

UNITED STATES V. CARRILLO-LOPEZ IS TRANSFORMING IMMIGRATION LAW: WILL IT SURVIVE APPELLATE REVIEW?

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BACKGROUND

In *United States v. Carrillo-Lopez*, Judge Miranda M. Du declared 8 U.S.C. § 1326—which provides a felony for persons who have been deported to reenter the United States¹—an unconstitutional violation of the Fifth Amendment’s Equal Protection Clause.² Defendant Gustavo Carrillo-Lopez was indicted on one count under § 1326, but instead of denying the charge brought against him, he attacked the statute as a violation of the Equal Protection Clause of the Constitution.³

A statute can violate the Equal Protection Clause in three ways.⁴ First, where a law is clearly discriminatory—that is, it discriminates “on its face.”⁵ Second, law makers can apply a facially neutral law in a discriminatory manner.⁶ Third, there can be a facially neutral law that was both enacted with a discriminatory purpose and disparately impacts a protected class.⁷ Carrillo-Lopez relies on the third approach. He argued that §1326 disparately impacts Mexican and Latinx persons and further, that it was enacted in 1952 with precisely this purpose.⁸ Carrillo-Lopez faced an up-hill battle given that Congress has plenary power over the admission of aliens and the complete and absolute power over the subject of immigration.⁹ Additionally, a similar attack on § 1326’s constitutionality failed fifteen days before the *Carrillo-Lopez* decision.¹⁰ Therefore, the question remains—although Carrillo-

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1. § 1326 punishes not only those who have been deported, but also those who have been denied admission, excluded, removed, or has departed the United States while an order of exclusion, deportation, or removal is outstanding. See Elie Mystal, *The Groundbreaking Decision That Just Struck a Blow to Our Racist Immigration Laws*, NATION (Oct. 14, 2021, 8:41 PM), perma.cc/798C-WHK3.

2. See § 1326; *United States v. Carrillo-Lopez*, 2021 WL 3667330, at *1 (D. Nev. 2021).

3. *Carrillo-Lopez*, at *1.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.* at *2.

9. *ArtI.S8.C18.4.2.1 Implied Power of Congress Over Immigration: Overview*, CONSTITUTION ANNOTATED (Jan. 25, 2022, 10:33 AM), perma.cc/SNR9-PEWD.

10. *United States v. Machic-Xiap*, 2021 WL 3362738 (D. Or. 2021).

Lopez's Equal Protection claim was successful in the district court, will the ruling survive appellate review?

I. DISPARATE IMPACT CLAIM

The *Arlington Heights* court held that for an Equal Protection claim using the disparate impact theory to be successful, the plaintiff must present evidence that “an official action . . . bears more heavily on one race than another.”¹¹ Pursuant to this standard, in *Carrillo-Lopez*, the court found that § 1326 does indeed disparately impact Mexican and Latinx individuals.¹² Citing statistics from the Department of Justice, the court offered that “over the course of a decade, well over 80% of border crossing apprehensions were those of Mexican or Latinx heritage.”¹³ For their part, the Government did not dispute that § 1326 bears more heavily on Mexican and Latinx people.¹⁴

II. DISCRIMINATORY INTENT CLAIM

In addition to disparate treatment—to violate the Equal Protection Clause under the *Arlington Heights* standard—the court must find that lawmakers had discriminatory intent in authoring § 1326.¹⁵ A finding of discriminatory intent includes an inquiry into factors such as (a) the historical background, (b) the legislative or administrative history, (c) the sequence of events leading to enactment, and (d) a departure by the state actor from procedural norms.¹⁶ If the movant can adequately demonstrate that a discriminatory intent was a motivating factor in the enactment of a statute, then the burden will shift to the government to establish that the same statute would have been enacted even had the impermissible purpose not been considered.¹⁷ Here, *Carrillo-Lopez* relied primarily on the historical background of §1326 and evidence such as pervasiveness of eugenics, the Juan Crow regime, and the racial epithets used in the “Wetback Bill.”¹⁸ The court in *Carrillo-Lopez* held that this evidence was sufficient to demonstrate discriminatory intent.¹⁹ However, the court does acknowledge that it “. . . is aware that proving discriminatory intent motivated the passage of a specific statute is difficult—in fact, unprecedented.”²⁰

11. See *Carrillo-Lopez*, 2021 WL 3667330, at *4 (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)).

12. *Id.* at *5.

13. *Id.* at *6.

14. *Id.*

15. *Id.* at *4.

16. *Id.*

17. *Id.*

18. *Id.* at *7, *10.

19. *Id.* at *5, *7.

20. *Carrillo-Lopez*, 2021 WL 3667330, at *20 (stating that only when taking the totality of evidence, defendant meets his burden).

Thus, the court ruled: given that two-pronged *Arlington Heights* test was satisfied, § 1326 was an unconstitutional violation of the Fifth Amendment's equal protection clause.²¹

III. WILL *CARRILLO-LOPEZ* WITHSTAND APPELLATE REVIEW?

There are two areas to examine when considering whether *Carrillo-Lopez* will withstand appellate review, should the Government choose to appeal the district court ruling. First, one telling inquiry is to purview prior case law on the constitutionality of § 1326. Second, case law litigated after *Carrillo-Lopez* is also a valuable query. While case law surrounding the general constitutionality of § 1326 prior to *Carrillo-Lopez* is sparse, there are two cases prior to *Carrillo-Lopez* that are significant: *United States v. Hernandez-Guerrero* and *United States v. Machic-Xiap*.²²

In 1998, the Supreme Court denied certiorari in consonance with the Ninth Circuit's holding in *Hernandez-Guerrero*, where the court held that § 1326's criminalization of reentry into United States by previously deported immigrants is a permissible exercise of Congress's "sweeping power over immigration matters."²³ The court also held that "over no conceivable subject is legislative power of Congress more complete than it is over the admission of aliens."²⁴ While the legal questions presented in *Carrillo-Lopez* and *Hernandez-Guerrero* are different, it is hard to ignore the Ninth Circuit's rigid interpretation of Congressional authority over immigration matters, particularly, when the *Carrillo-Lopez* court is located within the geographical bounds of the Ninth Circuit's voice.²⁵

Next, and relatedly, the court in *Carrillo-Lopez* relies on points made in *Machic-Xiap*, an Oregon district court case heard fifteen days before *Carrillo-Lopez*.²⁶ In *Machic-Xiap*, the court was faced with the same constitutional attack on § 1326.²⁷ Although the *Machic-Xiap* court heard arguments that were very similar to those before the *Carrillo-Lopez* court, the *Machic-Xiap* court held that defendant's attack on § 1326 was not strong enough because Machic-Xiap did not meet his burden on the discriminatory intent showing.²⁸ Moreover, the *Machic-Xiap* court offered that courts generally should not impose on § 1326; rather, Congress is the proper actor here.²⁹ The courts in *Carrillo-Lopez* and *Machic-Xiap* resolved the question of § 1326's

21. *Id.* at *25.

22. *See generally* *United States v. Hernandez-Guerrero*, 147 F.3d 1075 (9th Cir. 1998); *United States v. Valenzuela-Arisqueta*, 724 F.3d 1290 (9th Cir. 2013).

23. *Hernandez-Guerrero*, 147 F.3d at 1078.

24. *Id.* at 1076.

25. *Compare Carrillo-Lopez*, 2021 WL 3667330, at *2 (asking whether § 1326 violates Equal Protection principles), with *Hernandez-Guerrero*, 147 F.3d at 1076 (asking whether Congress has the power to criminalize reentry into the United States by a previously deported alien).

26. *See Carrillo-Lopez*, 2021 WL 3667330, at *1; *Machic-Xiap*, 2021 WL 3362738, at *1.

27. *Machic-Xiap*, 2021 WL 3362738, at *1.

28. *See Carrillo-Lopez*, 2021 WL 3667330, at*12, 19–20; *Machic-Xiap*, 2021 WL 3362738.

29. *Machic-Xiap*, 2021 WL 3362738, at *15.

constitutionality in opposite ways, giving the Ninth Circuit a district court split over this provision.³⁰

The second area to examine when considering whether *Carrillo-Lopez* will withstand appellate review is case law litigated after *Carrillo-Lopez*, which is now beginning to emerge. In *United States v. Sanchez-Felix*, litigated four months after *Carrillo-Lopez*, the defendant argued, similar to Carrillo, that § 1326 meets both the disparate impact and discriminatory intent prongs of the Equal Protection Clause and, thus, is “presumptively unconstitutional.”³¹ In contrast with *Carrillo-Lopez*, the Colorado district court in *Sanchez-Felix* rejected the defendant’s argument.³² Specifically, the court found that a piece of evidence offered by Carrillo-Lopez, the use of the term “Wetback Bill,” to be inadequate as it was used by a single senator, “who noted that ‘a Bill known as the Webtback Bill [] was going to be debated.’”³³ The court in *Sanchez-Felix* did not find this single piece of evidence sufficient to establish that Congress as a whole enacted § 1326 with discriminatory motives.³⁴

In *United States v. Maurico-Morales*, litigated five months after *Carrillo-Lopez*, defense counsel admitted that their motion was largely taken from the briefs in *Carrillo-Lopez*.³⁵ The *Maurico-Morales* court offers three reasons for rejecting the defendant’s Equal Protection arguments.³⁶ First, the Supreme Court has repeatedly emphasized the limited judicial review available on immigration matters.³⁷ Second, the application of the *Arlington Heights* standard to an immigration law challenge is misplaced and contrary to longstanding Supreme Court precedent.³⁸ Third, the court in *Maurico-Morales* concludes that, even if *Arlington Heights* did apply, § 1326 does not violate Equal Protection principles because the defendant fails to establish evidence that evinces a discriminatory purpose.³⁹ As for the second point, the *Maurico-Morales* court is referring to the Supreme Court’s acknowledgment that Congress has unfettered discretion over the admission or expulsion of immigrants.⁴⁰ Given the Supreme Court precedent, the *Maurico-Morales* court restricted its review to “limit[ing it] to the application of a rational basis

30. Robin J. Efron, *Ousted: The New Dynamics of Privatized Procedure and Judicial Discretion*, 98 B.U.L. REV. 127, 137–38 (2018). “Judicial discretion refers to the permissibility of a judge to reach any number of equally acceptable outcomes when deciding a legal question or taking a particular action in a case.”

31. *United States v. Sanchez-Felix*, Criminal Case No. 21-cr-00310-PAB, slip op. at *1 (D. Colo. 2021).

32. *Id.* at *8.

33. *Id.* at *7 n.3.

34. *Id.*

35. *United States v. Maurico-Morales*, No. CR-21-298-R, slip op. at *1 n.1 (W.D. Okla. 2022).

36. *Id.* at *1.

37. *Id.* (stating that “The Supreme Court has noted that ‘the power over aliens is of a political character and therefore subject only to narrow judicial review’”).

38. *Id.*

39. *Id.* at *1.

40. *See id.*; *U.S. v. Rivera-Sereno*, No. 2:21-cr-129, slip op. at *4 (S.D. Ohio 2021).

review, using ‘minimal scrutiny.’”⁴¹ The aforementioned case law calls into question both the strength of the discriminatory intent prong under *Arlington Heights* as well as a court’s power to question Congress’s authority on immigration matters. Thus, will the optimism in *Carrillo-Lopez* sustain appellate review?

CONCLUSION

The court in *Carrillo-Lopez* admits that proving discriminatory intent influenced the passage of a specific statute is unprecedented, so the court instead acts as the forerunning tribunal in declaring § 1326 to be an unconstitutional violation of the Fifth Amendment’s Equal Protection Clause. The court’s dearth of discriminatory intent evidence as well as its departure from the doctrine that Congress holds the sweeping power over immigration matters is untenable. To survive appellate review, an attack on the constitutionality of § 1326 will likely require more evidence of discriminatory motive—especially in the Ninth Circuit, where a district court split over this provision’s validity now lies.

41. *Maurico-Morales* at *1 (citing *Rivera-Sereno* at *4).