No. 23-5502

IN THE SUPREME COURT OF THE UNITED STATES

JUAN ANTONIO HERNANDEZ-LOPEZ, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Section 1326 of Title 8, enacted as part of the Immigration and Nationality Act, ch. 477, 66 Stat. 163 (8 U.S.C. 1101 et. seq.), proscribes unauthorized reentry by "any alien" following a prior removal from the United States. 8 U.S.C. 1326. Petitioner contends that a predecessor to that statute was enacted with a discriminatory purpose, and that as a result, the current statute violates the equal-protection component of the Fifth Amendment. The question presented is:

Whether the lower courts erred in determining that, although the historical background of the earlier statute may be relevant to the equal-protection inquiry, the focus of that inquiry is the current statute.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is not published in the Federal Reporter but is available at 2023 WL 4015227. The memorandum opinion and order of the district court (Pet. App. 3a-15a) is reported at 583 F. Supp. 3d 815.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 2023. The petition for a writ of certiorari was filed on August 29, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Texas, petitioner was convicted on one count of unlawful reentry into the United States following removal, in violation of 8 U.S.C. 1326(a). Judgment 1. He was sentenced to six months of imprisonment. Judgment 2. The court of appeals affirmed. Pet. App. 1a-2a.

1. The federal illegal-reentry statute makes it a crime for "any alien who * * * has been denied admission, excluded, deported, or removed" from the United States to "enter[], attempt[] to enter, or * * * at any time [be] found in, the United States," without appropriate authorization. 8 U.S.C. 1326(a). Section 1326 traces its roots to 1917, when Congress made it a misdemeanor for a limited class of noncitizens deported for immoral acts to "attempt thereafter to return to or to enter the United States." Immigration Act of 1917 (1917 Act), ch. 29, § 4, 39 Stat. 878-879.[1] The following year, Congress created a felony punishable by up to five years of imprisonment for those deported for being a member of the "anarchistic and similar classes" to "return to or enter the United States or attempt to" do so. Act of Oct. 16, 1918, ch. 186, § 3, 40 Stat. 1012.

Outside of those two prohibitions, the only sanction for illegal reentrants was repeated deportation. See 1917 Act § 19, 39

[1] This brief uses the term "noncitizen" as equivalent to the statutory term "alien." See Barton v. Barr, 140 S. Ct. 1442, 1446 n.2 (2020) (citation omitted).

Stat. 889-890. In 1929, however, Congress passed "[a]n Act Making it a felony with penalty for certain aliens to enter the United States of America under certain conditions in violation of law." Act of Mar. 4, 1929 (1929 Act), ch. 690, Pmbl., 45 Stat. 1551.[2] Section 1(a) of the 1929 Act provided that "any alien * * * arrested and deported in pursuance of law" would "be excluded from admission to the United States" and that, "if he enters or attempts to enter the United States" thereafter, "he shall be guilty of a felony" punishable by a fine and up to two years of imprisonment. 45 Stat. 1551. The 1929 Act responded to concerns expressed by Congress and the Department of Labor -- which at the time administered the immigration laws -- that the possibility of renewed deportation was insufficient to dissuade those who had been removed from returning and that criminal penalties were therefore necessary. See S. Rep. No. 1456, 70th Cong., 2d Sess. 1-2 (1929); H.R. Rep. No. 2418, 70th Cong., 2d Sess., Pt. 1 at 6 (1929).

Congress revisited the criminal reentry statute in 1952 as part of the Immigration and Nationality Act (INA), ch. 477, 66 Stat. 163 (8 U.S.C. 1101 et seq.). Five years earlier, Congress

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[2] Contrary to petitioner's suggestion (e.g., Pet. 3 n.1), the 1929 Act was not entitled "the Undesirable Aliens Act of 1929." See United States v. Barcenas-Rumualdo, 53 F.4th 859, 862 n.1 (5th Cir. 2022). A bill bearing that name was introduced in the House. See H.R. Rep. No. 2418, 70th Cong., 2d Sess., Pt. 1 (1929) (Section 10); 70 Cong. Rec. 3542 (Feb. 15, 1929). But the Senate rejected several portions of that proposal, including its title, see E. P. Hutchinson, Legislative History of American Immigration Policy, 1798-1965, at 209-210 (1981), and the House "recede[d] from its amendment to the title of the bill," 70 Cong. Rec. 4952 (1929).

had authorized the Senate Judiciary Committee "to make a full and complete investigation of our entire immigration system" and to provide "recommendations for changes in the immigration and naturalization laws as it may deem advisable." S. Rep. No. 1515, 81st Cong., 2d Sess. 803 (1950). As relevant here, the Committee's report described "difficulties encountered in getting prosecutions and convictions" under existing laws "relating to illegal entry and smuggling of aliens," "especially in the Mexican border area." Id. at 654. The report further observed that existing law criminalized illegal reentry in different provisions subject to different penalties and "suggested that one act would suffice for all persons who have been deported, regardless of the reason therefor." Id. at 655.

Congress responded with Section 276 of the INA, codified as 8 U.S.C. 1326 (1952). § 276, 66 Stat. 829. In line with the Committee's recommendation, Congress repealed the provisions prescribing disparate penalties for reentry defendants depending on the basis for their deportation, INA § 403(a)(13), (16), (30), 66 Stat. 279-280, and it created instead a single offense that subjected all reentry defendants to the same penalties as the 1929 Act: up to two years of imprisonment and a fine. INA § 276, 66 Stat. 229; see United States v. Mendoza-Lopez, 481 U.S. 828, 835-836 & n.10 (1987). Among other changes, the new law created an additional basis for liability -- being a noncitizen "found in the United States" after a previous deportation -- in an effort to

"overcome the inadequacies in [prior] law" observed when immigration authorities could not "establish the place of reentry, and hence the proper venue, arising in prosecutions * * * under the 1929 [A]ct." Revision of Immigration, Naturalization, and Nationality Laws: Joint Hearings Before the Subcomms. of the Comms. on the Judiciary on S. 716, H.R. 2379, and H.R. 2816, 82d Cong., 1st Sess. 716 (1951); see Pet. App. 4a-5a. The legislation also added language "except[ing] those aliens who have either received the express consent of the Attorney General to reapply for admission or who otherwise establish that they were not required to obtain such consent." Mendoza-Lopez, 481 U.S. at 831 n.2.

Section 1326 has been amended several times since 1952, often with an eye toward increasing its deterrent effect. In 1988, Congress enacted what is now Section 1326(b) to prescribe enhanced penalties for defendants with prior felony convictions. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7345(a), 102 Stat. 4471; see Almendarez-Torres v. United States, 523 U.S. 224, 229 (1998). Two years later, Congress increased the applicable fines in the Immigration Act of 1990, Pub. L. No. 101-649, § 543(b)(3), 104 Stat. 5059, and did so again in the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 130001(b), 108 Stat. 2023. In 1996, Congress added Section 1326(d) in response to this Court's decision in Mendoza-Lopez, which held that "where the defects in" a removal proceeding have "foreclose[d] judicial review of that proceeding," the Due Process Clause requires that

an illegal-reentry defendant be able to challenge the validity of the prior order in the Section 1326 prosecution itself. 481 U.S. at 838; see Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 441(a), 110 Stat. 1279 (8 U.S.C. 1326 (Supp. II 1996)); see also United States v. Palomar-Santiago, 141 S. Ct. 1615, 1619 (2021). Later that year, Congress updated Section 1326 by adding a new penalty provision, expanding the class of prosecutable defendants to include those who "ha[ve] departed the United States while an order of exclusion, deportation, or removal is outstanding," and aligning the statute with other changes to immigration law enacted in 1996. 8 U.S.C. 1326 (Supp. II 1996); see Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, §§ 305(b), 308(d)(4)(J), (e)(1)(K), and (14), 324, 110 Stat. 3009-606 to 3009-607, 3009-618 to 3009-621, 3009-629; see also Vartelas v. Holder, 566 U.S. 257, 261-262 (2012).

2. a. In March 2020, immigration officials located petitioner at a county jail in Texas after he had been arrested and charged with driving while intoxicated. Presentence Investigation Report (PSR) ¶ 8. A records check revealed that petitioner was a citizen of El Salvador who had been ordered removed from the United States in 2005; that he was convicted of driving while intoxicated following entry of that removal order; that he was eventually removed in 2008; and that he did not have authorization to reenter the United States. PSR ¶¶ 6-8, 27; C.A. ROA 721 (plea agreement).

b. Petitioner was charged with being a noncitizen found in the United States after a prior removal, in violation of 8 U.S.C. 1326(a). Indictment. He moved to dismiss the indictment, arguing that Section 1326 violates the equal-protection component of the Fifth Amendment under the framework for evaluating facially race-neutral laws set forth in Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977). C.A. ROA 35-52. Petitioner contended that the 1929 predecessor to Section 1326 was motivated by intent to discriminate against Latino individuals, C.A. ROA 39-51; that Section 1326's passage in 1952 was a "reenactment" that "did not cleanse the statute of the taint of racism," id. at 51 (capitalization and emphasis omitted); and that the 1952 Congress's action "was likewise the product of racial discrimination," id. at 52. Petitioner appended to his motion legislative materials, declarations from two professors who have written on the history and politics of immigration, and the transcript of an evidentiary hearing on an identical motion in the United States District Court for the District of Nevada. Pet. App. 7a; C.A. ROA 70-444, 488-610. Petitioner further contended that the evidence he presented shifted the burden to the government to show that the law would have been passed absent a discriminatory purpose and that the government could not "establish a nondiscriminatory motivation for reenacting Section 1326 in 1952 that existed independently from the discriminatory motivations." C.A. ROA 66.

In opposing petitioner's motion, the government contended that Arlington Heights was inapplicable and that petitioner's challenge should be subject to rational-basis review under precedents requiring deference to the political branches in the immigration context. C.A. ROA 454-460. But, the government explained, petitioner's claim would fail even if Arlington Heights applied, because the relevant official action was not the 1929 Act but Section 1326 as enacted in 1952 and subsequently amended; petitioner could not show that the 1952 enactment of Section 1326 was motivated by a discriminatory purpose; his claim of disparate impact on Latinos was likewise misplaced; and, in any event, Congress would have passed Section 1326 even absent the discriminatory purpose that petitioner claimed. C.A. ROA 460-479.

c. The district court denied petitioner's motion to dismiss. Pet. App. 3a-15a. The court noted at the outset that other "district courts that have addressed this issue differ as to whether [Section 1326], as a criminal immigration law, is reviewed under the Arlington Heights framework or under rational basis only." Id. at 5a. The court began its analysis "with the more stringent Arlington Heights standard," id. at 6a, and held that Section 1326 is constitutional under that standard, id. at 6a-14a.

In making that determination, the district court took the view "that at least some members of Congress were motivated to criminalize reentry" in 1929 "because of their support for eugenics and opposition to the increased presence of the 'Mexican race' in

the United States." Pet. App. 8a; see id. at 11a. But, the district court explained, "this history is remote from the 1952 Congress," and under this Court's precedents, "[p]roof of a discriminatory intent as to an earlier version [of a law] is insufficient to show discriminatory intent as to [a] later version." Id. at 11a-12a. While the district court identified some rhetoric from immigration debates in 1952 that it deemed "racist," the court determined that "[t]he legislative history shows that § 1326 was not the focus of [that] rhetoric." Id. at 13a-14a. The court therefore determined that petitioner "ha[d] not shown that the 82nd Congress was motivated by a discriminatory intent when it reenacted § 1326 in 1952." Id. at 13a.

The district court also addressed two other aspects of petitioner's arguments. The court determined that this was not "the 'rare case' in which the impact of an official action is sufficient to find a constitutional violation," because petitioner had not shown the disproportionate impact he claimed "was 'unexplainable on grounds other than race.'" Pet. App. 14a (quoting Arlington Heights, 429 U.S. at 266). Finally, the court analyzed Section 1326 under rational-basis review, holding that the statute "is rationally related to the legitimate government interests of preventing the reentry of those who have violated immigration laws in the past." Id. at 15a.

d. Petitioner entered a conditional guilty plea, reserving the right to appeal the denial of his motion to dismiss the in-

dictment. C.A. ROA 717. The district court sentenced him to six months of imprisonment, with no term of supervised release to follow. Judgment 2.

3. The court of appeals affirmed. Pet. App. 1a-2a.

a. Before petitioner filed his opening brief on appeal, the Fifth Circuit addressed and rejected an identical constitutional challenge to Section 1326 in United States v. Barcenas-Rumualdo, 53 F.4th 859 (2022). Barcenas-Rumualdo recognized that Fifth Circuit precedent "require[d]" the court to "'look to the most recent enactment of the challenged provision[]' in determining its constitutionality," which was Section 1326's enactment as part of the INA in 1952. Id. at 866 (quoting Harness v. Watson, 47 F.4th 296, 306 (5th Cir. 2022) (en banc) (per curiam), cert. denied, 143 S. Ct. 2426 (2023)). And the court determined that the evidence did not show that Section "1326 was enacted with a racially discriminatory motive." Id. at 867. The court therefore rejected the defendant's equal-protection challenge to Section 1326 without deciding whether Arlington Heights was the proper framework or whether the defendant had made the showing of disparate impact also required to establish an equal-protection violation. Id. at 864-865, 867.

b. In petitioner's appeal, the government moved for summary affirmance based on the intervening decision in Barcenas-Rumualdo. The court of appeals granted that motion, noting that petitioner's

argument was foreclosed and that he pressed his challenge only to preserve it for further review. Pet. App. 1a-2a.

ARGUMENT

Petitioner renews his contention that the federal illegal-reentry statute, 8 U.S.C. 1326, violates the Constitution's equal-protection guarantee on the theory that a predecessor law from 1929 was motivated by intent to discriminate against Latinos and the Congress that enacted Section 1326 in 1952 "fail[ed] to address the law's initial discriminatory purpose." Pet. 9. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or another court of appeals. Further review is unwarranted.[3]

1. To the extent that the framework set forth in Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977), applies, but see pp. 21-22, infra, the lower courts correctly applied that framework in determining that Section 1326 is constitutional.

a. Unlike the Fourteenth Amendment (which applies to the States), the Fifth Amendment does not contain an express equal-protection provision. But this Court has long construed the Fifth Amendment's guarantee of "due process of law" for all "person[s]," U.S. Const. Amend. V, to provide analogous protection. See Bolling v. Sharpe, 347 U.S. 497, 499 (1954). And the Court has generally

[3] The same question is also presented by the petition for a writ of certiorari in Nolasco-Ariza v. United States, petition for cert. pending, No. 23-5275 (filed Aug. 1, 2023).

applied the same equal-protection standards in both contexts. See Wayte v. United States, 470 U.S. 598, 608 n.9 (1985).

The Court has also long held that "[p]roof of racially discriminatory intent or purpose" is generally "required" to establish an equal-protection violation. Arlington Heights, 429 U.S. at 265; see Washington v. Davis, 426 U.S. 229, 242 (1976). Outside the immigration context, when a law that is alleged to discriminate against individuals of a particular race or national origin is neutral on its face, courts evaluate the existence of such intent using the "familiar approach outlined" in Arlington Heights." Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2349 (2021). Under that framework, "[t]he impact of the official action -- whether it bears more heavily on one race than another -- may provide an important starting point." Arlington Heights, 429 U.S. at 266 (citation and internal quotation marks omitted). But absent certain extreme circumstances, disparate "impact alone is not determinative," and courts must assess other evidence in deciding whether a racially discriminatory purpose was "a motivating factor in the decision." Id. at 265-266. Pertinent evidence includes "[t]he historical background of the decision," "[t]he specific sequence of events leading up to" it, "departures" from "[s]ubstantive" or "procedural" norms, and "[t]he legislative or administrative history * * * especially * * * contemporary statements by members of the decisionmaking body." Id. at 267-268. If the challenger proves that the provision was motivated in part by

prohibited intent, the burden shifts to the government to establish that "the same decision would have resulted even had the impermissible purpose not been considered." Id. at 271 n.21.

Assuming that the framework from Arlington Heights applies, the lower courts in this case correctly identified Section 1326's enactment in 1952 as the relevant "official action" or "challenged decision," 429 U.S. at 267-268. See Pet. App. 11a; United States v. Barcenas-Rumualdo, 53 F.4th 859, 866 (5th Cir. 2022). Petitioner was charged and sentenced under Section 1326. But, when it was in the process of enacting that statute, Congress repealed the prior illegal-reentry law on which petitioner relies (the 1929 Act), as well as two other reentry offenses that carried different criminal penalties. See p. 4, supra; United States v. Mendoza-Lopez, 481 U.S. 828, 835-836 (1987). As this Court has explained, in place of those provisions, Congress enacted a single law that "impos[ed] the same penalty on any person who returned to the United States without permission after deportation," Mendoza-Lopez, 481 U.S. at 835 n.10; and it eliminated "express language" from the 1929 Act "that would have permitted collateral challenges to the validity of deportation proceedings in a criminal prosecution for reentry after deportation," id. at 836.

Congress also created a new basis for liability that did not exist under the 1929 Act -- being "found in" the United States after a prior deportation. 8 U.S.C. 1326(a). Congress included that language in the new law to overcome difficulties in proving

the location at which a defendant reentered the country and thus the proper venue for prosecuting a reentry offense. See pp. 4-5, supra. The addition of that language -- which forms the basis for petitioner's conviction -- was a substantial, race-neutral alteration to the previous reentry prohibitions. Especially when considered alongside the other significant changes effectuated through the INA, the addition of that language confirms that Section 1326 as enacted in 1952 should be the focus of the "sensitive inquiry" required under Arlington Heights, 477 U.S. at 266.

This Court's decision in Abbott v. Perez, 138 S. Ct. 2305 (2018), confirms the point. Abbott involved a 2013 districting plan enacted by the Texas legislature after its original 2011 plan was challenged in two courts. Id. at 2316-2317. Although the legislature had adopted the 2013 plan from a version preliminarily approved by a three-judge court, that same court later invalidated the 2013 plan on the ground that it was tainted by the legislature's discriminatory intent in passing the predecessor 2011 plan. Id. at 2318. This Court reversed, holding that, in the circumstances before it, "there can be no doubt about what matters: It is the intent of the 2013 Legislature." Id. at 2325. In so holding, the Court recognized that "both the intent of the 2011 Legislature and" other circumstances leading up to the 2013 plan were "relevant to the extent that they naturally give rise to -- or tend to refute -- inferences regarding the intent of the 2013 Legislature." Id. at 2327. But the Court emphasized that the

challengers had the "burden to overcome the presumption of legislative good faith and show that the 2013 Legislature acted with invidious intent," id. at 2325, and that they had failed to make that showing. Id. at 2327.

Similarly, in this case, "what matters * * * is the intent of" the 1952 Congress that enacted Section 1326. Abbott, 138 S. Ct. at 2325. While the district court could and did consider the 1929 Act and its historical and legislative background to the extent those materials shed light on Congress's intent in 1952, Pet. App. 8a, that and the other evidence proffered by petitioner was "plainly insufficient to prove that [Congress] acted in bad faith and engaged in intentional discrimination" when it enacted Section 1326 in 1952 and amended it several times thereafter. Abbott, 138 S. Ct. at 2327. The lower courts therefore correctly rejected petitioner's equal-protection claim.

b. Petitioner does not meaningfully challenge the district court's determination in this case, see Pet. App. 13a-14a -- or the Fifth Circuit's earlier determination in Barcenas-Rumualdo, 53 F.4th at 867 -- that the Congress that enacted Section 1326 was not motivated by discriminatory intent. Rather, petitioner contends (Pet. 6-10) that the lower courts erred in focusing on the intent of the 1952 Congress because, he asserts, the intent underlying the "original" enactment of a reentry prohibition in 1929 controls. That contention lacks merit.

Petitioner primarily relies (Pet. 6-9) on this Court's decision in Hunter v. Underwood, 471 U.S. 222 (1985). The plaintiffs in that case challenged on equal-protection grounds an article of the Alabama Constitution adopted in 1901 at a constitutional convention avowedly dedicated to the establishment of white supremacy. Id. at 228-230. The article disenfranchised anyone convicted of any crime on a long list that included many minor offenses. Id. at 226-227. This Court accepted the court of appeals' determination that the article had been adopted with discriminatory intent. Ibid.

Although the article was never repealed, "[s]ome of the more blatantly discriminatory selections * * * ha[d] been struck down by the courts" in the ensuing 80 years. Hunter, 471 U.S. at 233. "At oral argument in this Court," id. at 232, the State contended that the portion of the article that had not "been pruned" by the courts "was facially constitutional." Abbott, 138 S. Ct. at 2325. "Without deciding whether [the article] would be valid if enacted today without any impermissible motivation," this Court "simply observe[d] 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." Hunter, 471 U.S. at 233. "As such," the Court determined, "it violates equal protection under Arlington Heights." Ibid.

Petitioner acknowledges (Pet. 7-8) that the courts of appeals -- including en banc panels of the Fifth and Eleventh Circuits --

have uniformly understood Hunter's reasoning as limited to scenarios where the only changes to a law with discriminatory origins were effectuated by judicial decision rather than legislative amendment. See Harness v. Watson, 47 F.4th 296, 304 (5th Cir. 2022) (en banc) (per curiam), cert. denied, 143 S. Ct. 2426 (2023); Hayden v. Paterson, 594 F.3d 150, 166 (2d Cir. 2010); Johnson v. Governor, 405 F.3d 1214, 1223 (11th Cir.) (en banc), cert. denied, 546 U.S. 1015 (2005). Petitioner nevertheless faults those courts for reading Hunter's reservation on whether the Alabama constitutional provision would be valid "if enacted today," 471 U.S. at 233, as if it said "if amended today" or "if reenacted today," Pet. 7. But in Abbott, this Court described Hunter in precisely those terms: It explained that Hunter "specifically declined to address the question whether the then-existing version would have been valid if '[re]enacted today.'" 138 S. Ct. at 2325 (quoting Hunter, 471 U.S. at 233) (brackets in Abbott). Abbott thus refutes petitioner's assertion that, under Hunter, the intent underlying an initial legislative enactment continues to govern even after the legislature has made substantive amendments to the law.

Indeed, petitioner's core theory -- that "amendments or reenactments can cure the taint of discriminatory purpose" only if the later-in-time legislature "recognize[s] the original discriminatory taint" or "address[es] the law's initial discriminatory purpose," Pet. 8-9 -- is irreconcilable with Abbott. "The primary question" in that case was whether the three-judge court "erred

when it required the State to show that the 2013 Legislature somehow purged the 'taint' that the court attributed to * * * plans enacted by a prior legislature in 2011." Abbott, 138 S. Ct. at 2324. This Court answered in the affirmative, holding that although the "'historical background'" of a legislative enactment may be relevant to the question of intent, the state legislature had no duty "to expiate its predecessor's bad intent," to "'cure' the earlier Legislature's 'taint,'" or to show that it "had experienced a true 'change of heart.'" Id. at 2325 (citations omitted); see id. at 2324 ("The allocation of the burden of proof and the presumption of legislative good faith are not changed by a finding of past discrimination."). The courts below thus properly rejected petitioner's reliance on Hunter.

Contrary to petitioner's suggestion (Pet. 9-10), this Court's decisions in Ramos v. Louisiana, 140 S. Ct. 1390 (2020), and Espinoza v. Montana Department of Revenue, 140 S. Ct. 2246 (2020), also do not support a focus on the 1929 Act. See Barcenas-Rumualdo, 53 F.4th at 866 n.22. In Ramos, this Court held that a state law allowing nonunanimous jury verdicts in criminal trials violated the Sixth Amendment, which "requires a unanimous verdict to convict a defendant of a serious offense." 140 S. Ct. at 1394; see id. at 1397. Although the Court observed that laws permitting nonunanimous verdicts in criminal cases were rooted in racism, Ramos was not an equal-protection case and never applied, or even cited, Arlington Heights. See id. at 1410 (Sotomayor, J., con-

curring at to all but Part IV-A). Rather, in responding to the dissent, the Court explained that it discussed the racist history of nonunanimous jury laws as part of a "functional" Sixth Amendment analysis and that "a jurisdiction adopting a nonunanimous jury rule even for benign reasons would still violate" that provision. Id. at 1401 n.44.

Espinoza is similarly inapposite. There, the Court considered whether application of a "no-aid" provision barring religious schools from participating in a state scholarship program violated the Free Exercise Clause of the First Amendment. Espinoza, 140 S. Ct. at 2254. The Court held that it did, reasoning that the provision "plainly exclude[d] schools from government aid solely because of religious status." Id. at 2255. But as in Ramos, the Court did not address an equal-protection argument, id. at 2263 n.5, and it neither cited nor applied Arlington Heights. Nor did it find the challenged provision unconstitutional because of the law's origins. Rather, the Court considered the history of no-aid provisions to determine whether a "'historic and substantial' tradition support[ed]" the challenged no-aid provision for purposes of the Court's analysis under the Free Exercise Clause. Id. at 2258-2259; cf. id. at 2267-2268 (Alito, J., concurring) (agreeing that, "[r]egardless of the motivation for" the no-aid provision "or its predecessor, its application here violates the Free Exercise Clause," but suggesting that the "original motivation" for the state law "is relevant" under Ramos).

At most, Ramos and Espinoza "confirm that the historical context of legislative enactments [is] relevant" in determining the existence of discriminatory intent. United States v. Wence, No. 20-cr-27, 2021 WL 2463567, at *5 (D.V.I. June 16, 2021), aff'd, No. 22-2618, 2023 WL 5739844 (3d Cir. Sept. 6, 2023). But the Arlington Heights framework already accounts for a challenged law's "historical background." 429 U.S. at 267. And petitioner does not argue in this Court that the district court's application of that and the other Arlington Heights factors for evaluating intent was clearly erroneous. See Brnovich, 141 S. Ct. at 2348-2349.

2. No further review is warranted.

a. The court of appeals' rejection of petitioner's equal-protection challenge to Section 1326 does not conflict with the decision of any other court of appeals. To the contrary, as petitioner acknowledges (Pet. 10), the court of appeals' precedential decision in Barcenas-Rumualdo accords with United States v. Carrillo-Lopez, 68 F.4th 1133 (9th Cir. 2023), in which the Ninth Circuit reversed the only district court in the country to invalidate Section 1326 on equal-protection grounds. And the Third Circuit has rejected an identical equal-protection argument in a non-precedential opinion, "substantially agree[ing] with the reasoning and analysis of the Ninth Circuit." United States v. Wence, No. 22-2618, 2023 WL 5738944, at *1 (3d Cir. Sept. 6, 2023).

b. The petition for a writ of certiorari should be denied for the additional reason that petitioner would not prevail on his constitutional challenge to Section 1326 even if the specific legal question he seeks to present were resolved in his favor.

As explained above, petitioner contends (Pet. 8) that, for purposes of the Arlington Heights analysis, the relevant intent is that of the 1929 Congress that passed the first illegal-reentry statute, not that of any subsequent Congress. Petitioner's contention rests on three premises: (i) that Arlington Heights is the framework that governs his equal-protection challenge to Section 1326; (ii) that he has established that the 1929 Congress was in fact motivated in part by discriminatory intent in enacting the predecessor to Section 1326; and (iii) that the government cannot show that Congress would have enacted Section 1326 absent any discriminatory intent. No court of appeals, however, has accepted any of those premises -- and petitioner's challenge fails unless all three of them are correct.

First, petitioner's argument rests on the proposition that his equal-protection challenge to Section 1326 is subject to scrutiny under the Arlington Heights framework. In Barcenas-Rumualdo, however, the Fifth Circuit identified "ample support for" the government's position that, because Section 1326 "is part of Congress's immigration scheme," it should instead be reviewed "under a more deferential standard akin to rational-basis review," 53 F.4th at 864, as this Court has done in other cases involving

immigration regulation by the executive and legislative branches. See, e.g., Trump v. Hawaii, 138 S. Ct. 2392, 2420 (2018); Fiallo v. Bell, 430 U.S. 787, 792-798 (1977); Mathews v. Diaz, 426 U.S. 67, 81-82 (1976). The court in Barcenas-Rumualdo did not reach the government's argument because the "equal-protection challenge fails" even under Arlington Heights. 53 F.4th at 865; see Carrillo-Lopez, 68 F.4th at 1142 (same). But petitioner does not dispute that his challenge would fail under rational-basis review. See Dandridge v. Williams, 397 U.S. 471, 475 n.6 (1970) (prevailing party may rely on any ground to support the judgment, even if not considered below).

Second, petitioner's argument rests on the premise that the 1929 predecessor to Section 1326 was motivated by discriminatory intent. Petitioner repeats (Pet. 10) the Ninth Circuit's statement that the parties before it did "not dispute that the 1929 Act was motivated in part by racial animus against Mexicans and other Central and South Americans." Carrillo-Lopez, 68 F.4th at 1150. But as the government made clear in Carrillo-Lopez and other cases -- including this one -- it disputes whether defendants have carried their burden of showing that "Congress as a whole" was motivated by discriminatory animus in enacting the 1929 Act. Gov't Br. at 12 n.3, Carrillo-Lopez, supra (9th Cir. No. 21-10233); see Gov't Br. at 29, Barcenas-Rumualdo, supra (5th Cir. No. 21-50795); C.A. ROA 468-469. And although the court in Barcenas-Rumualdo noted "troubling" aspects of the legislative record preceding the

1929 Act, 53 F.4th at 866, no court of appeals has made or upheld a finding that Congress enacted the 1929 Act based on discriminatory intent.

Finally, a determination that discriminatory intent was a motivating factor for Section 1326 would merely shift the burden to the government to establish that the same prohibition would have been enacted "even had the impermissible purpose not been considered." Arlington Heights, 429 U.S. at 271 n.21. The district court in this case had no occasion to resolve that question because it denied petitioner's challenge on other grounds. But the few district courts to reach the question have determined that the government can carry that burden because "the evidence shows that Congress would have enacted the statute in 1952 even absent any discriminatory motivation." United States v. Leonides-Seguria, 627 F. Supp. 3d 938, 942 (N.D. Ill. 2022) (Feinerman, J.); accord United States v. Calvillo-Diaz, No. 21-CR-445, 2022 WL 1607525, at *11 (N.D. Ill. May 20, 2022). Thus, even if petitioner were correct that the lower courts should have focused on the 1929 Act, he could not prevail on his constitutional challenge.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 2023