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8 **UNITED STATES DISTRICT COURT**
9 **DISTRICT OF NEVADA**

10 United States of America,
11 Plaintiff,
12 v.
13 Gustavo Carrillo-Lopez,
14 Defendant.
15

Case No. 3:20-CR-00026-MMD-WGC
POST-HEARING BRIEFING

16 **I. POINTS AND AUTHORITIES**

17 **A. Introduction**

18 The McCarran-Walter Act of 1952 collected, recodified, and revised the many existing
19 laws governing immigration and reorganized the structure of immigration law statutes. The
20 question the Court poses is whether the absence of any repudiation of the racial animus that led
21 to the adoption of the statute in 1929 should be construed as the defendant meeting his burden
22 of demonstrating that the 1952 codification was motivated by racial animus. The answer to that
23 question is yes.¹ But Mr. Carrillo-Lopez far exceeds his burden under *Arlington Heights*.
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26 ¹ The 1929 language: That (a) if any alien has been arrested and deported in pursuance of law, he shall be excluded from admission to the United States whether such deportation took place before or after the enactment of this act, and if he enters or attempts to enter the United States after the expiration of sixty days after the enactment of this act, he shall be guilty of a felony and upon conviction thereof shall, unless a different penalty is otherwise expressly provided by law, be punished by imprisonment for not more than two years or by a fine of not more than \$1,000 or by both such fine and imprisonment.

1 The 1952 congress did not just fail to repudiate racial animus. They chose to recodify
2 and make harsher illegal reentry at the same time as they expanded grounds for deportation and
3 limited discretionary relief from deportation. They recodified illegal reentry with knowledge of
4 the law’s disparate impact. They recodified over a presidential veto calling out the bill’s racism
5 and criticizing the expanded grounds for deportation. The same congress also passed a few
6 months earlier a discrete piece of alien harboring legislation known as the “Wetback Bill” that
7 exempted employers from prosecution. Exempting employers, who incentivize illegal
8 immigration and are vastly more responsive to deterrence than impoverished and uneducated
9 Latinx workers, in the same proverbial breath as reenacting illegal reentry, and with full
10 knowledge of the disparate impact of illegal reentry on Latinx migrants, is among the many
11 factors demonstrating racial animus was a motivating factor for the 1952 congress.

12 **B. Recognizing that discriminatory intent is rarely explicit, *Arlington***
13 ***Heights* requires an expansive inquiry and permits courts to consider**
14 **different kinds of evidence cumulatively - direct and circumstantial,**
15 **statistical and anecdotal, historical and contemporaneous.**

16 The factors under *Village of Arlington Heights v. Metropolitan Housing Development*
17 *Corp.*, 429 U.S. 252 (1977) support a racially “discriminatory *intent or purpose*” at the time of
18 the law’s passage. *Id.* at 265 (emphasis added). Determining whether a purpose was
19 discriminatory requires “a sensitive inquiry into such circumstantial and direct evidence of
20 intent as may be available.” *Id.* at 266. *Arlington Heights* gave a non-exhaustive list of relevant
21 factors to consider in this determination, including: 1) the impact of the official action and
22 whether it bears more heavily on one race than another; 2) the historical background of the
23 decision; 3) the specific sequence of events leading to the challenged action; 4) the

24 The 1952 language: Any alien who— (1) has been arrested and deported or excluded and
25 deported, and thereafter (2) enters, attempts to enter, or is at any time found in, the United States, unless
26 (A) prior to his reembarkation at a place outside the United States or his application for admission from
foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for
admission; or (B) with respect to an alien previously excluded and deported, unless such alien shall
establish that he was not required to obtain such advance consent under this or any prior Act, shall be
guilty of a felony, and upon conviction thereof, be punished by imprisonment of not more than two
years, or by a fine of not more than \$1,000, or both. Act of June 27, 1952, title II, ch. 8, § 276, 66 Stat.
163, 229 (1952)

1 [legislature’s] departures from normal procedures or substantive conclusions; and 5) the
2 relevant legislative or administrative history. *Arce v. Douglas*, 793 F.3d 968, 977 (9th Cir. 2015)
3 (citing *Arlington Heights*, 429 U.S. at 266–68). The threshold for satisfying these factors is low.
4 Since legislatures are rarely “motivated solely by a single concern,” a challenger need not show
5 that the legislature’s actions “rested solely on racially discriminatory purposes.” *Arlington*
6 *Heights*, 429 U.S. at 265–66. Instead, the challenger need only show “proof that a
7 discriminatory purpose has been a *motivating factor* in the decision.” *Id.* at 265–66 (emphasis
8 added). *See also Arce*, 793 F.3d at 977 (quoting *Arlington Heights* to hold that a challenger
9 need not prove discrimination was the “sole purpose”—only that it was a ““motivating factor”).

10 Most recently, an en banc panel of the Ninth Circuit applied *Arlington Heights* in the
11 context of the Voting Rights Act to strike down a state law criminalizing third-party ballot
12 collection. *See Democratic Nat’l Comm. v. Hobbs*, 948 F.3d 989 (9th Cir. 2020) (en banc). The
13 Court looked to the law’s legislative history and the events leading up to its passage, including
14 a “racially tinged” video made by the chairman of the county’s Republican party that was
15 widely distributed on social media. *Id.* at 1009. It also considered “unfounded and often
16 farfetched allegations” of ballot collection fraud by a state senator who was “one of the major
17 proponents” of the law and “influential in” its passage. *Id.* at 1009, 1039 (quotations omitted).
18 While the Court found that some lawmakers had voted in favor of the law due to a “sincere,
19 though mistaken, non-race-based belief” in voting misconduct, it concluded that this belief was
20 “fraudulently created” by misrepresentations and the “racially tinged” video. *Id.* at 1040. Citing
21 the “‘cat’s paw’ doctrine,”²—which holds that even the votes of “well-meaning legislators” can
22 contain a discriminatory intent if based on “false and race-based allegations”. *Id.* at 1041.

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² The “cat’s paw” doctrine is “based on the fable, often attributed to Aesop, in which a clever monkey induces a cat to use its paws to take chestnuts off of hot coals for the benefit of the monkey.” *Id.* at 1040.

1 **C. Because the 1952 Congress chose to merely continue and reenact the**
2 **existing law from 1929 without debate, the presumption is that**
3 **Congress’s intent remained the same. Recodification does not**
4 **somehow reset legislative intent.**

5 To presume that the intent of the 1952 congress differed from the intent of the 1929
6 congress is undermined by Supreme Court jurisprudence. *E.g.*, *Hunter v. Underwood*, 471 U.S.
7 222, 232 (1985) (striking down portion of Alabama’s constitution based on legislators’ racial
8 animus despite the more blatantly discriminatory selections being already struck down by the
9 courts because its original enactment was motivated by a desire to discriminate); *cf.* *Abbott v.*
10 *Perez*, 138 S. Ct. 2305, 2325 (2018) (refusing to import discriminatory intent of prior
11 legislature, but only because it did “not confront a situation like the one in *Hunter*. Nor is this
12 a case in which a law originally enacted with discriminatory intent is later reenacted by a
13 different legislature Nor did [the Texas legislature] use criteria that arguably carried
14 forward the effects of any discriminatory intent on the part of the [earlier Legislature.”); *United*
15 *States v. Ryder*, 110 U.S. 729 (1884) (“It will not be inferred that the legislature, in revising and
16 consolidating the laws, intended to change their policy, unless such intention be clearly
17 expressed.”); *Keene Corp. v. United States*, 508 U.S. 200, 209 (1993) (“[W]e do not presume
18 that the revision worked a change in the underlying substantive law ‘unless an intent to make
19 such [a] chang[e] is clearly expressed.’”) (quoting *Fourco Glass Co. v. Transmirra Prods.*
20 *Corp.*, 353 U.S. 222, 227 (1957)); *Anderson v. Pac. Coast S.S. Co.*, 225 U.S. 187, 198-99 (1912)
21 (“[I]t will not be inferred that Congress, in revising and consolidating the laws, intended to
22 change their effect unless such intention is clearly expressed.”); *see also State v. Lyon*, 58 Kan.
23 App. 2d 474, 489-90 (2020) (“[R]ecodification of a criminal statute without a substantive
24 change to the definition of the crime does not amount to a repeal. . . . When construing statutes
25 to determine legislative intent, appellate courts must consider various provisions of an act in
26 *pari materia* with a view of reconciling and bringing the provisions into workable harmony if
possible.”); *Allen v. State*, 402 Md. 59, 74–75 (2007) (“When we pursue the context of statutory
language, we are not limited to the words of the statute as they are printed in the Annotated
Code. We may and often must consider other ‘external manifestations’ or ‘persuasive

1 evidence,’ including a bill's title and function paragraphs, amendments that occurred as it passed
2 through the legislature, its relationship to earlier and subsequent legislation, and other material
3 that fairly bears on the fundamental issue of legislative purpose or goal, which becomes the
4 context within which we read the particular language before us in a given case.”); *In re Special*
5 *Investigation* No. 236, 295 Md. 573, 576–77 (1983) (“Hence, we turn for a possible explanation
6 of its meaning to its form as it existed prior to recodification in 1973. Recodification of statutes
7 is presumed to be for the purpose of clarity rather than change of meaning.”).

8 These principles and cannons of statutory construction reflect an intuitive and common
9 sensical understanding of legislative meaning and intent. Another way to frame the question is
10 whether the McCarran-Walter Act of 1952 is either responsive, i.e., reverses a prior piece of
11 legislation, or is extensive, that is, passed in the context of knowing what the existing statute
12 means and is intended to do, and builds on that. This case is clearly the latter. When a
13 subsequent legislature decides to carry forward a law motivated by racial animus and producing
14 racially disparate results, even after the legislation was vetoed for its racism, it takes no mental
15 gymnastics to find that racial animus remained a motivating factor. The opposite conclusion
16 would defy common sense. The 1929 legislature balanced the desire to maintain America’s
17 white identity with the hunger of business interests for an exploitable and controllable source
18 of labor. The 1952 legislature did the same.

19 **D. The legislative history of both the McCarran-Walter Act and the so-**
20 **called “Wetback Bill” demonstrate racial animus.**

21 **1. The McCarran-Walter Act**

22 The legislative history of the 1952 recodification reflects the same the same desire as
23 the 1929 legislature for a whites-preferred system for permanent immigration while
24 accommodating continued access to an exploitable, racially identified labor force. Congress
25 recodified illegal reentry with full knowledge of its disparate impact on Latinx people. Congress
26 also expanded grounds for deportation and added language to make illegal reentry easier to
prosecute and convict. And Congress passed the law over a presidential veto that explicitly
called out the law for its racism. In short, the 1952 Act too was motivated by racial animus.

1 The legislative history of 1952 demonstrates a choice not to mitigate the racially
2 disparate impact of illegal reentry, not to repudiate its eugenicist motives, but instead to make
3 it easier to prosecute and to correlate and consolidate the provisions of illegal reentry so that
4 “one act would suffice [to criminalize] all persons who have been deported, regardless of the
5 reason therefor, and that *the present Act of March 4, 1929, should be reenacted to cover any*
6 *and all deportations.*³ See ECF No. 45 (excerpt from Report: The Immigration and
7 Naturalization Systems of the United States, Senate Committee on the Judiciary, S. Rep. No.
8 1515, 81st Cong., 2d Sess., at 655-56 (1950)) (emphasis added).

9 The 1952 congress had the evidence of the disparate impact of illegal reentry in the 23
10 years since the law’s passage. They heard from its enforcers. They received scathing criticism
11 from the President. Yet there was no *debate* about whether illegal reentry should remain on the
12 books. That supports the inference that racial animus motivated the recodification.

13 One important piece of context is that the McCarran-Walter Act reenacted illegal reentry
14 while simultaneously broadening the grounds for deportation and limiting discretionary relief
15 from deportation, making more undocumented migrants and documented migrants vulnerable
16 to deportation and thus to prosecution upon return. The expansion of deportations and
17 limitations on discretionary relief formed one of the major critiques from President Truman:

18 The bill would sharply restrict the present opportunity of citizens
19 and alien residents to save family members from deportation.
20 Under the procedures of present law, the Attorney General can
21 exercise his discretion to suspend deportation in meritorious
22 cases. In each such case, at the present time, the exercise of
23 administrative discretion is subject to the scrutiny and approval
24 of the Congress. Nevertheless, the bill would prevent this
25 discretion from being used in many cases where it is now
26 available, and would narrow the circle of those who can obtain
relief from the letter of the law. This is most unfortunate, because
the bill, in its other provisions, would impose harsher restrictions
and greatly increase the number of cases deserving equitable
relief.

³ ECF No. 45 (Report: The Immigration and Naturalization Systems of the United States, Senate Committee on the Judiciary, S. Rep. No. 1515, 81st Cong., 2d Sess., at 655-56 (1950)).

1 ECF No. 44, Ex. A (Truman Veto).

2 Moreover, about 20 years transpired between illegal reentry's enactment and
3 reenactment. The profoundly disparate impact of the law was known by that time. The law was
4 effective in accomplishing its design to target Latinx individuals:

5 With stunning precision, the criminalization of unlawful
6 entry caged thousands of Mexico's proverbial birds of passage.
7 Within one year of enforcement, U.S. attorneys prosecuted 7,001
8 cases of unlawful entry. By 1939, they had prosecuted more than
9 44,000 cases.

10 In no year did the U.S. attorneys' conviction rate fall
11 below 93 percent of all immigration cases. Taking custody of
12 individuals convicted on federal immigration charges, the U.S.
13 Bureau of Prisons reported that Mexicans never comprised less
14 than 84.6 percent of all imprisoned immigrants. Some years,
15 Mexicans comprised 99 percent of immigration offenders.
16 Therefore, by the end of the 1930s, tens of thousands of Mexicans
17 had been arrested, charged, prosecuted, and imprisoned for
18 unlawfully entering the United States. With 71 percent of all
19 Mexican federal prisoners charged with immigration crimes, no
20 other federal legislation—not prohibition, not drug laws, and
21 neither laws against prostitution nor the Mann act—sent more
22 Mexicans to federal prison during those years.

23 ECF No. 26, Ex. A. “Discriminatory purpose ‘may often be inferred from the totality of the
24 relevant facts, including the fact, if it is true, that the law bears more heavily on one race than
25 another.’” *N. Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204, 220 (4th Cir.
26 2016).

27 The disparate impact of this law was known. There was testimony taken regarding
28 illegal reentry from the Immigration and Naturalization Service. *See* ECF No. 45. The testimony
29 complained only about the difficulties of obtaining convictions and prosecutions. *Id.* There were
30 comments solicited from Deputy Attorney General Peyton Ford that too form part of this
31 congressional record. The only substantive change to the 1929 law was indeed at the request of
32 Deputy Attorney General Peyton Ford, who requested that the law be amended to make being
33 “found in” the United States a crime so as to more easily establish venue.

1 With respect to the “found in” clause, Deputy Attorney General Peyton Ford stated, “It
2 adds to existing law by creating a crime which will be committed if a previously deported alien
3 is subsequently found in the United States. This change would overcome the inadequacies in
4 existing law, which have been observed in those cases in which it is not possible for the
5 Immigration and Naturalization Service to establish the place of reentry, and hence the proper
6 venue, arising in prosecutions against a deported alien under the 1929 act.” ECF No. 44, Ex. B.
7 Peyton Ford referenced in the same letter “conveyers and receivers of the wetback.” *Id.*

8 The 1952 congress heard from the prosecutor and enforcers of this law. The conclusion
9 reached in the legislative history was that it didn’t deliver up enough migrants to prosecute and
10 imprison. The result was the broadening of grounds for deportability and the addition of “found
11 in” to the criminalized conduct. In President Truman’s words:

12 In no other realm of our national life are we so hampered and
13 stultified by the dead hand of the past, as we are in this field of
14 immigration. We do not limit our cities to their 1920 boundaries-
15 -we do not hold our corporations to their 1920 capitalizations-we
welcome progress and change to meet changing conditions in
every sphere of life, except in the field of immigration.

16 ECF No. 44, Ex. A.

17 Finally, the legislative history of the McCarran Walter Act uses the racialized slur
18 “wetback” to refer to Latino migrants. In the words of Professor Gonzalez-O’Brien:

19 And that term “wetback” is one that is racially
20 derogatory, was recognized as being racially derogatory at the
21 time, and has roots that link back to some of the discussions
22 around both the quotas being applied to Mexico, of discussions
23 and debate of the Undesirable Aliens Act. And this term
24 “wetback” is referenced in a number of pieces of legislation at
25 the time, including a Senate Bill 1851 -- well, also known as the,
26 uh, Act of March 20th, 1952, which is referenced in the
Congressional Record as the Wetback Bill. And this was an
empty harboring Bill, but regularly referred to Mexicans as
wetbacks. And the term with “wetback” comes from the idea that
individuals who are entering without inspection have to do so at
an area where there is no bridge over the Rio Grande River and,
therefore, they get wet and, therefore, the term wetback. But
across the period of the 1940s and 1950s, this term has -- is

1 associated, and almost synonymous with Mexicans. And in
2 addition to being synonymous with Mexicans and racialized in
3 much the same way, it also has the attribution of a lot of the
4 negative stereotypes that were associated with Mexican
5 immigrants in the push, or quotas to be applied to immigration
6 from Mexico and south of the Rio Grande, as well as during
7 debate over the Undesirable Aliens Act.

8 ECF No. 49 at 89:3-90:4. Though this is not the only use of the racialized slur in the
9 congressional record, Ford was among the men who used the term “wetbacks.” “And while the
10 use of racial slurs, epithets, or other derogatory language does not alone prove discriminatory
11 intent, it is evidence that official action may be motivated by such an unlawful purpose.” *La*
12 *Union del Pueblo Entero v. Ross*, 353 F. Supp. 3d 381, 395 (D. Md. 2018). Ford wasn’t a lone
13 voice or a fringe figure. It was his request alone that added “found in,” ensuring venue could
14 be established anywhere migrants were found.

15 2. The Wetback Bill

16 At the same time as McCarran-Walter was being considered so too was the so-called
17 “Wetback Bill”, which passed a few months before. The bill’s stated aim was “to assist in
18 preventing aliens from entering or remaining in the United States illegally.” UNITED STATES
19 STATUTES AT LARGE, 82 Cong. Ch. 108, March 20, 1952, 66 Stat. 26 (March 20, 1952).

20 Despite its stated aim it *excluded* employers from prosecution:

21 willfully knowingly encourages or induces, or attempts to
22 encourage or induce, either directly or indirectly the entry into
23 the United States of any alien, including an alien seaman, not
24 duly admitted by an immigration officer or not lawfully entitled
25 to enter or reside within the United States under the terms of this
26 Act or any other law relating to the immigration or expulsion of
aliens, shall be guilty of a-felony, and upon conviction thereof
shall be punished by a fine not exceeding \$2,000 or by
imprisonment for it term not exceeding five years, or both, for
each alien in respect to whom any violation of this subsection
occurs: **Provided, however, That for the purposes of this
section, employment (including the its usual and normal
practices incidental to employment) shall not constitute
harboring.**

1 *Id.* (emphasis added). The “Wetback Bill’s” legislative history involved a nakedly racist debate
2 over the “wetback problem”. “[I]ndividuals, like, Senator Kilgore of West Virginia, who notes
3 in debate over the quote, unquote, Wetback Bill, that practically every state in the Union has
4 had the wetback problem. Some of these people cannot meet the standards of immigration. They
5 may be criminals because they are wetbacks. They can be kept in a state of peonage.” ECF No.
6 49 at 107:11-17.

7 The “Wetback Bill” was passed by the same congress during the same time frame and
8 with the same express aim as illegal reentry: “preventing aliens from entering or remaining in
9 the United States illegally.” But it remained a discrete piece of legislation. Its significance is
10 more than its racialized legislative history. It imposed criminal penalties on those who
11 “harbored” aliens but exempted employers from criminal prosecution. It did so despite the fact
12 that employers were the main reason Latinx individuals were coming to the United States.
13 American agricultural interests were reliant on the cheap labor provided by Latinx migrants.
14 There is no starker evidence that deterring illegal immigration is not a true goal of illegal reentry
15 than the express exemption of those who incentivize illegal immigration – i.e., employers. For
16 many reasons, employers are vastly more responsive to deterrence than are impoverished and
17 uneducated Latinx workers. By far the most effective means of deterring illegal immigration,
18 therefore, is to punish employers who hire illegal immigrants. Yet, congress didn’t.

19 This exemption is particularly relevant to two *Arlington Heights* factors: (1) “the
20 specific sequence of events leading to the challenged action and (2) “the [legislature’s]
21 departures from normal procedures or substantive conclusions.” *Arce v. Douglas*, 793 F.3d 968,
22 977 (9th Cir. 2015) (citing *Arlington Heights*, 429 U.S. at 266–68). In undermining its own
23 stated purpose by exempting employers, and using a discrete piece of legislation, the “Wetback
24 Bill” illustrates that the intent of congress was to preserve the influx of cheap and exploitable
25 labor, while simultaneously marginalizing those workers and excluding them from full
26 participation in American life. In instructing courts to consider the broader context surrounding
the passage of legislation, the Court recognized that “[o]utright admissions of impermissible

1 racial motivation are infrequent and plaintiffs often must rely upon other evidence. *N. Carolina*
2 *State Conference of NAACP v. McCrory*, 831 F.3d 204, 220–21 (4th Cir. 2016). The “Wetback
3 Bill” illustrates that the 1952 and 1929 congresses were both balancing the hunger of the
4 agricultural industry for exploitable labor and the desire to keep America’s identity white:

5 MS. GORMAN: And part of the legislative background also is
6 the Wetback Bill that occurred two months earlier. Is that fair?

7 THE WITNESS: That is fair.

8 MS. GORMAN: And the Wetback Bill explicitly carved out from
9 the harboring of aliens employers?

10 THE WITNESS: That is correct.

11 MS. GORMAN: And that tension between employers and the
12 utilization of south of the border
13 migrants was the same sort of tension that we see animating that
14 debate in 1929. Is that fair?

15 THE WITNESS: That's fair.

16 ECF No. 49 at 185:17-186:5

17 The 1952 congress carried forward the 1929 Act and made it easier to prosecute Latinx
18 migrants wherever they were “found”. It expanded upon its predecessor. It also expanded
19 grounds for deportation and narrowed grounds for discretionary relief. Thus, it ensured, again,
20 that Latinos would never gain a foothold in the U.S. Latinx migrants were maintained as a
21 source of exploitable labor, but eternally vulnerable to deportation and prosecution. The
22 employers who profited off their bodies and their need to make a better life were given a pass.

23 **E. The historical events that bridged 1929 and 1952**

24 The historical lead up to a law is a key *Arlington Heights* factor. Here, the two major
25 historical events with respect to Latinos that bridge 1929 and 1952 were the “repatriation”
26 drives during the Great Depression and the Bracero Program. Both events demonstrate an intent
to prevent permanent settlement and maintain control over a temporary, exploitable workforce.

1. Mexican Repatriation

During the Great Depression, an estimated 400,000 to over 1 million Mexicans and Mexican Americans were coerced and threatened into leaving the United States. 60% of whom were U.S. Citizens. They weren’t “repatriated.” They were racially targeted and forced from their homes. It was a scare campaign that hit at those who looked to be Mexican. Not a drive to

1 actually check papers and target those here without permission. If you looked Mexican, you
2 were at risk. As Professor Gonzalez O'Brien testified:

3 As the U.S. headed into the Great Depression, this push
4 to get Mexican immigrants to repatriate to Mexico. And, it was
5 relatively successful. The numbers vary in terms of the number
6 of immigrants -- or the number of Mexicans -- let me clarify that
7 -- the number of Mexicans who left the United States, with, kind
8 of, the lowest estimates being around 400,000, and some of the
9 higher estimates being well over a million who left for Mexico.
10 And some of the estimates of that is, you know, that around 60
11 percent of those who left -- who went back to the Mexico or went
12 to Mexico were, in fact, American citizens. Now, there's a
13 question of, well, why are Mexican -- if they're American
14 citizens, why are they returning to Mexico?

15 And I think that part of the story here is that this was a
16 campaign that was meant to fuel voluntary re-patronization. But,
17 that voluntary re-patronization was, in some cases, driven by a
18 sense of the threat of deportation or the threat of additional
19 penalties if those individuals did not return to Mexico. And in
20 particular, there was -- there were a number of raids in Los
21 Angeles. And along with those raids, there was publicity released
22 announcing the raids in advance; that there would be arrests; and
23 that these raids were coming to the area; and that, uh -- this idea
24 that this would create kind of a psychological push to get people
25 to leave for Mexico.
26

ECF No. 29 at 86:3-87:6. This constitutes overwhelming evidence of racial animus.

2. **Bracero Program**

19 Following, the "repatriation" of Latinos, the Great Depression ended, and the U.S. again
20 needed an exploitable source of labor as the U.S. engagement in World War II ramped up. In
21 1942, the U.S. started a Mexican Farm Labor Program, also known as Operation Bracero. After
22 threatening and deporting hundreds of thousands of Mexicans in the 30s, the Bracero Program
23 funneled Mexicans back into the United States on a legal, *temporary* basis in exchange for the
24 promise of wages and humane treatment. The program never delivered on those promises and
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1 instead spurred illegal immigration as some employers didn't like the red tape and found it more
2 advantageous to directly recruit Mexicans to labor for their farms and factories.⁴



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8 Mexican contract workers undergo medical inspection
9 before being sprayed with pesticides, ca. 1942. The
10 disinfections along the U.S.-Mexico border continued
11 until the late 1950s.

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Braceros were lured to the United States, and their bodies were broken and exploited. They underwent indignities reminiscent of those that precipitated the “bath riots” of 1917, when people with border crossing cards were subjected to weekly “baths” of kerosene and had their clothing sprayed with Zyklon B, the gas Nazis used to kill Jews. *See* ECF No. 49 at 69:10-70:3. Like the Latinx migrants

of the early 1900s Braceros were an exploited and racialized source of labor. They were stripped naked, subjected to invasive body searches, and sprayed with poisonous DDT. The few protections offered on paper rarely materialized. Many were worked and exploited until their bodies broke or they died. ECF No. 49 at 77:3-78:19.

F. White Supremacy in America between 1929 and 1952

White supremacy was alive and well between 1929 and 1952. Schools were segregated. Restaurants had signs to keep out Mexican and “Negro” patrons. Some of the most overt racism perpetuated against Latinx individuals resulted in litigation. Those cases provide a tragic snapshot of the racial animus against Latinx individuals that characterized this period of time.

In 1947, a federal lawsuit was brought alleging that the segregation of Mexican children in California schools violated the Fourteenth Amendment. It succeeded. *Westminster Sch. Dist. of Orange Cty. v. Mendez*, 161 F.2d 774, 781 (9th Cir. 1947) (“By enforcing the segregation of school children of Mexican descent against their will and contrary to the laws of California, respondents have violated the federal law as provided in the Fourteenth Amendment to the

⁴ Operation Wetback followed Operation Bracero. Operation Wetback was based xenophobia, and resulted in sizable large-scale violations of people’s rights, including the forced deportation of U.S. citizens. Like the Mexican “repatriation” drives of the 1930s, it resulted in the mass deportation of Latinos, many of whom were American citizens. ECF No. 49 at 122:3-123:10.

1 Federal Constitution by depriving them of liberty and property without due process of law and
2 by denying to them the equal protection of the laws.”)

3 In 1951, in Arizona, another federal lawsuit was brought to try to end the segregation
4 of children of Mexican descent. The United States District Court for the District of Arizona
5 “held that practice of public elementary school district authorities of segregating children of
6 Mexican descent in separate school buildings with inferior accommodations and facilities was
7 discriminatory and illegal in that it deprived children of constitutional rights of due process of
8 law and equal protection of the laws. *Gonzales v. Sheely*, 96 F. Supp. 1004 (D. Ariz. 1951).

9 In 1952, the Supreme Court decided *Hernandez v. Texas*, 347 U.S. 475 (1954), the first
10 Mexican American civil-rights case heard and decided by the United States Supreme Court
11 during the post-World War II period. The court held that Mexican Americans have equal
12 protection under the 14th Amendment of the U.S. Constitution. In *Hernandez*, the petitioner's
13 initial burden in substantiating his charge of group discrimination was to prove that persons of
14 Mexican descent constitute a separate class, distinct from ‘whites. *Id.* at 479. “One method by
15 which this may be demonstrated is by showing the attitude of the community.” *Id.* The
16 “testimony of responsible officials and citizens contained the admission that residents of the
17 community distinguished between ‘White’ and ‘Mexican.’” *Id.* The “participation of persons
18 of Mexican descent in business and community groups was shown to be slight.” *Id.* Until very
19 recent times, “children of Mexican descent were required to attend a segregated school for the
20 first four grades.” *Id.* “There was ‘at least one restaurant in town [that] prominently displayed
21 a sign announcing, ‘No Mexicans Served.’” *Id.* And, “on the courthouse grounds at the time of
22 the hearing, there were two men's toilets, one unmarked, and the other marked ‘Colored Men’
23 and ‘Hombres Aqui’ (‘Men Here’).” The “petitioner succeeded in his proof that individuals of
24 Mexican descent constituted a cognizable class. *Id.* at 479–80. The same evidence paints a
25 devastating picture of widespread racial animus against those of Mexican descent at the time of
26 the McCarran-Walter Act.

1 The period relevant to this motion was a period characterized by White supremacy
 2 driven by the same race-based ideals of the earlier eugenics’ movement. The laws of many
 3 states banned interracial marriage. It was not until 1967, 15 years after the McCarran-Walter
 4 Act, that the Supreme Court finally decided, in *Loving v. Virginia*, 388 U.S. 1 (1967), that laws
 5 banning interracial marriage were unconstitutional. The Virginia miscegenation law struck
 6 down in *Loving* had been upheld by the state’s supreme court in 1955. As set out in the Supreme
 7 Court’s opinion, “[T]he state court concluded that the State's legitimate purposes were ‘to
 8 preserve the racial integrity of its citizens,’ and to prevent ‘the corruption of blood,’ ‘a mongrel
 9 breed of citizens,’ and ‘the obliteration of racial pride,’ obviously an endorsement of the
 10 doctrine of White Supremacy.” 388 U.S. at 7. Thus, three years after the McCarran-Walter Act,
 11 the Virginia Supreme Court still openly endorsed a law against interracial marriage to prevent
 12 the corruption of blood, to preserve white supremacy, to prevent people who loved each other
 13 from marrying, lest they give birth to “mongrels,” using words remarkably similar to those used
 14 to endorse the Undesirable Aliens Act of 1929.

15 **II. CONCLUSION**



16 An Operation Streamline mass trial of immigrants at
 17 the Lucius D. Bunton Federal Courthouse, Pecos, Texas.
 18 May 2018.
 19 Public domain image courtesy of Wikipedia Commons
 20 and The Intercept.

21 The 1952 congress did not reenact illegal reentry
 22 despite its racist origins. It reenacted it because of them. It made
 23 Latinx individuals easier to deport, prosecute, and convict, and
 24 in the same proverbial breath exempted their employers from
 25 prosecution. This image speaks to the legacy of these choices
 26 and the continuing disparate impact of the law. Almost making the point, only two judges
 deemed a 1326 client worthy of hearing evidence, a request that would seem modest in another
 case. This court is one of the two. An analysis of the *Arlington Height* factors requires dismissal.

RENE L. VALLADARES
 Federal Public Defender

By: /s/ Lauren Gorman

LAUREN GORMAN
 Assistant Federal Public Defender
 Counsel for CARRILLO-LOPEZ

