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Taking Arlington to New Heights: The Carrillo-Lopez Decision

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I. Introduction

Former United States President Donald Trump brought immigration law into the public's focus during his presidential campaign in 2016. "I want to—I'm building a wall…" Trump told CNN's Jake Tapper, "...and it's a wall between Mexico, not another country…"[1] The Trump Administration promised immigration reform including, but not limited to, a wall spanning the United States-Mexican border, an increase in Immigration and Customs Enforcement ("ICE") agents at the border, and the deportation of all undocumented immigrants.[2] Recent research shows these promises unduly burdened immigrants from Mexican and Latine communities.[3] In 2013, over 90% of deportations were Latino

[1] Jake Tapper, *Interview with Donald Trump, Pres. Candidate*, CNN (June 3, 2016), https://cnnpressroom.blogs.cnn.com/2016/06/03/tapper-to-trump-is-that-not-the-definition-of-racism/.

[2] Nick Corasaniti, *A Look at Trump's Immigration Plan, Then and Now*, THE NEW YORK TIMES (Aug. 31, 2016), https://www.nytimes.com/interactive/2016/08/31/us/politics/donald-trump-immigration-changes.html.

[3] *See generally* Charles Kamasaki, *US Immigration Policy: A Classic, Unappreciated Example of Structural Racism*, BROOKINGS (Mar. 26, 2021), https://www.brookings.edu/blog/how-we-rise/2021/03/26/us-immigration-policy-a-classic-unappreciated-example-of-structural-racism/ (contrasting the plight Latino migrants face while attempting to obtain legal status in the United States compared to migrants of European descent and how immigration law unduly burdens the former). *See also* Michael D. Shear & Maggie Haberman, *Mexico Agreed to Take Border Actions Months Before Trump Announced Tariff Deal*, THE NEW YORK TIMES (June 8, 2019), https://www.nytimes.com/2019/06/08/us/politics/trump-mexico-deal-tariffs.html (discussing the agreement Mexico made with the Trump

noncitizens even though Latinos only comprise about 57% of noncitizens in the United States.[4] Trump's promise to increase border patrol and end "catch and release" procedures resulted in the highest number of apprehensions at the United States-Mexican border in 2019 in over a decade.[5] Guatemalans, Hondurans, Mexicans, and El Salvadorians accounted for 71% of all apprehensions, and under Trump's Title 42 expulsion policy, adult or family crossings from these countries were immediately deported to Mexico without deportation order.[6] Ultimately, the past half-decade of decision-making within immigration law has illuminated large accountability issues within the United States government in violation of noncitizen's constitutional rights.

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administration to deploy an additional 6,000 national guardsmen to avoid tariffs up to 25 percent, which accelerated the Migrant Protection Protocols, which helped reduce the "catch and release" of migrants in the United States by increasing wait times for asylum-seekers in Mexico).

[4] Asad L. Asad, *Why Latino Citizens are Worrying More About Deportation*, The Conversation (April 6, 2020), https://theconversation.com/why-latino-citizens-are-worrying-more-about-deportation-133216.

[5] John Gramlich & Luis Noe-Bustamante, *What's Happening at the U.S.-Mexico Border in 5 Charts,* Pew Research Center (Nov. 1, 2019), https://www.pewresearch.org/fact-tank/2019/11/01/whats-happening-at-the-u-s-mexico-border-in-5-charts/. *See also "Catch and Release": Frequently Asked Questions*, Justice for Immigrants, https://justiceforimmigrants.org/what-we-are-working-on/immigrant-detention/catch-and-release-frequently-asked-questions/ (last visited Oct. 11, 2021) (catch and release is a procedure in which certain immigrants are apprehended and released into the United States on parole while they wait from their immigration court hearing rather than detainment or returned to the country in which they crossed into the United States from).

[6] *Id*. *See also Rising Border Encounters in 2021: An Overview and Analysis*, Am. Immigration Council (Aug. 2, 2021), https://www.americanimmigrationcouncil.org/rising-border-encounters-in-2021.

The next section of this article will analyze the evolution of 8 U.S.C § 1326, constitutional protections for noncitizens, the implications of the plenary power doctrine in immigration law, and the importance of the *Carrillo-Lopez* decision. Then, this article will discuss why the *Carrillo-Lopez* decision correctly applied the *Arlington Heights* standard to review 8 U.S.C. § 1326 and its refusal to conform to the plenary power doctrine. Lastly, this article will conclude by encouraging courts to follow the *Carrillo-Lopez* decision in further Equal Protection challenges under the *Arlington Heights* standard.

II. Background

The history of American immigration law embodies an implicit bias towards non-white people. Mexican migrants faced laws such as "Operation Wetback" in the 1950s, resulting in the mass deportation of undocumented migrants of only Mexican descent.[7] During the Great Depression, the U.S. deported approximately 200,000 United States citizens of Mexican descent during Operation Wetback because the government assumed they were undocumented.[8] Overall, the beginning of immigration law began by denying "undesirable groups of people" from entering the United States. Mexican and Latino noncitizens are—and continue to be—targeted by broad and unforgiving deportation laws.[9]

This should come at no shock—the United States' weaponization of immigration law began long before the Trump Administration. On August 18, 2021, the United States District Court of Nevada in *United States v. Carrillo-Lopez* chose to address the racial underpinnings of a deportation law that was

[7] Mary Romero, *Racial Profiling, and Immigration Law Enforcement: Rounding Up of Usual Suspects in the Latino Community*, 32 CRIT. SOCIOL. 448, 450 (2006).
[8] Asad, *supra* note 4.
[9] Romero, *supra* note 7.

enacted in 1952.[10] In 1952, the 82nd Congress of the United States enacted 8 U.S.C. § 1326(a) & (b) ("Section 1326"), which criminalized any attempted unlawful re-entry to the United States after deportation.[11] Initially, courts followed a contextual approach to interpret Section 1326 as facially neutral with a lack of animus in its creation. However, in *Carrillo-Lopez*, Chief Judge Miranda Du granted the defendant's motion to dismiss after finding defendant demonstrated both a disparate impact and a discriminatory intent of Section 1326 under *Village of Arlington Heights v. Metropolitan Housing Development Corporation* (the "*Arlington Heights* standard").[12]

The Arlington Heights standard is a higher level of review than typical in Equal Protection cases reviewing immigration policy. Courts, such as the Ninth Circuit Court of Appeals and other jurisdictions, refuse to apply a more deferential standard of review, like the Arlington Heights standard, to Section 1326 and continue to review it under a rational basis.[13] The United States District Court of Nevada, however, correctly applied *Arlington Heights* to interpret the legislative intent of Section 1326, and other courts should adopt this reading as well as evaluate the prospective and practical consequences of Section 1326 in immigration law.

A. Societal issues leading to the enactment of 8 U.S.C. § 1326

The criminalization of entry and re-entry to the United States started in the 1920s when Congress began to close the

[10] United States v. Carrillo-Lopez, No. 3:20-cr-00026-MMD-WGC, 2021 U.S. Dist. (D. Nev. Aug. 18, 2021).
[11] 8 U.S.C. § 1326 (1996).
[12] *Carrillo-Lopez*, 2021 U.S. Dist. 155741 at 1.
[13] *See generally* United States v. Bernal, No. 21-CR-01817-TWR, 2021 U.S. Dist. 178922, 1 (S.D. Cal. Sep. 20, 2021).

country's open borders to certain classes of people.[14] The United States already denied citizenship and naturalization to–primarily–black people and people of color (excluding freed slaves), but Congress continued to bar non-white migration to the United States by shifting its focus onto the United States-Mexican border.[15] At the time, many Mexican migrants traveled to the United States for work due to an increased need for labor in World War I. A shift in the agricultural business model in the 1920s allowed Mexican laborers to stay year-round and bring their families with them to the United States.[16] During this period, almost two-thirds of Mexican entry into the United States was undocumented.[17] In 1929, Congress enacted the Immigration and Nationality Act, which made an unlawful entry—successful or attempted—a misdemeanor offense to help immigration officials enforce the law at the United States-Mexican border.[18] In the same legislation, Congress broadened prior re-entry bans from specific groups of people previously deported to include all noncitizens, primarily at the United States land borders.[19]

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[14] *See* Doug Keller, *Re-thinking Illegal Entry and Re-entry*, 44 Loy. U. Chi. L. J. 65, 2012. *See also* Act of March 3, 1891, ch. 551, § 11, 26 Stat. 1084, 1086 (making deportable anyone who was excludable to begin with); Quota Act of 1921, Pub. L. No. 67-5, ch. 8, § 2, 42 Stat. 5 (where Congress explicitly restricted immigration through quotas based on national origin and race).

[15] *See* 43 Stat. 153 (excluding entry to the United States to any immigrant from any Asian country except Japan and the Philippines); *see also* 22 Stat. 58., Chap. 126.

[16] Mae M. Ngai, Impossible Subjects: Illegal Aliens and the Making of Modern America 50 (2004).

[17] *Id*.

[18] *Supra* note 14.

[19] *Id*. (explaining how previous criminal re-entry laws focused on persons deported for prostitution or anarchy).

The Great Depression in the 1930s decreased the need for labor due to a lack of employment opportunities.[20] Immigration officials forcibly removed more than one million people of Mexican descent during this decade.[21] Overall, only about 5,000 individuals a year were prosecuted under the new entry and re-entry laws.[22] In the 1940s, however, the need for labor rose again, and Mexican noncitizens were invited to work in the United States under the Bracero Program.[23] This invitation back into the United States was not extended with open arms. At this time, United States citizens associated undocumented immigrants with "misery, disease, crime, and many other evils."[24] Social scientists found that white citizens saw no difference in local citizens of Mexican descent with undocumented immigrants.[25] Rhetoric of the dangers of undocumented immigrants permeated society, and political leaders perpetuated the stereotype.[26]

Congressional decisions and rhetoric against non-white immigrants became largely noticeable on a world stage.[27] The most insidious example of this was when Adolf Hitler wrote in *Mein Kampf* that Nazi Germany modeled their immigration laws after U.S. immigration law.[28] This (among other influences) led to several reforms in the 1940s and 1950s in immigration law, including the long-overdue repeal of the 1882 Chinese Exclusion

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[20] DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 215 (2007).
[21] *Id*.
[22] *Id*.
[23] Ngai, *supra* note 16, at 116.
[24] *Id*. at 171.
[25] *Id*.
[26] *Id*.
[27] Robert J. Miller, *Nazi Germany's Race Laws, the United States, and American Indians* 94 ST. JOHN'S L. REV. 751, 780 (2021).
[28] ADOLF HITLER, MEIN KAMPF 439-40 (Ralph Manheim trans., 1971); *see also* Robert J. Miller, *Nazi Germany's Race Laws, the United States, and American Indians* 94 ST. JOHN'S L. REV. 751, 780 (2021) (*citing* OTTO KOELLREUTTER, GRUNDRIFS DER ALLGEMEINEN STAATLEHRE 51-52 (1933)).

Act in 1943.[29] Almost a decade later, the 82nd Congress of the United States convened to create the Immigration and Naturalization Act of 1952 ("INA of 1952"), which still influences contemporary immigration and naturalization law.[30]

In the INA of 1952, Congress eliminated racial requirements for immigration and naturalization.[31] The Act, however, majorly overlooked other racially charged laws from 1929, such as deportation laws and quota systems that overtly benefit European immigrants.[32] Chapter 8 of the U.S. Code codified "illegal entry" and "illegal re-entry" in Sections 1325 and 1326, respectively, without further consideration of racial animus behind the 1929 legislation.[33] President Truman vetoed the INA of 1952 due to concerns about the Act's perpetuation of discriminatory practices and created a committee to review the implications of it.[34]

In 1953, the President's Commission on Immigration and Naturalization published a report entitled, "Whom We Shall Welcome" (the "Report"). The Committee warned that American deportation laws are "unreasonable" and deportation procedures are "inadequate."[35] The Report illustrated that in 1949, 1950, and 1951, Mexican noncitizen deportation comprised 84%, 50%, and

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[29] *Modern Immigration Wave Brings 59 Million to U.S., Driving Population Growth and Change Through 2065*, PEW RES. CTR. (September 28, 2015), https://www.pewresearch.org/hispanic/2015/09/28/chapter-1-the-nations-immigration-laws-1920-to-today/.

[30] 8 U.S.C. Ch. 12.

[31] *Id*.

[32] *Id*.

[33] *Id*.

[34] Message from the President of the United States to the House of Representatives, 82d Cong., 98 CONG. REC. 8o82 (1952).

[35] *Whom we Shall Welcome: Report of the President's Commission on Immigration and Naturalization*, July 1, 1953, at 194.

65% of all deportations in those years, respectively.[36] Additionally, the report showed that a majority of deportations were not for criminal misconduct but merely for entering without inspection or proper documentation.[37] The committee found the INA of 1952's use of deportation was "unnecessary and excessively severe" in many cases.[38] Regardless, Congress overrode President Truman's veto, and Section 1326 still governs illegal re-entry today.[39]

Since the INA of 1952, the use of deportation significantly increased. In 1954, Congress authorized "Operation Wetback" directly targeting undocumented Mexican immigrants. In all, Immigration Services deported or acquired voluntary removal of 801,069 undocumented Mexican immigrants within two years.[40] This trend continued throughout the decades. Within the 1950s, fewer than 2,000 people were prosecuted for illegal entry or re-entry.[41] Then, beginning in the 1960s, the government prosecuted around 10,000 people per year.[42] The Clinton Administration's "tough-on-crime" approach to immigration immediately followed by the Bush Administration's immigration enforcement campaign increased prosecution for unauthorized entry, reaching 50,000 prosecutions in 2008.[43] In 2018, immigration offenses were the majority of federally prosecuted

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[36] *Id*. at 195
[37] *Id*. at 196
[38] *Id*. at 200-206
[39] Alicia Campi, *The McCarran-Walter Act: A Contradictory Legacy on Race, Quotas, and Ideology*, Immigration Policy Center (June 2004), https://www.americanimmigrationcouncil.org/sites/default/files/research/Brief21%20-%20McCarran-Walter.pdf.
[40] Ngai, *supra* note 16, at 156.
[41] Jesse Franzblau, *A Legacy of Injustice: The U.S. Criminalization of Migration,* The Nat'l Immigration Justice Ctr. (July 2020), https://immigrantjustice.org/LegacyofInjustice.
[42] *Id*.
[43] *Id*.

crimes.[44] U.S. deportation laws have not changed in almost a century, yet prosecution for these offenses exponentially increased since Congress prohibited racial requirements for immigrants to migrate and naturalize in the United States.[45]

B. Noncitizens' constitutional protections and the Arlington Heights *standard*

Over a century of case law affirms that the United States Constitution affords noncitizens several rights while physically on U.S. soil.[46] Some rights are restricted to citizens only, but rights referring to "persons" or "people" rather than "citizens" in the Constitution are rights for all people in American jurisdiction.[47] Some of these rights afforded to all people include the freedoms of the First Amendment, protection against unreasonable search and seizure under the Fourth Amendment, the right to due process under the Fifth Amendment, and the right to legal counsel under

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[44] Mark Motivans, *Federal Justice Statistics, 2017-2018, Department of Justice*, Office of Justice Programs, BUREAU OF JUSTICE STATISTICS (April 2021), https://bjs.ojp.gov/content/pub/pdf/fjs1718.pdf (noting that in 2018, 65% of all federal arrests were heard in five federal judicial districts along the United States-Mexican border.). *See also Prosecuting People for Coming to the United States*, AM. IMMIGRATION COUNCIL (Aug. 23, 2021), https://www.americanimmigrationcouncil.org/research/immigration-prosecutions (asserting that in 2017, prosecutions under Sections 1325 and 1326 doubled from 53,614 charges in 2018 to 91,896 charges. In 2019, both laws reached peak prosecution at 106,312 total charges).

[45] *Prosecuting People for Coming to the United States*, AM. IMMIGRATION COUNCIL (Aug. 23, 2021), https://www.americanimmigrationcouncil.org/research/immigration-prosecutions This publication also explains that in 2018, noncitizens made up of a little under half of all prosecuted defendants in United States District Courts. Additionally, 31% of all defendants of all crimes charged in all United States District Courts were from Mexico.

[46] *See* Yick Wo v. Hopkins, 118 U.S. 356 (1886); Wong Wing v. United States, 163 U.S. 228 (1896); Plyler v. Doe, 457 U.S. 202 (1932); Reno v. Flores, 507 U.S. 292 (1993).

[47] *Id*.

the Sixth Amendment.[48] In 1886, the Supreme Court additionally held that the Equal Protection Clause of the Fifth and Fourteenth Amendments ("Equal Protection") apply to all people in the United States "without regard to differences of...nationality."[49]

The Equal Protection Clause of the Fifth Amendment reads "no *person* can be deprived of life, liberty, or property without due process," yet these protections are unclear in the context of distinctions based on nationality or national origin.[50] For example, a citizen may never face deportation for criminal charges or other egregious behavior, yet noncitizens can.[51] The courts recognize this difference in treatment as permissible and afford the federal government considerable difference to uphold the "plenary power" of the Executive Branch over immigration.[52] This allows Congress to make rules that would otherwise blatantly "violate a citizen's Constitutional rights."[53]

The plenary power doctrine began as an absolute federal power over borders and immigration law.[54] Case law suggests two reasons as to why political branches need plenary power of immigration.[55] The first rationale is that immigration power is a sovereign right because international law grants unbridled power to

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[48] U.S. CONST. amend. I*; Id.* amend. IV; *Id.* amend. V; *Id.* amend. VI.
[49] *See* U.S. CONST. amend. V*; Id.* amend. XIV; and *Yick Wo*, 118 U.S. at 238.
[50] U.S. CONST. amend. V (emphasis added). *See also* David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights As Citizens?*, 25 T. JEFFERSON L. REV. 367-88 (2003).
[51] *See generally Two Systems of Justice*, AM. IMMIGRATION COUNCIL (March 2013), https://www.americanimmigrationcouncil.org/sites/default/files/research/aic_twosystemsofjustice.pdf.
[52] Mathews v. Diaz, 426 U.S. 67 (1976).
[53] Mathews v. Eldridge, 426 U.S. 319 (1976).
[54] Adam B. Cox, *Citizenship, Standing, and Immigration Law* 92 CALIF. L. REV. 373, 384 (2004).
[55] *Id*. at 384-385.

countries to regulate their borders.[56] The second rationale is that the Constitution does afford the federal government unlimited power over immigration through congressional and presidential duties to international relations and national security.[57] The courts have affirmed and mixed both rationales frequently to create a jurisprudence on non-justiciability "to a highly deferential standard of review."[58] In *Harisiades v. Shaughnessy*, the U.S. Supreme Court afforded Congress an *almost* absolute power over immigration law when it held immigration statutes are "*largely* immune from judicial inquiry or interference."[59]

The *Harisiades* decision nearly converted immigration law into a political question, but left the question open for future interpretation. Ultimately, this question, however, has still not been addressed in the twentieth century by the courts. In *Kleindienst v. Mandel*, the Supreme Court affirmed Congress' power to exclude noncitizens because such power is "inherent in sovereignty, necessary for...defending the country against foreign encroachments and dangers—a power to be exercised exclusively by the political branches of the government."[60] In *United States v. Hernandez-Guerrero*, the defendant tried to narrow Congress' power over immigration and the high deference it afforded. He contended that Congress only possessed "sweeping" authority over civil statutes regarding immigration and does not possess this same

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[56] *Id*. at 385.

[57] *Id*. quoting The Chinese Exclusion Case, 130 U.S. at 609 (stating that the power over immigration is "delegated by the constitution"). See also *See generally* U.S. CONST. art. I §8 cl.18.; U.S. CONST. art. II §3.

[58] Shalini Bhargava Ray, *Plenary Power and Animus in Immigration Law* 80 OHIO ST. L.J. 13, 30 (2019).

[59] *Harisiades v. Shaughnessy*, 342 U.S. 580, 589, 72 S. Ct. 512, 519 (1952) (emphasis added).

[60] Kleindienst v. Mandel, 408 U.S. 753, 765 (1972), *quoting* The Chinese Exclusion Case, 130 U.S. 581, 609 (1889), and in Fong Yue Ting v. United States, 149 U.S. 698 (1893).

power in criminal law.[61] The Court denied this contention by finding that congressional control of immigration law pertains to any type of law that promotes civil compliance with immigration processes of the United States.[62] Plenary power creates a significant barrier for the judicial system to review immigration decisions. Federally, the courts refuse to officially define the standard of review it may use because it must permit considerable deference.[63]

Within the past five years, however, courts began reviewing federal immigration laws under a new standard of review. For example, in *Regents of the University of California v. U.S. Dep't of Homeland Security*, the Ninth Circuit held that judicial review promotes accountability within the Executive Branch, and with "substantially [great] evidence of discriminatory motivation," a heightened standard of review should apply.[64] The Ninth Circuit reviewed the precision of the Deferred Action for Childhood Arrivals Program ("DACA") under the discriminatory intent review laid out in *Arlington Heights*, finding that the plaintiff had a valid Equal Protection claim.[65] The Supreme Court affirmed that *Arlington Heights* review may apply to immigration statutes.[66]

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[61] United States v. Hernandez-Guerrero, 147 F.3d 1075, 1076 (9th Cir. 1998), *quoting* Catholic Social Servs. v. Reno*,* 134 F.3d 921, 927 (9th Cir. 1998).
[62] *Hernandez-Guerrero*, 147 F.3d. at 1077.
[63] Mathews v. Diaz, 426 U.S. 67 (1976); *see also* Trump v. Hawaii 138 S. Ct. 2392 (2018) (the courts applied rational basis review when decided the President may order travel bans to protect national security so it could be assumed this is the correct standard of review for federal alienage classification).
[64] Regents of the Univ. of Cal. v. United States Dep't of Homeland Sec., 908 F.3d 476, 520 (9th Cir. 2018).
[65] *Id*. at 522.
[66] Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020).

Regents created a new avenue to challenge broad—and seemingly absolute—immigration laws at the source of their creation rather than the application of those laws to individual cases. *Arlington Heights* is slowly gaining acceptance within many court systems as an acceptable review standard.[67] Under this standard, the moving party must prove (1) disparate impact; and (2) that "racially discriminatory intent or purpose" was a "motivating factor in the decision."[68] This standard allows the court to look into the intent of a statute's creation and its impact on one insular community compared to others, rather than afford the federal government almost unreviewable power.[69]

Though the courts are beginning to review immigration statutes under *Arlington Heights*, moving parties are failing to meet their burden.[70] The issue that continues to arise is regarding the "intent doctrine". The idea of an intent doctrine in Equal Protection jurisprudence began after cases like *Brown v. Board of Education* where facially neutral lawmakers could still not be held legally

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[67] *See generally* Washington v. United States Dep't of Homeland Sec., No. 4:19-CV-5210-RMP, 2020 U.S. Dist. 251197, 1 (E.D. Wash. Sep. 14, 2020) (accepting *Arlington Heights* as an applicable standard of review for the 8 U.S.C. § 1182(a)(4)(A) new definition of who to exclude from immigration status due to their likelihood to become a "public charge"); United States v. Rios-Montano, No. 19-CR-2123-GPC, 2020 U.S. Dist. 230122, 13 (S.D. Cal. Dec. 7, 2020) (accepting *Arlington Heights* as an acceptable standard of review for 8 U.S.C. § 1325); Ramos v. Wolf, 975 F.3d 872, 896 (9th Cir. 2020) (reaffirming *Arlington Heights* as a proper standard of review for immigration decisions of noncitizens on American soil).

[68] *Village of Arlington Heights v. Metropolitan Housing Development Corp*., 429 U.S. 252 (1977).

[69] *Regents*, 908 F.3d at 518-519; citing *Village of Arlington Heights*, 429 U.S. 252.

[70] In cases such as *United States v. Rios-Montano* and *Ramos v. Wolf*, the defendants failed to meet their burden under *Arlington Heights*. *See* cases cited *supra* note 67. *Washington v. United States Dep't of Homeland Sec.* and *Regents* sufficiently met its burden under *Arlington Heights* to survive a motion to dismiss.

accountable for racially charged statutes.[71] In *Washington v. Davis*, the Court famously held that "racially discriminatory purpose"—not "racially disproportionate impact"—was the standard demanded under Equal Protection.[72] A year later, *Arlington Heights* affirmed this demand and held that government action with discriminatory results does not violate Equal Protection unless discrimination was a "motivating factor."[73] Both *Davis* and *Arlington Heights* made one legal decision very clear: courts prioritized intent of discrimination over impact in reviewing facially neutral government actions.

Personnel Administrator of Massachusetts v. Feeney further narrowed the intent doctrine by focusing on proving the subjective willful action of the government.[74] Such decisions were a major blow to noncitizens' Equal Protection rights. A narrow scope of intent coupled with plenary power creates a next-to-impossible standard to prove.[75] *Regents* gave hope that the Court was willing to finally review not only subjective intent, but objective intent as well.[76] This broadened scope of review was desperately needed for any noncitizen to win a challenge under *Arlington Heights*. However, *Arlington Heights* still poses an

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[71] Katie R. Eyer, *Ideological Drift and the Forgotten History of Intent* 51 HARV. C.R-C.L. L. Rev. 1, 4 (2016).

[72] *Id*. at *50 quoting Washington v. Davis (the Court held that government discrimination is only found within).

[73] *Village of Arlington Heights*, 429 U.S.at 264-265.

[74] *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279, 99 S. Ct. 2282, 2296 (1979) (the majority held that the government must have acted 'because of', not merely 'in spite of' its adverse effects upon an identifiable group.

[75] Adam B. Cox, *Citizenship, Standing, and Immigration Law* 92 CALIF. L. REV. 373, 383-386 (2004) (explaining that Equal Protection challenges in immigration law are reviewable to an extent and do not fall under issues of standing nor political questions).

[76] William D. Araiza, *Regents: Resurrecting Animus/Renewing Discriminatory Intent* 51 Seton Hall L. Rev. 983, 1021-1023.

impossible form of Equal Protection review for migrants due to its circular logic.

On June 16, 2021, The Virgin Islands District Court heard *United States v. Wence*, in which defendant Wence argued that 8 U.S.C. § 1326 violated the Equal Protection Clause under *Arlington Heights*.[77] Though the court agreed that *Arlington Heights* is an applicable standard of review for Section 1326, the court ultimately found that the defendant did not meet his burden.[78] The defendant focused on proving the original enactment of Section 1326 violated Equal Protection in 1929. The court held that the intent in 1929 was not applicable for review because illegal re-entry was reenacted in 1952 without proof of discriminatory intent.[79] Importantly, the court did recognize that "past discrimination does not flip the evidentiary burden on its head," and found that Section 1326 was motivated in part by a discriminatory purpose.[80] This, however, did not surmount to enough evidence of discriminatory intent.[81]

Only two months later, the District Court for the District of Oregon reviewed a similar challenge to Section 1326 in *United States v. Machic-Xiap*.[82] The court reviewed an extensive historical record, finding that the Act of 1929 served "racist purposes" and identified evidence of racism within the 1952 reenactment.[83] Ultimately, the court held "strong and disconcerting" evidence of racial animus in the enactment of several immigration laws was not enough to show specific racial motivation to enact Section 1326,

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[77] *United States v. Wence,* No. 3:20-cr-0027, 2021 U.S. Dist. 112805, 2 (Dist.Vir.I. June 16, 2021).
[78] *Id*. at 4
[79] *Id*. at 11-14
[80] *Id*., *citing Abbott v. Perez*, 138 S. Ct. 2305, 2325 (2018).
[81] *Id*. at 28.
[82] *United States v. Machic-Xiap*, No. 3:19-cr-407-SI, 2021 U.S. Dist. 145037 (D. Or. Aug. 3, 2021).
[83] *Id*. at 32-33.

nor impede upon the Executive Branch's plenary power over immigration.[84]

C. The Carrillo-Lopez *Decision*

As the District Courts of the Virgin Islands and Oregon denied Equal Protection claims of both Wence and Machic-Xiap, respectively, defendant Gustavo Carrillo-Lopez also submitted a similar claim in the United States District Court of Southern Nevada.[85] Conversely, on August 18, 2021, two months after *Wence* and less than one month after *Machic-Xiap*, Chief Judge Du found for Carrillo-Lopez and granted his motion to dismiss under *Arlington Heights*.[86]

The past half-decade crept around judicial review of immigration statutes. Then, in 2021, the *Carrillo-Lopez* decision officially addressed the issue. In the case, defendant Gustavo Carrillo-Lopez was indicted on one count of illegal reentry after deportation under Section 1326 in June of 2020.[87] In litigation, Carrillo-Lopez attacked Section 1326 for its racist history and disproportionate impact on Mexican and Latino noncitizens.[88] He filed a motion to dismiss on Equal Protection grounds under the standard in *Arlington Heights,* which was ultimately granted.[89]

The court affirmed the *Arlington Heights* standard, following contemporary case law like *Regent* and *Wolf*.[90] Unlike other Section 1326 Equal Protection arguments, *Carrillo-Lopez* presented comprehensive testimony that analyzed historical background, the legislative and administrative history of Section 1326, Congress' departure from normal procedure, and the

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[84] *Id*. at 4.
[85] *Carrillo-Lopez*, 2021 U.S. Dist. 155741 at 1.
[86] *Id*. at 2-3.
[87] *Id*. at 3
[88] *Id*. at 10.
[89] *Id*. at 9.
[90] *Id*. at 4.

disparate racial impact of the law.[91] While past cases focused solely on small pieces of historical context or legislative intent, *Carrillo-Lopez* reviewed the larger problem of racism in American immigration law by comprising several smaller pieces of evidence together to show one larger picture of discrimination based on race.[92] Ultimately, the court held the government's claims unpersuasive for both prongs under *Arlington Heights*.[93] Under the disparate impact analysis, the court found that the geographic location of Mexico and Latin countries' proportionality were not valid reasons to discriminate.[94] Under the intent prong, the court found evidence that Section 1326 was not "cleansed" in 1952.[95] The lack of debate over Section 1326, contemporary remarks and actions by decision makers, and explicit concerns of the President at the time proved that discrimination was a motivating factor in its reenactment. [96]

III. Discussion

Judge Du delivered a decision in *Carrillo-Lopez* that is unsurprisingly unpopular by critics. Unpopular decisions, however, are not always bad decisions. Other courts should not be afraid to follow *Carrillo-Lopez* precedent as the reasoning approaches the legislative intent holistically. This decision created a functional discriminatory intent review under *Arlington Heights* without hindering the power of plenary power. However, the *Carrillo-Lopez* decision can also be interpreted as a subtle nod to judicial review of immigration decisions and encourage more courts to hold the political branches of government accountable for racially charged policy.

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[91] *Id.* at 7.
[92] *Id.* at 49.
[93] *Id.*at 11.
[94] *Id*. at 50.
[95] *Id*. at 24.
[96] *Id*.

A. Holistic Approach to Discriminatory Intent

Arlington Heights set a standard that, construed liberally, provides several avenues of obtaining evidence in favor of proving a moving party's contention.[97] However, there are barriers to the uniform application of this standard. First, the Supreme Court made evidence of disparate impact useless on its own and pivoted Equal Protection challenges to focus on discriminatory intent.[98] Second, the Supreme Court has never defined "discriminatory intent" and what that explicitly looks like.[99] Third, the review of discriminatory intent varies across different policy contexts, especially within immigration. Additionally, the burden to prove discriminatory purpose increases when the statute in review falls under both legislative and executive's plenary power, like immigration.[100]

Regents painfully reminded the legal community just how much deference the Supreme Court affords the Executive Branch in immigration law.[101] The Court found the termination of DACA was arbitrary and capricious but not on the Equal Protection challenge.[102] Within the five paragraphs discussing Equal Protection, the Court explained the evidence was insufficient to

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[97] *Village of Arlington Heights*, 429 U.S.at 267-268. Here, the Court explained that motivation can be proven by numerous factors, like the historical background of the decision, departures from normal procedures, legislative and administrative history, contemporary statements by members of the decision-making body, and a specific series of events leading up to the challenged action. The Court affirmed that the factors listed in this decision are persuasive, but not exhaustive.

[98] *Id*. at 271. (The court here found that the "ultimate effect" of a policy was racially discriminatory; there must be proof of government or state actor "discriminatory intent" was required.); *see generally Washington v. Davis*, 426 U.S. 229, 242 (1976).

[99] Aziz Z. Huq, *What is Discriminatory Intent?* 103 CORNELL L. REV 1211, 1212 (2018).

[100] *Id*. at 1279.

[101] *Regents*, 140 S. Ct. 1891 at 1915.

[102] *Id*.

find for an Equal Protection claim because the Court refused to apply then-President Trump's public ridicule of immigrants as evidence of discriminatory intent and only considered evidence of unusual history behind The Department of Homeland Security's decision to rescind DACA in its analysis.[103] The Court ultimately ended its discussion on Equal Protection by declining to consider President Trump's discriminatory remarks against Latinos as "contemporary statements" probative of the decision at issue.[104] This decision affirmed two contentions. First, the Court continues to apply a holistic approach to discriminatory intent that encompasses all factors the *Arlington Heights* decision allows. Second, discriminatory intent is impossible to prove when the Court provides an incredibly high allowance of deference in immigration decisions.

Defendants raising Equal Protection challenges against Section 1326 have been cognizant of this hesitation and attempt to argue for judicial review due to an overwhelming amount of evidence of animus. *Wence*, *Machic-Xiap*, and *Carrillo-Lopez*, the district courts differed as to what similar presentations of evidence showed.[105] In *Wence*, the court held that Section 1326 was partially motivated by racist motives, but that the reenactment in 1952 weakened the defendant's argument.[106] In *Machic-Xiap*, the court found strong evidence that both the 1929 enactment of Section 1326 and the reenactment in 1952 served a racist purpose, yet found the evidence was not strong enough to address the Executive Branch's plenary power.[107] Then, in *Carrillo-Lopez*, the court found that numerous pieces of evidence sufficiently composed a larger picture of discriminatory intent in the enactment and

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[103] *Id*. at 1915-1916.
[104] *Id*. at 1916.
[105] *See generally Wence*, 2021 U.S. Dist. 112805, *Machic-Xiap*, 2021 U.S. Dist., and *Carrillo-Lopez*, 2021 U.S. Dist. 155741.
[106] *Wence*, 2021 U.S. Dist. at 30.
[107] *Machic-Xiap*, 2021 U.S. Dist. 145037 at 42-43.

reenactment of Section 1326.[108] This inconsistent application of *Arlington Heights* illuminates the confusion lower courts face when reviewing immigration laws for discriminatory intent.

By ruling in favor of the defendant, the *Carrillo-Lopez* court is in a slim minority. The court's application of *Arlington Heights* correctly establishes discriminatory intent, though critics find this application negligent to the plenary power doctrine. The deference the Judicial Branch affords the other branches of government should not blind the courts to a prominent issue. Case law shows an affirmative trend in the past century that America affords Constitutional guarantees to noncitizens on American soil, including the right to Equal Protection.[109] However, when the courts refuse to review legislative intent of re-enactment, like in *Wence*,[110] nor hold the legislature accountable even after finding wrongdoing, like in *Machic-Xiap*, the judiciary abrogates its duty to give noncitizens a complete right to Equal Protection.[111] Instead, the courts provide a "quasi-protection" that is inconsistent with case law.[112] The courts must find a way to assure Equal Protection

[108] *Carrillo-Lopez*, 2021 U.S. Dist. at 63.
[109] *Supra* note 48.
[110] *Wence*, 2021 U.S. Dist. at 30-31.
[111] *Machic-Xiap*, 2021 U.S. Dist. at 2-3.
[112] See *Yick Wo v. Hopkins*, 118 U.S. 356 at 370. In the opinion, Justice Matthews affirmed an equal legal application of the law to immigrants when he wrote, "…there must always be lodged somewhere, and in some person or body, the authority of final decision; and in many cases…the responsibility is purely political…But the fundamental rights to life, liberty, and the pursuit of happiness…are secured by those maxims of constitutional law…[secure] to men the blessings of civilization under the reign of just and equal laws…[f]or, the very idea that one man may be compelled to hold his life…at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

principles equitably to an insular minority while balancing these interest against the decisions of elected officials.[113]

A holistic, comprehensive approach to reviewing discriminatory intent in an immigration context could help the courts maneuver the space between the Equal Protection, Due Process, and Plenary Power. The *Carrillo-Lopez* decision shows that, when combined, smaller pieces of evidence (though insufficient individually) may be sufficient to show blatant discrimination.[114] Though this review yielded a favorable opinion for the defendant, the district court should have been able to make its decision with more ease and less criticism. Courts should be able to review intent under a more modern framework within immigration law without fear of negating case law. Plenary power over immigration law has ultimately led to racially motivated statutes that remained unchecked for over a century.

A new vision of the intent doctrine must be explored for immigration law. *Washington v. Davis* sharply severed the importance of impact and emphasized determining intent.[115] Intent is wily and easily concealed, as seen in the government's arguments of "reenactment cleansing" for Section 1326.[116] The

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[113] *United States v. Carolene Products Co*., 304 U.S. 144, 152 n.4 ("a more stringent standard of review might apply to statutes "directed at particular religious or racial minorities . . . [because] prejudice against discrete and insular minorities may be a special condition, which tends to seriously curtail the operation of those political processes ordinarily to be relied on to protect minorities."

[114] *Carrillo-Lopez*, 2021 U.S. Dist. at 49 (also stating that the Southern District of Nevada recognizes that proving discriminatory intent is "difficult—in fact, unprecedented", but considered as a whole, "the evidence indicates discriminatory intent on the part of the 1952 Congress").

[115] *Washington v. Davis*, 426 U.S. 229, 242 (1976).

[116] *Carrillo-Lopez*, 2021 U.S. at 49.

courts shy away from even considering what racist intent looks like when not explicitly written down.[117]

However, this notion of racism as explicit retaliation is not wholly accurate.[118] The *Carrillo-Lopez* decision invoked a new era of analysis by implying a discussion of systemic and implicit racism. The opinion never clearly identified systematic and implicit racism as a reason for its ruling, but this approach helps show why *Carrillo-Lopez* came to such a different conclusion from *Wence*. When reviewed through an implicit intention framework, the *Carrillo-Lopez* decision logically proves racist intent in the enactment of Section 1326, unlike the narrow approach in *Wence*.

A major theme of Equal Protection—and the *Arlington Heights* decision—is the goal of protecting minorities who cannot politically protect themselves.[119] To achieve this, the court must look beyond outward animus and look to subtle or implicit acts of racism.[120] In "*The Id, the Ego, and Equal Protection*," the author suggests that courts review the government's conduct for its

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[117] *Machic-Xiap*, 2021 U.S. Dist. at 2-3. (Where the court explicitly found racial animus in the 1952 reenactment of Section 1326 yet refused to rule in favor of the defendant). *See also* Trump v. Hawaii, 138 S. Ct. 2392, 2422 (2018) (Sotomayor, J., dissenting) (asserting the court's deference allows the government to abuse its' discretion).

[118] Julia Kobick, *Discriminatory Intent Reconsidered: Folk Concepts of Intentionality and Equal Protection Jurisprudence* 45 HARV. C.R.-C.L.L. REV. 517, 520 (2010).

[119] *United States v. Carolene Products Co*., 304 U.S. 144, 152 n.4; *See also* the Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism* 39 STANFORD L. REV. 317, 347 (2008). (explaining how distortion exists where the unconstitutional motive of racial prejudice has influenced the decision and it does not matter whether the decision-maker is aware of her bias).

[120] Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism* 39 STANFORD L. REV. 317, 356 (2008).

"cultural meaning."[121] Repression of racist expression attaches to other decisions and conveys "symbolic messages to which the culture attaches racial significance."[122] To identify conduct that is intertwined with racist intent, the court must implement a holistic review of other decisions. This will help display where racism played an evident role in decision making.

Carrillo-Lopez reviewed the evidence that comprehensively showed the symbolic meaning of Section 1326 to Congress in 1952. To begin, Congress reviewed immigration laws in 1952 likely because of ridicule on the world stage.[123] Congress likely attempted to repress racist thoughts and ideology due to societal pressure; however, *Carrillo-Lopez* points out numerous ways where these thoughts and feelings are exposed in other decisions this Congress also made. For example, Congress minimally discussed Section 1326 compared to "robust" debates over several other immigration statutes.[124] This silence is not explicitly proof of racism or bias, but the *Carrillo-Lopez* decision points to several other decisions made by the same members of Congress that do show decisions motivated by racist beliefs, implicit or explicit. First, the quota systems that Congress maintained still marginally favored white-European countries.[125] Second, President Truman's veto and the committee report created on the country's immigration laws explicitly showed genuine concern that Congress did not actually make immigration statutes better, but instead reenacted "unreasonable" and "inadequate" statutes.[126] Still, even with the political branches in conflict, Congress overrode Truman's veto without any discussion of race

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[121] *Id.*
[122] *Id.*
[123] Miller, *supra* note 27.
[124] *Carrillo-Lopez*, 2021 U.S. Dist. at 24-25.
[125] Pub. L. No. 82-414.
[126] *Whom we Shall Welcome: Report of the President's Commission on Immigration and Naturalizatio*n, *supra* note 35.

the reasoning behind the harsh deportation laws.[127] Ultimately, the court in *Carrillo-Lopez* revealed several layers of implicit or subtle racism that was not addressed by earlier decisions.

The *Carrillo-Lopez* decision paralleled the *Arlington Heights* application regarding the 1929 enactment but approached the 1952 reenactment analysis in a less traditional way. Opening a review to a discussion of implicit and systematic racism would help strengthen the logic *Carrillo-Lopez* used to prove racist purpose for the reenactment of 1952. The usage of this factor, however, is slim. Many courts are reluctant to analyze the subconscious of politicians, especially in the immigration context. The overarching issue in the Equal Protection review of immigration laws stems, not from what factors courts review, but from the plenary power doctrine that narrows the scope's discretion.

B. Carrillo-Lopez*'s Nod to Judicial Review in Immigration Law*

The *Carrillo-Lopez* decision addressed a constitutional issue within immigration law that other courts declined to review. Cases such as *Chae Chan Ping*, *Nishimura Ekiu*, and *Fong Yue Ting* established the precedent that immigration decisions are wholly political and not for the courts to question.[128] The courts'

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[127] *Memoranudum, "Discussion of Points of Objections to Certain Provisions of S. 2550 Raised in White House Memorandum Truman Library*
"https://www.trumanlibrary.gov/library/research-files/memoranudum-discussion-points-objections-certain-provisions-s-2550-raised?documentid=NA&pagenumber=6.

[128] *United States v. Chae Chin Ping* ("The Chinese Exclusion Act"), 130 U.S. 581 (1889) (the Court affirmed Congress had the power to create immigration statutes even when they conflicted with international treaties because the national government enjoys plenary and sovereign right to its borders). *See also Nishimura Eiku v. United States*, 142 U.S. 651 (1892) (the court found the political branches are allowed to make final decisions on immigration law without a right to judicial review); *see also* Fong Yue Ting v. United States, 149 U.S. 698 (1893) (the Court held that

minimal involvement in immigration has resulted in numerous racist immigration laws that are not afforded judicial review. This deference allowed certain foreign nationals to obtain United States citizenship while others were excluded from American soil because their race was "undesirable."[129]

The plenary power doctrine slowly engulfed immigration law with hardly a protest from the courts. Within the past couple of decades, the courts began to insert themselves more frequently and apply semi-constitutional norms into immigration cases through different avenues, like civil rights claims against removal.[130] The modern increase in judicial intervention, though more sympathetic to noncitizens, is running up against a wall of plenary power case law. With this barrier, the courts lack avenues of review and, therefore, defer to the political branches.

In *Carrillo-Lopez,* the court opposed unbridled deference towards legislative acts, which directly conflicts with the decision

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the political branches of government may exercise its plenary power in immigration in any way it seems fit without judicial review even when immigration statutes would not be constitutional to citizens).

[129] *See generally* Pub. L. No. 70-1018, ch. 690, § 2, 45 Stat. 1551 ("Undesirable Aliens Act of 1929"). *See also* 69th Cong. Rec., pg. 2818 (where House Representative John Box, an outspoken support of the Undesirable Alien Act, said, "One purpose of our immigration laws is to prevent the lowering of the ideals and the average of our citizenship…the weakening of the Nation's powers of cohesion, resulting from the intermixing of differing races. The admission of 75,000 Mexican peons annually tends to aggravate this, another evil which the laws are designed to prevent or cure.").

[130] Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE LAW JOURNAL 545, 564 (1990). The phenomena of semi-constitutional decisions, otherwise known as "phantom norms" was the court's way of interjecting constitutional norms to inform statutory interpretation, which were not actually applied because of the plenary power doctrine.

in *Mandel*.[131] This is not inappropriate since contemporary case law chips away at the idea that deference is absolute against the legislature. *Regents*, for example, upheld the notion that Equal Protection claims against immigration statutes are judicially reviewable.[132] However, to *effectively* review these challenges, the courts must be afforded a greater ability to review constitutional claims by noncitizens.

Cases like *Chae Chan Ping*, *Ekiu*, and *Fong Yue Ting* are continuously cited to uphold plenary power, yet rarely cited to emphasize what happens when political power goes unchecked. History repeats and contemporary plenary power illustrates this. Recent Executive Administrations and sessions of Congress exemplify the government's unbridled ability to implement unreviewable, facially neutral policies that create lasting harm to Mexican and Latino noncitizens.

On May 7, 2018, the Department of Justice ("DOJ") implemented a "zero-tolerance" policy (the "Policy") towards any noncitizen that crossed a border into the United States illegally. This policy allowed the Department of Homeland Security ("DHS") and DOJ to enforce deportation proceedings against any person not in the U.S. legally, even if claiming asylum.[133] The

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[131] *Kleindienst v. Mandel*, 408 U.S. at 781 (limiting Executive decisions in immigration but affirms broad deference to legislative acts).

[132] *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. at 1916.

[133] William A. Kandel, *The Trump Administration's "Zero Tolerance" Immigration Enforcement Policy*, CONGRESSIONAL RESEARCH SERVICE (Updated Feb. 2, 2021), https://sgp.fas.org/crs/homesec/R45266.pdf. The "zero-tolerance" policy substantially decreased the use of "catch-and-release" where asylum seekers may be released to search for legal representation to aid in their asylum claims in front of immigration officials and judges. See also Justin Rivera, *The Impact of the "Zero-Tolerance" Policy on Asylum Seekers*, REDDY & NEUMANN P.C. (June 25, 2018), https://www.rnlawgroup.com/617-the-impact-of-the-zero-tolerance-policy-on-asylum-seekers/. Many critics of the "zero-tolerance" policy condemn

Policy significantly broadened the power of US attorneys' offices to criminally prosecute migrants at the border that enter without U.S. authorization. Ultimately, the past administrations authorized harmful policies for prosecuting illegal entry and reentry, like Operation Streamline, but Trump's "zero-tolerance" policy increased penalization for asylum seekers and parents traveling with children.[134]

The residual effect of the Policy has been devastating. More than 3,900 children were separated before the Policy was revoked by the Biden Administration in 2021.[135] Less than half of these children have been recorded as reunited with their families to date.[136] One of the most startling issues within the Policy is the lack of accountability.[137] The 115th and 116th Congressional Sessions introduced several immigration bills to aid in family

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the detention of asylum seekers, which may impede the asylum-seekers ability to retain appropriate counsel and spend sufficient time working on their case.

[134] Justin Rivera, *The Impact of the "Zero-Tolerance" Policy on Asylum Seekers*, REDDY & NEUMANN P.C. (June 25, 2018), https://www.rnlawgroup.com/617-the-impact-of-the-zero-tolerance-policy-on-asylum-seekers/; *see generally* Donald Kerwin & Kristen McCabe, *Arrested on Entry: Operation Streamline and the Prosecution of Immigration Crimes*, MIGRATION POLICY INSTITUTE (April 29, 2010) https://www.migrationpolicy.org/article/arrested-entry-operation-streamline-and-prosecution-immigration-crimes/.

[135] Myah Ward, *At Least 3,900 Children Separated From Families Under Trump 'Zero-Tolerance' Policy, Task Force Finds*, POLITICO (June 8,2021) https://www.politico.com/news/2021/06/08/trump-zero-tolerance-policy-child-separations-492099.

[136] *Id*. (Only about 1,800 children have been reunified with their families, 400 have been sent back to their origin country, and there is no record of reunification for about 2,100 families).

[137] Suzanne Gamboa, *'White Supremacy' was Behind Child Separations – and Trump Officials Went Along, Critics Say*, NBC NEWS (Aug. 22. 2020) https://www.nbcnews.com/news/latino/white-supremacy-was-behind-child-separations-trump-officials-went-along-n1237746.

reunification, yet none saw congressional action.[138] In fact, in the middle of family separation actions, there were multiple bills introduced to further increase immigration enforcement and child detainment.[139]

The Policy demonstrated a powerful imbalance in the political powers' ability to check each other. Judicial review would aid in the equal enforcement of immigration law because cases like *Chae Chan Ping* reveal plenary power's dangerous ability to mistreat and harm powerless communities in the political process. The decision of *Carrillo-Lopez, ultimately,* asserts itself firmly on the side of constitutional intervention and affirming rights to noncitizens while on American soil.

Conclusion

Discrimination in immigration law has been called "segregation's last stronghold".[140] The history of racism within the United States is sharply illustrated in immigration cases and statutes. The Chinese Exclusion Act of 1889 illuminated the animosity Americans had towards non-Western European people, and the Zero Tolerance Policy in 2018 reveals that not much changed in the past two centuries. The United States District Court of Nevada in *United States v. Carrillo-Lopez* addressed the animus of Congress towards Mexican and Latin American noncitizens

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[138] William A. Kandel, *The Trump Administration's "Zero Tolerance" Immigration Enforcement Policy*, CONGRESSIONAL RESEARCH SERVICE (Updated July 20, 2018), https://crsreports.congress.gov/product/pdf/R/R45266/7.

[139] *Id*. *See* Codifying President Trump's Affording Congress an Opportunity to Address Family Separation Executive Order Act, H.R. 6182, 115th Congress (2017-2018) and the Border Security and Immigration Reform Act of 2018, H.R. 6136 § 3102, 115th Congress (2018).

[140] Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 2 (1998).

both in 1929 and in 1952 when it found Section 1326 unconstitutional on Equal Protection grounds.

The decision in *Carrillo-Lopez* is not controlling, nor does it change precedent within immigration law. ICE continues to criminally charge and deport foreign nationals who re-enter the United States illegally after original removal proceedings. However, *Carrillo-Lopez* affords hope in an area of law that seems impossible to change and aligns with contemporary Equal Protection jurisprudence. The district court took *Village of Arlington* to new "heights" to afford noncitizens protections already guaranteed in prior case law. Other courts should adopt this reading and evaluate the prospective and practical consequences of Section 1326 in immigration law.