No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JORGE FERRETIZ-HERNANDEZ, IGNACIO FELIX-SALINAS, AND ELIAS CHIROY-CAC,

***Petitioners*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. 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?

PARTIES TO THE PROCEEDING

Petitioners Jorge Ferretiz-Hernandez, Ignacio Felix-Salinas, and Elias Chiroy-Cac were the appellants below. In accordance with this Court's Rule 12.4, Petitioners are filing a "single petition for a writ of certiorari" because the "judgments . . . sought to be reviewed" are from "the same court and involve identical or closely related questions." Sup. Ct. R. 12.4. Petitioners' three direct appeals were similarly consolidated in the Eleventh Circuit. Respondent in each of Petitioners' cases is the United States, which was the appellee below.

RELATED PROCEEDINGS

United States District Court (M.D. Fla.)

United States v. Jorge Cesar Ferretiz-Hernandez, Case No. 5:21-cr-63-JA-PRL
United States v. Ignacio Felix-Salinas, Case No. 5:21-cr-70-JA-PRL
United States v. Elias Chiroy-Cac, Case No. 5:21-cr-75-JA-PRL

United States Court of Appeals (11th Cir.)

United States v. Ferretiz-Hernandez, et al.,
Nos. 22-13038, 22-13039, 22-13307 (consolidated)
Reported at 139 F.4th 1286 (11th Cir. 2025), *rehearing denied, en banc* (August 25, 2025)

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Jorge Ferretiz-Hernandez, Ignacio Felix-Salinas, and Elias Chiroy-Cac respectfully ask that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Eleventh Circuit on June 11, 2025.

OPINION BELOW

The Eleventh Circuit's published opinion affirming Petitioners' convictions was reported at *United States v. Ferretiz-Hernandez, et. al.*, 139 F.4th 1286 (11th Cir. 2025), *rehearing denied, en banc* (August 25, 2025), and is attached to this petition as Appendix A. The Eleventh Circuit's decisions denying Petitioners' request for rehearing is attached to this petition as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on June 11, 2025. Petitioners timely filed a request for rehearing, and the Eleventh Circuit's decision denying rehearing was entered on August 25, 2025. This petition is filed within 90 days after the denial of rehearing. *See* Sup. Ct. R. 13.1, 13.3. This Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides, in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . .."

Section 1326 of Title 8 of the United States Code provides:

> . . . [A]ny alien who –
>
> (1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter
>
> (2) enters, attempts to enter, or is at any time found in, the United States . . . shall be fined under title 18, United States Code, or imprisoned not more than 2 years or both.

8 U.S.C. §§ 1326(a)(1) and (2).

STATEMENT OF THE CASE

A. Introduction and Statutory Background

Illegal reentry was first criminalized by Congress in 1929 at the height of the eugenics movement. The statute read:

> [I]f any alien has been arrested and deported in pursuance of law, he shall be excluded from admission to the United States . . . and if he enters or attempts to enter the United States . . . he shall be guilty of a felony.

Undesirable Aliens Act of 1929, Pub. L. No. 70-1018, ch. 690, 45 Stat. 1551 (Mar. 4, 1929). Legislators who championed the Undesirable Aliens Act believed that the "Mexican race"[1] would destroy the racial purity of the United States, and the

[1] In the early 20th century, "Mexican" was conceptualized as a race rather than a nationality. For example, the 1930 census listed "Mexican" as a "Color or Race." United States Census Bureau, *Measuring Race and Ethnicity Across The Decades: 1790-2010*, https://www.census.gov/data-

legislation was a direct result of efforts by white supremacists to use immigration laws to keep the country's blood "white and purely Caucasian." 70th Cong. Rec. H2462 (daily ed. Feb. 3, 1928) (statement of Rep. Lankford on "Across the Borders")[2]; *see also* 70th Cong. Rec. H2817-18 (daily ed. Feb. 9, 1928) (statement of Rep. Box on "Restriction of Mexican Immigration").[3]

In the days leading up to the passage of the final bill, representatives specified that the targeted population was Mexicans, opining that Mexicans were "poisoning the American citizen" because they are "of a class" that is "very undesirable." 71st Cong. Rec. H3620 (daily ed. Feb. 16, 1929).[4] Within a year of the law's passage, the government had prosecuted 7,001 border crossing crimes; ten years later, that number rose to over 44,000.[5] In each of these first ten years, individuals from Mexico accounted for no fewer than 84% of those convicted and often made up as many as 99% of defendants.[6]

In 1952, Congress enacted the Immigration and Nationality Act ("INA") and

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tools/demo/race/MREAD_1790_2010.html. And "[f]rom at least 1846 until as recently as 2001 courts throughout the United States have utilized the term 'Mexican race' to describe Latinos." Lupe S. Salinas, *Immigration and Language Rights: The Evolution of Private Racist Attitudes into American Public Law and Policy*, 7 Nev. L. J. 895, 913 (2007).

[2] https://www.congress.gov/bound-congressional-record/1928/02/03/house-section

[3] https://www.congress.gov/bound-congressional-record/1928/02/09/house-section

[4] https://www.congress.gov/bound-congressional-record/1929/02/16/house-section

[5] Annual Report of the Attorney General of the United States for Fiscal Year 1939, at 37; Kelly Lytle Hernandez, *City of inmates: Conquest, Rebellion, and the Rise of Human Caging in Los Angeles, 1771-1965*, at 138-39 n.6 (UNC Press 2017).

[6] Hernandez, *City of Inmates,* at 138-39 n.6 (citing U.S. Bureau of Prisons, *Federal Offenders*, Fiscal Years 1931-36).

codified the illegal reentry provision under 8 U.S.C. § 1326. Section 1326 carried forward almost identical language from the 1929 law:

> 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 . . . shall be guilty of a felony[.]

Immigration and Nationality Act, Pub. L. No. 82-414, § 276, 66 Stat. 229 (codified at 8 U.S.C. § 1326 (1952)).[7] The addition of the "found in" clause – the only significant alteration between the unlawful reentry provision in the Act of 1929 and § 1326 – makes the offense of illegal reentry easier to prove, especially for defendants who surreptitiously entered the United States, as often occurs at the southern border with Mexico, and reduces statute of limitations obstacles to charging persons not found until years after the illegal entry. *See United States v. Vargas-Garcia*, 434 F.3d 345, 350 (5th Cir. 2005) (so interpreting § 1326).

Importantly, the 1952 Congress codified § 1326 silently and without debate. *See Ferretiz-Hernandez*, 139 F.4th at 1293; *see also United States v. Carrillo-Lopez*, 555 F. Supp. 3d 996, 1012 (D. Nev. 2021) ("As a matter of logic, the 1952 Congress could have either examined [the racial animus reflected in the Act of 1929] or ignored it. If the 1952 Congress ignored the express nativist intent behind the Act of 1929, there is no reason to assume that the later enactment arose from some wholly

[7] Section 1326 was later amended to include longer imprisonment statutory maximums for defendants previously convicted of a felony and aggravated felony. *See* 8 U.S.C. § 1326(b); Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, Title VII, § 7345(a), 102 Stat. 4181, 4471 (1988) (providing statutory maxima for prior felonies to five years and for prior aggravated felonies to 15 years); Violent Crime Control & Law Enforcement Act of 1994, Pub. L. No. 103-322, Title XIII, § 130001(b), 108 Stat. 2023 (1994) (increasing statutory maxima for prior felonies to 10 years and for prior aggravated felonies to 15 years).

unrelated motivation cleansed from discriminatory intent. If it did not ignore the Act of 1929's history, there was opportunity to either adopt its racial animus or refute its improper motivation and clarify a purpose for the statute that did not violate the Equal Protection Clause. Here, the 1952 Congress remained silent, even when other provisions of the law were being debated.").

The disparate impact of the illegal reentry statute persists. In recent years, the number of illegal reentry offenders sentenced peaked at 22,077 in fiscal year 2019 and dropped during the pandemic to 11,565 in fiscal year 2021. U.S. Sentencing Comm'n, *Quick Facts: Illegal Reentry Offenses, Fiscal Year 2021*.[8] The number of illegal reentry offenders sentenced increased slightly to 11,980 in fiscal year 2022, U.S. Sentencing Comm'n, *Quick Facts: Illegal Reentry Offenses, Fiscal Year 2022*,[9] and more significantly to 12,551 in fiscal year 2024, U.S. Sentencing Comm'n, *Quick Facts: Illegal Reentry Offenses, Fiscal Year 2024*.[10] In fiscal year 2024, 99% of the illegal reentry offenders sentenced were Hispanic. *Id*.

B. Proceedings Below

Ferretiz-Hernandez, a Mexican citizen, was charged by indictment[11] in April 2021 with a single count of reentry after removal, in violation of 8 U.S.C. § 1326. [Doc.

[8] https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Illegal_Reentry_FY21.pdf

[9] https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Illegal_Reentry_FY22.pdf

[10] https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Illegal_Reentry_FY24.pdf

[11] Case No. 5:21-cr-63-JA-PRL

13]. He moved to dismiss the indictment, arguing that § 1326 violates the equal protection component of the Fifth Amendment under the framework established in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), based on the law's original discriminatory purpose and disparate impact on Latinos. [Doc. 31]. The district court denied the motion. [Doc. 85]. Ferretiz-Hernandez entered a plea of guilty on May 25, 2022, pursuant to a plea agreement. [Docs. 92, 95, 100]. The district court sentenced him to 46-months' imprisonment, followed by a two-year term of supervised release. [Doc. 106]. Ferretiz-Hernandez timely appealed in September 2022. [Doc. 108].

Felix-Salinas, a Mexican citizen, was charged by indictment[12] in September 2021 with a single count of reentry after removal, in violation of 8 U.S.C. § 1326. [Doc. 11]. He moved to dismiss the indictment, arguing that § 1326 violates the equal protection component of the Fifth Amendment under the framework established in *Arlington Heights*, based on the law's original discriminatory purpose and disparate impact on Latinos. [Doc. 14]. The district court denied the motion. [Doc. 63]. Felix-Salinas entered a plea of guilty on May 25, 2022, pursuant to a plea agreement. [Docs. 73, 75, 79]. The district court sentenced him to 46-months' imprisonment, followed by a two-year term of supervised release. [Doc. 86]. Felix-Salinas timely appealed in September 2022. [Doc. 88].

Chiroy-Cac, a Guatemalan citizen, was charged by indictment[13] in April 2021

[12] Case No. 5:21-cr-70-JA-PRL

[13] Case No. 5:21-cr-75-JA-PRL

with a single count of reentry after removal, in violation of 8 U.S.C. § 1326. [Doc. 1]. He moved to dismiss the indictment, arguing that § 1326 violates the equal protection component of the Fifth Amendment under the framework established in *Arlington Heights*, based on the law's original discriminatory purpose and disparate impact on Latinos. [Doc. 25]. The district court denied the motion. [Doc. 70]. Chiroy-Cac was found guilty pursuant to a stipulated bench trial on June 24, 2022. [Docs. 78, 81]. The district court sentenced him to time served, followed by a one-year term of supervised release. [Doc. 90]. Chiroy-Cac timely appealed in September 2022. [Doc. 93].

On appeal, Petitioners again challenged the constitutionality of 8 U.S.C. § 1326, arguing that the law violates the equal protection component of the Fifth Amendment's Due Process Clause under the *Arlington Heights* framework by discriminating against Mexican and other Latino immigrants. Central to that argument, Petitioners asserted that the statute's predecessor – the Undesirable Aliens Act of 1929 (the "1929 law") – was enacted with discriminatory intent, and that § 1326, codified as part of the INA of 1952, perpetuates that taint.

The majority opinion agreed with the premise that Congress acted with discriminatory intent when it criminalized unlawful reentry in 1929,[14] but held that Petitioners' taint argument was foreclosed by Eleventh Circuit precedent:

> The defendants and amici devote much of their argument to showing that the 1929 Congress acted with discriminatory intent when it criminalized unlawful reentry in the 1929 Act. They cite patently racist statements made during that era and argue that the 1929 Act was

[14] The government also did not deny that the 1929 law was motivated by racial animus. *See United States v. Ferretiz-Hernandez*, 139 F.4th 1286, 1292 (11th Cir. 2025).

> steeped in discriminatory intent. We agree that much of the 1929 Act's history is plagued with xenophobic rhetoric. Still, the statute before us is not the unlawful reentry provision in the 1929 Act; it is § 1326, enacted in 1952 and amended repeatedly thereafter. That distinction is dispositive.
>
> The defendants' theory – that the 1952 Congress reenacted the unlawful reentry provision with the same discriminatory intent as the 1929 Congress – rests on a misunderstanding of how legislative intent works. Laws do not carry forward "taint" through reenactment unless the later legislature acted with the same constitutionally impermissible purpose. *See Johnson v. Governor of Florida*, 405 F.3d 1214, 1223-24 (11th Cir. 2005) (en banc); *Thompson v. Sec'y of State for Alabama*, 65 F.4th 1288, 1298 (11th Cir. 2023); *Greater Birmingham Ministries v. Sec'y of State for Alabama*, 992 F.3d 1299, 1325 (11th Cir. 2021). "[P]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." *City of Mobile v. Bolden*, 446 U.S. 55, 74, 100 S. Ct. 1490, 1503 (1980).

United States v. Ferretiz-Hernandez, 139 F.4th 1286, 1293 (11th Cir. 2025). Even setting aside the prior precedent rule, the Eleventh Circuit rejected the argument that § 1326 perpetuates the discriminatory taint of the 1929 law, *id*. at 1293, n. 10, based on the presumption of legislative good faith and the doctrine of legislative immunity. *Id*. at 1294-95. Accordingly, the Eleventh Circuit determined that the relevant inquiry under the *Arlington Heights* framework was whether the 1952 Congress acted with a discriminatory purpose. *Id*. at 1295.

REASONS FOR GRANTING THE WRIT

A. The Eleventh Circuit's decision conflicts with this Court's precedent because it ignores the discriminatory animus of a substantively unchanged law that continues to have a disparate impact.

Because the original illegal reentry law was enacted with a discriminatory purpose and continues to have a disparate impact, § 1326 is presumptively unconstitutional under *Arlington Heights*. The burden thus shifts to the

government to show that Congress – in 1929 – would have passed the law in the absence of any discriminatory purpose. *Hunter v. Underwood*, 471 U.S. 222, 228 (1985); *Harness v. Watson*, 143 S. Ct. 2426, 2427 (2023) (Jackson, J., dissenting from denial of certiorari). The government cannot make this showing, and the Eleventh Circuit should have vacated Petitioners' convictions because § 1326 is unconstitutional.

But the majority explicitly rejects the burden-shifting framework articulated in *Arlington Heights* and, instead, looks to the 1952 reenactment of § 1326 as the relevant inquiry. *Ferretiz-Hernandez*, 139 F.4th at 1294-95. The Eleventh Circuit's decision therefore conflicts with *Hunter*, as well as *Abbott v. Perez*, 585 U.S. 579 (2018), and *Ramos v. Louisiana*, 590 U.S. 83 (2020). The 1952 reenactment did not purge the discriminatory taint of the 1929 law because (1) the law was not reenacted through a sufficient deliberative process, and (2) the presumption of legislative good faith is rebutted by the historical background of the 1929 law. The decision below cannot stand.

1. Section 1326 was not reenacted through a sufficient deliberative process to purge the discriminatory taint of the 1929 law.

Johnson v. Governor of Florida, 405 F.3d 1214, 1223 (11th Cir. 2005) (en banc), is the Eleventh Circuit's "seminal precedent on reenactments of laws that were originally enacted with discriminatory intent." *Thompson v. Alabama*, 65 F.4 1288, 1319 (11th Cir. 2023) (Rosenbaum, J., dissenting). To determine "whether a subsequent legislative re-enactment can eliminate the taint from a law that was originally enacted with discriminatory intent," it must be considered whether the law

was reenacted "through a deliberative process" while paying special attention to whether the reenactment resulted in any substantive changes. *Johnson*, 405 F.3d at 1223-24 (citing *Cotton v. Fordice*, 157 F.3d 388, 391 (5th Cir. 1988)).

In *Johnson*, the Eleventh Circuit approved Florida's reenactment of its discriminatory disenfranchisement provision because the bill went through what it considered to be a sufficient deliberative process: the law went through a committee, then the full legislature, and then was approved by the voters. *Id.* at 1224 (reasoning that the law had been cleansed because, after completing "a deliberative process," the state legislature adopted a "markedly different" provision that *narrowed* the scope of the law, allowing more people to regain their suffrage rights).[15] *Johnson* specifically rejected the proposition that the legislature had to explicitly discuss (and discount) the discriminatory intent underlying the earlier law. *Id.* The *Johnson* court also did not consider requiring the legislature to provide a legitimate, non-discriminatory reason for re-enacting the law that had previously been found to be discriminatory.[16]

However, this Court's precedent makes clear that – contrary to *Johnson* and its progeny (including *Thompson*) – the mere passage of a new statute is not enough to purge a law of its original discriminatory purpose. In this context, the Court has

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[15] In contrast, here, the reenactment of § 1326 *expanded* the scope of the law to apply to a previously removed alien that not only enters or attempts to enter, but "is at any time found in" the United States, making it easier for the government to establish jurisdiction for prosecutions under the law. *See Ferretiz-Hernandez*, 139 F.4th at 1292.

[16] *Johnson* is also notably different from the instant action because, in *Johnson*, neither the government nor the court agreed that the prior version of the law had been enacted with discriminatory intent. *See Johnson*, 405 F.3d at 1219. Moreover, the plaintiffs in *Johnson* conceded that, while they believed the prior version of the law had been enacted with discriminatory intent, the amended law had not been enacted with discriminatory intent. *Id.* at 1223.

long endorsed a basic rule of statutory construction: "it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect, unless such intention is clearly expressed." *Anderson v. Pacific Coast S.S. Co.*, 225 U.S. 187, 199 (1912). The re-enacting legislature must therefore confront the law's racist history to purge its discriminatory taint.

This Court has consistently held to this rule. In *Hunter*, 471 U.S. at 227-29, for example, the unanimous Court rejected the argument that amendments after the original enactment of Alabama's facially neutral voter disenfranchisement law 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 *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").

More recently, in *Ramos*, 590 U.S. at 87, the Court considered the constitutionality of Louisiana's nonunanimous jury verdict system, originally passed with an intent to discriminate. Many years later, Louisiana readopted the nonunanimous jury rules without mentioning race. *Id.* at 142 (Alito, J., dissenting). The Court held that the fact that those rules were later "recodified . . . in new proceedings untainted by racism" could not excuse "leaving an uncomfortable past unexamined." *Id.* at 99 n. 44; *see also id.* at 115 (Sotomayor, J., concurring)

(explaining a legislature does not purge discriminatory taint unless the law "otherwise is untethered to racial bias – and perhaps also where a legislature actually confronts a law's tawdry past in reenacting it").

While "past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful," *Ferretiz-Hernandez*, 139 F.4th at 1293 (citing *Bolden*, 446 U.S. at 74), 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, as *Johnson* allows.

Johnson claims that *Hunter* "left open the question whether later reenactments would have rendered the provision valid." 405 F.3d at 1223. However, *Johnson* misreads *Hunter*. In *Hunter*, the provision had not been reenacted or amended by the legislature, but judicial decisions over the years had struck 33 down some of the "more blatantly discriminatory" enumerated offenses. 471 U.S. at 233. Appellants argued that those changes had "legitimated the provision." *Id.* The Court soundly rejected this suggestion:

> Without deciding whether [the provision] would be valid if enacted today without any impermissible motivation, we simply observe that its original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect. As such, it violates equal protection under *Arlington Heights*.

Id. The Eleventh Circuit has latched onto that statement – "if enacted today" – and

transformed it to "if amended today" or "if reenacted today," in order to justify looking only to the most recent amendments of discriminatory laws. *See Johnson*, 405 F.3d at 1223 (limiting inquiry to later legislative amendment that narrowed the disenfranchisement terms). But nothing in *Hunter* suggests amendments or reenactments can cure the taint of discriminatory purpose without addressing that original intent. Rather, as this Court explained, the provision was not legitimated by amendments that "*did not alter the intent* with which the article, including the parts that remained, had been adopted." *Abbott*, 585 U.S. at 604 (emphasis added, explaining *Hunter*). What matters is the *original* intent.

Indeed, the insufficient deliberative process adopted in *Johnson* has drawn criticism from members of the Eleventh Circuit as well as other circuits. In her dissent to the majority opinion in *Johnson*, Judge Barkett noted that, as the Eleventh Circuit used the term, "the adjective 'deliberative' describes the procedural aspects of the decision, [but] it need not include any substantive component at all," expressing concern that "legislatures could continue to utilize statutes that were originally motivated by racial animus, and that continue to produce discriminatory effects, so long as they re-promulgate the statutes 'deliberately' and without explicit evidence of an illicit motivation." 405 F.3d at 1246. The Second Circuit echoed this concern: "We do not take lightly the possibility that a legislative body might seek to insulate from challenge a law known to have been originally enacted with a discriminatory purpose by (quietly) reenacting it without significant change." *Hayden v. Paterson*, 594 F.3d 150, 167 (2nd Cir. 2010). And, in her dissent to *Thompson*, Judge Rosenbaum

stated:

> Our precedent's sole taint-cleansing "requirement" (going through the "deliberative process") is wholly insufficient for ensuring the government is not continuing to violate the Equal Protection Clause. The requirement provides no assurance that the reenacted law that was previously found to have been adopted for discriminatory reasons was reenacted for nondiscriminatory reasons.
>
> . . . .
>
> Just as a false reason for an employment action against a member of a protected group can suggest discrimination under the Equal Protection Clause, a false reason for the enactment of a law that has a discriminatory impact can indicate pretext for discrimination. And that is especially the case when the law is the reenactment of a law that a federal court has previously expressly found to have been enacted for a discriminatory purpose.
>
> To purge that taint, to assure citizens and courts that a legislature is not merely "taint laundering," the reenacting legislature must identify its policy goal and justify any disparate impact, *see* W. Kerrel Murray, *Discriminatory Taint*, 135 Harv. L. Rev. 1190, 1244 (2022), as part of its showing that no impermissible substantive departures have occurred in the legislative process.

65 F.4th at 1321-22, 1324.

2. The presumption of legislative good faith is rebutted by the historical background of the 1929 law to support an inference of discriminatory intent.

The majority opinion correctly points out that "the presumption of legislative good faith [is] not changed by a finding of past discrimination," *Ferretiz-Hernandez*, 139 F.4th at 1294 (citing *Abbott*, 585 U.S. at 603), but historical evidence can be used as part of the *Arlington Heights* analysis as one source of evidence to rebut and overcome a presumption of legislative good faith. *See Abbott*, 585 U.S. at 603-04 (citing *Arlington Heights*, 429 U.S. at 267); *see also Arlington Heights*, 429 U.S. at 265-66 (enumerating the factors relevant to analyzing whether discriminatory intent

exists and stating that if there is "proof that a discriminatory purpose has been a motivating factor in the decision, . . . judicial deference is no longer justified").

Although the historical background of a law, on its own, cannot condemn lawful actions by the legislature, the historical background of the 1929 law here, taken together with the other *Arlington Heights* factors, supports the argument that § 1326 was enacted with discriminatory intent. Yet the Eleventh Circuit gave no real weight to the uncontested evidence of discrimination from 1929. *See Ferretiz-Hernandez*, 139 F.4th 1295 ("Congress's reuse of statutory language from 1929 tells us little – if anything – about its purposes in 1952"). Even if Eleventh Circuit precedent does not require consideration of such evidence, *see Thompson*, 65 F.4th at 1322-23 ("our precedent does not appear to consider the *Arlington Heights* factors at all in a challenge to a reenacted law that was previously found to have been enacted for a discriminatory reason"), "the *Arlington Heights* factors should govern reenactment challenges to at least the same extent that they control the analysis in Equal Protection challenges to laws that have not previously been found to be discriminatory," *id*. at 1323 (Rosenbaum, J., dissenting).

The Eleventh Circuit avoided looking at the troubling history of § 1326 simply because Congress enacted the same substantive law in 1952 and recodified it. *Ferretiz-Hernandez*, 139 F.4th at 1224. Nothing, however, suggests that the 1952 Congress recognized the original discriminatory taint and decided to reenact § 1326 for nondiscriminatory purposes. By failing to address the law's initial discriminatory purpose, Congress did not alter that original intent – and the

discriminatory intent of the 1929 Congress remains relevant to the *Arlington Heights* analysis. *See Abbott*, 585 U.S. at 604; *Hunter*, 471 U.S. at 233. The Eleventh Circuit misunderstands and misapplies this Court's precedent because it ignores the discriminatory animus of a substantively unchanged law that continues to have a disparate impact.

B. This is an exceptionally important and recurring question warranting certiorari review.

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. In addition, the Eleventh Circuit's reformulation of *Arlington Heights* will affect cases in various contexts outside criminal prosecutions for illegal reentry, heightening the need for this Court's intervention.

By ignoring evidence of the 1929 Congress's discriminatory intent, the Eleventh Circuit has set circuit precedent allowing for courts to curtail the proper analysis set forth by this Court. Without guidance from this Court, the Eleventh Circuit's opinion will also allow legislatures to cleanse unconstitutional intent – both past and current – from a law by silent reenactment or amendment without examining the history of the law. This question is therefore crucial for legislatures and courts grappling with problematic legislation. The Eleventh Circuit's holding

not only conflicts with this Court's precedent but also allows legislatures to leave racist laws in place, perpetuating a history of discrimination.

This Court should correct the Eleventh Circuit's error by granting certiorari and holding that (1) the silent reenactment of a racist law does not purge the discriminatory taint and (2) the 1929 evidence is relevant to the *Arlington Heights* inquiry. On remand, the circuit court can address whether Petitioners have shifted the burden to the government and whether the government can show that the statute would have been adopted absent the discriminatory purpose.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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