

APPENDIX

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114 F.4th 618

United States Court of Appeals, Seventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Alfredo VIVEROS-CHAVEZ, Defendant-Appellant.

No. 22-3285

|

Argued September 27, 2023

|

Decided August 15, 2024

Synopsis

Background: Defendant, a Mexican citizen without legal status in the United States, was charged with illegal reentry. Defendant moved to dismiss indictment, asserting that statute governing illegal reentry violates the Fifth Amendment's guarantee of equal protection because it was enacted with discriminatory intent and disproportionately impacts Mexican and Latino individuals. The United States District Court for the Northern District of Illinois, [Matthew F. Kennelly, J., 2022 WL 2116598](#), denied motion. Defendant entered a conditional guilty plea and appealed.

Holdings: The Court of Appeals, [Lee](#), Circuit Judge, held that:

[1] racial animus underlying enactment of Undesirable Aliens Act of 1929 (UAA) could not be imputed to enactment of Immigration and Nationality Act (INA), and

[2] determination that racial bias was not Congress's motivating factor in enacting statute prohibiting illegal reentry was not clear error.

Affirmed.

Procedural Posture(s): Appellate Review; Pre-Trial Hearing Motion.

West Headnotes (15)

[1] **Criminal Law** 🔑 Review De Novo

Criminal Law 🔑 Questions of Fact and Findings

Court of Appeals reviews district court's decision on constitutionality of criminal statute de novo, and reviews findings of fact incident to that determination for clear error.

[2] **Constitutional Law** 🔑 Race, national origin, or ethnicity

A law that explicitly discriminates on basis of race is subjected to strictest scrutiny and is justifiable under Fifth Amendment's equal protection guarantee only by weightiest of considerations. [U.S. Const. Amend. 5](#).

[3] **Constitutional Law** 🔑 Statutes and other written regulations and rules

A facially neutral law fails violates Fifth Amendment's equal protection guarantee if there is proof that discriminatory purpose has been motivating factor in its enactment. [U.S. Const. Amend. 5](#).

[4] **Civil Rights** 🔑 Weight and Sufficiency of Evidence

Constitutional Law 🔑 Statutes and other written regulations and rules

Determining whether invidious discriminatory purpose was a motivating factor in enacting a law, as would support claim that law violated Fifth Amendment's equal protection guarantee, demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. [U.S. Const. Amend. 5](#).

[5] **Statutes** 🔑 Motives, Opinions, and Statements of Legislators

Statements of one or two legislators, without more, may not be probative of intent of entire legislative body.

[6] **Constitutional Law** 🔑 Intentional or purposeful action

Where it is necessary for court to make finding of racial animus on part of legislature to resolve a Fifth Amendment equal protection claim, it should not hesitate to do so after carefully considering evidence in fulfillment of its constitutional responsibility. *U.S. Const. Amend. 5*.

[7] **Statutes** 🔑 Intent
Statutes 🔑 Legislative Construction

Actions of previous legislature may be relevant to extent that they naturally give rise to, or tend to refute, inferences regarding intent of enacting legislature, but it is just one evidentiary source relevant to question of intent; what counts is the motivation of the legislature that passed the law in question.

[8] **Aliens, Immigration, and Citizenship** 🔑 Constitutional and statutory provisions
Constitutional Law 🔑 Discrimination Between Classes of Aliens

Racial animus underlying enactment of Undesirable Aliens Act of 1929 (UAA) could not be imputed to enactment of Immigration and Nationality Act (INA) in 1952, for purpose of defendant's claim that INA provision criminalizing illegal reentry into United States violated Fifth Amendment's equal protection guarantee; while the racial motivations of the UAA could be a relevant data point, the INA, which reformulated the nation's immigration laws, was much broader in scope and purpose. *U.S. Const. Amend. 5*; Immigration and Nationality Act § 276, 8 U.S.C.A. § 1326.

[9] **Constitutional Law** 🔑 Statutes and other written regulations and rules

When challenging law for violating equal protection, plaintiff bears burden of demonstrating that discriminatory purpose was

motivating factor in challenged action's passage. *U.S. Const. Amends. 5, 14*.

[10] **Civil Rights** 🔑 Weight and Sufficiency of Evidence

Constitutional Law 🔑 Statutes and other written regulations and rules

In assessing equal protection claim, court must conduct sensitive inquiry into such circumstantial and direct evidence of intent as may be available; relevant evidence includes historical background of law's enactment, events leading up to enactment, legislative history, and any procedural or substantive departures from normal legislative process. *U.S. Const. Amends. 5, 14*.

[11] **Constitutional Law** 🔑 Race, National Origin, or Ethnicity

Whether the legislation in question bears more heavily on one race than another, is an important starting point in determining whether the law violates equal protection, but impact alone is not determinative. *U.S. Const. Amends. 5, 14*.

[12] **Criminal Law** 🔑 Questions of Fact and Findings

District court's finding of fact on the question of discriminatory intent of a law, in determining whether law violates equal protection, is reviewed for clear error. *U.S. Const. Amends. 5, 14*.

[13] **Aliens, Immigration, and Citizenship** 🔑 Constitutional and statutory provisions
Constitutional Law 🔑 Discrimination Between Classes of Aliens

District court did not commit clear error when it determined that racial bias against Mexican and Central American immigrants was not Congress's motivating factor in enacting statute prohibiting illegal reentry into United

States following prior removal, as would violate Fifth Amendment's equal protection guarantee; although statute's predecessor was motivated by racial animus, and 99.1% of prosecuted unlawful reentry offenders were Mexican or Latino, statute was enacted 23 years after predecessor, congressional debate over statute primarily focused on national-origin quotas to which Mexican and Central American immigrants were not subjected, and there was no data regarding what percentage of people who reentered country were Mexican or Latino, which was a fact necessary to gauge disparate impact. [U.S. Const. Amend. 5](#); Immigration and Nationality Act § 276, 8 U.S.C.A. § 1326.

[14] Constitutional Law 🔑 Statutes and other written regulations and rules

Disproportional impact of a statute is a fact to be considered as part of totality of relevant facts in determining whether statute has discriminatory intent in violation of Fifth Amendment's equal protection guarantee. [U.S. Const. Amend. 5](#).

[15] Constitutional Law 🔑 Race, National Origin, or Ethnicity

When considering the racial impact of a particular law, in determining whether the law violates Fifth Amendment equal protection guarantee, courts often look to data comparing how individuals in a protected class are affected differently from those in a similarly situated, unprotected group. [U.S. Const. Amend. 5](#).

*620 Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 1:21-cr-00665 — [Matthew F. Kennelly](#), *Judge*.

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Before [Sykes](#), Chief Judge, and [Flaum](#) and [Lee](#), Circuit Judges.

Opinion

[Lee](#), Circuit Judge.

*621 Alfredo Viveros-Chavez, a Mexican citizen who had previously been removed from the United States, was found again in the country without lawful immigration status. The government charged him with violating [8 U.S.C. § 1326](#), which forbids noncitizens from reentering the United States without authorization. Seeking to dismiss the indictment, Viveros-Chavez argued that [§ 1326](#) violates the Fifth Amendment's guarantee of equal protection because it was enacted with discriminatory intent and disproportionately impacts Mexican and Latino individuals. The district court disagreed, finding insufficient evidence that racial animus motivated the statute's enactment. Viveros-Chavez appeals, contesting the district court's reading of the statute's history. For the reasons below, we affirm.

I. Background

Viveros-Chavez, a Mexican citizen without legal status in the United States, was arrested in 2019 and convicted of felony aggravated robbery in Cook County, Illinois. Because he had already been removed from the United States twice before, he was charged with unlawful reentry in violation of 8 U.S.C. § 1326(a). Viveros-Chavez moved to dismiss the indictment, claiming that the statute violates the Fifth Amendment. In support, Viveros-Chavez argued that § 1326, which was enacted as part of the Immigration and Nationality Act (INA) in 1952, was incurably tainted by the racist sentiments that led to the passage of its predecessor, the Undesirable Aliens Act of 1929 (UAA), the first federal law to ban reentry.¹ He also presented data that, he claimed, demonstrated the statute's enforcement disproportionately impacted Mexicans and Latinos.

The district court denied the motion. In doing so, the court applied the discriminatory-intent framework the Supreme Court articulated in *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977), rather than rational basis review (which the government favored). The court then considered the circumstances surrounding *622 the enactment of the UAA as well as § 1326.

Ultimately, the district court agreed with Viveros-Chavez that the passage of the UAA was motivated by racial animus. However, it found little evidence that racial targeting was behind the enactment of § 1326. And, to the extent that certain legislators had expressed racially derogatory statements around the time of § 1326's enactment, the court concluded that the isolated comments did not speak to Congress's overall intent in passing the law. Finally, the district court was unpersuaded by Viveros-Chavez's statistical analysis, noting the lack of any evidence that the government targeted Mexican and Latino individuals for illegal reentry prosecutions at a disproportionate rate.

After the adverse ruling, Viveros-Chavez entered a conditional guilty plea pursuant to [Federal Rule of Criminal Procedure 11\(a\)\(2\)](#), preserving his right to appeal the denial of his motion to dismiss. This appeal followed.

II. Standard of Review

[1] We review a district court's decision on the constitutionality of a criminal statute *de novo*. *United States v. Bass*, 325 F.3d 847, 849 (7th Cir. 2003). And we review findings of fact incident to that determination for clear error. *Abbott v. Perez*, 585 U.S. 579, 607, 138 S.Ct. 2305, 201 L.Ed.2d 714 (2018); *United States v. Boyce*, 742 F.3d 792, 794 (7th Cir. 2014).

III. Analysis

[2] [3] The Fifth Amendment provides that no person should be “deprived of life, liberty, or property, without due process of law.” U.S. Const. amend. V. Although not explicit in the text, the Supreme Court has construed the amendment to “contain[] an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups.” *Washington v. Davis*, 426 U.S. 229, 239, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). A law that explicitly discriminates on the basis of race is “subjected to the strictest scrutiny and [is] justifiable only by the weightiest of considerations.” *Id.* at 242, 96 S.Ct. 2040. Similarly, a facially neutral law fails constitutional muster if “there is proof that a discriminatory purpose has been a motivating factor” in its enactment. *Arlington Heights*, 429 U.S. at 267, 97 S.Ct. 555.

Viveros-Chavez argues that § 1326 is unconstitutional because it discriminates against Mexican and Latino individuals in violation of the equal protection guarantee of the Fifth Amendment. In support, he points to congressional statements leading to the 1929 passage of the UAA, events surrounding the 1952 enactment of the INA, and statistics indicating that Mexicans and Latinos comprise the vast majority of individuals charged with illegal reentry under § 1326.

Our analysis proceeds as follows. First, we consider the proper deference to afford Congress when reviewing the constitutionality of § 1326, which in turn determines the scope of our review. Next, we discuss the history surrounding the enactment of the UAA and the relevance of that history to § 1326. Finally, we evaluate the constitutionality of § 1326 itself. In doing so, we consider § 1326's legislative history and examine whether the district court erred in rejecting Viveros-Chavez's disparate impact evidence.

In the end, we join our sister circuits in concluding that § 1326 does not violate the Fifth Amendment's guarantee of equal

protection. *See, e.g., United States v. Barcenas-Rumualdo*, 53 F.4th 859, 862 (5th Cir. 2022); *United States v. Carrillo-Lopez*, 68 F.4th 1133, 1138 (9th Cir. 2023); *623 *United States v. Wence*, No. 22-2618, 2023 WL 5739844, at *1 (3d Cir. Sept. 6, 2023); *Sanchez-Garcia*, 98 F.4th at 94.

A. Deference to Congress

The parties first dispute the proper deference to afford Congress when examining the constitutionality of § 1326. The government urges us to evaluate the law under rational basis review because the statute concerns immigration, an area where courts typically defer to the political branches. *See, e.g., Mathews v. Diaz*, 426 U.S. 67, 82, 96 S.Ct. 1883, 48 L.Ed.2d 478 (1976) (noting that courts should apply a “narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization”). By contrast, Viveros-Chavez argues that we should consider the statute under the test the Supreme Court established in *Arlington Heights*, which, he points out, the Court has utilized recently in the immigration setting. *See, e.g., Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 34–35, 140 S.Ct. 1891, 207 L.Ed.2d 353 (2020).

There is something to be said for both positions. Section 1326 penalizes unlawful entry into the country, and Congress rightly deserves deference to make decisions concerning the matriculation of noncitizens. On the other hand, § 1326 is not an immigration statute *per se* because it says nothing about who gets admitted or deported. It is perhaps better viewed as a criminal statute that affects the rights of those persons found and prosecuted within the United States.

For present purposes, we will assume that the less-deferential and more rigorous *Arlington Heights* standard applies, because if § 1326 overcomes this hurdle, it would certainly survive rational basis review. *See, e.g., Sanchez-Garcia*, 98 F.4th at 98 (“[W]e can leave for another day a definitive resolution of the standard of review question and proceed to an analysis under the familiar *Arlington Heights* framework.”).

B. The 1929 UAA

Viveros-Chavez’s primary argument on appeal is that the district court erred by discounting the racial animus underpinning the 1929 passage of the UAA. Citing the Supreme Court’s decision in *Abbott*, Viveros-Chavez asserts that whatever racial animus motivated the enactment of the UAA should also be imputed to the passage of § 1326. This is

so, he contends, because the discriminatory intent behind a preceding law should carry over to its successor unless Congress engages in a deliberative process to remove the “taint” of racial animus.

That the legislative history of the UAA contains many statements denigrating Mexicans is beyond dispute. The legislation itself was meant to be a compromise between hardline nativists, who wanted to exclude Mexican immigrants entirely, and business interests in the agricultural, mining, and construction industries in need of Mexican labor. *See* Decl. of Prof. Benjamin Gonzalez O’Brien (ECF No. 24-2) at 11; *see also* David Gutierrez, *Walls and Mirrors: Mexican Americans, Mexican Immigrants, and the Politics of Ethnicity* 40, 43 (1995). This tension is reflected in the congressional record. During the floor debate, for example, one congressman stated that Mexican immigrants were “poisoning the American citizen” because they are “of a class” that is “very undesirable.” 70 Cong. Rec. 3619–20 (1929) (statement of Rep. Fitzgerald). And another complained that Mexican immigrants were entering the country in “hordes.” 70 Cong. Rec. 3619 (1929) (statement of Rep. Blanton); *see also United States v. Calvillo-Diaz*, No. 21-CR-445, 2022 WL 1607525, at *6 (N.D. Ill. May 20, 2022) (discussing evidence of *624 discriminatory intent pertaining to the UAA).

[4] [5] But it is no small thing to find that a law duly enacted by Congress was motivated by racial animus. And “[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.” *Arlington Heights*, 429 U.S. at 266, 97 S.Ct. 555; *see United States v. O’Brien*, 391 U.S. 367, 383, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968) (observing that “[i]nquiries into congressional motives or purposes are a hazardous matter”). Moreover, we keep in mind that the statements of one or two legislators without more may not be probative of the intent of the entire body. *See O’Brien*, 391 U.S. at 384, 88 S.Ct. 1673 (“What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork.”).

[6] Here, the evidence certainly suggests that racial antipathy animated much of the debate in 1929. And, where it is necessary for a court to make a finding of racial animus (or the lack thereof) on the part of a legislature to resolve a claim, it should not hesitate to do so after carefully considering the

evidence in fulfillment of its constitutional responsibility. *See, e.g., Hunter v. Underwood*, 471 U.S. 222, 105 S.Ct. 1916, 85 L.Ed.2d 222 (1985). But, for reasons that will become plain, that is not the case here.

And so, we proceed by assuming for argument's sake that the passage of the UAA was motivated by racial animus towards Mexican and Latino immigrants. But the pertinent question is this: how relevant are the statements in 1929 to the enactment of the INA in 1952? To Viveros-Chavez, they matter a great deal. But we are not persuaded.

Consider Viveros-Chavez's reliance on *Abbott*. That case involved a challenge to a Texas redistricting plan. *Abbott*, 585 U.S. at 585, 138 S.Ct. 2305. The legislature had enacted one in 2011, but the plan was immediately challenged as being racially discriminatory. *Id.* at 587, 138 S.Ct. 2305. While the litigation was pending, the legislature adopted a new redistricting plan in 2013. *Id.* at 588, 138 S.Ct. 2305. A three-judge panel found the new plan unconstitutional, concluding that the legislature had failed to purge the discriminatory "taint" that allegedly had animated the passage of the 2011 plan. *Id.* at 592, 138 S.Ct. 2305.

[7] Overturning the panel, the Supreme Court expressly rejected the conclusion Viveros-Chavez asks us to reach. *See* W. Kerrel Murray, *Discriminatory Taint*, 135 Harv. L. Rev. 1190, 1204 (2022) (noting that the *Abbott* Court "blasted the idea that 'taint' associated with Texas's 2011 redistricting maps determined the validity of 2013 maps based (in part) on the 2011 maps"). In doing so, the Court held that a state legislature is entitled to a "presumption of legislative good faith" when redistricting, and challengers must show that the enacting body "acted with invidious intent." *Abbott*, 585 U.S. at 603, 605, 138 S.Ct. 2305. The actions of a previous legislature may be relevant "to the extent that they naturally give rise to—or tend to refute—inferences regarding the intent of the [enacting legislature]," but it is just "one evidentiary source relevant to the question of intent." *Id.* at 607, 138 S.Ct. 2305. What counts is the motivation of the legislature that passed the law in question.

Despite this, Viveros-Chavez directs us to three Supreme Court cases to support his theory that the discriminatory purpose behind a law must be imputed wholesale to a successor statute— *625 *Hunter*, 471 U.S. at 229, 105 S.Ct. 1916; *Ramos v. Louisiana*, 590 U.S. 83, 140 S.Ct. 1390, 206 L.Ed.2d 583 (2020); and *Espinoza v. Mont. Dep't of Revenue*,

591 U.S. 464, 140 S.Ct. 2246, 207 L.Ed.2d 679 (2020). But none of these cases help him.

In *Hunter*, the Supreme Court considered the constitutionality of a provision in the Alabama Constitution that disfranchised persons convicted of crimes involving moral turpitude. 471 U.S. at 225, 105 S.Ct. 1916. Even though the provision was racially neutral (other courts had already voided some of the more "blatantly discriminatory" sections, such as one concerning miscegenation), the Supreme Court held that the "original enactment was motivated by a desire to discriminate against blacks on account of race" and thus violated the Fourteenth Amendment's Equal Protection Clause under *Arlington Heights*. *Id.* at 233, 97 S.Ct. 555.

Seeking to come within *Hunter*'s ambit, Viveros-Chavez argues that Congress in 1952 "explicitly intended to keep [the UAA] with discrete technical modifications." As a result, he continues, the 1952 Congress merely recodified the UAA as § 1326 with only minor modifications. And where a statute was motivated by racial animus, he concludes, *Hunter* requires that its subsequent iterations be diagnosed with the same malady.

This misreads *Hunter*. The constitutional provision in question there had remained unchanged from its ratification. Certainly, other portions of the applicable section had been nullified by courts on constitutional grounds, but the Supreme Court trained its gaze on the intent of the constitutional convention that adopted the provision at issue.

Ramos is similarly unavailing. In that case, the Supreme Court considered a challenge to provisions in the Louisiana and Oregon constitutions that permitted nonunanimous jury verdicts for serious crimes. 590 U.S. at 88, 140 S.Ct. 1390. In finding that these sections violated the Sixth Amendment, the Court abrogated a prior decision that had blessed these provisions. *See Apodaca v. Oregon*, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972). It did so because, among other things, *Apodaca* failed to consider "the racially discriminatory reasons that Louisiana and Oregon adopted their peculiar rules in the first place." *Ramos*, 590 U.S. at 99, 140 S.Ct. 1390 (emphasis removed). Seizing on this language, Viveros-Chavez argues that the original sin of racial animus cannot be washed away by recodifying a law.

But the Supreme Court in *Ramos* was primarily concerned with *Apodaca*'s functionalist approach to constitutional analysis and its perfunctory acceptance of the benefits of

nonunanimous verdicts without any acknowledgement of the downfalls. *Id.* at 100, 140 S.Ct. 1390. Nothing in *Ramos* suggests that the racial animus of one legislature must be imputed to the next.

Similarly, *Espinoza* offers Viveros-Chavez no assistance. There, the Supreme Court considered a Montana constitutional provision that barred government funding for religious schools. *Espinoza*, 591 U.S. at 482, 140 S.Ct. 2246. While the opinion acknowledged that similar state “no-aid” provisions arose from a “checkered tradition,” the Court did so only as part of its discussion regarding the history of the Free Exercise Clause. *Id.*

[8] Aside from these cases, Viveros-Chavez’s wholesale-imputation theory falls short for a separate reason—§ 1326 was not a mere recodification of the UAA as he suggests. First, § 1326 was intended to replace the reentry proscriptions contained in three separate statutes. See *Carrillo-Lopez*, 68 F.4th at 1147 n.9 (quoting *626 *United States v. Mendoza-Lopez*, 481 U.S. 828, 835, 107 S.Ct. 2148, 95 L.Ed.2d 772 (1987)). Furthermore, as the district court aptly observed, there are material differences between § 1326 and the UAA. For example, the UAA prohibited reentry only for individuals who had been deported from the United States. See Act of Mar. 4, 1929, Pub. L. No. 70-1018, 45 Stat. 1551. In comparison, Congress expanded the law to encompass noncitizens who had been “denied admission” prior to entering the United States. 8 U.S.C. § 1326(a). The new law also added language permitting prosecutors to charge immigrants “found in” the United States, rather than those who just attempted to reenter. *Id.* § 1326(b); compare Act of Mar. 4, 1929, Pub. L. No. 70-1018, 45 Stat. 1551 (imposing a felony on individuals who had been “arrested and deported” and then later “enter[] or attempt[] to enter” the country), with 8 U.S.C. § 1326 (criminalizing when an individual who has previously been denied admission or deported later “enters, attempts to enter, or is at any time found in, the United States”). This made it easier for the government to identify the proper forum to prosecute alleged violators. In addition, § 1326(b) permitted a noncitizen to reenter the country by obtaining the Attorney General’s written consent in advance. *Id.*

These significant changes reflect the fact that the INA was not a mere recodification of the UAA’s statutory scheme, but a “broad reformulation of the nation’s immigration laws.” *Carrillo-Lopez*, 68 F.4th at 1151. Thus, while the racial motivations of the 1929 legislature may be a relevant data

point, the sheer breadth and purpose of the INA severely undercut the notion that the legislative motivations in 1929 should be imported fully to 1952.

C. Section 1326’s Constitutionality

We have assumed that *Arlington Heights* governs Viveros-Chavez’s constitutional claims and have determined that the legislative motivations in 1929 may be relevant to his claim but are not dispositive. We now consider § 1326 itself.

[9] [10] [11] As noted, when challenging a law for violating equal protection, the plaintiff bears the burden of demonstrating that “discriminatory purpose was a motivating factor” in the challenged action’s passage. *Arlington Heights*, 429 U.S. at 266, 97 S.Ct. 555. In assessing such a claim, a court must conduct a “sensitive inquiry into such circumstantial and direct evidence of intent as may be available.” *Id.* Relevant evidence includes the historical background of the law’s enactment, the events leading up to the enactment, the legislative history, and any procedural or substantive departures from the normal legislative process. See *id.* at 267–68, 97 S.Ct. 555. Moreover, whether the legislation in question “bears more heavily on one race than another,” *Davis*, 426 U.S. at 242, 96 S.Ct. 2040, is an “important starting point,” but “impact alone is not determinative.” *Arlington Heights*, 429 U.S. at 266, 97 S.Ct. 555.

Here, the district court made certain findings regarding the evidence and Congress’s motivations underlying § 1326. The parties disagree as to the appropriate standard of review for these conclusions. The government believes that the question of motivation is purely factual and the district court’s finding should only be reversed for clear error. Viveros-Chavez, however, points to our decision in *United States v. D.F.* and contends that “the ultimate question of whether [historical] facts satisfy the relevant standard [is] a mixed question of fact and law that ought to be subject to independent appellate review.” 115 F.3d 413, 415 (7th Cir. 1997).

[12] The government has the better argument. In *Abbott*, the Supreme Court *627 stated unequivocally that “a district court’s finding of fact on the question of discriminatory intent is reviewed for clear error.” 585 U.S. at 607, 138 S.Ct. 2305. Our decision in *D.F.* not only predates *Abbott*, but it concerns the standard of review when a district court determines that certain facts satisfy a particular legal standard, *i.e.*, a mixed question of fact and law. See *D.F.*, 115 F.3d at 415. Such is not the case here. Indeed, every appellate court to have considered

the constitutionality of § 1326 has applied clear error when reviewing a district court's finding regarding racial animus. *See, e.g., Carrillo-Lopez*, 68 F.4th at 1153 (“We hold that the district court clearly erred in its finding that Congress's enactment of § 1326 was motivated in part by the purpose of discriminating against Mexicans or other Central and South Americans.”); *Sanchez-Garcia*, 98 F.4th at 97 (“We review the district court's factual findings – including its findings as to whether § 1326 is motivated by a racially discriminatory purpose – for clear error.”).

With that, we turn to the evidence at hand.

1. Section 1326

[13] Congress passed the INA in 1952, overcoming a veto from President Harry Truman. *See Sanchez-Garcia*, 98 F.4th at 95. The statutory scheme arose from a comprehensive five-year Senate evaluation of the immigration system and was Congress's attempt to overhaul the patchwork of immigration laws that previously had governed entry into the country. *See generally* S. Rep. No. 1515 (1950); *see also Carrillo-Lopez*, 68 F.4th at 1143–45 (describing the Senate Report).

The debate surrounding the passage of the INA primarily focused on national-origin quotas that did not impact immigrants from Mexico and Central American countries. *Sanchez-Garcia*, 98 F.4th at 101. In fact, the only mention of the provision criminalizing reentry in the legislative history appears in a letter from Deputy Attorney General Peyton Ford to the Senate Judiciary Committee. Letter from Peyton Ford, Deputy Att’y Gen., to Sen. Pat McCarran, Chairman of the Comm. on the Judiciary (May 14, 1951). This letter discussed “overcom[ing] the inadequacies in existing law” by allowing prosecutors to charge immigrants without determining the location of reentry. *Id.* The provision was not debated in Congress, and because of this, there is scant evidence that Congress considered how § 1326 would affect immigrants from Mexico or other Central American countries. *See Sanchez-Garcia*, 98 F.4th at 101 (“Congress never even considered what effect § 1326 might have on the Mexican and Central American immigrants the defendants claim it targeted because of their race.”); *Carrillo-Lopez*, 68 F.4th at 1146 (“There was no discussion of [§ 1326's] impact on Mexicans or other Central and South Americans.”).

Given the dearth of relevant legislative history, Viveros-Chavez gathers a patchwork of evidence to prove racial

animus. For example, Representative Thomas Jenkins stated that the congressional debates were “reminiscent” of the passage of the UAA when Congress wanted to “keep away from our shores the thousands of undesirables just as it is their wish now.” 98 Cong. Rec. 4442 (1952). Representative John Wood remarked that “Western European races have made the best citizens in America.” 98 Cong. Rec. 4314 (1952). Senator Walter George recounted that the reason Congress passed prior immigration laws was “to preserve something of the homogeneity of the American people.” 98 Cong. Rec. 5774 (1952). But, while such statements demonstrate the antipathy these men may have had for immigrants generally, they were discussing other provisions *628 of the bill that did not target Mexican and Latino immigrants.

There were statements, however, that were directed at individuals from Mexico. Senator Pat McCarran, for instance, noted that the revisions to current immigration laws were needed “to meet the wetback situation.” 97 Cong. Rec. 5320 (1952); *see also Wetback*, *Webster's New World Dictionary, College Edition* (1958) (defining “wetback” as “a Mexican agricultural laborer who illegally enters or is brought into the United States to work” and noting the term comes from “the fact that many cross the border by swimming or wading into the Rio Grande”). The term “wetback” also appears in the Ford letter, which observed that searches on private property would “aid in taking action against the conveyors and receivers of the wetback.” Letter from Peyton Ford, Deputy Att’y Gen., to Sen. Pat McCarran, Chairman of the Comm. on the Judiciary (May 14, 1951). Furthermore, in 1952, Congress also criminalized the sheltering or transport of illegal immigrants at the southern border by passing Public Law 283, which was colloquially referred to as the “Wetback Bill.” *See* Pub. L. No. 82-283, 66 Stat. 26 (1952); Decl. of Prof. Benjamin Gonzalez O'Brien (ECF No. 24-2) at 17.

But Viveros-Chavez overstates the relevance of this evidence. McCarran did advocate for legislative modifications to prevent illegal immigration from Mexico, but those changes concerned parts of the legislation that punished American citizens who assisted illegal immigrants. *See* 98 Cong. Rec. 5320 (1952). McCarran never mentioned the issue of reentry. Ford was merely quoting from another report that addressed an entirely different provision of the INA. And Public Law 283 was passed months before the INA and did not target immigrants, but those who assisted illegal entry into the country. *See* Pub. L. No. 82-283, 66 Stat. 26 (1952) (reciting the Act's purpose to “assist in preventing aliens from entering or remaining in the United States illegally”). To our

knowledge, no legislator used “wetback” when discussing reentry proscriptions in general or § 1326 in particular.

Finally, Viveros-Chavez contends that President Truman's veto statement proves Congress's discriminatory intent. The statement says, in relevant part:

[The INA is] a mass of legislation which would perpetuate injustices of long standing against many other nations of the world, hamper the efforts we are making to rally the men of East and West alike to the cause of freedom, and intensify the repressive and inhumane aspects of our immigration procedures. The price is too high, and in good conscience I cannot agree to pay it.

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

The problem with this theory is that President Truman's veto statement says nothing about targeting Mexican or Latino individuals, nor does it mention § 1326. In fact, President Truman was expressing his concern with the INA's quota system that restricted immigration from Asian countries. *See id.* (“I cannot take the step I would like to take, and strike down the bars that prejudice has erected against them, without ... establishing new discriminations against the peoples of Asia and approving harsh and repressive measures directed at all who seek a new life within our boundaries.”).

All told, the district court considered all of this evidence and found that it was “insufficient to support a finding of discriminatory *629 intent” in the enactment of § 1326. We see no clear error in this conclusion.

2. Disparate Impact

[14] Viveros-Chavez attempts to bolster his argument by presenting statistical evidence that, he says, demonstrates

that § 1326 “bears more heavily on one race than another.” *Arlington Heights*, 429 U.S. at 266, 97 S.Ct. 555 (citation omitted). If he is right, this is another fact in “the totality of the relevant facts” that a court must consider in its intent analysis. *Davis*, 426 U.S. at 242, 96 S.Ct. 2040.

[15] When considering the racial impact of a particular law, courts often look to data comparing how individuals in a protected class are affected differently from those in a similarly situated, nonprotected group. *See, e.g., id.* at 233–35, 96 S.Ct. 2040 (evaluating evidence that a police department's written personnel test excluded a disproportionately high number of Black applicants compared to white applicants). Here, such evidence would include statistics showing how the enforcement of § 1326 disproportionately impacted immigrants from Mexico and Latin American countries as compared to immigrants from other regions.

To this end, Viveros-Chavez cites to data showing that, during the 2020 fiscal year, 99.1% of unlawful reentry offenders prosecuted under § 1326 were Mexican or Latino. But, as the district court observed, Viveros-Chavez offers no data as to what percentage of noncitizens subject to prosecution under § 1326, who entered the United States in 2020, were Mexican or Latino (versus any other group). The absence of this information renders any meaningful comparison impossible.

The Supreme Court's analysis in *Regents* is instructive. There, the plaintiffs argued that the administration's rescission of the Deferred Action for Childhood Arrivals (DACA) program infringed upon the Fifth Amendment's guarantee of equal protection because it disproportionately impacted Latinos from Mexico, who made up 78% of DACA recipients. 591 U.S. at 34, 140 S.Ct. 1891. But the Court rejected this reasoning, noting that, “because Latinos make up a large share of the unauthorized alien population, one would expect them to make up an outsized share of recipients of any cross-cutting immigration relief program.” *Id.* Without any comparative data that Latino DACA recipients were treated differently than non-Latino DACA recipients, the Court noted, “virtually any generally applicable immigration policy could be challenged on equal protection grounds.” *Id.*

In much the same way, Viveros-Chavez presents no data regarding what percentage of those who illegally reentered the country in 2020 were Mexican or Latino, a fact that is necessary to gauge disparate impact. For example, if Mexicans and Latinos comprised only 25% of total illegal

reentrants in 2020, but 99.1% of those charged, the numbers would be more compelling. On the other hand, the evidence would be less alarming if 99% of noncitizens, who illegally reentered the country in 2020, were Mexican or Latino individuals. The record is devoid of such information.

Viveros-Chavez instead tries to fashion a disparate treatment argument using two different groups—entrants from Canada and non-Latino noncitizens in the United States who overstay their visas. As for the first, Viveros-Chavez points to an agreement the United States had with Canada from 1935 to 1959. Under it, an individual in Canada could take advantage of a “pre-examination” process prior to entering the United States. *See* Decl. of Prof. Benjamin Gonzalez O'Brien (ECF No. 24-2) at 21. *630 No such program was available for individuals in Mexico. As for the second, Viveros-Chavez argues that noncitizens who overstay their visas (a group, he claims, are mostly non-Mexican and non-Latino) are “not being targeted for deportation in the same manner as Mexican or Latino immigrants.”

But we do not see how these groups are similarly situated to Mexican and Latino noncitizens who reentered the country even though they were previously removed, deported, or

denied entry. Perhaps Viveros-Chavez's data show that, throughout our history, certain immigrant groups were favored over others. But this is far from evidence that Congress was motivated by racial animus when passing § 1326.

We recognize that § 1326 and its enforcement have had significant consequences for individuals in the Mexican and Latino communities. But such policy concerns are better directed to the political branches of our government. Here, we conclude that the district court did not clearly err in finding that § 1326 was not motivated by racial animus against Mexican and Latino persons. We therefore affirm.²

IV. Conclusion

For the foregoing reasons, we AFFIRM the judgment of the district court.

All Citations

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Footnotes

- 1 Since Congress enacted the INA, the relevant provision has undergone numerous amendments, the substance of which are not relevant to this appeal. *See United States v. Sanchez-Garcia*, 98 F.4th 90, 95 n.2 (4th Cir. 2024) (describing amendments). For ease of reference, we will refer to the UAA by its name and the provision contained in the INA as § 1326.
- 2 The government alternatively asks that we uphold § 1326 because the legislation would have passed even without the purported racial animus. *See Arlington Heights*, 429 U.S. at 270 n.21, 97 S.Ct. 555 (noting that when racial discrimination motivates the passage of a law, the burden shifts to the government to show “the same decision would have resulted even had the impermissible purpose not been considered”). Because we find that race was not a motivating factor in the passage of § 1326, we need not address this issue.

2022 WL 2116598

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United States District Court, N.D. Illinois, Eastern Division.

UNITED STATES of America

v.

Alfredo VIVEROS-CHAVEZ

Case No. 21 CR 665

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Signed 06/13/2022

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MEMORANDUM OPINION AND ORDER[MATTHEW F. KENNELLY](#), District Judge:

*1 A federal statute, [8 U.S.C. § 1326](#), criminalizes the unlawful reentry of noncitizens who lack legal status. Defendant Alfredo Viveros-Chavez has filed a motion to dismiss the indictment in this case, which charges him with violating [section 1326](#). He argues that this statute violates the Fifth Amendment's equal protection guarantee because it was enacted with discriminatory intent and disparately impacts Mexican and Latino individuals. The Court agrees with Viveros-Chavez that the statute is subject to traditional equal protection scrutiny but denies his motion to dismiss for the reasons set forth below.

Background

Viveros-Chavez, a citizen of Mexico and not of the United States, has been removed from the United States twice in the past: once in March 2010, and again in September 2012. Nearly seven years later, in May 2019, he was convicted in Cook County for felony aggravated robbery. At the time of that conviction, Viveros-Chavez did not have citizenship or lawful immigration status in the United States.

On November 17, 2021, a grand jury returned an indictment against Viveros-Chavez charging him with unlawful reentry in violation of [section 1326](#). In short, this statute makes it a crime for a noncitizen to reenter or to be found in the United States after one “has been denied admission, excluded, deported or removed” without obtaining advance consent from the appropriate U.S. government official. [8 U.S.C. § 1326\(a\)](#).

On February 18, 2022, Viveros-Chavez filed a motion to dismiss the indictment. He argues that his constitutional challenge to [section 1326](#) is subject to traditional equal protection review and that the statute runs afoul of the Fifth Amendment's equal protection component because it was passed with discriminatory intent. His challenge follows in the wake of dozens of similar challenges around the country, including at least three in this district.¹ Every court to decide this issue has rejected the constitutional challenge, except for one court in the District of Nevada. *See United States v. Carrillo-Lopez*, 555 F. Supp. 3d 996 (D. Nev. 2021).

Discussion**A. Standard of review**

The Supreme Court has construed the Fifth Amendment's Due Process Clause to provide analogous protection as the Fourteenth Amendment's Equal Protection Clause. *See Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). Accordingly, constitutional challenges to federal laws that discriminate on the basis of race are subject to strict scrutiny. When this kind of challenge is based on a law that is facially neutral, the law may be struck down only “if it can be proved that the law was motivated by a racial purpose or object, or if it is unexplainable on grounds other than race.” *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999) (cleaned up). This discriminatory intent inquiry was first formulated by the Supreme Court in *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).

*2 Viveros-Chavez argues that the *Arlington Heights* framework should govern his challenge to [section 1326](#) because he is asserting that Congress passed the law with discriminatory intent. The government disagrees. It contends that rational basis review should apply because [section 1326](#) concerns immigration.

The Supreme Court has explained that federal immigration laws are afforded “special judicial deference,” meaning judicial review is “narrow” and “limited.” *Fiallo v. Bell*, 430 U.S. 787, 792–93 (1977). The government points to a handful of cases where the Seventh Circuit has applied rational basis review to constitutional challenges of laws that concern immigration. See, e.g., *Lopez-Ramos v. Barr*, 942 F.3d 376 (7th Cir. 2019) (statutory scheme conferring citizenship to some children born abroad); *Klementanovsky v. Gonzales*, 501 F.3d 788 (7th Cir. 2007) (statute providing for removal waiver depending on whether noncitizen has left country); *United States v. Montenegro*, 231 F.3d 389, 395 (7th Cir. 2000) (statute criminalizing hostage taking in connection with international terrorism); *City of Chicago v. Shalala*, 189 F.3d 598 (7th Cir. 1999) (statute disqualifying noncitizens from various welfare programs). Because section 1326 touches on immigration, the government contends rational basis review likewise should govern Viveros-Chavez’s challenge to section 1326.

The Court disagrees with the government. At its essence, Viveros-Chavez’s challenge is based on a claimed racial classification. Specifically, he contends that the Congress that passed section 1326 intended to discriminate against Latinos and Mexicans. As the Supreme Court explained in *Bolling*, “[c]lassifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect.” *Bolling*, 347 U.S. at 499. The fact that section 1326 relates to immigration does not alter the thrust of the constitutional challenge, which involves a racial classification.

Taken to its extreme, the government’s position would effectively require rational basis review even when a statute facially discriminates against specific races and nationalities so long as the statute concerns immigration. The Supreme Court, however, has not limited review in this way. In *Department of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891 (2020), a majority of the Court concluded that the *Arlington Heights* framework applied to the plaintiffs’ Fifth Amendment equal protection challenge to the termination of the immigration program known as Deferred Action for Childhood Arrivals, or DACA.² See *id.* at 1915–16 (plurality); *id.* at 1917–18 (Sotomayor, J., concurring in part). And though the government in this case cites *Regents* to support its argument regarding the lack of disparate impact (as discussed below), it has not grappled with the Supreme Court’s willingness to engage in an *Arlington*

Heights analysis in the first place. Put simply, the Court finds *Regents* instructive.

The Seventh Circuit cases that the government relies upon are inapposite. Those cases, cited above, concern immigration-related statutes where the constitutional challenge involved a classification based on legal status—specifically alienage, in other words treating noncitizens differently from citizens. Classifications based on immigration status are subject to rational basis review, and Viveros-Chavez does not suggest otherwise. See *Mathews v. Diaz*, 426 U.S. 67, 81 (1976). This case, in contrast, presents a constitutional challenge based on a claimed racial classification. The Seventh Circuit has cautioned against employing a rational basis test when a suspect class or fundamental right is at issue. See *Eby-Brown Co., LLC v. Wisconsin Dep’t. of Agric.*, 295 F.3d 749, 754 (7th Cir. 2002) (explaining rational basis should apply “[a]bsent some antipathy directed at a particular group”). Rational basis review is thus inappropriate in the present circumstances.

*3 The Court concludes that the *Arlington Heights* framework applies to Viveros-Chavez’s constitutional challenge to section 1326.

B. Equal protection challenge

Under *Arlington Heights*, a facially neutral statute may nevertheless be subject to strict scrutiny “[w]hen there is a proof that a discriminatory purpose has been a motivating factor in the decision.” *Arlington Heights*, 429 U.S. at 252; see also *Hunt*, 526 U.S. at 546. The statute’s impact on a certain race or ethnicity provides “an important starting point.” *Arlington Heights*, 429 U.S. at 266. But disparate impact alone is not enough. See *Washington v. Davis*, 426 U.S. 229, 239 (1976) (rejecting that a law “is unconstitutional solely because it has a racially disproportionate impact”). Courts must also assess other historical evidence in determining whether a racially discriminatory purpose was a motivating factor in the statute’s passage. Pertinent evidence includes: 1) the “historical background of the decision”; 2) the “specific sequence of events leading to [passage]”; 3) “procedural” and “[s]ubstantive departures” from the typical legislating process; and 4) “legislative or administrative history” including “contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports.” *Arlington Heights*, 429 U.S. at 267–68.

The party challenging the law bears the burden of establishing discriminatory purpose. If the party carries that burden, the government has the opportunity to establish that “the same

decision would have resulted even had the impermissible purpose not been considered.” *Id.* at 270 n.21.

The Court will follow the parties’ briefing and will address first the historical evidence underlying Congress’ intent in passing [section 1326](#), and then the issue of disparate impact.

1. Historical evidence

In 1929, Congress passed a law that criminalized reentry into the United States after removal. *See* Act of Mar. 4, 1929, Pub. L. No. 70-1018, 45 Stat. 1551. Also known as the Undesirable Aliens Act (UAA), this statute made unlawful reentry a felony punishable by up to two years’ imprisonment and a fine of up to \$1,000. Prior to the Act of 1929, there was no criminal penalty for reentering the country after removal, aside from repeated removal.

Nearly 25 years later, in 1952, Congress passed the Immigration and Nationality Act (INA). *See* Pub. L. No. 82-414, 66 Stat. 163. Included in this comprehensive overhaul of the nation’s immigration system was the provision that is codified today as [8 U.S.C. § 1326](#)—the provision under which Viveros-Chavez is now charged. Although [section 1326](#) has since been amended on numerous occasions, both parties agree that the subsequent amendments are not at issue for the purpose of establishing a prima facie case of discriminatory intent.

Viveros-Chavez’s primary argument is that the UAA was enacted with a discriminatory purpose and that [section 1326](#) is a continuation of the UAA such that it is tainted with the discriminatory purpose of its predecessor. For this argument, he primarily focuses on the intent of the 71st Congress, which enacted the UAA in 1929. In the alternative, he argues that the passage of the INA in 1952, including what is now [section 1326](#), was also premised on a discriminatory purpose within the meaning of *Arlington Heights*, even if considered without the taint from the 71st Congress. The Court will address each argument in turn.

a. 1929 UAA

*4 The history of the passage of the 1929 UAA reflects an ugly chapter in our nation’s past. Throughout the 1920s, nativist interests clashed with large agricultural interests over immigrant Mexican labor. As Viveros-Chavez points out, legislators routinely proposed bills that would

restrict Mexican immigration, but agricultural employers consistently blocked them. Eventually, Senator Coleman Blease brokered the passage of UAA as a compromise “between those who wanted an outright ban on Mexican migration and those who wanted to keep control over Mexican labor.” Alina Das, *Inclusive Immigrant Justice: Racial Animus and the Origins of Crime-Based Deportation*, 52 U.C. Davis L. Rev. 171, 193 (2018).

There is no question that racism “permeated the official congressional debate” when the 71st Congress passed the UAA. *United States v. Machic-Xiap*, 552 F. Supp. 3d. 1055, 1061 (D. Or. 2021). Although the UAA was passed in the Senate without debate, a number of House members expressed overt hostility toward Mexican immigrants. One House member referred to them as “hordes,” and another member said that they were “very undesirable” and “poisoning the American citizen.” *See* Def.’s Mot. to Dismiss at 16 (dkt. no. 24). Without revisiting the entirety of this history, the Court agrees with the findings of many other courts, including this Court’s colleague Judge John Tharp in *Calvillo-Diaz*, and acknowledges that Congress acted with a racially discriminatory purpose in passing the 1929 UAA. *See United States v. Hernandez-Lopez*, No. CR H-21-440, 2022 WL 313774, at *2 (S.D. Tex. Feb. 2, 2022) (collecting cases); *Calvillo-Diaz*, 2022 WL 1607525, at *6.

Nevertheless, as the government correctly points out, what matters it is the intent of the Congress that enacted the statute at issue, specifically [section 1326](#). Thus, the pivotal question on Viveros-Chavez’s primary argument is whether the intent behind the 1929 UAA should be imputed to the Congress that enacted [section 1326](#) in 1952.

Viveros-Chavez contends that the intent of the 71st Congress should be imputed and cites a handful of Supreme Court cases to support his position. *See Espinoza v. Montana Dep’t of Revenue*, 140 S. Ct. 2246 (2020); *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020); *Abbott v. Perez*, 138 S. Ct. 2305 (2018); *Hunter v. Underwood*, 471 U.S. 222 (1985). Put most simply, he argues that the discriminatory intent of the legislature that enacts the original law is imputed to the subsequent legislature that enacts the derivative law unless there is a “deliberative process to remove any such taint.” *Abbott*, 138 S. Ct. at 2318. And he asserts that the 82nd Congress in 1952 did not remove the stain of the 71st Congress’s action in 1929.

The Court finds *Abbott* instructive. *Abbott* concerned Texas’s state and federal redistricting following the 2010 census. *See*

id. at 2315–18. The state adopted a plan in 2013 after its original plan in 2011 was tied up in litigation in federal district court. That 2013 plan was subsequently challenged, and the same district court invalidated it on the ground that it was tainted by the discriminatory intent of the state legislature that passed the 2011 plan.

The Supreme Court reversed. The Court explained that this was not “a case in which a law originally enacted with discriminatory intent is later reenacted by a different legislature,” because the 2013 plan differed from the 2011 plan. *Id.* at 2325. Given this difference, the Court rejected the district court’s imposition of a “duty to expiate its predecessor’s bad intent” and reasoned that a successor legislature is entitled to a presumption of good faith. *Id.* The 2011 legislature’s intent was relevant only to the extent that it could give rise to inferences regarding the 2013 legislature’s intent. In other words, the past discrimination was one piece of historical evidence to be considered within the broader *Arlington Heights* analysis as applied to the successor legislature. Having determined the proper analytical framework, the Court concluded that there was a lack of direct and circumstantial evidence that the Texas state legislature adopted the 2013 redistricting plan with discriminatory intent.

*5 Viveros-Chavez’s principal response to *Abbott* is that the 1952 passage of [section 1326](#) amounts to a reenactment of the 1929 UAA. If so, then this case arguably would be distinguishable from *Abbott*. See *id.* (explaining that *Abbott* was not a “case in which a law ... is later reenacted”).

The Court is not persuaded. There are key substantive differences between the two statutes that establish that [section 1326](#) is not a mere reenactment of the UAA. The UAA, in relevant part, provides:

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.

Act of Mar. 4, 1929, Pub. L. No. 70-1018, 45 Stat. 1551. In comparison, [section 1326](#) provides, in relevant part:

Subject to subsection (b), any alien who—

(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (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 denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act, shall be fined under Title 18, or imprisoned not more than 2 years, or both.

8 U.S.C. § 1326(a).

There are three notable differences between the two statutes quoted above that demonstrate why [section 1326](#) is more than merely reenactment. The first difference involves the predicates listed in [paragraph 1 of section 1326](#). In addition to deportation, the statute also includes those who were “denied admission,” meaning any noncitizen entering or found in the United States need not have previously entered the country to be subject to prosecution. The UAA, in contrast, applies only to those who have been “arrested and deported.”

The second difference concerns the language “is at any time found in” in [paragraph 2 of section 1326](#). This language, which has no parallel in the UAA, was included based on the recommendation of the Attorney General, as discussed below. Prior to 1952, the government had trouble ascertaining some defendants’ point of entry and thus could not establish proper venue for prosecution. The addition of the “found in” language directly addressed that problem.

Third, [section 1326](#) permits noncitizens who would otherwise be subject to prosecution under the statute to avoid prosecution by obtaining the advance consent of the Attorney General for their entry into the United States. The UAA contains no such provision, and in stark contrast, is absolute in barring reentry.

*6 These differences establish that [section 1326](#) is not simply a reenactment of the UAA. Although it is true that the two statutes cover the same subject matter—criminalizing unlawful reentry—the same could be said of the two redistricting plans passed by the Texas state legislature. Accordingly, the Court concludes that *Abbott* controls the disposition of this case. The 82nd Congress is entitled to a presumption of good faith, and the 71st Congress's intent is relevant only to the extent that it can provide the basis for an inference regarding Congress's intent in 1952.

The Court rejects Viveros-Chavez's primary argument that [section 1326](#), as adopted by the 82nd Congress, is tainted with prior discriminatory intent. The Court will next address whether the INA was itself passed with discriminatory intent.

b. 1952 INA

Congress enacted the INA on June 27, 1952, over the veto of President Harry Truman. The law was the product of a three-year study that represented “a most intensive and searching investigation,” which entailed a committee report of nearly 1,000 pages. *Pena-Cabanillas v. United States*, 394 F.2d 785, 790 (9th Cir. 1968). Today's [section 1326](#), which at the time was section 276, was just one provision within this wide-ranging immigration legislation.

Aside from the history underlying the UAA, Viveros-Chavez's evidence of discriminatory intent concerning the passage of the INA consists of a contemporaneous bill and the public commentary of a few legislators, the Attorney General, and the President. *See* Def.'s Mot. to Dismiss at 20–22 (dkt. no. 24). He first points to Public Law 283 from 1952, which he says was referred to as the “Wetback bill,” as indicative of Congress' intent. Viveros-Chavez also points to the statements of four legislators, as well as letters from Attorney General Peyton Ford and President Truman.

Public Law 283 was adopted three months prior to the INA on March 20, 1952. *See* Pub. L. No. 82-283, 66 Stat. 26 (1952),

codified as amended at 8 U.S.C. § 1324(a). This law sought to prevent the unlawful entry of noncitizens by criminalizing actions that facilitated their entry or residence. For example, the law criminalized the transportation of undocumented noncitizens. It also criminalized concealing, harboring, or shielding undocumented noncitizens from detection, though it expressly carved out employers from liability, as the law defined employment as not constituting harboring.

The thrust of Viveros-Chavez's argument is not that this legislation matters from a substantive standpoint, but rather that the “nonchalance with which Congress used ‘wetback’ near the time of the INA's passage ... is further evidence that at least some members of Congress harbored racial animus toward immigrants from Latin America.” *Machic-Xiap*, 552 F. Supp. 3d at 1074. This context is particularly relevant, Viveros-Chavez argues, because there “was little debate leading up to the passage of the [INA].” *See* Def.'s Mot. to Dismiss at 20 (dkt. no. 24).

The Court views this legislation as relevant historical background, under the *Arlington Heights* framework, as opposed to evidence that directly connects to the passage of [section 1326](#). There is little doubt, as further illustrated by the statements below, that some legislators in 1952 harbored racist sentiments and willingly used the derogatory epithet “wetback” to describe immigrants from Latin America. But critically, Public Law 283 is an entirely different piece of legislation from [section 1326](#), with different substantive terms. Whereas the latter directly deters an excluded or removed noncitizen from unlawfully reentering the United States, the former deters both citizens and noncitizens from assisting *any* unlawful entry, not just reentry. *Compare* 8 U.S.C. § 1326 with 8 U.S.C. § 1324(a). Furthermore, Public Law 283 was passed three months prior to the INA. For these reasons, the Court disagrees with Viveros-Chavez's contention that the colloquial name of Public Law 283 provides relevant legislative history for [section 1326](#). That said, it does provide relevant historical background.

*7 Turning directly to the legislative history of the INA, Viveros-Chavez does cite a handful of public statements supporting his claim of racial animus. He offers the following statements by legislators:

- Representative John Wood of Idaho: “It seems to me the question of racial-origins, though I am not a follower of Hitler, there is something to it ... I believe that possibly statistics would show that the Western European races

have made the best citizens in America.” Def.’s Mot. to Dismiss at 20 (dkt. no. 24).

- Senator Pat McCarran of Nevada: “We changed the language a little to meet the wetback situation, which applies to the southern section of the country.” *Id.*
- Senator Alben Barkley of Kentucky: “[I]t has become unpopular to be wholly American. The real basic purpose [behind] the immigration act which we finally enacted in 1924 was to preserve something of the homogeneity of the American people.... [L]et all the aliens who desire to do so come here if you wish, but, in that event, American labor will suffer as American labor has never suffered before.” Def.’s Reply in Supp. of Mot. to Dismiss, Ex. Z at 5774 (dkt. no. 30-5).
- Representative Thomas Jenkins of Ohio: “The past day or two has been reminiscent of the days of 20 years ago when the wishes of the Members was to keep away from our shores the thousands of undesirables just as it is their wish now....” Def.’s Reply in Supp. of Mot. to Dismiss, Ex. Y at 4442 (dkt. no. 30-4).

The Court agrees with Viveros-Chavez that these statements can be taken at face value and are probative of the intent of these specific legislators. All four statements speak for themselves. Additionally, the last two appear to connect the INA to the passage of the UAA in 1929.

Viveros-Chavez next points to Attorney General Ford's letter responding to Senator McCarran's request for the views of the Department of Justice. *See id.*, Ex. AA (dkt. no. 30-6). This letter provided section-by-section commentary on the proposed legislation. With respect to what is now [section 1326](#), Ford wrote, in relevant part:

[This provision] adds to existing law by creating a crime which will be committed if a previously deported alien is subsequently found in the United States. This change would overcome the inadequacies in existing law which have been observed in those cases in which it is not possible for the Immigration and Naturalization Service to establish the place of reentry, and hence proper venue,

arising in prosecutions against a deported alien under the 1929 Act.

Id. at 7. Later in the letter, in discussing a different section that authorizes immigration officers to conduct searches, Attorney General Ford quoted a 1951 report from the President's Commission on Migratory Labor, which stated, “Statutory clarification on the above points [regarding conducting searches on private property] will aid in taking action against the conveyors and receivers of the wetback.” *Id.* at 9.

Reading this in context, the Court does not agree with Viveros-Chavez's interpretation that Ford “asked for the phrase ‘found in’ to be added to [section 1326](#) to make it easier to prosecute ‘wetback[s].’ ” Def.’s Mot. to Dismiss at 21 (dkt. no. 24). To the extent one might infer that Ford harbored discriminatory intent based on his quote from a presidential commission report's usage of the derogatory term, he did so in reference to an entirely different provision of the INA. The Court does not find Viveros-Chavez's argument persuasive.

*8 Finally, Viveros-Chavez contends that President Truman's veto statement proves that the entire legislation was racist. Viveros-Chavez quotes the following excerpt as indicative of Congress's racist intent:

[The INA is] a mass of legislation which would perpetuate injustices of long standing against many other nations of the world, hamper the efforts we are making to rally the men of East and West alike to the cause of freedom, and intensify the repressive and inhumane aspects of our immigration procedures. The price is too high, and in good conscience I cannot agree to pay it.

Id. (emphasis removed). The Court does not find this statement to have any bearing on the intent behind the adoption of [section 1326](#). Read in context, it concerned the INA's retention of the country-quota system, which President Truman wanted to end. *See* Harry S. Truman, *Veto of Bill to Revise the Laws Relating to Immigration, Naturalization and Nationality*, Am. Presidency Project (June 25, 1952), <https://www.presidency.ucsb.edu/node/231060>. President Truman

did not mention section 1326 in the veto statement, nor did he say anything about the INA arising from a desire to target Latinos or Mexicans. Like Ford's letter, the Court does not find President Truman's veto statement to be persuasive evidence of the discriminatory intent of Congress.

Taken as a whole, the evidence that Viveros-Chavez has offered is insufficient to support a finding of discriminatory intent. The statements of just four legislators, even if one of them was the bill's primary Senate sponsor, cannot be used to ascribe intent to the other hundreds of members of Congress. See *United States v. O'Brien*, 391 U.S. 367, 384 (1968) ("What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork."). Nor are the statements of four legislators sufficiently numerous to permit an inference that they in effect represented the intent of others in Congress.

Furthermore, to the extent that Senator Barkley's and Representative Jenkins's comments tie the INA to the UAA, only thirty congressmen from the 71st Congress remained in office in 1952. The 82nd Congress is entitled to a presumption of good faith, and even if the Court imputed discriminatory intent to all thirty overlapping congressmen, that would only bring the total count to thirty-two. In overriding President Truman's veto, the House voted 278-13, and the Senate voted 57-26. That means that at most, less than ten percent of the legislators who voted for the INA harbored discriminatory intent.

The Court acknowledges that Viveros-Chavez has also presented circumstantial historical evidence tending to show that Latino immigrants were the subject of an immigration regime that disproportionately targeted them in the decades prior to the INA's passage in 1952. See, e.g., Def.'s Reply in Supp. of Mot. to Dismiss at 15–16 (dkt. no. 30) (describing pre-examination procedures as applied to Mexicans versus Canadians). Additionally, he has Public Law 283 and the evidence surrounding the UAA's passage in 1929 insofar as each provides additional historical background.

^{*9} But this history does not tip the balance. Applying the factors laid out in *Arlington Heights*, Viveros-Chavez has not identified anything awry in the "specific sequence of events leading to" the INA's passage, nor has he identified any "procedural" or "[s]ubstantive departures" from the typical legislating process. *Arlington Heights*, 429 U.S. at 267–68. Furthermore, the four public statements discussed above

do not directly address section 1326. See *United States v. Johnson*, 40 F.3d 436, 440 (D.C. Cir. 1994) ("[S]cattered pieces of legislative history are quite inadequate to serve to attribute a discriminatory purpose to the Congress."). As discussed at oral argument, Viveros-Chavez's position would effectively nullify the entirety of the INA based on the statements of a few legislators. The Court disagrees that the evidence offered here is sufficient to establish that Congress passed the INA with racially discriminatory intent under the standard established in *Arlington Heights*.

In sum, the Court concludes that Viveros-Chavez has not shown that racial animus toward Latinos was a motivating reason for the INA's passage.

2. Disparate impact

Viveros-Chavez's evidence also falls short in establishing that section 1326 disparately impacts Latinos today. Doing so would require him to provide evidence that section 1326 "bears more heavily on one race than another." *Arlington Heights*, 429 U.S. at 266. But proving disparate impact also requires offering evidence of a comparator group. See *Alston v. City of Madison*, 853 F.3d 901, 908 (7th Cir. 2017) (discussing proper statistical comparisons for an equal protection claim); *Chi. Firefighters Loc. 2 v. City of Chicago*, 249 F.3d 649, 653 (7th Cir. 2001) (similar).

Viveros-Chavez points to government data indicating that in fiscal year 2020, 99.1 percent of unlawful reentry offenders charged in federal court were Hispanic. But when pressed to offer comparator numbers to demonstrate disproportionality, Viveros-Chavez cited nothing. Instead, he contends that the government's comparator argument "is circular logic" and that the 99.1 figure, considered on its own, aligns with other cases where courts have found disparate impact. See Def.'s Reply in Supp. of Mot. to Dismiss at 24 (dkt. no. 30).

The absence of comparator evidence undercuts Viveros-Chavez's disparate impact argument. The 99.1 percent figure certainly is sufficient to raise an eyebrow. But there needs to be *some* evidence of a comparator to give that figure context. The Court cannot, for example, rule out the possibility that 99.1 percent of those attempting to unlawfully reenter the United States in 2020 were Hispanic. If so, the fact that 99.1 percent of unlawful reentry defendants were also Hispanic would be proportional. It is Viveros-Chavez's burden to establish disparate impact. He has not carried that burden on the present record.

3. Inevitable passage

Because Viveros-Chavez has not carried his burden in establishing that Congress passed [section 1326](#) with discriminatory intent, the Court need not decide whether Congress would have enacted the law absent such discriminatory intent.

The Court denies Viveros-Chavez's motion to dismiss the indictment [dkt. no. 24]. The case is set for a telephonic status hearing on June 17, 2022 at 8:55 AM, using call-in number 888-684-8852, access code 746-1053.

All Citations

Not Reported in Fed. Supp., 2022 WL 2116598

Conclusion

Footnotes

- 1 See *United States v. Calvillo-Diaz*, No. 21 CR 445, 2022 WL 1607525 (N.D. Ill. May 20, 2022); *United States v. Porras*, No. 21 CR 158, 2022 WL 1444311 (N.D. Ill. May 6, 2022). Judge Feinerman has not yet issued an opinion on this issue in *United States v. Leonides-Segura*, No. 21 CR 390 (N.D. Ill.).
- 2 The *Arlington Heights* framework applies equally to legislative government action, or, as in the case of DACA, executive government action. See *Miller v. Johnson*, 515 U.S. 900, 913 (1995).



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Unconstitutional or Preempted Limitation Recognized by [United States v. Gonzalez-Fierro](#), 10th Cir.(N.M.), Feb. 04, 2020



KeyCite Yellow Flag - Negative Treatment

Proposed Legislation

United States Code Annotated

Title 8. Aliens and Nationality (Refs & Annos)

Chapter 12. Immigration and Nationality (Refs & Annos)

Subchapter II. Immigration

Part VIII. General Penalty Provisions

8 U.S.C.A. § 1326

§ 1326. Reentry of removed aliens

Effective: September 30, 1996

[Currentness](#)

(a) In general

Subject to subsection (b), any alien who--

(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (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 denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under Title 18, or imprisoned not more than 2 years, or both.

(b) Criminal penalties for reentry of certain removed aliens

Notwithstanding subsection (a), in the case of any alien described in such subsection--

(1) whose removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under Title 18, imprisoned not more than 10 years, or both;

(2) whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both;

(3) who has been excluded from the United States pursuant to [section 1225\(c\)](#) of this title because the alien was excludable under [section 1182\(a\)\(3\)\(B\)](#) of this title or who has been removed from the United States pursuant to the provisions of subchapter V, and who thereafter, without the permission of the Attorney General, enters the United States, or attempts to do so, shall be fined under Title 18 and imprisoned for a period of 10 years, which sentence shall not run concurrently with any other sentence.¹ or

(4) who was removed from the United States pursuant to [section 1231\(a\)\(4\)\(B\)](#) of this title who thereafter, without the permission of the Attorney General, enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be fined under Title 18, imprisoned for not more than 10 years, or both.

For the purposes of this subsection, the term “removal” includes any agreement in which an alien stipulates to removal during (or not during) a criminal trial under either Federal or State law.

(c) Reentry of alien deported prior to completion of term of imprisonment

Any alien deported pursuant to [section 1252\(h\)\(2\)](#)² of this title who enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be incarcerated for the remainder of the sentence of imprisonment which was pending at the time of deportation without any reduction for parole or supervised release. Such alien shall be subject to such other penalties relating to the reentry of deported aliens as may be available under this section or any other provision of law.

(d) Limitation on collateral attack on underlying deportation order

In a criminal proceeding under this section, an alien may not challenge the validity of the deportation order described in subsection (a)(1) or subsection (b) unless the alien demonstrates that--

- (1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;
- (2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and
- (3) the entry of the order was fundamentally unfair.

CREDIT(S)

(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; [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.)

Notes of Decisions (1573)

Footnotes

- 1 So in original. The period probably should be a semicolon.
- 2 So in original. [Section 1252](#) of this title, was amended by [Pub.L. 104-208](#), Div. C, Title III, § 306(a)(2), Sept. 30, 1996, 110 Stat. 3009-607, and as so amended, does not contain a subsec. (h); for provisions similar to those formerly contained in [section 1252\(h\)\(2\)](#) of this title, see [8 U.S.C.A. § 1231\(a\)\(4\)](#).

8 U.S.C.A. § 1326, 8 USCA § 1326

Current through P.L. 118-106. Some statute sections may be more current, see credits for details.

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