No. __-_____

IN THE

Supreme Court of the United States

CLAUDIO ALVAREZ RODRIGUEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the illegal re-entry statute, 8 U.S.C. § 1326, violates the equal protection guarantee of the Fifth Amendment because the law was enacted with a racially discriminatory purpose and it has had a discriminatory effect in practice.

PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page.

RELATED CASES

(1) *United States v. Alvarez Rodriguez*, No. 21-4563, United States Court of Appeals for the Fourth Circuit. Judgment entered April 4, 2024.

(2) *United States v. Sanchez-Garcia, et al.*, Nos. 22-4072, 22-4075, 22-4077, 22-4078, 22-4100, 22-4107, United States Court of Appeals for the Fourth Circuit. Judgment entered April 4, 2024.

(3) *United States v. Alvarez Rodriguez*, No. 1:21-cr-179, United States District Court for the Eastern District of Virginia. Judgment entered October 6, 2021.

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PETITION FOR WRIT OF CERTIORARI

Claudio Alvarez Rodriguez respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals may be found at pages 1a to 3a of the appendix to the petition. The court of appeals rejected Mr. Alvarez Rodriguez's arguments based on its decision, issued the same day, in *United States v. Sanchez-Garcia*, 98 F.4th 90 (4th Cir. 2024), and the opinion in that case is reprinted at pages 4a to 16a of the appendix. The district court's unpublished order denying Mr. Alvarez Rodriguez's motion to dismiss the indictment is available at page 17a of the appendix.

JURISDICTION

The district court in the Eastern District of Virginia had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The court of appeals had jurisdiction under 28 U.S.C. § 1291. That court issued its opinion and judgment on April 4, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY 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 . . . ."

The text of 8 U.S.C. § 1326 is contained in Appendix D to the petition.

INTRODUCTION

The law criminalizing re-entering the United States after deportation, 8 U.S.C. § 1326, is unconstitutional. The Fifth Amendment of the Constitution provides a guarantee of equal protection of the law to all persons. A law passed with a discriminatory purpose and with a disparate impact on a disfavored group violates this principle. This Court's test for evaluating race-based challenges to laws like this one requires courts to consider factors including the historical background and legislative intent behind the law; whether the law significantly burdens one group more than another; and whether the government can show that the law would have been adopted even absent the impermissible motive. *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 265–68 (1977).

Mr. Alvarez Rodriguez moved to dismiss his illegal re-entry indictment, relying largely on the district court's decision in *United States v. Carillo-Lopez*, 555 F. Supp. 3d 996 (D. Nev. 2021), *rev'd*, 68 F.4th 1133 (9th Cir. 2023), *cert. denied*, 144 S. Ct. 703 (2024). The core of his argument was that the original illegal re-entry law, enacted in 1929, was motivated by racial discrimination against individuals from Mexico and other Latin American countries. Although the current version of § 1326 dates to 1952, Mr. Alvarez Rodriguez argued that it was a mere re-enactment of a racist statute that did nothing to eliminate the underlying discriminatory basis for the law. The district court and Fourth Circuit disagreed, because they refused to consider the basis for the 1929 law as part of the historical background of the 1952 enactment. That approach does not comply with this Court's method in *Arlington Heights* and several other cases.

Mr. Alvarez Rodriguez "has established that Section 1326 was enacted with a discriminatory purpose and that the law has a disparate impact on Latinx people, and the government fails to show that Section 1326 would have been enacted absent racial animus." *Carillo-Lopez*, 555 F. Supp. 3d at 1000–01. The Fourth Circuit departed from this Court's precedent and as a result came to the opposite conclusion. This Court should grant certiorari to align the lower courts with this Court's decisions.

STATEMENT OF THE CASE

I. Legal Background

Illegal re-entry was first criminalized in 1929 at the height of the eugenics movement. Legislators who adhered to that cause wanted to rid the nation of immigrants they deemed undesirable, especially those from Mexico and other Latin American countries. And they expressed their plan in expressly racist terms. For example, one member of Congress said that the goal was to protect "American racial stock from further degradation or change through mongrelization" by "the Mexican peon." C.A.J.A. 270 (70th Cong. Rec. H2817 (daily ed. Feb. 9, 1928) (statement of Rep. John C. Box)).[1]

Because the original illegal re-entry 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). Once a challenger makes that showing, the

[1] "App. ___" refers to the appendix to this petition. "C.A.J.A. ___" refers to the joint appendix filed in the court of appeals.

burden then shifts to the government to show that Congress—in 1929—would have passed the law in the absence of any discriminatory purpose. *See 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 Fourth Circuit should have reversed the district court's order denying Mr. Alvarez Rodriguez's motion to dismiss his indictment for violating that statute.

Instead, the court of appeals largely dismissed the overwhelming evidence of racism surrounding the original enactment of the illegal re-entry law, and gave near-total weight to the fact that Congress re-enacted the provision as part of the Immigration and Nationality Act of 1952. This Court's precedents, however, compel courts to look deeper, and to examine the underlying motives for a law when it has been re-enacted without substantive change or reconsideration to purge the taint of the law's invidious basis. A review of that background is thus necessary in order to place Mr. Alvarez Rodriguez's claim in the proper perspective and make clear the necessity of correcting the Fourth Circuit's error.

A. The original 1929 Act criminalizing illegal re-entry

Congress first criminalized the offense of illegal re-entry 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

[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/

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. William Lankford).

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 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).

Prominent restrictionists "spoke increasingly of 'racial indigestion,'"[4] and "the 'contamination' of Anglo-American society."[5] The decade also brought a flood of

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through_the_decades/index_of_questions/1930_1.html.

[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/.

[4] Mae M. Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* 19, 20, 23 (2004); *see also United States v. Machic-Xiap*, 552 F. Supp. 3d 1055, 1065 (D. Or. 2021) (citing Ngai's book for historical background).

[5] Kelly Lytle Hernández, *Migra!: A History of the U.S. Border Patrol* 28 (2010); *see also Carrillo-Lopez*, 555 F. Supp. at 1008 (outlining this history and citing to Professor Lytle Hernández's works and testimony).

immigration legislation fueled by fears of "non-white" immigration.[6] At the start of the decade, Congress passed the first numerical restriction on immigration in the United States.[7] The restrictionists' legislative agenda focused 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"); *Hunt v. Cromartie*, 526 U.S. 541, 553 (1999) (acknowledging that "outright admissions of impermissible racial motivation are infrequent"). 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. *Carillo-Lopez*, 555 F. Supp. 3d at 1008.

Some wanted to go farther. During the remainder of the decade, legislators aimed for "America [to] cease to be the 'melting pot.'"[8] The National Origins Act 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

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[6] *See generally* Daniel Okrent, *The Guarded Gate: Bigotry, Eugenics, and the Law That Kept Two Generations of Jews, Italians, and Other European Immigrants Out of America* (2019) (discussing this history); *see also Machic-Xiap*, 552 F. Supp. 3d at 1064-70 (discussing context of "Undesirable Aliens Act of 1929," and finding that "[t]he 1929 Act also solidified perceptions of persons from Latin America as a separate, unwelcomed race").

[7] *See* Emergency Immigration Act of 1921, Pub. L. No. 67-5 § 2(a), 42 Stat. 5, 5 (1921) (establishing quota system); *see also* Eric S. Fish, *Race, History, and Immigration Crimes*, 107 Iowa L. Rev. 1051, 1061 (2022) (describing connection between eugenics movement and immigration quotas).

[8] Jia Lynn Yang, *One Mighty and Irresistible Tide: The Epic Struggle Over American Immigration* 3 (2020) (quoting Senator David A. Reed).

just over the border.[9] Legislators proposed numerous bills restricting Mexican immigration, but none could survive opposition from southwestern growers. 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. *Carillo-Lopez*, 555 F. Supp. 3d at 1008.

The leaders of this effort urged its passage in starkly racist language. One sponsor made clear that unlike previous immigration restrictions based on economic concerns, "the fundamental reason for [new restrictions, including criminal penalties] is biological." C.A.J.A. 23. The chairman of the House Immigration and Naturalization Committee held a hearing in 1926 that referred approvingly to a constituent's desire to keep out "the scoff and scum, the mongrel, the bootlegger element, from Mexico." C.A.J.A. 23; C.A.J.A. 310–44.

With eugenics supporters providing the philosophical underpinning for the new system, the bill's sponsors were able to get agribusiness leaders on board with a criminal law that would not threaten their use of migrant workers. C.A.J.A. 18–19; *see also* C.A.J.A. 346–47 (S.R. No. 1456, Jan. 17, 1929). During the brief floor debate, representatives made racist remarks, including testimony from one member who argued that Mexicans were "poisoning the American citizen" because they were of a

[9] *See Machic-Xiap*, 552 F. Supp. 3d at 1064 (describing legislative "compromise between southwestern agribusiness leaders who relied on undocumented aliens from Mexico and Central America for cheap labor and nativists in Congress who increasingly viewed immigrants from Latin America as a threat to blood purity in the United States").

"very undesirable" class. *Carrillo-Lopez*, 555 F. Supp. 3d at 1009; *Machic-Xiap*, 552 F. Supp. 3d at 1067; C.A.J.A. 134.

The compromise bill passed both houses of Congress and was signed into law by President Hoover. It 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. . . ." Undesirable Aliens Act, Pub. L. No. 70-1018 ch. 690, § 2, 45 Stat. 1551 (1929).

B. Re-enactment in 1952 as part of the INA

In 1952, Congress enacted the Immigration and Nationality Act ("INA") and codified the illegal re-entry provision as 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. . . ." 8 U.S.C. § 1326 (1952); *see* INA ch. 477, Title II, ch. 8, § 276, 66 Stat. 229 (1952).

Congress did not address the racist underpinnings of the illegal re-entry statute in 1952. To the contrary, Congress passed the legislation over President Truman's veto, even after his veto statement 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.

Just a few months before the INA passed, Congress passed Senate Bill 1851, nicknamed the "Wetback Bill." *See Carrillo-Lopez*, 555 F. Supp. 3d at 1015 (citing United Statutes at Large, 82 Cong. ch. 108, 66 Stat. 26 (March 20, 1952)). The debate around this bill was also replete with casual usage of derogatory slurs against Mexicans and other Latin Americans. The bill, an anti-harboring provision, was designed to "limit the number of Mexican immigrants and the trafficking of undocumented Mexican immigrants into the United States." *Id.* at 1016. But notably, the law did not punish the employers who hired them. *Id.* at 1015-16. Again, the history of the "Wetback Bill" highlights the milieu in which the INA was enacted, and which Congress did nothing to repudiate. *Id.* at 1016.

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 re-entry. *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 re-entry provision in the Act of 1929 and § 1326. *Compare* INA ch. 477, Title II, ch. 8, § 276, 66 Stat. 229 (1952) *with* Undesirable Aliens Act, Pub. L. No. 70-1018, ch. 690, § 2, 45 Stat. 1551 (Mar. 4, 1929). That change makes the offense of illegal re-entry 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, e.g.*, *United States v. Vargas-Garcia*, 434 F.3d 345, 350 (5th Cir. 2005).

The members of Congress who enacted the INA did so despite "their knowledge that Section 1326 disparately impacts Latinx people," which is "further evidence of continued racial animus." *Carillo-Lopez*, 555 F. Supp. 3d at 1016. In the years following the passage of the 1929 illegal re-entry statute, the government brought tens of thousands of prosecutions, the vast majority against Hispanic individuals. Yet in the face of this racially disparate impact from the earlier law, and even after President Truman's criticism of various aspect of the immigration system, Congress chose to re-enact the law. "Congress' silence about the prior racist iterations of this bill coupled with its decision to expand the grounds for deportation and carceral punishment, despite its knowledge of the disparate impact of this provision on Mexican and Latinx people, is some evidence that racial animus was a motivating factor." *Id.* at 1016–17.

In sum, "[t]he totality of evidence shows that the same factors motivating the passage of Section 1326 in 1929 were present in 1952." *Carrillo-Lopez*, 555 F. Supp. 3d at 1017.

C. Subsequent amendments and continued discriminatory effect

There have been five amendments to § 1326 since the passage of the INA—in 1988, 1990, 1994, and twice in 1996. App. 9a n.2. "Each time, Congress has added new penalties or otherwise strengthened the provision's punitive and deterrent effect." App. 9a. In spite of all these opportunities to repudiate the discriminatory underpinnings of the law, "there has been no attempt at any point to grapple with the

racist history of Section 1326 or remove its influence on the legislation." *Carrillo-Lopez*, 555 F. Supp. 3d at 1026. The Fourth Circuit found, however, that because "other factors" aside from pure racial discrimination drove those enactments, the passage of time had diminished any influence from racism on the current version of the statute. App. 14a; *but see* Br. of Dr. Deborah S. Kang as Amicus Curiae, *United States v. Alvarez Rodriguez*, 4th Cir. No. 21-4563, Doc. 29 (Nov. 28, 2022) (arguing that more recent amendments were likewise motivated, at least in part, by racial animus). As the district court noted in *Carillo-Lopez*, because "there has been no attempt at any point to grapple with the racist history of Section 1326 or remove its influence on the legislation," the court could not "find that subsequent amendments somehow cleansed the statute of its history while retaining the language and functional operation of the original statute." 555 F. Supp. 3d at 1026–27.

The result of this series of punitive enhancements to the illegal re-entry law has been predictable—a flood of cases. Immigration offenses constitute the second-largest category of federal prosecutions, with illegal re-entry specifically accounting for 20% of all federal criminal prosecutions in Fiscal Year 2023. And 99% of these prosecutions involved Latin American defendants.[10]

One of those defendants was Petitioner Claudio Alvarez Rodriguez.

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[10] U.S. Sent. Comm'n, 2023 Annual Report and Sourcebook of Federal Sentencing Statistics, p.47 (Table 20) (2024), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2023/2023_Sourcebook.pdf; U.S. Sent. Comm'n, Quick Facts: Illegal Reentry Offenses, Fiscal Year 2022 (June 2023), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Illegal_Reentry_FY22.pdf.

II. Procedural History

A. Proceedings in the district court

Mr. Alvarez Rodriguez was born in Mexico in 1975, and brought to the United States as a toddler. His parents and siblings are naturalized citizens, and Mr. Alvarez Rodriguez had lawful residence status for a time. Over twenty years ago, Mr. Alvarez Rodriguez developed a drug problem, and sustained a conviction for possession of methamphetamine. After his release from incarceration in 2002, Mr. Alvarez Rodriguez was deported from the United States. C.A.J.A. 9.

Sometime after that, Mr. Alvarez Rodriguez made his way back to this country, where he stayed away from bad influences and ultimately built a life in Virginia. He has been married to his U.S. citizen wife for more than fifteen years, and their children are U.S. citizens as well. C.A.J.A. 10.

In 2021, immigration authorities encountered Mr. Alvarez Rodriguez and arrested him. A grand jury in the Eastern District of Virginia indicted him on one count of violating 8 U.S.C. § 1326. C.A.J.A. 7.

Mr. Alvarez Rodriguez moved to dismiss the indictment, arguing that the illegal re-entry statute violated the equal protection component of the Fifth Amendment. App. 3a; C.A.J.A. 8. After holding a hearing, the district court denied the motion by adopting the decision from another judge in the same district in *United States v. Palacios-Arias*, No. 3:20-cr-62, Doc. 37 (E.D. Va. Oct. 13, 2020), *vacated and remanded on other grounds by United States v. Palacios-Arias*, No. 21-4020, 2022 WL 1172167 (4th Cir. Apr. 20, 2022). *See* App.17a; C.A.J.A. 1134.

Mr. Alvarez Rodriguez entered into a conditional plea agreement preserving his right to appeal the denial of his motion to dismiss the indictment. C.A.J.A. 1135, 1162. The district court later sentenced him to time served. C.A.J.A. 1175.

B. Proceedings in the court of appeals

The Fourth Circuit linked Mr. Alvarez Rodriguez's case with *United States v. Sanchez-Garcia*, a case raising identical arguments, for simultaneous briefing and seriatim argument, and issued a ruling in both cases on the same day. App. 1a; 4a. Because the opinion in Mr. Alvarez Rodriguez's case simply adopted the decision in *Sanchez-Garcia*, App. 3a, references in this Petition to "this case" or "the Fourth Circuit's decision below" include the *Sanchez-Garcia* opinion. *See* App. 4a; 98 F.4th 90 (4th Cir. 2024).

The Fourth Circuit rejected the argument that § 1326 is unconstitutional, relying largely on the Ninth Circuit's decision in *United States v. Carillo-Lopez*, 68 F.4th 1133 (9th Cir. 2023). App. 10a n.3. The court held that even under the *Arlington Heights* framework, the defendants had not been their burden of showing that the law was enacted with a discriminatory purpose. App. 12a–16a. According to the Fourth Circuit, the historical context in which the 1929 Act was enacted had "limited probative force" in evaluating the purpose of the 1952 passage of § 1326. App. 13a–14a.

The court of appeals declared that the 1952 version of the law was not a mere "recodification" or "reenactment" of the 1929 Act. App. 14a. Yet it also acknowledged that there was little discussion in 1952 of the illegal re-entry provision, and the court

dismissed or failed to cite numerous examples of racist sentiment pervading the debate over the passage of the INA. App. 15a-16a; *see* Br. of Immigration Scholars as Amicus Curiae at 18–27, *United States v. Alvarez Rodriguez*, 4th Cir. No. 21-4563, Doc. 40 (Nov. 28, 2022).

Ultimately, the court concluded that the defendants had not overcome a presumption of legislative good faith, and had not shown that racial animus was a motivating factor in the enactment of § 1326. App. 16a. For that reason, the Fourth Circuit affirmed the denial of the motion to dismiss the indictment, without considering whether the defendants had demonstrated a discriminatory impact or whether the government could prove that the law would have been enacted even absent malign purposes. App. 3a; App. 16a.

REASONS FOR GRANTING THE PETITION

CERTIORARI IS NECESSARY TO RESOLVE TENSION BETWEEN THIS COURT'S PRECEDENT AND THE FOURTH CIRCUIT'S DECISION.

The decision of the court of appeals conflicts with longstanding precedent from this Court. In *Village of Arlington Heights v. Metro. Housing Development Corp.*, the Court set out a multi-factor framework for determining whether a facially neutral law in fact violated the constitutional guarantee of equal protection. 429 U.S. 252 (1977). That searching inquiry requires an examination of, inter alia, "the historical background of the decision," "the specific sequence of events leading to the challenged action," "the legislative history," and "the disproportionate impact of the official action," i.e., "whether it bears more heavily on one race than another." *Id.* at 266–68.

In several cases since *Arlington Heights*, the Court has applied its test in order to determine whether facially neutral laws were motivated, at least in part, by invidious discrimination. The Fourth Circuit failed to follow *Arlington Heights* in a faithful manner in examining 8 U.S.C. § 1326, because it deemed irrelevant the considerable (and conceded) evidence that the original law against illegal re-entry was passed for discriminatory reasons. The extant version of the statute was no more than a re-enactment of that tainted provision. This Court's precedents require courts to include the original basis for a law when deciding if the current version still bears the stain of discrimination. Because the Fourth Circuit departed from that principle, certiorari is warranted. *See* S. Ct. R. 10(c).

I. This Court's cases look to the original enactment of a statute to determine discriminatory intent.

Acknowledging the insidious nature of race discrimination, *Arlington Heights* provided the framework for determining whether racial animus motivated a facially neutral statute. Trial courts must engage in "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available," examining, inter alia, the disparate impact, legislative history, and historical background of a law. *Arlington Heights*, 429 U.S. at 266–67. And because legislatures are "[r]arely . . . motivated solely by a single concern," it is enough to show that racial discrimination was "*a* motivating factor," even if it was not the only—or even the primary—concern. *Id.* at 265–66 (emphasis added).

Arlington Heights did not address how to apply its framework when a statute has been re-enacted, amended, or otherwise modified by a later legislature or court.

But in a trio of cases after *Arlington Heights*, the Court considered that issue, ruling in each case that the intent of the original legislature controlled the analysis.

First, *Hunter v. Underwood* considered Alabama's facially neutral voter disenfranchisement law, which was adopted in 1901 at a constitutional convention explicitly held to "establish white supremacy in this State." 471 U.S. 222, 227–29 (1985). In the next decades, courts struck down "[s]ome of the more blatantly discriminatory selections." *Id.* at 233. Writing for a unanimous Court, Chief Justice Rehnquist rejected the argument that the changes since the original enactment rendered the original history irrelevant. Instead, the Court looked to the continuing impact of the statute, reasoning 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." *Id.* at 233; *see also Abbott v. Perez*, 585 U.S. 579, 604 (2018) (explaining that *Hunter* rejected the argument that amendments rendered law constitutional "because the amendments did not alter the intent with which the article, including the parts that remained, had been adopted"); *United States v. Fordice*, 505 U.S. 717, 728 (1992) ("[A] State does not discharge its constitutional obligations until it eradicates policies and practices traceable to its [explicitly segregated system].").

The Court continues to examine history—including prior versions of a law—when determining whether government action is constitutional. In *Ramos v. Louisiana*, 590 U.S. 83 (2020), the Court considered the constitutionality of Louisiana's non-unanimous jury verdict system, originally developed at a state constitutional convention convened for the "avowed purpose" of "establish[ing] the supremacy of the

white race." *Id.* at 87. Many years later, Louisiana re-adopted non-unanimous jury rules without mentioning race. *Id.* at 142 (Alito, J., dissenting). But *Ramos*'s plurality still analyzed "the racially discriminatory reasons" for adopting the "rule[] in the first place," explaining that its "respect for 'rational and civil discourse'" could not excuse "leaving an uncomfortable past unexamined." *Id.* at 99 & n.44; *see also id.* at 126–27 (Kavanaugh, J., concurring in part). Those discriminatory reasons led the plurality to reject Justice Alito's dissenting view that recodification of the jury non-unanimity rule cleansed it of its racist origins. *Id.* at 99–100. As the plurality explained, in "assess[ing] the functional benefits" of a law, courts cannot "ignore the very functions those rules were"—at inception—"adopted to serve." *Id.* at 99 & n.44; *see also id.* at 115 (Sotomayor, J., concurring) (explaining a legislature does not purge discriminatory taint unless the law "otherwise is untethered to racial bias—and perhaps also where a legislature actually confronts a law's tawdry past in reenacting it").

The Court reached a similar conclusion in *Espinoza v. Mont. Dep't of Revenue*, 591 S. Ct. 464, 467 (2020), which considered the Montana Supreme Court's decision to exclude religious schools from the state scholarship program. Writing for the Court, Chief Justice Roberts discussed the "checkered tradition" and "shameful pedigree" of similar religious exclusions, born of anti-Catholic bigotry in the 1870s. *Id.* at 482. Like Louisiana's non-unanimous jury system, Montana re-enacted its religious exclusion in the 1970s, purportedly "for reasons unrelated to anti-Catholic bigotry." *Id.* But the Court again considered the original enactment a relevant consideration in its analysis. *Id.* at 482–83.

Justice Alito, unlike in *Ramos*, joined the majority opinion. But he also wrote separately about the same issue here—the relevance of history. *Id.* at 497–508 (Alito, J., concurring). Although Justice Alito would have struck down the provision under the Free Exercise Clause regardless of its discriminatory past, he also recognized "the provision's origin is relevant under . . .*Ramos*." *Id.* at 497 (Alito, J., concurring). Justice Alito had argued in his Ramos dissent "that this original motivation, though deplorable, had no bearing on the laws' constitutionality," but he acknowledged "[he] lost, and *Ramos* is now precedent." *Id.* (Alito, J., concurring). Thus, under *Ramos*, Justice Alito concurred to elaborate on the original anti-Catholic motivation for Montana's ban. *Id.* at 497-508.

These cases teach that a statute's prior versions, when known to be motivated by racial animus, infect the current version unless the legislature actively confronts the statute's racist past and chooses to re-enact it for race-neutral reasons notwithstanding that history. Comprehensively viewing the total efforts behind a law reveals the ongoing history of discriminatory intent and the need to grapple with such "insidious and pervasive evil" that drove the law. *See South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966) (detailing how "Congress explored with great care the problem of racial discrimination in voting" when passing the Voting Rights Act of 1965). A legislature's re-enactment cannot be examined in a vacuum. An assessment of the constitutionality of a re-enactment requires a comprehensive look at the entire history, particularly when the government concedes the racist origin of the law. *See, e.g.*, *Fordice*, 505 U.S. at 728 ("[A] State does not discharge its constitutional

obligations until it eradicates policies and practices traceable to its [explicitly segregated system]."). After all, "[t]he world is not made brand new every morning." *McCreary Cnty. v. ACLU*, 545 U.S. 844, 866 (2005).

Abbott v. Perez follows this principle. There, the Court considered Texas's redistricting plans, enacted in 2013 after a court determined prior plans were unconstitutionally discriminatory. *Abbott*, 585 U.S. at 584. The Court rejected the argument that the 2013 plans merely carried forward the discriminatory intent from the earlier plans. *Id.* at 584–85. But the Court did not rule that evidence of a prior legislature's intent was always irrelevant—just the opposite. The prior legislature's intent was relevant "to the extent that [it] naturally give[s] rise to—or tend[s] to refute—inferences regarding the intent of the 2013 Legislature." *Id.* at 607. The Court held that the prior legislature's intent did not give rise to an inference about the 2013 legislature because the prior legislature's redistricting plan was not simply re-enacted in 2013. *Id.* at 694. Instead, the 2013 legislature adopted plans from a Texas court. *Id.* Although the Texas court used the prior legislative plans as a starting point, it was directed by this Court to modify those plans to remove any "legal defects" under the Constitution and Voting Rights Act. *Id.* (quoting *Perry v. Perez*, 565 U.S. 388, 394 (2012)). Unlike Congress with respect to § 1326, the 2013 Texas legislature did not simply carry forward the past legislature's racial animus by silently re-enacting a discriminatory bill. It instead adopted a plan that, at this Court's instruction, had been cleansed of racial animus by a lower court.

Thus, *Abbott* is entirely consistent with the rule established in *Hunter*, *Ramos*, and *Espinoza*. When a legislature takes steps to remedy past discrimination, that discrimination no longer taints current legislation. But when a legislature fails to take those steps, silently amending or re-enacting a discriminatory law, the intent of the original discriminatory legislature continues to be relevant.

II. The Fourth Circuit's decision conflicts with this Court's precedent.

The Fourth Circuit's opinion departed from this Court's well-established method for evaluating whether a re-enacted law is tainted by its discriminatory predecessor. This Court's precedent requires the lower courts to consider the historical background of a law as part of a totality-of-the-circumstances analysis. *Arlington Heights*, 429 U.S. at 265–66. But the Fourth Circuit wrongly followed the Ninth Circuit and essentially ignored the historical context that § 1326—even as re-enacted in 1952—rested on a corrupt foundation. Going forward, the appeals court's holding would insulate statutes from historical review by ignoring past history, elevating the presumption of "legislative good faith" to a per se rule any time a statute is silently re-enacted or amended. The legislature could simply re-enact an avowedly racist law to avoid any scrutiny of the original statute's motivations. The Fourth Circuit's application of *Arlington Heights* thus conflicts with cases from this Court, and certiorari review is necessary. *See* Sup. Ct. R. 10(c).

This Court's precedent applies a presumption of legislative good faith. *Abbott*, 585 S. Ct. at 603. Because of this presumption, a law's challenger has the burden of establishing discriminatory intent. *Id.* But, as the district court in *Carrillo-Lopez*

recognized, "that presumption is not insurmountable." 555 F. Supp. 3d at 1022; *see also Abbott*, 585 S. Ct. at 607 (the presumption is not "unassailable"). A party may rebut the presumption of legislative good faith through not only contemporaneous discriminatory intent but by prior unconstitutional intent left unaddressed. Assessing the constitutionality of a re-enactment requires a comprehensive look at the entire history, particularly when the government concedes the racist origin of the law." *See Carillo-Lopez*, 555 F. Supp. 3d at 1028 (noting that the government conceded that "the Act of 1929 was motivated by racial animus").

The *Carrillo-Lopez* district court properly performed this analysis. Congress never attempted to reconcile the racist origins of Section 1326, as the legislative circumstances show a continuity in legislative purpose stretching from 1929 through 1952. And as the *Carrillo-Lopez* district court noted, the 1952 Congress "did not appear to be overly concerned with its animus toward Mexican and Latinx people, but instead welcomed racist epithets." 555 F. Supp. 3d at 1019.

This is not a case in which the mere passage of time or social transformation can be presumed to cleanse the taint of the law's racist origins. The legislative history surrounding Section 1326 does not include lawmakers engaged in any effort to reconcile racist origins with equal protection principles, or even to acknowledge the concern. Instead, there was no severance between the original discriminatory intent in 1929 and the subsequent 1952 discriminatory intent when re-enacting Section 1326.

The court of appeals in this case took the wrong approach. The Fourth Circuit followed the Ninth in noting that the 1952 statute "was enacted 23 years after the 1929

Act, and was attributable to a legislature with a substantially different composition." App. 14a (quoting *Carillo-Lopez*, 68 F.4th at 1150) (internal quotations omitted). But this overlooks that the 1952 Congress followed a Senate Report's recommendation that it pass a "reenactment" of the 1929 statute criminalizing re-entry. S. Rep. 81-1515, 655 (1950). And neither the passage of time nor the change in the legislature are controlling here. *See Abbott*, 585 U.S. at 591 (approving plans adopted only two years after invalid plans); *Hunter*, 471 U.S. at 225–27 (holding state constitutional provision unconstitutional 84 years after its passage); *see also N.C. State Conf. of the NAACP v. Raymond*, 981 F.3d 295, 304–05 (4th Cir. 2020) (explaining district court improperly focused on "who [the legislators] were, instead of what they did").

Several of the same legislators from 1929 remained in office to debate and vote on the 1952 Act, and those same members "praised the 1952 Congress for protecting American homogeneity and keeping 'undesirables' away from American shores." *Carillo-Lopez*, 68 F.4th at 1150 (quoting 98 Cong. Rec. 5774 (1952) (statement of Sen. Walter George)). Yet the Fourth Circuit held that the theory that the 1952 INA carried with it the racist origins of the law it re-enacted simply "has no application here" because the link was too attenuated. App. 14a. And despite statements of approval over the way the 1920s legislation had achieved its purpose, the Fourth Circuit stated that "[b]y all appearances, Congress never even considered what effect § 1326 might have on the Mexican and Central American immigrants the defendants claim it targeted because of their race." App. 15a.

Not only did the Fourth Circuit fail to examine the statute's 1929 origins and impute them to the 1952 re-enacting Congress, but the 1952 re-enactment, too, had a racist history that the Fourth Circuit minimized. *See* supra. The court brushed aside the relevance of Congress's repeated use of a racial slur and did not mention at all the inclusion of the slur in a letter from Deputy Attorney General Ford. App. 15a–16a. Courts rarely have such direct evidence of racist motivation, but it did not satisfy the Fourth Circuit since, apparently, not every single member of Congress used such derogatory language in public. App. 15a.

The Fourth Circuit's decision conflicts with this Court's precedent and changes the presumption of legislative good faith into a per se rule, insulating laws from historical review whenever that law has been silently re-enacted or amended. Only by comprehensively viewing the total efforts behind legislation can a court determine whether insidious discrimination was at least "*a* motivation" for the law. *Arlington Heights*, 429 U.S. at 265–66 (emphasis added).

The Fourth Circuit followed the Fifth Circuit's lead in rejecting the substantial evidence from the 1920s as irrelevant to the motivations behind the re-enactment of the illegal re-entry law. *See* App. 13a (citing *United States v. Barcenas-Rumualdo*, 53 F.4th 859, 866 (5th Cir. 2022)). The Fifth Circuit, in turn, pointed to its decision in *Harness v. Watson*, 47 F.4th 296, 306 (5th Cir. 2022) (en banc), which held that a court can only "look to the most recent enactment of the challenged provision, in determining its constitutionality." *Barcenas-Rumualdo*, 53 F.4th at 866 (internal quotation omitted). Judge Graves, joined by four other judges, dissented from this portion of

Harness, 47 F.4th at 317, and he maintained that position in *Barcenas-Rumualdo*, 53 F.4th at 869. As Judge Graves recognized, a legislature must do more than simply rubber-stamp a re-enactment of a discriminatory law in order to purge the racist motivation behind the original provision. *Harness*, 47 F.3d at 321 (Graves, J, dissenting). The Fifth Circuit's rule, now adopted by the Fourth Circuit, whereby a court refuses to consider the motivation behind a statute simply because a later Congress re-enacted the law, deviates from this Court's precedent.

This Court has often quoted Justice Frankfurter's observation that "if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." *E.g.*, *Sekhar v. United States*, 570 U.S. 729, 733 (2013) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947)). The Fourth Circuit did not dig deep enough.

"[I]t will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect, unless such intention is clearly expressed." *Anderson v. Pacific Coast Steamship Co.*, 225 U.S. 187, 198–99 (1912). By giving essentially dispositive weight only to the current legislation and virtually ignoring prior discriminatory versions of the statute, the Fourth Circuit's application of *Arlington Heights* conflicts with cases from this Court, including *Hunter*, *Ramos*, and *Espinoza*. Thus, granting a writ of certiorari is necessary to realign the Fourth Circuit's case law with *Arlington Heights* and its progeny.

III. The question presented is important and recurring.

It is crucial that the Court definitively resolve this issue. As noted above, illegal re-entry offenses are a huge percentage of the federal criminal docket. If the Justice Department's enforcement priorities change, immigration offenses could become an even greater portion of federal cases. Given how punitive the statute is and how easy Congress has made it to establish the elements of the offense, the government has little incentive to curb its reliance on Section 1326 as opposed to administrative deportation proceedings.

At the same time, defendants have no incentive not to raise this constitutional challenge to their convictions, at least until this Court settles the question once and for all. Although the Court has denied certiorari in *Carillo-Lopez* and other cases, it will continue to receive petitions arguing that the circuit courts have strayed from this Court's precedents from cases like *Arlington Heights* and *Hunter*. In light of the importance of the issue, and the fact that the issue is guaranteed to come before the Court repeatedly, the Court should grant review now to provide a clear answer.

It is true that the circuits have not yet diverged in their treatment of this claim, but that should not deter the Court. A circuit split is not a prerequisite to a cert grant. *E.g.*, *Gamble v. United States*, 587 U.S. 678, 682 (2019) (review granted despite "170 years of precedent" and no circuit split on question presented). And this Court is not reluctant to reverse the unanimous position of the lower courts. *E.g.*, *Rehaif v. United States*, 588 U.S. 225 (2019); *Alleyne v. United States*, 570 U.S. 99 (2013); *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994).

The question of § 1326's constitutionality has been thoroughly addressed by district courts and circuit courts around the country. No additional percolation is necessary. But the issue will continue to arise unless and until this Court steps in. There is no reason to wait any longer; the Court should grant review now.

IV. This case is a good vehicle for settling the question.

Petitioner's case provides the Court with an ideal opportunity to address this important issue. The constitutional question was extensively briefed and argued in the lower courts. It is the only issue in the case, so the Court can be confident there are no procedural hurdles or potential alternative resolutions.

Although the Fourth Circuit's opinion in Mr. Alvarez Rodriguez's case was short and unpublished, it adopted the published decision in its companion case, *Sanchez-Garcia*. App. 3a. For all intents and purposes, granting this petition would amount to granting review of the Fourth Circuit's published judgment. And now that the Fourth Circuit has binding authority addressing the issue, future cases will likely result in short, unpublished opinions citing to *Sanchez-Garcia*. Thus, there will not be a better vehicle coming from the Fourth Circuit after Mr. Alvarez Rodriguez's case.

The issue is ready for the Court to decide; it is necessary for the Court to decide; and Mr. Alvarez Rodriguez's case gives the Court a perfect chance to do so. The Court should grant Mr. Alvarez Rodriguez's petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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