No. _____

In the Supreme Court of the United States

Alfredo Viveros-Chavez,

Petitioner,

v.

United States of America,

Respondent.

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

Petition for a Writ of Certiorari

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Question Presented for Review

The government prosecuted Alfredo Viveros-Chavez under 8 U.S.C. § 1326, a statute with problematic origins steeped in racial animus. Congress criminalized illegal reentry into the United States in 1929 at the urging of white supremacists, nativists, and eugenicists, to keep America's bloodline "white and purely Caucasian." The core focus of the illegal reentry provision has remained substantively the same since 1929. And § 1326 continues to be wielded as a discriminatory tool driving the mass incarceration of Latino people, with 99% of statutory prosecutions involving Latin-American defendants. While acknowledging the statute's racist origins, neither the district court nor the Seventh Circuit properly applied *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1977) and its progeny. As a result, both courts failed to recognize that Congress violated the Fifth Amendment's prohibition against race discrimination by criminalizing illegal reentry with a racially-discriminatory purpose. Instead, the Seventh Circuit upheld the law based on a reenactment in 1952 which did not grapple with the law's racist past.

This case poses important questions about the role of appellate courts in applying the framework of *Arlington Heights* to a federal law used for nearly 20% of all federal criminal prosecutions, along with countless civil rights cases.

The question presented is:

Whether a legislature can cleanse the taint of a racially discriminatory law by silent reenactment or amendment when the law was originally adopted for an explicit and impermissible discriminatory purpose.

Parties to the Proceeding and Rule 29.6 Statement

Petitioner is Viveros-Chavez. Respondent is the United States of America. No party is a corporation.

Related Proceedings

The prior proceedings for this case are found at:

United States v. Viveros-Chavez, 114 F.4th (7th Cir. 2024), attached at App. 1a.

United States v. Viveros-Chavez, 2022 WL 2116598 (N.D. Ill.), attached at Appx C: 19a.

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Petition for a Writ of Certiorari

Alfredo Viveros-Chavez petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit that affirmed the denial of petitioner's motion to dismiss the indictment under the Fifth Amendment.

Opinions Below

The Seventh Circuit's decision affirming the denial of petitioner's motion to dismiss is published at *United States v. Viveros-Chavez*, 114 F.4th 618 (7th Cir. 2024). App. 1a. The order denying dismissal from the District Court for the Northern District of Illinois, while not published, is available at *United States v. Viveros-Chavez*, No. 21-CR-665, 2022 WL 2116598 (N.D. Ill. 2022). App. 11a.

Jurisdiction

The Seventh Circuit entered its final order by entry of judgment on August 15, 2024. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(a). This petition is timely per Sup. Ct. R. 13.1.

Constitutional and Federal Statutory Provisions

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 App. 19a.

Introduction

"The world is not made brand new every morning." *McCreary Cnty. v. ACLU*, 545 U.S. 844, 866 (2005). In recognition of that commonsensical point, this Court's precedent requires lower courts to look beyond a statute's plain text to its history in determining whether it violates core equal protection principles. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1977). And history is not limited to the current version of a statute—courts must look to previous enactments as part of the inquiry into discriminatory animus. *See Espinoza v. Mont. Dep't of Revenue*, 591 U.S. 464, 480–83 (2020); *Ramos v. Louisiana*, 590 U.S. 83, 100 & n.44 (2020); *Hunter v. Underwood*, 471 U.S. 222, 227–29, 233 (1985). By failing to apply this precedent, both the district court and Seventh Circuit came to the erroneous conclusion that Congress did not violate the Fifth Amendment's prohibition against race discrimination by enacting 8 U.S.C. § 1326, even though the statute was originally written with an overt and undeniable discriminatory purpose.

Disagreement has developed in lower courts about this precedent. Some courts look for similarities between an original statute and the challenged version; when the legislature has not substantively changed a statute, particularly when the legislature has done nothing to remedy past infirmities, the test in these circuits allows for consideration of the original legislature's intent. But other courts—like the Seventh Circuit here—largely ignore the statute's history, even the type of historical background which *Arlington Heights* explicitly allows. Specifically, although

Congress enacted a racially discriminatory law, then reenacted it without debate under a new name, the Seventh Circuit looked only to the silent reenactment.

"'The Constitution deals with substance, not shadows,' and the prohibition against racial discrimination is 'levelled at the thing, not the name.'" *Students for Fair Admis., Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 230 (2023) (quoting *Cummings v. Mo.*, 71 U.S. (4 Wall.) 277, 325 (1867)). This Court should grant certiorari to resolve disagreement about the relevance of a law's original enactment under the *Arlington Heights* framework and to resolve the tension between this Court's precedent and the Seventh Circuit's decision. *See* U.S. Sup. Ct. R. 10(a), (c).

Statement of the Case

I. The district court denied dismissal of the indictment.

The district court failed to recognize that, under controlling precedent, the illegal reentry law was motivated by a racially discriminatory purpose when enacted in 1929, and likewise when it was reenacted with little revision in 1952. The district court instead held that Congress did not violate the Fifth Amendment's prohibition against race discrimination by enacting 8 U.S.C. § 1326, despite its discriminatory purpose. App. 17a. The decision below did not fully consider the reprehensible anti-Latino intent and history undergirding § 1326. And it failed to recognize that there was a racially discriminatory intent and impact when 99% of prosecutions were against people from Latin American countries. *Id.* Ironically, these findings rested on largely uncontroverted evidence about the racist origins of the law.

A. Original enactment in 1929.

Section 1326 originated in 1929. App. 13a (summarizing procedural history). The statute read: "[I]f any alien has been arrested and deported in pursuance of law . . . and if he enters or attempts to enter the United States . . . he shall be guilty of a felony." App. 14a (quoting Undesirable Aliens Act of 1929, Pub. L. No. 70-1018, ch. 690, 45 Stat. 1551).

In spite of its holding, the district court recognized the racist nature of the Act of 1929. App. 13a. Relying on uncontroverted expert testimony and historical records, the district court found that anti-Latino discriminatory and racial animus propelled the Act of 1929. *Id.* For example, the district court observed that "a number of House members expressed overt hostility toward Mexican immigrants" in passing the Act. *Id.* Indeed, one House member "referred to them as 'hordes,' and another member said that they were 'very undesirable' and 'poisoning the American citizen.'" *Id.* Faced with this abundance of evidence of racial animus, the district court thus concluded "[t]here is no question that racism 'permeated the official congressional debate' when the 71st Congress passed the UAA." *Id.* It found that the "passage of the 1929 UAA "reflects an ugly chapter in our nation's past." *Id.*

B. Reenactment in 1952.

By 1952, several of the same 1929 legislators held positions of authority in Congress and the White House. They faced a crucial choice about the future of illegal reentry: (1) carry forward the illegal reentry provision without debate, including any discussion of its known discriminatory purpose and effect; (2) debate the provision and reenact it; or (3) repeal it. Congress chose the first option. App. 15a–17a.

Congress reenacted Section 1326 as part of the Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 276, 66 Stat. 229 ("INA"). The 1952 Congress relied on a Senate Report that recommended passage of the statute as a "reenactment" of the 1929 law. S. Rep. 81-1515, 655 (1950).[1] Notably, President Truman vetoed the INA because of its discriminatory provisions. App. 16a. Congress overrode the veto, including yea votes by several congressmen remaining in office since 1929, and § 1326 took effect on June 27, 1952.

The district court failed to recognize that the 1929 law was reenacted in 1952 without addressing its discriminatory intent and without substantive change. App. 14a. Further, the district court did not appreciate that the 1952 reenactment was accompanied by independent discriminatory intent. App 17a. Two erroneous findings by the district court are relevant here.

First, the district court failed to recognize that the 1952 Congress reenacted the statute without substantive changes. App. 14a. On the contrary, the reenactment carried forward almost identical language: "Any alien who—(1) has been arrested and

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[1] The Senate Report's recommendation states:

> The necessity of correlating the criminal provisions of the law received much comment. A good example of such correlation may be found in the act of March 4, 1929, and section 4 of the 1917 act. Both acts penalize a reentry after deportation but section 4 relates only to the reentry of persons deported as prostitutes or other immoral persons. It was suggested that one act would suffice for all persons who have been deported, regardless of the reason therefor, and that the present act of March 4, 1929, should be reenacted to cover any and all deportations.

S. Rep. 81-1515, 655 (1950).

deported or excluded and deported, and thereafter (2) enters, attempts to enter, or is any time found in, the United States … shall be guilty of a felony[.]" *Id.* (quoting INA § 276). Ignoring this Court's holding in *Abbott v. Perez*, 585 U.S. 579 (2018), "that how the reenacting legislature responds to a prior discriminatory statute is probative of the reenacting legislature's intent," the district court held that the 1952 reenactment effectively purged the prior discriminatory intent. App. 14a–15a.

And second, the district court failed to properly balance the legislative history: executive actions such as President Truman's overridden veto of the INA, contemporaneous legislation such as the "Wetback Bill," and Congressional awareness of the disparate impact on Latino persons as evidence of independent discriminatory intent in the 1952 reenactment. App. 15a–17a. The court instead found that "[t]aken as a whole, the evidence that Viveros-Chavez has offered is insufficient to support a finding of discriminatory intent." App. 17a.

II. The Seventh Circuit affirmed, focusing its analysis exclusively on the 1952 reenactment.

The Seventh Circuit affirmed the district's court order. App. 1a–10a. In several places in the opinion, the Seventh Circuit discounted evidence of discriminatory animus surrounding the original 1929 criminalization of illegal reentry, holding that the history of the 1929 statute is only relevant to the enactment of the 1952 law insofar as it "'naturally give[s] rise to—or tend to refute—inferences regarding the intent of the [enacting legislature].'" App. 6a (quoting *Abbott v. Perez*, 585 U.S. 579, 603, 605 (2018); *see also id.* ("What counts is the motivation of the legislature that passed the law in question."); *id.* ("But the pertinent question is this: how relevant

are the statements in 1929 to the enactment of the INA in 1952? To Viveros-Chavez, they matter a great deal. But we are not persuaded.").

Notably, the Seventh Circuit did not give weight to the importance of the 1952 Congressional silence on § 1326, despite robust debate on other sections of the INA. Instead, the court found that because "the provision was not debated in Congress . . . there is scant evidence that Congress considered how § 1326 would affect immigrants from Mexico or other Central American countries." App. 8a. Thus, the court failed to factor into the analysis how loud Congress's silence was in 1952. Finally, the court—looking only to the 1952 legislature's actions—found insufficient evidence of discriminatory animus to amount to an Equal Protection violation. App. 8a–9a. It therefore affirmed the district court's order. App. 10a.

Reasons for Granting the Petition

I. Certiorari review is necessary to resolve the circuit split arising from differing applications of *Arlington Heights* to amended and reenacted statutes.

The Seventh Circuit has further deepened an entrenched circuit split about the proper application of the *Arlington Heights* framework when the challenged statute has been amended or reenacted. Because this split involves the interpretation of this Court's precedent, certiorari is appropriate. *See* Sup. Ct. R. 10(a), (c).

A. 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* provides 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 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). The appellate court's role on appeal is deferential, so long as the district court did not clearly err. *See Abbott v. Perez*, 585 U.S. 579, 607 (2018); *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985).

Arlington Heights did not address how to apply its framework when a statute has been reenacted, amended, or otherwise modified by a later legislature or court. But in a trio of cases since *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*, 471 U.S. 222, 227–29 (1985), 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." 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 the Seventh Circuit relied on here—that the changes since the original enactment rendered the original history irrelevant. Instead, the Court looked to the continuing impact of the statute, reasoning "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, 585 U.S. at 604 (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].").

Most recently, 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, 87 (2020), the Court considered the constitutionality of Louisiana's nonunanimous jury verdict system, originally developed at a Constitutional Convention convened for the "avowed purpose" of "establish[ing] the supremacy of the white race." Many years later, Louisiana readopted nonunanimous jury rules without mentioning race. *Id.* at 141 (Alito, J., dissenting). But *Ramos*'s plurality still analyzed "the racially discriminatory reasons" for adopting the "rule[] in the first place," explaining its "respect for 'rational and civil discourse'" could not excuse "leaving an uncomfortable past unexamined." *Id.* at 99 & n.44. Those discriminatory reasons led the plurality to reject Justice Alito's dissenting opinion that recodification of the jury non-unanimity rule cleansed it of its racist origins. *Id.* As the plurality explained, in "assess[ing] the functional benefits" of a law, courts cannot "ignore the very functions those rules were"—*ab initio*—"adopted to serve." *Id.*; *see also id.* at 115 (Sotomayor, J., concurring) (explaining that 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 U.S. 464 (2020), which considered the Montana Supreme Court's decision to exclude religious schools from a 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 nonunanimous jury system, Montana reenacted 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.*

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 and undeniable anti-Catholic motivation for Montana's ban. *Id.* at 498–507.

These cases collectively teach that a statute's prior versions—when known to be indisputably motivated by racial animus—infect the current version unless the legislature actively confronts the statute's bigoted past and chooses to reenact it for permissible reasons. 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). In short, a legislature's reenactment cannot be examined in a vacuum.

Abbott—on which the Seventh Circuit relied to hold the opposite, App. 5a–7a, 13a–15a—follows this principle. In *Abbott*, the Court considered Texas's redistricting plans, enacted in 2013 after a court determined that prior plans were unconstitutionally discriminatory.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 584–86. 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. There, 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* reenacted in 2013. *Id.* 604–05. Instead, the 2013 legislature adopted plans from a Texas court. *Id.* at 604. 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 here, the 2013 legislature did not simply carry forward the past legislature's racial animus by silently reenacting a discriminatory bill. It instead adopted a plan that, at this Court's instruction, had been intentionally cleansed of racial animus by a court order. Thus, *Abbott* is entirely consistent with *Hunter*, *Ramos*, and *Espinoza*.

In sum, 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, instead silently amending or reenacting a discriminatory law, the intent of the original discriminatory legislature continues to be relevant.

B. The circuits are split on how to apply this precedent to reenactments and amended statutes.

In response to the Court's cases, two divergent tests have developed in the circuits. Some circuits hold that prior discrimination can be ignored only if there are significant or substantive changes after a deliberative process. Other circuits do not examine the extent of any changes or the legislature's deliberation, instead ignoring the original enactment and focusing solely on the current version. Only the former test is supported by this Court's precedent.

1. The Second, Fourth, and Eleventh Circuits consider whether the legislature substantively changed the law during a deliberative process.

The Second Circuit addressed the reenactment issue in *Hayden v. Peterson*, 594 F.3d 150 (2d Cir. 2010), which considered New York's felon disenfranchisement provision. The Second Circuit held that the plaintiffs sufficiently alleged discriminatory animus surrounded disenfranchisement provisions from 1821, 1846,

and 1874. *Id.* at 164–65. But the plaintiffs were challenging the 1894 provision, and they did not specifically introduce evidence of discrimination surrounding *that* provision's passage. *Id.* at 165–66. The Second Circuit held that was insufficient to state a claim when the 1894 provision "substantive[ly] amend[ed]" the previous provisions. *Id.* at 166–67. And the Second Circuit explicitly distinguished the type of situation here (where a legislature silently reenacts a discriminatory provision "without significant change") as showing *why* "the 1894 amendment was not only deliberative, but was also substantive in scope." *Id.* at 167.

The Eleventh Circuit reached the same conclusion addressing felony disenfranchisement provisions in Alabama and Florida. In *Johnson v. Governor of State of Fla.*, 405 F.3d 1214, 1223–27 (11th Cir. 2005) (en banc), the Eleventh Circuit assumed Florida's 1868 disenfranchisement provision was motivated by racial discrimination but held that the state's reenactment of the provision in 1968 cleansed any prior discriminatory animus. Like New York's reenactment, Florida reenacted its disenfranchisement provision during a deliberative process, where the law was considered by different legislative committees and underwent substantive amendments. *Id.* at 1224–25. The Eleventh Circuit then relied on *Johnson* in *Thompson v. Sec'y of State for the State of Ala.*, 65 F.4th 1288, 1298–300 (11th Cir. 2023), to uphold Alabama's felon disenfranchisement provision, which, again, was substantively altered during a deliberative process.

Next, in *N.C. State Conf. of the NAACP v. Raymond*, 981 F.3d 295 (4th Cir. 2020), the Fourth Circuit considered North Carolina's 2018 voter-ID law, passed after

a 2013 voter-ID law was struck down as discriminatory. The Fourth Circuit approved the 2018 law, finding several substantive differences between it and the previous version. *Id.* at 299–300, 302–11. Unlike the 2013 law, no procedural irregularities accompanied passage of the 2018 law. *Id.* at 305–06. The legislature in fact debated and remedied some infirmities that led the Fourth Circuit to invalidate the 2013 statute. *Id.* at 307–09. Particularly important to the Fourth Circuit, the 2018 statute included provisions mitigating the impact of the ID requirement on minority voters, which was lacking from the 2013 law. *Id.* at 309–10.

And last, in *United States v. Sanchez-Garcia*, 98 F.4th 90, 100 (4th Cir. 2024), the Fourth Circuit upheld the constitutionality of § 1326 in a decision that nevertheless accounted for the animus motivating the original 1929 Act. The Fourth Circuit stressed that "the origins of the 1929 Act," which the court "assume[d] are tainted by racial animus," were relevant to the *Arlington Heights* analysis. *Id.* And that's because as the Fourth Circuit "recently explained in *Raymond*, a prior legislature's discriminatory intent is appropriately considered as part of the *Arlington Heights* 'historical background' factor." *Id.* (citation omitted).

The approach in these circuits is in harmony with this Court's precedent. In *Abbott*, on which *Raymond* heavily relied, this Court considered changes the legislature made after a statute was deemed invalid. Because those changes went to the heart of the constitutional infirmities and were specifically designed to rectify the problems, this Court upheld the modified version of the statute, explaining that past discrimination cannot in perpetuity taint government action. *Abbott*, 585 U.S. at 602–

03. In this way, legislatures can enact constitutional statutes despite discriminatory animus previously infecting similar policies. *See Raymond*, 981 F.3d at 307–10 (approving measures taken by North Carolina legislature to remedy problems that made previous version of law unconstitutional); *cf. Trump v. Hawaii*, 585 U.S. 667 (2018) (approving immigration policy after changes under court orders blocking previous policies). But as this Court explained in *Abbott*, the changes must "alter the intent with which the article, including the parts that remained, had been adopted." 585 U.S. at 604 (distinguishing *Hunter*). Thus, when the legislature takes no action whatsoever to remedy infirmities, *Abbott* simply does not apply.

2. The Fifth, Seventh, and Ninth Circuits exclusively analyze the current version of the challenged statute.

In contrast to the searching inquiry by the Second, Fourth, and Eleventh Circuits, the Fifth, Ninth, and Seventh Circuits focus exclusively on the current version of the statute. If the statute's challenger cannot show discrimination by the legislature that enacted or reenacted the *current* version, it is immaterial whether *previous* iterations were blatantly motivated by discriminatory animus. By slicing up and narrowly viewing each iteration of the same law as a separate entity, these Circuits do not account for the complete circumstances of legislative intent.

In its decision here, the Seventh Circuit disavowed reliance on evidence surrounding the 1929 criminalization of illegal reentry into the United States. App. 5a–7a. Similarly, the Ninth Circuit, in *United States v, Carrillo-Lopez*, 68 F.4th 1133, 1150 (9th Cir. 2023), found that interpreting the 1952 reenactment in light of the 1929 statute was "clearly erroneous." The Fifth Circuit likewise reached the same

conclusion in *United States v. Barcenas-Rumualdo*, 53 F.4th 859, 865–67 (5th Cir. 2022), holding that its review of § 1326's constitutionality was limited to "the history surrounding the INA and the INA's disproportionate impact on Mexican and Latino immigrants."[2] These cases failed to perform the analysis from this Court's decision in *Abbott*, or from the Second, Fourth, and Eleventh Circuits, looking to the deliberative process and similarities between the two versions of the statute.[3]

As other petitioners have recently argued in this Court, the position taken by the Fifth, the Seventh, and the Ninth Circuits conflicts with precedent from this Court. Petition for Writ of Certiorari, *Harness v. Watson*, No. 22-412, 2022 WL 16699076 (U.S. Oct. 28, 2022); Petition for Writ of Certiorari, *Nolasco-Ariza v. United States*, No. 23-5275 (U.S. Aug. 1, 2023). Because it also conflicts with precedent from other circuits, certiorari is appropriate to resolve the split and provide the proper test for applying *Arlington Heights* to amended and reenacted statutes. *See Harness v. Watson*, 143 S. Ct. 2426, 2426–28 (2023) (Jackson, J., joined by Sotomayor, J., dissenting from the denial of certiorari).

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[2] That holding relied on the Fifth Circuit's prior decision in *Harness v. Watson*, 47 F.4th 296 (5th Cir. 2022) (en banc), *cert. denied*, 143 S. Ct. 2426 (2023). In *Harness*, a deeply divided en banc court rejected a challenge to Mississippi's felon disenfranchisement provision, looking only to the reenactment of the provision, not its original adoption. *Id.* at 303–07; *see also Cotton v. Fordice*, 157 F.3d 388, 391 (5th Cir. 1998).

[3] Notably, the Tenth Circuit in *United States v, Amador-Bonilla*, 102 F.4th 1110, 1116 (10th Cir. 2024), likewise focused its analysis of § 1326's constitutionality entirely on the 1952 Act. But in that case "both parties agree[d]" that the Tenth Circuit's "focus should be on the 1952 Act." *Id.* Thus, although the *Amador-Bonilla* court effectively followed the approach taken by the Fifth, Seventh, and Ninth Circuits, that was largely compelled by the party-presentation principle.

II. Certiorari is necessary to resolve tension between this Court's *Arlington Heights* precedent and the decisions from the Fifth, Seventh, and Ninth Circuits.

The Fifth, the Ninth, and now the Seventh Circuits do not only split from other circuits—they conflict from this Court's precedent. Their interpretation of *Arlington Heights* and its progeny insulate statutes from historical review by ignoring past history, elevating the presumption of "legislative good faith" to an unassailable rule anytime a statute is silently reenacted or amended. This 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 U.S. at 603. Because of this presumption, a law's challenger has the burden of establishing discriminatory intent. *Id.* But that presumption is not "unassailable." *Id.* at 607. A party may rebut the presumption of legislative good faith through not only contemporaneous discriminatory intent, but also by prior unconstitutional intent left unaddressed and unpurged. Assessing the constitutionality of a reenactment requires a comprehensive look at the entire history, particularly when the law's origins are explicitly and undeniably racist. *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].").

This analysis compels the opposite outcome here. Congress never attempted to purge the racist origins of § 1326. Rather, the legislative circumstances show a continuity in legislative purpose stretching from 1929 through 1952. And the candor with which Congress expressed racial hostility toward Latin Americans in both 1929

and 1952 undermines the presumption of legislative good faith. Critically, 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 § 1326 does not include lawmakers engaged in any effort to reconcile its racist origins with controlling equal protection principles. Instead, there was no severance between the original discriminatory intent in 1929 and the subsequent 1952 discriminatory intent when Congress reenacted § 1326.

There are several examples of the Seventh Circuit's incorrect approach. The Seventh Circuit found that in determining the intent behind the 1952 Act, "[w]hat counts is the motivation of the legislature that passed the law in question." App. 6a. But this overlooks that the 1952 Congress followed a Senate Report's recommendation it pass a "reenactment" of the 1929 statute criminalizing reentry. 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 588–91 (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 Raymond*, 981 F.3d at 304–05 (explaining that the district court improperly focused on "who [the legislators] were, instead of what they did"). Most importantly, *Arlington Heights* allows consideration of historical background. 429 U.S. at 264–68.

Not only did the Seventh Circuit fail to historically examine the statute's 1929 origins, but the 1952 reenactment, too, had a racist history itself that the Seventh Circuit minimized through its piecemeal review. For example, the Seventh Circuit downplayed the relevance of Congress's repeated use of a racial slur and inclusion of

the slur in a letter from then-Deputy Attorney General Peyton Ford. App. 8a. In the same vein, the Seventh Circuit rejected evidence that Congress's lack of debate on or acknowledgment of the provision's past supported a finding of purposeful discrimination. App.6a. And the Seventh Circuit rejected evidence of the stark disparate impact of § 1326 on people from Latin America. App. 9a–10a. The Seventh Circuit's decision thus insulates statutes from historical review and looks to whether each piece of evidence, on its own, is sufficient to establish discriminatory intent.

The Fifth Circuit's decisions repeat these problems. In *Harness*, 47 F.4th at 303–07, the en banc court refused to consider the original enactment of Mississippi's felon-disenfranchisement law, reasoning that only the amended law was relevant under *Arlington Heights*. And in *Barcenas-Rumualdo*, 53 F.4th at 865–66, the court relied on *Harness* and "look[ed] to the most recent enactment of the challenged provision"—the reenactment of the illegal reentry provision in 1952. *See id.* at 866 (holding that *Harness* "abrogates the relevance" of evidence about 1929 and "[n]arrowing Barcenas-Rumualdo's evidence to that relating to § 1326").

The Ninth Circuit similarly failed to recognize the importance of the 1929 legislative history. It found that the "evidence of the discriminatory motivation for the 1929 Act lacks probative value for determining the motivation of the legislature that enacted the INA," despite the fact that the 1952 legislators made no substantive changes to the admittedly racist 1929 law. *Carrillo-Lopez*, 68 F.4th at 1151.

Each of these cases conflict with this Court's precedent and change the presumption of legislative good faith into an unassailable per se rule, insulating laws from historical review, whenever that law has been silently reenacted or amended.

Only by comprehensively viewing the total efforts and intent behind legislation can a court determine whether a discriminatory purpose drove the law. By considering only current legislation and ignoring prior discriminatory versions of statutes, the Fifth, Seventh, and Ninth Circuit's application of *Arlington Heights* conflicts with cases from this Court, resulting in a new standard no challenger is likely to ever meet. Viveros-Chavez asks this Court to grant a writ of certiorari to realign the Seventh Circuit's caselaw with *Arlington Heights*.

III. The question presented is of exceptional importance.

This case presents recurring issues of exceptional importance: (1) how to interpret *Arlington Heights* consistently with its core purpose of weeding out insidious purposeful discrimination; and (2) whether a legislature can "cure" past discrimination by silent reenactment or amendment. *See, e.g., Harness,* 143 S. Ct. at 2426–28 (Jackson, J., joined by Sotomayor, J., dissenting from the denial of certiorari). And this case presents these issues in the context of one of the most highly prosecuted federal statutes. Immigration offenses constitute the second-largest category of federal prosecutions, with illegal reentry specifically accounting for nearly 20% of all federal criminal prosecutions. And 99% of these prosecutions involved Latin American defendants.[4] Section 1326 thus continues to be wielded as a discriminatory tool driving the mass incarceration of Latino people.

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[4] U.S. Sent. Comm'n, *2022 Annual Report and Sourcebook of Federal Sentencing Statistics,* p.45 Figure 2 and p.129 Table I-1 (2023), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2022/2022-Annual-Report-and-Sourcebook.pdf.; U.S. Sent.

In addition, the Seventh Circuit's reformulation of *Arlington Heights* will affect cases in various contexts outside illegal reentry prosecutions. The Seventh Circuit's reasoning would have precluded the successful challenges to government action in *Hunter*, *Ramos*, and *Espinoza*, all of which looked to original discriminatory intent.

This question is therefore crucial for legislatures and courts grappling with discriminatory legislation. Without guidance from this Court, the Seventh Circuit's opinion will allow legislatures to cleanse unconstitutional intent—both past and current—from a law by silent reenactment or amendment. The history of the law will not be examined, and courts need find only that individual pieces of evidence, alone, do not each prove racial animus. This holding not only conflicts with this Court's precedent, but also allows legislatures to leave racist laws in place, perpetuating a legacy of discrimination on new generations. Certiorari is necessary.

IV. This case presents the ideal vehicle to realign the Circuits with *Arlington Heights*.

How much the past matters is determinative here. Guidance from this Court is necessary for courts to assess when discriminatory intent continues through subsequent iterations of a law infected with discriminatory intent. Here, the government is defending a law whose roots lie in a statute from 1929 that everyone agrees was motivated by racism. Yet the Seventh Circuit gave no weight to the uncontested evidence of discrimination from 1929, despite *Arlington Heights*

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.

expressly allowing consideration of historical background. App. 5a–7a; *see Arlington Heights*, 429 U.S. at 264–68.

Because legislatures and courts need guidance on how and when the past matters when examining the unconstitutional origins of a criminal law, Petitioner Viveros-Chavez's case presents an ideal vehicle for this Court to realign the Seventh Circuit's caselaw with *Arlington Heights*.

Conclusion

Because the Seventh Circuit's opinion conflicts with Circuit and this Court's precedent on issues of exceptional importance, this Court should grant a writ of certiorari.

Dated this 13th day of November 2024.

Respectfully submitted,

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