IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA v. **AGUSTIN MACHIC-XIAP,** Defendant.	Case No. 3:19-cr-407-SI **OPINION AND ORDER**

Scott Erik Asphaug, Acting United States Attorney, and Sarah Barr, Assistant United States Attorney, UNITED STATES ATTORNEY'S OFFICE, 1000 SW Third Avenue, Suite 600, Portland, OR 97204. Of Attorneys for United States of America.

Alison M. Clark and Elizabeth G. Daily, Assistant Federal Public Defenders, OFFICE OF THE FEDERAL PUBLIC DEFENDER, 101 SW Main Street, Suite 1700, Portland, OR 97204. Of Attorneys for Defendant.

Michael H. Simon, District Judge.

Augustin Machic-Xiap is a Guatemalan national. A grand jury indicted Mr. Machic-Xiap for violating 8 U.S.C. § 1326 by unlawfully reentering the United States after having been previously arrested and denied admission, excluded, deported, or removed. Mr. Machic-Xiap moves to dismiss the indictment. He asserts that § 1326 is unconstitutional because it violates his right to equal protection of the law, as guaranteed to all persons under the Fifth Amendment to the United States Constitution. Mr. Machic-Xiap argues that Congress originally enacted the

criminal offense of illegal reentry with a "discriminatory purpose" and that the law as continuously applied has a "disparate impact" against persons coming from Latin America, even though it is facially neutral.[1] Invoking the factors set out by the United States Supreme Court in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) ("*Arlington Heights*"), Mr. Machic-Xiap contends that the indictment must be dismissed.

Congress first criminalized illegal reentry in a law called the "Undesirable Aliens Act of 1929" (1929 Act). Twenty-three years later, Congress enacted § 1326 as part of a comprehensive overhaul of the nation's immigration laws in the Immigration and Nationality Act of 1952 (INA), also called the "McCarran-Walter Act." The INA was enacted after Congress overrode the veto of President Harry S. Truman. As discussed below, almost everyone whom the United States has prosecuted for the crime of illegal reentry under § 1326 or its predecessor laws has come from Latin America, *i.e.*, Mexico, Central America, or South America.

Also as discussed below, the Court finds that racism has permeated the official congressional debate over United States immigration laws since the late 19th and early 20th centuries, including the 1929 Act. Although some members of Congress in 1952 hoped that the INA would eliminate the bigotry of earlier immigration legislation, especially anti-Asian bigotry, other members of Congress at that time continued to express statements exhibiting overt racial, ethnic, or religious prejudices. Indeed, new expressions of prejudice, evidenced by Congress's frequent use in the 1950s of the derogatory epithet "wetback" to describe immigrants from Latin America, emerged during the debate leading to the enactment of the INA.

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[1] In relevant part, § 1326 provides: "[A]ny alien who (1) has been denied admission, excluded, deported, or removed . . . and thereafter (2) enters, attempts to enter, or is at any time found in, the United States," without permission from the Attorney General or an exemption from that requirement, "shall be fined under title 18, or imprisoned not more than 2 years, or both." 8 U.S.C. § 1326(a).

Proving that racism "motivated" a specific congressional act sufficient to strike down that law as unconstitutional, however, is not easy. Indeed, this district court is unaware of any federal appellate decision holding that a facially neutral act passed by Congress was motivated by racial, ethnic, or religious animus. Although the Court also finds that § 1326 disproportionately affects persons coming to the United States from Latin America, disparate impact, by itself, is not enough to strike down a facially neutral law. There also must be evidence that Congress, as a body and distinct from a handful of individual members, intended that disparate effect.

Mr. Machic-Xiap presents significant and persuasive evidence of racial animus directed against persons coming from Latin America, especially as shown in the legislative history of the 1929 Act, which is a precursor to § 1326. The Supreme Court, however, has cautioned federal courts not to attribute the unjust prejudices of certain legislators to an entire legislative body. Moreover, even the motivations of earlier legislative bodies provide only limited evidence of improper motivation for later enactments. This presents a serious hurdle for Mr. Machic-Xiap's motion. In addition, Mr. Machic-Xiap presents scant evidence showing the existence of other indicators described by the Supreme Court, such as racist statements by "many prominent" supporters of the challenged law (here, § 1326, not the 1929 Act), procedural or substantive irregularities in the enactment of the challenged law, or a "sequence of events" suggesting that racial animus motivated Congress to enact the challenged law. The lack of evidence on these points further hampers Mr. Machic-Xiap's argument.

Racism is an invidious and, unfortunately, continuing presence in the United States. Mr. Machic-Xiap has presented strong and disconcerting evidence about the role that racism has played in the enactment, reenactment, and revision of the nation's immigration laws, especially those passed in the first three decades of the 20th century. Mr. Machic-Xiap has not, however,