No. _______

In the Supreme Court of the United States

Gustavo Carrillo-Lopez,

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 for Review

The government prosecuted Gustavo Carrillo-Lopez under 8 U.S.C. § 1326, a statute with undisputed racist origins. Congress criminalized illegal reentry into the United States in 1929 at the urging of "proud" white supremacists, nativists, and followers of eugenics theorists, to keep the American bloodline "white and purely Caucasian." The core focus of the illegal reentry provision has remained substantively the same since 1929. Section 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. Applying *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1977) and its progeny, the district court dismissed the indictment, holding Congress violated the Fifth Amendment's prohibition against race discrimination by criminalizing illegal reentry with a discriminatory purpose. But the Ninth Circuit upheld the law based on a reenactment in 1952 and amendments in the 1980s and 1990s, none of which grappled 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 impermissible discriminatory purpose.

Related Proceedings

The prior proceedings for this case are found at:

United States v. Carrillo-Lopez, 68 F.4th 1133 (9th Cir. 2023), attached at Appx A: 1a.

United States v. Carrillo-Lopez, 555 F. Supp. 3d 996 (D. Nev. 2021), attached at Appx C: 20a.

These pending petitions for writ of certiorari challenge the same criminal statute on equal protection grounds:

Petition for Writ of Certiorari, *Nolasco-Ariza v. United States*, No. 23-5275 (U.S. Aug. 1, 2023), appealing *United States v. Nolasco-Ariza*, No. 22-50943, 2023 WL 3222813 (5th Cir. May 3, 2020) (unpublished opinion).

Petition for Writ of Certiorari, *Hernandez-Lopez v. United States*, No. 23-5502 (U.S. Sept. 5, 2023), appealing *United States v. Hernandez-Lopez*, No. 22-20625, 2023 WL 4015227 (5th Cir. June 14, 2023) (unpublished).

These pending Circuit cases challenge the same criminal statute on equal protection grounds:

Second Circuit

United States v. Suquilanda, No. 22-1197 (2d Cir. arg. Oct. 23, 2023), appealing No. 1:21-cr-00263-VM, 2021 WL 4895956 (S.D.N.Y. Oct. 20, 2021) (unpublished).

United States v. Maldonado-Guzman, No. 22-3143 (2d Cir. filed Dec. 14, 2022) (briefing stayed), appealing No. 1:21-CR-448-CM, 2022 WL 2704036 (S.D.N.Y. July 12, 2022) (unpublished).

Third Circuit

United States v. Wence, No. 22-2618 (3d Cir. Oct. 3, 2023), *denying pet. for reh'g*, 2023 WL 5739844 (3d Cir. Sept. 6, 2023) (unpublished).

United States v. Gonzalez-Nane, No. 23-1418 (3d Cir. filed Mar. 8, 2023) (in briefing), appealing No. 1:21-cr-197, 2022 WL 2987895 (M.D. Penn. July 28, 2022) (unpublished).

Fourth Circuit

United States v. Sanchez-Garcia, 22-4072 (4th Cir. arg. Sept. 22, 2023), appealing No. 1:20-CR-00402-CCE, Dkt. 28 (M.D.N.C. Oct. 18, 2021) (unpublished).

United States v. Alvarez-Rodriguez, 21-4563 (4th Cir. arg. Sept. 22, 2023), appealing No. 1:21-CR-00179-AJT, Dkt. 41 (E.D.V.A. Oct. 6, 2021) (unpublished).

Seventh Circuit

United States v. Viveros-Chavez, No. 22-3285 (7th Cir. arg. Sept.27, 2023), appealing No. 21-CR-665, 2022 WL 2116598 (N.D. Ill. June 13, 2022) (unpublished).

United States v. Sargento-Cruz, No. 23-1670 (7th Cir. filed Apr. 6, 2023), appealing No. 3:22-CR-00135-wmc, Dkt. 25 (W.D. Wis. Mar. 21, 2023) (unpublished).

United States v. Calvillo-Diaz, No. 23-1200 (7th Cir. filed Feb. 1, 2023) (briefing stayed), appealing 21-CR-445, 2022 WL 1607525 (N.D. Ill. May 20, 2022) (unpublished).

Ninth Circuit

United States v. Gutierrez-Barba, No. 21-10232 (9th Cir. filed Aug. 19, 2021) (in briefing), appealing No. CR-19-01224-001-PHX-DJH, 2021 WL 2138801 (D. Ariz. May 25, 2021) (unpublished).

United States v. Machic-Xiap, No. 22-30023 (9th Cir. filed Feb. 4, 2022) (briefing stayed), appealing 552 F. Supp. 3d 1055 (D. Or. Aug. 3, 2021).

United States v. Munoz-De La O, No. 22-30100 (9th Cir. filed June 16, 2022) (briefing stayed), appealing, 586 F. Supp. 3d 1032 (E.D. Wash. Feb. 18, 2022).

United States v. Candelaria, No. 22-50015 (9th Cir. filed Feb. 3, 2022) (briefing stayed), appealing No. 2:20-cr-00117-RGK-1, Dkt. 40 (C.D. Cal. Oct. 3, 2021) (unpublished).

United States v. Figueroa-Juarez, No. 22-50085, 2023 WL 8053742 (9th Cir. Nov. 21, 2023) (unpublished).

United States v. Ponce-Galvan, No. 22-50114 (9th Cir. filed May 24, 2022) (in briefing), appealing No. 3:21-cr-02227-H-1, 2022 WL 484990 (S.D. Cal. Feb. 16, 2022) (unpublished).

United States v. Orozco-Orozco, No. 22-50146 (9th Cir. arg. Aug. 15, 2023), appealing No. 3:21-CR-02349, 2021 U.S. Dist. LEXIS 178951 (S.D. Cal. Sept. 20, 2021) (unpublished).

United States v. Villegas, No. 23-3492 (9th Cir. filed Nov. 14, 2023) (in briefing), appealing No. 23-CR-0044-TWR, 2023 WL 2876147 (S.D. Cal. Apr. 10, 2023) (unpublished).

United States v. Gonzalez-Reyes, No. 23-3532 (9th Cir. filed Nov. 15, 2023) (in briefing), appealing No. 23-CR-202-TWR, 2023 WL 3470890 (S.D. Cal. May 15, 2023) (unpublished).

Tenth Circuit

United States v. Amador-Bonilla, No. 22-6036 (10th Cir. arg. Jan. 30, 2023), appealing No. 5:21-cr-00187-C, 2021 WL 5349103 (W.D. Okla. Nov. 16, 2021) (unpublished).

United States v Sanchez-Felix, No. 22-1188 (10th Cir. filed June 14, 2022) (briefing stayed), appealing No. 21-cr-00310-PAB, 2021 WL 6125407 (D. Colo. Dec. 28, 2021) (unpublished).

United States v. Gamez-Reyes, No. 22-1245 (10th Cir. filed Aug. 17, 2022) (briefing stayed), appealing No. 21-cr-00123-CMA, 2022 WL 990717 (D. Colo. Mar. 31, 2022) (unpublished).

United States v. Sifuentes-Felix, No. 22-1299 (10th Cir. filed Sept. 20, 2022) (briefing stayed), appealing No. 21-cr-337-WJM, 2022 WL 293228 (D. Colo. Feb. 1, 2022) (unpublished).

Eleventh Circuit

United States v. Ferretiz-Hernandez, No. 22-13038 (11th Cir. filed Sept. 9, 2022) (in briefing), appealing No. 5:21-cr-63-JA-PRL, 2022 WL 815339 (M.D. Fla. Feb. 2, 2022) (unpublished).

United States v. Felix-Salinas, No. 22-13039 (11th Cir. filed Sept. 9, 2022) (in briefing), appealing No. 5:21-cr-70-JA-PRL, 2022 WL 815301 (M.D. Fla. Feb. 2, 2022) (unpublished).

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Petition for a Writ of Certiorari

Gustavo Carrillo-Lopez petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit that reversed dismissal of the indictment under the Fifth Amendment.

Opinions Below

The Ninth Circuit's decision reversing dismissal is published in the Federal Reporter at *United States v. Carrillo-Lopez*, 68 F.4th 1133 (9th Cir. 2023). Appx A: 1a. The order of dismissal by the District Court for the District of Nevada is published in the Federal Supplement at *United States v. Carrillo-Lopez*, 555 F. Supp. 3d 996 (D. Nev. 2021). Appx C: 20a.

Jurisdiction

The Ninth Circuit entered its final order by denying Petitioner's motion for rehearing on September 8, 2023. Appx. B: 19a. 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 Appendix D.

Introduction

"The world is not made brand new every morning[.]" *McCreary Cnty. v. ACLU*, 545 U.S. 844, 866 (2005). In recognition of this concept, this Court's precedent requires lower courts to look beyond the plain language of a statute to its history to determine whether it violates 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*, 140 S. Ct. 2246, 2251, 2258–29 (2020); *Ramos v. Louisiana*, 140 S. Ct. 1390, 1394, 1401 & n.44, 1417–18 (2020); *Hunter v. Underwood*, 471 U.S. 222, 227–29, 233 (1985). Correctly applying this precedent, the district court held that Congress violated the Fifth Amendment's prohibition against race discrimination by enacting 8 U.S.C. § 1326 with a discriminatory purpose, dismissing the indictment. Appx C: 20a.

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 Ninth Circuit here—largely ignore the statute's history, even the type of historical background *Arlington Heights* explicitly allows. Specifically, although Congress enacted a racially discriminatory law, then reenacted it without debate

under a new name, the Ninth Circuit looked only to the silent reenactment, holding the district court clearly erred in finding intentional discrimination.

"'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 lower court disagreement about the relevance of the original enactment under the *Arlington Heights* framework and to resolve tension between this Court's precedent and the Ninth Circuit's decision.[1] *See* U.S. Sup. Ct. R. 10(a), (c).

Statement of the Case

I. The district court ordered dismissal of the indictment under the Fifth Amendment's prohibition against race discrimination.

The district court found as a factual matter—under controlling precedent—that 8 U.S.C. § 1326 was motivated by a racially discriminatory purpose when enacted in 1929, reenacted with little revision in 1952, and non-substantively

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[1] At least two petitions for certiorari raising this same issue in the Fifth Circuit are pending before this Court and have been rescheduled for conference on December 8, 2023. *Nolasco-Ariza v. United States,* No. 23-5275 (filed Aug. 1, 2023); *Hernandez-Lopez v. United States*, No. 23-5502 (filed Aug. 29, 2023). A petition for certiorari in the companion case in the Ninth Circuit is also being filed contemporaneously with Mr. Carrillo-Lopez's. *See United States v. Rodrigues-Barios*, No. 21-50145, 2023 WL 3581954 (9th Cir. May 22, 2023), *pet. for reh'g denied* (9th Cir. Sept. 8, 2023). Counsel for these cases concur that joint consideration is in the interest of judicial economy and efficiency. Thus, it is respectfully requested the Court consider the petitions of Mr. Nolasco-Ariza, Mr. Hernandez-Lopez, Mr. Carrillo-Lopez, and Mr. Rodrigues-Barios together.

amended in the 1980s and 1990s. Appx C: 20a. After extensive fact-finding and analysis, including an evidentiary hearing with two unrebutted experts, the district court correctly applied precedent to hold Congress violated the Fifth Amendment's prohibition against race discrimination by enacting 8 U.S.C. § 1326 with a discriminatory purpose. Appx C: 25a. The decision below accurately considered the reprehensible anti-Latino intent and history undergirding Section 1326. It found there was a racially discriminatory intent and impact when 99% of prosecutions were against people from Latin American countries. Appx C: 26a–27a. These findings rested on largely uncontroverted evidence about the racist origins of the law.

A. Original enactment in 1929

Section 1326 originated in 1929. Appx C: 26a (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." Appx C: 42a n.9 (quoting Undesirable Aliens Act of 1929, Pub. L. No. 70-1018, ch. 690, 45 Stat. 1551).

The district court found consideration of the Act of 1929 relevant as a factor in the totality of circumstances under *Arlington Heights*, noting other district courts also found this history relevant. Appx C: 28a–30a, 34a–35a. Relying on uncontroverted expert testimony and historical records, the district court detailed the anti-Latino discriminatory and racial animus that propelled the Act of 1929. Appx C: 28a–30a, 34a–35a. 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." Appx C: 29a. 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.'" Appx C: 29a. 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." Appx C: 29a. And "[d]uring 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." Appx C: 29a. These nativist representatives "were furious in Congress" that agricultural and industrial employers defeated previous efforts to place quotas on Mexican workers, and "sought to pursue [nativism] through other means which ultimately led to the Act of 1929 which criminalizes unlawful entry and reentry." Appx C: 29a (cleaned up).

The government conceded "the Act of 1929 was motivated by racial animus." Appx C: 41a. The district court thus 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." Appx C: 29a. The district court also found the government did not prove the law would have been enacted absent racial animus. Appx C: 25a, 37a–40a.

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. Appx C: 29a–36a. 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).[2] President Truman vetoed the INA because of its discriminatory provisions. Appx C: 31a. Congress overrode the veto, including yea votes by several congressmen remaining in office since 1929, and Section 1326 took effect June 27, 1952.

Applying a presumption of good faith to the 1952 reenacting legislature, the district court found the law was reenacted in 1952 without addressing its

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[2] 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).

discriminatory intent and without substantive change. Appx C: 37a. In addition, the district court found that the 1952 reenactment was accompanied by independent discriminatory intent. Appx C: 29a–34a. Thus, the district court found Carrillo-Lopez sufficiently rebutted the presumption of legislative good faith. Appx C: 37a. Four findings by the district court are relevant here.

First, the district court found the 1952 Congressional silence on Section 1326 telling, in light of "robust debate on other provisions" of the INA. Appx C: 30a–31a. Because Congress had the opportunity to address the law's improper motivation but chose to remain silent, that Congressional silence "weighs in favor" of finding continued discriminatory intent. Appx C: 31a.

Second, the 1952 Congress reenacted the statute without substantive changes: "“[T]he initial and recodified unlawful reentry statutes are nearly identical, with the exception of broader enforcement measures." Appx. C: 35a. The reenactment carried forward almost identical language: "Any alien who—(1) has been arrested and 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[.]" Appx C: 42a n.10 (quoting INA § 276). Relying on this Court's holding in *Abbott v. Perez*, 138 S. Ct. 2305 (2018), "that how the reenacting legislature responds to a prior discriminatory statute is probative of the reenacting legislature's intent," the district court found the 1952 reenactment did not substantially alter or address the prior discriminatory intent. Appx C: 35a.

Third, the district court thoroughly examined 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 disparate impact on Latino persons as evidence of independent discriminatory intent in the 1952 reenactment. Appx C: 31a–34a. The court concluded "[t]he totality of evidence shows that the same factors motivating the passage of Section 1326 in 1929 were present in 1952. . .. Although it is 'not easy' to prove that racism motivated the passage of a particular statute, the Court reason[ed] that it cannot be impossible, or *Arlington Heights* would stand for nothing." Appx C: 34a.

Fourth, the district court found this legislative history distinguished this case from others with amended or reenacted laws. "While the *Hayden,*[3] *Cotton*,[4] and *Johnson*[5] legislatures were expressly revising felon-disenfranchisement laws to make them more race-neutral, the 1952 Congress did not depart from the original enactment of Section 1326 and instead adopted it in its entirety into the INA." Appx C: 36a (footnotes added). And Congress's adoption of Section 1326 "happened at a time that Congress did not appear to be overly concerned with its animus toward Mexican and Latinx people, but instead welcomed racist epithets." *Id.* Thus, the court concluded "Carrillo-Lopez has demonstrated that the 1952

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[3] *Hayden v. Paterson*, 594 F.3d 150 (2d Cir. 2010).

[4] *Cotton v. Fordice*, 157 F.3d 388 (5th Cir. 1998).

[5] *Johnson v. Governor of Fla.*, 405 F.3d 1214 (11th Cir. 2005) (en banc).

reenactment not only failed to reconcile with the racial animus of the Act of 1929, but was further embroiled by contemporary racial animus and discriminatory intent." *Id.*

C. Non-substantive amendments

The district court examined each of the five amendments to Section 1326 since its 1952 reenactment—in 1988, 1990, 1994, and twice in 1996—and found the amendments were non-substantive, as they "did not change the operation of Section 1326, but instead served to increase financial and carceral penalties."[6] Appx C: 40a. And the district court additionally found for each amendment "there has been no attempt [by Congress] at any point to grapple with the racist history of Section 1326 or remove its influence on the legislation." Appx C: 40a. Relying on two recent concurrences from this Court as persuasive and instructional, the district court concluded the "legislature's failure to confront a provision's racist past may keep it 'tethered to its original bias.'" Appx C: 40a (quoting *Espinoza v. Mont. Dept of Revenue*, 140 S. Ct. 2246, 2274 (2020) (Alito, J., concurring), and citing *Ramos v. Louisiana*, 140 S. Ct. 1390, 1410 (2020) (Sotomayor, J., concurring)). Thus, the district court concluded "the government fails to demonstrate how any subsequent amending Congress addressed either the racism that initially motivated the Act of

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[6] The 1988 amendment increased imprisonment time. Appx C: 40a. The 1990 amendment removed a monetary cap on financial penalties. *Id.* The 1994 amendment increased potential prison time for felony convictions. *Id.* And the 1996 amendments "added a penalty for those convicted of reentry while on parole, probation, or supervised release." *Id.*

1929 or the discriminatory intent that was contemporaneous with the 1952 reenactment." Appx C: 41a. After considering the 1929 Act, all its iterations, and the unrebutted expert testimony, the district court dismissed the indictment against Mr. Carrillo-Lopez.

II. The Ninth Circuit reversed, focusing its analysis exclusively on the 1952 reenactment.

The Ninth Circuit concluded the district court clearly erred in finding discriminatory intent and reversed dismissal of the indictment. Appx A: 1a–19a. In several places in the opinion, the Ninth Circuit discounted evidence of discriminatory animus surrounding the original 1929 criminalization of illegal reentry, holding the history of the 1929 statute "lacks probative value for determining the motivation of the legislature that enacted the INA." Appx A: 16a; *see* Appx A: 8a ("[T]he views of an earlier legislature are generally not probative of the intent of a later legislature, particularly when the subsequent legislature has a substantially different composition[.]" (internal quotation marks and citations omitted)); Appx A: 9a ("[U]nless historical evidence is reasonably contemporaneous with the challenged decision, it has little probative value." (quoting *McCleskey v. Kemp*, 481 U.S. 279, 298 n.20 (1987)); Appx A: 15a–16a (concluding district court clearly erred by considering 1929 statute); Appx A: 18a (criticizing district court for considering "evidence unrelated to [Section] 1326"); *see also* Appx A: 10a ("The history of the INA began in 1947[.]"). And the court, looking only to the 1952 legislature, found insufficient evidence of discriminatory animus to sustain the dismissal. Appx A: 10a–15a.

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.

With its decision here, the Ninth Circuit has deepened a 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, including cases in recent terms, 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* 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). The appellate court's role on appeal is deferential, so long as the district court did not clearly err. *See Abbott v. Perez*, 138 S. Ct. 2305, 2326 (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 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*, 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 Ninth 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*, 138 S. Ct. at 2325 (explaining *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*, 140 S. Ct. 1390, 1394 (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 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 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"—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").

The Court reached a similar conclusion in *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2251 (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 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 *Ramos*, joined the majority opinion. But he also wrote separately about the same issue here—the relevance of history. *Id.* 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*[.]" *Id.* at 2267 (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.* at 2268 (Alito, J., concurring). Thus, under *Ramos*, Justice Alito concurred to elaborate on the original anti-Catholic motivation for Montana's ban. *Id.* at 2268–74.

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 reenact 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 reenactment cannot be examined in a

vacuum. *Abbott*—on which the Ninth Circuit relied to hold the opposite, Appx A: 7a–9a, 14a–16a—follows this principle.

In *Abbott*, the Court considered Texas's redistricting plans, enacted in 2013 after a court determined prior plans were unconstitutionally discriminatory. *Abbott*, 138 S. Ct. at 2313. The Court rejected the argument that the 2013 plans merely carried forward the discriminatory intent from the earlier plans. *Id.* at 2313–14. 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.* 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.* at 2325. Instead, the 2013 legislature adopted plans from a Texas court. *Id.* at 2316. 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.* at 2316 (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 cleansed of racial animus by a lower court. Thus, *Abbott* is entirely consistent with *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 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 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, 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 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 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.

Last, 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.

The approach in these circuits 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 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.

2. The Fifth 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 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 do not encapsulate the complete circumstances of legislative intent.

In its decision here, the Ninth Circuit disavowed reliance on evidence surrounding the 1929 criminalization of illegal reentry into the United States. Appx. A, p. 8–10, 15–16, 18. 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."[7] 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.

As other petitioners have recently argued in this Court, the position taken by both the Fifth 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

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[7] 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).

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).

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

The Fifth and Ninth Circuits do not only split from other circuits—they conflict from this Court's precedent. This Court's precedents require district courts, as factfinder, to consider the historical background of a law, as part of its totality-of-the-circumstances analysis. *Arlington Heights*, 429 U.S. at 265–66. Appellate courts, under this precedent, must defer to the district court's factfinding. *See Abbott*, 138 S. Ct. at 2326; *Anderson*, 470 U.S. at 573. But the Ninth Circuit's decision did not defer to the district court's factfinding, instead relying on its own judgment of limited, piecemeal evidence to reverse dismissal of the indictment. And more generally, the Fifth Circuit's and Ninth Circuit's interpretation of *Arlington Heights* and its progeny insulate statutes from historical review by ignoring past history, 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* 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*, 138 S. Ct. at 2326–27. Because of this presumption, a law's challenger has the burden of establishing discriminatory intent. *Id.* But, as the district court

recognized here, "that presumption is not insurmountable." Appx C: 37a; *see also Abbott*, 138 S. Ct. at 2327 (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 reenactment 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].").

The district court properly performed this analysis here. As the government conceded, "discriminatory intent motivated the passage of the Act of 1929." Appx C: 28a. Congress never attempted to reconcile the racist origins of Section 1326. *See* Appx C: 36a. The legislative circumstances show a continuity in legislative purpose stretching from 1929 through 1952. *Id.* And the candor with which Congress expressed racial hostility toward Latin Americans in both 1929 and 1952 undermines the presumption of legislative good faith. *See* Appx C: 36a ("[In 1952] Congress did not appear to be overly concerned with its animus toward Mexican and Latinx people, but instead welcomed racist epithets.").

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. Instead, there was no severance between the original discriminatory intent in 1929 and the subsequent

1952 discriminatory intent when reenacting Section 1326. *See* Appx C: 36a ("[T]he 1952 reenactment not only failed to reconcile with the racial animus of the Act of 1929, but was further embroiled by contemporary racial animus and discriminatory intent.").

The Ninth Circuit substituted its view of the evidence for the district court's.[8] The Ninth Circuit did not discuss several items the district court found compelling in its analysis—the bulk of which the government never rebutted. Instead, the Ninth Circuit improperly engaged in a divide-and-conquer analysis, refusing to consider the history from 1929 and considering limited pieces of evidence individually instead of the collective totality that demonstrates racial animus was at least one motivation underlying Section 1326. *Cf. United States v. Arvizu*, 534 U.S. 266, 274–77 (2002); *United States v. Valdes-Vega*, 738 F.3d 1074, 1078 (9th Cir. 2013) (en banc).

There are several examples of the Ninth Circuit's improper approach. Appx A: 10a–19a. The Ninth Circuit mentioned the 1952 statute "was enacted 23 years after the 1929 Act, and was attributable to a legislature with a substantially different composition[.]" Appx A: 16a (internal quotation marks and citation omitted). 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). *See supra* note 2. And neither the passage of time nor

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[8] By assuming the role of factfinder, rather than deferring to the district court's factual findings, the Ninth Circuit's opinion creates conflict with this Court's clear-error precedent. *See, e.g., Monasky v. Taglieri,* 140 S. Ct. 719, 730 (2020); *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948).

the change in the legislature are controlling here. *See Abbott*, 138 S. Ct. at 2316–18 (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 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." Appx A: 15a–16a. And *Arlington Heights* expressly allowing consideration of historical background. Appx A: 15a–16a; *see Arlington Heights*, 429 U.S. at 264–68.

Not only did the Ninth Circuit not historically examine the statute's 1929 origins, but the 1952 reenactment, too, had a racist history itself that the Ninth Circuit minimized through its piecemeal review. The Ninth Circuit minimized 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. *See* Appx A: 10a, 14a–15a. The Ninth Circuit claimed the key Senate report underlying the 1952 reenactment contained no "racist or derogatory language"—even though this report repeatedly referred to Mexicans and other Latin Americans using a racial slur and expressed Congress's desire to maintain the country's "white population." Appx A: 14a; *see also* S. Rep. 81-1515 (1950) at 445–46, 473, 573, 579, 580, 584, 585, 586. The Ninth Circuit rejected evidence that Congress's lack of debate on or acknowledgment of the provision's past supported the district court's finding of purposeful discrimination. Appx. A: 12a. And the Ninth Circuit rejected evidence

of the stark disparate impact of Section 1326 on people from Latin America as "highly attenuated." Appx A: 16a–17a. The Ninth 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 *Harness* "abrogates the relevance" of evidence about 1929 and "[n]arrowing Barcenas-Rumualdo's evidence to that relating to § 1326").

Each of these cases conflict with this Court's precedent and change the presumption of legislative good faith into a per se rule, insulating laws from historical review, whenever that law has been silently reenacted or amended. Only by comprehensively viewing the total efforts 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 and Ninth Circuit's application of *Arlington Heights* conflicts with cases from this Court, resulting in a new standard no challenger is likely to meet. Carrillo-Lopez asks this Court to grant a writ of certiorari to realign the Ninth 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 in Fiscal Year 2022. And 99% of these prosecutions involved Latin American defendants.[9] Section 1326 thus continues to be wielded as a discriminatory tool driving the mass incarceration of Latino people.

In addition, the Ninth Circuit's reformulation of *Arlington Heights* will affect cases in various contexts outside criminal prosecutions for illegal reentry. The Ninth 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.

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[9] 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. 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.

This question is therefore crucial for legislatures and courts grappling with problematic legislation. Without guidance from this Court, the Ninth 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 history 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 reenacted after conceding its unconstitutional racist origin. *See* Appx C: 28a ("The government ultimately conceded that discriminatory intent motivated the passage of the Act of 1929."). Yet the Ninth Circuit gave no weight to the uncontested evidence of discrimination from 1929, despite *Arlington Heights* expressly allowing consideration of historical background. Appx A: 15a–16a; *see Arlington Heights*, 429 U.S. at 264–68.

Because legislatures and courts need guidance on how and when the past matters where the government concedes the unconstitutional origins of a law,

Petitioner Carrillo-Lopez's case presents an ideal vehicle for this Court to realign the Ninth Circuit's caselaw with *Arlington Heights*.

Conclusion

Because the Ninth 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 6th day of December 2023.

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