

**In the Supreme Court of the United States**

AMBROSIA NOLASCO-ARIZA, *PETITIONER*,

v.

UNITED STATES OF AMERICA

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**REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION**

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES .....	iv
ARGUMENTS AND AUTHORITIES .....	1
I.    Reenactment, without more, does not purge the taint of original discriminatory intent. ....	2
II.   The Court should grant certiorari to correct the circuits' misapplication of <i>Arlington Heights</i> , <i>Hunter</i> , and <i>Abbott</i> to equal protection arguments against the illegal reentry statute. ....	4
CONCLUSION.....	7

## TABLE OF AUTHORITIES

### Cases

<i>Abbott v. Perez</i> , 138 S. Ct. 2305 (2018) .....	2, 3, 4
<i>Espinoza v. Mont. Dep’t of Rev.</i> , 140 S. Ct. 2246 (2020) .....	4
<i>Hunter v. Underwood</i> , 471 U.S. 222 (1985) .....	2, 3, 4
<i>Perry v. Perez</i> , 565 U.S. 388 (2012) .....	3
<i>Ramos v. Louisiana</i> , 140 S. Ct. 1390 (2020) .....	4
<i>United States v. Barcenas-Rumualdo</i> , 53 F.4th 859 (5th Cir. 2022) .....	5
<i>United States v. Carrillo-Lopez</i> , 68 F.4th 1133 (9th Cir. 2023) .....	1, 5
<i>United States v. Wence</i> , No. 22-2618 (3d Cir. Sept. 6, 2023) .....	6
<i>Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.</i> , 429 U.S. 252 (1977) .....	4, 5

### Statutes

8 U.S.C. § 1326 .....	1, 2, 3, 5
1929 Act, Pub. L. No. 70-1018, ch. 690, 45 Stat. 1551 (Mar. 4, 1929) .....	3
Immigration & Nationality Act of 1952, c. 477, Title II, ch. 8, 66 Stat. 229 (1952) .....	3

**Other Authorities**

<i>Hernandez-Lopez v. United States</i> , No. 23-5502 (filed Aug. 29, 2023) .....	1
<i>United States v. Ferritez-Hernandez</i> , No. 22-130308 (11th Cir.).....	6
<i>United States v. Rodriguez</i> , No. 21-4563 (4th Cir.).....	6
<i>United States v. Suquilanda</i> , No. 22-1197 (2d Cir.) .....	6
<i>United States v. Viveros-Chavez</i> , No. 22-3285 (7th Cir.).....	6

## INTRODUCTION

The 1929 Congress had a discriminatory motive when it passed the first illegal reentry statute. The 1952 Congress carried that discriminatory motive forward when it recodified the illegal reentry offense at 8 U.S.C. § 1326 with the same key elements and an even broader scope. The disparate impact of that illegal reentry offense continues today. Thus, under *Arlington Heights*, § 1326 is presumptively unconstitutional.

Yet the Fifth Circuit, other circuit courts, and the Government misread this Court's precedents as requiring them to ignore illegal reentry's troubling history. The Court should grant certiorari to correct the misapplication of its precedents.<sup>1</sup>

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<sup>1</sup> At least one other petition for certiorari raising this same issue is pending. See *Hernandez-Lopez v. United States*, No. 23-5502 (filed Aug. 29, 2023). Another is anticipated out of the Ninth Circuit. See *United States v. Carrillo-Lopez*, 68 F.4th 1133 (9th Cir. 2023), *pet. for rehearing en banc denied*, No. 21-10233 (9th Cir. Sept. 8, 2023). Undersigned counsel conferred with Carrillo-Lopez's counsel, and they anticipate filing a petition by December 7. In the interest of judicial economy and efficiency, the Court may wish to consider these petitions—*Nolasco-Ariza*, *Hernandez-Lopez*, and *Carrillo-Lopez*—together. Counsel conferred with Hernandez-Lopez's counsel, and he concurs that joint consideration could be efficacious.

## ARGUMENTS AND AUTHORITIES

### **I. Reenactment, without more, does not purge the taint of original discriminatory intent.**

The Government misreads *Abbott* and *Hunter* as supporting its argument that the Fifth Circuit correctly ignored the discriminatory intent behind the 1929 illegal reentry statute that was later reenacted as 8 U.S.C. § 1326. See BIO 14–18 (citing *Abbott v. Perez*, 138 S. Ct. 2305 (2018); *Hunter v. Underwood*, 471 U.S. 222 (1985)). They do not.

In *Abbott*, the Court considered whether the 2013 Texas Legislature’s plan was tainted by its 2011 predecessor, which was motivated by discriminatory intent. 138 S. Ct. at 2325. This Court held that it was not and that the State had no additional obligation to prove a “change of heart.” *Id.* (cleaned up). That holding was a product of the specific circumstances presented in *Abbott*, which are materially different than the circumstances here. Indeed, the Court specifically noted it was *not* considering a case—like this one—“in which a law originally enacted with discriminatory intent is later reenacted by a different legislature.” *Id.*

Notably, the 2013 Texas Legislature “did not reenact the plan previously passed by its 2011 predecessor.” *Id.* It did not even “use criteria that arguably carried forward the effects of any discriminatory intent on the part of the 2011 Legislature.” *Id.* Instead, it

enacted “plans that had been developed by the Texas court pursuant to instructions from this Court ‘not to incorporate ... any legal defects.’” *Id.* (quoting *Perry v. Perez*, 565 U.S. 388, 394 (2012)). Under those circumstances, this Court held “there can be no doubt about what matters: It is the intent of the 2013 Legislature.” *Id.*

But unlike the 2013 Texas Legislature’s plan, § 1326 embraced the 1929 illegal reentry statute. Pet. 24–25 (citing 1929 Act, Pub. L. No. 70-1018, ch. 690, § 2; Immigration & Nationality Act, c. 477, Title II, ch. 8, § 276, 66 Stat. 229 (1952)). The few changes made by the 1952 Congress broadened the scope of illegal reentry by adding being “found in” the United States as a type of illegal reentry offense. Pet. 26–27. Section 1326 was not a product of different criteria than the 1929 Act; the basic elements remain the same, as does the discriminatory effect. Pet. 24–28. And, unlike the plan considered in *Abbott*, § 1326 was enacted by a Congress acting without instructions to purge legal defects from the 1929 Act. Under these circumstances, the discriminatory intent of the 1929 Congress still matters because its taint has not dissipated.

This Court said as much in *Hunter*. There, the challenged provision of the Alabama Constitution had been judicially pruned over the years, with blatantly discriminatory aspects struck down by the courts. But the Court still held that the provision violated

equal protection under *Arlington Heights*<sup>2</sup> because “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.” *Hunter*, 471 U.S. at 233.

*Abbott* and *Hunter* support Nolasco’s argument that reenactment alone does not purge the discriminatory intent of the 1929 Congress. The Court’s approach to considering racially discriminatory reasons in other contexts also counsels against the use of historical blinders. *See* Pet. 34–35 (addressing *Ramos v. Louisiana*, 140 S. Ct. 1390, 1401 & n.44 (2020), and *Espinoza v. Montana Dep’t of Rev.*, 140 S. Ct. 2246, 2259 (2020)). The discriminatory intent of the 1929 Congress remains relevant to the *Arlington Heights* analysis. The Government, like the Fifth Circuit, misunderstands and misapplies this Court’s precedents in arguing otherwise.

**II. The Court should grant certiorari to correct the circuits’ misapplication of *Arlington Heights*, *Hunter*, and *Abbott* to equal protection arguments against the illegal reentry statute.**

By ignoring the evidence of the 1929 Congress’s discriminatory intent, the Fifth Circuit cut its analysis short. Focusing only on the evidence presented of discriminatory animus by the 1952

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<sup>2</sup> *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).



Congress, it held Nolasco failed to prove that § 1326 was enacted with any racially discriminatory motive. Pet. App. A; *see United States v. Barcenas-Rumualdo*, 53 F.4th 859, 867 (5th Cir. 2022). It did not resolve whether the *Arlington Heights* framework or rational-basis review applies or whether, considering evidence of discriminatory animus from 1929, Nolasco would have made a sufficient showing.

This Court should correct the Fifth Circuit’s error by granting certiorari and holding that the 1929 evidence is relevant to the inquiry. On remand, the court can address the remaining questions about whether *Arlington Heights* applies (it does, Pet. App. B5–B6), whether Nolasco has shifted the burden to the Government (he has), and whether the Government can show that the statute would have been adopted absent the discriminatory purpose (it cannot). *Compare* BIO 21–23, *with* Pet. 11–24.

The courts need this Court’s guidance. The Third and Ninth Circuits, like the Fifth Circuit, recently held that the 1929 history was irrelevant to whether § 1326 violated equal protection because the statute had been reenacted in 1952. *United States v. Carrillo-Lopez*, 68 F.4th 1133 (9th Cir. 2023), *pet. for rehearing en banc*

*denied*, No. 21-10233 (9th Cir. Sept. 8, 2023);<sup>3</sup> *United States v. Wence*, No. 22-2618, 2023 WL 5739844, at \*3 (3d Cir. Sept. 6, 2023) (adopting *Carrillo-Lopez*), *pet. for rehearing en banc denied*, No. 22-2618 (3d Cir. Oct. 3, 2023). The Second, Fourth, Seventh, and Eleventh Circuits are considering cases raising the same issue.<sup>4</sup> This Court should grant certiorari to address this recurring and important issue.

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<sup>3</sup> Counsel for *Carrillo-Lopez* anticipate filing a petition for certiorari by December 7, 2023. *See supra* n.1.

<sup>4</sup> *United States v. Suquilanda*, No. 22-1197 (2d Cir.) (post-argument supplemental brief filed November 6, 2023); *United States v. Rodriguez*, No. 21-4563 (4th Cir.) (argument heard September 22, 2023); *United States v. Viveros-Chavez*, No. 22-3285 (7th Cir.) (argument heard September 27, 2023); *United States v. Ferritez-Hernandez*, No. 22-130308 (11th Cir.) (appellee's brief due November 29, 2023).

**CONCLUSION**

FOR THESE REASONS, the Petition for Writ of Certiorari should be granted.

Respectfully submitted.

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