NO._____

IN THE SUPREME COURT OF THE UNITED STATES

JUAN ANTONIO HERNANDEZ-LOPEZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas
Attorney of Record

SCOTT A. MARTIN
Assistant Federal Public Defender
Attorneys for Petitioner
440 Louisiana Street, Suite 1350
Houston, TX 77002-1056
Telephone: (713) 718-4600

QUESTION PRESENTED

Petitioner is a citizen of El Salvador who was convicted of illegally reentering the United States after deportation, 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. Particularly, he argued that the law was originally enacted with a discriminatory purpose as part of the Undesirable Aliens Act of 1929 and continues to have a disparate impact on Latinos.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 disregard the original discriminatory animus and look only to the most recent enactment of the challenged provision to determine its constitutionality.

The questions presented is:

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?

PARTIES TO THE PROCEEDINGS

All parties to petitioner's Fifth Circuit proceedings are named in the caption of the case before this Court. No party is a corporation.

RELATED PROCEEDINGS

United States Court of Appeals (5th Cir.):

United States v. Juan Antonio Hernandez-Lopez, No. 22-20625 (June 14, 2023)

United States District Court (S.D. Tex.):

United States v. Juan Antonio Hernandez-Lopez, No. 4:21-cr-440 (Dec. 27, 2022)

TABLE OF CONTENTS

Page

TABLE OF CONTENTS – (cont'd)

Page

TABLE OF CITATIONS

Page

CASES

TABLE OF CITATIONS – (cont'd)

Page

CONSTITUTIONAL PROVISIONS

STATUTES AND RULES

MISCELLANEOUS

PRAYER

Petitioner Juan Antonio Hernandez-Lopez prays that a writ of certiorari be granted to review the judgment entered by the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's unpublished opinion in this case is attached to this petition as Appendix A. The district court's Memorandum Opinion and Order denying petitioner's motion to dismiss is attached to this petition as Appendix B.

JURISDICTION

The Fifth Circuit's judgment and opinion was entered on June 14, 2023. *See* Appendix A. This petition is filed within 90 days after entry of judgment. *See* Sup. Ct. R. 13.1. This Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION 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. . . ." U.S. Const. amend. V.

FEDERAL STATUTE INVOLVED

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

BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

This case was originally brought as a federal criminal prosecution under 8 U.S.C. § 1326. The district court therefore had jurisdiction pursuant to 8 U.S.C. § 1329 and 18 U.S.C. § 3231.

STATEMENT OF THE CASE

Petitioner Juan Antonio Hernandez-Lopez, a citizen of El Salvador, was charged with illegally reentering the country after deportation, 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 *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265–68 (1977), based on the law's original discriminatory purpose and disparate impact on Latinos.[1] To support his argument, Mr. Hernandez-Lopez cited congressional records and presented, *inter alia*, a declaration by history professor Kelly Lytle Hernández (a historian); the transcript of an evidentiary hearing that included testimony from Dr. Hernández and Dr. Benjamin Gonzalez O'Brien (a political science professor); and a declaration by history professor Deborah Kang (a historian).

The district court denied the motion to dismiss in a Memorandum Opinion and Order entered on February 2, 2022. *See* Appendix B. Mr. Hernandez-Lopez then entered a conditional guilty plea preserving his right to appeal the denial of his motion to dismiss the indictment. The district court accepted his plea and, on December 1, 2022, sentenced him to six months' imprisonment, with no term of supervised release to follow. On that same date, Mr. Hernandez-Lopez timely filed notice of appeal.

---

[1] Before Section 1326 was enacted in 1952, Congress first criminalized unlawful reentry in 1929 as part of the Undesirable Aliens Act. *See* Pub. L. No 70-1018, ch. 690, 70 Congress, 45 Stat. 1551 (1929). What we now know as the illegal-reentry statute, codified at 8 U.S.C. § 1326, was enacted as part of the Immigration and Nationality Act of 1952 (the "INA"), often referred to as the "McCarran-Walter Act." *See* Pub. L. No. 82-414, § 276, 66 Stat. 163 (1952). Section 1326 was subsequently amended in 1988, 1990, 1994 and 1996, always to increase its deterrent value.

Meanwhile, in August of 2022, the Fifth Circuit issued an *en banc* decision in *Harness*. *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. Judge Graves, in his dissent, explained 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. *Id.* at 320 (Graves, J., dissenting) (citing *Abbott v. Perez*, 138 S. Ct. 2305 (2018), and *Hunter v. Underwood*, 471 U.S. 222 (1985)). Judge Graves reasoned that, with the original discriminatory intent unaddressed by Mississippi's reenactments, the provision violated the Equal Protection Clause. *Id.* at 318, 343.

The Fifth Circuit, in November of 2022, applied *Harness* to hold that § 1326 does not violate the equal protection component of the Fifth Amendment. *See United States v. Barcenas-Rumualdo*, 53 F.4th 859, 866–67 (5th Cir. 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 ignored the racism of the 1920's and looked only to the history of the enactment of § 1326 in 1952. *Id.* Judge Graves dissented, citing his *Harness* dissent. *Id.* at 869 (Graves, J., dissenting in part).

Acknowledging that *Barcenas-Rumualdo* foreclosed his argument, Mr. Hernandez-Lopez 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. *See* Appendix A.

REASONS FOR GRANTING THE WRIT

A. The decision below resolves an important federal question in a way that conflicts with a relevant decision of this Court.

The Fifth Circuit, in *Barcenas-Rumualdo*, held that § 1326 does not violate the equal protection component of the Fifth Amendment. In so holding, the Fifth Circuit decided an important federal question in a way that conflicts with this Court's decision in *Hunter v. Underwood*, 471 U.S. 222 (1985). *See* Sup. Ct. R. 10(c).

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. *See* 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, stating: "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, e.g.*, *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* Pet. C.A. Br. 10-20. 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, 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-congressionalrecord/1929/02/16/house-section. This legislative history easily shows that racism and eugenics were a motivating factor.

The Fifth Circuit ignored that "troubling history" simply because Congress enacted the same substantive law in 1952 and recodified it. *See Barcenas-Rumualdo*, 53 F.4th at 866. Nothing, however, suggests that the 1952 Congress recognized the original discriminatory taint and decided to reenact the illegal-reentry law for nondiscriminatory purposes. *See* Pet. C.A. Br. 23-26. 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 v. Louisiana*, ___ U.S. ___, 140 S. Ct. 1390 (2020), 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. *Id.* at 1401; *see also id.* at 1426 (Alito, J., dissenting). And, in *Espinoza v. Montana Department of Revenue*, ___ U.S. ___, 140 S. Ct. 2246 (2020), 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." *Id.* at 2259.

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.*, ___ U.S. ___, 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); *United States v. Vargas-Garcia*, 434 F.3d 345, 350 (5th Cir. 2005). Its disparate impact continues. *See* Pet. C.A. Br. 26-27. This Court thus should not pass on this opportunity to correct the lower courts' misinterpretation of its precedent.

B. The question presented is important and recurring.

This Court denied certiorari in *Harness* in June, over a dissent by Justice Jackson (joined by Justice Sotomayor). *See* 143 S. Ct. at 2426-28. The Fifth Circuit has already used *Harness* to avoid considering the discriminatory motivations of the 1929 Congress in Mr. Hernandez-Lopez's case, as well as in *Barcenas-Rumualdo*. 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. *United States v. Carrillo-Lopez*, 68 F.4th 1133, 1150 (9th Cir. 2023). Other circuits will soon be deciding the same issue.[2]

---

[2] *See, e.g.*, *United States v. Suquilanda*, No. 22-1197 (2d Cir.) (argument calendared for the week of October 23, 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 for September 22, 2023); *United States v. Calvillo-Diaz*, No. 23-1200 (7th Cir.) (appellee's brief due on Sept. 15, 2023).

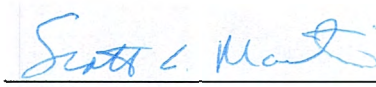
CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Date: August 29, 2023

Respectfully submitted,

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas
Attorney of Record

By 
SCOTT A. MARTIN
Assistant Federal Public Defender
Attorneys for Petitioner
440 Louisiana Street, Suite 1350
Houston, TX 77002-1056
Telephone: (713) 718-4600