No. 21-50145

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE

v.

MANUEL RODRIGUES-BARIOS,
DEFENDANT-APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON (CR. NO. 20-1684) (THE HONORABLE LARRY A. BURNS)

BRIEF OF IMMIGRATION SCHOLARS AS AMICI CURIAE SUPPORTING APPELLANT AND REVERSAL

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INTEREST OF AMICI CURIAE

Amici are professors with expertise on U.S. immigration laws.[1] Ingrid Eagly is Professor of Law and Faculty Director of the Criminal Justice Program at UCLA School of Law. David G. Gutiérrez is Professor of History at UC San Diego. Mae Ngai is the Lung Family Professor of Asian American Studies and Professor of History at Columbia University. George J. Sánchez is Professor of American Studies & Ethnicity and History at University of Southern California. Daniel Tichenor is the Philip H. Knight Chair of Social Science, a professor of Political Science, and director of the Wayne Morse Center's Program on Democratic Governance at University of Oregon. Devra Weber is Professor Emerita of History at UC Riverside.

As some of the nation's leading scholars on immigration, Amici have a professional interest in ensuring that the Court is fully and accurately informed regarding the history behind the criminal reentry provision under which Appellant has been indicted.

[1] Amici curiae state that no counsel for any party authored this brief in whole or in part; no counsel or party contributed money intended to fund the preparation or submission of this brief; and no person other than amici curiae or their counsel contributed money intended to fund its preparation or submission. All parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Government seeks to criminally prosecute Appellant Rodrigues-Barios under 8 U.S.C. § 1326, a statutory provision enacted in 1929 to solve "the Mexican problem" by criminalizing unauthorized reentry after deportation from the United States. Like its misdemeanor companion provision, 8 U.S.C. § 1325, Section 1326 was designed to target people crossing the Southwest border, rather than Europeans who overstayed their visas. Both statutes authorize extraordinarily harsh results against those who cross by land, who are overwhelmingly Mexican immigrants.

In this brief, Amici describe the unambiguously racist intentions of the legislators who drafted Sections 1325 and 1326. In reviewing appellant's conviction, this Court must acknowledge those disturbing origins in light of the "imperative to purge racial prejudice from the administration of justice." *Ramos* v. *Louisiana*, 140 S. Ct. 1390, 1418 (2020) (Kavanaugh, J., concurring in part) (citation and quotation marks omitted).

In Part I, Amici discuss the context surrounding the enactment of the entry and reentry provisions through the Undesirable Aliens Act of 1929 ("1929 Act"). Amici first describe early legislative efforts by the Nativists—a political faction organized to oppose non-white immigration—to curb the entry and settlement of Mexicans. Amici then recount how the Nativists enacted highly restrictive immigration legislation in 1924, but failed to curtail

Mexican immigration in the face of opposition from agribusiness, a burgeoning industrialist constituency that depended on a Mexican migrant workforce for the development of the Southwestern economy. Instead, the two factions brokered a compromise that became the 1929 Act. That statute criminalized unauthorized entry and reentry to further the Nativists' racist goal of preventing long-term Mexican immigration while preserving agribusiness's access to low-cost workers. The 1929 Act was conceived to protect the "desirable character of citizenship" from being tainted by Mexican immigrants, who the Nativists (and even the agribusiness constituency) saw as inherently inferior and undesirable as a racial group.

In Part II, Amici address the reenactment of Sections 1325 and 1326 in the McCarran-Walter Act of 1952 ("1952 Act"), and explain why it did not cure the statute's original constitutional infirmity. Indeed, the history confirms not only that Congress failed to purge the racial animus traceable to the 1929 Act, but also that the same racist intent to exclude Mexicans infected the reenactment. Unsurprisingly, the 1952 Act's only material revisions made unauthorized reentry easier to prosecute. Congress's continued failure to grapple with the racist history of Sections 1325 and 1326 makes the legislative history discussed here a relevant evidentiary source bearing on the constitutionality of those provisions.

The district court erred in this case by convicting appellant, in violation of his constitutional rights, under a statute tainted by racial prejudice. The judgment below should be reversed and his conviction vacated.

ARGUMENT

I. RACIAL ANIMUS INFECTS THE ORIGINS OF SECTION 1326

The statutes criminalizing unauthorized entry (§ 1325) and reentry after deportation (§ 1326) trace their origins to the 1920s. The contemporaneous congressional debates establish that legislators saw Mexican immigrants as a "social problem" that threatened white hegemony. This perception was the animating motivation behind the 1929 Act as a whole, and the criminal entry and reentry provisions in particular.

A. A "Nativist" Coalition Aimed to Restrict Non-White Immigration As Mexican Immigrants Settled Into Community Life

Since the 1890s, a group of white lawmakers known as the "Nativists" had been pushing an agenda that demonized all immigrants from anywhere other than certain favored European countries. Daniel J. Tichenor, *Dividing Lines: The Politics of Immigration Control in America* 174–75 (2002); Mae M. Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* 26 (2004) [hereinafter Ngai, *Impossible*]. Early on, the Nativists championed a literacy requirement that they expected would be particularly onerous for eastern and southern Europeans and the "hurtful and undesira-

ble" "birds of passage" who engaged in seasonal work (such as Mexican immigrants). *See* 28 Cong. Rec. 2816–17 (1896) (speech by Sen. Henry Cabot Lodge); Tichenor, *supra*, at 126, 184. By contrast, the Nativists anticipated that the literacy requirement would minimally impact English speakers and their "most closely related" and "desirable" "kindred races," such as Germans, Scandinavians, and French. 28 Cong. Rec. 2817 (1896); Tichenor, *supra*, at 126.

By the early 1920s, the Nativists achieved significant, if partial, legislative victories in their quest for American racial homogeneity. The first was the Immigration Act of 1917 ("1917 Act"), which implemented the literacy test previously vetoed by three Presidents, excluded immigrants from most of Asia,[2] and imposed an increased entrance "head tax" on all immigrants.[3] Pub. L. No. 64-301, 39 Stat. 874; Ngai, *Impossible*, *supra*, at 19; John Higham, *Strangers in the Land: Patterns of American Nativism, 1860–1925*, at 193 (1988). The second was the Emergency Immigration Act of 1921,

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[2] Expanding existing restrictions under the Chinese Exclusion laws, the 1917 Act created a "barred Asiatic zone" from Afghanistan to the Pacific, with exceptions for the Philippines—a U.S. territory—and Japan—which was still subject to restrictions on laborer migration under a U.S.-Japan diplomatic agreement. Ngai, *Impossible*, *supra*, at 36.

[3] Since 1882, certain immigrants had to pay a head tax, but Mexican nationals had been exempted in 1903. Pub. L. No. 47-376, 22 Stat. 214, 214 (1882); Pub. L. No. 57-162, 32 Stat. 1213, 1213 (1903); *see also* Tichenor, *supra*, at 107, 185, 192.

which temporarily set an unprecedented annual cap on immigration and restricted the number of immigrants per country to 3% of the people from that country living in the United States as of the 1910 census. Pub. L. No. 67-5, 42 Stat. 5. But these temporary and relatively cabined measures were insufficient to mollify the Nativists, many of whom demanded a whites-only immigration system.

Meanwhile, at least one to one-and-a-half million Mexican immigrants steadily crossed into the United States between 1890 and 1929. David Gutiérrez, *Walls and Mirrors: Mexican Americans, Mexican Immigrants, and the Politics of Ethnicity* 40 (1995). In the 1900s and 1910s, immigration inspectors prioritized enforcement at seaports over land borders and largely ignored Mexican immigrants' entries. Mae M. Ngai, *The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States, 1921–1965*, 21 L. & Hist. Rev. 69, 81–82 (2003) [hereinafter Ngai, *Career*]. "[A]cutely sensitive to the needs of American employers," officials saw Mexican immigration as outside their purview and left it to be regulated by labor market demand. *Id.*; *see also* George J. Sánchez, *Becoming Mexican American: Ethnicity, Culture, and Identity in Chicano Los Angeles, 1900–1945*, at 51–53 (1993).

Even as the 1917 Act generally imposed extensive entry requirements for immigrants, the Labor Secretary acceded to pressure from employers by

granting temporary waivers for Mexican laborers. Tichenor, *supra*, at 253. Unlike other aspiring immigrants, Mexicans neither had to submit to inspection at the border until 1919, nor had to pass a literacy test or pay an $8 head tax until 1921. *Id.*; *see also* Ngai, *Career*, *supra*, at 82, 85. But eventually, Mexicans not only became subject to all the 1917 Act's entry requirements (including a degrading health exam and separate visa fee)—they were singled out during inspection. After 1924, *only Mexicans* had to undergo bathing, naked inspection, and delousing and clothing fumigation with gasoline and other toxic chemicals (unless they arrived via first class rail). Ngai, *Career*, *supra*, at 85–86; Erika Lee, *America for Americans: A History of Xenophobia in the United States* 346 (2019).

Despite that harsh introduction, many Mexican migrants settled permanently and built families in American cities and rural areas. *See* Ngai, *Impossible*, *supra*, at 133; Gutiérrez, *supra*, at 45. The Nativists saw these burgeoning communities as threats. Emboldened in a climate of ascendant eugenics and Ku Klux Klan expansion, they sponsored increasingly racially restrictive immigration legislation in the 1920s. Higham, *supra*, at 264–99.

B. The National Origins Act Of 1924 Advanced a Racist Conception of Immigration But Failed To Fully Achieve the Nativists' Anti-Mexican Goals

The Nativists next achieved a significant victory by enacting the National Origins Act of 1924 ("1924 Act"), which aimed to reshape the composi-

tion of the immigrant pool to exclude immigrants the Nativists considered "undesirables." Pub. L. No. 68-139, 43 Stat. 153; *see* Gutiérrez, *supra*, at 52–53.

The law excluded all Asian immigrants on grounds that they were ineligible for citizenship (including Japanese immigrants who were previously exempted from statutory restrictions); restricted immigration to 155,000 people a year; established temporary quotas on Eastern-hemisphere immigration pegged to 2% of the U.S. population from each country as of the 1890 census[4]; and mandated permanent immigration caps by 1927 styled as "quotas" based on "national origins." Ngai, *Impossible*, *supra*, at 21–23, 36.

While the 1924 Act's limitations on non-European immigration were draconian, the Nativists had pushed for *even greater* restrictions. The 1924 Act ultimately did not numerically limit Western-Hemisphere immigration only because the Southwestern economy depended on the Mexican immigrant workforce. *Id.* at 49–50.

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[4] By setting immigrant caps based on U.S. statistics from 1890 rather than 1910, Nativists sought to undo a recent demographic shift in European immigration: Using the 1890 baseline favored certain groups (such as British, Germans, and Scandinavians) over others that the Nativists thought less desirable (such as Italians, Greeks, and Poles). Ngai, *Impossible*, *supra*, at 21; John M. Murrin et al., *Liberty, Equality, Power: A History of the American People, Volume 2: Since 1863*, at 659 (7th ed. 2015).

By the turn of the twentieth century, places like California and Texas required "a massive infusion of labor" due to railroad expansion and the growth of specialized irrigated agriculture, mining, and construction. Gutiérrez, *supra*, at 42–43. But white American itinerant labor was declining, and restrictionist immigration policies in place since the 1880s had already cut off labor immigration from China and Japan. *Id.* at 43–44; Ngai, *Impossible*, *supra*, at 50. Testifying for himself and livestock raisers' associations before Congress, California rancher Fred Bixby lamented that "we have no Chinamen, we have not the Japs. The Hindu is worthless; the Filipino is nothing, and the white man will not do the work." *Restriction of Western Hemisphere Immigration: Hearings on S. 1296, S. 1437, and S. 3019 Before the S. Comm. on Immigr.*, 70th Cong. 24, 26 (1928) [hereinafter *Western Hemisphere Restriction*].

Southwestern agribusiness therefore strenuously opposed any Western-Hemisphere quota that may have interfered with their labor supply. By the late 1920s, Mexican immigrants constituted a substantial proportion of the low-wage workforce in the Southwest, accounting for 65 to 85% of workers cultivating vegetables, fruit, and truck crops; more than 50% of workers in the sugar-beet industry; 60% of common labor in mining; and 60 to 90% of the track crews on regional railroads. Gutiérrez, *supra*, at 45. As the President of the Los Angeles Chamber of Commerce put it, "[w]e are totally de-

pendent . . . upon Mexico for agricultural and industrial common or casual labor. It is our only source of supply." *See* Devra Weber, *Dark Sweat, White Gold: California Farm Workers, Cotton, and the New Deal* 35 (1994). In the face of such pro-business opposition and foreign-policy concerns about what a quota would do to inter-American governmental cooperation, the proponents of Western-Hemisphere quotas lost in the Senate 60 to 12. Ngai, *Impossible*, *supra*, at 48–50.

As an alternative, some Nativists called for the application of the 1924 Act's racial ineligibility-for-citizenship bar to Mexicans. At the time, only "free white persons" and "persons of African nativity or descent" were statutorily eligible for naturalized citizenship. *Id.* at 37. But Mexican nationals had been naturalized *en masse* after the Mexican-American war.[5] *Id.* at 50. And because they had been deemed citizenship-eligible then, Mexicans were effectively categorized as white for naturalization purposes. Moreover, revisiting the issue in the 1920s would have posed administrability challenges. As Labor Secretary James Davis observed, "[t]he Mexican people are of such a mixed stock and individuals have such a limited knowledge of their racial

[5] The 1848 Treaty of Guadalupe Hidalgo, which governed Mexico's defeat in the Mexican-American War, stipulated that certain inhabitants of the ceded territory automatically became U.S. citizens unless they either announced an intent to remain Mexican citizens or left the territory. Ngai, *Impossible*, *supra*, at 50.

composition" that it would be "practically impossible" "to determine their racial origin." *Id.* at 54.

Mexicans' "legal whiteness," such as it was, did not immunize them from the racist stereotypes about the "colored races" that Nativists held. *Id.* at 49–51, 54. For example, the president of the California Commission of Immigration and Housing, Edward Hanna, said: "Mexicans as a general rule become a public charge under slight provocation" and "are very low mentally and are generally unhealthy," traits he attributed to his belief that Mexicans "are for the most part Indians." *Id.* at 53 (citation omitted). For his part, Congressman John C. Box described Mexicans as a "blend" of "low-grade Spaniard, peonized Indian, and negro slave mixe[d] with negroes, mulattoes, and other mongrels, and some sorry whites, already here." 69 Cong. Rec. 2817–18 (1928). Unsurprisingly, he opined that "[t]he continuance of a desirable character of citizenship . . . will be violated by increasing the Mexican population of the country." *Seasonal Agricultural Laborers from Mexico: Hearings on H.R. 6741, H.R. 7559, and H.R. 9036 Before the H. Comm. on Immigr. & Naturalization*, 69th Cong. 124 (1926) [hereinafter *Seasonal Laborers*].

The 1924 Act, with its Western-hemisphere exception, did not assuage Nativists' concerns. One Congressman wondered: "What is the use of closing the front door to keep out undesirables from Europe when you permit

Mexicans to come in here by the back door by the thousands and thousands?" Gutiérrez, *supra*, 52–53. And Mexicans continued to immigrate into the United States in significant numbers, prompting further Nativist backlash.

C. Congressional Debates On Mexican Immigration Reveal Widespread Racism Against Mexicans

Though the Western-Hemisphere quotas failed, Congress considered bills to curtail Mexican immigration in 1926 and 1928 under the slogan "close the back door." Eric S. Fish, *Race, History, and Immigration Crimes*, 107 Iowa L. Rev. 1051, 1067 (2022). Although those debates ostensibly pitted Nativists against agribusiness, both sides spoke of Mexican immigrants in openly racist terms.

The Nativists voiced their usual fears about the United States' shifting demographic composition. For example, the Immigration Restriction League warned the Senate that "[o]ur great Southwest is rapidly creating for itself a new racial problem, as our old South did when it imported slave labor from Africa." *Western Hemisphere Restriction*, *supra*, at 188. And eugenicist Harry Laughlin[6] testified before the House that "[i]f we do not deport

[6] Dr. Laughlin, the director of the Eugenics Record Office, was well known for designing a model sterilization law used by many regimes as a template, including Nazi Germany. Ngai, *Impossible*, *supra*, at 24; *Laughlin's Model Law*, Harry Laughlin and Eugenics: A Selection of Historical Objects from Harry H. Laughlin Papers, Truman State University, https://historyofeugenics.truman.edu/altering-lives/sterilization/model-law/.

the undesirable individual, we can not get rid of his blood[] no matter how inferior it may be, because we can not deport his off-spring born here." *The Eugenical Aspects of Deportation: Hearings Before the H. Comm. on Immigr. & Naturalization*, 70th Cong. 45 (1928), *quoted in* Fish, *supra*, at 1072.

While the Southwestern agricultural lobby fought against proposals to curtail Mexican immigration, they accepted their racist premise. In 1926, lobbyist S. Parker Frisselle testified before Congress that "[w]e, gentlemen . . . are just as anxious as you are not to build the civilization of California or any other Western district upon a Mexican foundation." *Seasonal Laborers*, *supra*, at 7. "With the Mexican comes a social problem. . . . It is a serious one. It comes into our schools, it comes into our cities, and it comes into our whole civilization in California." *Id.* at 6–7.

Agribusiness disagreed with the Nativists on Mexican migrants' long-term intentions to stay. Southwestern lobbyists believed the Mexican migrant was more like a "pigeon," who "goes home to roost" at the end of each season. *Seasonal Laborers*, *supra*, at 6, 10, 14. They also believed that, in any event, settling Mexicans could easily be deported if necessary. *See* Mark Reisler, *Always the Laborer, Never the Citizen: Anglo Perceptions of the Mexican Immigrant During the 1920s*, 45 Pacific Hist. Rev. 231, 252 (1976).

Embracing racial animus, agribusiness also raised the specter of an influx of Filipino and Black Puerto Rican workers that might replace Mexi-

cans. *Id.* at 251. Agribusiness lobbyist George Clements warned that Puerto Ricans would pose a greater menace because "[w]hile they all have negro blood within their veins, the greater part of them are without those physical markings which can only protect society." *Id.* (citation omitted). And California Congressman Arthur M. Free lamented that "with [Filipinos] comes the sex problem. This is what make[s] the race problem become acute on the Pacific coast." *Id.* (citing *Agricultural Labor Supply: Hearings on S.J. Res. 86 Before the S. Comm. On Agriculture & Forestry*, 71st Cong. 84–85 (1930)). By contrast, agribusiness touted that Mexicans "do not intermarry like the negro with white people. They do not mingle. They keep to themselves. That is the safety of it." *Id.* at 252 (citing *Immigration from Countries of the Western Hemisphere: Hearings on H.R. 6485 et al. Before the H. Comm. on Immigr. & Naturalization*, 70th Cong. 61–69 (1930) (testimony of landowner Harry Chandler)).

While the two camps had their differences, the congressional debates show that both Nativists and agribusiness industrialists agreed that Mexican immigration presented a "social problem" to be managed. A Texas businessman put it plainly: "If we could not control the Mexicans and they would take this country it would be better to keep them out, but we can and do control them." Paul Schuster Taylor, *An American-Mexican Frontier, Nueces County, Texas* 286 (1971). Frisselle likewise promised: "We, in California,

think we can handle that social problem" of permanent Mexican settlement. *Seasonal Laborers*, *supra*, at 6. For example, he highlighted an initiative to set up labor organizations that could shuffle immigrant workers across the state based on different crops' harvesting periods. *Id.* at 13–15. The goal, as he put it, was to get migrants "out of the congested areas" where they were "congregating" (like Los Angeles) and "keep them moving." *Id.* at 14–15.

D. The Criminal Entry And Reentry Provisions Were Crafted in 1929 As A Solution To The "Mexican Problem"

Although Nativists initially accepted the agricultural industry's promises that it could "handle" the Mexican "problem," as Frisselle put it, by 1929 those assurances of Mexican impermanence looked hollow.

Ultimately, the solution to their impasse came from Senator Coleman Livingston Blease, who according to one biographer exhibited a "Negrophobia that knew no bounds." Kenneth Wayne Mixon, *The Senatorial Career of Coleman Blease* 5 (1967) (M.A. thesis, University of South Carolina). Senator Blease infamously opposed a world court on the grounds that it would require Anglo-Americans to "sit side by side with a full blooded '[n*****].'" *Id.* at 30. In another incident, he attempted to introduce a formal resolution that included a poem titled "(N******) in the White House" to protest that the First Lady had invited a congressman's African American wife to tea. Isaac Stanley-Becker, *Who's Behind the Law Making Undocumented Immigrants Criminals? An 'Unrepentant White Supremacist.'*,

Wash. Post, June 17, 2019, http://www.washingtonpost.com/nation/2019/06/27/julian-castro-beto-orourke-section-immigration-illegal-coleman-livingstone-blease/; 71 Cong. Rec. 2946–2947 (1929).

In addressing the "Mexican problem," Senator Blease had assistance from Labor Secretary James Davis, who was an adherent of Dr. Laughlin's eugenics theories (discussed above). *See* Hans P. Vought, *The Bully Pulpit* 173 (2004). Secretary Davis had warned of the "rat-men" arriving via the southern border who would jeopardize the American gene pool. James J. Davis, *The Iron Puddler: My Life in the Rolling Mills and What Came of It* 61 (1922). Like others, he criticized the 1924 Act for closing "the front door to immigration" while leaving the "back door wide open." James J. Davis, *Selective Immigration* 207 (1925).

After the 1924 Act became law, Davis sponsored a study by Princeton economics professor Robert Foerster on the "racial problems" of Latin American immigration, which was incorporated into the permanent records of the House Committee on Immigration and Naturalization. Robert F. Foerster, Report Submitted to the U.S. Dep't of Labor, *The Racial Problems Involved in Immigration from Latin America and the West Indies to the United States* (1925); *Immigration from Latin America, the West Indies, and Canada: Hearings Before the H. Comm. on Immigr. & Naturalization*, 68th Cong. 303–38 (1925) [hereinafter *Latin America Immigration*]. In his

report, Professor Foerster provided a racial analysis of Mexico and other Latin American countries, finding that most of their inhabitants were Indian, Black, or mixed race, all of which he described as "dubious race factor[s]." *Latin America Immigration*, supra, at 334–35. He strongly recommended curtailing further southern immigration because "when an immigrant is accepted by the country, a race element or unit is added into the race stock of the country." *Id.*

In 1929, Senator Blease and Secretary Davis saw an opportunity to broker a legislative compromise on Mexican immigration. Their idea, which became the 1929 Act, would not restrict *authorized* immigration—as previously attempted—but instead would regulate so-called "unauthorized" migration for the first time in U.S. history. "[U]nlawfully entering" the United States would become a misdemeanor punishable by a $1,000 fine, up to one year in prison, or both. Act of March 4, 1929, Pub. L. No. 70-1018, ch. 690, § 2, 45 Stat. 1551. "Unlawfully returning to the United States after deportation" would be a felony punishable by a $1,000 fine, up to two years in prison, or both. *Id.* These provisions are now codified as Sections 1325 and 1326, respectively.

Senator Blease and Secretary Davis found allies for their proposal in the House of Representatives. One was Representative John C. Box, discussed above, who saw "the protection of American racial stock from further

degradation or change through mongrelization" as the goal of immigration law. 69 Cong. Rec. 2817 (1928). Another was Representative Albert Johnson, Chair of the House Immigration and Naturalization Committee, who also headed the Eugenics Research Association. Daniel Okrent, *The Guarded Gate: Bigotry, Eugenics, and the Law That Kept Two Generations of Jew, Italians, and Other European Immigrants out of America* 271, 326 (2019). Speaking in support of legislation that would have excluded the "Mexican race," Representative Johnson explained that while prior reform was economically motivated, now "the fundamental reason for it is biological." *Id.* at 3 (quoting Albert Johnson, *Immigration, a Legislative Viewpoint*, Nation's Bus., July 1923, at 26, 26).

Unlike in the past, agribusiness supported the 1929 Act; they liked the idea of taking advantage of inexpensive labor to meet "peak labor demands" while having "these laborers returned to their country" after the harvest. *See, e.g.*, *Seasonal Laborers*, *supra*, at 8. Sections 1325 and 1326 became law.

Notably, the 1929 Act did not contain any provision criminalizing the act of overstaying a nonimmigrant visa, a form of unauthorized immigration in which Europeans participated; it only authorized punishment for those who crossed by land, who were overwhelmingly Mexicans. In the first seven years after the 1929 Act's enactment, the government pursued over 40,000 prosecutions for entry and reentry crimes, with a roughly 90% conviction

rate—the significant majority of them Mexicans. Fish, *supra*, at 1090. Those prosecutions worked in conjunction with a government campaign to expel thousands of people based on their Mexican ethnicity. *Id.*

II. THE REENACTMENT AND RECODIFICATION OF THE CRIMINAL ENTRY AND REENTRY STATUTES IN 1952 DID NOT CURE THEIR ORIGINAL DISCRIMINATORY PURPOSE

Racial animus against Mexicans remained a driving force motivating immigration policy throughout the 1940s and 1950s. And while Congress recodified and reenacted the unauthorized entry and reentry provisions in 1952, it never purged the racial animus underlying them. The historical record unambiguously shows that Congress's actions did not cleanse, and in fact affirmatively maintained, the original racist intent behind Sections 1325 and 1326.

A. Anti-Mexican Racial Animus Still Infected Immigration Policy By 1952

As many U.S. citizens joined the armed services in World War II, southwestern farmers faced severe domestic labor shortages. Ngai, *Impossible*, *supra*, at 135–37. To address them, the U.S. and Mexican governments entered into agreements enabling migration of short-term Mexican contract laborers, known as braceros, in and out of the United States under the auspices of the Bracero Program. *Id.* at 95, 138–39.

The federal government's embrace of foreign contract labor represented "a momentous break with past policy and practice." *Id.* at 137. Contract

labor after the Civil War had generally been perceived as "unambiguously unfree" and hence, "like slavery," antithetical to the voluntary labor "upon which democracy depended." *Id.* at 137–38. As a result, foreign contract labor had been outlawed in the mainland United States since 1885, and was either abolished or never instituted in U.S. territories. *Id.* The United States' resort to a long-rejected "colonial labor practice" in the Bracero Program was yet another manifestation of how "Mexican workers in the Southwest and California were racialized as a foreign people, an 'alien race' not legitimately present or intended for inclusion in the polity." *Id.* at 138. That Mexican workers were recruited for an institution deemed unconscionable for others is an "expression of the legacies of slavery and conquest." *Id.* Nevertheless, the Bracero Program found many willing participants seeking to earn a higher income than they could hope for in rural Mexico. *Id.* at 141.

Around the same time, the Bracero program was a catalyst for a spike in *unauthorized* immigration to the United States. *Id.* at 147. First, many Mexicans did not qualify for the program, which accepted only young, healthy men with agricultural experience. S. Deborah Kang, *The INS on the Line: Making Immigration Law on the US-Mexico Border, 1917–1954*, at 104 (2017). Second, some States that enforced racial segregation were excluded from the Bracero Program based on Mexico's objection to race discrimination against Mexican workers. Ngai, *Impossible*, *supra*, at 147. As a

result, Texas, Arkansas, and Missouri growers "increasingly resorted to illegal labor during the 1940s." *Id.* Third, some braceros left their contracts because of inhumane work conditions that violated the terms of the Bracero Program, including severe underpayment, illegal pay deductions, threats, mistreatment, and serious safety risks. *Id.* at 137–46; *see also* President's Commission on Migratory Labor, *Migratory Labor in American Agriculture* 5, 69–88, 105, 130, 137 (1951). Braceros who left their contracts but did not depart from the United States lost their immigration status. *Ngai*, *Impossible*, *supra*, at 147.

Facing growing unauthorized entries at the southern border, United States immigration and deportation policies became focused on Mexico. Kang, *supra*, at 103. Starting in the mid-1940s, the Border Patrol concentrated its personnel along the Mexican border, including by redeploying officers who had been stationed along the northern border. Richard Tait Jarnagin, *The Effect of Increased Illegal Mexican Migration Upon the Organization and Operation of the United States Immigration Border Patrol, Southwest Region* 91–92 (1957) (M.S. thesis, University of Southern California); *see also Department of Justice Appropriation Bill for 1948: Hearings Before the H. Comm. on Appropriations*, 80th Cong. 168 (1947). The United States also secured Mexico's cooperation to deport Mexican immigrants to

the Mexican interior to ensure they could not easily return to the United States. Kang, *supra*, at 159–60.

As the U.S.-Mexico border was reshaped by these policies, national sentiment in and out of government coalesced around a stereotype of the "'wetback' as a dangerous and criminal social pathogen [that] fed the general racial stereotype 'Mexican.'" Ngai, *Impossible*, *supra*, at 149. Within INS, a "conventional view" took hold "that illegal aliens were by definition criminal" because once "the 'wetback' starts out by violating a law . . . it is easier and sometimes appears even more necessary for him to break other laws." *Id.* Gradually, any effort to distinguish between the supposed characteristics of unauthorized entrants and the local population of Mexican descent was lost. *Id.* (citation omitted).

Meanwhile, the Senate Judiciary Committee convened a subcommittee to conduct a comprehensive study of the nation's immigration policy, which would culminate in the passage of the 1952 Act. *Id.* at 237. The subcommittee's work was heavily influenced by Senator Pat McCarran, who was well-known for his xenophobic and anti-Semitic views. *See* Lee, *supra*, at 227–28; Kang, *supra*, at 228 n.88. Senator McCarran had warned that "untold millions" were "storming our gates for admission" while "there are hard-core, indigestible blocks who have not become integrated into the American way of life." Lee, *supra*, at 227. He viewed the 1952 Act as necessary to preserve

"this Nation, the last hope of Western civilization" against efforts (by foreigners) to "overrun, pervert[], contaminate[], or detroy[]" it. *Id.*

B. The 1952 Act Failed to Reconsider, Let Alone Purge, the Racial Animus Of The Criminal Entry and Reentry Provisions

Although the 1952 Act recodified the criminal entry and reentry provisions, with some revisions, the anti-Mexican racist views that underpinned the 1929 legislation remained a motivating factor. The recodified 1952 Act may have been "free of discriminatory taint" had Congress "actually confront[ed] [the 1929 Act's] tawdry past in reenacting it" and produced a law "untethered to racial bias." *Ramos*, 140 S. Ct. at 1410 (Sotomayor, J., concurring). But Congress did neither.

The 1952 Act changed immigration law and policy in several ways, none of which meaningfully alleviated the impact of Sections 1325 and 1326 on the Mexican immigrants singularly burdened by them. First, Congress repealed the complete exclusion of Asian immigrants from naturalization, although it maintained quotas for Asian immigrants. Ngai, *Impossible*, *supra*, at 238. Second, the 1952 Act codified suspension of deportation for individuals who had been continually present in the country for seven years with spouses or children who were United States citizens. Of the approximately 35,000 suspensions of deportation from 1941–1960, nearly three-quarters were of Europeans; only 8% involved Mexicans. *Id.* at 82–88 & n.120, 239.

The 1952 Act also "brought the many fragments of the nation's immigration and naturalization laws under a single code. Still, it was less an overhaul than a hardening of existing policy, with a few reforms and innovations tailored for the Cold War." Ngai, *Impossible*, *supra*, at 237. Indeed, the 1952 Act only reinforced the 1929 debates' central view: that the arrival and assimilation of "aliens" who could undermine the uniformity of the United States' white "cultural background" was undesirable and posed a national-security threat. *Id.* at 239.

President Truman vetoed the Act "principally for its racist features," but Congress overrode his veto. *Id.* That explicit commitment to retaining racist provisions should dispel any notion that Congress simultaneously intended to confront and purge the racism from predecessor immigration statutes, including the 1929 Act that introduced the unauthorized reentry provision. *See N. Carolina State Conf. of NAACP* v. *McCrory*, 831 F.3d 204, 223–24 (4th Cir. 2016) ("A historical pattern of laws producing discriminatory results provides important context for determining whether the same decisionmaking body has also enacted a law with discriminatory purpose."), *cert. denied*, 137 S. Ct. 1399 (2017). Indeed, scholars have noted that the 1952 Act's emphasis on "similarity of cultural background" was an attempt to preserve the United States' "Western" identity through immigration policy. Ngai, *Impossible*, *supra*, at 237.

Unsurprisingly, the same Congress that preserved and *renewed* the 1920s-era racist quotas never took steps to purge the taint of racism inherent in the criminal entry and reentry laws. With respect to those provisions, the 1952 Act made no substantive changes to ameliorate their original racist purpose. *See* Immigration and Nationality (McCarran-Walter) Act, ch. 477, § 276, 66 Stat. 229 (1952); *see also* Ingrid V. Eagly, *Prosecuting Immigration*, 104 Nw. U. L. Rev. 1281, 1326–27 (2010) [hereinafter Eagly, *Prosecuting*]; Doug Keller, *Re-Thinking Illegal Entry and Re-Entry*, 44 Loy. U. Chi. L.J. 65, 83 (2012); Fish, *supra*, at 1099. To the contrary, the 1952 Act's changes made unlawful entry and reentry easier to prosecute, thereby exacerbating rather than diminishing their racially discriminatory harm.

As to reentry, Congress took what were previously three scattered provisions (targeting anarchism, prostitution, and general illegal reentry) and combined them into one provision that largely tracks Section 1326 to this day. Keller, *supra*, at 84. Other than that consolidation, the only change to the provision made prosecution *easier* by explicitly penalizing being "found in" the United States after deportation (if the Attorney General has not granted permission to return). *Id.* at 84–85 & nn.99–100. Because the Sixth Amendment requires criminal defendants to be tried in the district in which the "crime shall have been committed," prosecutors previously had to determine where the defendant actually reentered. *Id.* at 85. As the relevant

committee report explained, the 1952 Act tweaked the definition of the offense to facilitate prosecution where "it is not possible" for the INS "to establish the place of reentry, and hence the proper venue" to try "a deported alien under the 1929 act." *See Joint Hearings on S. 716, H.R. 2379, and H.R. 2816 Before the H. & S. Subcomms. of the Comms. on the Judiciary*, 82d Cong. 716 (1951). Going forward, defendants could be tried in any district in which they were found.

Another (seemingly benign) revision also worked to make it easier to prosecute and convict immigrants, albeit under the misdemeanor illegal entry statute, rather than the reentry provision at issue here. The 1952 Act lessened the penalty for a first illegal entry from one year to six months in prison, which made it a petty offense. Eagly, *Prosecuting*, *supra*, at 1326–1327; Keller, *supra*, at 83–84 & n.94. As a result, after 1952, defendants charged with a first illegal entry lost the right to a jury trial. Eagly, *Prosecuting*, *supra*, at 1327 & n.268; Keller, *supra*, at 84. At the time it made this change, Congress had learned that 1940s grand juries in El Paso refused to indict in more than 90% of cases because the criminal entry laws were "locally unpopular." Eagly, *Prosecuting*, *supra*, at 1327 & n.269 (quoting *Immigration and Naturalization: Hearing Before the S. Subcomm. on Immigr. of the S. Comm. on the Judiciary*, 80th Cong. 30 (1948)). The reduced sentence solved that problem. And the diminished process enabled by that change not

only endured through subsequent reenactments of the criminal entry provision, but eventually opened the door to having magistrate judges, rather than Article III judges, preside over illegal-entry trials. *Id.* at 1326–27.

These amendments laid the groundwork for an enduring and massive use of illegal entry and reentry prosecutions. *See* Eagly, *Prosecuting*, *supra*, at 1281–82, 1353 & fig.4; Ingrid V. Eagly, *The Movement to Decriminalize Border Crossing*, 61 B.C. L. Rev. 1967, 1984 & fig.2, 1988 & tbl.1 (2020) [hereinafter Eagly, *Movement*]. Nothing in the 1952 reenactment can plausibly be read to contain a clear expression of an intent to purge the criminal entry and reentry provisions of their racist origins. And, indeed, the racist intent that propelled the original enactment of Sections 1325 and 1326 in 1929 still infected them after recodification.

C. The Post-1952 History Confirms That The Racist Intent Of The 1929 Statute Remains Relevant

The inhumane treatment of Mexican immigrants at the border continued and intensified after Congress passed the 1952 Act. In 1954, President Eisenhower appointed retired Army General Joseph Swing as INS Commissioner to focus on the agency's militarization. Ngai, *Impossible*, *supra*, at 154. According to Swing, the "'alarming, ever-increasing, flood tide' of undocumented migrants from Mexico constituted 'an actual invasion of the United States'" that necessitated a reciprocal response. *Id.* at 155 (citation omitted).

The government responded with "Operation Wetback," an intensive law enforcement campaign designed to be a "direct attack . . . upon the hordes of aliens facing [the United States] across the border." *Id.* at 155. Under that Operation, the INS redirected resources from the northern and eastern districts to the southern border and deployed Border Patrol officers, vehicles, airplanes, and other equipment to sweep across the southwestern United States performing raids and mass deportations. *Id.* The policy of discouraging illegal reentry by relocating apprehended migrants "far into" the Mexican interior also continued in full force. *Id.* at 156.

"Operation Wetback" also resulted in mass deportations on an enormous scale. Between 1953 and 1955, the INS reported capturing 801,069 Mexican immigrants—twice the apprehensions from 1947 through 1949. *Id.* (citation omitted). General Swing also sought to build a fence along sections of the California and Arizona borders to deter "the illegal migration of 'disease-ridden' women and children whom he said comprised over 60 percent of those entering surreptitiously after Operation Wetback." *Id.*

Prosecutions under the criminal entry and reentry provisions also surged during this period. Eagly, *Prosecuting*, *supra*, at 1352–53. In what were referred to by the Attorney General as the "wet-back" cases, thousands of laborers were criminally charged, served little if any jail time, and were sent back across the Southwest border. *Id.* at 1352. In Arizona, the U.S.

Attorney's Office instituted a zero-tolerance policy of prosecuting *all* unauthorized border crossers. *Id.* Unauthorized entry quickly became the most prosecuted crime on the entire federal docket, and in the decades since, the total number of prosecutions has increased dramatically. *Id.*; *see also* Eagly, *Movement*, *supra*, at 1984. Unauthorized reentry prosecutions, for their part, have risen steeply since the early 2000s. Eagly, *Movement*, *supra*, at 1988 & tbl.1.

* * * * *

Section 1326, and its misdemeanor counterpart in Section 1325, have remained virtually unchanged since their tainted enactment. Congress's repeated failure to grapple with the "sordid history" of those provisions makes clear that their original intent remains a motivating factor behind them to this day. *Ramos*, 140 S. Ct. at 1410 (Sotomayor, J., concurring).

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted,

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FOR THE NINTH CIRCUIT

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I, Alexia D. Korberg, counsel for amici curiae and a member of the Bar of this Court, certify that, on March 21, 2022, a copy of the attached Brief of Immigration Scholars as Amici Curiae was filed with the Clerk through the Court's electronic filing system. I further certify that all parties required to be served have been served.

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