In the

UNITED STATES COURT OF APPEALS

For the Fourth Circuit

No. 22-4072(L); 22-4075; 22-4077; 22-4078; 22-4100; 22-4107

UNITED STATES OF AMERICA,

Appellee,

v.

JORGE SANCHEZ-GARCIA,
VINCENTE RODRIGUEZ,
NICOLAS MORALES-GUTIERREZ,
JESUS PINEDA,
HECTOR HERNANDEZ-AVILA,
MARTIN MALACARA-GUERRERA,

Appellants.

On Appeal from the United States District Court
For the Middle District of North Carolina

BRIEF FOR APPELLEE

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STATEMENT OF JURISDICTION

This case is a direct appeal from the convictions and sentences of six separate defendants in six independent federal criminal cases. The United States District Court for the Middle District of North Carolina had jurisdiction over these matters pursuant to 18 U.S.C. § 3231 (2021). Appellate jurisdiction is conferred upon this Court by 28 U.S.C. § 1291 (2021).

ISSUE PRESENTED

DOES THE FEDERAL STATUTE CRIMINALIZING ILLEGAL REENTRY AFTER DEPORTATION, 8 U.S.C. § 1326, VIOLATE THE EQUAL PROTECTION COMPONENT OF THE FIFTH AMENDMENT'S DUE PROCESS CLAUSE?

STATEMENT OF THE CASE

A. Statutory Background

This appeal concerns the constitutionality of the illegal-reentry statute, which makes it a crime when "any alien who ... has been," *inter alia*, "denied admission, excluded, deported, or removed ... enters, attempts to enter, or is at any time found in, the United States," without appropriate authorization. 8 U.S.C. § 1326(a). The base offense is punishable by a fine and up to two years' imprisonment. *Id.* Higher maximum sentences of 10 and 20 years apply if the defendant was

removed after being convicted for certain crimes, depending on their nature or gravity. 8 U.S.C. § 1326(b)(1)-(2).

Section 1326 traces its roots to 1917. *See United States v. Corrales-Beltran*, 192 F.3d 1311, 1319 (9th Cir. 1999). That year, Congress made it a misdemeanor for a limited class of noncitizens deported for immoral acts to "attempt thereafter to return to or to enter the United States." Immigration Act of 1917, Pub. L. No. 64-301, § 4, 39 Stat. 874, 878-879. The following year, Congress created a felony punishable by up to five years' imprisonment for those deported for being a member of the "anarchistic and similar classes" to "return to or enter the United States or attempt to" do so. Act of Oct. 16, 1918, Pub. L. No. 65-221, § 3, 40 Stat. 1012.

In cases not involving these two classes of noncitizens, however, no sanction other than repeatedly deporting illegal reentrants existed until 1929. *See* Pub. L. No. 64-301, § 19, 39 Stat. 889. That year, Congress passed "[a]n Act Making it a felony with penalty for certain aliens to enter the United States of America under certain conditions in violation of law." Act of March 4, 1929, Pub. L. No. 70-1018, 45 Stat. 1551 (1929 Act);

J.A. 0649-0650.[1] Section 1(a) of the Act provided that "any alien ... arrested and deported in pursuance of law" would "be excluded from admission to the United States" and that, "if he enters or attempts to enter the United States" thereafter, "he shall be guilty of a felony" punishable by a fine and up to two years' imprisonment. (J.A. 0649). The 1929 Act responded to concerns expressed by Congress and the Department of Labor—which at the time administered the immigration laws—that the possibility of renewed deportation was insufficient to dissuade those who had been removed from returning and that criminal penalties were therefore needed as an added deterrent. *See* S. Rep. No. 70-1456, at 1-2 (Jan. 17, 1929) (J.A. 0629-0630); H.R. Rep. No. 70-2418, at 6 (Feb. 7, 1929).

Congress revisited the criminal reentry statute 23 years later as part of the Immigration and Nationality Act of 1952 (INA), Pub. L. No.

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[1] The 1929 Act was not titled "the Undesirable Aliens Act." A more expansive bill bearing that name was introduced in the House. *See* H.R. Rep. No. 70-2418, at 12 (Feb. 7, 1929) (Sec. 10); 70 Cong. Rec. 3542 (Feb. 15, 1929). The Senate rejected several portions of that proposal, including its title, and the House relented. 70 Cong. Rec. 4952 (Mar. 1, 1929) (explaining the development of the Act and "[t]hat the House recede[d] from its amendment to the title of the bill"). *See also United States v. Barcenas-Rumualdo*, 53 F.3d 859, n.1 (5th Cir. 2022).

82-414, 66 Stat. 163, through which it "substantially revised the immigration laws[.]" *City & Cty. of San Francisco v. United States Citizenship & Immigration Servs.*, 944 F.3d 773, 795 (9th Cir. 2019). The INA "represents the final product of a most intensive and searching investigation and study over a three[-]year period." *Pena-Cabanillas v. United States*, 394 F.2d 785, 790 (9th Cir. 1968). Congress had authorized the Senate Judiciary Committee "to make a full and complete investigation of our entire immigration system" and to provide "recommendations for changes in the immigration and naturalization laws as it may deem advisable." S. Rep. No. 81-1515, at 803 (1950).

As relevant here, the Committee's 925-page report described "difficulties encountered in getting prosecutions and convictions" under existing laws "relating to illegal entry and smuggling of aliens," "especially in the Mexican border area." *Id.* at 654–55. It also noted that existing law criminalized illegal reentry in different provisions subject to different penalties and "suggested that one act would suffice for all persons who have been deported, regardless of the reason therefor." *Id.* at 655.

Congress responded with § 276 of the INA, codified as § 1326. In line with the Judiciary Committee's recommendation, the INA eliminated the disparate penalties applicable to reentry defendants depending on the basis for their deportation, creating instead a single offense that subjected all reentry defendants to the same penalties as the 1929 Act: two years' imprisonment and a fine. Pub. L. No. 82-414, § 276, 66 Stat. 230; *see United States v. Mendoza-Lopez*, 481 U.S. 828, 835–36 (1987). The statute also sought to offset some difficulties in enforcing prior statutes by adding a new basis for liability: being "found in" the United States after a prior deportation, "thus creating a continuing offense centered on the alien's entry into the United States and presence therein until found." *United States v. Ayon-Brito*, 981 F.3d 265, 270 (4th Cir. 2020) (quoting *United States v. Rodriguez-Rodriguez*, 453 F.3d 458, 460 (7th Cir. 2006)); *see also United States v. Ruelas-Arreguin*, 219 F.3d 1056, 1061 (9th Cir. 2000).

Section 1326 has been amended on several occasions since 1952, often with an eye toward increasing its deterrent effect. In 1988, Congress enacted what is now § 1326(b) to prescribe enhanced penalties for defendants with prior felony convictions. Pub. L. No. 100-690, § 7345,

102 Stat. 4181, 4471; *see Almendarez-Torres v. United States*, 523 U.S. 224, 229 (1998). Congress increased the applicable fines two years later in the Immigration Act of 1990, Pub. L. No. 101-649, § 543, 104 Stat. 4978, 5059, and again upped the penalties in the Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 130001, 108 Stat. 1796, 2023. In 1996, Congress enacted § 1326(d) in response to the Supreme Court's decision in *Mendoza-Lopez*, *supra*, which had held that the statute may violate due process absent an opportunity for the defendant to challenge the validity of the prior removal order. Pub. L. No. 104-132, § 441(a), 110 Stat. 1214, 1279; *see United States v. Palomar-Santiago*, 141 S. Ct. 1615, 1619 (2021). Later that year, Congress updated § 1326 to add a new penalty provision, to expand the class of prosecutable defendants to include those who "ha[ve] departed the United States while an order of exclusion, deportation or removal is outstanding," and to align the statute with other changes to immigration law enacted in 1996. Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, 110 Stat. 3009, 3009-606, 3009-618 to 3009-620, 3009-629; *see Vartelas v. Holder*, 566 U.S. 257, 261–62 (2012).

B. District Court Proceedings

Each of the defendants in this consolidated appeal were charged in the Middle District of North Carolina in one-count indictments alleging a violation of 8 U.S.C. § 1326.[2] (J.A. 0008, J.A. 1063, J.A. 1099, J.A. 1150, J.A. 1184, J.A. 1226). Following the decision in *United States v. Carrillo-Lopez*, 555 F. Supp. 3d (D. Nev. 2021), *appeal pending*, 9th Cir. No. 21-10233, defendants each filed a motion, and accompanying briefing, to dismiss their indictments, arguing that Section 1326 violates the Fifth Amendment's equal-protection guarantee. (J.A. 0017-0022; J.A. 0420-0461; J.A. 0051-0082). With consent from the government, these cases were heard in a consolidated evidentiary hearing. (J.A. 0016; J.A. 0879). The defendants presented the testimony of one expert at the evidentiary hearing, Dr. Benjamin Gonzalez O'Brien. (J.A. 0882-0988). Dr. O'Brien testified concerning the historical background of immigration laws in the United States, the 1929 and 1952 laws in particular. (J.A. 0882-0988).

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[2] Defendants Sanchez-Garica, Hernandez-Avila, and Malcara-Guerreo were all convicted under 8 U.S.C. § 1326(a). Defendant Pineda was convicted under 8 U.S.C. § 1326(a) and (b)(1). Defendants Morales-Gutierrez and Rodriguez were convicted under 8 U.S.C. § 1326(a) and (b)(2).

Defendants also presented legislative materials on the subject, as well as the transcript of testimony from the evidentiary hearing in *United States v. Carrillo Lopez*, Case No. 3:20-cr-026-MMD-WGC, D. NV, Feb. 2, 2021. (J.A. 0678-0876). Defendants argued that the proof they presented of discriminatory intent and disparate impact sufficed to show that the statute was unconstitutional—unless the government could establish that the law would have been passed absent discriminatory purposes. (J.A. 0456-0457; J.A. 0995-0996).

The district court ruled immediately after hearing the evidence and arguments of the parties, denying their motions to suppress. (J.A. 1041-1044). The court found that although it was "kind of willing to give you 1929 in terms of some underlying racist motivations being one of the factors there; but, you know, when you get much past that, I think it's a much dicier proposition." (J.A. 1042). It further elaborated:

> And historical context under *Arlington Heights*, I don't think I really buy the idea that it's just what happened when it was enacted when you have a situation where it was reenacted in 1952, much weaker evidence of racism towards Mexican or Hispanics or Latinx, however you want to phrase the group that we're talking about here, you know, an antiracist component to it in terms of Asian Americans, and no quotas imposed for people in the Western Hemisphere. So it just seems much, much weaker.

> And then you have repeated congressional reenactments well into the modern era, which demonstrate a continued commitment to the deterrence effect of criminal punishment for this kind of conduct and – and to the protection of the public as – which I think you see with the – you know, well, if you keep coming back, the only way to protect the public is – or you come back after you've committed crimes, then we have to protect the public by separating you; and if we can't separate you by removing you, we will separate you by incarceration. And, you know, those are legitimate policy decisions.
>
> So it's pretty tough for me to – to say that when I look at the entire historical context that the Act, you know, before me now continues to be motivated by racial animus. I don't think I can find that. I do not find that. And, you know, whether it was or wasn't in 1929 – you know, yeah, it probably was a motivating factor of many folks in Congress, but that – that doesn't seem to be the end of the inquiry to me.

(J.A. 1042-1043). Although it did not definitively determine what standard of review to apply to this question, the court nonetheless determined that if rational basis applies, the law passes. (J.A. 1043). Alternatively, the court continued, "even if *Arlington Heights* applies and even if one assumes racial animus in 1929, I'm not satisfied that it continues – that it continued into 1952 and beyond." (J.A. 1044). Following denial of defendants' motions to suppress, the district court subsequently accepted the conditional pleas of each of the defendants, conducted sentencing hearings, and entered judgment in each case. (J.A.

116; J.A. J.A. 1047-1053; J.A. 1071-1080; J.A. 1081-1087; J.A. 1113-1122; J.A. 1123-1132; J.A. 1133-1139; J.A. 1158-1166; J.A. 1167-1173; J.A. 1199-1208; J.A. 1209-1215; J.A. 1236-1245; J.A. 1246-1252). Each defendant entered a timely notice of appeal. (J.A. 1054-1055; J.A. 1088-1089; J.A. 1140-1141; J.A. 1174-1175; J.A. 1216-1217; J.A. 1253-1254).

SUMMARY OF ARGUMENT

This Court should join the Fifth Circuit and around four dozen district courts in rejecting the contention that 8 U.S.C. § 1326 violates equal-protection principles on the ground that it was enacted with intent to discriminate against Mexicans and Latinos. *See Barcenas-Rumualdo*, 53 F.3d at 865 & n.15. And like the Fifth Circuit, *id.* at 865, this Court can reach that result under either the rational-basis standard or the *Arlington Heights* framework.

This case can be resolved solely under the rational-basis standard that has long governed equal-protection challenges to federal immigration laws. Section 1326 is properly treated as such a law because it is an important part of the immigration-regulation framework. And the statute passes muster under that standard because it advances the

legitimate government interest in enforcing its immigration laws and deterring repeated violations of the same.

Regardless, the district court correctly determined that Section 1326 is constitutional even under the *Arlington Heights* framework. The relevant inquiry is whether the statute applicable to defendants—Section 1326 as enacted in 1952 and amended since—was motivated in part by discriminatory intent. Defendants present no persuasive evidence that it was, relying primarily on arguments concerning a 1929 predecessor law and an outlier district court opinion (*Carrillo-Lopez*) that has been rightly rejected by all courts to consider it. Nor do several Supreme Court decisions outside the equal-protection context support the position that taint from the 1929 law carries forward despite the substantial revisions Congress has undertaken in the ensuing decades. Even if defendants had a shown discriminatory intent, their challenge would fail at the last step of *Arlington Heights* because logic and history demonstrate that Congress would have passed Section 1326 even absent that intent.

ARGUMENT

SECTION 1326(a) DOES NOT VIOLATE THE EQUAL PROTECTION COMPONENT OF THE FIFTH AMENDMENT'S DUE PROCESS CLAUSE WHEN SCRUTINIZED UNDER EITHER RATIONAL BASIS REVIEW OR THE ARLINGTON HEIGHTS STANDARD.

A. Standard of Review

This Court reviews de novo a challenge to the constitutionality of a criminal statute. *United States v. Roof*, 10 F.4th 314, 391 n.51 (4th Cir. 2021). Factual findings, including those that concern whether a legislative enactment was motivated by a discriminatory purpose, are reviewed for clear error. *See Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2348–49 (2021); *Abbott v. Perez*, 138 S. Ct. 2305, 2326 (2018); *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204, 220–21 (4th Cir. 2016).

B. Discussion of Issue

1. Section 1326 Passes Rational Basis Review

a. Legal Principles

The Fifth Amendment of the U.S. Constitution provides that no person shall be "deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. Unlike the Fourteenth Amendment (which

applies to the States), the Fifth Amendment does not contain an express equal protection provision. Since 1954, however, the Supreme Court has construed the Amendment's guarantee of "due process of law" for all "person[s]," U.S. Const. amend. V, to provide analogous protection. *See Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

Federal immigration laws are an exception to that general rule. *See Hampton v. Wong*, 426 U.S. 88, 100 (1976). "'[O]ver no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." *Johnson v. Whitehead*, 647 F.3d 120, 126–27 (4th Cir. 2011) (quoting *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (internal citation omitted). While state statutes that distinguish between citizens and noncitizens remain subject to heightened scrutiny, *see Graham v. Richardson*, 403 U.S. 365, 371–72 (1971), the Supreme Court and this Court have taken a different approach to federal laws drawing such distinctions, in deference to the federal government's exclusive authority over immigration matters. "For reasons long recognized as valid," the Court has explained, "the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government." *Mathews v. Diaz*, 426

U.S. 67, 81 (1976). "Because decisions in these matters may implicate 'relations with foreign powers,' or involve 'classifications defined in the light of changing political and economic circumstances,' such judgments 'are frequently of a character more appropriate to either the Legislature or the Executive.'" *Trump v. Hawaii*, 138 S. Ct. 2392, 2418–19 (2018) (quoting *Mathews*, 426 U.S. at 81).[3] Therefore, the Supreme Court "has firmly and repeatedly endorsed the proposition that Congress may make rules as to aliens that would be unacceptable if applied to citizens." *Demore v. Kim*, 538 U.S. 510, 522 (2003).

"The reasons that preclude judicial review of political questions" thus "also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization," *Mathews*, 426 U.S. at 81–82—including congressional enactments that "regulate the admission and exclusion of aliens." *Fiallo*, 430 U.S. at 793

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[3] Defendants' expert, Dr. O'Brien, explained as much in his testimony in the district court. (J.A. 0971 "Q: We talked a little bit about this idea that immigration policy is a function in some parts about foreign policy. Would you agree with that? A: Yes."; J.A. 0954-0955 (discussion of national security); J.A. 0962 (same); *contra* J.A. 0982)). The district court also cited to "national security factors" as one of the "other factors" that overcame the racial animus from 1929. (J.A. 1044).

n.5. This Court has equated that narrow standard of review with the rational-basis test applied to other classifications that do not affect "fundamental rights nor proceed along suspect lines," *Heller v. Doe*, 509 U.S. 312, 319 (1993) (quotation marks omitted). *See, e.g.*, *Johnson*, 647 F.3d at 127; *Midi v. Holder*, 566 F.3d 132, 137 (4th Cir. 2009); *Appiah v. U.S. I.N.S.*, 202 F.3d 704, 709 (4th Cir. 2000); *see also Othi v. Holder*, 734 F.3d 259, 269 (4th Cir. 2013) ("[N]oting the extraordinarily deferential standard of review that applies in this [immigration] context, even as to constitutional questions.").

The rational basis test "is quite deferential. It simply requires courts to determine whether the classification in question is, at a minimum, rationally related to legitimate governmental goals." *Wilkins v. Gaddy*, 734 F.3d 344, 347–48 (4th Cir. 2013). The test is met where "there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller*, 509 U.S. at 320. The government "has no obligation to produce evidence to sustain the rationality of a statutory classification." *Id.* Instead, the "burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it[.]" *Id.*

The Supreme Court, this Court, and other courts of appeals have applied this "unexacting" standard, *Reno v. Flores*, 507 U.S. 292, 306 (1993)—or arguably more deferential ones, *see Hawaii*, 138 S. Ct. at 2419—to an array of challenges in civil and criminal cases. The Supreme Court in *Fiallo*, for example, applied minimal scrutiny to a law that drew a gender-based distinction by giving special immigration preferences to mothers, but not fathers, of U.S. citizen children. 430 U.S. at 792–99. Correspondingly, this Court has applied rational basis review to an Executive Branch admission policy aimed at specific countries, *Int'l Refugee Assistance Project v. Trump*, 961 F.3d 635, 651–54 (4th Cir. 2020); a criminal statute barring aliens from possessing firearms, *United States v. Carpio-Leon*, 701 F.3d 974 (4th Cir. 2012); a citizenship classification based on the legitimacy of a child, *Johnson*, 647 F.3d at 127; and an immigration statute conferring benefits on children of refugees from some countries but not others, *Holder*, 566 F.3d at 137. Like this Court, other courts of appeals have conducted rational-basis review in rejecting equal-protection challenges to various laws or policies with penal consequences; for example, a Sentencing Guideline that implements § 1326 and provides for a greater enhancement for "illegal

reentrants … than other felons with the same prior criminal record," *United States v. Ruiz-Chairez*, 493 F.3d 1089, 1091 (9th Cir. 2007); *see United States v. Osorto*, 995 F.3d 801, 811, 821 (11th Cir. 2021); a deportation order that formed the basis for a later reentry prosecution under § 1326, *see United States v. Barajas-Guillen*, 632 F.2d 749, 752 (9th Cir. 1980); and an Executive Branch policy treating the crime of illegally entering the United States differently from other petty offenses, *United States v. Ayala-Bello*, 995 F.3d 710, 714–15 (9th Cir. 2021).

These decisions, and others, confirm the Supreme Court's recent statement that "a circumscribed [judicial] inquiry applies to any constitutional claim concerning the entry of foreign nationals." *Hawaii*, 138 S. Ct. at 2420 n.5; *see also id.* at 2419 ("[O]ur opinions have reaffirmed and applied [this] deferential standard of review across different contexts and constitutional claims.").

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

Here, defendants were each convicted of a variation of illegal reentry, all in violation of 8 U.S.C. § 1326. *See supra*, fn. 2. Section 1326 is, on its face, a law that regulates the admission and removal of aliens. Courts have described § 1326 as "a regulatory statute enacted to assist

in the control of unlawful immigration by aliens." *Pena-Cabanillas v. United States*, 394 F.2d 785, 788 (9th Cir. 1968); *see United States v. Rizo-Rizo*, 16 F.4th 1292, 1298 (9th Cir. 2021) (reaffirming this language). Several aspects of the statute bear out that description. Section 1326 was enacted as part of the INA in 1952. It is codified in Title 8 alongside other immigration provisions. Most important, its "text ... plainly reveals its immigration-regulation purpose." *United States v. Hernandez-Guerrero*, 147 F.3d 1075, 1078 (9th Cir. 1998).

By threatening with criminal prosecution any alien found in the United States who has previously been 'excluded, deported, or removed,' Congress sought in § 1326 to give teeth to civil immigration statutes and to ensure compliance with civil deportation orders." *Id.* (quoting 8 U.S.C. § 1326(a)). The statute is thus "a necessary piece of the immigration-regulation framework." *Id.* Because § 1326 is part of that framework, equal protection challenges to it are subject to the same standard that applies to other claims in the immigration context: rational basis review.

c. The District Court Properly Found that Section 1326 Is Constitutional Under Rational Basis Review

Concluding that if the rational basis test applies, the district court here determined that Section 1326 passes because there is a rational basis considering "public safety and deterrence and control of the borders […]." (J.A. 1043-1044). A statute meets the rational basis test if it bears some rational relation to a legitimate government interest or purpose. *Carpio-Leon*, 701 F.3d at 982–83. "It is axiomatic that the United States, as sovereign, has the inherent authority to protect, and a paramount interest in protecting, its territorial integrity." *United States v. Flores-Montano*, 541 U.S. 149, 153 (2004). In *Ruiz-Chairez*, the Ninth Circuit recognized that "deterring illegal reentry" is such an interest. 493 F.3d at 1092; *see also Ayala-Bello*, 995 F.3d at 715 ("[T]he federal government has a legitimate interest in controlling our borders."). And § 1326 is rationally designed to advance that interest. "[I]ts clear purpose is to deter aliens who have been forced to leave the United States from reentering the United States." *Hernandez-Guerrero*, 147 F.3d at 1078 (ellipses and quotation marks omitted).

Indeed, "without the threat of criminal prosecution that it provides, Congress's immigration-regulation authority would be fatally undermined—all bark and no bite." *Hernandez-Guerrero*, 147 F.3d at 1078. What's more, three of the defendants in this consolidated appeal were convicted of violating § 1326(a), (b)(1) or § 1326(a), (b)(2), through which "Congress intended to create enhanced penalties for 'certain' aliens who commit the underlying offense of unlawfully reentering the United States after having been previously deported[.]" *United States v. Crawford*, 18 F.3d 1173, 1177 (4th Cir. 1994). "The reentry of an ex-felon is a serious offense for which Congress has seen fit to impose a statutory maximum sentence of 20 years." *United States v. Montes-Pineda*, 445 F.3d 375, 379 (4th Cir. 2006). The district court correctly concluded that § 1326 is constitutional if evaluated under rational basis review.

d. Defendants Have Not Shown That Heightened Scrutiny Applies

As discussed, courts apply rational basis because of the unique authority that Congress retains over "immigration policy as an incident of sovereignty." *Hernandez-Guerrero*, 147 F.3d 1076 (citation omitted); *Int'l Refugee Assistance Project*, 961 F.3d at 648–50 (similar). Indeed, "over no conceivable subject is the legislative power of Congress more

complete than it is over the admission of aliens." *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972) (quotation marks and alteration omitted). That is because the power to exclude or expel is "an inherent and inalienable right of every sovereign and independent nation." *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893). It is this consideration that dictates the appropriate standard of review.[4]

A contrary conclusion would lead to a stark anomaly. Decisions such as *Fiallo* and *Hawaii* foreclose a searching judicial inquiry into legislative or executive motivations even when the political branches have drawn express distinctions that would trigger close scrutiny outside of the immigration context. It would be strange if courts were nonetheless required to probe deeply into legislative motives—"a substantial

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[4] Defendants' expert at the district court level, Dr. O'Brien, acknowledged as much, conceding in response to a question about whether individual states have ever attempted to regulate immigration, "[w]ell, I mean, states – immigration is the – you know, falls under the jurisdiction of Congress, especially after plenary power is established in the 19th century. Now, some states do try to create – or do pass legislation, say during repatriation, limiting the hiring of immigrants and things like this – and things like that; but if we're talking specifically about kind of national immigration control, that falls under the jurisdiction of Congress." (J.A. 0960-0961).

intrusion into the workings of" a coequal branch, *see Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 268 n.18 (1977)—when an immigration law that draws no such distinction on its face—like § 1326—is alleged to discriminate based on race or national origin. Applying rational basis review to challenges such as defendants' avoids that odd result.

Arguments, which defendants do not raise on appeal, but did argue in their district court briefings, do not offer a legitimate basis to apply an alternative heightened standard of review.[5] (J.A. 0075-0080; J.A. 0429-0430). For instance, any argument that a more searching review is supported by the Ninth Circuit's decision in *Regents of the Univ. of California v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 518 (9th Cir. 2018), *rev'd in part, vacated in part sub nom. Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891 (2020), is meritless.

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[5] Defendants have therefore waived these arguments, but the government nonetheless includes the analysis as a complete picture of the issue. *See Grayson O Company v. Agadir International LLC*, 856 F.3d 307, 316 (4th Cir. 2017) (a party waives an argument by not presenting it in its opening brief); *see also United States v. Leeson*, 453 F.3d 631, n.4 (4th Cir. 2006); *United States v. Boyd*, 55 F.4th 272, 279-280 (4th Cir. 2022).

(*See* J.A. 0075-0080). In *Regents*, the Ninth Circuit applied an *Arlington Heights* analysis when reviewing the Attorney General's decision to end the Deferred Action for Childhood Arrivals (DACA) program and concluded that the plaintiffs had a plausible equal protection claim. But the Supreme Court ultimately reversed on that issue and held that the plaintiffs had *not* stated "a plausible equal protection claim." 140 S. Ct. at 1915. In so holding, the Supreme Court only assumed, without deciding, that an *Arlington Heights* framework should have applied. *See* 140 S. Ct. at 1915. Moreover, the choice in *Regents* was not, as here, between rational basis review and scrutiny of legislative motivation under *Arlington Heights*. Rather, the government had argued in *Regents* that the plaintiffs' claim raised the type of "selective enforcement" challenge that is not cognizable in immigration cases. *See id*. As a result, the choice before the Supreme Court was between *Arlington Heights* and no judicial review at all—a choice the *Regents* plurality avoided by determining that the claim failed even under the standard (*Arlington Heights*) more favorable to the plaintiffs. *Id*. This ambiguous holding is not enough to undermine over a century of consistent caselaw recognizing the broad authority of Congress in the immigration arena.

Moreover, the plaintiffs in *Regents* were not directly challenging an act of Congress. They were merely challenging an "agency procedure under the Administrative Procedure Act." *United States v. Ramirez-Aleman*, 2022 WL 1271139, at *4 (S.D. Cal. Apr. 27, 2022). Here, the challenge is to an Act of Congress, and Congress is "entitled to an additional measure of deference when it legislates as to admission, exclusion, removal, naturalization or other matters pertaining to aliens[.]" *Abebe v. Mukasey*, 554 F.3d 1203, 1206 (9th Cir. 2009) (en banc). The Supreme Court has likewise made clear that "it is not the judicial role … to probe and test the justifications for" Congress's decision-making in this area. *Fiallo*, 430 U.S. at 799. Thus, any reliance on *Regents* would be misplaced.

Although defendants offer this Court no reason to not apply the rational basis standard of review on appeal, in the district court, defendants argued that rational basis review should not apply because § 1326 is a criminal law, not a civil immigration law. (J.A. 0073-0080; J.A. 0431). To the extent the Court wishes to address this argument on

appeal[6], that is a distinction without a difference as far as the standard review is concerned. *See United States v. Ferreira*, 275 F.3d 1020, 1025–26 (11th Cir. 2001) (rejecting a civil-criminal distinction). Background principles concerning Congress' immigration authority do not disappear when a term of imprisonment is included in a statute. *See United States v. Guzman*, 998 F.3d 562, 569 (4th Cir. 2021) (rejecting argument that *Thuraissigiam* "'does not apply in criminal cases under 8 U.S.C. § 1326' because the consequences of a conviction entitle him to greater protections than an alien facing only deportation."). As explained above, this Court and others have applied the rational basis standard to equal protection challenges raised in criminal cases, including a criminal statute barring aliens from possessing firearms, *see Carpio-Leon*, 701 F.3d at 982–83, and a challenge to a Sentencing Guideline that implements § 1326 and provides for a greater enhancement for "illegal reentrants … than other felons with the same prior criminal record." *Ruiz-Chairez*, 493 F.3d at 1091; *United States v. Alvarez-Aldana*, 554 F. App'x 225, 226 (4th Cir. 2014) (same); *United States v. Alejo-Pena*, 474 F.

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[6] Any presentation of this argument by defendants is waived because it was not otherwise addressed in defendants' opening brief.

App'x 137, 138 (4th Cir. 2012) (same); *see also Barajas-Guillen*, 632 F.2d at 752 (applying rational basis standard to defendant's collateral attack on a deportation order in a criminal case); *United States v. Calderon-Segura*, 512 F.3d 1104, 1107 (9th Cir. 2008) (same); *United States v. Lopez-Flores*, 63 F.3d 1468, 1471–75 (9th Cir. 1995) (rational basis applies to criminal statute that "classifies offenders on the basis of the offender's and the victim's nationality"); *United States v. Montenegro*, 231 F.3d 389, 394-95 (7th Cir. 2000) (same); *United States v. Lue*, 134 F.3d 79, 87 (2d Cir. 1998) (same).

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

noncitizens shall be permitted to remain within our borders"). It is this sovereign interest that requires rational basis review, regardless of whether the challenged statute is civil or criminal.

Wong Wing v. United States, 163 U.S. 228 (1896), is not to the contrary. *Wong Wing* addressed an 1892 statute providing that certain Chinese immigrants could "be imprisoned at hard labor for a period of not exceeding one year" before they were removed from the United States. 163 U.S. at 235. The Supreme Court held that the period of pre-deportation imprisonment authorized under the statute was a criminal punishment that could be imposed only after a "judicial trial" subject to the protections of the Fifth and Sixth Amendments. *Id.* at 237–38. But *Wong Wing* did not involve an equal protection challenge; indeed, it predated by 60 years the Supreme Court's application of equal protection principles to federal action. The Court's decision therefore does not indicate what standard governs in such a challenge, much less mandate exacting scrutiny for immigration statutes that impose criminal penalties. "Without question, [defendants here] enjoy[] full constitutional protections with respect to [their] criminal prosecution[.]" *Guzman*, 998 F.3d at 569. But so does every other criminal defendant whose equal

protection challenge is subject to rational basis review. *Cf. Carpio-Leon*, 701 F.3d at 982–83. *Wong Wing* says nothing about the appropriate standard of review.

Applying rational basis review subjects criminal laws to appropriate review. As the Supreme Court recently reiterated in an immigration case, "a common thread" in its decisions invalidating laws "under rational basis scrutiny … has been that the laws at issue lack any purpose other than a bare desire to harm a politically unpopular group." *Hawaii*, 138 S. Ct. at 2420 (ellipses and quotation marks omitted). Accordingly, an immigration law that drew a distinction for reasons "inexplicable by anything but animus," *id.* (quoting *Romer v. Evans*, 517 U.S. 620, 632 (1996)), would likely be invalid even under the rational basis standard, but Section 1326 is no such law.

2. Section 1326 is Constitutional under an *Arlington Heights* Analysis

The district court properly determined that, if the *Arlington Heights* framework applies, Section 1326 is constitutional under it. Defendants have not established that the version of the law applicable to them—§ 1326 as enacted in 1952 and later amended—was motivated by discriminatory intent. Nor did the district court clearly err in concluding

it was not satisfied that, even assuming racial animus in 1929, it continued into 1952 with Section 1326's enactment. (J.A. 1041-1044). In any event, the historical record shows that Congress would have enacted Section 1326 absent any racial animus, providing an additional (and alternative) basis to uphold the statute.

a. Legal Principles

The Supreme Court has long held that claims based on disparate impact alone are not cognizable under the Equal Protection Clause; instead, "[p]roof of racially discriminatory intent or purpose is required to show a violation of" that Clause. *Arlington Heights*, 429 U.S. at 265; *see Washington v. Davis*, 426 U.S. 229, 242 (1976). When the law alleged to discriminate against individuals of a particular race or national origin is neutral on its face, courts evaluate the existence of such intent using the framework from *Arlington Heights*, 429 U.S. at 265–68. Under that framework, "[t]he impact of the official action—whether it bears more heavily on one race than another—may provide an important starting point." *Id.* at 266 (quotation marks and citation omitted). But outside of certain extreme circumstances, disparate "impact alone is not determinative," and courts must assess other evidence in deciding

whether a racially discriminatory purpose was "a motivating factor in the decision." *Id.* at 265–66. Pertinent evidence includes "[t]he historical background of the decision," "[t]he specific sequence of events leading up to" it, "departures" from "[s]ubstantive" or "procedural" norms, and "[t]he legislative or administrative history, ... especially … contemporary statements by members of the decisionmaking body." *Id.* at 267–68. If the challenger proves that the provision was motivated in part by the prohibited intent, the burden shifts to the government to establish that "the same decision would have resulted even had the impermissible purpose not been considered." *Id.* at 270 n.21.

Several principles inform how courts conduct the "sensitive inquiry" into official motivation required under *Arlington Heights*. *See* 429 U.S. at 266. First, in the equal-protection context, showing a discriminatory motive requires something more than proof that the legislature had "awareness of [the] consequences" for the affected group, *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979), that those consequences were "foreseeable," *id.* at 278, or that it acted "with indifference to" the effect on that group, *Luft v. Evers*, 963 F.3d 665, 670 (7th Cir. 2020). Instead, a challenger must show "that the decisionmaker, in this

case [the] legislature, selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Feeney*, 442 U.S. at 279.

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

Third, a legislature alleged to have acted with discriminatory intent is not automatically saddled with the sins of its predecessors. *See City of Mobile v. Bolden*, 446 U.S. 55, 74 (1980) (plurality) ("[P]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful."). Courts assessing legislative intent generally presume that the legislature acted in good faith and require a movant to come forward with evidence that the challenged law—not just a prior one—was motivated in part by a

discriminatory purpose. *See Abbott*, 138 S. Ct. at 2324–25; *see also City of Mobile*, 446 U.S. at 74 (discriminatory intent must be "proved in a given case"). Relevant evidence may include proof that earlier legislatures had discriminatory intent when enacting particular laws, *id.* at 2327, but the probative value of such evidence decreases when it is remote in time, *see Regents*, 140 S. Ct. at 1916 (plurality); *McCleskey v. Kemp*, 481 U.S. 279, 298 n.20 (1987); *City of Mobile*, 446 U.S. at 74, or attributable to a legislature with "a substantially different composition," *Brnovich*, 141 S. Ct. at 2349 n.22 (quotation marks omitted).

b. Section 1326, As Enacted In 1952 And Subsequently Amended, Is Constitutional

i. The relevant focus must be on Section 1326 as enacted in 1952 and amended since, not on the 1929 Act

Defendants' equal-protection challenge to § 1326 fails under the foregoing principles. They rely on the history of the 1929 Act, which was passed 23 years before § 1326. Defendants' account of the 1929 Act's history is incomplete. The testimony from Dr. O'Brien in the district court hearing, reflected in defendants' brief now, highlights several problematic remarks but those concern immigration issues other than illegal reentry, such as national-origin quotas, while other materials

predate the 1929 Act by several years (and are thus too "remote in time," *Regents*, 140 S. Ct. at 1916 (plurality)). Other remarks were made in reference to a section of the bill that Congress ultimately dropped from the 1929 Act. Defendants therefore cannot show that the 1929 Congress as a whole, as distinct from some individual congressmen, was motivated by an intent to discriminate against Mexican persons when it enacted the 1929 Act. *See Brnovich*, 141 S. Ct. at 2349–50 ("[W]hile the District Court recognized that the 'racially-tinged' video helped spur the debate about ballot collection, it found no evidence that the legislature as a whole was imbued with racial motives.").

But this Court need not reach that question. Defendants were not convicted of violating the repealed 1929 Act. They were convicted of violating § 1326 as enacted in 1952 and amended as recently as 1988 and 1990. Governing doctrine dictates that the relevant focus must be on *that* statute, not the 1929 Act. *See Barcenas-Rumualdo*, 53 F.4th at 866 (1929 Act "is not our point of reference"; *see also Abbott*, 138 S. Ct. at 2324–25; *Raymond*, 981 F.3d at 303 ("*Abbott* could not be more clear in allocating the burden of proof and applying the presumption of good faith."). And that remains the case even if the Court assumes that discriminatory

intent motivated the passage of the 1929 Act. *See Abbott*, 138 S. Ct. at 2325 ("[W]e have never suggested that past discrimination flips the evidentiary burden on its head."). "That courts must look to the most recent enactment of the challenged provision, not the original tainted version, is fortified, if not fully ratified, by the Supreme Court's decision in *Abbott*[.]" *Harness v. Watson*, 47 F.4th 296, 306 (5th Cir. 2022) (en banc).

The need to focus on the 1952 Congress does not mean that events preceding the 1929 Act are excluded altogether from consideration. Thus, although the Court may consider the evidence from the 1920s under *Arlington Heights*, reliance on that evidence alone will not carry the day. Moreover, its probative value is significantly lessened for several reasons. First, this evidence is too remote in time to shed any meaningful light on the statute Congress enacted in 1952. *See Regents*, 140 S. Ct. at 1916 (plurality opinion) ("[T]hese statements—remote in time and made in unrelated contexts—do not qualify as 'contemporary statements' probative of the decision at issue." (quoting *Arlington Heights*, 429 U.S. at 268); *McCleskey*, 481 U.S. at 298 n.20 ("[U]nless historical evidence is reasonably contemporaneous with the challenged decision, it has little

probative value."); *City of Mobile*, 446 U.S. at 74 ("More distant instances of official discrimination in other cases are of limited help in resolving that question."). It was passed by a legislature that had experienced a more than 90 percent turnover, with "all architects of the [1929] Act ha[ving] either died or departed from Congress." *United States v. Gonzalez-Nane*, No. 1-21-cr-197, 2022 WL 2987895, at *5 (M.D. Pa. July 28, 2022); *see United States v. Viveros-Chavez*, No. 21-cr-665, 2022 WL 2116598, at *8 (N.D. Ill. June 13, 2022) ("only thirty congressmen from the [1929] Congress remained in office in 1952"). And defendants presented no evidence that Members of the 1952 Congress were even aware "of the history behind the original 1929 criminalization of illegal reentry." *Calvillo-Diaz*, 2022 WL 1607525, at *10. Its probative value is therefore significantly lessened.[7] *Id.*

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[7] Tellingly, by 1952, the members of Congress who made the troubling statements that defendants reference from the 1920s were either out of Congress (Reps. Albert Johnson, Patrick O'Sullivan, Robert Green, John Schafer) or deceased (Sen. Blease and Rep. John Box). *See United States v. Gonzalez-Nane*, 2022 WL 2987895, at *5 (M.D. Pa. July 28, 2022) ("When Congress enacted the INA, over Truman's veto, all architects of the [1929] Act had either died or departed from Congress."). James Davis, the Secretary of Labor from that era, died in 1947. Indeed, a 96% turnover occurred between the 70th and 82nd Congresses. *See United States v. Palacios-Arias*, 3:20-cr-62 (E.D. Va. Oct. 13, 2020); *Barrera-*

"The official action being challenged is 8 U.S.C. § 1326, not the repealed 1929 Act." *United States v. Ponce-Galvan*, 2022 WL 484990, at *3 (S.D. Cal. Feb. 16, 2022). And governing doctrine requires the Court to focus on the illegal reentry statute Congress passed in 1952 and has amended many times since. *See Abbott*, 138 S. Ct. at 2324–25; *Raymond*, 981 F.3d at 303–05. The only court of appeals to address this particular[8] challenge agrees. *See Barcenas-Rumualdo*, 53 F.4th at 866 ("Barcenas-Rumualdo relies heavily on the political climate and debate surrounding the passage of the [1929 Act]. He paints a vivid picture of the [Act's] troubling history, but the [1929 Act] is not our point of reference."). Numerous district courts are also in accord.[9]

Vasquez, 2022 WL 3006773, at *5 n.16 (noting that 70th Congress shared only 21 members with 82nd Congress).

[8] The Eighth Circuit has also addressed the issue on plain error review. *See United States v. Nunez-Hernandez*, 43 F.4th 857 (8th Cir. 2022).

[9] *See United States v. Maldonado-Guzman*, 2022 WL 2704036, at *2 (S.D.N.Y. July 12, 2022) ("*Arlington Heights* directs the Court to look at the motivation behind the official action being challenged, which is not the 1929 Act in this case, but rather § 1326 from the 1952 INA."); *United States v. Muria-Palacios*, 2022 WL 956275, at *2 (E.D. Cal. Mar. 30, 2022) ("*Arlington Heights* directs the Court to look at the motivation behind the official action being challenged and here the official action being challenged is Section 1326 codified in the 1952 [Act] … not the repealed 1929 Act." (internal quotation marks omitted)); *United States v. Ponce-Galvan*, 2022 WL 484990, at *2 (S.D. Cal. Feb. 16, 2022) ("[T]he Court

ii. Congress made substantive changes to § 1326 in 1952 and has continued doing so in the decades since

Defendants attempt to bridge the divide between 1929 and 1952 through their claim that the 1952 Congress simply recodified the 1929 criminal reentry statute. Def. Br. 31. Defendants argue that "[e]ven in the absence of continued racial animus, that simple recodification alone would not purge the criminal reentry statute of the discriminatory purpose behind its original enactment." Def. Br. 31. But a simple comparison of the two statutes defeats this claim. *See United States v. Jimenez Joachin*, 2022 WL 17736798, at *4 (D. Mass. Dec. 16, 2022) ("[T]he INA was not simply a re-enactment of the [1929 Act] and Section 1326, specifically, had novel elements."); *United States v. Rodriguez-Soto*, 2022 WL 17852518, at *4 (N.D. Ga. Dec. 21, 2022) (same). Thus, even assuming a later legislature was required to make substantive changes

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rejects Defendant's argument that the legislative history of the repealed 1929 Act is controlling of an analysis of § 1326 under *Arlington Heights*."); *United States v. Rodriguez-Arevalo*, 2022 WL 1542151, at *6 (M.D. Pa. May 16, 2022) ("[T]he intent of the 1929 Congress will not be imputed to the 1952 Congress."); *United States v. Amador-Bonilla*, 2021 WL 5349103, at *2 (W.D. Okla. Nov. 16, 2021) ("The primary flaw in Defendant's argument is his focus on the 1929 Act."); *United States v. Gamez-Reyes*, 2022 WL 990717, at *3 (D. Colo. Mar. 31, 2022) (same).

when reenacting a prior discriminatory law, and assuming the prior law—here, the 1929 Act—was motivated by animus, § 1326 would still pass this test.

Section 1326 as enacted in the INA made multiple meaningful alterations to the criminal reentry regime that existed under prior law. First, Congress repealed both the 1929 Act and other laws that had prescribed different criminal penalties for defendants deported for subversive or immoral activities, replacing them with a single illegal-reentry statute (§ 1326) that applied the same penalties to all defendants. *See* INA, Pub. L. No. 82-414, § 403, 66 Stat. 163, 279-80; S. Rep. No. 81-1515, at 646-47, 655-56 (1950); J.A. 0108-0109; *Mendoza-Lopez*, 481 U.S. at 835 & n.10. That change both provided uniformity and was substantive in nature—it served to decrease the maximum prison term for some defendants (from five years to two) and to increase the fine amounts applicable to others (from zero to $1,000). *See Mendoza-Lopez*, 481 U.S. at 830–31, 835 n.10.

Second, Congress made several changes to the scope of the illegal-reentry prohibition. Congress added the "found in" clause to § 1326(a), creating a "substantive offense[]" that is "distinct" from the two grounds

for liability (entry and attempted entry) that were in the 1929 Act. *Corrales-Beltran*, 192 F.3d at 1319; *Ayon-Brito*, 981 F.3d at 269 (Congress' inclusion of "found in" language "create[ed] a continuing offense centered on the aliens entry into the United States and presence therein until found.").

In addition, Congress (1) changed the reentry prohibition to reach those "excluded and deported," not just those "arrested and deported," INA § 276, 66 Stat. 229; (2) omitted a phrase in the 1929 Act ("in pursuance of law") that the Supreme Court later identified as a potential textual basis for allowing defendants to challenge the validity of their deportation orders in the illegal-reentry prosecution, *see Mendoza-Lopez*, 481 U.S. at 836; and (3) added language "except[ing] those aliens who have either received the express consent of the Attorney General to reapply for admission or who otherwise establish that they were not required to obtain such consent," *id.* at 831 n.2.

Notably, all of these alterations were race-neutral, as they are part of a statute that applies to "any alien who" engages in the prohibited conduct, without regard to race, ethnicity, or national origin. *See Barcenas-Rumualdo*, 53 F.4th at 864 ("On its face, § 1326 does not

discriminate: All aliens who re-enter the United States without permission after a previous removal are subject to its terms regardless of race or alienage.").

The 1952 enactment alone refutes any argument that there were minor differences between the 1929 Act and the INA. But any remaining doubt is dispelled by the more recent amendments that put in place the sentencing and fine ranges to which several defendants in this consolidated appeal are subject. In 1988, Congress added § 1326(b), which authorized courts to impose enhanced prison terms for "any" reentry defendant whose initial removal was "subsequent to a conviction for commission of" certain qualifying crimes—including for defendants with convictions for non-aggravated felonies. *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7345, 102 Stat. 4181, 4471. Two years later, Congress authorized greater fines for § 1326 violations. Immigration Act of 1990, Pub. L. No. 101-649, § 543, 104 Stat. 5059.[10]

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[10] That Congress effectuated these changes legislatively distinguishes this case from *Hunter v. Underwood*, 471 U.S. 222 (1985), a case which defendants reference. Def. Br. 25. *Hunter* rejected an argument that a felon-disenfranchisement law originally motivated by discriminatory intent was constitutional in its present form in light of *judicial* decisions that had invalidated "[s]ome of [its] more blatantly discriminatory"

Defendants argue that the intent underlying the 1929 Act continues to infect Section 1326 because Congress has not repudiated any "of the racial animus that led to the original criminalization of reentry in 1929 […]." Def. Br. 30. However, defendants do not explain what would satisfy this rule or how it differs from the core theory the Supreme Court rejected in *Abbott*, where a lower court had required a state legislature "to expiate its predecessor's bad intent," "'cure' the earlier Legislature's 'taint," and show that it "had experienced a true 'change of heart.'" 138 S. Ct. at 2325. The Supreme Court reversed, holding that discriminatory purpose must be shown as to the actual law being challenged and that a

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portions. 471 U.S. at 232–33. As several courts have noted, *Hunter* reserved whether *legislative* revisions to such a law may render it constitutional. *See Harness v. Watson*, 47 F.4th 296, 306 (5th Cir. 2022) (en banc); *Hayden v. Paterson*, 594 F.3d 150, 166 (2d Cir. 2010); *Johnson v. Governor of State of Florida*, 405 F.3d 1214, 1223 n.20 (11th Cir. 2005) (en banc); *Cotton v. Fordice*, 157 F.3d 388, 391 n.7 (5th Cir. 1998); *see also Abbott*, 138 S. Ct. at 2325 (noting that *Hunter* was not "a case in which a law originally enacted with discriminatory intent is later reenacted by a different legislature"). As such, this case "is not like *Hunter*, because unlike Alabama's moral turpitude provision, the 1929 Act does not remain on the books. Indeed, *Hunter* confirms that later enactments alter the *Arlington Heights* analysis, noting that the moral turpitude provision would perhaps survive 'if enacted today without any impermissible motivation.'" *United States v. Machic-Xiap*, 552 F. Supp. 3d 1055, 1077 (D. Or. 2021) (quoting *Hunter*, 471 U.S. at 233)).

finding of past discrimination does not "flip[ ] the evidentiary burden" to the government to prove that the successor statute is free from discriminatory intent. *Id*. at 2324-25. Defendants' argument here tries to shift the burden to the government in the very way that *Abbott* condemned. Def. Br. 39; *see*. *Raymond*, 981 F.3d at 303 ("*Abbott* could not be more clear in allocating the burden of proof and applying the presumption of good faith."); *Calvillo-Diaz*, 2022 WL 1607525, at *7 (*Abbott* "put[s] to rest the idea that a subsequent legislature must 'engage in deliberation' regarding past racism in order to cure its 'taint' or else have the past legislature's discriminatory animus imputed to the contemporary one").

Defendants have not identified any evidence that these amendments were motivated by an intent to discriminate against Mexicans or other Latino defendants. Nor would such an argument be plausible. For example, in the same 1990 legislation that authorized increased fines, Congress more than doubled the then-existing cap on immigration, granted Temporary Protected Status to citizens of El Salvador fleeing that country's civil war, and created a diversity visa program to increase the number of visas provided to countries that were

underrepresented in admission to the United States. Pub. L. No. 101-649, §§ 131, 303, 104 Stat. 4997-99, 5036-37. The history of that legislation, in one court's words, marks "an about face away from the racist trope that accompanied" earlier immigration laws. *United States v. Gallegos-Aparicio*, 2020 WL 7318124, at *3 (S.D. Cal. Dec. 11, 2020). Taken together with § 1326's enactment in 1952, these more recent amendments confirm that the illegal-reentry law has undergone meaningful alteration since 1929.

Finally, the cases offered by defendants concerning whether the "taint" from the 1929 law carries forward despite the substantial revisions Congress has undertaken in the decades since provide this Court no guidance. (Def. Br. 31-32). All of these cases[11] concern the canons of statutory construction and do not involve equal protection inquiries. For example, *Keene Corp*. dealt with statutory interpretation, and the proposition for which the defendants cite it ("we do not presume that the revision worked a change in the underlying substantive law

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[11] *United States v. Ryder*, 110 U.S. 729 (1884); *Keene Corp. v. United States*, 508 U.S. 200, 209 (1993); *Bear Lake & River Waterworks & Irrigation Co. v. Garland*, 164 U.S. 1 (1896); *Oneida County v. Oneida Indian Nation of New York State*, 470 U.S. 226 (1985).

'unless an intent to make such [a] chang[e] is clearly expressed'" Def. Br. 31-32) actually supports the position that the 1952 law was substantially different than the 1929 Act. Contrary to defendants' argument, the clear changes made in 1952 demonstrate Congress's intent to specifically alter the existing immigration laws – it was not a simple recodification of the 1929 law. *See Jimenez Joachin*, 2022 WL 17736798, at *4 ("[T]he INA was not simply a re-enactment of the [1929 Act] and Section 1326, specifically, had novel elements."); *Rodriguez-Soto*, 2022 WL 17852518, at *4 (same). Thus, assuming a later legislature was required to make substantive changes when reenacting a prior discriminatory law, Section 1326 would still survive review.

iii. The district court did not clearly err in finding no discriminatory intent on the part of the 1952 congress

Although defendants further argue that "the 1952 recodification was still motivated by discriminatory intent," this argument is without merit. Def. Br. 31. In order to prove discrimination with respect to the 1952 Congress, defendants rely on *Carrillo-Lopez*, the lone decision to conclude that discriminatory intent in part motivated Congress when it enacted § 1326 in 1952. *See* Def. Br. 33-39. Every other district court to

consider *Carrillo-Lopez*'s reasoning, however, has rejected it. *See, e.g.*, *United States v. Suquilanda*, 2021 WL 4895956, at *5 (S.D.N.Y. Oct. 20, 2021) (describing *Carrillo* as "somewhat of an outlier"); *United States v. Sanchez-Felix*, 2021 WL 6125407, at *7 n.3 (D. Colo. Dec. 28, 2021). The district court here did not err in determining it was "not satisfied" that racial animus "continued into 1952 and beyond." (J.A. 1044).

The *Carrillo-Lopez* court committed factual and legal errors in inferring discriminatory intent from the absence of legislative debate on § 1326, when "compared to robust Congressional debate" about the INA's national-origins quotas. 555 F. Supp. At 1011. Factually, the court overlooked key historical context—namely, that the INA was controversial in part because it maintained the system of national-origin quotas in effect since 1924, which did not apply to Mexico and other Western Hemisphere countries. Section 1326, by contrast, was uncontroversial and widely supported. Indeed, the competing Senate bill proposed by the INA's opponents—who criticized the national-origin quotas as xenophobic, *see, e.g.,* 98 Cong. Rec. 5169, 5768 (1952) (Sen. Lehman) —contained an illegal-reentry law identical to what became § 1326. *See* S. 2842, § 276, 82d Cong., 2d Sess. (Mar. 12, 1952); *see also*

United States v. Leonides-Seguria, 2022 WL 4273176, at *3 (N.D. Ill. Sept. 12, 2022) (recognizing this point). It is therefore unsurprising that congressional debate centered on the contested quotas yet omitted discussion of a provision accepted by the INA's proponents and opponents alike.

The *Carrillo-Lopez*'s court's reasoning was legally erroneous as well. Its reliance on what Congress failed to say contravenes the Supreme Court's warning against "[d]rawing meaning from [Congressional] silence." *Kimbrough v. United States*, 552 U.S. 85, 103 (2007). Furthermore, in holding against Congress its failure either to expressly "adopt [the] racial animus" of the 1929 Act "or refute its improper motivation," 555 F. Supp. at 1012, *Carrillo-Lopez* denied the 1952 Congress "the presumption of legislative good faith" and demanded of it what the Supreme Court recently refused to require of a state legislature that had passed a substantially revised law—*viz.*, that it "expiate its predecessor's bad intent." *Abbott*, 138 S. Ct. at 2324–25; 2326 n.18.

Defendants here accept *Carrillo-Lopez*'s adoption-by-silence theory, arguing that because the 1952 Congress did not address the alleged racism behind the 1929 Act, simple recodification did not "purge" the

statute of the discriminatory purpose behind its original enactment. Def. Br. 31. Elsewhere, defendants argue that "Section 1326's reenactment and subsequent amendments never substantively altered the original provision, [and] do not reflect any change of Congressional intent policy or reasoning." Def. Br. 39 (citing *Carrillo-Lopez*, 555 F. Supp. 3d at 1026).

But defendants are demanding something of Congress that the law does not require. In fact, defendants "ask[] this Court to commit the same error [as the district court in *Abbott*] by demanding Congress prove it has faced the (alleged) discriminatory roots of the 1929 Act and changed its heart in more recent enactments and amendments, thereby purging the taint." *Ramirez-Aleman*, 2022 WL 1271139, at *6; *Santos-Reynoso*, 2022 WL 2274470, at *4 (same); *see also Jimenez Joachin*, 2022 WL 17736798, at *3 (rejecting defendant's request "that the Court infer the enactment of the INA was motivated by the same discriminatory purpose of the [1929 Act] unless proven otherwise." (citing *Abbott*, 138 S. Ct. at 2324)).

This Court's application of *Abbot* in *Raymond* highlights the flaw in defendants' theory. In *Raymond*, the Court faced a challenge to a 2018 North Carolina voter identification law that the challengers alleged was passed with the same discriminatory intent as an earlier 2013 law. The

district court granted a preliminary injunction against the 2018 law's enforcement, concluding that the challengers were likely to succeed on the merits of their equal protection claim. *Raymond*, 981 F.3d 295 at 298. This Court reversed, framing the question presented thusly: "The outcome [of this case] hinges on the answer to a simple question: How much does the past matter?" *Id*. And in concluding that the district court erred, the court rejected the notion that "the North Carolina General Assembly's recent discriminatory past was effectively dispositive of the Challengers' claims[.]" *Id*. As the Court put it, "[a] legislature's past acts do not condemn the acts of a later legislature, which we must presume acts in good faith. *Id*. (citing *Abbott*, 138 S. Ct. at 2324).

Key to *Raymond*'s holding was the proper operation of the presumption of legislative good faith and the correct assignment of the burden of proof in equal protection challenges. As *Raymond* explained:

> The district court here considered the General Assembly's discriminatory intent in passing the 2013 Omnibus Law to be effectively dispositive of its intent in passing the 2018 Voter-ID Law. In doing so, it improperly flipped the burden of proof at the first step of its analysis and failed to give effect to the Supreme Court's presumption of legislative good faith. These errors fatally infected its finding of discriminatory intent.

Id. at 303. Moreover, *Raymond* rejected the precise burden-shifting argument defendants make here in arguing that "the 1952 Congress made no effort to repudiate the racist origins, or mitigate the disparate impact, of the status it was simply recodifying and making easier to enforce, it also made no effort to insulate that work from the racist atmosphere of the time" Def. Br. 34. As *Raymond* held, the district court erroneously assumed that the North Carolina legislature's positions "remained virtually unchanged[.]" 981 F.3d at 304. By "requiring the General Assembly to purge the taint of the prior law, the district court flipped the burden and disregarded *Abbott*'s presumption." *Id.* at 305.

Abbott and *Raymond* make clear that the 1952 Congress was not obligated to confront the alleged discrimination of the 1929 Congress. As the Fifth Circuit recently held, "we presume the legislature acted in good faith. So, we do not take Congress's silence about the history of the [1929 Act] as evidence that it adopted any prior discriminatory intent." *Barcenas-Rumualdo*, 53 F.4th at 866 & n.24 (citing *Abbott*, 138 S. Ct. at 2324). "Moreover, Congress has amended § 1326 multiple times since its enactment. By amendment, a facially neutral provision … might overcome its odious origin. [Defendants] make[] no showing that those

amendments were adopted with racial animus. The further removed that § 1326 becomes from the [1929 Act] by amendment, the less it retains its odor." *Id.* (cleaned up).[12]

The remaining aspects of the *Carrillo-Lopez* court's analysis cited by defendants are equally unpersuasive. Def. Br. 34-36. For instance, the court grounded its finding of discriminatory *congressional* intent in part on statements of President Truman and Deputy Attorney General Peyton Ford, members of the Executive Branch. 2021 WL 3667330, at *12–*13. These conclusions are legally and factually unsound.

First, President Truman's veto had nothing to do with § 1326. Instead, President Truman opposed the INA's quota system based on

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[12] Although Congress—as a matter of law—was not required to address the alleged sins of the past when it passed the INA in 1952, it did, in fact, do so in 1965, when it abolished the controversial national-origin quota system and included a provision stating, "[n]o person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence." Immigration and Nationality Act, Pub. L. No. 89-236, 66 Stat. 175, 911 (1965); see J.A. 0965. Notably, "Congress did not repeal § 1326" in the 1965 Act. *Lopez-Segura*, 2022 WL 4084438, at *4. And as one court has explained, through the 1965 Act, "the people themselves adopted amendments to the INA aimed at prohibiting invidious discrimination to remove the 'bad taint' of its prior iterations." *Gutierrez-Barba*, 2021 WL 2138801, at *4; *United States v. Novondo-Ceballos*, 554 F. Supp. 3d 1114, 1122 (D.N.M. 2021) (same).

national origin.[13] President Truman was not a lawmaker and thus his views on the INA are only minimally probative of Congress's intent. *See Barcenas-Rumualdo*, 53 F.4th at 867 ("[E]ven assuming that President Truman's veto of the INA and adjoining statement say something about § 1326 specifically and not just the INA generally, it carries scant interpretive weight. President Truman's opinion on the INA is not probative of what Congress believed."). Moreover, President Truman was an opponent of the INA. His views should therefore be treated with even greater caution. *See id.*; *Shell Oil Co. v. Iowa Dep't of Revenue*, 488 U.S. 19, 29 (1988) ("This Court does not usually accord much weight to the statements of a bill's opponents."). Like the Fifth Circuit, numerous courts have concluded that President Truman's veto statement says nothing Congress' intent in 1952.[14]

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[13] *See Rodriguez-Arevalo*, 2022 WL 1542151, at *7; *United States v. Felix-Salinas*, 2022 WL 815301, at *4 (M.D. Fla. Feb. 2, 2022); *United States v. Sanchez-Felix*, 2021 WL 6125407, at *7 (D. Colo. Dec. 28, 2021); *Machic-Xiap*, 552 F. Supp. 3d at 1075.

[14] *See United States v. Samuels-Baldayaquez*, 2021 WL 5166488, at *3 n.6 (N.D. Ohio Nov. 5, 2021); *Machic-Xiap*, 552 F. Supp. 3d at 1075; *United States v. Munoz-De La O*, 586 F. Supp. 3d 1032, 1049 (E.D. Wash. 2022); *United States v. Crespo-Castelan*, 2022 WL 2237574, at *4 (S.D.N.Y. June 22, 2022); *United States v. Viveros-Chavez*, 2022 WL 2116598, at *8 (N.D. Ill. June 13, 2022); *Maldonado-Guzman*, 2022 WL

The same principles apply to defendants' reliance on Deputy Attorney General Peyton Ford letter.[15] *See Barcenas-Rumualdo*, 53 F.4th at 867 ("Attorney General Ford's letter carries little weight for the same reasons."). Ford was not a member of Congress. His views on the INA carry little weight. *See Brnovich*, 141 S. Ct. at 2350 ("[T]he legislators who vote to adopt a bill are not the agents of the bill's sponsor or proponents"); *Roy v. Cty. of Lexington, S.C.*, 141 F.3d 533, 539 (4th Cir. 1998) ("The remarks of individual legislators, even sponsors of legislation, however, are not regarded as a reliable measure of congressional intent."). Numerous courts have concluded that Ford's letter to Congress is of little value in discerning Congress' intent.[16]

2704036, at *4; *United States v. Lopez-Segura*, 2022 WL 4084438, at *4 (W.D. Okla. Sept. 6, 2022); *United States v. Calvillo-Diaz*, 2022 WL 1607525, at *10 (N.D. Ill. May 20, 2022); *Gonzalez-Nane*, 2022 WL 2987895, at *6; *Santos-Reynoso*, 2022 WL 2274470, at *5.

[15] *Carrillo-Lopez* misapprehended the historical record, as do defendants. (Def. Br. 31). Ford did not propose the relevant language. He wrote in "response" to the Senate Committee's request for Justice Department views on a draft bill that already contained the "found in" clause.

[16] *See Machic-Xiap*, 2021 WL 3362738, at *13; *Barrera-Vasquez*, 2022 WL 3006773, at *7; *Munoz-De La O*, 586 F. Supp. 3d at 1049; *Sanchez-Felix*, 2021 WL 6125407, at *7; *Rodriguez-Arevalo*, 2022 WL 1542151, at *7; *Crespo-Castelan*, 2022 WL 2237574, at *4; *Santos-Reynoso*, 2022 WL 2274470, at *5; *Lopez-Segura*, 2022 WL 4084438, at *3; *United States v. Hernandez-Lopez*, 583 F. Supp. 3d 815, 821 (S.D. Tex. 2022).

Carrillo-Lopez also understood legislation enacted a few months before the INA—colloquially known as the "Wetback Bill"—to evince discrimination because it "criminaliz[ed] Mexican immigrant laborers" to the exclusion of all others. 555 F. Supp. at 1016. But in reality, the bill was an anti-harboring measure that targeted those involved in transporting and otherwise facilitating noncitizens' entry into the United States, *see* Pub. L. No. 82-283, 66 Stat. 26 (1952), and was deemed a necessary response to the decision holding an earlier anti-harboring law unenforceable in *United States v. Evans*, 333 U.S. 483 (1948). S. Rep. No. 82–1145, at 2 (1952). As the Fifth Circuit recently held, "the proposal of a crudely nicknamed bill does not carry [defendant's] burden of proving that Congress enacted § 1326 with racial malice. The fact that individual lawmakers dubbed a bill something derogatory, without more, says nothing of the motivations of Congress 'as a whole' regarding the INA or § 1326 specifically." *Barcenas-Rumualdo*, 53 F.4th at 867 (citing *Brnovich* 141 S. Ct. at 2350); *see also Jimenez Joachin*, 2022 WL 17736798, at *4 ("Such statements were not in reference to Section 1326 and provide 'no evidence that the legislature as a whole was imbued with racial motives.'" (quoting *Brnovich*, 141 S. Ct. at 2350)); *United States v.*

Viveros-Chavez, 2022 WL 2116598, at *6 (N.D. Ill. June 13, 2022); *Machic-Xiap*, 552 F. Supp. at 1074; *Calvillo-Diaz*, 2022 WL 1607525, at *10.

Finally, *Carrillo-Lopez* gave excessive weight to the presence of the term "wetback" in congressional debates and other materials. (J.A. 0129-0417). That term, if used today, would unquestionably be understood as a term indicative of animus. This Court, however, should recognize that linguistic norms change over time and that, in that era, the term was often used to refer to an undocumented worker from Mexico without necessarily indicating discriminatory intent. Judicial opinions used the term in precisely that manner. *See Johnson v. Kirkland*, 290 F.2d 440, 441 (5th Cir. 1961) (describing a statute's purpose as "protect[ing] migrant Mexican workers—referred to traditionally as 'wetbacks' because of their illegal entry across the Rio Grande—from exploitation by American employers") (John R. Brown, J.); *see also Bennett v. United States*, 285 F.2d 567, 569 (5th Cir. 1960) (Elbert P. Tuttle, J.); *Amaya v. United States*, 247 F.2d 947, 947–48 (9th Cir. 1957); *United States v. Sugden*, 226 F.2d 281, 282 (9th Cir. 1955). President Truman used the

term as well,[17] who was otherwise noted by the *Carrillo-Lopez* court for his sensitivity to discrimination. Accordingly, while *Carrillo-Lopez*'s reaction to the term is understandable, that court erred in treating its appearance in congressional debates of that era as evidence of discriminatory purpose. In sum, defendants' reliance on *Carrillo-Lopez* does not suffice to carry their burden of showing that a discriminatory animus motivated Congress's enactment of, or amendments to, § 1326.

Further, *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), and *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020), do not support defendants' proposed standard either. *See Barcenas-Rumualdo*, 53 F.3d at 866 n.22. The question presented in *Ramos* was whether a state law allowing non-unanimous jury verdicts in criminal trials was constitutional. 140 S. Ct. at 1394. The Court held that the Sixth Amendment right to a jury trial "requires a unanimous verdict to convict

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[17] Harry S. Truman, "Special Message to the Congress on the Employment of Agricultural Workers from Mexico" (July 13, 1951) ("The really crucial point, which this Act scarcely faces, is the steady stream of illegal immigrants from Mexico, the so-called 'wetbacks,' who cross the Rio Grande or the western stretches of our long border, in search of employment."), at https://www.trumanlibrary.gov/library/public-papers/154/special-message-congress-employment-agricultural-workers-mexico.

a defendant of a serious offense." *Id.* at 1394, 1397. Although the Court observed that laws permitting non-unanimous verdicts in criminal cases were rooted in racism, the Court's core reasoning was not that such laws are unconstitutional due to their origins, but that the Sixth Amendment demanded unanimity in criminal trials. *See id.* at 1397. *Ramos* was not an equal protection case and never applied, or even cited, *Arlington Heights*. *See id.* at 1410 ("Ramos does not bring an equal protection challenge.") (Sotomayor, J., concurring). In fact, in noting its disagreement with Justice Alito's dissent, the Court explained that it discussed the racist history of non-unanimous jury laws as part of the "functional" analysis required by the Sixth Amendment and that "a jurisdiction adopting a nonunanimous jury rule even for benign reasons would still violate" that provision. *Id.* at 1401 n.44.

The decision in *Espinoza* similarly provides no support for defendants' position. There, the Court considered whether application of a "no-aid" provision barring religious schools from participating in a state scholarship program violated the Free Exercise Clause of the First Amendment. 140 S. Ct. at 2254. The Court held that it did, reasoning that the provision "plainly exclude[d] schools from government aid solely

because of religious status." *Id.* at 2255. The Court did not, however, rule on equal-protection grounds. *Id.* at 2263 n.5. Nor did it find the challenged provision unconstitutional because of any "checkered tradition." That phrase appears once in the opinion in response to the argument that a tradition arose in the second half of the 19th century against state support for religious schools. *Espinoza*, 140 S. Ct. at 2258–59. The Court rejected that movement as illuminating the historical understanding of the Free Exercise Clause. *Id.* at 2259. And while Justice Alito urged that the "original motivation" for the state law mattered in light of *Ramos*, *id.* at 2268 (concurring opinion), this solo concurrence is not binding and hardly stands for the proposition a failure to explicitly address the animus-based law invalidates any subsequent versions. And while Justice Alito urged in a concurring opinion that the "original motivation" for the state law mattered in light of *Ramos*, *id.* at 2268, no other Member of the Court joined his solo concurrence.

c. Defendants' disparate-impact argument does not support an inference of discriminatory intent

Defendants have also failed to demonstrate that Section 1326's asserted disparate impact on Mexican and Latino defendants supports a finding that the 1952 Congress had discriminatory motives. To the

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

Here, the disparate impact on Mexican and Latino defendants is "explainable on grounds other than race." *Dumas*, 64 F.3d at 1431. One obvious explanation for the higher number of Hispanic defendants charged with illegal reentry is the simple fact that the United States shares a several-thousand-mile border with Mexico, and the overall rate of attempted entry from Mexico and Central America is significantly higher. *See Arizona*, 567 U.S. at 397 ("Arizona bears many of the consequences of unlawful immigration. Hundreds of thousands of deportable aliens are apprehended in Arizona each year."); *United States v. Arenas-Ortiz*, 339 F.3d 1066, 1070 (9th Cir. 2003) (explaining the "common sense" notion "that it would be substantially more difficult for

an alien removed to China to return to the United States than for an alien removed to Mexico to do so"). For example, during fiscal year 2019, Border Patrol had 859,501 encounters,[18] 99% of which were on the U.S.-Mexico border.[19]

Unsurprisingly, then, numerous courts have explained that statistics concerning Section 1326 prosecutions can be "explained by the geographic proximity of the border to Mexico and Latin America than by animus." *Barrera-Vasquez*, 2022 WL 3006773, at *7 (quoting *United States v. Lucas-Hernandez*, 2020 WL 6161150, at *3 (S.D. Cal. Oct. 21, 2020)).[20]

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[18] U.S. Customs and Border Protection, CBP Enforcement Statistics FY 2019, https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics-fy2019 (last accessed January 10, 2023).

[19] U.S. Customs and Border Protection, Southwest Border Migration FY 2019, https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2019 (last accessed January 10, 2023).

[20] *See Jimenez Joachin*, 2022 WL 17736798, at *3; *Gonzalez-Nane*, 2022 WL 2987895, at *3 ("[P]lausible neutral explanations exist for the extreme disparate impact of Section 1326 on Latinos."); *United States v. Paredes-Medina*, 2022 WL 7683738, at *4 (D. Nev. Oct. 13, 2022) ("Without more, and because another reason–geography–explains the disparate impact of § 1326, I find that Paredes-Medina has not met his burden of demonstrating that this is the 'rare' case in which a constitutional violation is obvious from the impact of the law."); *Gutierrez-Barba*, 2021 WL 2138801, at *4; *Merlo-Espinal*, 2022 WL 2191192, at *3; *Samuels-Baldayaquez*, 2021 WL 5166488 at *3; *United*

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

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States v. Rivera-Sereno, 2021 WL 5630728, at *5 (S.D. Ohio Dec. 1, 2021); *United States v. Ruiz-Rivera*, 2020 WL 5230519, at *4 (S.D. Cal. Sept. 2, 2020).

sufficient to state a claim, virtually any generally applicable immigration policy could be challenged on equal protection grounds." *Id.* at 1916.

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

thereby give rise to a potential equal protection claim"—which "cannot be the case." *Id.*

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

d. Section 1326 would have been enacted even in the absence of any discriminatory intent

A showing that racial discrimination was a motivating factor for the current version of § 1326 would not end the equal-protection analysis; it would just shift to the government the burden "to demonstrate that the law would have been enacted without this factor." *McCrory*, 831 F.3d at 233 (quotation marks omitted). Two main considerations confirm that the government can carry that burden here. The first is the obviously valid federal immigration objectives served by an illegal-reentry law. The

Supreme Court has recognized that cases exist "in which—notwithstanding impact—the legitimate noninvidious purposes of a law cannot be missed." *Feeney*, 442 U.S. at 275. This is such a case. Imposing a sanction on those who repeatedly violate U.S. immigration laws (and territorial boundaries) is a basic and legitimate feature of a controlled border. *Cf. Flores-Montano*, 541 U.S. at 153 (recognizing the "inherent authority" of the government as sovereign "to protect, and [its] paramount interest in protecting, its territorial integrity"). And nothing suggests that Congress, whch was aware of the need for a deterrent a century ago, *see* S. Rep. No. 70-1456, at 1-2 (Jan. 17, 1929), would forgo such a law decades later. Indeed, "Congress has repeatedly shown that it considers immigration enforcement–even against otherwise non-criminal aliens–to be a vital public interest[.]" *Miranda v. Garland*, 34 F.4th 338, 364 (4th Cir. 2022). Furthermore, "the criminalization of unlawful entry–and reentry, by implication–is a highly typical national policy, making it less likely that it emerged in the United States due to discriminatory animus towards persons of any particular race or national origin." *Leonides-Seguria*, 2022 WL 4273176, at *4 (explain that "the criminalization of unlawful entry is the norm among nations" and noting

that 162 countries punish illegal entry, with 124 criminalizing the act).

More to the point, the repeated amendments to § 1326 obviate any need to speculate about whether Congress would have enacted the statute absent discriminatory motives. Congress has amended § 1326 five times since 1952. Defendants have not meaningfully alleged that any of those amendments were motivated by discriminatory intent, and the history of some amendments refutes any such suggestion. *See* pp. 42-45, *supra* (discussing the Immigration Act of 1990). The fact that Congress has repeatedly expanded § 1326's scope or penalties without any evidence of discriminatory intent indicates that the law would have passed in the first instance absent any impermissible motive. As several courts have recognized,

> the government can show that the law would have been enacted free of that purpose. The law has been amended several times since 1952–in 1988, 1990, 1994, 1996, and 1997–in each instance, to add penalties or to ease prosecution and with nary a word suggesting discriminatory animus to those of Latin American descent.

Calvillo-Diaz, 2022 WL 1607525, at *11; *Maldonado-Guzman*, 2022 WL 2704036, at *5 (same); *Santos-Reynoso*, 2022 WL 2274470, at *5 (same); *Lopez-Segura*, 2022 WL 4084438, at *4 n.30 (same). Notably, "when Congress enacted the Immigration and Nationality Act of 1965, which

explicitly precluded discrimination based on race in issuing immigrant visas and abolished the national-origin quota system, Congress did not repeal § 1326." *Lopez-Segura*, 2022 WL 4084438, at *4. Of course, this is unsurprising given that even the opponents of the INA's national-origin quotas wanted to pass an identical illegal reentry statute in 1952. *See Leonides-Seguria*, 2022 WL 4273176, at *3.

Defendants do not address the post-1952 amendments to § 1326. Defendants were convicted of violating § 1326, which was enacted in 1952. In fact, two of the six defendants in this consolidated appeal "[were] also indicted under the 1988 penalty provision targeting aliens whose prior removal was subsequent to a commission of an aggravated felony. 8 U.S.C. § 1326(b)(2). This provision was not a part of the original 1929 law." *United States v. Romo-Martinez*, 2022 WL 16825190, at *5 (W.D. Tex. Nov. 8, 2022); *see* J.A. 1081-1087; J.A. 1133-1139. Even assuming Congress was motivated by animus when it enacted § 1326 in 1952, subsequent events conclusively demonstrate that it would have passed the illegal reentry statute absent such animus. *See Leonides-Seguria*, 2022 WL 4273176, at *4 ("Congress's repeated implicit reapproval of § 1326 via amendment shows—particularly given the imposition of

penalties more severe than those established in 1952—that lawmakers not motivated by discriminatory animus favored criminalizing illegal reentry, providing further support for the proposition that § 1326 would have been enacted even absent such animus."). The Court can reject defendants' equal protection challenge for this reason alone. *See id*. at *3.

CONCLUSION

Based on the foregoing, the United States respectfully requests that the Court affirm the judgments of the district court.

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Effective 12/01/2016

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