the Congressional Record detailing debates on the House and Senate floor, as well as various materials submitted to Congress. 2-ER-82–274. He cited dozens of government documents and secondary sources detailing the creation of the illegal reentry law. 2-ER-48, 53–70. These sources all pointed to the same conclusion: that Congress's motive in creating the crime of illegal reentry was to further a "comprehensive whites-only immigration system." 2-ER-76 (quoting Dr. Lytle Hernández).

Because Mr. Rodrigues-Barios met his burden to show that discriminatory intent was a "motivating factor" in the law's passage, he argued that the burden had shifted to the government to show that the law would have passed "even had the impermissible purpose not been considered." 2-ER-69 (quoting *Arlington Heights*, 429 U.S. at 266–68, 270 n.21). If the government submitted such evidence, or if the district

court doubted that Mr. Rodrigues-Barios had met his burden, he requested that the court grant an evidentiary hearing to consider expert testimony. 2-ER-70. As potential expert witnesses, Mr. Rodrigues-Barios submitted the curricula vitae of Dr. Lytle Hernández, as well as that of Dr. Benjamin Gonzalez O'Brien, a professor at San Diego State University, both of whom have written extensively on the history of illegal reentry. 2-ER-70, 276–301.

The government filed an opposition to Mr. Rodrigues-Barios's motion to dismiss. 2-ER-28–46. In this opposition, the government claimed that § 1326 is an "immigration law" that must be reviewed for rational basis, rather than under *Arlington Heights*. 2-ER-31–35. While the government admitted that legislators had said some "startling" and "regrettabl[e]" things, it denied that discrimination was a motivating factor in the creation of the 1929 law. 2-ER-42, 44. It presented no independent evidence in support of this position. 2-ER-28–46.

III. Applying a "rational basis" standard, the district court denies the equal protection challenge.

The district court rejected Mr. Rodrigues-Barios's request for an evidentiary hearing and denied his motion to dismiss. 1-ER-3–19. The court did not dispute that Congress had racial motives when it created

the original crime of illegal reentry. 1-ER-3–19. But regardless of whether there was a "discriminating motive back in 1917,"[7] the court questioned why it should "look back to some original enactment of the statute" rather than "study the motives of the Congress at the time of the most recent enactment[.]" 1-ER-6, 9. The court also posited that the effects of the law "have more to do with the lay of the land and the fact that we're on a border that is just north of Mexico than anything else." 1-ER-4.

The district court also wondered whether the "history of discrimination in this field" meant that Congress would be permanently "unable to enact another law that forbade people from coming into the United States without permission[.]" 1-ER-7. Mr. Rodrigues-Barios denied that it would, acknowledging that Congress has "an interest in establishing laws that govern … immigration." 1-ER-7. So if Congress had ever chosen to "criminalize this for nonracially discriminatory

[7] The district court appeared to believe that Mr. Rodrigues-Barios was challenging the Immigration Act of 1917, *see* 1-ER-9, 18, even though his motion always referred to the 1929 law and never mentioned the 1917 law. 2-ER-48, 49, 53, 56, 61–64, 66, 69, 70. The only reference to the 1917 law in the record was the government's point that the 1917 law authorized the civil deportation of people who entered without inspection but created no criminal penalty. 2-ER-29.

reasons then I don't think we'd have any problem with it." 1-ER-13. But "[t]he problem is they never did that in any of these reenactments. They never did it in 1952, 1965, 1990. All they did is they changed the penalties, and that is not enough." 1-ER-13.

The court ultimately agreed with the government's statement that "the appropriate test is rational basis … so we don't even make it" to an analysis under *Arlington Heights*. 1-ER-17. The court then held that it "finds a rational basis for this" law and denied the motion. 1-ER-18, 19. After a stipulated-facts bench trial, the district court found Mr. Rodriguez-Barios guilty and sentenced him to five years of probation. 2-ER-21–22. This appeal follows.

SUMMARY OF THE ARGUMENT

Congress created the crime of illegal entry in 1929 for one primary reason: to keep American blood "white and purely Caucasian." 2-ER-202. Analyzing the overwhelming evidence under *Arlington Heights* leaves no doubt that racial discrimination motivated the law's passage. Because the burden then shifts to the government to prove that Congress would have created the law without this motivating factor,

and because the government made no attempt to meet this burden, § 1326 is unconstitutional.

The district court should not have applied rational basis to this claim. *Arlington Heights* applies for at least three independent reasons. First, this Court applies *Arlington Heights* to claims of *racial* discrimination, even when the challenged law also relates to immigration. Second, § 1326 is a *criminal* law subject to greater constitutional and procedural protections. Third, case law applying a highly deferential standard to noncitizens seeking admission from abroad is inapposite here. For any and all of these reasons, the Court should review this claim under *Arlington Heights*.

The district court's other conclusions were also legally incorrect and unpersuasive. While the district court believed that a subsequent reenactment could cleanse a law of its discriminatory taint, Supreme Court precedent shows that a reenactment cannot do so on its own. At a minimum, Congress would have to confront the law's shameful history and consciously reenact it for non-racial reasons, which Congress has never done with illegal reentry. And in any case, racial animus independently infected illegal reentry's subsequent reenactment.

Finally, the district court incorrectly believed that disparate impact must be motivated by animus to be relevant to a finding of discriminatory intent.

Because § 1326 violates equal protection under *Arlington Heights*, the Court should reverse Mr. Rodrigues-Barios's conviction. At a minimum, it should remand for an evidentiary hearing if any factual questions remain.

ARGUMENT

I. Mr. Rodrigues-Barios met his burden under *Arlington Heights* to show discriminatory intent.

A. The standard of review is de novo.

The Court reviews the constitutionality of a statute de novo. *United States v. Mohamud*, 843 F.3d 420, 432 (9th Cir. 2016). It also reviews a district court's conclusions of law de novo. *Gonzalez v. Arizona*, 677 F.3d 383, 406 (9th Cir. 2012) (en banc).

B. *Arlington Heights* set forth a burden-shifting framework for determining whether a law violates equal protection.

To determine whether a facially neutral law violates the Fifth Amendment's equal protection guarantee, courts apply the burden-shifting framework set forth in *Arlington Heights*, 429 U.S. at 266–68.

Under this framework, a challenger carries the burden to show that a law, policy, or rule was created with a "discriminatory intent or purpose." *Id.* at 265.

Establishing a discriminatory purpose "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Id.* at 266. In making this inquiry, the Supreme Court has identified the following potential sources of evidence:

1) the "historical background of the decision";

2) the "specific sequence of events leading to the challenged decision";

3) the "legislative or administrative history";

4) any "[d]epartures from normal procedural sequence"; and

5) the "impact of the official action and whether it bears more heavily on one race than another[.]"

Arce v. Douglas, 793 F.3d 968, 977 (9th Cir. 2015) (citing *Arlington Heights*, 429 U.S. at 266–68). These are referred to as the "*Arlington Heights* factors." *Id.* at 981. While not "purporting to be exhaustive," these factors represent the "proper inquiry in determining whether racially discriminatory intent existed." *Arlington Heights*, 429 U.S. at 268.

Because legislatures are rarely "motivated solely by a single concern," a law's challenger need not show that the legislature's actions "rested solely on racially discriminatory purposes." *Id.* at 265–66. Rather, the challenger must show only "that a discriminatory purpose has been a *motivating factor* in the decision." *Id.* (emphasis added). The challenger must make this showing by a preponderance of the evidence. *See Hunter v. Underwood*, 471 U.S. 222, 225 (1985).

Once a challenger satisfies their burden to show that racial discrimination was a "motivating factor," the burden shifts. *Id.* at 270 n. 21. At that point, the party defending the law's constitutionality must show that the legislature would have enacted the law "even had the impermissible purpose not been considered." *Id.* If they cannot meet this burden, the challenged law violates the Fifth Amendment and is invalid. *Id. See also Hunter*, 471 U.S. at 233.

Under *Arlington Heights*, Mr. Rodrigues-Barios met his burden to show that Congress created the crime of illegal reentry with a discriminatory intent. And because the government never attempted to show that the law would have passed absent this intent, the statute is unconstitutional.

C. Overwhelming evidence shows that racism was a "motivating factor" in the creation of illegal reentry.

To show that discrimination was a motivating factor in the creation of § 1326, Mr. Rodrigues-Barios submitted hundreds of pages of evidence, including a detailed declaration from a leading U.S. scholar on race and immigration, numerous transcripts from the Congressional Record, and dozens of citations to secondary sources. 2-ER-72–301. Step by step, he walked through the *Arlington Heights* factors and used this evidence to illustrate each respective category, leaving no doubt that race was a "motivating factor" in the creation of illegal reentry. 2-ER-72–275.

1. The "historical background" of the law

First, the law's "historical background" shows that it came about in a time of racial animosity and upheaval. *Arlington Heights*, 429 U.S. at 267; 2-ER-53–55. The 1920s were an era when "the Ku Klux Klan was reborn, Jim Crow came of age, and public intellectuals preached the science of eugenics." 2-ER-75 (quoting Declaration of Dr. Lytle Hernández). Many politicians, known as "nativists," hoped to restrict or end immigration from everywhere except the "Nordic" regions of northern and western Europe. 2-ER-75–76. Citing a rise in migration

from southern and eastern Europe, nativists fretted about "racial indigestion," "non-white" immigration, and "the contamination of Anglo-American society." 2-ER-53.

This race-fueled movement frequently pointed to the "science" of eugenics to justify its position. 2-ER-75. *The Saturday Evening Post* ran eugenicist articles warning that new immigrants were racially inferior, impossible to assimilate, and a threat to stability and democracy. 2-ER-54. Many prominent politicians openly held positions in eugenics-based organizations, such as Representative Albert Johnson, the powerful chairman of the House Committee on Immigration and Naturalization who also headed the Eugenics Research Institute. 2-ER-38. Additionally, the Department of Labor, which controlled immigration before the creation of the Immigration and Naturalization Service, was headed by James Davis, a eugenicist who published articles warning that "rat men" were jeopardizing the American gene pool. 2-ER-56–57.

But no eugenicist in the 1920s was more famous than Dr. Harry H. Laughlin, director of the Eugenics Record Office. 2-ER-54. Dr. Laughlin was well known for drafting the model involuntary sterilization law adopted by many states and countries, including the

Third Reich of Nazi Germany. 2-ER-54. He also served as the eugenics expert for Chairman Johnson's Committee on Immigration and Naturalization from 1920 to 1931. 2-ER-85. During this decade, he produced four eugenics-based reports and testified before Congress multiple times. 2-ER-85–86.

In one notorious hearing before the House Immigration and Naturalization Committee, Dr. Laughlin testified that Congress must base its immigration law and policy on eugenics to "protect American blood from alien contamination." 2-ER-88. He described "[i]mmigration control" as the "greatest instrument which the Federal Government can use in promoting race conservation of the Nation." 2-ER-103. He compared the drafters of deportation laws to "successful breeders of thoroughbred horses," who would never consider "acquiring a mare or a stallion not of the top level" for their "stud farm." 2-ER-128. And he stressed that deportation of the "undesirable individual" is critical; otherwise, "we cannot get rid of his blood no matter how inferior it may be[.]" 2-ER-129.

During this hearing, Chairman Johnson described Dr. Laughlin's work as a "priceless" resource that would "bear intimately on

immigration policy." 2-ER-87. Chairman Johnson advocated for Congress to use the "principle of applied eugenics" in crafting laws, agreeing that "[i]mmigration looks more and more like a biological problem[.]" 2-ER-109, 130. Another representative agreed, stating that "we will have to control immigration to suit our own needs or we will lose our national character," which would "spell destruction for the future of America." 2-ER-109. Congress was thus primed to use race as the guiding force in crafting its immigration laws.

2. The "specific sequence of events" leading to the law's enactment

Next, the "specific sequence of events" leading up to the enactment of illegal reentry revealed a discriminatory intent. In 1924, Congress had largely succeeded in enacting its racially-fueled agenda through a law known as the National Origins Act, co-sponsored by Chairman Johnson. 2-ER-55, 76. This law created a quota system that reserved the vast majority of visas for immigrants from northern and western Europe, thereby keeping the nation's "racial strains" purely white. 2-ER-55, 75, 110. The law also excluded any "nonwhite" person from the quota system in an effort to "stand firm against the efforts of

'hyphenates' who would 'play politics with the nation's blood stream.'" 2-ER-55 (citing historian Dr. Mae Ngai).

But this campaign to create a "whites-only" nation ran into a problem: resistance from southwestern agricultural businesses, who depended heavily on Mexican labor. 2-ER-56, 75, 76. These businesses pressured a bloc of congressmen from western states to exempt all countries in the Western Hemisphere (including Mexico) from the 1924 law's quota system. 2-ER-56, 76, 77, 178. Lawmakers were forced to "choose between accepting a Mexican quota exemption or passing no immigration law at all." 2-ER-76. Grudgingly, they chose the exemption, complaining that it "leaves open the doors for perhaps the worst element that comes into the United States—the Mexican peon." 2-ER-56.

Despite this setback, lawmakers' zeal to exclude Mexican immigrants did not abate. 2-ER-48. Legislators held hearings and proposed "bill after bill" that would add Mexico to the quota system. 2-ER-56–61, 83–169, 204–38. They spewed a constant litany of racial and biological justifications for the policy. To quote just a few of the comments from the Congressional Record:

- Mexicans are "raising a serious race question";
- The "Mexican peon" is a mixture of the "Mediterranean-blooded Spanish peasant," "low-grade Indians," and "negro slave blood";
- Mexicans represent "the scoff and scum, the mongrel, the bootlegger element";
- Mexicans were "of a class" that was "very undesirable" and were "poisoning the American citizen";
- The goal of immigration law is to protect "American racial stock from further degradation or change through mongrelization";
- Quotas should "apply to the country south of the Rio Grande" because its population is "composed of mixture blood of white, Indian, and negro";
- The infusion of "mixture blood" inflicts a "very great penalty upon the society which assimilates it," and the U.S. "already has sufficient race and blood troubles";
- The U.S. was at a disadvantage compared to countries that had "kept their blood white and purely Caucasian";
- Mexicans are "illiterate, unclean, peonized masses";
- Mexicans "take the place of white Americans in communities and often thereby destroy schools, churches, and all good community life";
- "[A] mixture of blocs of peoples of different races has a bad effect upon citizenship, creating more race conflicts and weakening national character";

- "Mexican impulses and traditions" represent the "want of intelligence and stamina among the mass of its people";
- "Mexican peons" tend to aggravate the "creation of race friction" and the lack of cohesion due to "the intermixing of different races";
- "The Mexican peons are illiterate and ignorant" and have "unsanitary habits and living conditions";
- Mexicans should not be exempt from quotas when "the average Italian is as much superior to the average Mexican as a full-blooded Airedale is to a mongrel"; and
- Without restrictions on Mexico, Haiti, Cuba, and South America, their "evil stream will continue to pour its pollution into the mass of our population."

2-ER-48, 56, 58, 59, 60, 62, 64, 109, 122, 130, 178, 179, 198–99, 201, 202, 235.

Despite these adamant racist sentiments, no proposed legislation could surmount the agribusinesses' opposition to quotas on countries from the Western Hemisphere. 2-ER-56. After years of failed bills, legislators began to search for a more creative solution.

3. The "legislative or administrative history" of the 1929 law

Five years after Congress passed the 1924 National Origins Act, legislators finally had a breakthrough. Secretary of Labor James Davis,

together with Senator Coleman Blease from South Carolina (a proud segregationist and white supremacist), came up with a compromise. 2-ER-79–80. Rather than add Mexicans to the *civil* immigration quota system, they proposed that Congress create *criminal* penalties for crossing the border between ports of entry. 2-ER-57, 76. Senator Blease presented this plan to the agribusinesses, who were on board. 2-ER-80. As one grower put it, the agribusinesses "greatly favor[ed]" a criminal law, rather than an immigration quota, since it would mean that "our peak labor demands might be met and upon completion of our harvest these laborers returned to their country." 2-ER-57, 80.

Once the compromise was brokered, Senator Blease presented a bill criminalizing illegal entry and reentry on the Senate floor, where it quickly passed. 2-ER-61, 243. Chairman Johnson asked Senator Blease to "get the measures over to the House" within two days. 2-ER-61, 243. The House swiftly passed the bill, and President Hoover signed it into law three days later. 2-ER-62, 173–80, 273–74.

4. The "[d]epartures from normal procedural sequence"

The creation of illegal reentry also departed from Congress's "normal procedures or substantive conclusions." 2-ER-63–64. The 1920s

represented the first and only era in which Congress openly relied on the now-discredited theory of eugenics to draft immigration legislation. 2-ER-48, 53–55, 83–171. Several decades later, the Hart-Cellar Act of 1965 openly acknowledged Congress's racial motives from that era and repealed the National Origins Act of 1924. 2-ER-63–64, 69. Illegal reentry remains one of the only laws from that era still on the books. 2-ER-63–64, 69.

Before the district court, the government argued that the creation of illegal reentry was motivated by "the need to preserve jobs for American citizens." 2-ER-43. But if "the need to preserve jobs" were Congress's true goal, it made no sense for Congress to maintain a quota exemption that still allowed hundreds of thousands of Mexican immigrants to work legally in the U.S. Nor did it make sense to broker a compromise that would allow growers to employ Mexican immigrants during the harvest and get rid of them *after* the work was done. And although tens of thousands of Canadians were also entering the U.S. to work, legislators directed their vitriol at Mexicans—even lawmakers from northern states who were geographically more likely to see job competition from Canadians. 2-ER-64, 178.

Even in the 1920s, some legislators condemned this "preserving jobs" excuse for what it was—a thin veneer to disguise legislators' racial motives. One representative speaking about a proposed bill to end the Mexico exemption mused, "Perhaps we should close the doors. But I do detest the giving of false economic reasons to disguise intolerance." 2-ER-261. He also noted that it was "not so much the particular provisions of any immigration bill as it is the spirit behind the bill with which I am deeply concerned." 2-ER-261. This was "a spirit of intolerance and bigotry not only to religions but to races," as well as the "spirit of the Ku-Klux Klan." 2-ER-261.

Another legislator noted that a precursor bill removing the quota exemption was "inspired, prompted, and urged" by those with a "fixed obsession on Anglo-Saxon superiority." 2-ER-182. And when the House of Representatives debated the 1929 bill shortly before it passed, one legislator commented that the illegal reentry law had grown out of the "present day hysteria and intolerance" of "narrow-minded and bigoted" individuals who were "forcing the legislation now before us." 2-ER-175.

5. The "impact" of the law and "whether it bears more heavily on one race than another"

To this day, the illegal reentry law still does what its drafters designed it to do: disparately impact Mexicans and Latin Americans. Since the law's passage, Mexicans have never comprised less than 84.6% of those prosecuted for illegal reentry. 2-ER-80–81. In some years, the number has risen to 99%. 2-ER-81. This trend continues today, as the U.S. Sentencing Commission's own data shows that 99.1% of individuals convicted of illegal reentry in 2020 were Hispanic.[8]

Given the overwhelming evidence in support of all five of the *Arlington Heights* factors, Mr. Rodrigues-Barios easily met his burden to show that race was a "motivating factor" in the passage of the illegal reentry law.

D. The government did not meet its burden to show that Congress would have created illegal reentry absent a discriminatory intent.

Once a challenger satisfies their burden to show that racial discrimination was a "motivating factor," the burden shifts. *Arlington*

[8] United States Sentencing Commission, Quick Facts Illegal Reentry Offenses, Research and Publications (2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Illegal_Reentry_FY20.pdf.

Heights, 429 U.S. at 270 n. 21. At that point, the party defending the law's constitutionality must show that the legislature would have enacted the law "even had the impermissible purpose not been considered." *Id*. Because Mr. Rodrigues-Barios met his burden of showing discriminatory intent, the burden shifted to the government to show that Congress would have created the crime of illegal reentry absent any intent to racially discriminate.

Below, the government did not even *attempt* to meet this burden. It did not file a declaration from an expert witness, let alone call one to testify. It did not submit Congressional records. It did not submit a *single* piece of evidence to show that Congress would have created this law without a racial motive.

Instead, the government denied that the burden had shifted, claiming that because *Arlington Heights* did not apply, and that Mr. Rodriguez-Barios failed to meet his burden even if it had, "[t]here is no need to reach this point." 2-ER-45. So if the Court finds that Mr. Rodrigues-Barios carried his burden below, the government has waived or forfeited any opportunity to show that the law would have

passed absent a discriminatory intent. *See, e.g., United States v. Jones,* 565 U.S. 400, 413 (2012).

* * *

Dr. Lytle Hernández is not alone in her opinion that the creation of illegal reentry was "a racially motivated act that quickly delivered racially disparate outcomes." 2-ER-81. As one recent law review article noted, "no one seriously disputes the original law's illegitimate nature[.]" W. Kerrel Murray, *Discriminatory Taint*, 135 Harv. L. Rev. 1192, 1253 (2022). Another expert has testified that the "academic consensus" is that Congress acted with discriminatory intent when it created illegal reentry; indeed, she was aware of *no* historian who "believe[d] Congress acted with race-neutral motivation when it criminalized reentry."[9]

This unanimity on Congress's racial motives extends to district court judges, nearly all of whom have "acknowledged the racial animus behind the 1929 law." *United States v. Hernandez-Lopez*, No. CR H-21-440, 2022 WL 313774, at *2 (S.D. Tex. Feb. 2, 2022). Even the

[9] *See* Transcript of Testimony of Dr. Deborah Kang, United States v. Munoz-de la O, Jan. 28, 2022, 20-cr-134, Dkt. No. 92, pp. 23–24.

government in *Carrillo-Lopez* admitted as much. *See* 2021 WL 3667330, at *7 ("The government ultimately conceded that discriminatory intent motivated the passage of the Act of 1929."). Because experts, the Congressional Record, historical sources, judges, and even occasionally the government all agree that Congress acted with racial animus when creating the law of illegal reentry, and because the government has not shown that the 1929 law would have passed without this racial animus, § 1326 violates the Fifth Amendment's guarantee of equal protection.

II. *Arlington Heights*—not rational basis—applies.

Although overwhelming evidence and consensus show that racism motivated the creation of illegal reentry, the district court declined to consider this under *Arlington Heights*. 1-ER-18. Instead, it relied on case law that applied rational basis review to challenges brought by immigrants abroad who were seeking admission to the United States. 1-ER-3 (citing *Fiallo v. Bell*, 430 U.S. 787 (1977), and *Kleindienst v. Mandel*, 408 U.S. 753 (1972)). Holding that these cases controlled *any* equal protection challenge to a law that relates to immigration, the district court denied Mr. Rodrigues-Barios's claim. 1-ER-18.

The district court's refusal to apply *Arlington Heights* was wrong for three reasons. First, *Arlington Heights* is the correct standard for analyzing race-based equal protection claims. Second, § 1326 is not an "immigration law"—it is a *criminal* law subject to greater constitutional and procedural scrutiny. Third, even if § 1326 *were* an immigration law, not every immigration law receives rational basis review.

A. *Arlington Heights* is the appropriate framework for race-based challenges.

First, and most importantly, Mr. Rodrigues-Barios does not base his equal protection claim on alienage or immigration status. He bases it on *race*. 2-ER-48–71. Below, both his motion and his supporting evidence focused exclusively on race and made no claims of discriminatory treatment based on immigration status. 2-ER-48–301. Indeed, Mr. Rodrigues-Barios agreed that Congress has the authority to create an illegal reentry law that punishes noncitizens who enter unlawfully, so long as it is not racially motivated. *See* 1-ER-13 (defense counsel noting that if Congress had "criminalize[d] this for nonracially discriminatory reasons then I don't think we'd have any problem with it").

Because Mr. Rodrigues-Barios makes a race-based claim, rational basis does not apply. It is black-letter law that "[e]qual protection demands that racial classifications, especially suspect in criminal statutes, be subjected to the most rigid scrutiny." *Loving v. Virginia*, 388 U.S. 1 (1967) (internal citation and quotation marks omitted). Indeed, "the Supreme Court has repeatedly held that reliance 'on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees.'" *United States v. Montero-Camargo*, 208 F.3d 1122, 1134 (9th Cir. 2000) (en banc) (quoting *Wygant v. Jackson Bd. of Ed.,* 476 U.S. 267, 273 (1986)). Courts thus apply the highest level of scrutiny to race-based claims to ensure that there is "little or no possibility" that the motive underlying government action relied on "illegitimate racial prejudice or stereotype." *Id.* (quotations omitted).

The Court confirmed this principle when it applied *Arlington Heights* in a recent case involving the Deferred Action for Childhood Arrivals ("DACA") program. *See Regents of the Univ. of Cal. 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 Cal., 140 S. Ct. 1891 (2020). There, the plaintiffs alleged that the rescission of this program was motivated by discriminatory animus against "Latinos," "individuals of Mexican heritage," and "persons of Hispanic descent." *Id.* The Court rejected the government's argument that "nationality, as opposed to ethnicity," meant that a lower level of scrutiny applied. *Id.* at 519 n.29. Instead, the Court applied *Arlington Heights* in part because the plaintiffs "allege discriminatory intent not only toward 'Mexican nationals,' but also toward 'individuals of Mexican heritage, and Latinos.'" *Id.* at 519 n.29.

Although the Supreme Court later held that the DACA plaintiffs' allegations were insufficient to establish an equal protection violation, it did not disturb this Court's conclusion that *Arlington Heights* applied. *See Regents*, 140 S. Ct. at 1915. Indeed, five justices analyzed the *Arlington Heights* factors on the merits. *See id.* at 1915–16; *see also id.* at 1917–18 (Sotomayor, J., dissenting). And as discussed *infra*, this Court later relied on its earlier reasoning in *Regents* to apply *Arlington Heights* in a different immigration case alleging racial discrimination. *See* Section II.C (discussing *Ramos v. Wolf*, 975 F.3d 872 (9th Cir.

2020)). Thus, *Arlington Heights* applies to race-based claims even when the challenged law relates to immigration.

As in *Regents*, Mr. Rodrigues-Barios's claim alleges discriminatory intent against Latinos, individuals of Mexican heritage, and persons of Hispanic descent. 2-ER-48–71. *Regents* thus confirms that the Court should apply *Arlington Height*s regardless of whether the challenged law relates to immigration. In other words, while immigration status might not *supply* the basis for an elevated standard of scrutiny, it cannot *negate* the elevated scrutiny that race-based claims demand.

Numerous district courts have also applied *Arlington Heights* to various race-based claims related to provisions in the immigration context, including the public charge ground of inadmissibility,[10] a form of humanitarian relief known as Temporary Protected Status,[11] and

[10] *See, e.g.*, *Cook Cnty., Illinois v. Wolf,* 461 F. Supp. 3d 779, 789 (N.D. Ill. 2020); *California v. U.S. Dep't of Homeland Sec.*, 476 F. Supp. 3d 994, 1023 (N.D. Cal. Aug. 3, 2020) (public charge inadmissibility ground); *La Clinica de la Raza v. Trump*, __ F. Supp. 3d __, 2020 WL 6940934, at *18 (N.D. Cal. Nov. 25, 2020).

[11] *See, e.g., Ramos v. Nielsen,* 321 F. Supp. 3d 1083, 1124 (N.D. Cal. 2018); *CASA de Maryland, Inc. v. Trump*, 355 F. Supp. 3d 307, 325 (D. Md. 2018).

laws regarding so-called "sanctuary cities."[12] And even courts that have denied this particular challenge to § 1326 have frequently applied *Arlington Heights* to it.[13] As one court explained, "Congress's plenary power over immigration matters cannot be constitutionally reconciled to allow for *carte blanche* in enacting racially discriminatory statutes in violation of the Fifth Amendment and its guarantee of equal protection." *Wence*, 2021 WL 2463567, at *3.

As *Wence* suggested, a rigid application of rational basis to immigration-related laws would have the perverse effect of preventing courts from *ever* considering evidence of racial animus—even when a law carries criminal sanctions. *See infra*, Section II.B. Unlike *Arlington Heights*, rational basis prohibits courts from considering evidence of discrimination "if there is any reasonably conceivable state of facts that

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[12] *See, e.g., City of S. Miami v. DeSantis*, No. 19-cv-22927, 2021 WL 4272017, at *33 (S.D. Fla. Sept. 21, 2021).

[13] *See, e.g., United States v. Rios-Montano,* No. 19-cr-2123-GPC, 2020 WL 7226441, at *2 (S.D. Cal. Dec. 8, 2020); *United States v. Zepeda*, No. cr 20-0057 FMO, 2021 WL 4998418, at *2 (C.D. Cal. Jan. 5, 2021); *United States v. Wence*, No. 3:20-cr-0027, 2021 WL 2463567, at *4 (D.V.I. June 16, 2021); *United States v. Machic-Xiap*, No. 3:19-cr-407-SI, 2021 WL 3362738, at *10 (D. Or. Aug. 3, 2021); *United States v. Sanchez-Felix*, No. 21-cr-00310-PAB, 2021 WL 6125407, at *3 (D. Colo. Dec. 28, 2021); *United States v. Munoz-de la O*, No. 2:20-cr-134-RMP-1, 2022 WL 508892, at *9 (E.D. Wash. Feb. 18, 2022).

could provide a rational basis for the classification." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993). So an inflexible application of rational basis review to immigration-related laws would force courts to turn a blind eye to blatant racism that no one factually disputes.

Applying *Arlington Heights* does not mean a challenger will always win. Courts may still hold (and frequently do) that a claim presents insufficient evidence of discrimination and deny it on the merits. *See, e.g., Ramos*, 975 F.3d at 899 (finding insufficient evidence that race was a "motivating factor" in the termination of Temporary Protected Status). But the Court should not be hamstrung by a blanket standard that gives Congress a free pass to racially discriminate simply because a law relates to immigration.

B. Section 1326 is a criminal law not subject to deferential immigration standards.

Rational basis review is also inapplicable for a wholly separate reason: § 1326 is not even an "immigration" law. Rather, it is a *criminal* law, with penalties of up to twenty years in federal prison. *See* 8 U.S.C. § 1326(b)(2). This distinction matters, as the purpose of criminal statutes is to "punish past transgressions," while the purpose of a "purely civil" immigration law is to "look[] prospectively to the

[individual's] right to remain in this country in the future." *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1038, 1039 (1984). If anything, the heightened standard of review in criminal cases suggests that "the criminal standard should be set *above*" the standard in civil cases, rather than that "the civil standard should be buried *below* it." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1229 (2018) (Gorsuch, J., concurring) (emphases in original).

Indeed, the primary case the district court relied on actually distinguished civil immigration laws from border-related crimes for purposes of the standard of review. 1-ER-3. In *Fiallo*, the noncitizen plaintiffs argued that rational basis did not apply, relying on the higher level of scrutiny applied in cases involving border offenses such as drug importation and transporting undocumented immigrants. *See Fiallo*, 430 U.S. at 793–94 (citing *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973), and *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975)). But *Fiallo* rejected this comparison, distinguishing the more robust constitutional protections in those cases from the deference afforded Congress's "exceptionally broad power to determine which classes of aliens may lawfully enter the country." *Id.* at 794 (emphasis added).

This alone undercuts the conclusion that the Supreme Court intended the *Fiallo* standard to apply in criminal cases.

In fact, this elevated scrutiny of criminal proceedings pre-dates *Fiallo* by nearly a century. Ninety years earlier, as part of the Chinese Exclusion Act, Congress created a law barring Chinese nationals from entering or remaining in the United States and punishing violators with up to one year of imprisonment. *See Wong Wing v. United States*, 163 U.S. 228, 234 (1896). The government urged the Court to characterize this law as a "political offense" not eligible for a jury trial or other Fifth or Sixth Amendment criminal protections. *Id.* But the Court rejected this argument, relying on the "distinction between those provisions of the statute which contemplate only the *exclusion* or *expulsion* of Chinese persons and those which provide for their imprisonment at hard labor"—the latter of which required a jury trial. *Id.* at 236 (emphases added). Put simply, the Court refused to apply a relaxed version of the Constitution to noncitizens charged with immigration crimes, even when Congress enacted those crimes to deter unlawful immigration.

Wong Wing established several important guideposts for this case. It held that Congress may *create* the crime of illegal entry. *See id.* at 235 (holding that Congress may "declare the act of an alien in remaining unlawfully within the United States to be an offense punishable by fine or imprisonment"). It also confirmed that Congress may *deport* noncitizens and *detain* them during the process. *See id.* But *Wong Wing* showed that none of these principles *diminish* a defendant's Fifth Amendment protections merely because they are charged with an immigration-related crime. And in a prescient move, *Wong Wing* reminded us that noncitizen defendants charged with illegal entry receive "*equal protection of the law* … within the territorial jurisdiction, without regard to any differences of *race*, of color, or nationality." *Id.* at 238 (emphases added).

Since *Wong Wing*, courts have always distinguished between the rights afforded people in criminal and immigration proceedings. *See Lopez-Mendoza*, 468 U.S. at 1038–43 (collecting cases holding that many constitutional guarantees in criminal proceedings do not apply in immigration proceedings). If the Court were to hold that criminal statutes like § 1326 are merely immigration laws in disguise, it would

award the government a "heads I win, tails you lose" advantage by emphasizing the criminal/immigration distinction in removal cases (where it *diminishes* a noncitizen's rights) while ignoring the same distinction in criminal cases (where it *bolsters* the noncitizen's rights). Because over a century of precedent holds that individuals charged with crimes enjoy greater constitutional and procedural protections, rational basis does not apply to race-based challenges to § 1326.

C. Rational basis does not even apply to all immigration laws.

Not only is § 1326 a criminal law, rather than an immigration one, "[a] challenged law does not receive minimal scrutiny merely because it is related to immigration." *Dent v. Sessions*, 900 F.3d 1075, 1081 (9th Cir. 2018). Although the district court applied the rational basis standard from *Fiallo* and *Mandel*, 1-ER-3, this Court has rejected the government's calls to apply that standard simply because a law or policy relates to immigration. Instead, the Court has applied *Arlington Heights* in quintessential "immigration" cases as long as the underlying concerns meriting deference in *Fiallo* and *Mandel* were not implicated.

First, as already discussed, this Court applied *Arlington Heights* in a DACA case alleging discrimination against "Latinos," "individuals

of Mexican heritage," and "persons of Hispanic descent." *Regents*, 908 F.3d at 518. Additionally, *Regents* distinguished in "several potentially important respects" the use of the more deferential standard in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), a case reviewing an executive order barring the admission of noncitizens from certain countries. *Id.* at 520. Specifically, this Court relied on the "physical location of the [DACA] plaintiffs within the geographic United States," the "lack of a national security justification" for the DACA rescission, and the "nature of the constitutional claim raised." *Id.* (citation omitted). Given these distinctions, this Court eschewed the use of rational basis and held that the petitioners had "stated a plausible equal protection claim" under *Arlington Heights*. *Id.*

Shortly after the Supreme Court's subsequent decision in *Regents*, this Court again applied *Arlington Heights* in an immigration case. *See Ramos*, 975 F.3d at 896. There, the petitioners challenged the executive's attempts to terminate a program providing a "widescale, nationality-based humanitarian harbor" known as Temporary Protected Status. *Id.* Citing its rejection of rational basis in *Regents*, this Court again distinguished *Trump v. Hawaii* and *Fiallo* because those cases

"turned primarily" on the executive's authority to "manage our nation's foreign policy and national security affairs without judicial interference." *Id.* at 895. By contrast, *Ramos* held, Temporary Protected Status did not involve "the level of deference that courts owe to the President in his executive decision to exclude foreign nationals who have not yet entered the United States[.]" *Id.* at 896. Noting that the Supreme Court in *Regents* had "also applied the *Arlington Heights* standard," this Court "reject[ed] the Government's contention that *Trump v. Hawaii*'s standard of review should apply." *Id.* (citing *Regents,* 140 S. Ct. at 1915–16).

These cases squarely foreclose the district court's conclusion that rational basis applies simply because a law relates to immigration. Instead, they show that courts have used rational basis in cases where noncitizens are applying for *admission* from *abroad*. *See also California v. U.S. Dep't of Homeland Sec.*, 476 F. Supp. 3d at 1019–21 (describing *Trump v. Hawaii*, *Mandel*, and *Fiallo* as "initial admission case[s]"). Courts have done so because applications for admission from abroad implicate "foreign policy and national security" concerns where deference to the political branches is at its peak. *Ramos*, 975 F.3d at

895; *see also Trump v. Hawaii*, 138 S. Ct. at 2418 (stating that "the admission and exclusion of foreign nationals" is a "'fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control'") (quoting *Fiallo*, 430 U.S. at 792).

But where a person has already "effected an entry into the United States," courts consider foreign policy and national security implications to a "lesser extent." *Ramos*, 975 F.3d at 896 (quotations omitted). Indeed, once a noncitizen is physically present in the country, oversight of immigration issues falls within the Department of Homeland Security and the Department of Justice, whose decisions are subject to greater judicial review than the admissions decisions of consular officials working in the Department of State. *See, e.g., Khachatryan v. Blinken,* 4 F.4th 841, 849 (9th Cir. 2021) (noting that "ordinarily, a consular official's decision to deny a visa to a foreigner is not subject to judicial review") (quotations omitted).

Here, the interests that led *Fiallo* and *Mandel* to apply rational basis are not present. Individuals charged with § 1326 are not applying for "admission" to the United States from abroad—by definition, they are ineligible to do so. *See* 8 U.S.C. § 1182(a)(6)(A)(i) (stating that

persons who are present without admission or parole or enter at an undesignated time or place are "inadmissible"). Indeed, § 1326 proceedings have no bearing on whether a noncitizen stays in the country or faces deportation—they decide only whether a person may be punished for a crime.

But like DACA and Temporary Protected Status recipients, most people charged with § 1326 have spent years in the U.S. cultivating homes, families, businesses, and other ties to the community. One survey found that more than 80 percent of people charged with § 1326 were reentering to rejoin their family members in the United States.[14] And most border crossers have "significant equities and strong ties to the United States."[15] Mr. Rodrigues-Barios himself explained that he returned to the U.S. "to be with my family on this side"—his common-

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[14] *See National Immigrant Justice Center*, A Legacy of Injustice: The U.S. Criminalization of Migration, National Immigrant Justice Center News and Research6 (July 2020), https://immigrantjustice.org/sites/default/files/uploaded-files/no-content-type/2020-07/NIJC-Legacy-of-Injustice-report_2020-07-22_FINAL.pdf.

[15] *See* Carlos Estrada, Rooted in Racism: The Human Impact of Migrant Prosecutions, National Immigration Project of the National Lawyers Guild 7-14 (Dec. 2021), https://www.nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/pr/2021_21Dec_Rooted-in-Racism-Report.pdf.

law wife and four-year-old daughter. *See* 2-ER-25. Thus, the foreign policy and national security concerns that led *Fiallo*, *Mandel*, and *Trump v. Hawaii* to apply rational basis are not present in § 1326 cases.

Accordingly, rational basis cannot apply because Mr. Rodrigues-Barios brings a *race*-based claim that challenges a *criminal* law and does not involve an *application for admission from abroad*. Because *Arlington Heights* applies, and because Mr. Rodrigues-Barios met his burden under *Arlington Heights* and the government did not, § 1326 violates equal protection.

III. The district court's reasoning on reenactments and disparate impact was legally flawed and unpersuasive.

Although the district court did not apply *Arlington Heights* to Mr. Rodrigues-Barios's equal protection challenge, it nevertheless discussed several factors relating to that analysis. First, the court questioned why it should "look back to some original enactment of the statute" rather than "study the motives of the Congress at the time of the most recent enactment[.]" 1-ER-6, 9. The court also posited that the disparate impact in this case has "more to do with the lay of the land and the fact that we're on a border that is just north of Mexico," rather than that the law has been "applied unfairly" or that the government

"has it out for Hispanics." 1-ER-4, 9, 15. Because both theories are legally flawed, the Court should not find them persuasive. And if any other factual questions remain, the Court should remand for an evidentiary hearing.

A. The 1952 reenactment could not and did not cure the 1929 law of its unconstitutional taint.

Although the original 1929 illegal reentry law was reenacted in 1952, this reenactment could not and did not cure the former's discriminatory intent, for three reasons. First, neither this Court nor the Supreme Court has ever held that a reenactment can cleanse a law of its discriminatory taint. Second, even assuming that a reenactment *could* do so, Congress has never grappled with the racially-motivated history of § 1326 and consciously reenacted the law for non-discriminatory reasons. Third, racial animus was independently a motivating factor in the later reenactment of § 1326.

1. This Court has never held that reenactments may cleanse a law of its discriminatory motive.

In denying Mr. Rodrigues-Barios's motion, the district court questioned why it should "look back to some original enactment of the statute" rather than "study the motives of the Congress at the time of

the most recent enactment[.]" 1-ER-6. The simple answer is that neither this Court nor the Supreme Court has ever allowed Congress to launder discrimination from an earlier statute to a later one.

Hunter v. Underwood addressed this situation. There, delegates at the 1901 Alabama constitutional convention wrote a provision denying the right to vote to people convicted of certain crimes, specifically crimes that the delegates believed were "more frequently committed by blacks." 471 U.S. at 227. Writing for a unanimous court, Justice Rehnquist declared the provision unconstitutional under *Arlington Heights*—even though its defenders argued that a subsequent culling of the list of crimes in the last 80 years had "legitimated the provision." *Id.* at 233.

Hunter deemed these changes to the statute irrelevant. *See id.* It noted that the Court was not deciding whether the provision "would be valid if enacted today without any impermissible motivation." *Id.* Instead, *Hunter* concluded that the statute's "original enactment was motivated by a desire to discriminate against blacks[,]" and it "continues to this day to have that effect." *Id.* Thus, even the modified version "violate[d] equal protection under *Arlington Heights*." *Id.*

Recently, the Supreme Court affirmed *Hunter* by contrasting it with the facts in a Texas redistricting case. *See Abbott v. Perez*, 138 S. Ct. 2305 (2018). In *Abbott*, the Supreme Court refused to consider the legislature's racial motives behind a 2013 redistricting map that had been repealed and replaced with a court-approved version. *See id.* at 2325. *Abbott* declined to rely on the "very different situation" in *Hunter*, where the discriminatory provision was "never repealed." *Id.* Although time had "pruned" the list of disqualifying offenses in *Hunter*, "the amendments *did not alter* the intent with which the article, including the parts that remained, had been adopted." *Id.* (emphasis added). The Court reiterated that this was not a case "like the one in *Hunter*" where a law "originally enacted with discriminatory intent is later reenacted by a different legislature" or "arguably carried forward the effects of any discriminatory intent[.]" *Id.* And *Abbott* confirmed the longstanding rule that courts consider the "historical background of a legislative enactment" as an "evidentiary source relevant to the question of intent." *Id.* (quotations omitted).

Hunter and *Abbott* contradict the notion that reenactments may cleanse a law of its discriminatory taint. Below, the government did not

point to a *single* case in which the Supreme Court or this Court has ever used a reenactment to erase an underlying racial motive. 2-ER-28–46. Absent such authority, and in light of *Hunter* and *Abbott*, this Court should not consider reenactments when evaluating discriminatory intent under *Arlington Heights*.

2. No reenactment has meaningfully altered § 1326 or grappled with its racially-motivated origins.

Even if a reenactment *could* cleanse a law of its discriminatory taint, no reenactment has done so here. This is because Congress never meaningfully debated or confronted the shameful history behind illegal reentry and consciously reenacted it for non-racial reasons. As two Supreme Court cases have confirmed, Congress's failure to do so means that no reenactment has purged § 1326 of its racial animus.

In *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), the Supreme Court found unconstitutional a Louisiana law that permitted non-unanimous jury verdicts in criminal cases. At the outset, the majority explained that the undisputed history of the law showed that convention delegates "sculpted a facially race-neutral rule" to "ensure that African-American juror service would be meaningless." *Id.* at 1394 (quotations omitted). Over the dissent's objections, the majority criticized past Supreme

Court precedent that had ignored the state's "racially discriminatory *reasons*" for enacting the law. *Id.* at 1401 (emphasis in original). While the majority recognized that a non-unanimous jury rule enacted "even for benign reasons" would violate the Sixth Amendment, it refused to "leav[e] an uncomfortable past unexamined" when considering the "very functions [jury] rules were adopted to serve." *Id.* at 1401 n.44.

Dissenting, Justice Alito argued that the legislature's original motives were irrelevant because Louisiana "adopted a new, narrower rule" in 1974 that made no mention of race and cited a neutral purpose. *Id.* at 1426. Justice Alito thus believed that the law's origins "have no bearing on the broad constitutional question that the Court decides." *Id.* In a concurring opinion, Justice Sotomayor rejected the suggestion that a reenactment alone could purge laws of their racist taint if lawmakers "never truly grappled with the laws' sordid history[.]" *Id.* at 1410. Only when a legislature "actually confronts a law's tawdry past in reenacting it" can the law rid itself of the discriminatory taint. *Id.*

Later that term, the Supreme Court struck down a Montana law banning the use of public school funds at religious schools. *See Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246 (2020). In his concurrence,

Justice Alito described the anti-Catholic bigotry motivating the law's original passage and reminded us that "the provision's origin is relevant." *Id.* at 2267. "Under *Ramos*," he explained, "it emphatically does not matter whether Montana readopted the no-aid provision for benign reasons" because the law's "uncomfortable past must still be examined." *Id.* at 2273 (quotations and alterations omitted). Justice Alito noted that although he had dissented in *Ramos*, "I lost, and *Ramos* is now precedent." *Id.* at 2268. Because the specific terms in the Montana law "keep it tethered to its original bias," and it was "not clear at all that the State actually confronted the provision's tawdry past in reenacting it," Justice Alito determined that the statute was unconstitutional. *Id.* at 2274 (citing *Ramos*, 140 S. Ct. at 1410) (Sotomayor, J., concurring) (quotations and alterations omitted)).

These cases show not only that a law's "uncomfortable past must still be examined," *id.* at 2273, but also that the *nature* of a reenactment may affect its ability to cleanse a law of its discriminatory animus. For instance, a "silent reenactment"—i.e., one that "does not consider the law's merits"—cannot "displace the law's original intent" because the legislature has not "form[ed] separate intentions of its own." Eric S.

Fish, *Race, History, and Immigration Crimes*, 107 Iowa L. Rev. 1051, 1104 (2022). Additionally, where Congress reenacts a law for "benign reasons" but does not consciously reject its original motive, Justice Alito admits its history "must still be examined" because "*Ramos* is now precedent." *Espinoza*, 140 S. Ct. at 2268, 2273 (Alito, J., concurring). Only a reenactment that "actually confronts a law's tawdry past" may cleanse it of its original motive. *Ramos*, 140 S. Ct. at 1410 (Sotomayor, J., concurring).

Here, no reenactment ever confronted illegal reentry's "tawdry past" or consciously purged it of its discriminatory motives. *Id.* Congress's codification of illegal reentry in the Immigration and Nationality Act of 1952 contained no direct debate or discussion of the 1929 law—it was simply an effort to "reorganize[] and recodif[y] all existing [immigration] laws to make them more accessible[.]" Fish, *Race, History, and Immigration Crimes*, *supra*, at 1104. In fact, the Senate Report for the 1952 reenactment makes the continuity between the two laws clear, as it recommends that "the present act of March 4,

1929, should be reenacted" in the new version and its provisions "carried forward."[16]

This "silent reenactment" did not "cure the law of its original racism" and cannot "defeat an *Arlington Heights* equal protection claim." Fish, *Race, History, and Immigration Crimes*, *supra*, at 1104. Nor does it reflect that Congress reenacted the law for "benign reasons" unrelated to race. *Espinoza*, 140 S. Ct. at 2273 (Alito, J., concurring). To the contrary, it shows that the 1952 Act "carried forward" the embedded racism of the original 1929 law.[17]

Congress's failure to confront the racially-discriminatory reasons for enacting § 1326 is not surprising given that the statute has undergone little change in the last century. *See Abbott*, 138 S. Ct. at 2316 (declining to consider the legislature's original motive because the provision had been "substantially changed" and "markedly altered"). The 1929 version of illegal reentry stated that if a noncitizen has been "arrested and deported in pursuance of law" and later "enters or attempts to enter the United States," they "shall be guilty of a felony"

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[16] THE IMMIGRATION AND NATURALIZATION SYSTEMS OF THE UNITED STATES, S. Rep. No. 81–1515, 655, 656 (1950).

[17] S. REP. NO. 81–1515, at 656.

and "punished by imprisonment for not more than two years." Pub. L. No. 70-1018, ch. 690, 45 Stat. 1551 (1929). Similarly, the current version states that if a noncitizen has been "denied admission, excluded, deported, or removed" and later "enters, attempts to enter, or is at any time found in, the United States," they shall be "imprisoned not more than two years." 8 U.S.C. § 1326(a). These versions "bear substantially similar language" to one another. *United States v. Rizo-Rizo*, 16 F.4th 1292, 1298 (9th Cir. 2021). Aside from minor clarifications,[18] the statute criminalizes the same core conduct it did in 1929—returning to the U.S. after a prior deportation.

Had Congress ever taken the time to reevaluate § 1326 through a nonracist lens, it may well have "substantially change[d]" the statute to reflect the law's purported goals. *Abbott*, 138 S. Ct. at 2316. For instance, Congress never criminalized (in § 1326 or elsewhere) entering

[18] The current version also includes reentries that occur when an order of removal is outstanding and exempts people who have either obtained, or need not seek, consent to reenter. *See* 8 U.S.C. § 1326(a). And although the 1952 Congress removed language requiring that the noncitizen be "deported in pursuance of law," the Supreme Court subsequently held that a deportation must "comport with the constitutional requirement of due process." *United States v. Mendoza-Lopez*, 481 U.S. 828, 835, 837 (1987).

the U.S. on a visa and staying beyond the permitted time period. 1-ER-10. Yet visa overstays now outnumber border crossers two-to-one as a percentage of the newly-undocumented population.[19] Even after the attacks of 9/11—perpetrated by individuals who came legally on visas and overstayed[20]—Congress never updated the statute to criminalize conduct that poses a *greater* threat to national security than unlawfully crossing the border.[21] This legislative inertia suggests that Congress has never meaningfully considered the intent behind § 1326, nor adopted it for non-discriminatory reasons.

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[19] Richard Gonzales, For 7th Consecutive Year, Visa Overstays Exceeded Illegal Border Crossings, NPR (Jan. 16, 2019, 7:02 PM), https://www.npr.org/2019/01/16/686056668/for-seventh-consecutive-year-visa-overstays-exceeded-illegal-border-crossings.

[20] *See* "From the 9/11 Hijackers to Amine El-Khalifi: Terrorists and the Visa Overstay Problem," Before the Subcomm. On Border and Maritime Security of the H. Comm. on Homeland Sec., 112th Cong. 1 (2012) (noting that several of the 9/11 hijackers overstayed their visas and that "[e]ntering a country and overstaying a visa has been the preferred method for terrorists actually to enter our country"), https://www.govinfo.gov/content/pkg/CHRG-112hhrg76600/html/CHRG-112hhrg76600.htm.

[21] *See* "Visa Overstay Tracking: Progress, Prospects and Pitfalls," Before the Comm. On Homeland Sec., 111th Cong. 1 (2010) (explaining that Congress has long sought a civil system that would "identify accurately those who come lawfully to the United States but then overstay the terms of their entry"), https://www.cfr.org/sites/default/files/pdf/2010/03/AldenTestimony3.25.2010.pdf.

Constitutional scholars agree that a discriminatory taint continues to infect § 1326. As one explained, the "operative core" of the law—the scope of conduct it criminalizes—has been "carried forward functionally unchanged." W. Kerrel Murray, *Discriminatory Taint*, 135 Harv. L. Rev. 1192, 1252, 1253 (2022). Furthermore, "Congress's reenactments have neither specifically referenced the 1929 law nor engaged with the risks of perpetuating a plausibly discriminatory past." *Id.* at 1252–53. What's more, "no intervening event" has "cut[] the continuity chain," and "the mere passage of time is insufficient, as is the mere presence of intervening reenactment." *Id.* at 1252. Thus, § 1326's legislative history reflects an "insufficient engagement with past problematic history," and the current law remains "tainted." *Id.* As another scholar explained, § 1326 remains unconstitutional because Congress in 1952 "did not debate the wisdom of keeping these crimes on the books" but "merely reenacted them, with a few technical changes, as part of a larger project to reorganize all existing immigration laws." Fish, *Race, History, and Immigration Crimes*, *supra*, at 1104.

Furthermore, this Court has frequently relied on the legislative history surrounding the original version of illegal reentry to determine

congressional intent. In *Rizo-Rizo*, the Court pointed to the "legislative history" of § 1326's "precursor statute" to interpret the lesser-included offense of misdemeanor § 1325—despite its later reenactment. 16 F.4th at 1298. And in *United States v. Corrales-Vazquez*, 931 F.3d 944, 947 (9th Cir. 2019), the Court discussed the origins of the lesser included offense of § 1325 and Congress's "minimal alteration" of the statute in 1952. Had this reenactment rendered the history surrounding the 1929 version of the statute irrelevant, it would have made no sense for the Court to consider it in those cases.

As the Supreme Court has explained, courts should not ignore "perfectly probative evidence" of lawmakers' discriminatory motives given that "the world is not made brand new every morning." *McCreary Cty., Ky. v. Am. C.L. Union of Ky.*, 545 U.S. 844, 866 (2005). Indeed, it is difficult to imagine that Congress's 1952 reenactment of illegal reentry—three years before *Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294 (1955), and a dozen years before the Civil Rights Act of 1964—was a conscious and deliberate repudiation of racism, rather than a mere recycling of it. The 1952 reenactment of § 1326 thus did not comply with *Ramos*'s command to consider the "racially discriminatory

reasons" for enacting the law, rather than "leaving an uncomfortable past unexamined." *Ramos*, 140 S. Ct. at 1401 & n.44 (emphasis in original).

3. Discriminatory intent also motivated the reenacted version of illegal reentry.

Even if the Court were to hold that a silent reenactment could wipe the constitutional slate clean, this would not end the inquiry. At a minimum, the Court would then apply *Arlington Heights* to determine whether discrimination infected that reenactment, or else remand for the district court to do so. And importantly, the same burden of proof would apply—the law's challenger must show only that discrimination was a "motivating factor" in that reenactment. *Arlington Heights*, 429 U.S. at 265–66. If it was, the burden shifts to the government to prove that the reenactment would have occurred "even had [race] not been considered." *Id.* at 270 n. 21.

Although the court here did not apply *Arlington Heights* to any subsequent reenactment, *Carrillo-Lopez* did. There, after a day-long evidentiary hearing with two expert witnesses, the court ordered post-hearing briefing on the specific question of "whether the racial animus motivating the Act of 1929 tainted the statute's reenactment in 1952[.]"

Carrillo-Lopez, 2021 WL 3667330, at *9 n.18. After considering this briefing and all the evidence, the court concluded in a thoughtful decision that race remained a "motivating factor" in the 1952 reenactment. *Carrillo-Lopez*, 2021 WL 3667330, at *10–18.

The court first observed that a "lack of debate" existed over the recodification of § 1326 in comparison to the "express debate over other racially problematic predecessor statutes." *Id.* at *11. As one expert explained, Congress's willingness to "remain[] silent" demonstrated that it was "more concerned with which racial and ethnic groups warranted continued discriminatory exclusion, rather than any desire to confront or revise the nativism reflected in the Act of 1929." *Id*. This silence was particularly telling given President Truman's veto of the Immigration and Nationality Act on the basis that it "'continue[d], practically without change' discriminatory practices first enacted in 1924 and 1929." *Id*. at *12 (quoting Truman's veto statement).

Furthermore, Deputy Attorney General Peyton Ford wrote a letter to Congress in support of the law that used the "racially derogatory term 'wetback'" and proposed expanding the law to include people "found in" the U.S. *Id*. at *13. Not only did this reflect "the racial

environment and rhetoric in 1952 … specifically with regard to Mexican and Latinx people," it was also "the only recommendation adopted by Congress" and "the only substantive change" to § 1326. *Id*. Indeed, "the same Congress during the same time frame" passed a law known as the "Wetback Bill," which was "aimed strictly at Mexicans" and debated with frequent use of that racial slur. *Id*. at *14.

When considered together, these factors present "sufficient evidence to conclude that racial animus continued to be a motivating factor in the recodification of 1952." *Id*. at *15. While it is "not easy to prove that racism motivated the passage of a particular statute," *Carrillo-Lopez* reasoned that "it cannot be impossible, or *Arlington Heights* would stand for nothing." *Id*. at *16 (quotations omitted).

Here, the district court held that *Arlington Heights* did not apply to the 1929 enactment of the law and thus had no reason to apply it to the 1952 reenactment. 1-ER-3–4, 18. But should the Court hold that *Arlington Heights* applies, it may consider the evidence and rationale from *Carrillo-Lopez* to conclude that discrimination was a "motivating factor" in the 1952 reenactment.

B. Disparate impact need not reflect discrimination from modern-day law enforcement.

Below, the district court did not deny that § 1326 has a disparate impact on Mexicans and Latin Americans. 1-ER-2–19. But it insisted that this "has more to do with the lay of the land and the fact that we're on a border that is just north of Mexico." 1-ER-4. To show disparate impact, the court believed, Mr. Rodrigues-Barios must show that the law has been "applied unfairly" or that the government "has it out for Hispanics." 1-ER-9, 15.

This grossly misapplies *Arlington Heights*. Disparate impact requires a party to show only that a law "bears more heavily on one race than another." *Arlington Heights*, 429 U.S. at 266 (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976)). This analysis is purely mathematical and does not require the disparity to be motivated by *current* discrimination against the targeted group. *See Hunter*, 471 U.S. at 233 (requiring only that the "*original* enactment was motivated by a desire to discriminate" and it "continues to this day to have that effect") (emphasis added).

The Supreme Court's recent DACA decision does not hold to the contrary. In *Regents*, 140 S. Ct. at 1915, a plurality noted that one

source of "[p]ossible evidence" of a discriminatory intent was a provision's "disparate impact on a particular group[.]" To show that a discriminatory intent motivated DACA's rescission, the respondents cited the "disparate impact of the rescission on Latinos from Mexico, who represent 78% of DACA recipients[.]" *Id*. While *Regents* held that this fact was not "sufficient" to prove a discriminatory intent in that case, it did not hold that it was irrelevant. *Id*. at 1915–16.

Here, the U.S. Sentencing Commission reports that over 99% of the people convicted of illegal reentry in 2020 were Hispanic.[22] This statistic is 22% higher than the percentage of Hispanics in the undocumented population as a whole,[23] an overrepresentation suggesting that § 1326 reaches a disproportionately high number of people from the racial group it was created to harm. In other words, the fact that Mexico borders the U.S. does not erase the disparate impact of

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[22] United States Sentencing Commission, Quick Facts Illegal Reentry Offenses, Research and Publications (2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Illegal_Reentry_FY20.pdf.

[23] *Profile of the Unauthorized Population: United States,* Migration Policy Institute (2019), https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/US.

illegal reentry—it shows that the law is working precisely as the 1929 legislators intended. Thus, contrary to the district court's belief, evidence of disparate impact need not be motivated by animus to be relevant to a finding of discriminatory intent.

C. If any factual questions remain, this Court should remand for an evidentiary hearing.

In light of all the above, this Court must declare the statute unconstitutional and reverse Mr. Rodrigues-Barios's conviction. But if any doubt remains as to Congress's motives in 1929 or later years, this Court should remand for an evidentiary hearing.

Before the district court, Mr. Rodrigues-Barios requested an evidentiary hearing to elicit testimony from his expert witnesses. 2-ER-70–71. He pointed out that courts frequently hold evidentiary hearings and trials to hear evidence on the *Arlington Heights* factors. 2-ER-49, 70 (citing *Hunter*, 471 U.S. at 229, which relied on evidence at trial of state legislative proceedings, "several historical studies, and the testimony of two expert historians"). But the district court denied his request. This alone was error. *See Hunt v. Cromartie*, 526 U.S. 541, 545, 554 (1999) (finding error where a lower court granted summary judgment "without

an evidentiary hearing" on a legislature's disputed motives under *Arlington Heights*).

Should the Court need additional evidence to resolve the factual issues presented in this case, it may remand with instructions to hold an evidentiary hearing. But given the overwhelming amount of evidence showing that race was a motivating factor in creating the crime of illegal reentry, and because the government has never shown that Congress would have enacted the law without it, this Court need not do so. Instead, it should conclude that § 1326 is unconstitutional.

CONCLUSION

No one disputes that Congress can criminalize illegal reentry. But when it has done so for improper motives, the law violates equal protection. Here, expert declarations, the Congressional Record, dozens of historical sources, and every scholar who has ever studied the history of § 1326 all agree that Congress created the crime of illegal reentry to keep the "Mexican race" out of the United States. The government has submitted no evidence to the contrary. The Court should reverse

Mr. Rodrigues-Barios's conviction, or at least remand for an evidentiary hearing.

Respectfully submitted,

/s/ Kara Hartzler

DATED: March 14, 2022

KARA HARTZLER
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, California 92101-5030
Telephone: (619) 234.8467

Attorneys for Defendant-Appellant

CERTIFICATE OF RELATED CASES

Counsel is aware of the related case of United States v. Carrillo-Lopez, Case No. 21-10233, that is currently pending before this Court.

Respectfully submitted,

/s/ Kara Hartzler

DATED: March 14, 2022

KARA HARTZLER
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, California 92101-5030
Telephone: (619) 234.8467

Attorneys for Defendant-Appellant

CERTIFICATE OF COMPLIANCE

PURSUANT TO FED R. APP. 32(A)(7) AND CIRCUIT RULE 32-1
FOR CASE NUMBER 21-50145

I certify that:

X Pursuant to Fed. R. App. P. 32(a)(7)) and Ninth Circuit Rule 32-1, the attached opening brief is:

X Proportionately spaced, has a typeface of 14 points or more and contains 11,923 words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words).

DATED: March 14, 2022

/s/ Kara Hartzler
KARA HARTZLER
Federal Defenders of San Diego, Inc.
Attorneys for Mr. Rodrigues-Barios