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10 **UNITED STATES DISTRICT COURT**
11 **DISTRICT OF NEVADA**

12 UNITED STATES OF AMERICA,
13 Plaintiff,
14 v.
15 GUSTAVO CARRILLO-LOPEZ,
16 Defendant.

Case No. 3:20-CR-00026-MMD-WGC

**Motion to Dismiss Because
§ 1326 Violates Equal Protection
Under *Arlington Heights*¹**

17
18 **I. INTRODUCTION**

19
20 In April 2020, the Supreme Court relied on historical evidence of a state legislature’s
21 racial motives to strike down a criminal law enacted a century earlier. *See Ramos v. Louisiana*,
22 140 S. Ct. 1390 (2020). Although the law was later reenacted with no evidence of animus, the
23 Court refused to ignore the “racially discriminatory *reasons* that [the state] adopted [its]
24 peculiar rules in the first place.” *Id.* at 1401 (emphasis in original). Even the justices’ “shared
25 respect for rational and civil discourse” could not “supply an excuse for leaving an
26 uncomfortable past unexamined.” *Id.* at 1401 n.44.

¹ This motion is timely filed.

1 Like the law in *Ramos*, the law criminalizing illegal reentry into the United States at 8
 2 U.S.C. § 1326 has an “uncomfortable past” that must be examined. *Id.* Enacted at the height of
 3 the eugenics movement, the “Undesirable Aliens Act of 1929” was conceived, drafted, and
 4 enacted by white supremacists out of a belief that the “Mexican race”² would destroy the racial
 5 purity of the United States. Legislators referred to Mexicans as “mongrels” and “peons.”³ They
 6 claimed Mexicans were “poisoning the American citizen.”⁴ They sought to keep the country’s
 7 blood “white and purely Caucasian.”⁵ They solicited reports and testimony from a eugenicist
 8 who likened immigration policy to the “breed[ing] of thoroughbred horses.”⁶ Not only did this
 9 racism underlie the original version of § 1326, the law has disparately impacted Mexicans and
 10 other Latinx individuals in the century since.

11 Because the facts and historical evidence presented here show that the original illegal
 12 reentry law was enacted with a discriminatory purpose and still has a disparate impact, § 1326
 13 is presumptively unconstitutional under *Village of Arlington Heights v. Metropolitan Housing*
 14 *Development Corp.*, 429 U.S. 252 (1977). The burden thus shifts to the government to show
 15 that Congress would have passed the 1929 law in the absence of any discriminatory purpose. If
 16 the government cannot make this showing, the law is invalid, and the Court must dismiss Mr.
 17 Carrillo-Lopez’s criminal charge.

18 At a minimum, if the Court believes Mr. Carrillo-Lopez has not shown a discriminatory
 19 purpose and a disparate impact, it should hold an evidentiary hearing. At this hearing,
 20

21 ² In the early 20th century, “Mexican” was conceptualized as a race rather than a
 22 nationality. For instance, the 1930 census listed “Mexican” as a “Color or Race.” United States
 23 Census Bureau, *History: 1930*, https://www.census.gov/history/www/through_the_decades/index_of_questions/1930_1.html. And “[f]rom at least
 24 1846 until as recently as 2001 courts throughout the United States have utilized the term
 25 ‘Mexican race’ to describe Latinos.” Lupe S. Salinas, *Immigration and Language Rights: The*
 26 *Evolution of Private Racist Attitudes into American Public Law and Policy*, 7 Nev. L.J. 895,
 913 (2007).

³ See *infra* at 8, 10, 11, 12, 13, 17.

⁴ See *infra* at 15, 17.

⁵ See *infra* at 13.

⁶ See *infra* at 13–14.

1 Mr. Carrillo will present expert testimony as further evidence of the law’s discriminatory
2 origins. The Court should also schedule an evidentiary hearing if the government submits
3 evidence that the Court believes may be sufficient to rebut Mr. Carrillo-Lopez’s evidence. But
4 if the government does not attempt to rebut his evidence, or cannot do so, the law is
5 unconstitutional, and the Court must dismiss the complaint.

6 **II. ARGUMENT**

7 **A. Legal framework**

8 The Fifth Amendment of the Constitution provides that no person shall be “deprived of
9 life, liberty, or property, without due process of law.” U.S. Const. amend. V. This clause
10 contains an implicit guarantee of equal protection in federal laws identical to what the
11 Fourteenth Amendment guarantees in state laws. *See Sessions v. Morales-Santana*, 137 S. Ct.
12 1678, 1686 n.1 (2017).

13 A law may violate equal protection in three ways. First, a law may discriminate on its
14 face. *See, e.g., Loving v. Virginia*, 388 U.S. 1 (1967). Second, authorities may apply a facially
15 neutral law in a discriminatory way. *See, e.g., Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Third,
16 a legislature may enact a facially neutral law with a discriminatory purpose, which disparately
17 impacts a disfavored group. *See, e.g., Arlington Heights*, 429 U.S. at 265–68.

18 Here, Mr. Carrillo-Lopez challenges § 1326 only under the third rationale, so the legal
19 framework of *Arlington Heights* applies. *Arlington Heights* clarified that the *effect* of a racially
20 discriminatory law does not alone make it unconstitutional—challengers must also show
21 “[p]roof of racially discriminatory *intent or purpose*” at the time of the law’s passage. *Id.* at 265
22 (emphasis added). Determining whether a purpose was discriminatory requires “a sensitive
23 inquiry into such circumstantial and direct evidence of intent as may be available.” *Id.* at 266.
24 *Arlington Heights* gave a non-exhaustive list of relevant factors to consider in this
25 determination, including:

26 1) the impact of the official action and whether it bears more heavily on one race
than another;

- 1 2) the historical background of the decision;
- 2 3) the specific sequence of events leading to the challenged action;
- 3 4) the [legislature’s] departures from normal procedures or substantive
- 4 conclusions; and
- 5 5) the relevant legislative or administrative history.

6 *Arce v. Douglas*, 793 F.3d 968, 977 (9th Cir. 2015) (citing *Arlington Heights*, 429 U.S.

7 at 266–68).

8 The threshold for satisfying these factors is low. Since legislatures are rarely “motivated

9 solely by a single concern,” a challenger need not show that the legislature’s actions “rested

10 solely on racially discriminatory purposes.” *Arlington Heights*, 429 U.S. at 265–66. Instead, the

11 challenger need only show “proof that a discriminatory purpose has been a *motivating factor* in

12 the decision.” *Id.* at 265–66 (emphasis added). *See also Arce*, 793 F.3d at 977 (quoting

13 *Arlington Heights* to hold that a challenger need not prove discrimination was the “sole

14 purpose” of the challenged action—only that it was a ““motivating factor”).

15 Once the challenger shows that discriminatory purpose was a “motivating factor,” the

16 burden shifts to the law’s defender to show that “the same decision would have resulted even

17 had the impermissible purpose not been considered.” *Arlington Heights*, 429 U.S. at 270 n.21.

18 *See also Hunter v. Underwood*, 471 U.S. 222, 228 (1985) (if racial discrimination was a

19 motivating factor, “the burden shifts to the law’s defenders to demonstrate that the law would

20 have been enacted without this factor.”). If the government cannot show that the legislature

21 would have enacted the offending law in the “absence of the racially discriminatory

22 motivation,” the law violates the Fifth Amendment and must be invalidated. *Id.* at 225.

23 Courts have applied *Arlington Heights* to a variety of laws and government actions. One

24 of the first involved a provision in the Alabama constitution that barred voting for any person

25 convicted of a “crime involving moral turpitude.” *Hunter*, 471 U.S. at 222. Though neutral on

26 its face, the provision disenfranchised ten times as many Blacks as whites. *Id.* at 227. To prove

discriminatory intent in its passage, challengers submitted transcripts of the 1901 Alabama

1 constitutional convention where lawmakers had originally enacted the provision, as well as
2 several historical studies and the testimony of two expert historians. *See id.* at 229. This
3 evidence showed that “zeal for white supremacy ran rampant” at the 1901 convention and was
4 a “motivating factor” underlying the voting provision. *Id.* at 229–31. And because the provision
5 “would not have been adopted by the convention or ratified by the electorate in the absence of
6 the racially discriminatory motivation,” the Supreme Court held that it violated equal
7 protection. *Id.* at 231.

8 Similarly, this Court applied *Arlington Heights* in a challenge to an Arizona law shutting
9 down a Mexican American Studies program in the Tucson school district. *See Arce v. Douglas*,
10 793 F.3d at 981. During the law’s passage, legislators had accused the program of inciting
11 “racial warfare” and supporting a group purportedly claiming that “North America is a land for
12 the bronze peoples.” *Id.* at 978. Finding that such comments created a genuine issue of material
13 fact as to whether the law was “motivated, at least in part, by an intent to discriminate against
14 [Mexican-American Studies] students,” the Court reversed the district court’s grant of summary
15 judgment and remanded for a full trial. *Id.* at 981.

16 Most recently, an en banc panel of this Court applied *Arlington Heights* in the context
17 of the Voting Rights Act to strike down a state law criminalizing third-party ballot collection.
18 *See Democratic Nat’l Comm. v. Hobbs*, 948 F.3d 989 (9th Cir. 2020) (en banc). The Court
19 looked to the law’s legislative history and the events leading up to its passage, including a
20 “racially tinged” video made by the chairman of the county’s Republican party that was widely
21 distributed on social media. *Id.* at 1009. It also considered “unfounded and often farfetched
22 allegations” of ballot collection fraud by a state senator who was “one of the major proponents”
23 of the law and “influential in” its passage. *Id.* at 1009, 1039 (quotations omitted). While the
24 Court found that some lawmakers had voted in favor of the law due to a “sincere, though
25 mistaken, non-race-based belief” in voting misconduct, it concluded that this belief was
26 “fraudulently created” by the senator’s misrepresentations and the “racially tinged” video. *Id.*

1 at 1040. Citing the “‘cat’s paw’ doctrine,”⁷—which holds that even the votes of “well meaning
2 legislators” can contain a discriminatory intent if based on “false and race-based allegations”
3 of other legislators—the Court invalidated the law. *Id.* at 1041.

4 These cases show that courts have used *Arlington Heights* for decades to invalidate
5 facially neutral laws enacted with a discriminatory intent that have disparately impacted racial
6 groups.⁸ As Mr. Carrillo-Lopez will show, the same animus infected § 1326 to an equal (or
7 even greater) degree.

8 **B. Congress enacted illegal reentry with a discriminatory purpose.**

9 While not “purporting to be exhaustive,” the five *Arlington Heights* factors constitute
10 the “proper inquiry in determining whether racially discriminatory intent existed.” *Arlington*
11 *Heights*, 429 U.S. at 268. And as recent Supreme Court precedent confirms, courts must
12 consider this historical evidence in determining the statute’s constitutionality.

13 **C. Under the *Arlington Heights* factors, racism and eugenics were a
14 “motivating factor” in the passage of illegal reentry laws.**

15 A close examination of the political context underlying the criminalization of illegal
16 entry in 1929 reveals a disturbing truth: that racism and eugenics were not only a “motivating
17 factor” in the legislature’s passage of this law. *Arlington Heights*, 429 U.S. at 265. They were
18 the *primary* factor.

19 **D. “The historical background of the decision.”**

20 Historians often refer to the 1920s as the “Tribal Twenties”—a time when “the Ku Klux
21 Klan was reborn, Jim Crow came of age, and public intellectuals preached the science of
22 eugenics.” Exhibit A, Declaration of Dr. Kelly Lytle Hernández, Professor of History at the
23 University of California, Los Angeles, at 2. World War I had produced “a feverish sentiment
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25 ⁷ The “cat’s paw” doctrine is “based on the fable, often attributed to Aesop, in which a clever
26 monkey induces a cat to use its paws to take chestnuts off of hot coals for the benefit of the
monkey.” *Id.* at 1040.

⁸ Courts apply strict scrutiny to the question of whether a law was “motivated by a racial
purpose or object” under *Arlington Heights*. See *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999)
(quotations omitted).

1 against presumably disloyal ‘hyphenated Americans,’” and “few could resist the combination
2 of nativism, job scarcity, and anti-Bolshevism that fueled the politics of restriction.”⁹ Prominent
3 restrictionists “spoke increasingly of ‘racial indigestion,’”¹⁰ and “the ‘contamination’ of Anglo-
4 American society.”¹¹

5 The decade also brought a flood of immigration legislation fueled by fears of “non-
6 white” immigration.¹² Many politicians, especially those popularly known as “nativists,” hoped
7 to “restrict and even end immigration to the United States from every region of the world other
8 than western Europe.” Exh. A, Hernández declaration, at 2. At the start of the decade, Congress
9 passed the first numerical restriction on immigration in the United States.¹³ During the
10 remainder of the decade, legislators aimed for “‘America [to] cease to be the “melting pot.””¹⁴
11 Although the arrival of southern and eastern Europeans in the early 1900s “fueled the rise of
12 American manufacturing,” nativists saw these groups as “‘undesirable immigrants”” who were
13 “socially inferior, culturally alien, and politically suspect.”¹⁵

14 These fears of non-white immigration were bolstered by the growing acceptance of
15 eugenics—a theory that “captured the imagination of many of America’s leading
16 intellectuals.”¹⁶ The popular magazine *The Saturday Evening Post* ran articles warning that new
17 immigrants were racially inferior, impossible to assimilate, and a threat to stability and
18 democracy.¹⁷ The leader of a major scientific institution contended that neither education nor
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20 ⁹ Mae M. Ngai, *Impossible Subjects*, 19, 20 (2004 William Chafe, et al.).

21 ¹⁰ *Id.* at 23.

22 ¹¹ Kelly Lytle Hernández, *Migra!: A History of the U.S. Border Patrol*, 28 (2010).

23 ¹² See generally Daniel Okrent, *The Guarded Gate: Bigotry, Eugenics, and the Law
24 That Kept Two Generations of Jews, Italians, and Other European Immigrants Out of America*
(2019).

25 ¹³ Emergency Immigration Act of 1921, Pub.L. 67-5, 42 Stat. 5 (1921).

26 ¹⁴ Jia Lynn Yang, *One Mighty and Irresistible Tide: The Epic Struggle Over American
Immigration*, 2020, 3 (2020) (quoting Senator David A. Reed).

¹⁵ Hernández, *supra*, at 28.

¹⁶ Yang, *supra*, at 35.

¹⁷ *Id.* at 8.

1 environment could alter the “‘profound and inborn racial differences’ that rendered certain
2 people inferior.”¹⁸ And states throughout the country were drafting laws “based on this
3 burgeoning race science, including aggressive sterilization programs.”¹⁹

4 At the center of the eugenics movement was Dr. Harry H. Laughlin, the director of the
5 Eugenics Record Office.²⁰ Dr. Laughlin was well known for his model sterilization law that
6 many states and countries, including the Third Reich of Nazi Germany, used as a template.²¹
7 During the 1920s, Dr. Laughlin testified before Congress multiple times and produced four
8 reports that discussed topics such as “race crossing,” “mate selection,” “fecundity,” “racial
9 composition,” and the “individual quality of future population.” Exhibit B, *The Eugenic*
10 *Aspects of Deportation: Hearings before the Committee on Immigration and Naturalization*
11 *House of Representative, 70th Cong. 70.1.4*, pp. 2, 3 (1928). Relying heavily on these theories,
12 Congress would anchor its immigration legislation in eugenics and racial inferiority for the
13 remainder of the decade.²²

14 **E. “The specific sequence of events leading to the challenged action.”**

15 In the early 1920s, Congress began to focus its legislation around the exclusion of
16 “undesirable” immigrants—which was often code for non-white. *See Ave. 6E Investments, LLC*
17 *v. City of Yuma, Ariz.*, 818 F.3d 493, 505–06 (9th Cir. 2016) (holding that “the use of
18 ‘code words’ may demonstrate discriminatory intent”). The first such law was the National
19 Origins Act of 1924, which established quotas based on the national origins of U.S. citizens as
20 reflected in the 1920 census.

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23 ¹⁸ Okrent, *supra*, at 3.

24 ¹⁹ *Id.* at 38. Those sterilization laws were affirmed in the now infamous decision *Buck*
25 *v. Bell*, 274 U.S. 200, 207 (1927).

26 ²⁰ Ngai, *supra*, at 24.

²¹ *Harry Laughlin and Eugenics*, Truman State University. Accessible at
<https://historyofeugenics.truman.edu/altering-lives/sterilization/model-law/>.

²² *See* E.P. Hutchinson, *Legislative History of American Immigration Law, 1798-1965*, 212-13 (1981).

1 The quotas created by the National Origins Act were skewed to keep the nation’s “racial
2 strains” predominantly Anglo-Saxon.²³ The law on its face did not count “nonwhite people
3 residing in the United States” toward the quotas it established. Indeed, its newly-created “Quota
4 Board” interpreted this provision to exclude all Black people; all East and South Asians
5 (including those who had American citizenship by birth); and all citizens in Hawai‘i, Puerto
6 Rico, and Alaska.²⁴ Congress and the president accepted these exclusions under pressure to
7 “stand firm against the efforts of ‘hyphenates’ who would ‘play politics with the nation’s blood
8 stream.’”²⁵

9 Yet there was a wrinkle in the National Origins Act—it did not set quotas on immigrants
10 from countries in the Western Hemisphere. This was due to the influence of large agricultural
11 businesses that relied heavily on labor from just over the border.²⁶ These agri-businesses
12 pressured legislators from western states to vote against the law, forcing nativists in Congress
13 to “choose between accepting a Mexican quota exemption or passing no immigration law at
14 all.” Exh. A, Hernández declaration, at 3. As one representative complained, there was no
15 chance of capping the number of Mexican immigrants because too many growers were
16 “interested in the importation of these poor peons.” Exhibit C, Representative Box (TX).
17 “Deportation of Aliens.” *Congressional Record*, (Feb. 16, 1929) p. H3619.

18 So, despite passing the most sweeping immigration law in years, legislators were not
19 happy. Representative Madden grumbled that the bill “leaves open the doors for perhaps the
20 worst element that comes into the United States—the Mexican peon.”²⁷ Representative Patrick
21 O’Sullivan criticized the restrictions on Italian immigrants, stating that “the average Italian is
22 as much superior to the average Mexican as a full-blooded Airedale is to a mongrel.” Exhibit
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25 ²³ Ngai, *supra*, at 24–25.

26 ²⁴ *Id.* at 26.

²⁵ *Id.* at 35.

²⁶ See Hans P. Vought, *The Bully Pulpit*, 179 (2004)..

²⁷ Benjamin Gonzalez O’Brien, Chap. 1, *Handcuffs and Chain Link* (2018).

1 D, Representative O’Sullivan, “Administration of the Law.” *Congressional Record* 65:6 (1924)
2 p. H5900. Legislators “proposed bill after bill” restricting Mexican immigration but none could
3 survive opposition from southwestern growers. Exh. A, Hernández declaration, at 5. To solve
4 this problem, a group of key figures began to strategize a new type of immigration bill that
5 would approach immigration from a criminal—rather than a civil—angle.

6 **3. “The relevant legislative or administrative history.”**

7 After passage of the National Origins Act of 1924, the Department of Labor (which
8 governed the Bureau of Immigration) began implementing Congress’s new quota system.²⁸
9 Then-Secretary of Labor James Davis was a strong advocate of Dr. Laughlin and his eugenics
10 theories—even using them as the basis for policies he had developed and published under the
11 title “Selective Immigration or None.”²⁹ Davis warned that the “rat type” was coming to the
12 United States, and that these “rat men” would jeopardize the American gene pool.³⁰

13 Secretary Davis was nevertheless torn between his belief in eugenics and his
14 responsibility to maintain a large labor supply for the railroad and agriculture industries.³¹ So
15 together with devout racist (and suspected Ku Klux Klan member) Senator Coleman Blease,³²
16 Davis developed a compromise—Congress would criminalize border crossing *after the fact*,
17 rather than *prevent* it in the first place.³³ That way, they reasoned, authorities could expel
18 Mexicans through a criminal prosecution after the growing season was over, thereby avoiding
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21 ²⁸ See Vought, *supra*, at 174–79.

22 ²⁹ *Id.*

23 ³⁰ *Id.* at 174–75.

24 ³¹ *Id.* at 216.

25 ³² For biographical and historical context about Senator Blease, see B. Simon, *The*
26 *appeal of Cole Blease of South Carolina: Race, Class, and Sex in the New South*, *The Journal*
of Southern History, 62:1, pp. 57–86 (Feb. 1996), available at
<http://www.jstor.com/stable/2211206>.

³³ Ian MacDougall, *Behind the Criminal Immigration Law: Eugenics and White*
Supremacy, ProPublica (June 19, 2020), <https://www.propublica.org/article/behind-the-criminal-immigration-law-eugenics-and-white-supremacy>.

1 resistance from businesses that depended on Mexican labor.³⁴ The southwest growers were in
2 agreement—as one put it, “We, in California, would greatly prefer some set up in which our
3 peak labor demands might be met and upon the completion of our harvest these laborers
4 returned to their country.” Exh. A, Hernández declaration, at 7.

5 Secretary Davis and Senator Blease found two eager collaborators in the House of
6 Representatives, both of whom were on the powerful Immigration and Naturalization
7 Committee. Representative John C. Box from Texas had long characterized the goal of
8 immigration law as “the protection of American racial stock from further degradation or change
9 through mongrelization.” Exhibit E, Representative Box (TX). “Restriction of Mexican
10 Immigration,” *Congressional Record*, (Feb. 9, 1928) pp. H2817–18. In one speech at an
11 immigration conference, Rep. Box had explained that

12 [t]he Mexican peon is a mixture of Mediterranean-
13 blooded Spanish peasant with low-grade Indians who did not
14 fight to extinction but submitted and multiplied as serfs. Into that
15 was fused much negro slave blood....The prevention of such
mongrelization and the degradation it causes is one of the
purposes of our [immigration] laws.

16 *Id.* Box believed this importation was “raising a serious race question” because
17 Mexicans were “essentially different from us in character, in social position.” Exh. C at H3619.

18 Box was joined by the influential Chairman of the House Immigration and
19 Naturalization Committee, Representative Albert Johnson of Washington. Chairman
20 Johnson—for whom the 1924 “Johnson-Reed” National Origins Act was named—was an
21 “energetic and vehement racist and nativist.”³⁵ He headed the Eugenics Research Association,
22 a group that opposed interracial marriage and supported forced sterilizations.³⁶ He also proudly
23 described his 1924 law as a “bulwark against ‘a stream of alien blood, with all its inherited
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25 ³⁴ *Id.*

26 ³⁵ Dennis Wepman, *Immigration: From the Founding of Virginia to the Closing of Ellis Island*, p. 242–43 (2002).

³⁶ *Id.*

1 misconceptions respecting the relationships of the governing power to the governed.”³⁷ Within
2 two years of the 1924 Act, Chairman Johnson turned to legislation that would exclude the
3 “Mexican race,” explaining that while the argument for immigration restriction had previously
4 been economic, now “the fundamental reason for it is biological.”³⁸

5 Following the lead of these legislators, other lawmakers soon “turned to narratives of
6 racial threat to justify restriction.”³⁹ In 1928, for instance, Representative Robert A. Green of
7 Florida delivered a radio speech (later read into the congressional record by Representative
8 Lankford) that advocated for Western Hemisphere quotas. He asserted that countries south of
9 the United States are “composed of mixture blood of White, Indian, and negro.” Exhibit F,
10 Representative Lankford. “Across the Borders.” *Congressional Record* (Feb. 3, 1928) p.
11 H2462. Immigration from these countries, he believed, created a “very great penalty upon the
12 society which assimilates,” and put it at a disadvantage to countries that have “kept their blood
13 white and purely Caucasian.” Exh. F, at H2462.

14 Chairman Johnson soon convened hearings on new immigration legislation. *See* Exhibit
15 G, *Hearings Before the Committee on Immigration and Naturalization*, 69th Cong. 69.1.3
16 (1926). At the first hearing, Chairman Johnson admitted into the record a letter from a
17 constituent in El Paso who urged the legislators to keep out “the scoff and scum, the mongrel,
18 the bootlegger element, from Mexico.” Exh. G, at 30. In response to this letter, Commissioner
19 General of Immigration Harry Hull, stated, “I think he is right.” Exh. G, at 30. Rep. Box added,
20 “I have some letters, Mr. Chairman, just like that.” Exh. G, at 30

21 The following month, the same House committee held a hearing on “The Eugenic
22 Aspects of Deportation,” where the principal witness was the well-known eugenicist Dr.
23 Laughlin. Exh. B, at 1. Early in the hearing, Chairman Johnson praised Dr. Laughlin’s prior
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26 ³⁷ Roger Daniels, *Guarding the Golden Door*, p. 55 (Hill and Wang, 2004).

³⁸ Okrent, *supra*, at 3.

³⁹ Gonzalez O’Brien, *supra*, at Chap. 1 (Kindle edition).

1 reports to Congress on race crossing, mate selection, and fecundity, describing one as a
2 “priceless” resource that would “bear intimately on immigration policy.” Exh. B, at 3.

3 Dr. Laughlin testified about his latest eugenics report, the goal of which was to “protect
4 American blood from alien contamination.” Exh. B, at 3. When Dr. Laughlin encouraged the
5 committee to conduct future research on the effect of “race crossing within the United States,”
6 Chairman Johnson replied that such a study would “be of great use to the committee in its
7 deliberations.” Exh. B, at 11.

8 Dr. Laughlin discussed the need for further research into “mate selection,” because
9 “whenever two races come in contact there is always race mixture” even though the “upper
10 levels tend to maintain themselves because of the purity of the women of the upper classes.”
11 Exh. B, at 19. The job of any government, Dr. Laughlin explained, was to “demand fit mating
12 and high fertility from the classes who are better endowed physically, mentally, and morally by
13 heredity.” Exh. B, at 19. By deporting or excluding the “lower races” from the country, Dr.
14 Laughlin contended, “[i]mmigration control is the greatest instrument which the Federal
15 Government can use in promoting race conservation of the Nation.” Exh. B, at 19.

16 In response, Chairman Johnson advocated for Congress’s use of the “principle of
17 applied eugenics” to “do everything possible” to reduce crime by “debaring and deporting”
18 more people. Exh. B, at 25. Rep. Box agreed, stating, “we will have to control immigration to
19 suit our own needs or we will lose our national character,” which would “spell destruction for
20 the future of America.” Exh. B, at 25.

21 Dr. Laughlin even compared the drafters of deportation laws to “successful breeders of
22 thoroughbred horses,” who would never consider “acquiring a mare or a stallion not of the top
23 level” for their “stud farm.” Exh. B, at 44. One such successful breeder he knew “weeds out
24 from the lower levels and recruits by purchase”—a process that is “analogous to immigration
25 in man.” Exh. B, at 44–45. “Man is an animal,” Dr. Laughlin explained, “and so far as heredity
26 and future generations are concerned, there is considerable real basis for [this] comparison.”
Exh. B, at 45.

1 When such racial engineering is not possible, Dr. Laughlin warned, deportation of the
2 “undesirable individual” becomes even more critical; otherwise, “we cannot get rid of his blood
3 no matter how inferior it may be, because we cannot deport his offspring born here.” Exh. B, at
4 45. Dr. Laughlin predicted that so long as the nation’s borders remained open to immigrants,
5 “there will always be need for deportation, or the ‘final selection.’” Exh. B, at 44. In response
6 to this testimony, Chairman Johnson agreed that “[i]mmigration looks more and more like a
7 biological problem, and if the work of this committee results in establishing this principle in
8 our immigration policy we will be well repaid for our efforts.” Exh. B, at 46.

9 Though Chairman Johnson’s initial legislation failed, the compromise with the
10 agricultural industry brokered by Secretary Davis and Senator Blease soon made a
11 breakthrough. On January 18, 1929, Senator Blease, on behalf of the Senate Committee on
12 Immigration, submitted a report to the full Senate recommending passage of a law that would
13 penalize “aliens who have been expelled from the United States and who reenter the country
14 unlawfully.” Exhibit H, S. Rep. No. 1456, at 1 (1929). This report was accompanied by a letter
15 from Secretary Davis on behalf of the Department of Labor advocating for passage of the law.
16 Exh. H, at 2.

17 The following week, Senator Blease presented this bill on the Senate floor, where he
18 reported that Chairman Johnson had “asked me to get the measures over to the House [within
19 two days] if I possibly could.” Exhibit I, Senator Blease (SC). *Congressional Record* (Jan. 23,
20 1929) p. S2092. The full Senate passed the bill with almost no discussion or debate. Exh. I, at
21 S2092. Two weeks later, Chairman Johnson submitted a report from the Committee of
22 Immigration and Naturalization to the full House recommending passage of the illegal reentry
23 law. Exhibit J, S. Rep. No. 2397 (1929).

24 During debate on the bill, Rep. Thomas L. Blanton complained that Mexicans “come
25 into Texas by hordes” and that “my friend Judge Box has been making a just fight against this
26 situation for years.” Exh. C, Cong. Rec. 1929. Rep. Blanton urged the House to “apprehend the
thousands of these Mexicans who are in Texas now unlawfully and put them back across the

1 Rio Grande and keep them there.” Exh. C, Representative Blanton, “Deportation of Aliens.”
2 *Congressional Record* (1929) p. H3619. Rep. Schafer added that “[t]hese Mexicans also come
3 into Wisconsin in droves,” and Rep. Blanton challenged others to visit the international ports
4 of entry in Texas to see the “hordes that come across the bridges with no intention of ever going
5 back.” Exh. C, at H3619. Rep. Fitzgerald then added that from a “moral standpoint,” Mexicans
6 were “poisoning the American citizen” because they are “of a class” that is “very undesirable.”
7 Exh. C, Representative FitzGerald, “Deportation of Aliens.” *Congressional Record* (1929) p.
8 H3620.

9 Minutes later, the bill passed the House of Representatives. Exh. C, H3621. The
10 president signed it into law three days later. Exhibit K, 70th Cong., Sess. II, Chap. 690, Mar. 4,
11 1929.

12 This legislative history easily clears the low threshold of showing that racism and
13 eugenics were a “motivating factor” under the first three factors. Like other *Arlington Heights*
14 cases, passage of the racially-motivated law followed a predictable pattern. A broad social
15 movement founded on principles of white supremacy and eugenics gained popular support in
16 the 1920s. *Compare Hunter*, 471 U.S. at 229 (discussing “a movement that swept the post-
17 Reconstruction South to disenfranchise blacks”). Dr. Laughlin, a notorious eugenics “expert,”
18 promoted theories of racial inferiority through multiple reports and testimony to Congress.
19 *Compare Democratic National Committee*, 948 F.3d at 1009 (local Republican chair widely
20 shared a “racially tinged” video suggesting Hispanics were involved in ballot fraud). Key
21 lawmakers like Chairman Johnson, Senator Blease, and Representative Box (along with
22 Secretary of Labor Davis) promoted these theories and repeatedly endorsed them during
23 legislative sessions. *Compare id.* (state senator repeated “unfounded and often farfetched
24 allegations” of ballot fraud); *Arce*, 793 F.3d at 978–79 (legislators accused ethnic studies
25 program of inciting “racial warfare”). Other legislators expressed similar sentiments. *See id.*
26 And even Congressmen who might not have otherwise endorsed racially motivated legislation
were consistently advised of the “inferiority” of the “Mexican race” during legislative sessions

1 in the five years leading up to the law’s passage. *Compare Democratic National Committee*,
2 948 F.3d at 1041 (invoking the “cat’s paw doctrine). In other words, the evidence of racial
3 discrimination in the legislative history and events leading up to the passage of the 1929 law
4 easily meets—if not exceeds—the evidence in other *Arlington Heights* cases where race was
5 found to be a “motivating factor.”

6 **F. “The legislature’s departures from normal procedures or substantive**
7 **conclusions.”**

8 Examining the fourth *Arlington Heights* factor—whether a decisionmaker departs from
9 “normal procedures or substantive conclusions”—requires courts to consider any “procedural
10 irregularities” leading up to the enactment of a law that could signal a discriminatory intent.
11 *Pac. Shores Properties, LLC v. City of Newport Beach*, 730 F.3d 1142, 1164 (9th Cir. 2013).
12 Courts may also consider illogical or counter-intuitive conclusions in the decision-making
13 process. *See, e.g., Ave. 6E Investments, LLC v. City of Yuma*, 818 F.3d 493, 507 (9th Cir. 2016)
14 (citing the city’s decision to “disregard the zoning advice of its own experts”). Here, not only
15 do the overtly racist statements of legislators during the law’s passage show its discriminatory
16 purpose, several irregularities and illogical conclusions in the passage of the 1929 law also
17 implicate this factor.

18 First, the 1920s was the first and only era in which Congress openly relied on the now-
19 discredited theory of eugenics to enact immigration legislation. Both the 1924 and 1929
20 immigration laws drew heavily on Dr. Laughlin’s debunked beliefs that immigration control
21 was a matter of racial engineering, akin to horse breeding. And while Congress ultimately
22 acknowledged the discriminatory origins of the National Origins Act of 1924 and repealed it in
23 1965, illegal reentry remains one of the few laws still in effect from that era.

24 Second, the racial vitriol expressed during the debates was directed almost exclusively
25 at Mexicans—even though Canadians were also entering the United States in record numbers.
26 *See* Exh. C, at H3621 (stating that 81,506 Canadians entered the United States in 1928). If the
1929 Act were motivated by generalized xenophobia or economic anxiety, rather than racism,
one would expect legislators to criticize foreigners across the board. But no legislator referred

1 to Canadians as “mongrels”; none complained of “hordes” of Canadians crossing the border;
 2 none objected that Canadians were “poisoning the American citizen.” And a representative
 3 from Wisconsin complained only about *Mexicans* taking jobs, not Canadians. *See* Exh. C, at
 4 H3619. These irregularities show that not only was Congress’s passage of the Undesirable
 5 Aliens Act based on eugenics and racism, it also departed from typical substantive conclusions
 6 underlying immigration law.

7 **G. “The impact of the official action and whether it bears more heavily**
 8 **on one race than another.”**

9 Within a year of the 1929 law’s passage, the government had prosecuted 7,001 border
 10 crossing crimes; by 1939, that number rose to over 44,000.⁴⁰ In each of these years, individuals
 11 from Mexico comprised no fewer than 84% of those convicted, and often made up as many as
 12 99% of defendants.⁴¹ And the number of prosecutions has soared—in the last three years, the
 13 number of § 1326 cases has risen by nearly 40% to 22,077,⁴² making illegal reentry one of the
 14 most common federal felonies today.

15 In sum, applying the five *Arlington Heights* factors shows that racism and eugenics
 16 were, at minimum, a “motivating factor” in the passage of the Undesirable Aliens Act. And as
 17 new Supreme Court precedent confirms, courts must consider this historical evidence in
 18 determining whether a statute is constitutional.

19 **H. New Supreme Court precedent confirms that discriminatory purpose**
 20 **is relevant to a law’s constitutionality.**

21 Two recent Supreme Court cases confirm that a discriminatory purpose that fueled a
 22 law’s original enactment remains relevant in determining its constitutionality. In *Ramos v.*
 23

24 ⁴⁰ *Annual Report of the Attorney General of the United States for the Fiscal Year 1939*, 37;
 25 Kelly Lytle Hernández, *City of Inmates: Conquest, Rebellion, and the Rise of Human Caging in Los Angeles, 1771-1965*, n.6 at 138–39 (UNC Press, 2017).

26 ⁴¹ Hernández, *supra* n. 6, at 138–39 (citing U.S. Bureau of Prisons, *Federal Offenders*, Fiscal Years, 1931–36.

⁴² *See* United States Sentencing Commission, *Quick Facts: Illegal Reentry Offenses*, Fiscal Year 2019, available at: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Illegal_Reentry_FY19.pdf.

1 *Louisiana*, the Court struck down a state law permitting convictions by non-unanimous juries,
2 citing the “racially discriminatory *reasons* that Louisiana and Oregon adopted their peculiar
3 rules in the first place.” 140 S. Ct. at 1401 (emphasis in *Ramos*). Although Justice Alito argued
4 in his dissent that both states later recodified their non-unanimity rules with no mention of race,
5 the majority rejected the notion that this cured the laws’ original animus, holding that if courts
6 must “assess the functional benefits” of a law, they cannot “ignore the very functions those
7 rules were adopted to serve.” *Id.* at 1401 n.44. Nor could the justices’ “shared respect for
8 rational and civil discourse . . . supply an excuse for leaving an uncomfortable past
9 unexamined.” *Id.* (citation and quotations omitted).

10 Two months later, the Supreme Court struck down a Montana law prohibiting families
11 from using state-sponsored scholarships at religious schools. *See Espinoza v. Montana Dep't of*
12 *Revenue*, 140 S. Ct. 2246 (2020). The majority relied on the law’s “checkered tradition” of
13 underlying religious discrimination, even though it was reenacted in the 1970s “for reasons
14 unrelated to anti-Catholic bigotry.” *Id.* at 2259.

15 Concurring, Justice Alito invoked his *Ramos* dissent, noting its argument that courts
16 cannot examine impermissible motives underlying the original version of a law where states
17 have “readopted their rules under different circumstances in later years.” *Id.* at 2268 (quotations
18 omitted). Justice Alito then stated, “But I lost, and *Ramos* is now precedent.” *Id.* Justice Alito
19 then provided an extensive history of the anti-Catholic and anti-immigrant motives underlying
20 Montana’s law, concluding that “[u]nder *Ramos*, it emphatically does not matter whether
21 Montana readopted the no-aid provision for benign reasons. The provision’s ‘uncomfortable
22 past’ must still be ‘examined.’” *Id.* at 2273 (quoting *Ramos*, 140 S. Ct., at 1396, n.44).

23 Here, the original illegal reentry law codified in the Undesirable Aliens Act of 1929 has
24 been reenacted several times, most notably in the Immigration and Nationality Act of 1952.⁴³

25
26 ⁴³ *See* June 27, 1952, c. 477, Title II, ch. 8, § 276, 66 Stat. 229; Pub.L. 100-690, Title VII, § 7345(a), Nov. 18, 1988, 102 Stat. 4471; Pub.L. 101-649, Title V, § 543(b)(3), Nov. 29, 1990, 104 Stat. 5059; Pub.L. 103-322, Title XIII, § 130001(b), Sept. 13, 1994, 108 Stat. 2023;

1 But *Ramos* and *Espinoza* both confirm that not only do courts examine the racial motivations
2 of a law at the time of its passage, later reenactments do not cleanse the law of its original taint.

3 The government may also argue that even if racism and eugenics were a “motivating
4 factor” in § 1326’s original passage, the law currently serves other legitimate purposes. But
5 laws enacted with a discriminatory purpose cannot be “cured” merely because they later satisfy
6 a non-discriminatory purpose. *See Hunter*, 471 U.S. at 233 (rejecting Alabama’s argument that
7 “events occurring in the succeeding 80 years had legitimated” a racially motivated
8 disenfranchisement provision). Rather, when a court determines that a law’s “original
9 enactment was motivated by a desire to discriminate . . . on account of race and the section
10 continues to this day to have that effect,” the court must conclude that the law “violates equal
11 protection under *Arlington Heights*.” *Id.* *See also United States v. Fordice*, 505 U.S. 717, 718
12 (1992) (“If the State perpetuates policies and practices traceable to its prior de jure dual system
13 that continue to have segregative effects-whether by influencing student enrollment decisions
14 or by fostering segregation in other facets of the university system-and such policies are without
15 sound educational justification and can be practicably eliminated, the policies violate the
16 Clause, even though the State has abolished the legal requirement that the races be educated
17 separately and has established racially neutral policies not animated by a discriminatory
18 purpose.”)

19 **I. Section 1326 continues to disparately impact Mexican and other**
20 **Latinx defendants.**

21 *Arlington Heights* requires challengers to show that a law was enacted with a
22 discriminatory purpose and disparately impacts a particular group. *See* 429 U.S. at 265. Here,
23 not only were racism and eugenics a discriminatory purpose motivating the enactment of the
24

25
26 Pub.L. 104-132, Title IV, §§ 401(c), 438(b), 441(a), Apr. 24, 1996, 110 Stat. 1267, 1276, 1279;
Pub.L. 104-208, Div. C, Title III, §§ 305(b), 308(d)(4)(J), (e)(1)(K), (14)(A), 324(a), (b), Sept.
30, 1996, 110 Stat. 3009-606, 3009-618 to 3009-620, 3009-629.

1 first border crossing laws, such laws continue to disparately impact Mexican and other Latinx
2 defendants.

3 Though no publicly available statistics exist concerning the national origin of persons
4 prosecuted for § 1326 today, the overwhelming number of Border Patrol arrests along the
5 southern border are of Mexicans or people of Latinx origin. In 2000, over 97% of persons
6 apprehended at the border were Mexican. In 2005, Mexicans made up 86% of apprehensions,
7 and in 2010, 87%.⁴⁴ In the last decade, Mexicans have made up a smaller percentage of arrestees
8 due to increased migration from Central America, but combined, the two groups easily
9 constitute the overwhelming majority of border crossers.⁴⁵ *See The Committee Concerning*
10 *Community Improvement v. City of Modesto*, 583 F.3d 690, 704 (9th Cir. 2009) (recognizing a
11 disparate impact on Latinx people where the neighborhoods were “trending” Latinx during the
12 relevant period).

13 Overall, these disparities are comparable to disparities that have supported other
14 successful *Arlington Heights* challenges. *See, e.g., Ave. 6E Investments*, 818 F.3d at 497
15 (concentrating most low-income housing in neighborhoods that are 75% Hispanic); *Arce*, 793
16 F.3d at 978 (targeting a program, 90% of whose enrollees were of Mexican or other Hispanic
17 origin); *Community Improvement*, 583 F.3d at 704 (excluding 71% Latino areas from benefits,
18 while extending those benefits to other areas that were only 48% Latino).

19 The executive branch continues to wield § 1326 as a tool of mass prosecution that
20 disproportionately affects Mexicans and Latin Americans. In April 2018, then-Attorney
21

22
23 ⁴⁴ *Border Patrol Total Apprehensions by Mexico and Other Than Mexico, 2000–2019*,
24 [https://www.cbp.gov/sites/default/files/assets/documents/2020-](https://www.cbp.gov/sites/default/files/assets/documents/2020-Jan/U.S.%20Border%20Patrol%20Total%20Monthly%20Family%20Unit%20Apprehensions%20by%20Sector%20%28FY%202013%20-%20FY%202019%29_0.pdf)
25 [Jan/U.S.%20Border%20Patrol%20Total%20Monthly%20Family%20Unit%20Apprehensions%20by%20Sector%20%28FY%202013%20-%20FY%202019%29_0.pdf](https://www.cbp.gov/sites/default/files/assets/documents/2020-Jan/U.S.%20Border%20Patrol%20Total%20Monthly%20Family%20Unit%20Apprehensions%20by%20Sector%20%28FY%202013%20-%20FY%202019%29_0.pdf).

26 ⁴⁵ *U.S. Border Patrol Nationwide Apprehensions by Citizenship and Sector, 2007 –*
2019, [https://www.cbp.gov/sites/default/files/assets/documents/2020-](https://www.cbp.gov/sites/default/files/assets/documents/2020-Jan/U.S.%20Border%20Patrol%20Nationwide%20Apprehensions%20by%20Citizenship%20and%20Sector%20%28FY2007%20-%20FY%202019%29_1.pdf)
[Jan/U.S.%20Border%20Patrol%20Nationwide%20Apprehensions%20by%20Citizenship%20and%20Sector%20%28FY2007%20-%20FY%202019%29_1.pdf](https://www.cbp.gov/sites/default/files/assets/documents/2020-Jan/U.S.%20Border%20Patrol%20Nationwide%20Apprehensions%20by%20Citizenship%20and%20Sector%20%28FY2007%20-%20FY%202019%29_1.pdf).

1 General Jeff Sessions announced a “zero tolerance” policy targeting illegal entry.⁴⁶ The
2 following month, Sessions made clear at an address delivered in San Diego that “the
3 Department of Homeland Security is now referring 100 percent of illegal Southwest Border
4 crossings to the Department of Justice for prosecution. And the Department of Justice will take
5 up those cases.”⁴⁷

6 Both Sessions and Stephen Miller, a senior policy advisor to President Trump and the
7 architect of the zero-tolerance policy,⁴⁸ have drawn inspiration from the discriminatory
8 immigration laws of the 1920s. In a series of leaked emails, Miller lauded the immigration
9 policies of this era, suggesting to a journalist, “This would seem a good opportunity to remind
10 people about the heritage established by Calvin Coolidge, which covers four decades of the
11 20th century”—i.e., the decades between the 1924 Act and its repeal in 1965.⁴⁹ Likewise, in a
12 2015 interview with Breitbart, Sessions expressed alarm at the rising percentage of “non-native
13 born” Americans, noting that when immigration levels were “about this high in 1924,” the
14 President and Congress “changed the policy, and it slowed down immigration significantly.”⁵⁰
15 He warned that repeal of those policies in 1965 had primed the country for a “surge fast past
16 what the situation was in 1924.”⁵¹

17
18 ⁴⁶ See “Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry,” U.S.
19 Dept. of Justice, Apr. 6, 2018, *available at*: <https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry>.

20 ⁴⁷ “Attorney General Sessions Delivers Remarks Discussing the Immigration
21 Enforcement Actions of the Trump Administration,” Dept. of Justice, May 7, 2018, San Diego,
22 California, <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions>.

23 ⁴⁸ See, e.g., Julie Hirschfeld Davis & Michael D. Shear, *How Trump Came to Enforce
24 a Practice of Separating Migrant Families*, N.Y. Times (June 16, 2018),
25 <https://www.nytimes.com/2018/06/16/us/politics/family-separation-trump.html?login=smartlock&auth=login-smartlock>.

26 ⁴⁹ Katie Rogers & Jason DeParle, *The White Nationalist Websites Cited by Stephen
Miller*, N.Y. Times (Nov. 18, 2019), <https://www.nytimes.com/2019/11/18/us/politics/stephen-miller-white-nationalism.html>.

⁵⁰ Adam Serwer, *Jeff Sessions’ Unqualified Praise for a 1924 Immigration Law*, Atlantic (Jan 10, 2017), <https://www.theatlantic.com/politics/archive/2017/01/jeff-sessions-1924-immigration/512591/>.

⁵¹ *Id.*

1 This evidence demonstrates that § 1326 has disparately impacted Mexican and Latinx
2 immigrants and continues to do so today. Combined with Mr. Carrillo-Lopez’s showing that
3 racial discrimination was a “motivating factor” in its passage, he has satisfied his initial burden
4 under *Arlington Heights* to demonstrate that the law violates equal protection.

5 **J. The burden of proof shifts to the government.**

6 Because Mr. Carrillo-Lopez has shown both a discriminatory purpose and a disparate
7 impact underlying § 1326, the burden shifts to the government to show that the Undesirable
8 Aliens Act of 1929 would have passed “even had the impermissible purpose not been
9 considered.” *Arlington Heights*, 429 U.S. at 266–68, 270 n.21. *See also Hunter*, 471 U.S. at 228
10 (shifting the burden to the law’s defenders to “demonstrate that the law would have been
11 enacted without this factor”). The Court should thus provide the government an opportunity to
12 make this showing; if it declines to do so, the Court should dismiss the charge.

13 If, however, the government submits evidence showing that the 1929 law would have
14 been enacted without a discriminatory purpose (or if the Court believes that Mr. Carrillo-Lopez
15 has not yet shown a disparate impact and discriminatory purpose), the Court should schedule
16 an evidentiary hearing. Courts frequently hold evidentiary hearings and trials to hear evidence
17 on the *Arlington Heights* factors. *See e.g., Hunter*, 471 U.S. at 229 (relying on evidence at trial
18 of state legislative proceedings, “several historical studies, and the testimony of two expert
19 historians”); *Democratic National Committee*, 948 F.3d at 998 (referencing ten-day bench
20 trial); *Arce*, 793 F.3d at 991. Indeed, the Supreme Court has found error where a lower court
21 granted summary judgment “without an evidentiary hearing” on a legislature’s disputed
22 motives under *Arlington Heights*. *Hunt*, 526 U.S. at 545.

23 At this evidentiary hearing, Mr. Carrillo-Lopez will present testimony from expert
24 witnesses, including Dr. Kelly Lytle Hernández, Professor of History at the University of
25 California, Los Angeles, and Dr. Benjamin Gonzalez O’Brien, Associate Professor of Political
26 Science at San Diego State University. *See Exhibit L, Curriculum Vitae of Prof. Lytle
Hernández; Exhibit M, Curriculum Vitae of Prof. Gonzalez O’Brien. See Hunter*, 471 U.S. at

1 228–29 (crediting the “testimony and opinions of historians” to determine a legislature’s
2 discriminatory intent under *Arlington Heights*). Both experts have written extensively on the
3 Undesirable Aliens Act of 1929 and can testify about the historical events surrounding its
4 passage. At the end of this hearing, if the government has not carried its burden to show that
5 the crime of illegal reentry would have been enacted without a racially discriminatory motive,
6 § 1326 is unconstitutional, and the Court must dismiss the charge.

7 **K. A final note**

8 We are beginning our process of national reckoning with the sordid history of § 1326.
9 In 2009, Justice Sonia Sotomayor, the nation’s first Latino justice, wrote her first opinion as a
10 member of the high court. For the first time in the history of the Court, her opinion used the
11 term “undocumented immigrant” to refer to persons who are in the United States without
12 permission. Not alien. Not illegal immigrant. *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100,
13 100 (2009).

14 Congress has begun to join Justice Sotomayor in her recognition of the humanity of
15 migrants. On December 10, 2019, Representative Garcia of Illinois introduced a bill that, if
16 passed, will forever end the prosecution of 1325 and 1326 offenses. The bill now has 44 co-
17 sponsors. Representative Garcia’s introductory remarks eloquently recognize the racist origins
18 of the illegal reentry crime:

19 Mr. GARCIA of Illinois. Madam Speaker, I rise today to
20 support the New Way Forward Act.

21 For too long, unjust, anti-immigrant laws including
22 racialized laws dating back to the 1920s criminalizing migration
23 and the 1996 laws that entangle our civil immigration system
24 with our broken criminal legal system have led to overly harsh
25 punishments and the mass criminalization of immigrants.

26 These laws have resulted in mass incarceration and
deportations, separation of families, stripping people of due
process and exacerbating racial animus in both our immigration
and criminal legal systems.

We must end the labels of the `good' versus `bad'
immigrant used to dehumanize and divide communities.

At this moment in history, we are called to uphold our
values of compassion, common humanity, and racial justice.

1 I am proud to introduce the New Way Forward Act to
2 disrupt the prison to deportation pipeline, give all immigrants the
3 dignity of due process, and ensure America remains a nation that
welcomes all.

4 The bill corrects racial and anti-immigrant injustices
5 embedded in our immigration laws, many of which have enabled
6 the Trump Administration's inhumane assault on non-citizens in
the United States and at our southern border.

7 Our communities deserve dignity, restoration and repair,
8 not further criminalization.

9 It's time for a new vision for the future and for our
10 immigration system. It's time for a New Way Forward.

11 I urge this body to support and pass this bill.^[1]

12 The congressional record now openly acknowledges the racial animus that pervades
13 section 1326. The same historical reckoning that prompted the bill's introduction supports this
14 Equal Protection challenge.

15 Finally, the racist history of § 1326 is, at bottom, the history of millions of individual
16 Latinx lives ruined, and degraded, by application of this unjust law. Thus, Mr. Carrillo-Lopez's
17 name and story must be made part of the record.

18 Mr. Carrillo-Lopez is serving a life sentence for possessing drugs. He was sentenced to
19 life in prison in March of 2020 for a non-violent drug offense – “Trafficking” of a controlled
20 substance. This is what Mr. Carrillo-Lopez received a life sentence for: “possessing a zip-lock
21 baggie located in a clothes basket in the bathroom, containing 28 grams or more of
22 methamphetamine, a Schedule I Controlled substance.”⁵²

23 Life in prison for a nonviolent drug crime is a steep penalty. But it remains *life* in prison.
24 It is not supposed to be a death sentence. Yet, after he was sentenced to life in prison for
25 possessing drugs, the United States Attorney elected to prosecute Mr. Carrillo-Lopez for being
an “alien” who reentered this country without legal authorization. It is worth pausing on the
26 circumstance that this choice was made in the midst of a global pandemic. The myriad hidden

[1] <https://www.congress.gov/congressional-record/volume-165/extensions-of-remarks-section/page/E1571-1572>

⁵² Exhibit N (Documents of conviction).

1 but intimate acts necessary to effectuate Mr. Carrillo-Lopez’s transportation between state
2 prison Court – shackling, body searches, moving him from vehicles to holding cells to
3 courtrooms - threaten not just his own health and safety but the health and safety of those around
4 him. Of course, the law does not compel the government to produce a rationale tethered to
5 public safety for its prosecutorial decisions. Nor does the law compel the government to
6 articulate why it chose to risk the safety of yet another Latinx body in the course of this
7 prosecution.

8 The law does, however, require this Court to examine closely the statute under which
9 Mr. Carrillo-Lopez is prosecuted. If the evidence produced in connection with this motion is
10 insufficient to carry the day, Mr. Carrillo-Lopez, through his counsel requests that this Court
11 schedule an evidentiary hearing, so that Mr. Carrillo-Lopez receives a full and fair opportunity
12 to assert this challenge.

13
14 DATED October 19, 2020.

15 RENE L. VALLADARES
16 Federal Public Defender

17 By: */s/ Lauren Gorman*

18 LAUREN GORMAN
19 Assistant Federal Public Defender
20 Counsel for CARRILLO-LOPEZ
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CERTIFICATE OF ELECTRONIC SERVICE

The undersigned hereby certifies that she is an employee of the Federal Public Defender for the District of Nevada and is a person of such age and discretion as to be competent to serve papers.

That on October 19, 2020, she served an electronic copy of the above and foregoing **Motion to Dismiss Because § 1326 Violates Equal Protection Under *Arlington Heights*** by electronic service (ECF) to the person named below:

NICHOLAS A. TRUTANICH
United States Attorney
PETER WALKINGSHAW
Assistant United States Attorney
400 South Virginia Street, Suite 900
Reno, NV 89501

/s/ Katrina Burden
Employee of the Federal Public Defender