

Case No. 14.042

Before the
INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

Family Members of Anastasio Hernández-Rojas
(Petitioner)

v.

United States of America
(Respondent)

Amicus Curiae Brief Submitted in Support of Petitioners by
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I. INTEREST OF AMICI

The **Berkeley Law Center on Comparative Equality and Anti-Discrimination Law** is a research and policy center at the University of California, Berkeley School of Law that works to bring together scholars and advocates of equality law from around the globe to address problems of inequality, including racial inequality, through comparative law. We assist on litigation and policy projects globally, including filing amicus curiae briefs in important equality law cases. This brief was prepared by Berkeley law students working under the supervision of the Center director, Clinical Professor David Oppenheimer.

II. SUMMARY OF THE ARGUMENT: THE KILLING OF MR. HERNÁNDEZ-ROJAS WAS AN ACT OF DISCRIMINATION UNDER INTER-AMERICAN AND INTERNATIONAL HUMAN RIGHTS LAW

This brief explains how a history of racist immigration laws in the United States created a Customs and Border Protection (“CBP”) agency that is fueled by nativism and motivated to keep America white at the cost of immigrant lives. Anastasio Hernández-Rojas’ violent death at the hands of CBP agents at the U.S. Southern border was the result of the agency’s racist culture enabled by a U.S. discriminatory policy that targets undocumented, Mexican migrants. The CBP’s use of excessive and lethal force against Mr. Hernández-Rojas was racially motivated and thus an act of discrimination as defined by International and Inter-American human rights law, including the American Declaration on the Rights and Duties of Man.

III. LEGAL STANDARD

The United States became a member state of the Organization of American States (“OAS”) and adopted the American Declaration on the Rights and Duties of Man (“American Declaration”

or “Declaration”) during the Ninth International Conference of American States.¹ The American Declaration of the Inter-American Commission prohibits policies and practices that are deliberately discriminatory or discriminatory in effect (Articles I & II), regardless of the facial neutrality of the law.² As a result, the international human rights law of the Americas requires that United States’ immigration laws be enforced without discrimination.

The Inter-American Commission describes the right to equal protection before the law and the prohibition against discrimination as a “fundamental principle of the Inter-American system of human rights.”³ Under Article II of the American Declaration, “[a]ll persons are equal before the law and have the rights and duties established in th[e] Declaration, without distinction as to race. . . or any other factor.”⁴ Of course, Inter-American law does not prohibit all distinctions in treatment, however permissible distinctions must be “based upon objective and reasonable justification, must further a legitimate objective . . . and the means must be reasonable and proportionate to the end sought.”⁵ The American Declaration prohibits both *de jure*⁶ and *de facto*⁷ discrimination, which encompasses policies and practice that are deliberately discriminatory in

¹ Organization of American States, American Declaration of the Rights and Duties of Man art. II, adopted by the Ninth International Conference of American States (1948), reprinted in Basic Documents pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992) [hereinafter American Declaration].

² INTER-AM. COMM’N H.R., REPORT ON IMMIGRATION IN THE UNITED STATES: DETENTION AND DUE PROCESS ¶ 95 (2010) [hereinafter REPORT ON IMMIGRATION IN THE UNITED STATES: DETENTION AND DUE PROCESS].

³ Jessica Lenahan (Gonzales) et al. v. United States, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11, ¶ 107 (2011).

⁴ American Declaration, *supra* note 1, at art. I-II.

⁵ INTER-AM. COMM’N H.R., REPORT ON TERRORISM AND HUMAN RIGHTS ¶ 338 (2002) [hereinafter REPORT ON TERRORISM AND HUMAN RIGHTS].

⁶ See Oscar Elías Bicet et al. v. Cuba, Case 12.476, Inter-Am. Comm’n H.R., Report No. 67/06, ¶¶ 228–31 (2006).

⁷ Maya Indigenous Community of the Toledo District v. Belize, Case 12.053, Inter-Am. Comm’n H.R., Report No. 40/04, OEA/Ser.L/V/II.122, 5 rev. 1 at 727 ¶ 171 (2004).

nature as well as those that are discriminatory in effect.⁸ In short, if a facially neutral laws or policy is discriminatory in effect, it constitutes discrimination under the American Declaration.

The Inter-American Commission recognizes that discrimination manifests in indirect ways.⁹ In such an analysis, the Commission focuses on objective factors, such as the actual discriminatory effect, rather than the declared *intent* to discriminate.¹⁰ The Commission considers various factors to determine if a policy or practice is discriminatory in its effect, including whether (1) the affected person belongs to a particularly vulnerable group,¹¹ (2) whether the vulnerable group has been subjected to violence,¹² and (3) whether victims have access to effective forms of redress.¹³ Undocumented migrants are an internationally recognized particularly vulnerable group, the rights of which are systematically violated with impunity.¹⁴ As this brief will demonstrate, as an undocumented, Mexican migrant, Mr. Hernández-Rojas was a member of a particularly vulnerable group that is historically subject to violence by CBP agents in the border regions and denied forms of effective redress.

This Brief demonstrates how the fatal violence inflicted on Mr. Hernández-Rojas was an act of discrimination in both intent *and* effect. The deliberate act of excessive force by the CBP agents

⁸ REPORT ON IMMIGRATION IN THE UNITED STATES: DETENTION AND DUE PROCESS, *supra* note 2, at ¶ 95; *see also* Nadege Dorzema et al. v. Dominican Republic, Case 12.688, Inter-Am. Comm’n H.R., Report No. 174/10, ¶ 209 (2010), <http://www.oas.org/en/iachr/decisions/court/12688FondoEn.pdf>.

⁹ INTER-AM. COMM’N H.R., ACCESS TO JUSTICE FOR WOMEN VICTIMS OF VIOLENCE IN THE AMERICAS ¶ 89 (2007).

¹⁰ INTER-AM. COMM’N H.R., ACCESS TO JUSTICE FOR WOMEN VICTIMS OF VIOLENCE IN THE AMERICAS ¶¶ 91-92 (2007).

¹¹ *See* Nadege Dorzema et al. v. Dominican Republic, Case 12.688, Inter-Am. Comm’n H.R., Report No. 174/10, ¶ 202 (2010), <http://www.oas.org/en/iachr/decisions/court/12688FondoEn.pdf>; Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (Ser. A) No.18, ¶ 112–13 (Sept. 17, 2003).

¹² *Id.* at ¶ 210.

¹³ *See* Jessica Lenahan (Gonzales) et al. v. United States, Report No. 80/11, *supra* note 3, ¶ 168; *see also* Nadege Dorzema et al. v. Dominican Republic, Report No. 174/10, *supra* note 11, ¶ 210.

¹⁴ Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, *supra* note 11, ¶ 113

was motivated by a racial animus against undocumented Mexican immigrants effectuated by a history of discriminatory immigration policies in the United States.

IV. SUMMARY OF FACTS AND BACKGROUND INFORMATION

Mr. Hernández-Rojas was a Mexican citizen and longtime resident of San Diego, California, where he worked to provide for his wife and five children.¹⁵ On May 10, 2010, Mexican Mother’s Day, he was arrested and removed to Mexico for allegedly stealing groceries.¹⁶ On May 28, 2010, Mr. Hernández-Rojas attempted to rejoin his family in San Diego but was detained by U.S. CBP agents.¹⁷ According to the officer who detained Mr. Hernández-Rojas at the border, he was compliant and did not resist.¹⁸ However, the officer still reported that Mr. Hernández-Rojas “had a ‘vibe’ about him.”¹⁹ When Mr. Hernández-Rojas was transported to the Chula Vista Border Patrol Station, where he was severely beaten and denied medical attention,²⁰ an officer profiled Mr. Hernández-Rojas as a threat, stating “From my experience if you have a subject that’s 190 and stocky and he has a full jug of water he could be an officer safety issue.”²¹ Despite Hernández-Rojas’ continued compliant and cooperative behavior at the station, officers claimed that his talkative nature “[threw] up some red flags.”²²

¹⁵ Third Amended Complaint (Mar. 23, 2012) (Ex. 1) at 5.

¹⁶ San Diego Police Department, San Diego Regional Arrest Report (May 5, 2010) (Ex. 2) at 5.

¹⁷ Motion for Summary Judgment by Customs and Border Protection Officer S (May, 31, 2013) (Ex. 3) at 11; Declaration of Border Patrol Agent Jose Galvan (May 17, 2013) (Ex. 4).

¹⁸ San Diego Police Department Police Investigation (Feb. 13, 2013) (Ex. 43) at 170.

¹⁹ *Id.*

²⁰ Declaration of Border Patrol Agent Jose Galvan (May 17, 2013) (Ex. 4); Third Amended Complaint (Ex. 1) at 7.

²¹ San Diego Police Department Police Investigation (Feb. 13, 2013) (Ex. 43) at 262.

²² San Diego Police Department Police Investigation (Feb. 13, 2013) (Ex. 43) at 263.

Another CBP agent present at the station alleged Mr. Hernández-Rojas was “talking loudly”, “complaining” about his injuries, and not being as docile and compliant as other detainees.²³ The agent claimed this behavior led him to “[become] concerned for his own safety.”²⁴ Another agent working at the station told Mr. Hernández-Rojas that if he “acted like a gentleman he would be treated like one.”²⁵ Despite his injuries and request for medical attention,²⁶ some of the same agents who beat Mr. Hernández-Rojas at the Chula Vista detention center transported him to the San Ysidro Port of Entry for immediate removal to Mexico.²⁷

Once at the port, the agents allege that a struggle ensued after they removed Mr. Hernández-Rojas from the van in which he was being transported.²⁸ Approximately twenty agents beat Mr. Hernández-Rojas to death while he lay face down on the pavement, handcuffed, and immobilized.²⁹ Witnesses testified that throughout the incident Mr. Hernández-Rojas was desperately screaming “stop you are killing me”³⁰ and “help,”³¹ and begging the agents to “stop treating [him] like an animal.”³² Mr. Hernández-Rojas was tased excessively until he became unresponsive and motionless due to cardiac arrest.³³

²³ Declaration of Border Patrol Agent Jose Galvan (May 17, 2013) (Ex. 4); Third Amended Complaint (Ex. 1) at 2.

²⁴ Declaration of Border Patrol Agent Jose Galvan (May 17, 2013) (Ex. 4).

²⁵ *Id.* at 3.

²⁶ *Id.*

²⁷ Plaintiff’s Response in Opposition to All Defendants’ Motions for Summary Judgment Ex. 10 at 30.

²⁸ *Id.* at 31.

²⁹ Transcript of Videotaped Deposition of Humberto Navarrete (Jan. 9, 2013) (Ex. 14) at 155:13-15; 156:20-157:9; Transcript of Videotaped Deposition of Sergio Gonzalez-Gomez (Jan. 10, 2013) (Ex. 13) at 66:4-9; 74:8-20; Transcript of Videotaped Deposition of Ashley Young (Jan. 24, 2013) (Ex. 12) at 100:7-19; San Diego Police Department, Interview of Rafael Barriga (Ex. 16) at ¶¶ 2; County of San Diego Autopsy Report (June 1, 2010) [hereinafter County Autopsy Report] (Ex. 25) at 1.

³⁰ San Diego Police Department Police Investigation (Feb. 13, 2013) (Ex. 43) at 172.

³¹ San Diego Police Department Police Investigation (Feb. 13, 2013) (Ex. 43) at 149, 202.

³² Transcript of Humberto Navarrete’s Videos (2010) (Ex. 21).

³³ San Diego Police Department Police Investigation (Feb. 13, 2013) (Ex. 43) at 145, 166.

Two autopsies ruled Mr. Hernández-Rojas’s death a homicide.³⁴ The police opened a criminal investigation into Mr. Hernández-Rojas’s death but prosecutors closed the investigation without pursuing any criminal charges against the agents.³⁵ Officers interviewed during the investigation described Mr. Hernández-Rojas’s as “wild,”³⁶ and a “bomb waiting to explode.”³⁷ One officer involved in the altercation said Mr. Hernández-Rojas “looked [...] like a pretty rough guy. He did not look [...] like some 140-pound meek guy who gives up [...] and his] physical appearance just looked like bad news.”³⁸ This same officer stated that if he had met Mr. Hernández-Rojas alone he “might have had to shoot him.”³⁹

V. HISTORY OF U.S. IMMIGRATION LAWS

“[T]he United States has an immigration dark side.”⁴⁰ Throughout the country’s history, immigration policies have had deep-seated white supremacist foundations.⁴¹ The very first U.S. immigration law restricted naturalization to “free white person[s].”⁴² Since then, the United States

³⁴ County Autopsy Report (Ex. 25) at 4; Marvin Pietruska, M.D., J.D., F.C.A.P, Autopsy (June 4, 2010) (Ex. 27) at 8.

³⁵ *Federal Officials Close the Investigation into the Death of Anastasio Hernández-Rojas*, U.S. DEPARTMENT OF JUSTICE (Nov. 6, 2015), <https://www.justice.gov/opa/pr/federal-officials-close-investigation-death-anastasio-Hernández-rojas>.

³⁶ San Diego Police Department Police Investigation (Feb. 13, 2013) (Ex. 43) at 187.

³⁷ San Diego Police Department Police Investigation (Feb. 13, 2013) (Ex. 43) at 202.

³⁸ *Id.* at 204

³⁹ *Id.*

⁴⁰ Kevin Johnson, *Opening the Floodgates: Why America Needs to Rethink Its Borders and Immigration Laws* 2 (2007).

⁴¹ See Reece Jones, *Facing up to the Racist Legacy of America’s Immigration Laws*, N.Y. Times, Oct. 28, 2021, <https://www.nytimes.com/2021/10/28/opinion/race-immigration-racism.html>; David B. Oppenheimer, Swati Prakash & Rachel Burns, *Playing the Trump Card: The Enduring Legacy of Racism in Immigration Law*, 26 BERKELEY LA RAZA L.J. 1 (2016) at 1; Kelly Lytle Hernández, *City of Inmates: Conquest, Rebellion, and the Rise of Human Caging in Los Angeles, 1771-1965* at 131-39 (2017).

⁴² Naturalization Act of 1790, 1 Stat. 103, 103-04 (1790); *Nationality Act of 1790*, Immigration History, <https://immigrationhistory.org/item/1790-nationality-act/> (last visited Apr. 22, 2022); Andrew Glass, *US Enacts First Immigration Law March 26, 1970*, Politico, Mar. 26, 2012, <https://www.politico.com/story/2012/03/the-united-states-enacts-first-immigration-law-074438>

has repeatedly enacted policies focused on keeping out persons who were not considered “white.”⁴³ For nearly a century, these policies have harmed Mexicans in particular.⁴⁴ Despite their vital contributions to the development of U.S. agricultural, railroad, mining, and steel industries, Mexican immigrants “were always considered second class citizens.”⁴⁵ Policies discriminating against Mexicans have been justified by racialized fears that the influx of certain kinds of immigrants cause various types of harm.⁴⁶ They have run the gamut from exploitative labor schemes to deadly border enforcement programs and mass deportations.⁴⁷

A. Immigration Laws 1790 – 1929

The Naturalization Act of 1790 initiated a series of racist immigration laws that were often rooted in baseless fears. The Naturalization Act of 1790 was the first law to establish a process for immigrants to become citizens.⁴⁸ It stated that only “free white” immigrants could naturalize.⁴⁹ The Alien and Sedition Acts of 1798 were passed in part because Congress was afraid that Irish Catholics were pro-French radicals who threatened American society.⁵⁰ The Page Law of 1875 and the Chinese Exclusion Act of 1882 barred Chinese immigration because Congress feared an

⁴³ See Jones, *supra* note 19; Oppenheimer, Prakash & Burns, *supra* note 19 at 1-2; Hernández, *supra* note 19 at 131-39.

⁴⁴ See Oppenheimer, Prakash & Burns, *supra* note 19 at 35-40.

⁴⁵ Eric L. Ray, *Mexican Repatriation and the Possibility for a Federal Cause of Action: A Comparative Analysis on Reparations*, 37 U. Mia. Inter-Am. L. Rev. 171, 174 (2005).

⁴⁶ See, e.g., Mabel Aguilar, *The Discriminatory Impact of the Immigration Reform and Control Act of 1986*, 10 Chicano/a Latina/o L. Rev. 14, 17 (1990); 70 CONG. REC. H3619-20 (1929) [<https://www.congress.gov/bound-congressional-record/1929/02/16/house-section>]; Hoffman, *infra* note 32 at 29.

⁴⁷ See, e.g., Leobardo F. Estrada et al., *Chicanos in the United States: A History of Exploitation and Resistance*, 110 Daedalus 103, 119 (1981); No More Deaths & La Coalicion de Derechos Humanos, *Left to Die, Border patrol, Search and Rescue, and the Crisis of Disappearance*, http://www.thedisappearedreport.org/uploads/8/3/5/1/83515082/left_to_die_-_english.pdf; Kevin Johnson, *The Forgotten Repatriation of Persons of Mexican Ancestry and Lessons for the War on Terror*, 26 Pace L. Rev. 1, 2 (2005).

⁴⁸ Immigration History, *supra* note 20; Glass, *supra* note 20.

⁴⁹ Immigration History, *supra* note 20.

⁵⁰ Oppenheimer, Prakash & Burns, *supra* note 19 at 8.

“oriental invasion.”⁵¹ The 1907 “Gentlemen's Agreement” and Executive Order 589 were passed to exclude Japanese immigrants who were seen as “economic and cultural threats.”⁵² And in 1926 the Supreme Court upheld racially restrictive covenants that were used to exclude Jewish immigrants (among others) from fully integrating into American society.⁵³

After the Immigration Act of 1924 established a quota system for Eastern Hemisphere immigration based on national origin, prohibiting Asian immigrants, and allocating ninety-six percent of visas under the system to Europeans, there were debates throughout the United States regarding whether to also limit Mexican immigrants, who “were not considered white.”⁵⁴ These debates were laden with racist rhetoric. Some congressmen described Mexicans as dirty, “illiterate,” “ignorant,” and more likely to commit crimes.⁵⁵ Others said that Mexicans were economic burdens who threatened both job security and the country’s safety.⁵⁶ Still others couched their arguments in eugenicist theory.⁵⁷

For example, in a 1928 speech before Congress, Congressman John Box warned that immigration laws should protect the “American racial stock from...mongrelization,” and argued that “the alien Mexican peon is not good material for the making of an American citizen[,]” in part because “the Mexican peon is a mixture of Mediterranean-blooded Spanish peasants with low-

⁵¹ *Id.* at 21.

⁵² *Id.* at 28.

⁵³ *Id.* at 13.

⁵⁴ Abraham Hoffman, *Unwanted Mexican Americans in the Great Depression: Repatriation Pressures, 1929-1939*, at 26-30 (1974); Benjamin Gonzalez O’Brien, *The 1929 Law that Turned Undocumented Entry Into a Crime*, Zocalo Public Square, Nov. 27, 2018, <https://www.zocalopublicsquare.org/2018/11/27/1929-law-turned-undocumented-entry-crime/ideas/essay/>; Hernández, *supra* note 19 at 133; *The Immigration Act of 1924*, Office of the Historian, <https://history.state.gov/milestones/1921-1936/immigration-act#:~:text=Existing%20nationality%20laws%20dating%20from,admitted%20to%20the%20United%20States> (last visited Apr. 22, 2022).

⁵⁵ O’Brien, *supra* note 32.

⁵⁶ *Id.*

⁵⁷ *Id.*

grade Indians who...submitted and multiplied as serfs. Into that was infused much Negro slave blood . . .”⁵⁸ At an immigration conference that same year, Box warned again of the influx of Mexicans, declaring that “the Mexican peons are illiterate and ignorant. Because of their unsanitary habits and living conditions and their vices, they are especially subject to ...venereal diseases . . . and other dangerous contagions . . . Few, if any, other immigrants have brought us so large a proportion of criminals and paupers as the Mexican peons.”⁵⁹ And Congressman Robert Green argued in a 1928 radio broadcast that Mexicans’ “mixture of” “White, Indian, and Negro blood” interfered with their assimilation.⁶⁰ Green went on to argue that the “influx of all types of undesirable aliens...[would] cause a general weakening...of our civilization.”⁶¹

Against the backdrop of these debates, the federal government enacted a series of policies to restrict immigration from Mexico.⁶² In 1924, Congress created the Border Patrol.⁶³ In 1928, U.S. consular offices, following new State Department instructions, began rejecting visa applications from Mexico by enforcing relevant portions of the 1917 Immigration Act.⁶⁴ Consular offices were directed to reject Mexican visa applicants who were illiterate, who were “liable to become a public charge,” or who violated the prohibition on advance contract labor.⁶⁵ This created an impossible choice for many Mexican immigrants seeking entry to the United States: either they disclosed their employment plans and were liable to disqualification because of the contract labor

⁵⁸ 70 CONG. REC. H9612 (1928) [<https://www.govinfo.gov/content/pkg/GPO-CRECB-1928-pt9-v69/pdf/GPO-CRECB-1928-pt9-v69-5-2.pdf>].

⁵⁹ O’Brien, *supra* note 32.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Hoffman, *supra* note 32 at 30-34.

⁶³ *CBP Timeline*, U.S. Customs and Border Patrol, <https://www.cbp.gov/about/history/timeline-static-view#:~:text=May%2028%2C%201924,in%20the%20DEPARTMENT%20OF%20LABOR> (last visited Apr. 22, 2022).

⁶⁴ Hoffman, *supra* note 32 at 30, 32; Joseph Nevins, *Operation Gatekeeper and Beyond- The War on Illegals and the Remaking of the US-Mexico Boundary* 43 (2nd ed. 2010).

⁶⁵ Hoffman, *supra* note 32 at 30, 32.

prohibition, or they omitted their employment plans and were liable to disqualification for being considered at risk of becoming a public charge.⁶⁶ The new guidelines triggered a ninety-four percent reduction in visas granted for Mexican immigrants.⁶⁷

In 1929, Congress passed the Undesirable Aliens Act, which made it illegal to enter the United States by land except through official border checkpoints and made reentry after deportation a felony punishable by imprisonment for up to two years and a fine of up to \$1,000.⁶⁸ The Immigration and Nationality Act of 1952 codified the re-entry provision under Title 8 of the United States Code, at 8 U.S.C. § 1326,⁶⁹ and in 1988 Congress added subsection (b) to increase penalties for persons with prior criminal convictions.⁷⁰ Coleman Livingston Blease, a known white supremacist, introduced the Undesirable Aliens Act.⁷¹ The law disproportionately impacted Mexican immigrants, because it penalized only those who entered by land, a majority of whom were Mexican.⁷² It did not affect the mostly European visa overstayers.⁷³

⁶⁶ *Id.* at 32.

⁶⁷ “Between 1923-1929, an average of 62,000 Mexicans a year had legally entered the United States...Between 1 July 1930, and 30 June 1931, only 2,457 Mexican immigrants were granted visas...” Hoffman, *supra* note 32 at 32.

⁶⁸ *Undesirable Aliens Act of 1929 (Bleuse’s Law)*, Immigration History, <https://immigrationhistory.org/item/undesirable-aliens-act-of-1929-bleases-law/> (last visited Apr. 22, 2022); Undesirable Aliens Act, Pub. L. No. 70-1018, ch. 690, 45 Stat. 1551 (1929).

⁶⁹ Immigration and Nationality Act, Pub. L. No. 82-414, § 276, 66 Stat. 229 (codified at 8 U.S.C. § 1326 (1952)).

⁷⁰ Pub. L. 100-690, title VII § 7345(a), 102 Stat. 4471 (Nov. 18, 1988) (codified at 8 U.S.C. § 1326 (1988)).

⁷¹ Isaac Stanley-Becker, *Who’s Behind the Law making undocumented immigrants criminals? An ‘Unrepentant’ white Supremacist*, Wash. Post, June 27, 2019, <https://www.washingtonpost.com/nation/2019/06/27/julian-castro-beto-orourke-section-immigration-illegal-coleman-livingstone-blease/>; Hernández, *supra* note 19 at 138; Ian MacDougall, *Behind the Criminal Immigration Law: Eugenics and White Supremacy*, Propublica, June 19, 2018, <https://www.propublica.org/article/behind-the-criminal-immigration-law-eugenics-and-white-supremacy>

⁷² Brief for Professors Kelly Lytle Hernández et. al. as Amici Curiae Supporting Respondent at 17, *United States v. Refugio Palomar-Santiago*, No. 20-437, https://law.ucla.edu/sites/default/files/PDFs/Center_for_Immigration_Law_and_Policy/20-437_Amici_Brief.pdf

⁷³ *Id.*

Legislative history makes clear that the 1929 law catered to racist and discriminatory impulses, much of which targeted Mexicans.⁷⁴ In February 1928, Dr. Harry H. Laughlin, a eugenics expert, spoke before the House of Representatives' Committee on Immigration and Naturalization.⁷⁵ He said, "in our immigration law and practice, deportation is the last line of defense against the contamination of American family stocks by alien hereditary degeneracy. The first line of defense is to attempt to exclude certain types . . . from admission to the United States . . . our last resort is to deport them, if we wish to protect American blood from alien contamination."⁷⁶ While Dr. Laughlin claimed that his views were "not a matter of race," he explained that only a small portion of "foreign-born inadequates" were deportable, urging for "more thorough examination into . . . would-be immigrant[s]."⁷⁷

Debates on the floor of Congress built upon Dr. Laughlin's racist rhetoric.⁷⁸ When discussing the bill's passage, members of the House of Representatives repeatedly referred to Mexicans as an economic and societal threat.⁷⁹ Congressmen complained that Mexicans entered their states "by hordes" and "in droves[.]"⁸⁰ They lamented that the "unfair competition of cheap Mexican labor" was "taking away jobs from American citizens."⁸¹ One Congressman added, "[t]hey are poisoning the American citizen. They are a class that come across the line which are

⁷⁴ See *id.*; *The Eugenic Aspects of Deportation: Hearing Before the H. Comm. on Immigr. and Naturalization*, 70th Cong. 3-4, 6 (1928) [<https://babel.hathitrust.org/cgi/pt?id=umn.31951d03588343m&view=1up&seq=5>]; 70 CONG. REC. H3619-20 (1929).

⁷⁵ *The Eugenic Aspects of Deportation*, *supra* note 52 at 3-4.

⁷⁶ *Id.*

⁷⁷ *Id.* at 6.

⁷⁸ See 70 CONG. REC. H3619-20 (1929).

⁷⁹ See *id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 3619.

very undesirable . . . ”⁸² Still another Congressman said, “I believe we could keep out most Mexicans to which objection has been made to-day if we simply enforced [the existing laws].”⁸³

The Great Depression hit months after the 1929 Act passed, triggering even stronger anti-Mexican sentiments.⁸⁴ The stock market crash of 1929 led to high rates of unemployment, and in its xenophobic response, the government sought to expel perceived foreigners to preserve jobs and resources.⁸⁵ Mexicans were blamed both for “taking away jobs from Americans” and “living off public relief.”⁸⁶ Widespread demands to “curtail the employment of Mexicans,” kick them off of welfare relief rolls, and “ship” them “back to Mexico” eventually culminated in the Mexican Repatriation Program, one of the most abhorrent immigration policies in U.S. history.⁸⁷

B. Immigration Laws 1930 – 1990

i. Mexican Repatriation

Kevin Johnson, a leading scholar on immigration law and the dean of U.C. Davis School of Law, describes the Mexican Repatriation Program as a form of ethnic cleansing.⁸⁸ It began when President Hoover enacted a depression-era policy of “American jobs for real Americans,” arguing

⁸² *Id.* at 3620.

⁸³ *Id.*

⁸⁴ See Ray, *supra* note 23 at 175 (stating that the “Great Depression sparked a nationwide anti-immigrant environment that the federal government could not ignore”); Larry Elliott, *Crash Course: What the Great Depression reveals about our future*, *The Guardian*, Mar. 4, 2017, <https://www.theguardian.com/society/2017/mar/04/crash-1929-wall-street-what-the-great-depression-reveals-about-our-future>.

⁸⁵ See Ray, *supra* note 23 at 174-175; Hoffman, *supra* note 32 at 38-39; Massey et al., *Beyond Smoke and Mirrors: Mexican Immigration in an Era of Economic Integration* 33-34 (2002); The Information Architects of Encyc. Britannica, *Great Depression: Facts and Related Content*, Encyc. Britannica, <https://www.britannica.com/facts/Great-Depression> (last visited Apr. 15, 2022); Elliott, *supra* note 62.

⁸⁶ Massey et al., *supra* note 63 at 33.

⁸⁷ Ray, *supra* note 23 at 174-75; Massey et al., *supra* note 63 at 33-34.

⁸⁸ Johnson, *supra* note 25 at 6; Johnson, *supra* note 18 at 80.

that welfare resources and jobs should not be wasted on foreigners.⁸⁹ The Hoover administration advocated expelling Mexicans, claiming this was justified in order to free up jobs and welfare resources for “real Americans,” and because Mexicans would be better off in Mexico.⁹⁰ President Hoover’s claims lacked evidence,⁹¹ but the federal government took action anyway, expelling men, women, and children of Mexican ancestry en masse.⁹² It was during this period that the modern perception of an immigration crisis and uncontrollable borders began; when the restrictions created a new class of “illegal aliens,” most notably along the U.S.-Mexican border.⁹³

California legislator Joseph Dunn, who researched this history and authored a state bill apologizing for California’s role in the ethnic cleansing, estimates that two million Mexicans were formally deported or otherwise coerced into leaving the United States,⁹⁴ sixty percent were U.S.

⁸⁹ Diane Bernard, *The time a president deported 1 million Mexican Americans for supposedly stealing U.S. jobs*, Wash. Post, Aug. 13, 2018, <https://www.washingtonpost.com/news/retropolis/wp/2018/08/13/the-time-a-president-deported-1-million-mexican-americans-for-stealing-u-s-jobs/>; Hoffman, *supra* note 32 at 38-39; Francisco E. Balderrama & Raymond Rodríguez, *Decade of Betrayal*, 120, 330 (2006).

⁹⁰ Balderrama & Rodríguez, *supra* note 67 at 216, 329-31; Bernard, *supra* note 67; Ray, *supra* note 23 at 171-72.

⁹¹ For example, persons of Mexican descent accounted for only ten percent of the welfare rolls. And a 2018 study showed that the mass expulsions did not improve employment rates. Bernard, *supra* note 67; Lisa Howard, *Research Shows Deporting Immigrants Hurts Local Economies*, UC Davis Off. of Rsch (June 13, 2018), <https://research.ucdavis.edu/migration-research-cluster/>

⁹² Bernard *supra* note 67; Massey et al., *supra* note 63 at 33-34; Balderrama & Rodríguez, *supra* note 67 at 329-34.

⁹³ Boswell, Richard A., *Racism and U.S. Immigration Law: Prospects for Reform After “9/11?”* (2003) at 325.

⁹⁴ Other estimates range from 500,000 to 1 million. All Things Considered, *Remembering California's 'Repatriation Program*, NPR, Jan. 2, 2006, <https://www.npr.org/templates/story/story.php?storyId=5079627>; S.B. 670 (Cal. 2005). ; Ray, *supra* note 23 at 174; Johnson, *supra* note 25 at 2.

citizens.⁹⁵ The Hoover administration's mass-expulsion movement reduced the United States' Mexican population by forty-one percent.⁹⁶

a. Actions at the Federal Level

The federal government ensured that many subcontracted Mexican employees would lose their jobs.⁹⁷ It passed a rule prohibiting companies that had contracts with the federal government for goods and services from hiring non-citizens.⁹⁸ Corporations such as General Motors fired non-citizens in order to preserve their federal contracts.⁹⁹ Other companies similarly "colluded" with the government and laid off thousands of Mexican employees.¹⁰⁰

The Hoover administration also announced "deportation programs" and conducted high-profile raids across the United States.¹⁰¹ In 1930, William Doak, then secretary of labor, suggested that large-scale deportation could help solve America's unemployment problem.¹⁰² He claimed that 400,000 "illegal aliens" lived in the United States, 100,000 of whom could be deported, and began a "sensationalized" scheme of arresting immigrants "suspected" of being deportable.¹⁰³ As one author writes, Doak turned a "routine bureaucratic procedure" into a "gladiatorial spectacle."¹⁰⁴

⁹⁵ SB 670, Ch. 663; Ray, *supra* note 23 at 176; All Things Considered, *supra* note 71.

⁹⁶ Massey et al., *supra* note 63 at 34.

⁹⁷ See Balderrama & Rodríguez, *supra* note 67 at 89-91.

⁹⁸ *Id.* at 90.

⁹⁹ *Id.* at 90-91.

¹⁰⁰ *Id.*; Bernard, *supra* note 67.

¹⁰¹ Jasmine Aguilera, *Citizens Facing Deportation Isn't New. Here's What Happened When the U.S. Removed Mexican-Americans in the 1930s*, Time, Aug. 2, 2019, <https://time.com/5638586/us-citizens-deportation-raids/>

¹⁰² Hoffman, *supra* note 32 at 39.

¹⁰³ *Id.*; Bernard, *supra* note 67.

¹⁰⁴ Hoffman, *supra* note 32 at 39.

The raids were horrific.¹⁰⁵ The government’s 1932 Wickersham Commission reported that “[the] apprehension and examination of supposed aliens are often characterized by methods [which are] unconstitutional, tyrannical, and oppressive.”¹⁰⁶ Individuals caught up in the raids were arrested without warrants, could not post bail, and could not meet with anyone after their arrests.¹⁰⁷ They were incarcerated until their deportations.¹⁰⁸ Many groups, including the Los Angeles Bar Association, spoke out against constitutional rights violations.¹⁰⁹ In addition to conducting raids themselves, the federal government reimbursed local governments for helping to carry out President Hoover’s policies, sometimes assisting local raids directly.¹¹⁰

One particularly infamous raid, La Placita Park Raid, was designed to “send a message” and induce Mexicans to leave the country.¹¹¹ In the days leading up to the February 25, 1931 incident, the Immigration and Naturalization Service (INS) placed notices in local newspapers, warning of immigration raids.¹¹² Then on a Sunday afternoon, immigration officers raided the busy public park, which was frequented by members of the Mexican community.¹¹³ Trucks and officers surrounded the park goers, blocking off entrances and rounding up “all the people with brown skin.”¹¹⁴ According to California Legislator Joseph Dunn, 400 people were detained.¹¹⁵

¹⁰⁵ Alex Wagner, *America’s Forgotten History of Illegal Deportations*, Atl., Mar. 6, 2017, <https://www.theatlantic.com/politics/archive/2017/03/americas-brutal-forgotten-history-of-illegal-deportations/517971/>

¹⁰⁶ Ray, *supra* note 23 at 176; Antonio Olivio, *Ghosts of a 1931 Raid*, L.A. Times, Feb 25, 2001, <https://www.latimes.com/archives/la-xpm-2001-feb-25-me-30223-story.html>

¹⁰⁷ Ray *supra* note 23 at 176.

¹⁰⁸ *Id.*

¹⁰⁹ Balderrama & Rodríguez, *supra* note 67 at 329-30.

¹¹⁰ *INS Records for 1930s Mexican Repatriations*, U.S. Citizenship and Immigr. Servs., <https://www.uscis.gov/about-us/our-history/history-office-and-library/featured-stories-from-the-uscis-history-office-and-library/ins-records-for-1930s-mexican-repatriations> (last visited Apr. 20, 2022); Bernard, *supra* note 67.

¹¹¹ Bernard, *supra* note 67; Olivio, *supra* note 83.

¹¹² Olivio, *supra* note 83.

¹¹³ Bernard, *supra* note 67; Olivio, *supra* note 83.

¹¹⁴ Bernard, *supra* note 67.

¹¹⁵ *Id.*

Immigration officials demanded to see documents proving legal entry and U.S. citizenship, and held those who could not produce it, ordering many of them to depart onto chartered trains to Mexico.¹¹⁶

When President Roosevelt took office, he stopped the formal federal deportations, but the local and state authorities continued to drive Mexicans out, following the policies that the Hoover administration began.¹¹⁷

President Hoover's policies disproportionately impacted persons of Mexican descent, and the evidence shows that Mexicans were targeted.¹¹⁸ From 1930-1939, Mexicans represented less than one percent of the U.S. population, but nearly half of those deported.¹¹⁹ Indeed, the U.S. Labor Department's expulsion of Mexicans "far outnumbered the deportation or departure of any other ethnic group from the United States territory in recent American history."¹²⁰ The United States Citizen and Immigration Services (USCIS) itself concedes that Mexicans account for a majority of the deportations conducted in 1930.¹²¹ The Immigration and Naturalization Service (INS) claims that it "formally removed" about 82,000 persons of Mexican descent.¹²² But this number accounts

¹¹⁶ *Id.*

¹¹⁷ Eric L. Ray, *Mexican Repatriation and the Possibility for a Federal Cause of Action: A Comparative Analysis on Reparations*, 37 Univ. of Mia. Inter-Am. L. Rev. 171, 173 (2005).

¹¹⁸ Ray, *supra* note 94, at 176; Bernard, *supra* note 91; *INS Records for 1930s Mexican Repatriations*, U.S. Citizenship and Immigr. Servs., <https://www.uscis.gov/about-us/our-history/history-office-and-library/featured-stories-from-the-uscis-history-office-and-library/ins-records-for-1930s-mexican-repatriations> (last visited Apr. 20, 2022) (conceding that some local governments "sought to remove Mexicans from their jurisdictions.").

¹¹⁹ Ray, *supra* note 94, at 176.

¹²⁰ Abraham Hoffman, *Unwanted Mexican Americans in the Great Depression: Repatriation Pressures, 1929-1939*, at 126 (1974).

¹²¹ *INS Records for 1930s Mexican Repatriations*, U.S. Citizenship and Immigr. Servs., <https://www.uscis.gov/about-us/our-history/history-office-and-library/featured-stories-from-the-uscis-history-office-and-library/ins-records-for-1930s-mexican-repatriations> (last visited Apr. 20, 2022).

¹²² *Id.*

for only a small portion of those who were driven out, because a majority of those expelled were removed by state, local, and welfare agency policies.¹²³

While repatriation victims were most commonly accused of being undocumented, in reality a majority of those deported were legal residents or US-born citizens.¹²⁴ The U.S. government never had the power to deport citizens, but those arrested had little opportunity to learn of—let alone exercise—their rights.¹²⁵ Once detained by immigration officials, arrestees had the right to either request deportation proceedings or voluntarily leave the country.¹²⁶ But most of the people arrested never knew they had the option to seek formal proceedings.¹²⁷

b. Actions at the State and Local Levels

Following the federal government’s example, local governments also took part in driving out Mexican families.¹²⁸ The Los Angeles County Board of Supervisors kicked “tens of thousands” of Mexicans out of the country, becoming a “model” for other states.¹²⁹ The state and local removals were coercive but technically voluntary, because the entities conducting them did not actually have the power to formally deport anyone.¹³⁰

A variety of tactics were used to drive Mexicans out.¹³¹ Some states passed laws prohibiting non-citizens from becoming public employees, making it hard for persons of Mexican ancestry

¹²³ *See id.*

¹²⁴ Ray, *supra* note 94, at 175; Hoffman, *supra* note 97, at 126.

¹²⁵ *See* Ray, *supra* note 94, at 175; Jasmine Aguilera, *Citizens Facing Deportation Isn't New. Here's What Happened When the U.S. Removed Mexican-Americans in the 1930s*, Time, Aug. 2, 2019, <https://time.com/5638586/us-citizens-deportation-raids/>.

¹²⁶ Ray, *supra* note 94, at 175.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Aguilera, *supra* note 102.

¹³⁰ Ray, *supra* note 94, at 175; Aguilera, *supra* note 102.

¹³¹ *See, e.g.*, Francisco E. Balderrama & Raymond Rodriguez, *Decade of Betrayal: Mexican Repatriation in the 1930s* 89 (2006); *INS Records for 1930s Mexican Repatriations*, U.S. Citizenship and Immigr.

(including U.S. citizens) to find jobs.¹³² Local law enforcement conducted raids, and sometimes threatened Mexicans with federal deportations to coerce them to leave on their own rather than face official deportation.¹³³ Even large companies such as Ford Motor Company and Southern Pacific took part by laying off Mexican workers and “putting people on trains to Mexico.”¹³⁴ As the Washington Post has reported, “[f]ear swept Mexican communities nationwide throughout the early 1930s, as local law enforcement rounded up people in parks, hospitals, markets, and social clubs, crammed them onto chartered trains and deposited them across the border.”¹³⁵

Welfare agencies took part by targeting Mexican welfare beneficiaries.¹³⁶ In the middle of the Great Depression, they excluded “foreign-born” applicants, began demanding proof of legal residence before providing aid, and cited laws making immigrants deportable for becoming public charges, threatening Mexican-Americans with deportation.¹³⁷ A grandchild of Mexican-Americans expelled during the repatriation program said that a welfare worker came to her

Servs., <https://www.uscis.gov/about-us/our-history/history-office-and-library/featured-stories-from-the-uscis-history-office-and-library/ins-records-for-1930s-mexican-repatriations> (last visited Apr. 20, 2022); Alex Wagner, *America’s Forgotten History of Illegal Deportations*, The Atl., Mar. 6, 2017, <https://www.theatlantic.com/politics/archive/2017/03/americas-brutal-forgotten-history-of-illegal-deportations/517971/>; Bernard, *supra* note 91.

¹³² Francisco E. Balderrama & Raymond Rodriguez, *Decade of Betrayal: Mexican Repatriation in the 1930s* 89-90 (2006).

¹³³ *INS Records for 1930s Mexican Repatriations*, U.S. Citizenship and Immigr. Servs., <https://www.uscis.gov/about-us/our-history/history-office-and-library/featured-stories-from-the-uscis-history-office-and-library/ins-records-for-1930s-mexican-repatriations> (last visited Apr. 20, 2022); Bernard, *supra* note 91.

¹³⁴ *INS Records for 1930s Mexican Repatriations*, U.S. Citizenship and Immigr. Servs., <https://www.uscis.gov/about-us/our-history/history-office-and-library/featured-stories-from-the-uscis-history-office-and-library/ins-records-for-1930s-mexican-repatriations> (last visited Apr. 20, 2022); Bernard, *supra* note 91; Aguilera, *supra* note 106.

¹³⁵ Bernard, *supra* note 91.

¹³⁶ *INS Records for 1930s Mexican Repatriations*, U.S. Citizenship and Immigr. Servs., <https://www.uscis.gov/about-us/our-history/history-office-and-library/featured-stories-from-the-uscis-history-office-and-library/ins-records-for-1930s-mexican-repatriations> (last visited Apr. 20, 2022); Wagner, *supra* note 108.

¹³⁷ *INS Records for 1930s Mexican Repatriations*, U.S. Citizenship and Immigr. Servs., <https://www.uscis.gov/about-us/our-history/history-office-and-library/featured-stories-from-the-uscis-history-office-and-library/ins-records-for-1930s-mexican-repatriations> (last visited Apr. 20, 2022).

grandfather's door and asked where he was from.¹³⁸ He was reluctant to say "Mexico."¹³⁹ She explains, "[m]y grandfather didn't have work at the time, and they were forcing them to leave. There was no gun put to his head, but [they said he] wouldn't be eligible to receive assistance—and he would starve."¹⁴⁰

There appears to be some coordination between the local and federal agencies in carrying out the forced removals. For example, INS assisted in some local raids.¹⁴¹ And a representative of the Los Angeles Citizens' Committee for Coordination of Unemployment telegraphed the federal coordinator of unemployment relief, stating that five percent of the 400,000 "deportable aliens" were in the Los Angeles district, offering to "pick them all up through local police and sheriff channels" and stating "we need their jobs for needy citizens."¹⁴²

The Great Depression waned as World War II began.¹⁴³ In the early 1940s, demand for agricultural labor grew again, and the Federal Government mobilized to supply the United States with more workers.¹⁴⁴

ii. Bracero Program

Established in 1942 by executive order to provide much needed agricultural labor during World War II, the "Mexican Farm Labor Program," known informally as the Bracero program, involved a set of laws and diplomatic agreements with Mexico, permitting Mexican men to work

¹³⁸ Wagner, *supra* note 108.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *INS Records for 1930s Mexican Repatriations*, U.S. Citizenship and Immigr. Servs., <https://www.uscis.gov/about-us/our-history/history-office-and-library/featured-stories-from-the-uscis-history-office-and-library/ins-records-for-1930s-mexican-repatriations> (last visited Apr. 20, 2022).

¹⁴² Ray, *supra* note 94, at 176.

¹⁴³ Gary Richardson, *The Great Depression*, Federal Reserve History (Nov. 22, 2013) <https://www.federalreservehistory.org/essays/great-depression>

¹⁴⁴ Douglas S. Massey, Jorge Durand, and Nolan J. Malone, *Beyond Smoke and Mirrors: Mexican Immigration in an Era of Economic Integration* 35-36 (2002).

in the United States on temporary labor contracts and visas.¹⁴⁵ The program was extended on a yearly basis until 1951, when Congress passed Public Law 78, extending it permanently (though it ended in 1964).¹⁴⁶ Immigration and Naturalization Service (INS) handled Bracero entries and departures and enforced visa requirements.¹⁴⁷ The number of temporary visas authorized never sufficed to meet the labor demands, so employers recruited undocumented immigrants to fill the gaps.¹⁴⁸ The program faced criticism from workers and civil rights groups because it was “exploitative and discriminatory[.]”¹⁴⁹ Ending on December 31, 1964, it was the largest guest labor visa program in U.S. history.¹⁵⁰

The U.S. promised a minimum wage and “equitable treatment” but the program was so structurally exploitative that the Department of Labor’s own Lee G. Williams described it as “legalized slavery.”¹⁵¹ Officially, employers were required to comply with rules negotiated between the United States and Mexico.¹⁵² But workers faced widespread abuses and were

¹⁴⁵ *1942: Bracero Program*, Library of Congress: A Latinx Resource Guide, Civil Rights Cases and Events in the United States, <https://guides.loc.gov/latinx-civil-rights/bracero-program#:~:text=An%20executive%20order%20called%20the,on%20short%2Dterm%20labor%20contracts> (Last visited Apr. 20, 2022); John Powell, *Bracero Program*, in *Encyclopedia of North American Immigration* (2016).

¹⁴⁶ Massey et al., *supra* note 121, at 34-36.

¹⁴⁷ *Id.* at 35.

¹⁴⁸ *Id.* at 36.

¹⁴⁹ Mary Bauer & Meredith Stewart, *Close to Slavery: Guestworkers Programs in the United States*, S. Poverty L. Ctr. (Feb. 19, 2013) <https://www.splcenter.org/20130218/close-slavery-guestworker-programs-united-states#history>; Massey et al., *supra* note 121, at 40-41.

¹⁵⁰ *Bracero Program*, Farmworkers Justice, <https://www.farmworkerjustice.org/resource/bracero-program/> (last visited Apr. 20, 2022); *1942: Bracero Program*, Library of Congress: A Latinx Resource Guide, Civil Rights Cases and Events in the United States, <https://guides.loc.gov/latinx-civil-rights/bracero-program#:~:text=An%20executive%20order%20called%20the,on%20short%2Dterm%20labor%20contracts> (last visited Apr. 20, 2022).

¹⁵¹ Leobardo F. Estrada et al., *Chicanos in the United States: A History of Exploitation and Resistance*, 110 *Daedalus* 103, 119 (1981); Bauer & Stewart, *supra* note 126.

¹⁵² Estrada et al., *supra* note 128, at 119

prohibited from changing employers if they disliked working conditions.¹⁵³ In addition, many Bracero workers never knew of their contractual protections because they could not read English.¹⁵⁴ Working conditions were “deplorable.”¹⁵⁵

In addition, it is estimated that employers stole hundreds of millions of dollars in earned wages from Bracero workers.¹⁵⁶ As part of the program, ten percent of employee pay was withheld so it could be deposited into a Mexican bank in order to fund worker pension plans.¹⁵⁷ The money was never paid.¹⁵⁸

iii. Operation “Wetback”

In May 1954, while the Bracero visa program was in full swing, Attorney General Herbert Brownell announced Operation “Wetback,” a “well-publicized” mass deportation campaign specifically targeting Mexican immigrants.¹⁵⁹ Brownell named the campaign using a term now recognized as a racial slur referring to Mexican immigrants.¹⁶⁰ That year, eight hundred Border Patrol officers raided the U.S.-Mexico border region and erected checkpoints, deporting over one million people, most of whom were Mexican.¹⁶¹ And according to a United States Commission

¹⁵³ *Id.*; Mabel Aguilar, *The Discriminatory Impact of the Immigration Reform and Control Act of 1986*, 10 *Chicano/a Latina/o L.Rev.* 14, 17 (1990).

¹⁵⁴ Bauer & Stewart, *supra* note 126.

¹⁵⁵ Massey et al., *supra* note 121, at 41

¹⁵⁶ Bauer & Stewart, *supra* note 126.

¹⁵⁷ *Id.*

¹⁵⁸ Bauer & Stewart, *supra* note 126.

¹⁵⁹ Massey et al., *supra* note 121, at 37; Kelly Lytle Hernández, *The Crimes and Consequences of Illegal Immigration: A Cross-Border Examination of Operation Wetback, 1943 to 1954*, 37 *W. Hist. Q.* 421, 421-22 (2006).

¹⁶⁰ See, e.g., Greg Henderson, *Boehner Blasts Veteran GOP Lawmaker For 'Wetbacks' Comment*, NPR: It's All Politics, Mar. 29, 2013, <https://www.npr.org/sections/itsallpolitics/2013/03/29/175692805/boehner-blasts-veteran-gop-lawmaker-for-wetbacks-comment> (describing the “wetback” as a slur and reporting on the backlash a Congressman received for using the term).

¹⁶¹ Kelly Lytle Hernández, *The Crimes and Consequences of Illegal Immigration: A Cross-Border Examination of Operation Wetback, 1943 to 1954*, 37 *W. Hist. Q.* 421, 421-22 (2006).

On Civil Rights Report, “[t]o ensure the effectiveness of the expulsion process, many of those apprehended were denied a hearing to assert their constitutional rights or to present evidence that would have prevented their deportation.”¹⁶²

Operation “Wetback” overlapped with the Bracero programs in “contradictory” ways.¹⁶³ On the one hand, Mexican immigrants were essential for the agricultural economy.¹⁶⁴ On the other hand, there was pressure to “control the border.”¹⁶⁵ So while INS “militariz[ed]” the southern border, it simultaneously increased the number of visas available under the Bracero program more than twofold in order to meet labor needs.¹⁶⁶ In fact, undocumented workers were deported only to be reprocessed at the border, and given Bracero visas to permit their return to their original place of employment.¹⁶⁷ But the Bracero visas, which were temporary, did not allow these workers to stay permanently in the U.S.¹⁶⁸ They were allowed entry into the country for the limited purpose of providing their labor short-term.¹⁶⁹

Federal policies regarding border enforcement have mirrored the widespread anti-Mexican sentiments persisting in local politics for years.¹⁷⁰ For example, in 1982, the Supreme Court invalidated a Texas education law which would have denied educational funding to undocumented students and allowed schools to exclude them from enrollment.¹⁷¹ And in 1994, California passed

¹⁶² Aguilar, *supra* note 130, at 17.

¹⁶³ Massey et al., *supra* note 121, at 37 (explaining that INS faced “contradictory pressures” to control the border and satisfy agricultural labor needs); Oppenheimer et al., *supra* note 19, at 38.

¹⁶⁴ Massey et al., *supra* note 121, at 35-37.

¹⁶⁵ *Id.* at 37; Oppenheimer et al., *supra* note 19, at 38.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *1942: Bracero Program*, Library of Congress: A Latinx Resource Guide, Civil Rights Cases and Events in the United States, <https://guides.loc.gov/latinx-civil-rights/bracero-program#:~:text=An%20executive%20order%20called%20the,on%20short%2Dterm%20labor%20contracts> (Last visited Apr. 20, 2022); John Powell, *Bracero Program*, in *Encyclopedia of North American Immigration* (2016).

¹⁶⁹ *Id.*

¹⁷⁰ See Oppenheimer et al., *supra* note 19, at 38.

¹⁷¹ *Id.*; *Plyler v. Doe*, 457 U.S. 202 (1982).

Proposition 187 by referendum, which would have prevented undocumented immigrants from using public schools and other social services.¹⁷² The American Civil Liberties Union challenged the law, which was declared unconstitutional.¹⁷³

iv. Immigration Reform and Control Act (IRCA) of 1986

After a rise in unemployment during the 1980s, Congress passed IRCA with the hope that it would stem immigration from Mexico.¹⁷⁴ While the Act provided amnesty for some undocumented residents, granting legal status to 2.3 million Mexican immigrants, it increased INS's Border Patrol budget and sanctioned persons for employing undocumented workers.¹⁷⁵ Under IRCA, Employers may receive civil or criminal penalties if (1) they knowingly hire someone who is not authorized to work in the United States, (2) continue to employ someone while knowing their work authorization has terminated, or (3) fail to check a prospective employee's work authorization.¹⁷⁶

Prior to IRCA, it was not illegal to employ undocumented immigrants.¹⁷⁷ When unemployment rates rose, many blamed undocumented immigrants, who were seen as a "source of cheap labor."¹⁷⁸ Congress, in agreement, turned to employer sanctions to counteract the

¹⁷² Massey et al., *supra* note 121, at 89, 91; Press Release, *CA'S ANTI-IMMIGRANT PROPOSITION 187 IS VOIDED, ENDING STATE'S FIVE-YEAR BATTLE WITH ACLU, RIGHTS GROUPS*, American Civil Liberties Union (July 29, 1999), <https://www.aclu.org/press-releases/cas-anti-immigrant-proposition-187-voided-ending-states-five-year-battle-aclu-rights>.

¹⁷³ Massey et al., *supra* note 121, at 89, 91; Press Release, *CA'S ANTI-IMMIGRANT PROPOSITION 187 IS VOIDED, ENDING STATE'S FIVE-YEAR BATTLE WITH ACLU, RIGHTS GROUPS*, American Civil Liberties Union (July 29, 1999), <https://www.aclu.org/press-releases/cas-anti-immigrant-proposition-187-voided-ending-states-five-year-battle-aclu-rights>.

¹⁷⁴ Richard C. Auxier, *Raegan's Recession*, Pew Research Ctr. (Dec. 14, 2020), <https://www.pewresearch.org/2010/12/14/reagans-recession/>; Massey et al., *supra* note 121, at 86, 89, 90-91; Aguilar, *supra* note 130, at 15-16.

¹⁷⁵ Massey et al., *supra* note 121, at 90-91

¹⁷⁶ Aguilar, *supra* note 130, at 19-20.

¹⁷⁷ *Id.* at 15-16.

¹⁷⁸ *Id.*

perceived labor problems.¹⁷⁹ As one scholar recognizes, IRCA’s employment sanctions assume that the right to work is a privilege for citizens and that sanctions will stop the undocumented from getting jobs, preventing immigration from Mexico and other Latinx countries.¹⁸⁰ The “faulty assumption” of a “causal relationship” between undocumented immigration and economic difficulty “illustrates a pervasive practice of blaming immigrants for national economic difficulties...” and is motivated by “a deeply rooted American tradition: racial and ethnic prejudice.”¹⁸¹

IRCA has provisions protecting some workers from discrimination, but they are limited.¹⁸² They only protect American citizens and immigrants “intending to become American citizens.”¹⁸³ Critics rightfully feared that IRCA would cause employers to use indicators such as “race, foreign appearance, or accent” to identify undocumented persons.¹⁸⁴ One scholar writes that IRCA’s employer sanctions echo the many abuses “masked in the guise of immigration reforms,” and are “as offensive to the Latino community as the past Asian/Pacific exclusionary laws were to the Asian/Pacific community.”¹⁸⁵

v. Immigration Act of 1990

Despite IRCA, both legal and illegal immigration from Mexico rose.¹⁸⁶ Congress doubled down on its efforts to discourage immigration from Mexico when it passed the 1990 Immigration Act.¹⁸⁷ The Act provided funding for 1,000 more Border Patrol agents, and “tightened” employer

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 18.

¹⁸¹ *Id.* at 15-16.

¹⁸² *Id.* at 20-23.

¹⁸³ *Id.* at 23.

¹⁸⁴ *Id.* at 17.

¹⁸⁵ *Id.* at 16.

¹⁸⁶ Massey et al., *supra* note 121, at 91-92.

¹⁸⁷ *Id.*

sanctions.¹⁸⁸ It also expedited the deportation process for immigrants convicted of certain crimes, while restricting their procedural protections.¹⁸⁹ Moreover, the Act tried to restrict family immigration and placed a limit on the total number of immigrants who could enter the United States, all while setting aside space for immigrants more likely to come from preferred countries outside of Latin America.¹⁹⁰

Congress tried to adjust the makeup of immigrants entering the U.S. through the Immigration Act's caps and visa programs.¹⁹¹ In 1990, sixty-three percent of U.S. immigrants came from Latin America, including forty-four percent from Mexico, and there were discussions in Congress about how some regions were "underrepresented" in immigration.¹⁹² The Act placed limits on family visas, while also increasing the number of visas for "skilled, well-educated job-seekers, who were expected to come mainly from developed nations."¹⁹³ In addition, the law set aside 55,000 "diversity" visas for applicants from a "foreign state that is not contiguous to the United States" (thus excluding Mexico) and that had been "'adversely affected' by the 1965 Immigration and Nationality Act."¹⁹⁴ This meant applicants from Europe – immigrants viewed as "white."¹⁹⁵

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*; Warren R. Leiden & David L. Neal, *Highlights of the U.S. Immigration Act of 1990*, 14 *Fordham Int'l L. J.* 328, 335-36

¹⁹⁰ Massey et al., *supra* note 121, at 92.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*; Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978.

¹⁹⁵ Massey et al., *supra* note 121, at 92; Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978.

C. Immigration Laws 1991 – 2010

Over the next decade, Congress further militarized the border to keep Mexicans and Latinx immigrants out.¹⁹⁶ With respect to legislation, Congress passed the Illegal Immigration Reform and Immigration Responsibility Act of 1996, fortifying the border with Mexico, limiting immigrant access to public benefits, and attempting to further curtail family immigration.¹⁹⁷ The law authorized funds for fences and military technology, and an additional 1,000 Border Patrol agents.¹⁹⁸ It also enacted higher penalties for undocumented immigrants, and stripped them of Social Security and certain educational benefits at the federal level.¹⁹⁹ Moreover, it permitted states to reduce public assistance even for immigrants with legal status.²⁰⁰ And in order to make family immigration harder for poor families, the law increased the income threshold requirement for relative sponsors.²⁰¹

At the administrative level, Immigration and Naturalization Services launched a number of initiatives that increased policing of the southern border.²⁰² These included Operation Blockade, Operation Hold-the-Line, and Operation Gatekeeper.²⁰³ The focus of these border enforcement efforts was to deter undocumented immigration from Mexico.²⁰⁴ The operations involved increasing Border Patrol presence, as well as installing fences, floodlights, and new technology across portions of Mexico's border with Texas, Arizona, and California.²⁰⁵

¹⁹⁶ Massey et al., *supra* note 121, at 95.

¹⁹⁷ *Id.* at 95-96.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.* at 93

²⁰³ *Id.* at 93-94.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

These initiatives never stopped immigrants from crossing the border into the United States—they only made those crossings deadlier.²⁰⁶ They pushed immigrants to farther, more remote, and dangerous portions of the border to avoid the policed zones.²⁰⁷ In response, Border Patrol expanded its enforcement campaigns to cover more land.²⁰⁸ One news agency reported that in Arizona alone, over 2,100 immigrants died between 2001-2004 while crossing into the United States. A report by No More Deaths and La Coalición De Derechos Humanos stated that while the Border Patrol counts 7,805 “southwest border deaths” from 1998-2019, they estimate that the true deaths toll since 1994 is much higher—possibly as high as 80,000.²⁰⁹

VI. THE U.S. CUSTOMS AND BORDER PROTECTION AGENCY HAS EFFECTUATED THE UNITED STATES’ RACIST IMMIGRATION LAWS THROUGH A PRACTICE OF RACIST ATTACKS ON MEXICAN AND OTHER LANTINX MIGRANTS.

The 1924 founding of the U.S. Border Patrol stemmed from the fears expressed by white supremacists that the “open-border policy with Mexico was hastening the ‘mongrelization’ of the United States.”²¹⁰ After losing the national debate on keeping Mexicans out of the U.S., white supremacists took control of the U.S. Border Patrol and turned it into a “frontline instrument of race vigilantism.”²¹¹

As discussed within, when the Border Patrol was founded in 1924²¹² – at a time of nativist violence and extremism – it recruited many of its members from the Ku Klux Klan (“KKK”) and

²⁰⁶ See *id* at 94-95; No More Deaths & La Coalición De Derechos Humanos, *supra* note 25, at 5.

²⁰⁷ Massey et al., *supra* note 121, at 95; No More Deaths & La Coalición De Derechos Humanos, *supra* note 25, at 5.

²⁰⁸ *Id.*

²⁰⁹ No More Deaths & La Coalición De Derechos Humanos, *supra* note 25, at 60.

²¹⁰ Greg Grandin, *The Border Patrol Has Been A Cult Of Brutality Since 1924*, The Intercept, Jan. 12, 2019, <https://theintercept.com/2019/01/12/border-patrol-history/>.

²¹¹ *Id.*

²¹² 1924: *Border Patrol established*, U.S. Customs and Border Patrol, <https://www.cbp.gov/about/history/1924-border-patrol->

from the famously then-violent and racist Texas Rangers.²¹³ While there has been mass coverage of the KKK's racist actions, the Rangers have a lesser-known but equally well-documented history of racist violence.

Today we may think of the Texas Rangers as a state police force, but in the early twentieth century they were known as a vigilante force protecting white supremacy. In *The Injustice Never Leaves You*, Brown University Professor Monica Munoz Martinez traced the Texas Rangers' racist history from its beginnings in the 1830s. It began as a small group of armed men, organized to protect Texas settlers. According to journalist Dough Swanson, Texas settlers wanted the Karankawa Indians²¹⁴ removed, so the Texas Rangers' first mission was to protect Texas Settlers from the Karankawa.²¹⁵ By the late 19th century, it had turned into a "state-sponsored terror squad directed to secure white racial hegemony along the Texas-Mexico border." In the 19th Century, the Republic of Texas, and later the Texas state legislature, had tasked the Rangers with "the suppression of Indigenous peoples like the Comanche, the recapture of enslaved Black people and the raiding of Mexican communities in Texas' border region."²¹⁶ The Rangers were directly responsible for numerous extrajudicial killings in the late 19th to early 20th century. In other instances, they incited and aided lynch mobs or local authorities in such killings. The 1910 burning-at-the-stake of Antonia Rodriguez in Rocksprings, the 1918 midnight massacre of 15

[established#:~:text=On%20May%2028%2C%201924%2C%20Congress,Labor%20Appropriation%20Act%20of%201924](#) (last visited Apr. 19, 2022).

²¹³ Katy Murdza & Walters Ewing, *The Legacy of Racism within the U.S. Border Patrol*, Am. Immigr. Council (Feb. 10, 2021), <https://www.americanimmigrationcouncil.org/research/legacy-racism-within-us-border-patrol>

²¹⁴ The Karankawa Indians are a coastal tribe in Texas.

²¹⁵ Fresh Air, 'Cult of Glory' Reveals the Dark History of the Texas Rangers, NPR, June 8, 2020, <https://www.npr.org/2020/06/08/871929844/cult-of-glory-reveals-the-dark-history-of-the-texas-rangers>.

²¹⁶ Jonathan S. Jones, *Though Often Mythologized, the Texas Rangers have an Ugly History of Brutality*, Wash. Post, Sept. 21, 2020, <https://www.washingtonpost.com/outlook/2020/09/21/though-often-mythologized-texas-rangers-have-an-ugly-history-brutality/>.

unarmed Mexicans by Texas Rangers in Porvenir, and the double murder of Antonio Longoria and Jesus Bazan are prominent examples of the unjustified anti-Mexican violence that the Texas Rangers carried out both directly and indirectly.²¹⁷ Professor Martinez found that the racist violence perpetuated by the Rangers peaked in the period of 1915-1919. A few years later the CBP was created and began heavily recruiting from the ranks of the Rangers.²¹⁸

The Rangers carried their “highly racialized...tradition of violence” into the culture of the Border Patrol. This included a brutal practice known as “revenge by proxy,” where agents killed anyone suspected of being of Mexican descent as revenge for crimes committed by perpetrators believed to be Mexican. Clifford Perkins—the first Border Patrol inspector in charge in El Paso, Texas—called the methods employed by the Rangers “rough but effective,” contributing to a culture of impunity that exists within the agency to this day.²¹⁹

Along with recruiting from the Texas Rangers, the Border Patrol also recruited from the membership of the Ku Klux Klan, which was then active in border towns from Texas to California. “Practically every other member” of El Paso’s National Guard “was in the Klan,” one military officer recalled, and many joined the Border Patrol upon its establishment.²²⁰

“From the beginning, the Border Patrol “brotherhood” has consistently perpetuated an internal culture of racism. To maintain whiteness within its ranks, the Border Patrol pushed out many officers who had close ties to the surrounding Mexican communities.”²²¹ From the start, this was specifically witnessed in the districts covering El Paso and Laredo, Texas.

²¹⁷ *Id.* at 187

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ Greg Grandin, *The Border Patrol has been a cult of brutality since 1924*, *The Intercept*, Jan. 12, 2019, <https://theintercept.com/2019/01/12/border-patrol-history/>; Shawn Lay, *War, Revolution, and the Ku Klux Klan: A Study of Intolerance in a Border City* (1985).

²²¹ *Id.*

Consistent with its racist origins and culture, the Border Patrol has targeted people on the basis of their appearance since its inception – an appearance that “one officer described as “Mexican male; about 5’5” to 5’8”; dark brown hair; brown eyes; dark complexion”²²² —or what immigration historian Kelly Lytle Hernández calls ‘Mexican Brown.’”²²³

D. The Border Patrol’s policies remain steeped in its racist history.

The dehumanization of immigrants that the CBP instills in its agents is a practice that encourages agents to perpetuate the abhorrent racist treatment of immigrants under their responsibility. This practice makes it easy for the agency to ignore the physical, sexual, and verbal abuse committed by CBP agents, and contributes to the racist culture of the agency. This dehumanizing racism is well documented in court decisions and reports from leading NGOs.

i. Court decisions finding a widespread culture of racism

In *Orantes-Hernández v. Meese*, a class action lawsuit brought by El Salvadorans residing in the United States against Immigration and Naturalization Services (INS), the district court held that the INS refused to recognize Salvadorans’ rights to counsel in voluntary departure agreements, and discouraged class members from applying for Asylum.²²⁴ In its ruling, the district court enjoined the INS from coercing Salvadoran detainees into signing voluntary departure agreements, required the INS to notify Salvadoran detainees of their right to political asylum and their right to representation by counsel in deportation proceedings, and enjoined the INS from transferring detainees irrespective of established attorney-client relationships.”²²⁵

²²² *Id.*

²²³ *Id.*

²²⁴ *Orantes-Hernández v. Meese*, 685 F. Supp. 1488, 1490 (C.D. Cal. 1988).

²²⁵ *Id.*

On appeal, the Ninth Circuit affirmed, holding that denying Salvadorans their rights to assistance of counsel, prohibiting them from telephone access, and forbidding them from receiving or possessing any written material other than the new testament “establishes that INS engages in a pattern and practice of pressuring or intimidating Salvadorans who remain detained after the issuance of an OSC to request voluntary departure or voluntary deportation to El Salvador.”²²⁶ In its holding, the court relied on evidence that class members were being induced to accept voluntary departure because INS agents circled the signature line for voluntary departure or put an “X” on the form next to it and instructed class members to “sign here.”²²⁷ There was also evidence that agents gave forms in English to class members who could not understand the language.²²⁸ In one case, the INS agent “grabbed [a class member’s] hand and physically forced her to make an X as her signature on Form 1-274.”²²⁹

ii. Court decisions finding widespread official policies promoting racism

In *United States v. Carrillo-Lopez*,²³⁰ the court granted a motion to dismiss an indictment resulting from an illegal reentry after deportation on the grounds that the statute was motivated by racial animus in violation of equal protection. The court reasoned that because (1) the reentry provision (8 U.S.C.S. § 1326) has a disparate impact on Mexican and other Latinx individuals, (2) the predecessor of the statute was enacted with racially discriminatory purpose, (3) the legislative history showed that the statute had discriminatory purpose, and (4) the government failed to show that the statute would have been enacted absent discriminatory motivation, the statute violated the

²²⁶ *Orantes- Hernández v. Thornburgh*, 919 F.2d 549, 558 (9th Cir. 1990).

²²⁷ *Id.* at 562.

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *United States v. Carrillo-Lopez*, No. 3:20-cr-00026-MMD-WGC, 2021 U.S. Dist. LEXIS 155741 (D. Nev. Aug. 18, 2021).

Equal Protection Clause.²³¹ ²³² Even though there is no publicly-available data on the national origin of individuals prosecuted under the reentry provision of 8 U.S.C.S. § 1326, the court relied on available data showing that “over ninety-seven percent of persons apprehended at the border in 2000 were of Mexican descent, eighty-six percent in 2005, and eighty-seven percent in 2010” and that because “the immigration policy under President Trump and Department of Justice directives to prosecuting attorneys demonstrate that many, if not all, apprehensions are ultimately prosecuted[,]” the data “meet the necessary standard of disproportionality.”²³³

The court also rejected the government’s argument “that geography explains disparate impact” because “the Ninth Circuit has previously found disparate impact in situations where “geography” might arguably explain the disparity” and found the government’s argument “circular and inconclusive” because “it cannot be the case that the mere over-policing of certain locations—here the Southern border as opposed to the Northern border—prevents a specific group from raising equal protection challenges, or that because Mexican citizens will likely make up more unlawful reentries because they are a higher percentage of the overall illegal alien population, they cannot raise equal protection challenges. Ultimately, the law still bears more heavily on those individuals than others[,]” which meets the disparate impact standard.²³⁴

The court further rejected the government’s arguments that there were sufficient “obvious and uncontroverted . . . nondiscriminatory objectives motivating the passage” of the reentry provision in Section 1326.²³⁵ The court rejected arguments that the statute was driven “by a desire to protect American citizens from economic competition,” “a need to maintain national security,”

²³¹ *Id.* at 52-57.

²³² U.S. Const. Amend. XIV, § 1.

²³³ *United States v. Carrillo-Lopez*, No. 3:20-cr-00026-MMD-WGC at 10-11.

²³⁴ *Id.* at 13-14.

²³⁵ *Id.* at 55.

and “a need to maintain foreign relations with international allies, including Mexico”.²³⁶ The court found that none of these were “motivating factor[s] independent from the demonstrated racial animus.”²³⁷

iii. Recent investigations by the American Civil Liberties Union (ACLU)

A series of recent reports by the American Civil Liberties Union (ACLU) investigating the actions of the CBP in New York, Michigan, Montana, and Texas reveal that the CBP remains a deeply racist organization. The ACLU was founded in 1920 to protect the victims of the “Palmer Raids” in which immigrants were rounded up for deportation without legal protections.²³⁸ For the past 100+ years it has played a crucial role in defending and protecting immigrants’ rights.²³⁹

A report released on March 25, 2021 by the Michigan ACLU revealed the use of extensive racial profiling by the US Border Patrol in Michigan spanning the years 2012 to 2019. The data show that Border Patrol agents routinely spend their time and resources targeting people of Latin American origin, many of whom are long-term Michigan residents, by using language and skin color in deciding whom to stop and question.²⁴⁰ As a result, even though Latin Americans constitute only 16.8% of Michigan’s foreign-born population, the report shows that nearly eighty-four percent of all noncitizens apprehended by Border Patrol were Latinx.²⁴¹ At the US-Canadian border, Border Patrol agents in Michigan use “complexion codes” to refer to individuals they

²³⁶ *Id.* at 51-58

²³⁷ *Id.* at 56.

²³⁸ *ACLU History*, American Civil Liberties Union, <https://www.aclu.org/about/aclu-history> (last visited Apr. 19, 2022).

²³⁹ *Id.*

²⁴⁰ ACLU of Michigan, *New ACLU Of Michigan Report: Border Patrol Operates Far From The Border And Uses Racial Profiling And State And Local Police To Target Michigan Immigrant Communities*, Mar. 25, 2021, <https://www.aclu.org/press-releases/new-aclu-michigan-report-border-patrol-operates-far-border-and-uses-racial-profiling>.

²⁴¹ *Id.*

detain.²⁴² More than ninety-six percent of those arrested are recorded by Border Patrol as being “Black,” “Dark Brown,” “Dark,” “Light Brown,” “Medium Brown,” “Medium,” or “Yellow.”²⁴³

The New York chapter of the ACLU analyzed over 200 incident reports of the Border Patrol between November 2016 and March 2017 in five New York counties near the Canadian border. Approximately eighty-six percent of those who were stopped by the Border Patrol were people of color. In one example, local police detained two backseat passengers at a traffic stop who “appeared Hispanic,” and made them wait despite the fact that the driver and the owner both presented valid driver’s licenses.²⁴⁴ In another incident, “local sheriffs arriving at a house in response to a 911 call in Spanish detained six Latinx men they presumed to be of Mexican descent and in the country illegally, and called Border Patrol to pick them up.”²⁴⁵

In Montana, agents from the Havre Sector CBP unit routinely target Latinx individuals without lawful cause. “One such incident led to a published Ninth Circuit opinion holding that CBP agents illegally detained a group of men in Havre in 2006. ...CBP agents admitted they routinely profile non-white individuals in the Havre Sector.” According to a CBP supervisor, “[w]e have a lot of agents here and nobody really has much to do.” He recounted seeing “two Mexicans” while off duty in a local mall. He was about to report the two shoppers to CBP so the agency could send an agent — only to find that another off-duty CBP agent had already made the same report. For these agents, people are suspicious if they do not fit their profile of a typical resident of Havre

²⁴² ACLU of Michigan, *Michigan, The Borders Long Shadow* (Mar. 25, 2021),

https://www.aclumich.org/sites/default/files/field_documents/100_mile_zone_report-updated.pdf.

²⁴³ ACLU of Michigan, *New ACLU Of Michigan Report: Border Patrol Operates Far From The Border And Uses Racial Profiling And State And Local Police To Target Michigan Immigrant Communities* (Mar. 25, 2021), <https://www.aclu.org/press-releases/new-aclu-michigan-report-border-patrol-operates-far-border-and-uses-racial-profiling>.

²⁴⁴ New York Civil Liberties Union, *Crossing The Line: Border Patrol And Local Law Enforcement Practices In New York* (Apr. 2019), https://www.nyclu.org/sites/default/files/field_documents/20190402_borderpatrol_final.pdf.

²⁴⁵ *Id.*

— i.e., if they are not white.²⁴⁶ In another instance, two women, American citizens, born in Texas and California, were questioned as they attempted to buy groceries in Havre. They were detained and asked to show identification after speaking Spanish in a convenience store in Montana.²⁴⁷ Video footage of the encounter shows CBP Agent Paul O'Neal telling one of the women, "Ma'am, the reason I asked you for your ID is because I came in here and I saw that you guys are speaking Spanish, which is very unheard of up here."²⁴⁸

The ACLU Texas chapter tracked fatal encounters with the CBP in a detailed report issued on August 6, 2021. The report identified 177 fatal encounters with CBP personnel dating back to January 2010.²⁴⁹ “Some of the most disturbing incidents include an agent shooting and killing a teenager across the border in Mexico; agents neglecting a dying 16-year-old on a Border Patrol cell floor; and agents engaging in deadly high-speed car chases.”²⁵⁰ Of those fatalities caused by the Border Patrol in which the names were recorded, the majority of the victims had Latinx names. Looking at three years, 2010 (the year Mr. Hernández-Rojas was killed), 2015, and 2020, the statistics demonstrate that in sixty-six percent to eighty-three percent of the fatalities the victims had Latinx names: five of the six in 2010, six out of nine in 2015 and seven out of nine in 2020.²⁵¹

²⁴⁶ American Civil Liberties Union, *Customs And Border Protection Settles Federal Lawsuit With American Citizens Racially Profiled And Unlawfully Detained For Speaking Spanish* (Nov. 24, 2020), <https://www.aclu.org/press-releases/customs-and-border-protection-settles-federal-lawsuit-american-citizens-rationally>

²⁴⁷ Bill Chapell, *Americans Who Were Detained After Speaking Spanish In Montana Sue U.S. Border Agency*, NPR, Feb. 15, 2019, <https://www.npr.org/2019/02/15/695184555/americans-who-were-detained-after-speaking-spanish-in-montana-sue-u-s-border-pat>.

²⁴⁸ *Id.*

²⁴⁹ Mat Levin, *New Tracker Finds 177 Fatal Encounters With Customs And Border Protection (CBP) Since 2010*, ACLU of Texas (Aug. 6, 2021), <https://www.aclutx.org/en/press-releases/new-tracker-finds-177-fatal-encounters-customs-and-border-protection-cbp-2010>.

²⁵⁰ *Id.*

²⁵¹ Southern Border Communities Coalition, *Fatal Encounter with CBP Since 2010* (Feb. 23, 2022), https://www.southernborder.org/deaths_by_border_patrol; U.S. Customs and Border Prot., *Southwest Land Border Encounters (By Component)*, <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters-by-component> (last visited Apr. 23, 2022).

iv. Recent reports of the racist inhumanity of Border Patrol agents

Numerous reports point to a systemic practice of dehumanization. An NBC News report from 2019 shows the poor treatment of migrant children by the US Border Patrol Agents in Arizona.²⁵² A 15-year-old girl from Honduras recounted her experience of being groped by an officer in front of other officers and immigrants as the officers laughed. NBC reported “dehumanizing cruelty, retaliation against those who complain and the culture of impunity that needs reform and accountability”²⁵³ “In nearly 30 accounts . . . kids who spent time in the Yuma border station repeatedly described . . . being denied a phone call, not being offered a shower, sleeping on concrete or outside with only a Mylar blanket . . .”²⁵⁴

It is common to use language that dehumanizes migrants in the internal Border Patrol culture. In a 2021 special report titled *The Legacy of Racism within the U.S. Border Patrol*, the American Immigration Council reported that some agents have stated that the internal culture results in “pseudospeciation,” in which a different cultural group is thought of as another species.²⁵⁵ The Migrant Border Crossing Study surveyed over 1,000 recently deported Mexicans between 2010 and 2012. Participants reported various “statements demonstrating prejudice against Latin Americans” made by Border Patrol agents.²⁵⁶ The statements included “wetback,” “beaner,”

²⁵² Jacob Soboroff & Julia Ainsley, *Migrant kids in overcrowded Arizona border station allege sex assault, retaliation from U.S. agents*, NBC News, July 9, 2019, <https://www.nbcnews.com/politics/immigration/migrant-kids-overcrowded-arizona-border-station-allege-sex-assault-retaliation-n1027886>.

²⁵³ America’s Voice Education Fund, *A Culture of Impunity and Dehumanizing Cruelty on Display at CBP* (July 10, 2019), https://americasvoice.org/press_releases/a-culture-of-impunity-and-dehumanizing-cruelty-on-display-at-cbp/; See also Soboroff & Ainsley, *supra* note 229.

²⁵⁴ *Id.*

²⁵⁵ Murdza, *supra* 191.

²⁵⁶ *Id.*

“filthy Indian,” “dirty little Mexican woman,” “Mexican pieces of shit,” and “you just come over to pop your baby out.”²⁵⁷

In 2012, a CBP use-of-force instructor reported to ICE’s Office of Professional Responsibility that one of his colleagues had told a room of supervisors, “you tell all the guys that if they feel threatened, they can beat that ‘tonk’ like a piñata until candy comes out,” in contradiction with the agency’s use of force policy.²⁵⁸ A Border Patrol agent defined the word “tonk” in federal court as “the sound made when a ‘wetback’ is hit over the head with a flashlight.”²⁵⁹ Border Patrol agents have explained that agency policy requires paperwork to be completed after the use of weapons such as pepper spray, tasers, or batons, so the use of a flashlight as a weapon is therefore favored because it does not require paperwork. “Tonk water” is used to refer to the water that humanitarian volunteers leave in the desert for migrants; these volunteers are in turn called “tonk lovers.”²⁶⁰

In 2014, a group of advocacy organizations filed a complaint with DHS oversight agencies on behalf of 116 unaccompanied immigrant children who had experienced abuse and mistreatment in Border Patrol custody.²⁶¹ In addition to physical and sexual abuse, nearly all of the accounts include “racially and sexually-charged comments and death threats,” including referring to children as “dog[s]” and “piece[s] of crap” and telling them they “contaminate this country.”²⁶²

In an Arizona survey conducted between 2006 and 2008, twenty-two percent of U.S. citizens and lawful permanent residents of Mexican descent who responded reported having

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.*

experienced or witnessed mistreatment by immigration officials.²⁶³ Incidents included immigration officers detaining people without inquiring about their immigration status, ordering them to lie down at gunpoint while they were out running for exercise, shaking a ladder to throw someone off of it while demanding identity documents.²⁶⁴ Participants also reported being detained and accused of smuggling while traveling with a minor relative of a lighter skin complexion.²⁶⁵ In 2014, Arivaca, Arizona residents conducted a survey which revealed that Latinx-occupied vehicles were more than 26 times more likely to be required to show identification while passing through a CBP checkpoint.²⁶⁶

Activities among Border Patrol agents that have surfaced depict widespread racial bias against the Latinx community. In 2019, *ProPublica* revealed a Facebook group with about 9500 Border Patrol members, titled “I’m 10-15,” (code for ‘aliens in custody’).” It included Carla Provost, the highest-ranking official within the agency at that time. “The three-year-old group shared derogatory comments about Latina lawmakers who were planning to visit a controversial Texas detention facility, calling them ‘scum buckets’ and ‘hoes.’”²⁶⁷ Postings included jokes about U.S. Congresswoman Alexandria Ocasio-Cortez participating in sexual activity with a detained migrant, the deaths of migrants, and throwing burritos at Latino members of Congress visiting a detention facility.²⁶⁸ In September 2020, the Border Patrol released a fictionalized 3-minute video on its YouTube channel.²⁶⁹ It depicted a Spanish-speaking man escaping from Border Patrol

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ A.C. Thompson, *Inside the Secret Border Patrol Facebook Group Where Agents Joke About Migrant Deaths and Post Sexist Memes*, July 1, 2019, <https://www.propublica.org/article/secret-border-patrol-facebook-group-agents-joke-about-migrant-deaths-post-sexist-memes>.

²⁶⁸ *Id.*

²⁶⁹ Murdza, *supra* note 191.

agents, then stabbing another man, with a voice over, “Every apprehension matters. Do you know who got away?”²⁷⁰ This promotes racist attitudes correlating Latino immigrants with violent crime.

In November 2014, a civil rights complaint was filed with the Office of Civil Rights and Civil Liberties raising concerns about CBP’s failure to properly screen asylum seekers by a group of organizations including the American Immigration Lawyers Association (AILA), the Center for Gender & Refugee Studies, Human Rights First, and the Lawyers’ Committee for Civil Rights.²⁷¹ The complaint asserts that the failure of CBP officers to properly screen individuals for asylum at the border results in erroneous issuances of expedited removal orders and the premature deportation of “certain noncitizens.”²⁷² Specifically, the report points to the number of expedited removal orders issued by the Department of Homeland Security (DHS) more than doubling from 72,911 in 2005 to 193,092 in 2013. In 2013, expedited removals accounted for 44 percent (up 5 percent from FY 2012) of all removals. Almost all expedited removals—98 percent—were issued against nationals from Mexico, Guatemala, El Salvador, and Honduras.²⁷³

v. Recent investigations by Human Rights Watch

An investigative report by Human Rights Watch, based on 35 interviews with Central American migrants in detention in the US or recently deported to Honduras, uncovers the same abuse of the expedited removal and reinstatement of removal policies against Central American

²⁷⁰ *Id.*

²⁷¹ National Immigrant Justice Center et al., Office for Civil Rights and Civil Liberties, Department of Homeland Security, Complaint Cover Letter (Nov. 13, 2014), <https://immigrantjustice.org/sites/immigrantjustice.org/files/images/Right%20to%20Asylum%20-%20CRCL%20Complaint%20Cover%20Letter%20-%202011.13.14%20FINAL%20PUBLIC.pdf> .

²⁷² *Id.*

²⁷³ *Id.*

migrants.²⁷⁴ The report contained 2011-2012 data obtained from Customs and Border Protection under the Freedom of Information Act (FOIA), which indicated that few Central American migrants are identified by CBP as people who fear return to their country in the first stage of the expedited removal process. The report stated:

“The data show that the vast majority of Hondurans, at least 80 percent, are placed in fast-track expedited removal and reinstatement of removal proceedings but only a minuscule minority, 1.9 percent, got flagged for credible fear assessments by CBP. The percentages for Mexico, Honduras, El Salvador, and Guatemala are similar, ranging from 0.1 to 5.5 percent. By comparison, 21 percent of migrants from other countries who underwent the same proceedings in the same years were flagged for credible fear interviews by CBP.”²⁷⁵

In a 2019 internal email disclosed to Human Rights Watch, an asylum officer describes “alarming” evidence contained in an applicant’s file that a border agent intimidated an asylum applicant and failed to correctly record their fear of return to their country of origin or personal information.²⁷⁶

In 2021, Human Rights Watch received internal US Department of Homeland Security reports via the Freedom of Information Act (FOIA). The internal reports included over 160 allegations of assault, sexual abuse, due process violations, denial of medical care, harsh detention

²⁷⁴ Human Rights Watch, *“You Don’t Have Rights Here” US Border Screening and Returns of Central Americans to Risk of Serious Harm* (Oct. 16, 2014), <https://www.hrw.org/report/2014/10/16/you-dont-have-rights-here/us-border-screening-and-returns-central-americans-risk>.

²⁷⁵ *Id.*

²⁷⁶ *“They treat you like you are worthless”*: *Internal DHS Reports of Abuses by US Border Officials*, October 21, 2021, <https://www.hrw.org/report/2021/10/21/they-treat-you-you-are-worthless/internal-dhs-reports-abuses-us-border-officials>.

conditions, and dehumanizing treatment at the hands of officers within several DHS components, particularly CBP officers and Border Patrol agents.²⁷⁷

The FOIA documents paint a picture of DHS as an agency that appears to have normalized shocking abuses, especially within CBP, where serious transparency, oversight, and accountability deficits have been mounting for years. A 2019 report from the DHS Office of Inspector General found that 47% of CBP employees surveyed did not believe officials at all levels were held accountable for their conduct.²⁷⁸ In a 2018 affidavit, CBP's former deputy assistant commissioner for internal affairs described CBP leadership as "reluctant to hold agents and others within the agency accountable for their actions, including if they were involved in criminal activity."²⁷⁹

Border patrol agents have shared with Human Rights Watch that the agency "has a culture of cruelty" and "a culture of dehumanizing" border crossers,²⁸⁰ while former asylum officers have little hope DHS will act on reports of misconduct.²⁸¹

VII. DIMINISHING FORMS OF REDRESS

For over 50 years, under the Supreme Court's ruling in *Bivens v. Six Unknown Named Agents*, plaintiffs were able to seek money damages against federal agents for violating their constitutional rights. As the Customs and Border Protection is the largest law enforcement agency in the United States, *Bivens* actions are particularly pertinent in holding agents

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ Ari Sawyer, *the US Border Patrol Is Broken*, March 2, 2022, <https://www.hrw.org/news/2022/03/02/us-border-patrol-broken>.

²⁸¹ "They treat you like you are worthless": Internal DHS Reports of Abuses by US Border Officials, October 21, 2021, <https://www.hrw.org/report/2021/10/21/they-treat-you-you-are-worthless/internal-dhs-reports-abuses-us-border-officials>.

accountable at the border.²⁸² However, the recent Supreme Court decision in *Egbert v. Boule* significantly narrows the applicability of *Bivens* cases and effectively eliminates migrant plaintiff's ability to seek remedies for the unconstitutional conduct of CBP agents.

In *Egbert v. Boule*, the Court ruled in a 6-3 decision that Boule was not entitled to seek monetary damages for the harm caused by agent Egbert's excessive force and retaliation against Boule. The Court held that the threshold question for a *Bivens* claim is "whether there is any reason to think that Congress might be better equipped to create a damages remedy."²⁸³ In *Boule*, the Court reasoned that because the altercation took place while agent Egbert was carrying out Border Patrol's mandate to "interdic[t] persons attempting to illegally enter or exit the United States or goods being illegally imported into or exported from the United States," the case was thus a matter of border-security.²⁸⁴ The Court held that a *Bivens* claim is not proper in a border-security context because Congress is better positioned to create remedies for cases that have national security implications.²⁸⁵ This eliminates the possibility of Mr. Hernández-Rojas and his family recovering damages under the most-frequently used U.S. civil rights statute, and makes a Commission decision even more appropriate.

This Supreme Court decision has a discriminatory impact on migrant plaintiffs, such as Mr. Hernández-Rojas and his family, who are disproportionately vulnerable to violations of their human rights by border patrol agents in the border regions.

²⁸² Complaint (March 2016) at 9.

²⁸³ *Egbert v. Boule*, 213 L. Ed. 2d 54, 142 S. Ct. 1793, 1798 (2022)

²⁸⁴ *Id.*; 6 U. S. C. §211(e)(3)(A).

²⁸⁵ *Egbert*, 142 S. Ct. at 1798.

VIII. CONCLUSION

The arguments set forth above demonstrate that Mr. Hernández-Rojas's death cannot be divorced from the discrimination and racism embedded in the history, design, and implementation of U.S. immigration policy. From its founding, the goal of United States immigration policy has been to keep America white by targeting Mexican and other non-white immigrants. These policies excluded Mexican and other non-white immigrants, inflicted violence upon them if they succeeded in entering the country, singled them out for harassment, and deported them and their descendants unlawfully. The Border Patrol's creation, increased funding, militarization, and violent and unlawful enforcement campaigns are an essential component of this racist legacy. The violence inflicted on Mr. Hernández-Rojas at the hands of over a dozen federal agents reflects how the agency's racist history and policies that systematically regards Latinx migrants as not fully human is internalized and reinforced by individual agents.

From his initial detainment, to his arrival at the Chula Vista Station, up to the moment of his death, Mr. Hernández-Rojas was subject to racism and dehumanizing conduct by CBP agents. While detained at the border, Mr. Hernández-Rojas was reportedly compliant and did not resist arrest. Nevertheless, Mr. Hernández-Rojas was considered threatening to the agent simply because he allegedly had a "vibe" about him.²⁸⁶ Upon arriving to the Chula Vista station, Mr. Hernández-Rojas was again profiled as a threat by one agent because he was carrying a water jug²⁸⁷, and by another because he was too "talkative."²⁸⁸ Lastly, one of the officers involved in the beating and killing of Mr. Hernández-Rojas said his "physical appearance just looked like bad news" and if he

²⁸⁶ San Diego Police Department Police Investigation (Feb. 13, 2013) (Ex. 43) at 170.

²⁸⁷ San Diego Police Department Police Investigation (Feb. 13, 2013) (Ex. 43) at 262.

²⁸⁸ San Diego Police Department Police Investigation (Feb. 13, 2013) (Ex. 43) at 263.

ever met Mr. Hernández-Rojas alone, “he might have had to shoot [him].”²⁸⁹ During police investigations, several agents commented on Mr. Hernández-Rojas’ threatening “size” as a reason for their use of excessive force. However, as a 5’9 male weighing 180 pounds,²⁹⁰ Mr. Hernández-Rojas’ was smaller than the average American male who is 5’9 and 198 pounds.²⁹¹

How is it that armed agents of the state felt threatened, to the point of using fatal force, by a smaller than average unarmed man who had not attempted an act of violence? The explanations offered, namely that Mr. Hernández-Rojas’ was “talking loudly”, carrying a water jug, and had a “vibe” about him, strains credibility as none of these acts in and of themselves are threatening and justify excessive force. In short, Mr. Hernández-Rojas’ greatest act of violence was being an average-size Latino man. The racist conduct of each agent that Mr. Hernández-Rojas encountered reflects the collective dehumanizing culture at CBP, a culture that normalizes agents taking turns beating a man to death as he laid hog-tied and incapacitated.

Federal agents systematically regard Latinx persons at the border as inherently dangerous and threatening because of their race. This racism leads agents to use excessive and inhumane force against Latinx migrants such as Mr. Hernández-Rojas, who begged the agents to stop “treating [him] like an animal” just moments before his death.²⁹² As demonstrated in this brief, the conduct of the CBP agents is a reflection of a long history of racism and violence perpetrated against Latinx migrants. Along with numerous other tragedies, this discrimination was a causal factor in Mr. Hernández-Rojas’ murder.

²⁸⁹ San Diego Police Department Police Investigation (Feb. 13, 2013) (Ex. 43) at 204.

²⁹⁰ San Diego Police Department Police Investigation (Feb. 13, 2013) (Ex. 43) at 490.

²⁹¹ Nicholas Bakalar, *You’re not getting much taller, America. But you are getting bigger.*, January 4, 2019, <https://www.nytimes.com/2019/01/14/health/height-weight-americans-cdc.html>.

²⁹² Transcript of Humberto Navarrete’s Videos (2010) (Ex. 21).

October 13, 2022

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David B. Oppenheimer", enclosed in a thin black rectangular border.

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