No. _____

In the Supreme Court of the United States

AMBROSIO NOLASCO-ARIZA, *PETITIONER*,

V.

UNITED STATES OF AMERICA, *RESPONDENT*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Petitioner is a Mexican citizen charged with illegally reentering the United States in violation of 8 U.S.C. § 1326. In the district court and again on appeal, he argued that § 1326 violates the equal protection guarantee of the Fifth Amendment. The original illegal reentry law was enacted with a discriminatory purpose as part of the Undesirable Aliens Act of 1929 and continues to have a disparate impact on Latinos. The Fifth Circuit granted summary affirmance based on its precedent requiring a court to ignore the original discriminatory animus and look only to the most recent enactment of the challenged provision to determine its constitutionality.

The questions presented are:

1. When a law is originally adopted for an impermissible racially discriminatory purpose and continues to have a disparate impact, do subsequent amendments or reenactments cure any equal protection violation even if they do not address the original discriminatory intent?
2. Does 8 U.S.C. § 1326 violate the equal protection guarantee of the Fifth Amendment?

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Petitioner Ambrosio Nolasco-Ariza asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on May 3, 2023.

PARTIES TO THE PROCEEDING

The caption of this case names all parties to the proceeding in the court whose judgment is sought to be reviewed.

RELATED PROCEEDINGS

All proceedings directly related to the case are as follows:

- *United States v. Nolasco-Ariza*, No. 1:21-CR-234-1 (W.D. Tex. June 10, 2022) (order denying motion to dismiss)

- *United States v. Nolasco-Ariza*, No. 22-50943 (5th Cir. May 3, 2023) (unpublished opinion)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Rules

Legislative History

Other Authorities

DECISIONS BELOW

A copy of the unpublished opinion of the court of appeals, *United States v. Nolasco-Ariza*, No. 22-50943 (5th Cir. May 3, 2023) (per curiam), is attached to this petition as Appendix A. The court of appeals summarily affirmed the district court's denial of the motion to dismiss based on *United States v. Barcenas-Rumualdo*, 53 F.4th 859 (5th Cir. Nov. 18, 2022), which in turn based its analysis and holding on *Harness v. Watson*, 47 F.4th 296 (5th Cir. Aug. 24, 2022) (en banc). The district court's decision denying Nolasco's motion to dismiss is attached as Appendix B.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on May 3, 2023. This petition is filed within 90 days after entry of judgment or order sought to be reviewed. *See* Sup. Ct. R. 13.1, 13.3. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides, in pertinent part: "No person shall … be deprived of life, liberty, or property, without due process of law …."

FEDERAL STATUTE INVOLVED

The text of 8 U.S.C. § 1326 is reproduced in Appendix C.

INTRODUCTION

Illegal reentry was first criminalized in 1929 at the height of the eugenics movement. Legislators who championed the Unauthorized Aliens Act believed that the "Mexican race" would destroy the racial purity of the United States.[1] This law has disparately impacted Mexicans and other Latinos ever since.

Because the original illegal reentry law was enacted with a discriminatory purpose and continues to have a disparate impact, 8 U.S.C. § 1326 is presumptively unconstitutional under *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). The burden thus shifts to the government to show that Congress—in 1929—would have passed the law in the absence of any discriminatory purpose. *Hunter v. Underwood*, 471 U.S. 222, 228 (1985); *Harness v. Watson*, 143 S. Ct. 2426, 2427 (2023) (Jackson, J., dissenting from denial of certiorari). The government cannot make this showing, and the court of appeals

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[1] 70th Cong. Rec. H2817–18 (daily ed. Feb. 9, 1928) (statement of Rep. Box on "Restriction of Mexican Immigration"), https://www.congress.gov/bound-congressional-record/1928/02/09/house-section.

should have vacated Nolasco's conviction because § 1326 is unconstitutional.

But the court of appeals avoided examining the illegal reentry law's "troubling history." *United States v. Barcenas-Rumualdo*, 53 F.4th 859, 866 (5th Cir. 2022); *cf. Ramos v. Louisiana*, 140 S. Ct. 1390, 1401 n.44 (2020) (noting that respect for rational and civil discourse does not excuse leaving the racist reasons for codifying nonunanimous jury laws unexamined). The court determined that recent Fifth Circuit precedent, *Harness*, required it to "'look to the most recent enactment of the challenged provision,' in determining its constitutionality." *Barcenas-Rumualdo*, 53 F.4th at 865 (quoting *Harness v. Watson*, 47 F.4th 296, 306 (5th Cir. 2022) (en banc)).

Harness is wrong. *Harness*, 143 S. Ct. at 2427–28 (2023) (Jackson, J., dissenting from denial of certiorari). It is also inconsistent with this Court's precedent. *See Hunter v. Underwood*, 471 U.S. 222 (1985). The Court should not forego another opportunity to correct the Fifth Circuit's error.

STATEMENT

A. The Undesirable Aliens Act of 1929.

Congress first criminalized the offense of illegal reentry in the Undesirable Aliens Act of 1929, Pub. L. No. 70-1018, ch. 690, § 2, 45 Stat. 1551 (Mar. 4, 1929). That legislation was a direct result of

efforts by white supremacists who believed that the "Mexican race"[2] would destroy the racial purity of the United States. Enacted at the height of the eugenics movement, legislators wanted to use immigration laws to keep the country's blood "white and purely Caucasian." 70th Cong. Rec. H2462 (daily ed. Feb. 3, 1928) (statement of Rep. Lankford on "Across the Borders"), https://www.congress.gov/bound-congressional-record/1928/02/03/house-section.

During the 1920s, legislators solicited reports and testimony from a eugenicist, Dr. Harry H. Laughlin,[3] who testified before Congress multiple times and produced four reports that discussed topics such as "race crossing," "mate selection," "fecundity," "racial

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[2] In the early 20th century, "Mexican" was conceptualized as a race rather than a nationality. For instance, the 1930 census listed "Mexican" as a "Color or Race." United States Census Bureau, *History: 1930*, https://www.census.gov/history/www/through_the_decades/index_of_questions/1930_1.html. And "[f]rom at least 1846 until as recently as 2001 courts throughout the United States have utilized the term 'Mexican race' to describe Latinos." Lupe S. Salinas, *Immigration and Language Rights: The Evolution of Private Racist Attitudes into American Public Law and Policy*, 7 Nev. L.J. 895, 913 (2007).

[3] Dr. Laughlin was well known for his model sterilization law that many states and countries, including the Third Reich of Nazi Germany, used as a template. Steven A. Farber, *U.S. Scientists' Role in the Eugenics Movement (1907–1939): A Contemporary Biologist's Perspective*, Zebrafish (Dec. 2008), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2757926/.

composition," and the "individual quality of future population." *The Eugenical Aspects of Deportation: Hearings Before the H. Comm. on Immig. & Naturalization*, 70th Cong., Hearing No. 70.1.4, at 2, 3 (1928). Relying heavily on these theories, Congress anchored its 1920s immigration legislation in eugenics and racial inferiority. *See* E.P. Hutchinson, Legislative History of American Immigration Law, 1798-1965, at 212–13 (Penn. Press 1981).

In the early 1920s, Congress began to focus its legislation on the exclusion of "undesirable" immigrants—which was often code for non-white. *See Ave. 6E Investments, LLC v. City of Yuma*, 818 F.3d 493, 505–06 (9th Cir. 2016) (holding that "the use of 'code words' may demonstrate discriminatory intent"). The first such law was the National Origins Act of 1924, which established quotas based on the national origins of U.S. citizens as reflected in the 1920 census. Pub. L. No. 68-139, 43 Stat. 153 (May 26, 1924).

The quotas created by the National Origins Act were skewed to keep the nation's "racial strains" predominantly Anglo-Saxon. Mae M. Ngai, Impossible Subjects 24–25 (William Chafe, et al. 2004) ["Ngai, Impossible Subjects"]. The law on its face did not count "nonwhite people residing in the United States" toward the quotas it established. *Id.* Indeed, its newly-created "Quota Board" interpreted this provision to exclude all Black people; all East and

South Asians (including those who had American citizenship by birth); and all citizens in Hawaii, Puerto Rico, and Alaska. *Id.* at 26. Congress and the president accepted these exclusions under pressure to "stand firm against the efforts of 'hyphenates' who would play politics with the nation's blood stream." *Id.* at 35 (cleaned up).

Yet there was a wrinkle in the National Origins Act—it did not set quotas on immigrants from countries in the Western Hemisphere. This was due to the influence of large agricultural businesses that relied heavily on labor from just over the border. *See* Hans P. Vought, The Bully Pulpit 179 (Mercer Univ. Press 2004). These agri-businesses pressured legislators from western states to vote against the law, forcing nativists in Congress to "choose between accepting a Mexican quota exemption or passing no immigration law at all." C.A. ROA.94 (Hernández declaration, at 3). As one representative complained, there was no chance of capping the number of Mexican immigrants because too many growers were "interested in the importation of these poor peons." 71st Cong. Rec. H3619 (daily ed. Feb. 16, 1929) (statement of Rep. Box), https://www.congress.gov/bound-congressional-record/1929/02/16/house-section.

So despite passing the most sweeping immigration law in years, legislators were unsatisfied. Representative Madden grumbled that the bill "leaves open the doors for perhaps the worst element that comes into the United States—the Mexican peon." Benjamin Gonzalez O'Brien, Chap. 1, Handcuffs and Chain Link (Kindle Ed. 2018) ["Gonzalez O'Brien, Handcuffs"]. Representative Patrick O'Sullivan criticized the restrictions on Italian immigrants, stating that "the average Italian is as much superior to the average Mexican as a full-blooded Airedale is to a mongrel." 68th Cong. Rec. H5900 (daily ed. Apr. 8, 1924) (statement of Rep. O'Sullivan), https://www.congress.gov/bound-congressional-record/1924/04/08/house-section. Legislators "proposed bill after bill" restricting Mexican immigration but none could survive opposition from southwestern growers. C.A. ROA.96 (Hernández declaration, at 5). To solve this problem, a group of key figures began to strategize a new type of immigration bill that would approach immigration from a criminal—rather than a civil—angle.

After passage of the National Origins Act of 1924, the Department of Labor (which governed the Bureau of Immigration) began implementing Congress's new quota system. *See* Vought, The Bully Pulpit 174–79. Then-Secretary of Labor James Davis was a strong advocate of Dr. Laughlin and his eugenics theories—even

using them as the basis for policies he had developed and published under the title "Selective Immigration or None." *Id.* Davis warned that the "rat type" was coming to the United States, and that these "rat men" would jeopardize the American gene pool. *Id.* at 174–75.

Secretary Davis was nevertheless torn between his belief in eugenics and his responsibility to maintain a large labor supply for the railroad and agriculture industries. *Id.* at 216. So together with devout racist (and suspected Ku Klux Klan member) Senator Coleman Blease,[4] Davis developed a compromise—Congress would criminalize border crossing *after the fact*, rather than *prevent* it in the first place. 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. That way, they reasoned, authorities could expel Mexicans through a criminal prosecution after the growing season was over, avoiding resistance from businesses that depended on Mexican labor. *Id.* The southwest growers were in agreement. As one put it, "We, in California, would greatly

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[4] For biographical and historical context about Senator Blease, s*ee* B. Simon, *The Appeal of Cole Blease of South Carolina: Race, Class, and Sex in the New South*, 62 The Journal of Southern History 1, 57–86 (Feb. 1996), http://www.jstor.com/stable/2211206.

prefer some set up in which our peak labor demands might be met and upon the completion of our harvest these laborers returned to their country." C.A. ROA.98 (Hernández declaration, at 7).

Secretary Davis and Senator Blease found two eager collaborators in the House of Representatives, both of whom were on the powerful Immigration and Naturalization Committee. Representative John C. Box from Texas had long characterized the goal of immigration law as "the protection of American racial stock from further degradation or change through mongrelization." 70th Cong. Rec. H2817–18 (daily ed. Feb. 9, 1928) (statement of Rep. Box on "Restriction of Mexican Immigration"), https://www.congress.gov/bound-congressional-record/1928/02/09/house-section. In one speech at an immigration conference, Representative Box had explained that

> [t]he Mexican peon is a mixture of Mediterranean-blooded Spanish peasant with low-grade Indians who did not fight to extinction but submitted and multiplied as serfs. Into that was fused much negro slave blood…. The prevention of such mongrelization and the degradation it causes is one of the purposes of our [immigration] laws.

Id. Box believed this importation was "raising a serious race question" because Mexicans were "essentially different from us in character, in social position." *Id.*

Representative Box was joined by the influential Chairman of the House Immigration and Naturalization Committee, Representative Albert Johnson of Washington. Chairman Johnson—for whom the 1924 "Johnson-Reed" National Origins Act was named—was an "energetic and vehement racist and nativist." Dennis Wepman, Immigration: From the Founding of Virginia to the Closing of Ellis Island 242–43 (Facts on File 2002). He headed the Eugenics Research Association, a group that opposed interracial marriage and supported forced sterilizations. *Id.* He also proudly described his 1924 law as a "bulwark against 'a stream of alien blood, with all its inherited misconceptions respecting the relationships of the governing power to the governed." Roger Daniels, Guarding the Golden Door 55 (Hill & Wang 2004). Within two years of the 1924 Act, Chairman Johnson turned to legislation that would exclude the "Mexican race," explaining that, while the argument for immigration restriction had previously been economic, now "'the fundamental reason for it is biological.'" Daniel Okrent, The Guarded Gate: Bigotry, Eugenics, and the Law That Kept Two Generations of Jews, Italians, and Other European Immigrants Out of America 3 (Scribner 2019).

Following the lead of these legislators, other lawmakers soon "turned to narratives of racial threat to justify restriction." Gonzalez O'Brien, Handcuffs, Chap. 1. In 1928, for instance, Representative Robert A. Green of Florida delivered a radio speech (later read into the congressional record by Representative Lankford) that advocated for Western Hemisphere quotas. He asserted that countries south of the United States are "composed of mixtured blood of white, Indian, and negro." 70th Cong. Rec. H2462 (daily ed. Feb. 3, 1928) (statement of Rep. Lankford on "Across the Borders"), https://www.congress.gov/bound-congressional-record/1928/02/03/house-section. Immigration from these countries, he believed, created a "very great penalty upon the society which assimilates," and put it at a disadvantage to countries that have "kept their blood white and purely Caucasian." *Id.*

Chairman Johnson soon convened hearings on new immigration legislation. *Deportation*, *Hearings Before the H. Comm. on Immig. & Naturalization*, 69th Cong. 69.1.3 (1926), https://babel.hathitrust.org/cgi/pt?id=umn.31951d035051758&view=1up&seq=3. At the first hearing, Chairman Johnson admitted into the record a letter from a constituent who urged the legislators to keep out "the scoff and scum, the mongrel, the bootlegger element, from Mexico." *Id.* at 29–30. In response to this letter, Commissioner General of

Immigration Harry Hull, stated, "I think he is right." *Id.* at 29. Representative Box added, "I have some letters, Mr. Chairman, just like that." *Id.*

The following month, the same House committee held a hearing on "The Eugenical Aspects of Deportation," where the principal witness was the well-known eugenicist, Dr. Laughlin. *The Eugenical Aspects of Deportation: Hearings Before the H. Comm. on Immig. & Naturalization*, 70th Cong., Hearing No. 70.1.4, at 1 (1928). Early in the hearing, Chairman Johnson praised Dr. Laughlin's prior reports to Congress on race crossing, mate selection, and fecundity, describing one as a "priceless" resource that would "bear intimately on immigration policy." *Id.* at 3.

Dr. Laughlin testified about his latest eugenics report, the goal of which was to "protect American blood from alien contamination." *Id.* at 4. When Dr. Laughlin encouraged the committee to conduct future research on the effect of "race crossing within the United States," Chairman Johnson replied that such a study would "be of great use to the committee in its deliberations." *Id.* at 11.

Dr. Laughlin discussed the need for further research into "mate selection," because "whenever two races come in contact there is always race mixture" even though the "upper levels tend to maintain themselves because of the purity of the women of the upper

classes." *Id.* at 19. The job of any government, Dr. Laughlin explained, was to "demand fit mating and high fertility from the classes who are better endowed physically, mentally, and morally by heredity." *Id.* By deporting or excluding the "lower races" from the country, Dr. Laughlin contended, "[i]mmigration control is the greatest instrument which the Federal Government can use in promoting race conservation of the Nation." *Id.*

In response, Chairman Johnson advocated for Congress's use of the "principle of applied eugenics" to "do everything possible" to reduce crime by "debarring and deporting" more people. *Id.* at 25. Representative Box agreed, stating, "we will have to control immigration to suit our own needs or we will lose our national character," which would "spell destruction for the future of America." *Id.*

Dr. Laughlin even compared the drafters of deportation laws to "successful breeders of thoroughbred horses," who would never consider "acquiring a mare or a stallion not of the top level" for their "stud farm." *Id.* at 44. One such successful breeder he knew "weeds out from the lower levels and recruits by purchase"—a process that is "analogous to immigration in man." *Id.* at 44–45. "Man is an animal," Dr. Laughlin explained, "and so far as heredity and future generations are concerned, there is considerable real basis for [this] comparison." *Id.* at 45.

When such racial engineering is not possible, Dr. Laughlin warned, deportation of the "undesirable individual" becomes even more critical; otherwise, "we cannot get rid of his blood no matter how inferior it may be, because we cannot deport his offspring born here." *Id.* Dr. Laughlin predicted that so long as the nation's borders remained open to immigrants, "there will always be need for deportation, or the 'final selection.'" *Id.* at 44. In response to this testimony, Chairman Johnson agreed that "[i]mmigration looks more and more like a biological problem, and if the work of this committee results in establishing this principle in our immigration policy we will be well repaid for our efforts." *Id.* at 46.

Though Chairman Johnson's initial legislation failed, the compromise with the agricultural industry brokered by Secretary Davis and Senator Blease soon made a breakthrough. On January 18, 1929, Senator Blease, on behalf of the Senate Committee on Immigration, submitted a report to the full Senate recommending passage of a law that would penalize "aliens who have been expelled from the United States and who reenter the country unlawfully." S. Rep. No. 1456, at 1 (1929).

The following week, Senator Blease presented this bill on the Senate floor, where he reported that Chairman Johnson had "asked me to get the measures over to the House [within two days]

if I possibly could." 71st Cong. Rec. S2092 (daily ed. Jan. 23, 1929), https://www.congress.gov/bound-congressional-record/1929/01/23/senate-section. The full Senate passed the bill with almost no discussion or debate. *Id.* Two weeks later, Chairman Johnson submitted a report from the Committee of Immigration and Naturalization to the full House recommending passage of the illegal reentry law. *Deportation of Aliens*, 70th Cong., Report No. 2397 (Feb. 6, 1929).

During debate on the bill, Representative Thomas L. Blanton complained that Mexicans "come into Texas by hordes" and that "my friend Judge Box has been making a just fight against this situation for years." 71st Cong. Rec. H3619 (daily ed. Feb. 16, 1929), https://www.congress.gov/bound-congressional-record/1929/02/16/house-section. Representative Blanton urged the House to "apprehend the thousands of these Mexicans who are in Texas now unlawfully and put them back across the Rio Grande and keep them there." *Id.* Rep. Schafer added that "[t]hese Mexicans also come into Wisconsin in droves," and Blanton challenged others to visit the international ports of entry in Texas to see the "hordes that come across the bridges with no intention of ever going back." *Id.* Representative Fitzgerald then added that from a

"moral standpoint," Mexicans were "poisoning the American citizen" because they are "of a class" that is "very undesirable." *Id.* at H3620. Even though Canadians were also entering the United States in record numbers at the time, C.A. ROA.168, the racial vitriol expressed during the debates was directed almost exclusively at Mexicans, including by those from states effectively bordering Canada. *See, e.g.*, 71st Cong. Rec. H3619 (daily ed. Feb. 16, 1929), https://www.congress.gov/bound-congressional-record/1929/02/16/house-section (Wisconsin representative complaining only about *Mexicans* taking jobs, not Canadians).

Minutes later, the bill passed the House of Representatives, *id.* at H3621, and the president later signed it into law. 70th Cong., Sess. II, Chap. 690 (Mar. 4, 1929). The law provided that, "if any alien has been arrested and deported in pursuance of law" and "enters or attempts to enter the United States …, he shall be guilty of a felony and upon conviction thereof shall … be punished by imprisonment for not more than two years …." Pub. L. No. 70-1018, ch. 690, § 2.

Within a year of the 1929 law's passage, the government had prosecuted 7,001 border crossing crimes; by 1939, that number

rose to over 44,000.[5] In each of these first ten years, individuals from Mexico accounted for no fewer than 84% of those convicted, and often made up as many as 99% of defendants.[6]

B. The Immigration and Nationality Act of 1952.

In 1952, Congress enacted the Immigration and Nationality Act ("INA") and codified the illegal reentry provision under 8 U.S.C. § 1326. Section 1326 retained the same key features of the 1929 version: "Any alien who (1) has been arrested and deported, and thereafter (2) enters, attempts to enter, or is at any time found in, the United States … shall be guilty of a felony, and upon conviction thereof, be punished by imprisonment of not more than two years…."[7] 8 U.S.C. § 1326 (1952); *see* INA c. 477, Title II, ch. 8, § 276, 66 Stat. 229 (1952).

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[5] Annual Report of the Attorney General of the United States for the Fiscal Year 1939, at 37; Kelly Lytle Hernández, City of Inmates: Conquest, Rebellion, and the Rise of Human Caging in Los Angeles, 1771-1965, at 138–39 n.6 (UNC Press, 2017).

[6] Hernández, City of Inmates, *supra* n.5 at 138–39 n.6 (citing U.S. Bureau of Prisons, *Federal Offenders*, Fiscal Years, 1931–36).

[7] Section 1326 was later amended to include longer imprisonment statutory maximums for defendants previously convicted of a felony and aggravated felony. *See* 8 U.S.C. § 1326(b); Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, Title VII, § 7345(a), 102 Stat. 4181, 4471 (1988) (providing statutory maxima for prior felonies to five years and for prior

Congress did not address the racist underpinnings of the illegal reentry statute in 1952. To the contrary, President Truman condemned the INA as "legislation which would perpetuate injustices of long standing against many other nations of the world" and "intensify the repressive and inhumane aspects of our immigration procedures." Pres. Truman, Veto of Bill to Revise the Laws Relating to Immigration, Naturalization, and Nationality (June 25, 1952), https://www.trumanlibrary.gov/library/public-papers/182/veto-bill-revise-laws-relating-immigration-naturalization-and-nationality.

The deliberation and debate of the INA included legislators repeatedly referring to migrant laborers derogatorily as "wetbacks," discussing the need to deal with the "wetback problem," and nicknaming the senate bill the "Wetback Bill." Cong. Rec. S791–S799 (Feb. 5, 1952), https://www.govinfo.gov/content/pkg/GPO-CRECB-1952-pt1/pdf/GPO-CRECB-1952-pt1-18-1.pdf.

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aggravated felonies to 15 years); Violent Crime Control & Law Enforcement Act of 1994, Pub. L. No. 103-322, Title XIII, § 130001(b), 108 Stat. 2023 (1994) (increasing statutory maxima for prior felonies to 10 years and for prior aggravated felonies to 15 years).

Deputy Attorney General Peyton Ford referred to "wetbacks" in his letter of support for the INA and supported expanding the grounds for prosecution and conviction of unlawful reentry. *See United States v. Carrillo-Lopez*, 68 F.4th 1133, 1149 (9th Cir. 2023). Ford's letter specifically recommended amending the law by adding the "found in" clause now in § 1326—the only significant alteration between the unlawful reentry provision in the Act of 1929 and § 1326. *Compare* INA c. 477, Title II, ch. 8, § 276, 66 Stat. 229 (1952) *with* UUA, Pub. L. No. 70-1018, ch. 690, § 2, 45 Stat. 1551 (Mar. 4, 1929). That change makes the offense of illegal reentry easier to prove, especially for defendants who surreptitiously entered the United States, as often occurs at the southern border with Mexico, and reduces statute of limitations obstacles to charging persons not found until years after the illegal entry. *See United States v. Vargas-Garcia*, 434 F.3d 345, 350 (5th Cir. 2005) (so interpreting § 1326).

Consequently, the disparate impact of the illegal reentry statute persists. The number of prosecutions remains high,[8] making illegal reentry one of the most common federal felonies today.[9] In fiscal year 2022, 99% of the illegal reentry offenders sentenced were Hispanic.[10]

C. Procedural history.

Petitioner Ambrosio Nolasco-Ariza, a Mexican citizen, was charged with illegally reentering the country after having been removed, in violation of 8 U.S.C. § 1326. He moved to dismiss the indictment, arguing that § 1326 violates the equal protection component of the Fifth Amendment under the framework established in *Arlington Heights*, based on the law's original discriminatory

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[8] In recent years, the number of illegal reentry offenders sentenced peaked at 22,077 in fiscal year 2019 and dropped during the pandemic to 11,565 in fiscal year 2021. U.S. Sentencing Comm'n, *Quick Facts: Illegal Reentry Offenses*, *Fiscal Year 2021*, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Illegal_Reentry_FY21.pdf. The number of illegal reentry offenders sentenced increased slightly to 11,978 in fiscal year 2022. U.S. Sentencing Comm'n, *Quick Facts: Illegal Reentry Offenses*, *Fiscal Year 2022*, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Illegal_Reentry_FY22.pdf ["USSC, *2022 Quick Facts*"].

[9] U.S. Sentencing Comm'n, *Fiscal Year 2021: Overview of Federal Criminal Cases* (Apr. 2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/FY21_Overview_Federal_Criminal_Cases.pdf.

[10] USSC, 2022 Quick Facts 1, *supra* n.8.

purpose and disparate impact on Latinos. To support his argument, Nolasco cited congressional records and presented the district court a declaration by history professor Kelly Lytle Hernández, a transcript of Professor Hernández's testimony from an evidentiary hearing, and a declaration by history professor Deborah Kang.

The district court denied the motion in June 2022. Nolasco entered a conditional guilty plea preserving his right to appeal the court's equal protection ruling. The court sentenced Nolasco to 48 months' imprisonment and three years' supervised release. Nolasco timely appealed in October 2022.

Meanwhile the Fifth Circuit issued an en banc decision in *Harness* in August 2022. *Harness* involved a Mississippi constitutional provision that disenfranchises felons. The original provision was adopted as part of a state constitutional convention that "was steeped in racism and … motivated by a desire to discriminate against blacks…." *Harness v. Watson*, 47 F.4th 296, 300 (5th Cir. 2022) (en banc), *cert. denied,* 143 S. Ct. 2426 (2023) (cleaned up). But the majority believed that the provision's reenactments after constitutional amendments were "consequential," and that the critical issue was whether the reenactment of the provision in 1968 was free of intentional racial discrimination. *Id.* at 300, 307. The

principal dissent argued that this Court's precedent required examining the motivation for the original provision unless something had happened since that altered the intent with which the article was adopted. *Harness*, 47 F.4th at 320 (Graves, J., dissenting) (citing *Abbott v. Perez*, 138 S. Ct. 2305 (2018), and *Hunter v. Underwood*, 471 U.S. 222 (1985)). With the original discriminatory intent unaddressed by Mississippi's reenactments, the dissent argued the provision violated the Equal Protection Clause. *Id.* at 318, 343.

The Fifth Circuit then applied *Harness* to hold that § 1326 does not violate the equal protection component of the Fifth Amendment. *United States v. Barcenas-Rumualdo*, 53 F.4th 859, 866–67 (5th Cir. Nov. 18, 2022). The court acknowledged that the Undesirable Aliens Act of 1929 has a "troubling history," but concluded that "the UAA is not our point of reference." *Id.* at 866. Rather, because *Harness* requires looking "to the most recent enactment of the challenged provision" in determining its constitutionality, the court determined it could ignore the racism of the 1920's and look only to the history of the enactment of § 1326 in 1952. *Id.* Judge Graves dissented in relevant part, citing his *Harness* dissent. *Id.* at 869 (Graves, J., dissenting in part).

Acknowledging that *Barcenas-Rumualdo* foreclosed his argument, Nolasco argued on appeal that § 1326 violates the equal protection guarantee of the Fifth Amendment. The government moved for summary affirmance, and the court of appeals granted that motion. Pet. App. A.

REASONS FOR GRANTING THE WRIT

A. The decision conflicts with this Court's precedent because it ignores the discriminatory animus of a substantively unchanged law that continues to have a disparate impact.

The decision of the court of appeals conflicts with *Hunter v. Underwood*, 471 U.S. 222 (1985). In *Hunter*, a unanimous Court held that a provision in the Alabama Constitution that disenfranchised persons convicted of crimes involving moral turpitude violated the Equal Protection Clause of the Fourteenth Amendment. 47 U.S. at 225. That provision, like § 1326, was racially neutral on its face. *Id.* at 227. It applied equally to anyone convicted of the enumerated crimes or falling within one of the catchall provisions. *Id.* But the "provision produced disproportionate effects along racial lines," so the Court applied the *Arlington Heights* approach to determine whether the provision violated the Equal Protection Clause. *Id.*

The Court noted that the challenged provision was passed in 1901 as "part of a movement that swept the post-Reconstruction

South to disenfranchise blacks." *Id.* at 229. The delegates to the "all-white convention were not secretive about their purpose." *Id.* As the president of the convention stated, they wanted "to establish white supremacy in this State." *Id.* (cleaned up). And neither the district court nor the appellants seriously disputed the claim that a "zeal for white supremacy ran rampant" at the Alabama constitutional convention. *Id.* Given that historical background, the Court found that disenfranchising blacks was a motivating factor in passing the challenged provision, and the Court affirmed the Eleventh Circuit's conclusion that the provision would not have been enacted in absence of the racially discriminatory motivation. *Id.*

Some courts of appeals have tried to distinguish *Hunter*, claiming it "left open the question whether later reenactments would have rendered the provision valid." *Harness*, 47 F.4th at 304; *see also Johnson v. Governor of Fla.*, 405 F.3d 1214, 1223 (11th Cir. 2005) (en banc); *Hayden v. Paterson*, 594 F.3d 150, 166 (2d Cir. 2010). Those courts have misread *Hunter*. *See Harness*, 143 S. Ct. at 2427 (Jackson, J., dissenting from denial of certiorari).

In *Hunter*, the provision had not been reenacted or amended. 471 U.S. at 233. But judicial decisions over the years had struck

down some of the "more blatantly discriminatory" enumerated offenses. *Id.* Appellants argued that those changes had "legitimated the provision." *Id.* The Court soundly rejected this suggestion: "Without deciding whether [the provision] would be valid if enacted today without any impermissible motivation, we simply observe that its original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect. As such, it violates equal protection under *Arlington Heights*." *Id.*

Courts have latched onto that statement—"if enacted today"—and transformed it to "if amended today" or "if reenacted today," in order to justify looking only to the most recent amendments of discriminatory laws. *See Harness*, 47 F.4th at 304 (limiting inquiry to later constitutional amendments, which the court called reenactments, that altered disenfranchisement terms); *Johnson*, 405 F.3d at 1223 (limiting inquiry to later legislative amendment that narrowed the disenfranchisement terms); *Hayden*, 594 F.3d at 166 (limiting inquiry to later constitutional amendment that mandated felon disenfranchisement laws). But nothing in *Hunter* suggests amendments or reenactments can cure the taint of discriminatory purpose without addressing that original intent. Rather, as

this Court explained, the provision was not legitimated by amendments that "*did not alter the intent* with which the article, including the parts that remained, had been adopted." *Abbott*, 138 S. Ct. at 2325 (emphasis added, explaining *Hunter*). What matters is the *original* intent.

For the illegal reentry statute, that original intent was unquestionably to discriminate based on race. It was passed as part of a eugenics movement that was being expressly considered and promoted by members of Congress. *See supra* 11–24. A motivating factor for the Unauthorized Aliens Act of 1929 was to "protect American blood from alien contamination." *The Eugenical Aspects of Deportation: Hearings Before the H. Comm. on Immig. & Naturalization*, 70th Cong., Hearing No. 70.1.4, at 4 (1928). In the days leading up to the passage of the final bill, representatives specified that the targeted population was Mexicans, *supra* 23–24, opining that Mexicans were "poisoning the American citizen" because they are "of a class" that is "very undesirable." 71st Cong. Rec. H3620 (daily ed. Feb. 16, 1929), https://www.congress.gov/bound-congressional-record/1929/02/16/house-section. This legislative history easily shows that racism and eugenics were a motivating factor.

The court of appeals avoided looking at that "troubling history" simply because Congress enacted the same substantive law in

1952 and recodified it. *Barcenas-Rumualdo*, 53 F.4th at 866. Nothing, however, suggests that the 1952 Congress recognized the original discriminatory taint and decided to reenact illegal reentry for nondiscriminatory purposes. *See supra* 26–27. By failing to address the law's initial discriminatory purpose, Congress did not alter that original intent—and the illegal reentry law violates the equal protection guarantee. *See Abbott*, 138 S. Ct. at 2325; *Hunter*, 471 U.S. at 233.

The lower courts' use of historical blinders is out of step with this Court's decisions in other contexts as well. In *Ramos*, the Court acknowledged, and certainly did not ignore, the "racially discriminatory *reasons* that Louisiana and Oregon adopted" their nonunanimous jury rules, even though those rules were reenacted later without an obvious discriminatory purpose. 140 S. Ct. at 1401; *see also id.* at 1426 (Alito, J., dissenting). And, in *Espinoza v. Montana Department of Revenue,* the Court considered a scholarship law's "checkered tradition" of underlying religious discrimination, even though it was reenacted in the 1970s "for reasons unrelated to anti-Catholic bigotry." 140 S. Ct. 2246, 2259 (2020).

As this Court recently said, "'[t]he Constitution deals with substance, not shadows,' and the prohibition against racial discrimination is 'levelled at the thing, not the name.'" *Students for Fair*

Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2176 (2023) (quoting *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1867)). Whether called an amendment, enactment, or reenactment, the core substance of the illegal reentry statute is the same as it was in 1929. And that substance was motivated by racial discrimination. Rather than its discriminatory impact being pruned, as occurred in *Hunter*, Congress has exacerbated the harm by making illegal reentry easier to prove and subject to greater penalties. *See* § 1326(b); *Vargas-Garcia*, 434 F.3d at 350. Its disparate impact continues. *See supra* 26–27. This Court should not pass another opportunity to correct the misinterpretation of its precedent.

B. This important issue will reoccur.

This Court denied certiorari in *Harness* in June. 143 S. Ct. at 2426. The Fifth Circuit has already used *Harness* to avoid considering the discriminatory motivations of the 1929 Congress in Nolasco's case as well as in *Barcenas-Rumualdo*, 53 F.4th at 866. The Ninth Circuit employed similar reasoning to find that the 1929 history—which the parties did "not dispute … was motivated in part by racial animus against Mexicans and other Central and South

Americans"—was irrelevant to the equal protection inquiry regarding § 1326. *Carrillo-Lopez*, 68 F.4th at 1150.[11] Other circuits will soon be deciding the same issue.[12]

This Court should grant certiorari so that other circuits do not "misinterpret (or misunderst[and]) this Court's holdings about the necessary inquiry" under *Arlington Heights*. *Harness*, 143 S. Ct. at 2427 (Jackson, J., dissenting from denial of certiorari).

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[11] The petition for rehearing en banc in *Carrillo-Lopez* is due on August 4, 2023. *United States v. Carrillo-Lopez*, No. 21-10233 (9th Cir.).

[12] *See, e.g.*, *United States v. Suquilanda*, No. 22-1197 (2d Cir.) (argument calendared for October 2023); *United States v. Wence*, No. 22-2618 (3d Cir.) (argued May 24, 2023); *United States v. Rodriguez*, No. 21-4563 (4th Cir.) (argument calendared September 22, 2023); *United States v. Calvillo-Diaz*, No. 23-1200 (7th Cir.) (appellee's brief due August 16, 2023).

CONCLUSION

FOR THESE REASONS, Nolasco asks that this Honorable Court grant a writ of certiorari.

Respectfully submitted.

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