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
20-CR-1684-LAB
Honorable Larry A. Burns Presiding

APPELLANT'S REPLY BRIEF

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INTRODUCTION

In his opening brief, Mr. Rodrigues-Barios argued that the district court should have followed the lead of *United States v. Carrillo-Lopez*, 555 F. Supp. 3d 996 (D. Nev. 2021), and held that the crime of illegal reentry under 8 U.S.C. § 1326 is unconstitutional under *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).

In 1929, Congress created illegal reentry to protect "American racial stock" from "degradation or change through mongrelization." 2-ER-198. Fueled by the popular theory of eugenics, leaders believed that the "Mexican peon" was a mixture of the "Mediterranean-blooded Spanish peasant," "low-grade Indians," and "negro slave blood," who must be barred from the country. 2-ER-198. Because the resulting Undesirable Aliens Act of 1929 was motivated by discriminatory intent that Congress never confronted and purged from the statute, Mr. Rodrigues-Barios argued that § 1326 violates equal protection under *Arlington Heights*.

In its answering brief, the government largely ignores this history. Instead, it claims that the origins of § 1326 are irrelevant because, after

a "full and complete investigation of our entire immigration system," Congress reenacted the illegal reentry law in 1952, curing any discrimination. Government Brief ("GB") 34, 43 (quotations omitted). The government also disputes that *Arlington Heights* applies, urging the Court to use rational basis review because a federal crime with a potential prison sentence of twenty years is actually an "immigration statute" subject to the lowest level of scrutiny. GB 8. Even if *Arlington Heights* applied, the government contends, there is "simply not enough evidence" to show discrimination was a motivating factor in 1952. GB 28–58.

To see sufficient proof of discriminatory intent, this Court need look no further than the very "investigation" the government touts. The 1950 report that served as the basis for the 1952 statute repeatedly used the word "wetback." S. Rep. 81-1515 at 446, 473, 573, 579, 580, 584, 585, 586. It sought to conserve "our white population." *Id*. at 445, 446. It refused to change a system "designed to maintain designated racial characteristics." *Id*. at 473. This and other evidence shows that the 1952 reenactment was motivated by discrimination and did not purge the 1929 statute of its racial animus.

As to the level of scrutiny, binding case law requires this Court to apply *Arlington Heights* to a race-based challenge brought by a criminal defendant not applying for admission. *See Regents of the Univ. of California v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476 (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). Because the government makes no effort to show that either the 1929 or the 1952 law would have passed absent discriminatory intent, this Court should follow *Carrillo-Lopez* and conclude that § 1326 violates equal protection.

ARGUMENT

I. The same racial motives that fueled the 1929 law also motivated the 1952 law.

In his opening brief, Mr. Rodrigues-Barios first showed how the eugenics movement inspired legislators to create the crime of illegal reentry in the 1920s. Appellant's Opening Brief ("AOB") 15–18. To prevent southern and eastern Europeans from migrating to the United States, Congress passed the National Origins Act of 1924, which created a quota system and reserved the majority of visas for northern and western Europeans. AOB 19–20. But outcry from large agribusinesses forced Congress to create an exemption to this quota

system for Mexican laborers and others from the Western Hemisphere. AOB 18–21. Legislators bitterly protested this exemption, complaining that "the average Italian is as much superior to the average Mexican as a full-blooded Airedale is to a mongrel." 2-ER-195. Within five years, eugenicist leaders in Congress struck a compromise with agribusinesses to create a criminal law that would serve as a substitute for the quota. AOB 21–25.

In its brief, the government admits that the 1929 law has a "troubling history." GB 33. But it assures this Court that the 1952 reenactment wiped the slate clean of any racial animus, pointing to "legislative materials in the public record." GB 57. Those materials show the opposite.

A. The government's best evidence—the 1950 report—confirms that race was a "motivating factor" in 1952.

The first sentence of the government's brief begins: "In 1952, following a complete investigation of our immigration system," Congress reenacted the crime of illegal reentry. GB 1 (quotations omitted). This "complete investigation" refers to a 925-page report by the Senate Judiciary Committee (the "1950 report"). GB 43. Congress relied on this report to reorganize and recodify illegal reentry and other immigration

laws into the McCarran-Walter Act, also known as the Immigration and Nationality Act of 1952 ("INA"). Pub. L. No. 82-414, § 276, 66 Stat. 229. The government relies heavily on this 1950 report to claim that § 1326 is constitutional. GB 1, 34, 35, 36, 43.

But this report only *confirms* that animus motivated the 1952 law. First, it repeatedly used the racial slur "wetback." S. Rep. 81-1515 at 573, 579, 580, 584, 585, 586. In other contexts, the government tries to downplay this, pointing to examples from that era that "use the term generically when referring to undocumented workers from Mexico." GB 47. But lawmakers were aware of the word's racist connotations. For instance, during a 1953 congressional hearing, an agribusiness leader called the term a "dirty word" that he tried "never to use"—to which a senator replied, "I know."[1]

To see that the term was not used "generically when referring to undocumented workers," GB 47, one need look no further than comments from Senator Pat McCarran. Senator McCarran was the powerful chair of the Senate Judiciary Committee that authored the

[1] Extension of the Mexican Farm Labor Program, Hearings before the Committee on Agriculture and Forestry United States Senate on S. 1207, 83d Cong., 1st Sess., March 24, 1953, 47.

1950 report. S. Rep. 81-1515 at II. During a 1951 hearing, he applied the word to both undocumented *and* documented Mexicans, stating that "there is a flood of people who come across the boundary. They are called wet-backs, and they come across *legally or illegally* during the various harvest seasons."[2] In other words, the lead author of the 1950 report—and the man after whom the entire Immigration and Nationality Act of 1952 was named—used this term to refer to *all people* from Mexico, not just the undocumented.

The 1950 report reflected discriminatory animus throughout. It divided the world's population into five racial categories: the "White race," "yellow race," "black race," "brown race," and "red race." S. Rep. 81-1515 at 7. It added the caveat that "intermarriage between the Indian and other racial groups has produced a variety of crossed racial types, especially in Mexico and South America." *Id*. at 11. It warned that unlawful entrants from these areas "pose an increasingly difficult immigration problem," and recommended that lawmakers consider the

[2] Hearings before the Subcommittee of the Committee on Appropriations United States Senate: Making Appropriations for the Departments of State, Justice, Commerce, and the Judiciary for the Fiscal Year ending June 30, 1952, Part I, 82d Cong., 1st Sess., March 8, 1951, 124 (emphasis added).

"related problem" that northern and western Europe is "now in, or approaching, a stage of stationary population growth, and gradual decline." *Id.* at 25. In other words, the problem was not simply unlawful entrants—it was the lower number of white immigrants from more favored regions. This mirrors the sentiments of 1920s lawmakers, who reserved nearly all visas for northern and western Europeans and created illegal reentry to "protect[ ] American racial stock" from Mexican "mongrels." 2-ER-198, 199.

The 1950 report cautioned that the 1920s laws had not "preserv[ed] the relationship between the various elements in our *white* population." S. Rep. 81-1515 at 445 (emphasis added). Because northern and western Europeans had not used their allotted visas, "the proportionate contribution of the various nationalities has departed from the ratios contemplated by the framers of the system." *Id.* at 445. Meanwhile, immigrants from the Western Hemisphere had "upset the national origins pattern" because they were "of stock similar to the stock of natives of southern Europe." *Id.* at 446, 473. But the report reassured Congress that because 60% of Western Hemisphere entrants were Canadian and mostly of "northern and western European stock,"

there had been "no significant effect on the homogeneity of our population" or its "ethnological composition." *Id.* at 446, 454.

The 1950 report openly recognized that the United States employed a "preferential system" designed to "maintain designated racial characteristics of the population." *Id.* at 473. It approvingly cited a 1924 statement by the House Committee on Immigration and Naturalization that expressed concern about tilting the "balance of racial preponderance" towards those who "reproduce more rapidly on a lower standard of living than those possessing other ideals." *Id.* at 60. Again, the report acknowledged that the purpose of the immigration system was to "maintain the balance of the various elements in our *white* population." *Id.* at 446 (emphasis added).

The government claims this Court should ignore the 1920s history because there is "no evidence that the 1952 Congress was even *aware*" of it. GB 39 (quotations omitted); GB 45 (suggesting that legislators were "unlikely to be aware of that decades-old history"). But the 1950 report shows that Congress was well aware of it. The report discussed the "highly controversial" nature of the 1920s policy and the "bitter charges of discrimination hurled" at it. S. Rep. 81-1515 at 417, 433, 455,

448. Not only was the earlier law "highly controversial at the time of its adoption," it had "remained so ever since." *Id.* at 447.

Nevertheless, the 1950 report defended this discriminatory policy. It warned that amending the quota system would change the "nationality composition of the country." *Id.* at 441. It asserted that even those who "assail the system as discriminatory" would be "forced to admit that it is desirable" to select immigrants based on "the need for preserving the balance of the various elements of our population." *Id.* at 448. And while claiming to take no position on "any theory of Nordic superiority," it argued that a race-based policy would "best preserve the sociological and cultural balance in the population of the United States." *Id.* at 455.

In short, the 1950 report the government relies on did not eradicate discriminatory intent from the 1929 law. It endorsed it. And as the government argues, Congress accepted the report's "recommendations" and "implemented" them in the 1952 law. GB 43, 44. So the government's best (and only) evidence proves Mr. Rodrigues-Barios's point: that racial animus motivated both the 1929 law *and* its 1952 reenactment.

B. The government has not rebutted other evidence that race was a "motivating factor" in 1952.

In his opening brief, Mr. Rodrigues-Barios also pointed to other evidence showing that discrimination was a "motivating factor" in 1952. AOB 56–58; *Arlington Heights*, 429 U.S. at 265–66. Among other things, he pointed out that evidence from 1929 remains relevant as "historical background," that Deputy Attorney General Peyton Ford used the term "wetback" when recommending edits to the illegal reentry provision, that the same Congress passed a law known as the "Wetback Bill" two months before enacting the INA, and that President Truman vetoed the 1952 law because of its racist policies. AOB 57–58.

The government does not rebut these facts—it tries to explain them away. But its minor criticisms are akin to a "Goldilocks" approach. If evidence from 1929 shows animus, the government argues it is too "remote in time." GB 31, 33. If Congress enacted the "Wetback Bill" two months before the INA, it is a "different piece of legislation." GB 48. If politicians in 1952 used a known racial slur, it did not have the "same connotation" it does now. GB 47. If legislators made other racist remarks, they cannot be "attributed to Congress as a whole." GB 44. No

matter how blatant the discrimination, the porridge is always too hot or too cold.

But *Arlington Heights* does not require a smoking gun, or even a showing that Congress was "motivated solely" by discrimination. Discrimination need not be the "dominant" or "primary" motive. *Arlington Heights*, 429 U.S. at 265. A challenger need only show that discriminatory intent was *a* "motivating factor." *Id*. at 266. Here, the evidence of animus from both 1929 and 1952 easily clears that bar. *See* AOB 16–26; *see also* Brief of Immigration Scholars and Brief of Prof. Deborah Kang as Amici Curiae (discussing history of Congress's race-based motives underlying illegal reentry).

Even when addressing individual instances of discrimination, the government's rebuttals do not make sense. For instance, the government says that Congress passed the 1952 law with a "supermajority of votes," and there was "nothing irregular about this process." GB 43. But this ignores that Congress *had* to pass the law with a "supermajority" to override President Truman's veto. President Truman vetoed the bill, he explained to the House of Representatives, because it "discriminates, deliberately and intentionally, against many

of the peoples of the world."[3] By choosing to override this veto, Congress left no doubt about the nature of its intent.

The government next argues that the "context" of this veto shows that it concerned the "country-quota system," rather than illegal reentry. GB 45–46. There are two problems with this response.

First, the historical record is clear (and the government does not dispute) that, but for agribusiness resistance, Mexicans and Latin Americans would have been included in this quota system. AOB 18–19. Because they were not, Congress designed the 1929 illegal reentry law as a *substitute* to achieve the same racial result. AOB 19–22. The 1950 report shows that Congress regretted this exemption, calling it "one of the most questionable features of our immigration system." S. Rep. 81-1515 at 473. So the two provisions cannot be considered in isolation because Congress designed illegal reentry to function as a *de facto* quota on Mexicans and Latin Americans. AOB 19–22.

[3] "Veto of Bill to Revise the Laws Relating to Immigration, Naturalization, and Nationality," Harry S. Truman Library, June 25, 1952, https://www.trumanlibrary.gov/library/public-papers/182/veto-bill-revise-laws-relating-immigration-naturalization-and-nationality.

Second, in considering whether a legislature "enacted a law with discriminatory purpose," courts may consider whether the same legislature has a "historical pattern of laws producing discriminatory results." *North Carolina State Conf. of NAACP v. McCrory*, 831 F.3d 204, 223–24 (4th Cir. 2016). For instance, it is "evidence of discriminatory intent" that the "same Legislature . . . passed two laws found to be passed with discriminatory purpose." *Veasey v. Abbott*, 830 F.3d 216, 239–40 (5th Cir. 2016) (en banc). Thus, this Court may consider the 1952 Congress's simultaneous reenactment of the quota system and illegal reentry, as well as its passage of the "Wetback Law" two months prior, as "evidence of discriminatory intent." *Id.*

Next, the government argues that Mr. Rodrigues-Barios points to "statements of a handful of legislators" that cannot be "attributed to Congress as a whole." GB 1, 44. The government's own reliance on the 1950 report forecloses this argument. The report recommended keeping a system "designed to maintain designated racial characteristics" and conserve our "white population." S. Rep. 81-1515 at 445, 446, 473. Facing a veto on the basis of this racially-motivated approach, a "supermajority" of Congress—not a "handful" of lawmakers—accepted

the report's recommendations and "implemented" them in the 1952 law. GB 43.

The government also admits that Deputy Attorney General Peyton Ford "used the term 'wetback' when recommending the addition of a 'found-in' provision" to § 1326." GB 46. But it argues that Ford did not "propose" this provision, and instead wrote in "response" to a draft that contained it. GB 46. This misses the larger and more disturbing point: that when reenacting and expanding a law designed to exclude Mexicans and Latin Americans, powerful leaders in both the legislative and executive branches consistently used a racial slur to describe them.

Finally, the government concedes that this Court may consider the overwhelming evidence of racism in 1929 as part of the law's "historical background." GB 8, 32, 42. Nevertheless, it contends this evidence has little "probative value" because the "vast historical gulf" between 1929 and 1952 makes the earlier evidence too "remote in time." GB 2, 8, 31, 33, 34, 42. But the government's own cases involved wider "historical gulfs" than here—e.g., the century between the Civil War and the 1960s or 1980s. GB 31, 33, 39 (citing *McCleskey v. Kemp*, 481 U.S. 279, 298 n.20 (1987); *Johnson v. Governor of the State of Florida*,

405 F.3d 1214 (11th Cir. 2005) (en banc)). By contrast, the period between 1929 and 1952 is roughly the same as the period between 9/11 and now. GB 33.

Because the 1952 law did not remove racial animus from the 1929 law—and actually contributed to it—*Arlington Heights* requires that the government show the law would have passed "even had the impermissible purpose not been considered." *Arlington Heights*, 429 U.S. at 270 n.21. The government submits no evidence of this and makes no meaningful attempt to argue it. Instead, it asserts that controlling the border is a "normal regulatory function," citing cases issued decades after 1929 and 1952. GB 54–55 (quotations omitted). While such unsupported generalizations may satisfy rational basis, they do not satisfy *Arlington Heights*. *See Hunter v. Underwood*, 471 U.S. 222, 233 (1985) (rejecting the argument that justifications in the "succeeding 80 years" could "legitimate[ ] the provision"). Thus, this Court need look no further to conclude that discrimination motivated the creation *and* reenactment of illegal reentry.

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

In his opening brief, Mr. Rodrigues-Barios explained that the district court's refusal to apply *Arlington Heights* was wrong for three reasons. First, *Arlington Heights* provides the correct standard for analyzing race-based equal protection claims. AOB 29–34. Second, § 1326 is not an "immigration law" but a *criminal* law subject to less deference. AOB 34–38. Third, even if § 1326 *were* an immigration law, only laws concerning the admission of noncitizens from outside the country automatically receive rational basis review. AOB 38–43. The government's attempts to rebut these reasons are not persuasive.[4]

A. Binding law requires this Court to apply *Arlington Heights* to race-based challenges.

In his opening brief, Mr. Rodrigues-Barios emphasized that he was raising a purely *race*-based challenge, not one resting on alienage or immigration status. AOB 29. He discussed this Court's binding

[4] Though the government relies heavily on district court decisions that have "affirmed the continued constitutionality of Section 1326," GB 3, it does not mention that nearly half of these cases applied *Arlington Heights*, rather than rational basis. *See, e.g., United States v. Machic-Xiap,* 552 F. Supp. 3d 1055, 1071 (D. Or. 2021) (rejecting the government's argument that courts have "little role" in deciding constitutional questions in criminal cases).

decisions in *Regents*, 908 F.3d at 518–19, and *Ramos v. Wolf*, 975 F.3d 872, 896 (9th Cir. 2020), which applied *Arlington Heights* to race-based claims, even in the immigration context. AOB 30–32, 39–41.

The government denies that *Regents* and *Ramos* control. As to *Regents*, both Mr. Rodrigues-Barios and the government agree that after the Supreme Court granted certiorari, it "assumed, without deciding," that *Arlington Heights* applied. GB 19; AOB 31. They also agree that the Supreme Court reversed on the merits after finding insufficient evidence of discrimination. GB 19; AOB 31. But the government believes this reversal on the merits also reversed this Court's earlier holding about whether *Arlington Heights* applies to race-based challenges in the immigration context. GB 19.

That is incorrect. When the Supreme Court expressly declines to decide an issue that a circuit court previously resolved, it "leaves intact" the court's prior holding. *Mastro v. Rigby*, 764 F.3d 1090, 1094 (9th Cir. 2014); *see also Shaibi v. Berryhill*, 883 F.3d 1102, 1109 (9th Cir. 2017) (same). Because the Supreme Court in *Regents* expressly stated that it "need not resolve" whether *Arlington Heights* applies to racial

challenges in the immigration context, 140 S. Ct. at 1915, it "le[ft] intact" this Court's prior holding that *Arlington Heights* applies.

Even so, the government claims this Court may ignore *Regents* because the choice there was between "*Arlington Heights* and no judicial review at all," while the choice here is between *Arlington Heights* and rational basis. GB 19. The government never explains why the Court's consideration of a *lower* level of scrutiny in an earlier case would affect the *higher* level of scrutiny it ultimately adopted, which now controls. Regardless, *Ramos* applied *Arlington Heights* to a racial challenge of an immigration provision three months *after* the Supreme Court decided *Regents*, confirming that this Court's holding remains good law. *See* 975 F. 3d at 896.

The government also tries to distinguish *Regents* and *Ramos* because the plaintiffs there were "not directly challenging an act of Congress," which is "entitled to an additional measure of deference . . . [on] matters pertaining to aliens." GB 20 (quoting *Abebe v. Mukasey*, 554 F.3d 1203, 1206 (9th Cir. 2009) (en banc)).[5] But the sentence

[5] As one *amici* brief explains, even this "plenary power" doctrine was originally "rooted in racism against Asian immigrants." Brief of Asian Americans Advancing Justice, et al., as Amici Curiae at 5, 8–23.

immediately preceding this quote in *Abebe* states: "We note at the outset that the statute doesn't discriminate against a discrete and insular minority or trench on any fundamental rights, and therefore we apply a standard of bare rationality." 554 F.3d at 1206. In other words, *Abebe* applied rational basis because *no* protected class was involved—not because a lower immigration standard took precedence over a higher protected-class standard.

The government also attempts to strip Mr. Rodrigues-Barios of his ability to bring a protected-class challenge, arguing that "the nature of [his] allegations do not dictate the level of scrutiny." GB 17. Courts do not allow an opposing party to reverse-engineer a more favorable standard by simply pointing to a non-protected class that the challenger may also fall within. *See, e.g., Fisher v. Univ. of Texas at Austin*, 579 U.S. 365, 378 (2016) (applying strict scrutiny even though "the largest impact on petitioner's chances of admission was not the school's consideration of race . . . but rather the Top Ten Percent Plan"). Courts may conclude that a classification did not rest on race and *then* apply rational basis. *See, e.g., Kahawaiolaa v. Norton,* 386 F.3d 1271, 1278 (9th Cir. 2004) (holding that classification was political, rather than

racial). But one party cannot preemptively reject a higher tier of scrutiny before this Court has even determined whether race was a motivating factor. GB 17.

The government nevertheless believes this would lead to a "stark anomaly": courts would have to "probe deeply into legislative motives." GB 18. But that is exactly what *Arlington Heights* and the century of doctrine it rests on require. Facially neutral laws enacted with discriminatory intent violate equal protection, just as facially discriminatory provisions do. *See, e.g.*, *Hunter*, 471 U.S. 222 (striking down facially neutral voting provision); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (same, for municipal ordinance). A presumption of invalidity applies to a "racial classification" but "applies as well to a classification that is ostensibly neutral" yet "an obvious pretext for racial discrimination." *Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979). So the government's real objection is not with Mr. Rodrigues-Barios's claim but with longstanding equal protection jurisprudence subjecting the political branches to a measure of "accountability." *Regents*, 908 F.3d at 520.

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

In his opening brief, Mr. Rodrigues-Barios explained that rational basis review also does not apply because § 1326 is a *criminal* law, not a civil immigration law. AOB 34–38. He pointed to a series of Supreme Court decisions distinguishing the full panoply of rights in criminal proceedings from the lower constitutional protections in civil deportation proceedings. AOB 34–38. *See, e.g., Pereida v. Wilkinson,* 141 S. Ct. 754, 766 (2021) ("When it comes to civil immigration proceedings, Congress can, and has, allocated the burden differently.").

In response, the government cites several cases showing that "this Court has applied the rational basis standard to equal protection challenges raised in criminal cases[.]" GB 21. But none of these cases involved racial discrimination, a fundamental right, or any other class protected by heightened scrutiny.

For instance, in *United States v. Ruiz-Chairez*, 493 F.3d 1089, 1091 (9th Cir. 2007), this Court rejected an equal protection challenge on the basis of the Sentencing Guidelines' facially disparate treatment of a subset of "illegal reentrants" as compared to other defendants. GB 21 (quotations omitted). But the defendant in *Ruiz-Chairez* freely

admitted that rational basis applied to this classification. Brief of Defendant, United States v. Ruiz-Chairez, 05-10226, Dkt. 6, 2005 WL 3132445, at 7. So the immigration-related nature of his equal protection challenge did not *defeat* a claim to higher scrutiny. His claim simply did not fall within the higher tiers of scrutiny in the first place. *See also United States v. Calderon-Segura*, 512 F.3d 1104, 1107 (9th Cir. 2008) (defendant made "no assertion" that his claim "involves a classification along suspect lines").

When noncitizens *have* claimed that higher scrutiny applies, courts determine whether they fall within a protected class before deciding which level of scrutiny applies. For instance, in *United States v. Barajas-Guillen*, this Court first held that the defendant's claim to "wealth" disparities did not involve a protected class; only then did it apply rational basis. 632 F.2d 749, 752–53 (9th Cir. 1980). And *United States v. Ayala-Bello* rejected an argument that strict scrutiny applied to a separate docket for illegal entry cases, explaining that the docket only "distinguishes between defendants based on their criminal

conduct," which is "not a protected class." 995 F.3d 710, 714 (9th Cir. 2021). Neither involved a showing of racial animus.[6]

Here, Mr. Rodrigues-Barios *has* asserted racial animus, and race *is* a protected class. *See* AOB 30; *Loving v. Virginia*, 388 U.S. 1, 11 (1967). The government has not (and cannot) point to any precedent holding that a person who falls within a protected class loses that status simply because their case touches on immigration. While immigration status alone does not supply a basis for heightened scrutiny, it in no way negates the higher scrutiny that a race-based claim demands. AOB 32.

The government also points to *United States v. Hernandez-Guerrero*, 147 F.3d 1075 (9th Cir. 1998), and other cases to argue that § 1326 has an "immigration-regulation purpose." GB 15, 22, 25, 28, 35, 53, 54, 55. But the fact that § 1326 serves a regulatory purpose does not insulate it from review if Congress enacted it for racially discriminatory reasons. A law may be constitutional or unconstitutional depending on

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[6] *See also United States v. Lopez-Flores*, 63 F.3d 1468, 1471–75 (9th Cir. 1995) (rejecting an equal protection challenge to the Hostage Taking Act because federal classifications on the basis of alienage are subject to rational basis review); *United States v. Ferreira*, 275 F.3d 1020, 1025 (11th Cir. 2001) (same).

the motive underlying it. *See, e.g. Hunter*, 471 U.S. at 233 (striking down racially motivated provision "[w]ithout deciding whether [it] would be valid if enacted today without any impermissible motivation"). That a statute *could* have a legitimate purpose does not immunize it from *Arlington Heights*. If it did, Congress could openly discriminate against noncitizens on the basis of race so long as any "rational speculation unsupported by evidence or empirical data" provided a post-hoc justification. *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993).

Finally, the government attempts to downplay the holdings of the Supreme Court's decisions in *Fiallo v. Bell*, 430 U.S. 787 (1977), and *Wong Wing v. United States*, 163 U.S. 228 (1896). GB 23–24. Both cases distinguished the more robust constitutional protections afforded defendants in criminal proceedings (even ones involving border searches) from the weaker protections afforded noncitizens in civil immigration proceedings. AOB 35–38.

The government claims that *Fiallo* and *Wong Wing* "did not involve an equal protection challenge" and did not say that criminal cases were "subject to heightened scrutiny *because* they were criminal."

GB 23–24 (emphasis in original). Neither objection defeats the crux of these cases: that the constitutional protections afforded criminal defendants take precedence over any deference in the civil immigration context. After all, "[t]he rights guaranteed by the Fifth and Sixth Amendments are preserved to every one accused of [a] crime[.]" *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 165 (1963) (quotations omitted). Put simply, there's no such thing as an "immigrant defendant"—only a "defendant."

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

In his opening brief, Mr. Rodrigues-Barios also explained that the cases the district court and the government relied on did not apply rational basis to *all* immigration cases—they applied it to cases involving an initial admission from outside the country. AOB 38–43. *Ramos* and *Regents* continued this theme. *Ramos* distinguished its plaintiffs from "foreign nationals who have not yet entered the United States." 975 F.3d at 896. And *Regents* relied on the plaintiffs' "physical location . . . within the geographic United States." 908 F.3d at 520.

In response, the government contradicts its earlier call for blanket deference by seizing on a single line in *Ramos* that described the

plaintiffs as having "lawfully resided" in the United States. GB 26. The government uses this isolated phrase to claim that § 1326 defendants "may never have been lawfully present in the country" and thus cannot benefit from *Arlington Heights*. GB 26.

No authority supports the notion that courts treat racial discrimination claims by documented and undocumented people differently. *Regents* said nothing about "lawful" presence. *See Regents*, 908 F.3d 476. Neither *Regents* nor *Ramos* conditioned application of *Arlington Heights* on this factor. *See id*. Nor do the government's other cases suggest that deference turns on whether a person has lawful status.[7]

Furthermore, many § 1326 defendants have equal or greater ties to the U.S. than the plaintiffs in *Ramos* and *Regents*. *See* AOB 42–43; *see also* Brief of Legal Service Providers and Immigrant Rights Organizations as Amici Curiae at 14 (stating that "more than 80 percent" of defendants have family members in the United States).

[7] The government's only deference case *not* involving admission or immigration benefits is *Fong Yue Ting v. United States*, 149 U.S. 698 (1893), which upheld the "one white witness rule" portion of the Chinese Exclusion Act. It is no longer good law. *See Ma v. Ashcroft*, 257 F.3d 1095, 1109 (9th Cir. 2001).

Indeed, Mr. Rodrigues-Barios himself lived in the U.S. for nearly a decade and returned to be with his partner and four-year-old daughter. *See* 2-ER-25, 33–34.

The government separately claims that Mr. Rodrigues-Barios was charged with attempt, which "necessarily applies only to aliens who are not physically in the United States[.]" GB 27. That is not correct. The government regularly charges individuals inside the U.S. with attempted illegal entry and reentry. *See, e.g.*, *United States v. Carpio-Xochitla*, No. 19MJ23092BMKBAS1, 2020 WL 6158200, at *1 (S.D. Cal. Oct. 21, 2020) (defendant charged with attempt apprehended "four miles north of the U.S.-Mexico border"). Indeed, the government's own evidence shows that Mr. Rodrigues-Barios was arrested "north of the United States/Mexico International Boundary Fence." SER 61. What's more, the government admits that § 1326 also includes a "found-in" provision that permits officials to arrest and prosecute a person anywhere inside the United States, even if they have lived here for decades. GB 46.

In short, Mr. Rodrigues-Barios raised a 1) race-based claim that 2) challenges a criminal law and 3) does not involve an application for

admission from abroad. Each of these factors independently justifies application of *Arlington Heights*.

III. The government misapprehends the law surrounding reenactments and disparate impact.

In his opening brief, Mr. Rodrigues-Barios also explained why the district court's statements on later reenactments and disparate impact were unpersuasive. AOB 43–61. First, he showed that the 1952 reenactment of illegal reentry did not eradicate the discriminatory intent underlying it. AOB 44–58. Second, he rebutted the district court's theory that disparate impact requires a *current* intent to discriminate. AOB 59–61.

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

As to the 1952 reenactment, Mr. Rodrigues-Barios explained that neither this Court nor the Supreme Court has held that reenacting a law automatically removes its discriminatory taint. AOB 44–47 (discussing *Hunter*, 471 U.S. at 233, and *Abbott v. Perez*, 138 S. Ct. 2305 (2018)). To purge a law of animus, a legislature must confront and reject

the discriminatory motives underlying a law, which the 1952 Congress never did. AOB 47–56.

The government disagrees. It pulls various quotes from *Abbott* to argue that a subsequent legislature has no duty to "'expiate its predecessor's bad intent.'" GB 37 (quoting *Abbott*, 138 S. Ct. at 2325). But the government never addresses the factual distinction between *Abbott* and *Hunter*: that *Abbott* declined to impute the discriminatory intent from a legislature's *repealed* redistricting map into an independently drawn, court-approved map. *See Abbott*, 138 S. Ct. at 2325; AOB 46–47. *Abbott* itself held that this was a "very different situation" than "the one in *Hunter*," where a law is "later reenacted by a different legislature." *Id.* By its own terms, *Abbott* does not permit legislatures to launder discrimination in cases where the law was "never repealed." *Id.*

The government is correct that *Hunter* did not directly address "whether legislative revisions to such a law may render it constitutional." GB 40. But this only proves Mr. Rodrigues-Barios's point. No binding law allows a legislature to excise discriminatory intent from the "original enactment" merely by reenacting it. *Hunter*,

471 U.S. at 233. At a minimum, this presents a question of first impression before this Court.

Mr. Rodrigues-Barios also discussed the Supreme Court's recent decisions holding that a legislature's "racially discriminatory *reasons*" for enacting a law must be examined—even when the law was later reenacted for "benign reasons." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1401 (2020) (emphasis in original); *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2273 (2020) (Alito, J., concurring); AOB 47–50. He showed that reenactments that reorganize and recodify preexisting laws, without consciously rejecting their original motives, cannot purge laws of their impermissible intent. AOB 47–56. *See also* Brief of Aoki Center, et al., as Amici Curiae at 4–8, 11–17 (discussing "silent," "benign," and "conscious" reenactments). Because the 1952 Congress did not debate or confront the shameful history underlying illegal reentry (and actually added to it), this impermissible motive renders the statute unconstitutional. *See id.* at 17–24; AOB 47–56.

The government's chief rebuttal to *Ramos* and *Espinoza* is that neither case specifically involved an equal protection challenge or relied on the law's history to strike it down. GB 40–42. While true, this makes

the fact that these cases considered history all the more important. Neither the Sixth Amendment nor the Establishment Clause typically require the Supreme Court to consider history when determining a provision's constitutionality—nonetheless, the Supreme Court did so in both cases. *See Ramos*, 140 S. Ct. at 1401; *Espinoza*, 140 S. Ct. at 2273. In contrast, *Arlington Heights* requires courts to consider the "historical background" of a challenged law. 429 U.S. at 267. If courts consider the past when analyzing a constitutional right that does *not* require a historical inquiry, surely they must consider history to the same (or greater) degree when analyzing a constitutional right that *does* require it.

As the government notes, several circuits have declined to consider history in certain instances. For instance, the Eleventh Circuit upheld a Florida voting provision reenacted in 1968 without looking at the history of the original provision. *See Johnson*, 405 F.3d at 1220. The Fifth Circuit recently did the same with a Mississippi voting provision reenacted in 1968. *See Harness v. Watson*, 47 F.4th 296 (5th Cir. 2022) (en banc).

But none of the plaintiffs in those cases "even allege[d] that the 1968 amendment was enacted with discriminatory intent." *Id.* at 307. *See also Johnson*, 405 F.3d at 1220 (stating that the Florida plaintiffs "d[id] not allege that racial discrimination motivated the adoption of Florida's 1968 felon disenfranchisement law"). Indeed, both the Fifth and Eleventh Circuits explained that the reenactments had affirmatively *removed* some discriminatory provisions from the voting laws. *See Johnson*, 405 F.3d at 1221; *Harness*, 47 F.4th at 301–02.

Here, by contrast, Mr. Rodrigues-Barios *does* contend that racial animus motivated the 1952 reenactment. And no evidence shows that the 1952 Congress tried to remove discrimination from the original law. To the contrary, it doubled down on a system designed to "maintain designated racial characteristics" and preserve the "white population." *Id.* at 445, 446, 473. So the outcomes in the Eleventh and Fifth Circuits are not inconsistent with what this Court should do here: conclude that the 1952 reenactment did not remove the original racial animus but deliberately perpetuated it.

Although the government brings up the amendments to illegal reentry in the 1980s and 1990s, it makes no meaningful attempt to

argue that an amendment—unlike a reenactment—can purge a statute of its discriminatory intent. GB 55. Nor can it. As the Supreme Court has explained, the amendments in the 1980s and 1990s were "housekeeping measure[s]" that tinkered with § 1326's penalties and "simplified the phrasing." *Almendarez-Torres v. United States*, 523 U.S. 224, 233–34 (1998). No Supreme Court case addressing reenactments has ever suggested that amendments to an ancillary provision of a statute can somehow cure the racism tainting its core.

The government's novel argument about amendments also has no textual support. Black's Law Dictionary defines "enact" as "mak[ing] into law by authoritative act." ENACT, Black's Law Dictionary (11th ed. 2019). So to "reenact" a law means to "make [it] into law" again. *Id.* By contrast, an "amendment" is defined as a "minor revision" made to a statute by "addition, deletion, or correction," especially an "alteration in wording." AMENDMENT, Black's Law Dictionary (11th ed. 2019).

As the Supreme Court explained in *Abbott*, a legislature only cleanses a statute of discrimination when it "alter[s] the intent with which the article, *including the parts that remained*, had been adopted." 138 S. Ct. at 2325 (emphasis added). In other words, an

amendment at most purges discrimination from the portions of the statute it substantively modified—not those it left intact. Here, the 1980s and 1990s amendments tweaked the penalties and phrasing of § 1326. *See Almendarez-Torres*, 523 U.S. at 233–34. The government cites no authority showing that such "housekeeping" amendments could purge discriminatory taint from the substantive language of § 1326 that Congress never altered. *Id.*

B. Disparate impact need not reflect current discrimination from law enforcement.

In his opening brief, Mr. Rodrigues-Barios corrected the district court's misimpression that the *Arlington Heights* disparate-impact factor requires *current* discrimination against a disfavored group. AOB 59–61; 1-ER-9, 15. Mr. Rodrigues-Barios agreed that disparate impact would not alone show discriminatory intent but explained that it should be considered as one of the five *Arlington Heights* factors. AOB 60. He then pointed to evidence of § 1326's disparate impact, arguing that the fact that 99% of people convicted of illegal reentry are Hispanic is strong proof of discriminatory intent. AOB 60–61.

The government does not defend the district court's view, conceding that these statistics are not "*irrelevant* to the court's

analysis." GB 52 (quotations omitted). Yet it cites cases purporting to show that evidence of disparate impact has "far less force" as an *Arlington Heights* factor when it is "'explainable on grounds other than race.'" GB 49, 52 (quoting *United States v. Dumas*, 64 F.3d 1427, 1431 (9th Cir. 1995)).

Nothing in the government's cases supports that theory. *Dumas* held that evidence of a crack/powder cocaine racial disparity "may have established discriminatory effect." 64 F.3d at 1431. But it denied the defendant's claim because he "offered *no* evidence of discriminatory purpose." *Id.* (emphasis added). The Court declined to treat his claim as one of "those rare cases in which evidence of disparate impact suffices to prove discriminatory intent." *Id.* (quotations omitted). *Dumas* only shows that disparities "explainable" on other grounds cannot (absent evidence of animus) sustain an equal protection violation—not that they carry "far less force" when considered as one of the five *Arlington Heights* factors. *See also Feeney*, 442 U.S. at 279 (declining to rely *solely* on disparate impact when "nothing in the record" established discriminatory intent).

As both Mr. Rodrigues-Barios and *amici* have shown, the evidence of disparate impact here is startling. *See* Brief of Advocates for Basic Legal Equality, et al., as Amici Curiae at 7–29. It exceeds that of every case this Court has considered. Thus, the Court should afford it serious consideration as one of the five *Arlington Heights* factors.

C. Because the government failed to rebut evidence of racial animus, this Court need not remand for an evidentiary hearing.

In his opening brief, Mr. Rodrigues-Barios noted that the district court denied his request for an evidentiary hearing. AOB 62. The government opposes any remand for an evidentiary hearing, claiming this Court is "fully capable of analyzing" the "legislative materials in the public record." GB 57.

Mr. Rodrigues-Barios agrees. The Court need look no further than the 1950 report, which is riddled with the same racial intent that fueled the 1929 law. Because the government relies on this report—and nothing else—it has not shown that Congress would have enacted the illegal reentry law in 1929, or reenacted it in 1952, absent this intent. Accordingly, this Court should conclude that the law violates equal

protection. Should any factual questions remain, the Court may remand for an evidentiary hearing.

CONCLUSION

For these reasons, the Court should reverse Mr. Rodrigues-Barios's conviction or remand for an evidentiary hearing.

Respectfully submitted,

/s/ Kara Hartzler

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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 reply brief is:

X Proportionately spaced, has a typeface of 14 points or more and contains 6,993 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: September 30, 2022

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