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EXPLAINER

EQUAL PROTECTION CHALLENGES TO PROSECUTIONS UNDER 1325 & 1326: THE GROUNDBREAKING DECISION IN *UNITED STATES V. CARILLO-LOPEZ*

Over the past two years, federal defenders have begun challenging the laws that criminalize crossing the border — 8 U.S.C. § 1325 and 8 USC § 1326 — on the grounds that the law is racist, and therefore unconstitutional. Recently, in a case called *United States v. Carrillo-Lopez* ("*Carrillo-Lopez*"), Judge Miranda Du in the District of Nevada agreed with this argument and granted a motion to dismiss a criminal case against a person charged with the crime of crossing the border after being previously deported. This explainer will summarize the argument that these laws are racist, discuss Judge Du's groundbreaking decision, and provide a chart tracking other challenges to these laws.

THE ARGUMENT

1. Equal Protection Primer

The equal protection clause of the 14th Amendment, ratified after the Civil War, provides that states cannot apply laws differently to different groups of people, but must instead ensure that everyone receives "equal protection of the laws." In 1954, in a companion case to *Brown v. Board of Education*, the Supreme Court decided that the 14th Amendment also applies to the federal government because the Fifth Amendment's due process clause also incorporates the promise of equal protection.

Under later Supreme Court doctrine, in most cases when the government discriminates against certain groups of people that fall into a "suspect classification" — including race, religion, or national origin — the government must show that it had a very compelling reason for the law *and no other way to accomplish its goal*. This means that if someone challenges the law, the government has to provide much more justification for the law than it does in other contexts.

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In 1977, the Supreme Court issued an opinion in a case called *Village of Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252 ("Arlington Heights"). In *Arlington Heights*, the Court decided that, in order to succeed on a claim that a law that does not have obviously discriminatory language violates the equal protection clause, the challenger must show that it that it was passed with a discriminatory intent -- meaning that the people who passed the law intended for it to discriminate against people. Evidence of disparate impact, that is, evidence that the law affected a certain group of people more than others, can be evidence of discriminatory intent, but is not sufficient by itself to prove that a law violates the equal protection clause. The person challenging the law has the burden of proof, meaning that the law will stand and the government will win unless the challenger provides enough evidence.

2. SHOWING DISPARATE IMPACT AND DISCRIMINATORY INTENT

In cases challenging the laws that criminalize crossing the border ("1325 and 1326") on equal protection grounds, people prosecuted under those laws argue that Congress had a racist intent in passing the laws and that they disparately impact Latinx people.

a. Disparate Impact

The government disproportionately prosecutes Latinx and Mexican people under 1325 and 1326. In 2020, 97% of people prosecuted were from Latin American countries, with 76% from Mexico. In 2021, these percentages have not changed.

People challenging these laws have relied on this data to show that the laws have a disparate racial impact. In response, the government has argued that "geography" is the reason. Most courts reviewing these claims so far have concluded, however, that the data does show disparate impact, and that this stark disparate impact would be unconstitutional if Congress passed these laws with a racist intent.

b. Racist Intent

Congress passed 1325 and 1326 in 1929, following the National Origins Act of 1924. That law explicitly aimed to recreate the racial and ethnic makeup of the United States as it existed in 1890 by imposing strict quotas on the number of people who

could immigrate from most countries, apart from Western Europe. However, the National Origins Act exempted the Western Hemisphere, including Mexico, because powerful agricultural interests lobbied to maintain their access to Mexican workers. The exemption angered the white supremacist nativists who had pushed for the law. During the 1920s especially, the theory of eugenics -- that certain races are genetically better than others and that people should only reproduce with members of their own race -- gained popularity in the United States, and members of Congress openly subscribed to this racist theory. Eugenics motivated the passage of the National Origins Act and both 1325 and 1326. The passage of 1325 and 1326 represented a compromise between agribusiness (who could still exploit Mexican laborers, who were subject to deportation and, under 1325 and 1326, prosecution as well) and the white supremacist nativists, who accepted the criminal laws as sufficient tools to keep the United States white.

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The Congressional record documenting the debate, "expert" testimony, and ultimate passage of these laws is explicitly racist, riddled with racial slurs, derogatory remarks about Mexican people, and commentary about the need to preserve the white race. It would be essentially impossible to argue that Congress did not have a discriminatory, racist intent in passing 1325 and 1326 -- and indeed, the government did not in several of these cases, including *Carillo-Lopez*. So why and how is it defending these laws?

c. Government's Argument

In each of these cases, the government has argued that because Congress recodified (essentially, repassed) 1325 and 1326 in 1952, when Congress replaced the National Origins Act with the Immigration and Nationality Act ("INA") – the same law that we have today, albeit with many amendments (that courts should consider the record from 1952 as well). The government argues that the record from 1952 is not sufficiently racist to show Congress's discriminatory intent or for the laws to be unconstitutional under *Arlington Heights*. Congress also amended 1325 and 1326 several times, in 1988, 1990, 1994, and twice in 1996. Each of these amendments increased the punishments for violating these laws, but did not otherwise change how the laws worked. The government has argued in several cases that Congress revisiting these laws to amend them "cleansed" them of the racism of 1929.

3. GROUNDBREAKING DECISION IN CARRILLO-LOPEZ

Judge Du's decision in *Carrillo-Lopez* is the first in which a court has agreed with people challenging the law that 1326 (the law criminalizing unauthorized reentry after a removal order) is unconstitutional because it has a disparate impact and Congress passed it with a racist intent (1325, the law criminalizing unauthorized entry, was not at issue in that case, but the same reasoning applies to it as well).

The *Carillo-Lopez* decision is the first decision ever to find that a law is unconstitutional under the *Arlington Heights* standard. After conducting a thorough analysis of the historical record of both the 1929 and the 1952 versions of 1326, and considering all of the evidence *together,* Judge Du concluded that Congress still had a racist intent in recodifying 1326 in 1952. Judge Du focused on 1) the lack of debate of 1326 compared to other provisions; 2) President Truman's veto of the INA on the grounds that the law was discriminatory and racist; 3) a letter in support of strengthening 1326 from then-Attorney General Peyton Ford containing the word "wetback"; 4) the simultaneous passage of a bill nicknamed the "Wetback Bill"; and 5) Congress's awareness of the law's disparate impact.

Unlike the passage of 1326 in 1929, Congress did not much debate re-including the law in the new INA. The government argued that this silence is a lack of evidence of intent; but Judge Du agreed with Carrillo-Lopez that the lack of debate shows that Congress never reconsidered its motivations from 1929, and never identified and explained on the record new, non-racist justifications for the 1326. Judge Du concluded that the most reasonable explanation is that Congress did not debate the law again because its intent remained the same, and just as racially motivated.

Additionally, Judge Du took into account the fact that President Truman vetoed the INA expressly because it was "legislation which would perpetuate injustices of long standing against many other nations of the world," and because it was punitive, carrying forward the "dead weight of past mistakes," and "intensify[ing] the repressive and inhumane aspects of our immigration procedures." While President Truman did not explicitly name 1326 or discrimination against Latinx people, he alluded to it when he asked Congress to abandon their prior approach to immigration.

Judge Du also considered a letter from then-Attorney General Ford to Congress seeking to expand the ways the government could prosecute people under 1326. In the letter, Ford repeatedly used the racial slur "wet back," showing the continued and casually racist attitude towards Mexican and Latinx people common among government officials, including members of Congress. Judge Du found it especially convincing that the only changes that Congress made to 1326 were to adopt Ford's recommendations.

Another law passed at the same time as the INA and nicknamed the "Wetback Bill" criminalized the "harboring" of undocumented people. An expert historian in the case stated that the Bill was initially targeted only at Mexican people. Moreover, the Bill made clear that employers who hired undocumented people were not "harboring" — that is, the Bill recreated the same racist and exploitative compromise struck between white supremacists and agribusiness during the passage of the 1929 act. Judge Du recognized the passage of this Bill as further evidence of the racist attitudes of Congress and their intent in recodifying 1326 in 1952.

Finally, Judge Du considered evidence that Congress knew that 1326 was primarily and disparately impacting Latinx and particularly Mexican people when they recodified it in 1952. Border Patrol officials had indicated as much when they testified before Congress. Thus, Judge Du agreed with the multiple expert historians who testified that Congress still had a racist and discriminatory intent when it passed 1326 again in 1952 as part of the INA.

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Judge Du rejected the argument that the subsequent amendments to the law, all of which increased the penalties the law imposed, fixed the initial racist intent. In none of those instances did Congress reconsider the reasons for the law in the first place or find alternative justification. Thus, Judge Due agreed that the racist intent that motivated the law's initial passage still infects the law today.

4. CASE CHART OF OTHER CASES CHALLENGING 1325 & 1326

Although several cases have challenged 1325 and 1326 under the equal protection clause, Judge Du's is the only decision so far agreeing that 1325 or 1326 is unconstitutional under the *Arlington Heights* framework. The chart on the following page provides a brief overview of all the challenges so far.

CASE CHART OF OTHER CASES CHALLENGING 1325 & 1326

DATE	CASE NAME	PROVISION	COURT	OUTCOME	REASONING
Dec. 1, 2021	*U.S. v. Rivera Sereno*	1326	Southern Dist. of Ohio - J. Marbley	Denied	*Arlington Heights* did not apply; no evidence of racist intent in 1952 statute
Nov. 16, 2021	*U.S. v. Amador Bonilla*	1326	Western Dist. of Oklahoma - J. Cauthron	Denied	*Arlington Heights* did not apply; no evidence of racist intent in 1952 statute
Nov. 16, 2021	*U.S. v. Campos Atrisco*	1325	Southern Dist. of California	Denied	1990 1325 legislation did not show racism of 1929 legislation[1]
Nov. 5, 2021	*U.S. v. Samuels Baldayaquez*	1326	Northern Dis. of Ohio - J. Nugent	Denied	*Arlington Heights* did not apply; no evidence of racist intent in 1952 statute
Oct. 21, 2021	*U.S. v. Suquilanda*	1326	Southern Dist. of New York - J. Marrero	Denied	Insufficient evidence of racist intent in 1952
Oct. 20, 2021	*U.S. v. Lucas Hernandez*	1325	Southern Dist. of California - J. Lopez	Denied	1952 and 1990 1325 legislation did not show racism of 1929 legislation
Aug. 18, 2021	***U.S. v. Carrillo-Lopez***	**1326**	**Dist. of Nevada - J. Du**	**Motion to Dismiss Granted**	**1952 and amendments did not fix original racist intent**
Aug. 12, 2021	*U.S. v. Novondo-Ceballos*	1326	Dist. of New Mexico - J. Brack	Denied	*Arlington Heights* did not apply
Aug. 3, 2021	*U.S. v. Machic-Xiap*	1326	Dist. of Oregon - J. Simon	Denied	Insufficient evidence of racist intent in 1952

1 Congress did not criminalize attempted unauthorized entry until 1990.

CASE CHART OF OTHER CASES CHALLENGING 1325 & 1326 (CONTINUED)

DATE	CASE NAME	PROVISION	COURT	OUTCOME	REASONING
Jun. 16, 2021	*U.S. v. Wence*	1326	Dist. of Virgin Islands- J. Molloy	Denied	Insufficient evidence of racist intent in 1952 and 1990
May 25, 2021	*U.S. v. Gutierrez-Barba*	1326	Dist. of Arizona - J. Humetawa	Denied	*Arlington Heights* did not apply
Jan. 5, 2021	*U.S. v. Medina-Zepeda*	1326	C. Dist. California - J. Olguin	Denied	1920s legislative history does not apply to 1952 statute and insufficient evidence of racist intent in 1952
Dec. 11, 2020	*U.S. v. Gallegos-Aparicio*	1325	S. Dist. California - J. Curiel	Denied	1990 1325 legislation did not show racism of 1929 legislation
Dec. 8, 2020	*U.S. v. Rios-Montano*	1325	S. Dist. California - J. Curiel	Denied	1990 1325 legislation did not show racism of 1929 legislation
Oct. 29, 2020	*U.S. v. Lazcano-Neria*	1325	S. Dist. California - J. Goddard	Denied	1920s legislative history not relevant to 1990 statute; Congress has authority to criminalize immigration
Oct. 13, 2020	*U.S. v. Palacios-Arias*	1326	E. Dist. Virginia - J. Gibney	Motion to Dismiss Granted	Insufficient evidence of racist intent in 1952 statute
Sept. 14, 2020	*U.S. v. Morales-Roblero*	1325	S. Dist. California - J. Goddard	Denied	1920s legislative history not relevant to 1990 statute; Congress has authority to criminalize immigration
Sept. 2, 2020	*U.S. v. Ruiz-Rivera*	1325	S. Dist. California - J. Goddard	Denied	1920s legislative history not relevant to 1990 statute; Congress has authority to criminalize immigration

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