No. _____

IN THE SUPREME COURT

OF THE UNITED STATES

JUAN ALBERTO MURIA-PALACIO

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

Petition for a Writ of Certiorari

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QUESTION PRESENTED

When a law, such as 8 U.S.C. § 1326, was originally adopted for an impermissible discriminatory purpose, does a later silent legislative amendment or reenactment cleanse the taint of a racially discriminatory law?

Related Proceedings

The prior proceedings for this case are found at:

United States v. v. Muria-Palacios, C.A. No. 24-2578 (9th Cir. Oct. 17, 2024) (unpublished), attached at App.-1.

United States v. Muria-Palacios, D.Ct. 2:21-cr-00023-JAM (E.D. CA March 30, 2022) (unpublished), attached at App.-2–App.-7.

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MISCELLANOUS

PETITION FOR A WRIT OF CERTIORARI

Juan Alberto Muria-Palacios petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit that summarily affirmed the district court denial of Mr. Muria-Palacios's motion to dismiss the indictment under the Fifth Amendment.

OPINIONS BELOW

The Ninth Circuit's decision summarily affirming the denial of Mr. Muria-Palacios's motion to dismiss is unpublished. It is included in the appendix as *United States v. Muria-Palacios*, C.A. No. 24-2578 (9th Cir. Oct. 17, 2024); App.-1. The district court's order denying Mr. Muria-Palacios's motion to dismiss is also unpublished. *United States v. Muria-Palacios*, D.Ct. 2:21-cr-00023-JAM (E.D. CA March 30, 2022). It is reproduced in the appendix at App.-2–App.-7.

JURISDICTION

The Ninth Circuit entered its final order by denying Mr. Muria-Palacios's motion for an initial hearing *en banc* and summarily affirming the district court October 17, 2024. App.-1. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(a). This petition is timely per Rule 13.1 of the Rules of the Supreme Court.

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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 Appendix D.

STATEMENT OF THE CASE

This Court has long held that the Due Process Clause of the Fifth Amendment requires equal protection under the laws of the federal government. *Bolling v. Sharpe*, 347 U.S. 497 (1954) (holding that racial segregation in the District of Columbia's the public school is a denial of the due process of law guaranteed by the Fifth Amendment). In *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977) (hereinafter *Arlington Heights*), this Court recognized the Equal Protection Clause prevents insidious purposeful discrimination. "When there is a proof that a discriminatory purpose has been a motivating factor in the [legislative or administrative] decision, . . . judicial deference is no longer justified." *Id*., 429 U.S. at 265-66. *Arlington Heights* Court also explained that "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct

evidence of intent as may be available. The impact of the official action -- whether it bears more heavily on one race than another, . . . may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face." *Id*. at 266 (internal citation and quotations omitted).

In this matter, Mr. Muria-Palacios is convicted following a jury trial for being a deported alien found in the United States in violation of 8 U.S.C. § 1326. Pretrial, he moved to dismiss the indictment arguing § 1326 violated the equal Protection Clause of the Fifth Amendment. He presented the same evidence that Mr. Carrillo-Lopez had presented. The district court did not hold an evidentiary hearing. The government opposed the motion to dismiss, arguing the kind of "searching review of a given statute's background, and of the motivations of those who supported it, called for by *Arlington Heights* does not apply in the federal immigration context because of Congress's plenary power in that arena." *United States v. Muria-Palacios*, 2:21-cr-00023 JAM, docket entry no. 36, p. 15. The district court, like the Court in *United States v. Carrillo-Lopez*, 555 F.Supp.3d 996, 1007–1012, 1018 (2021), did not ultimately decide whether a deferential ration-review or the *Arlington Heights* test applied. Instead, it applied its version of *Arlington Heights* and concluded, based largely on other district court decisions that had rejected the same challenge that

Muria-Palacios had "fail[ed] to provide . . . a link between the legislative history of the 1929 Undesirable Aliens Act and the 1952 reenactment of Section 1326." App.-6. It held no evidentiary hearing.

Before Mr. Muria-Palacios's appeal was briefed in the Ninth Circuit, that court had issued its decision in the Carrillo-Lopez appeal. *United States v. Carrillo-Lopez*, 68 F.4th 1133 (9th Cir. May 24, 2023). That published opinion reversed the district court's decision. As a result, Mr. Muria-Palacios sought an initial hearing *en banc* in his appeal, pointing out the errors he saw in the *Carrillo-Lopez* decision. *See* App.-1 (denying the same). The government filed a motion for summary affirmance that the Circuit granted. App.-1.

I. The Legislative Enactments Relevant to the Challenged § 1326 Statute

A. Original enactment in 1929

The evidence Mr. Muria-Palacios presented the district court demonstrated that Congress criminalized illegal reentry into the United States in 1929 for racist reasons. Uncontroverted expert testimony and historical records demonstrated the anti-Latino discriminatory and racial animus that propelled the Act of 1929. *United States v. Carrillo-Lopez*, 555 F.Supp.3d 996, 1007–1012, 1018 (2021), *reversed by* 68 F.4th

1133 (2023).[1/] For example, the Act of 1929 was introduced after "a House Committee on Immigration and Naturalization hearing on 'The Eugenical Aspects of Deportation' included testimony from principal witness Dr. Harry H. Laughlin." *Carrillo-Lopez*, 555 F.Supp.3d at 1009. Dr. Laughlin was "a well-known eugenicist who suggested that 'immigration control is the greatest instrument which the Federal Government can use in promoting race conservation of the Nation,'" and "compared drafters of deportation laws to 'successful breeders of thoroughbred horses.'" *Id*. Congressman Albert Johnson, the Chairman of the House Immigration and Naturalization Committee "advocated for Congress's use of 'the principle of applied eugenics' to reduce crime by 'debarring and deporting' people." *Id*. "During debate on the bill in the House, representatives made similar racist remarks, including testimony from Representative Fitzgerald who argued that Mexicans were 'poisoning the American citizen' because they were of a 'very undesirable' class." *Id*. The court heard expert testimony from Professor Lytle Hernández who "explained that while employment lobbies won initially, 'the nativists [were] furious in Congress ... so

[1] The *Carrillo-Lopez* district court decision and the supporting exhibits filed in that case were used by Mr. Muria-Palacios in his motion to dismiss. The district court's decision was reversed by the Ninth Circuit, as noted above. This Court denied certiorari review. *Carrillo-Lopez v. United States,* No. 23-6221, certiorari denied Jan 22, 2024. Nonetheless, Mr. Muria-Palacios cites to the district court opinion in order to summarize the factual record he presented in the district court in this matter.

[sought] to pursue this through other means' which ultimately led to the Act of 1929 which criminalizes unlawful entry and reentry.' She concludes that it is her 'professional opinion' that 'the illegal reentry provision of the 1929 law was intended to target Latinos.'" *Id*. at 1008. The government in *Carrillo-Lopez* conceded the 1929 Act of 1929 was motivated by racial animus. *Id*. at 1027.

As the *Carrillo-Lopez* district court concluded "[t]he evidence clearly indicates, as both parties and other district courts agree, that the Act of 1929 was passed during a time when nativism and eugenics were widely accepted, both in the country at large and by Congress, and that these racist theories ultimately fueled the Act's passage." *Id*. at 1009. The district court also found the government did not prove the law would have been enacted absent racial animus. *Id*. at 1000–01, 1022– 25.

B. Reenactment in 1952

The illegal reentry provision from 1929 remained substantively the same in the 1952 INA revision of the immigration laws in 8 U.S.C. §§ 1325, 1326. *See* Eric S. Fish, *Race, History, and Immigration Crimes*, 107 Iowa L. Rev. 1051, 1098–1099 (2022) (explaining the 1952 revisions "made two technical changes .... [i]t lowered the statutory maximum for the misdemeanor to six months, and provided that for a second or subsequent conviction the maximum would be two years. It also added a new 'found in' element to the felony, so that a defendant could now be convicted if

he or she 'enters, attempts to enter, or is at any time found in, the United States.' Aside from those two changes, the provisions remained substantively the same.") (footnotes omitted).

This Court has also explained this close connection between the 1929 and 1952 laws. In *United States v. Hansen*, 143 S. Ct. 1932, 1943–44 (2023), for example, this Court observed that Congress's "cleanup" of a neighboring provision in the 1952 immigration law did not substantively alter the provision from its decades-old roots.[2/] *See also Almendarez-Torres v. United States*, 523 U.S. 224, 237 (1998) (describing the 1990 amendment to § 1326 in particular as mere "housekeeping").

The 1952 reeanctment statute carried forward the illegal reentry provision without debate, including any discussion of its known discriminatory purpose and effect. *Carrillo-Lopez*, 555 F.Supp.3d at 1009–25. 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). President Truman vetoed the INA because of its discriminatory

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[2] *Hansen* involved the interpretation of 8 U.S.C. § 1324(a)(1)(A)(iv)) which prohibits "encourag[ing] or induc[ing] an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such [activity] is or will be in violation of law." 599 U.S. at 762.

provisions. *Carrillo-Lopez*, 555 F.Supp.3d at 1012 (quoting Truman's veto statement: "the INA 'would continue, practically without change' discriminatory practices first enacted in 1924 and 1929.") Congress overrode the veto. `

The facts presented to the district court in Muria-Palacios's case showed clear and uncontested direct link between the 1929 criminalization of unauthorized entry, an act the Ninth Circuit recognized was racially motivated,[3/] and the revisions made in 1952 that resulted substantively in the version of Section 1326 Muria-Palacios challenged. Nor was there any dispute that Section 1326 results in racially disparate outcomes. The evidence presented demonstrated consistent enforcement disproportionately affects Hispanics. *Muria-Palacios*, 2:21-cr-00023-JAM, docket entry 33-2, page 10 (ED CA filed Filed Nov. 29, 2021) (Declaration of Professor Kelly Lytle, describing U.S. Bureau of Prison statistics showing "Mexicans never comprised less than 84.6 percent of all imprisoned immigrants. Some years, Mexicans comprised 99 percent of immigration offenders.")

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[3] *Carrillo-Lopez*, 64 F.4th 1133, 1150 (9th Cir. 2023) ("The parties do not dispute that the 1929 Act was motivated in part by racial animus against Mexicans and other Central and South Americans.")

REASONS FOR GRANTING THE PETITION

Certiorari Review Is Necessary to Resolve the Circuit Conflict and the Conflict Between the Ninth Circuit's Ruling and this Court's *Arlington Heights* Decision Regarding the Analysis of Amended and Reenacted Statutes

By failing to reconsider its *Carrillo-Lopez* decision, the summary affirmance in Mr. Muria-Palacios's case, the Ninth Circuit considered only the current legislation and ignored prior discriminatory versions of statutes. The Ninth Circuit's application of *Arlington Heights* conflicts with cases from this Court. This Circuit's interpretation of *Arlington Heights* insulates statutes from historical review by ignoring past history and elevating the presumption of "legislative good faith" to a per se rule anytime a statute is silently reenacted or amended. This application of *Arlington Heights* conflicts with cases from this Court, and certiorari review is necessary. See Rule 10(c), Rules of the Supreme Court.

I. This Court's Binding Precedent Requires Courts to Look to the Original Enactment of a Statute to Determine Discriminatory Intent

The Circuit's decision adopts *Carrillo-Lopez*'s error by implicitly concluding that Section 1326 was first adopted in 1952. *Carrillo-Lopez*, 68 F.4th at 1142. It thus put aside the admitted racist motivations behind the source legislation enacted in 1929. But, as shown in the district court, the 1929 Congress first criminalized the act of entering the United States without authorization, making entering the United States

without authorization a misdemeanor and re-entering the United States without authorization after deportation a felony. The original language read:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) if any alien has been arrested and deported in pursuance of law, he shall be excluded from admission to the United States whether such deportation took place before or after the enactment of this Act, and if he enters or attempts to enter the United States after the expiration of sixty days after the enactment of this act, he shall be guilty of a felony . . . .

Act of Mar. 4, 1929, Pub. L. No. 70-1018, § 1.

The 1952 reorganization of the immigration laws into the Immigration and Nationality Act, the INA, did nothing to reinvent § 1326 save making it clear that remaining in the United States without permission was a violation of this law. It read:

> Any alien who—
>
> (1) has been arrested and deported or excluded and deported, and thereafter
>
> (2) enters, attempts to enter, or is *at any time found in*, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously excluded and deported, unless such alien shall establish that he was not required to obtain such advance consent under this or any prior Act,
>
> shall be guilty of a felony, and upon conviction thereof, be punished by imprisonment of not more than two years, or by a fine of not more than $1,000, or both.

Section 276, Public Law 414, 66 STAT. 229 (June 27, 1952) (emphasis added).

This amendment retained the substance of the 1929 provision. This has recognized the connection between these laws, explaining Congress's "cleanup" of a neighboring provision in the 1952 immigration law did not substantively alter the provision from its roots dating back decades. *Hansen*, 143 S. Ct. at 1943–44 (using original 1917 version of statue to interpret the meaning of 8 U. S. C. § 1324(a)(1)(A)(iv)'s prohibition of "encourag[ing] or induc[ing]" illegal immigration in context of a First Amendment over broadness challenge); *see also Almendarez-Torres*, 523 U.S. at 234 (describing the 1990 amendment to § 1326 as a mere "housekeeping measure" which Congress did not intend "to change, or to clarify" the provision).

Carrillo-Lopez recognized "[t]he 1929 Act was one of three statutes that 'imposed criminal penalties upon aliens who reentered the country after deportation.' *[United States v.] Mendoza-Lopez*, 481 U.S. 828[,] 835, 107 S.Ct. 2148, [95 L.Ed.2d 772 (1987).] The parties do 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. Because Section 1326 was a reenactment, not a new statute, the issue before the district court and Circuit should have been whether the 1952 law cured the discriminatory taint. But that is not the analysis these courts used.

This Court's precedent requires more than silent passage to cure the taint of the 1929 Congress's racial animus. *See McCreary Cnty. v. ACLU*, 545 U.S. 844, 866, 125 S. Ct. 2722, 2726-37, 162 L. Ed. 2d 729 (2005) (in First Amendment challenge to a display of the Ten Commandments in a public courthouse, the Court rejected the county's argument that its purpose "should be inferred, if at all, only from the latest news about the last in a series of governmental actions"; "the world is not made brand new every morning[.]"). *McCreary* specifically cautioned against such narrow analysis, explaining "[t]he Counties' position just bucks common sense: reasonable observers have reasonable memories, and our precedents sensibly forbid an observer 'to turn a blind eye to the context in which [the] policy arose.'" *Id*., quoting *Santa Fe Independent School Dist. v. Doe,* 530 U. S. 290, 315 (2000).

Likewise, in *Hunter v. Underwood*, this Court considered a challenge to Alabama's facially neutral voter disenfranchisement law, which was adopted in 1901 to "establish white supremacy in [the] 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 2333. Writing for a unanimous Court, Chief Justice Rehnquist rejected the argument the Circuit used in *Carrillo-Lopez* and so here—that the changes since the original enactment rendered the original history irrelevant. Instead, the Supreme Court called on us to look 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 v. Perez*, 585 U.S. 579, 694, 138 S. Ct. 2305, 2325 (2018) (finding challenged modification of redistricting plan for elections had been designed to remove the discriminatory taint the earlier unconstitutional version included); *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].").

Not addressed in the *Carrillo-Lopez* opinion are this Court's 2020 decisions which continues to examine history when determining whether government action is constitutional. In *Ramos v. Louisiana*, 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." 140 S. Ct. 1390, 1394 (2020). Many years later, Louisiana readopted nonunanimous jury rules without mentioning race. *Id*. at 1426 (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 1401 & n.44, 1417–18. Those

discriminatory reasons led the plurality to reject Justice Alito's dissenting opinion which argued that recodification of the jury non-unanimity rule cleansed it of its racist intent. *Id*. 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 1401 & n.44; *see also id*. at 1410 (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").

Nor did *Carrillo-Lopez* grapple with this Court's *Espinoza v. Montana Department of Revenue*, 140 S.Ct. 2246, 2251 (2020), decision. There, this Court reviewed 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 2258–59. 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 the *Ramos* case, joined the majority opinion. He wrote separately about the same issue here—the relevance of history. *Espinoza,* 140 S.Ct.

at 2267–74 (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*[.]" 140 S.Ct. at 2267 (Alito, J., concurring). Justice Alito explained that he 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." 140 S.Ct. at 2268 (Alito, J., concurring). Thus, following *Ramos*, Justice Alito concurred to elaborate on the original anti-Catholic motivation for Montana's ban. 140 S.Ct. at 2268–74.

These cases hold that a statute's prior versions, when known to be motivated by racial animus, infect the current version unless the government actively confronts the statute's racist past and chooses to reenact it for race-neutral reasons notwithstanding that history. The Ninth Circuit failed to address these cases and the resulting decision should be rejected.

Abbott—which *Carrillo-Lopez* relied on to hold the opposite, is consistent with *Ramos* and *Espinoza*. *Abbott* considered Texas's redistricting plans, enacted in 2013 after a court determined prior plans were unconstitutionally discriminatory. *Abbott*, 138 S. Ct. at 2313. This Court rejected the argument that the 2013 plans merely carried forward the discriminatory intent from the earlier plans. *Id*. at 2313–14. The

Court did not rule that evidence of a prior legislature's intent was 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*. Unlike Section 1326's legislative experience, the Court found the prior legislature's intent in *Abbott* did not give rise to an inference about the 2013 legislature because the prior legislature's redistricting plan was not reenacted in 2013. *Id*. at 2325. Instead, the later legislative changes were designed to cure the unconstitutional prior redistricting plan. *Id.*

The facts regarding the changes in § 1326 differ from the facts in *Abbott*. In 1952, despite adopting almost identical statutory language and knowing the disparate impact of the 1929 law, Congress never debated or even acknowledged the statute's racist origins. Fish, *Race, History, and Immigration Crimes*, 107 Iowa L. Rev. at 1099.[4/] And the core purpose of the 1929 and 1952 enactments—allowing for arrest,

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[4] Professor Fish explains:

> Delving into the legislative materials, one finds almost no discussion of these two crimes in the debates over the McCarran-Walter Act. The 925-page Senate report comments on them twice. In one section it says that the committee heard testimony from witnesses who complained about the difficulties of enforcing alien smuggling and illegal entry laws. The report note: "Most of the statements were devoted, not so much to the law itself, but to difficulties encountered in getting prosecutions and convictions, especially in the Mexican border area." The Committee concluded that Congress should not change the

prosecution, and imprisonment of Hispanics—is identical. Professor Fish concluded the legislative records demonstrate "Congress in 1952 did not debate the merits of these crimes. It did not consider whether unlawful immigration should be criminalized in the first place. This was a recodification project. Congress understood itself to be rationalizing and reorganizing an existing set of laws. The few comments in the Senate report advocate making no changes, aside from increasing the penalty for a second unlawful entry. And the Report describes the action Congress ultimately took as 'the present act of March 4, 1929, should be reenacted.' Congress did not understand itself to be creating a new law. It was keeping the existing law in place, with some technical modifications, and changing its code section." Fish, *Race, History, and Immigration Crimes*, 107 Iowa L. Rev. at 1100 (footnotes omitted).

> law in light of these complaints: "Since the situation appears to be a local problem and a question of administration of present statutes rather than a legislative matter, it is believed that it should be left to the proper authorities to work out some solution."
>
> Later on the same page, the report advocates repealing two minor reentry provisions (these are separate laws giving higher penalties to prostitutes and anarchists) and consolidating them with the general felony reentry provision. It concludes: "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."

Fish, *Race, History, and Immigration Crimes,* 107 Iowa L. Reviw, at 1099-1100 (footnotes omitted).

The *Carrillo-Lopez* panel created a conflict with this Court's precedent by ruling this evidence irrelevant. The Ninth Circuit continues that conflict in Mr. Muria-Palacios's case.

II. The Ninth Circuit Continues a Circuit Split on How to Apply this Court's Precedent to Reenactments and Amended Statutes

Further, the decision in Muria-Palacios's case, deepens a circuit split about the proper application of the *Arlington Heights* framework when the challenged statute has been amended or reenacted. *Arlington Heights* expressly allowing consideration of historical background. *See Arlington Heights*, 429 U.S. at 264–68. Because this split involves the interpretation of this Court's precedent, including cases in recent terms, certiorari is appropriate. *See* Rule 10(a), (c) of the Rules of the Supreme Court.

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, and instead ignore the original enactment to focus solely on the current version. The latter test, used by the Ninth Circuit, conflicts with this Court's precedent.

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A. 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). There, it considered New York's felon disenfranchisement provision. It concluded the plaintiffs sufficiently alleged discriminatory animus surrounded disenfranchisement provisions from 1821, 1846, and 1874. *Id.* at 164–65. However, plaintiffs challenged a later provision from 1894, and did not specifically introduce evidence of discrimination related to that provision's passage. *Id.* at 165–66. The Second Circuit held that plaintiffs failed to state a sufficient claim because the 1894 provision "substantive[ly] amend[ed]" the previous provisions. *Id.* at 166–67. In so holding, the Second Circuit explicitly distinguished the type of situation here—where a legislature silently reenacts a discriminatory provision "without significant change," as, among other reasons, "the 1894 amendment was not only deliberative, but was also substantive in scope." *Id.* at 167.

The Eleventh Circuit reached the same conclusion when it addressed 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 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 used *Johnson* when it addressed the Alabama law in *Thompson v. Sec'y of State for the State of Ala.*, 65 F.4th 1288, 1298–300 (11th Cir. 2023). Consistently, it upheld Alabama's felon disenfranchisement provision, which, again, was substantively altered during a deliberative process.

Finally, the Fourth Circuit did the same in *N.C. State Conf. of the NAACP v. Raymond*, 981 F.3d 295 (4th Cir. 2020). Here, the Circuit considered North Carolina's 2018 voter-ID law, passed after a 2013 voter-ID law was struck down as discriminatory. The 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 had led the Fourth Circuit to invalidate the 2013 statute. *Id.* at 307–09. Particularly important to the Fourth Circuit was the fact that 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.

The approach these circuits took finds support in 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 past discrimination cannot forever taint government action. *Abbott*, 138 S. Ct. at 2324–25. 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*, 138 S. Ct. 2392, 2421 (2018) (approving immigration policy after changes under court orders blocking previous policies). But as this Court explained in *Abbott*, the legislative changes must "alter the intent with which the article, including the parts that remained, had been adopted." 138 S. Ct. at 2325 (distinguishing *Hunter*). Thus, when the legislature takes no action to remedy infirmities, *Abbott* does not apply.

B. The Fifth and Ninth Circuits Created Conflicts by Exclusively Analyzing the Current Version of the Challenged Statute

In conflict with these Circuits, the Fifth and Ninth 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 motivated by discriminatory animus. By narrowly viewing each iteration of the same law as a separate entity, these Circuits fail to consider the complete circumstances of legislative intent and fail to follow this Court's precedent.

By following its *Carrillo-Lopez* decision here, the Ninth Circuit disavowed reliance on evidence surrounding the 1929 criminalization of illegal reentry into the United States. The Fifth Circuit reached the same conclusion in *United States v. Barcenas-Rumualdo*, 53 F.4th 859, 865–67 (5th Cir. 2022), holding its review of Section 1326's constitutionality was limited to "the history surrounding the INA and the INA's disproportionate impact on Mexican and Latino immigrants."[5/] In neither case does the court 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.

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[5] *Barcenas-Rumualdo*'s 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.

The Fifth and the Ninth Circuits cases conflict with precedent from this Court. Because the decision in Mr. Muria-Palacio's case 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).

CONCLUSION

For all the above reasons, this Court should grant certiorari review to address this persistent conflict among the Circuits and the Ninth Circuit's misapplication of this Court's precedent.

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Respectfully submitted,

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