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August 25, 2021

The Honorable Merrick Garland
Attorney General
950 Pennsylvania Ave NW
Washington, DC 20530-0001

Re: Constitutionality of Illegal Reentry Criminal Statute, 8 U.S.C. § 1326

Dear Attorney General Garland,

We, the undersigned attorneys general, write as chief legal officers of our States to inquire about your intent to appeal the decision in *United States v. Carrillo-Lopez*, No. 3:20-cr-00026-MMD-WGC, ECF. 60 (D. Nev. Aug. 18, 2021). As you know, in that decision, Chief Judge Du found unconstitutional 8 U.S.C. § 1326, the statute that criminalizes the illegal reentry of previously removed aliens. We appreciate that you recently filed a notice of appeal, preserving your ability to defend the law on appeal. We now urge you to follow through by defending the law before the Ninth Circuit and (if necessary) the Supreme Court. We ask that you confirm expeditiously DOJ's intent to do so. Alternatively, if you do not intend to seek reversal of that decision and instead decide to cease prosecutions for illegal reentry in some or all of the country, we ask that you let us know, in writing, so that the undersigned can take appropriate action.

Section 1326, as part of the Immigration and Nationality Act of 1952, is unremarkable in that it requires all aliens—no matter their race or country of origin—to enter the country lawfully. In finding the law racially discriminatory against "Latinx persons," Chief Judge Du made some truly astounding claims, especially considering that, under the Immigration and Nationality Act, Mexico has more legal permanent residents in the United States, by far, than any other country.[1] Chief Judge Du determined that, because most illegal reentrants at the border are from Mexico, the law has an impermissible "disparate impact" on Mexicans. When faced with somewhat obvious information about geography, Chief Judge Du said she was "not persuaded." Chief Judge Du went on to discuss her thoughts on racist motivations surrounding *legal* immigration quotas—which again prioritize Mexican immigration—but failed to describe how a

[1] Estimates of the Lawful Permanent Resident Population in the United States: January 2015-2019, Department of Homeland Security, https://www.dhs.gov/sites/default/files/publications/immigration-statistics/Pop_Estimate/LPR/lpr_population_estimates_2015_-_2019.pdf.pdf.

prohibition on *illegal* immigration is anything but a necessity for a functional sovereign nation with even a modicum of control of its borders.

Secretary of Homeland Security Alejandro Mayorkas recently acknowledged that the Department of Homeland Security has lost control of the border, lamenting that the current situation is "unsustainable," that it "cannot continue," that the system is getting close to "breaking," and that "we're going to lose."[2] The American public agrees.[3] Now, more than ever, the constitutionality of this statute must be defended, since it is one of the federal government's most important tools for deterring illegal reentry into the United States. Given that border security had reached the breaking point *before* Chief Judge Du issued her opinion, just imagine what awaits if you announce your intent not to appeal—an announcement that would, in effect, tell already-deported aliens that they are free to try reentering again. Indeed, acquiescing in the district court's opinion would be tantamount to announcing legalization of illegal reentry. Moreover, under the district court's reasoning, the United States may well be unable to enforce *any* immigration laws, which by their nature disparately impact the many *billions* of people living outside of our borders.

If the DOJ fails to seek reversal of this ruling, and if it adopts a policy of refusing to enforce the illegal reentry statute, that non-enforcement policy will be subject to a challenge And the importance of any such challenge would be magnified by this administration's practice of shirking its duty to take care that the laws be faithfully executed—a practice that has become troublingly common. In one case, the DOJ took the unprecedented step of stipulating to the dismissal of an appeal challenging the nationwide vacatur of a policy it opposed.[4] In another, the DOJ stipulated to the dismissal of a Supreme Court case in which *the DOJ itself* had just recently petitioned for *certiorari*.[5] It did so, apparently, to prevent third-party interveners from obtaining a ruling that would frustrate the current administration's effort to misapply the federal law known as Title X.[6] The DOJ also changed position in *Terry v. United States*, 141 S. Ct. 1858 (2021). On March 15, 2021, *the same day* the DOJ's merits brief was due, the Acting Solicitor General abandoned the federal government's prior interpretation of the First Step Act of 2018, asking the Supreme Court to appoint an amicus curiae to defend an already-obtained favorable

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[2] Edmund DeMarche, Emma Colton, and Bill Melugin, "Mayorkas says border crisis 'unsustainable' and 'we're going to lose' in leaked audio," *Fox News* (August 13, 2021), https://www.foxnews.com/politics/mayorkas-leaked-audio-border.

[3] Poll: Large majority say situation at the border is a 'crisis', The Hill (Mar. 22, 2021), https://thehill.com/hilltv/what-americas-thinking/544391-poll-majority-say-surge-at-the-border-a-crisis.

[4] *See* Mtn. to Dismiss, *Cook County v. Wolf*, No. 20-3150, Doc.23 (7th Cir. March 9, 2021).

[5] *See* Joint Stipulation to Dismiss, *Becerra v. Mayor and City Council of Baltimore*, No. 20-454 (U.S., Mar. 12, 2021).

[6] *See* Letter Brief of Proposed-Intervenor States, *Becerra v. Mayor and City Council of Baltimore*, No. 20-454 (May 10, 2021).

ruling.[7] As you know, the Court appointed Adam Mortara to shoulder the government's burden and argue the case in the government's absence. In June, the Court issued its opinion, agreeing with him and ruling in favor of the position the government had forsaken. And not only did the government's abandoned position win, but it wasn't even close—the Court ruled unanimously and without dissent.

The legal issues here are as clear as they were there. Every court to examine the issue has come out directly contrary to Chief Judge Du's decision, finding that 8 U.S.C. § 1326 is constitutional and does not violate equal-protection principles. *See, e.g. United States v. Novondo-Ceballos*, No. 21-CR-383 RB, 2021 WL 3570229 at *2-*5 (D.N.M. Aug. 12, 2021) (finding 8 U.S.C. § 1326 to be constitutional and not violative of the Equal Protection Clause); *United States v. Machic-Xiap*, No. 3:19-CR-407-SI, 2021 WL 3362738 at *2-*15 (D. Or. Aug. 3, 2021) (same); *United States v. Wence*, No. 3:20-CR-0027, 2021 WL 2463567 at *2-*10 (D.V.I. June 16, 2021) (same); *United States v. Gutierrez-Barba*, No. CR1901224001PHXDJH, 2021 WL 2138801 at *2-*5 (D. Ariz. May 25, 2021) (same); *United States v. Medina-Zepeda*, Case No. CR 20-0057, ECF No. 33 at 2-6 (C.D. Cal. Jan. 5, 2021) (same); *United States v. Palacios-Arias*, Case No. 3:20-cr-62-JAG, ECF No. 37 at 3-8 (E.D. Va. Oct. 13, 2020) (same). Courts have also rejected similar equal protection challenges to 8 U.S.C. § 1325, which was originally adopted at the same time as 8 U.S.C. § 1326 and criminalizes first-time illegal entries. *United States v. Gallegos-Aparicio*, No. 19-CR-2637-GPC, 2020 WL 7318124, at *4 (S.D. Cal. Dec. 11, 2020) (finding that 8 U.S.C. § 1325 is constitution and not violative of the Equal Protection Clause); *United States v. Rios-Montano*, No. 19-CR-2123-GPC, 2020 WL 7226441 (S.D. Cal. Dec. 8, 2020) (same); *United States v. Lucas-Hernandez*, No. 19MJ24522-LL, 2020 WL 6161150, at *2–4 (S.D. Cal. Oct. 21, 2020) (same); *United States v. Morales-Roblero*, No. 3:19-MJ-24442-AHG, 2020 WL 5517594, at *7-*10 (S.D. Cal. Sept. 14, 2020) (same); *United States v. Ruiz-Rivera*, No. 3:20-MJ-20306-AHG, 2020 WL 5230519, at *2-*5 (S.D. Cal. Sept. 2, 2020). Indeed, most of the courts to have considered equal protection challenges to §§ 1325 and 1326 are all in the Ninth Circuit, as is the District of Nevada, and they have all come to the opposite conclusion. Chief Judge Du's opinion stands alone as an outlier—a clearly wrong outlier.

What is more, courts of appeals have evaluated constitutional challenges to 8 U.S.C. § 1326 on other grounds and have always held it to be constitutional. *United States v. Osorto*, 995 F.3d 801, 821–22 (11th Cir. 2021) (holding that sentencing guidelines based on § 1326 "do[] not violate equal protection"); *United States v. Barajas-Barajas*, 51 F. App'x 258, 259 (9th Cir. 2002) (holding there to be no constitutional violation where "almost all of the individuals selected for interviews and prosecution under § 1326 . . . are Hispanic men"); *United States v. Solorzano*, 202 F.3d 283 (10th Cir. 2000) (holding that "§ 1326 does not violate [the defendant's] equal protection rights"); *United States v. Carrillo-Colorado*, 56 F.3d 73 (9th Cir.

[7] https://www.supremecourt.gov/DocketPDF/20/20-5904/171877/20210315103509839_20-5904 Terry.pdf.

1995) (table) (holding there to be no "discriminatory effect or intent by the government with regard to [the government's] decision to charge [an alien] with a violation of § 1326(a) and (b)(1)"); *United States v. Estrada-Plata*, 57 F.3d 757, 761 (9th Cir. 1995) (holding there to be no constitutional violation even though the government's prosecutions under § 1326 "affect[] Hispanics more than other races"); *United States v. Terrazas-Carrasco*, 861 F.2d 93, 97 (5th Cir. 1988) (holding that § 1326 "as applied in this case does not violate any of defendant's constitutional rights, and no good-faith argument for reversal can be made on this basis"). It would be passing strange if the unconstitutionality of the statute escaped all these distinguished jurists for all these years.

The States should not have to worry about the administration doing its job and defending federal law. But given this administration's habit of policymaking through the expedient of strategic surrender, the States have reason to fear. If you do not intend to defend § 1326, we request that you inform us by the close of business on Friday, September 17.

Respectfully,

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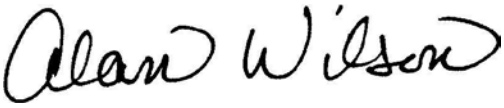

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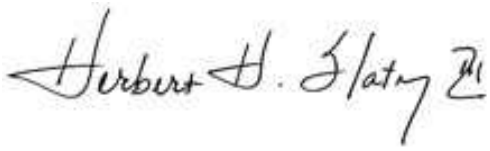

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