No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

JOSE HERNANDEZ-MARTINEZ, et al.,

Petitioners,

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 WRIT OF CERTIORARI

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QUESTION PRESENTED

Upon approval of retroactive amendments to the Guidelines, the Sentencing Commission has authority to promulgate binding policy statements to govern sentence reduction proceedings under 18 U.S.C. § 3582(c)(2). In 2011, the Sentencing Commission changed its policy statement in U.S.S.G. § 1B1.10 to disqualify defendants who received sentences below the Guidelines range from receiving consideration for retroactive sentence reductions, while making defendants who received within or even above Guidelines sentences fully eligible. Although recognizing that the new policy created sentencing disparities, the Ninth Circuit in the present case rejected both statutory and constitutional challenges to the Commission's policy statement, holding that the Commission is "not constrained" by general sentencing statutes in the context of retroactive sentence reductions. This case presents important questions regarding the substantive limits of the Commission's authority:

> Is the Sentencing Commission's delegated authority over retroactive sentence reduction proceedings constrained by the general purposes of the Commission and the aims of sentencing as set out in 18 U.S.C. § 3553(a), 28 U.S.C. § 991(b), and 28 U.S.C. § 994?
>
> Under the equal protection component of the Due Process Clause, does the exclusion of defendants who established grounds for variance or departure at their original sentencings from eligibility for sentence reductions under 18 U.S.C. § 3582(c)(2) fail rational basis scrutiny because the discrimination neither furthers nor is connected in scope to a legitimate government purpose?

PARTIES TO THE PROCEEDINGS

The 23 petitioners in this case and their Ninth Circuit docket numbers are identified as follows:

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Petition for Writ of Certiorari

The petitioners in these 23 consolidated appeals respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Opinions Below

The Ninth Circuit's published opinion appears at *United States v. Hernandez-Martinez*, 933 F.3d 1126 (9th Cir. 2019), and is included at Appendix 1-7. The district courts' rulings denying each of the petitioners' motions to reduce sentence under 18 U.S.C. § 3582(c)(2) are unpublished and included at Appendix 8-161.

Jurisdictional Statement

The Ninth Circuit entered its final order in this case on August 13, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Relevant Constitutional, Statutory, and Guidelines Provisions

The issue before the Court involves provisions of the Constitution, parts of the Sentencing Reform Act directed to the Sentencing Commission and to sentencing judges, and the Commission's evolving policy statement for implementing retroactive amendments to the Guidelines.

A. Constitutional Provisions

The Equal Protection Clause of the Fourteenth Amendment states in relevant part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Const. amend. XIV. The Due Process Clause of the Fifth Amendment states in relevant part: "No person shall be . . . deprived of life, liberty, or property, without due process of law." Const. amend. V. The Equal Protection Clause applies to the federal government through the Fifth Amendment's Due Process Clause. *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954).

B. Statutory Provisions Relating to the Sentencing Commission

In 28 U.S.C. § 991(b), Congress stated that the purposes of the Sentencing Commission include establishing sentencing policies that avoid unwarranted sentencing disparities and permit individualized sentencing flexibility:

> The purposes of the United States Sentencing Commission are to—
>
> (1) establish sentencing policies and practices for the Federal criminal justice system that—
>
> (A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;
>
> (B) *provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices*; and
>
> (C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; and
>
> (2) develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.

28 U.S.C. § 991(b) (emphasis added) (Appendix 169-70). Congress directed the Commission that it must promulgate Guidelines with "particular attention" to the stated congressional purposes of certainty, fairness, and reducing unwarranted sentencing disparities:

> The Commission, in promulgating guidelines pursuant to subsection (a)(1), shall promote the purposes set forth in section 991(b)(1), with particular attention to the requirements of subsection 991(b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted sentence disparities.

28 U.S.C. § 994(f) (Appendix 174).

In 28 U.S.C. § 994(o), Congress provided authority for the Commission to periodically amend the Guidelines after receiving input from "authorities on, and individual and representatives of, various aspects of the Federal criminal justice system." Appendix 176. In 28 U.S.C. § 994(u), Congress also authorized the Commission to specify procedures for retroactive application of ameliorative amendments:

> If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.

28 U.S.C. § 994(u) (Appendix 177).

C. Statutory Provisions Relating to Sentencing Courts

In 18 U.S.C. § 3553(a), Congress directed judges imposing sentence to consider specific factors, including the defendant's individual circumstances, the purposes of sentencing, the applicable Guidelines range and Commission policy statements, and "the

need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct[.]" 18 U.S.C. § 3553(a) (Appendix 162-63). The statute also creates a rule of parsimony, directing judges to impose a sentence that is "sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection." *Id.*

In 18 U.S.C. § 3582(c)(2), Congress authorized sentencing courts to reduce a defendant's term of imprisonment when a retroactive guideline amendments has lowered the applicable sentencing range:

> **Modification of an Imposed Term of Imprisonment.**—The court may not modify a term of imprisonment once it has been imposed except that—
>
> * * * *
>
> (2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

18 U.S.C. § 3582(c)(2) (Appendix 167-68).

D. Sentencing Guidelines Provisions

The Sentencing Commission's policy statement on retroactive application of ameliorative amendments is U.S.S.G. § 1B1.10. Appendix 179-85. The policy statement directs courts in sentence reduction proceedings to isolate the impact of the amended guideline while leaving other sentencing decisions intact:

> (a) In determining whether, and to what extent, a reduction in the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement is warranted, the court shall determine the amended guideline range that would have been applicable to the defendant if the amendment(s) to the guidelines listed in subsection (d) had been in effect at the time the defendant was sentenced. In making such determination, *the court shall substitute only the amendments listed in subsection (d) for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected.*

U.S.S.G. § 1B1.10(b)(1) (emphasis added).

The policy statement has evolved from its first iteration in 1989. However, until 2011, no prior version of the policy statement limited eligibility for sentence reductions based on whether the defendant's original sentence involved a variance or departure. Appendix 186-220 (setting out all historical versions of U.S.S.G. § 1B1.10, along with the Commission's explanations for each substantive amendment).

By a 2011 amendment, the Commission for the first time altered the policy statement to preclude sentence reductions for defendants whose original sentences included variances or departures below the Guidelines range based on any factor other than substantial assistance:

> **(2) Limitation and Prohibition on Extent of Reduction.—**
>
> (A) Limitation.—Except as provided in subdivision (B), the court shall not reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement to a term that is less than the minimum of the amended guideline range determined under subdivision (1) of this subsection.
>
> (B) Exception for Substantial Assistance.—If the term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing pursuant to a

> government motion to reflect the defendant's substantial assistance to authorities, a reduction comparably less than the amended guideline range determined under subdivision (1) of this subsection may be appropriate.

U.S.S.G. § 1B1.10(b) (2011).

In 2014, the Sentencing Commission determined that the base offense levels for drug offenders were too high. U.S.S.G. app. C, amend. 782, at 70-73 (Reason for Amendment) (Supp. 2016). The Commission adopted Amendment 782, an across-the-board two-level reduction in the Drug Quantity Table for most drug types and quantities. *Id.* at 64-66. The Commission applied Amendment 782 retroactively. U.S.S.G. app. C, amend. 788, at 65-87 (Supp. 2016).

Statement of the Case

This case concerns the limitation in U.S.S.G. § 1B1.10(b)(2)(A) on sentence reductions for defendants whose original sentences included variances or departures below the Guidelines range. Each of the petitioners in the consolidated appeal were sentenced before Amendment 782 went into effect. Each petitioner's applicable Guidelines sentencing range was calculated based on the pre-2014 version of the Drug Quantity Table set out at U.S.S.G. § 2D1.1(c). And each petitioner received an initial sentence at least two levels below the applicable sentencing range for a myriad of reasons. None of the petitioners received downward departures for providing substantial assistance to the government.

Amendment 782 to the Guidelines retroactively lowered each petitioner's base offense level by two levels, producing a sentencing range months or years lower than the

range applied at the original sentencing from which the variances and departures were granted. Each petitioner thereafter sought a sentence reduction based on Amendment 782 to reflect the lower sentencing range. At the district court level, the judges in each case denied relief under U.S.S.G. § 1B1.10(b)(2)(A), because the petitioners' sentences were determined to be already below the low end of the amended Guidelines range.

In the district court and on appeal to the Ninth Circuit, the petitioners argued that § 1B1.10(b)(2)(A) creates unwarranted sentencing disparity, contrary to the foundational statutes that Congress articulated as the required aims of all Sentencing Commission action, because it erases the effect of variances below the Guidelines range that were justified by individual mitigation. The petitioners also argued that the policy statement violates the Equal Protection Clause by irrationally denying eligibility for sentence reductions to an arbitrary class of defendants whose original sentences were equally tethered to the amended guideline as those who received within or above-Guidelines sentences without adequate justification.

In the Ninth Circuit, after consolidating the individual appeals, the court deferred to its earlier decision in *United States v. Padilla-Diaz*, 862 F.3d 856 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 1304 (2018), notwithstanding this Court's intervening decision in *Hughes v. United States*, 138 S. Ct. 1765 (2018), and affirmed the district courts' denial of relief. *Hernandez-Martinez*, 933 F.3d at 1134-35 (Appendix 5-6). In *Padilla-Diaz*, the Ninth Circuit had agreed with the petitioners about the skewing impact of § 1B1.10(b)(2)(A):

> [D]efendants who originally had lower sentences may be awarded the same sentences in § 3582(c)(2) proceedings as offenders who originally had higher sentences. That is, sentences that were initially tailored to avoid unwarranted disparities and to account for individualized circumstances will now converge at the low end of the amended guideline range.

Padilla-Diaz, 862 F.3d at 861. However, the court nevertheless held that § 1B1.10(b)(2)(A) is statutorily and constitutionally valid. On the statutory argument, the Court reasoned that:

- 28 U.S.C. § 991(b)'s statement about avoiding unwarranted disparity "is a general statement of the Commission's goals . . . not a specific directive to which all sentencing policies must conform"; and
- As acts of lenity, § 3582(c)(2) sentence reductions "are not constrained by the general policies underlying initial sentencing or even plenary resentencing proceedings."

Padilla-Diaz, 862 F.3d at 861 (citing *Dillon v. United States*, 560 U.S. 817, 831 (2010)). On the constitutional argument, the Ninth Circuit in *Padilla-Diaz* acknowledged that § 1B1.10(b)(2)(A) "will sometimes produce unequal and arguably unfair results," but concluded that it survives rational basis scrutiny because it "makes determining sentence reductions relatively simple" and "provides encouragement to defendants to cooperate with the government[.]" *Id.* at 862

After *Padilla-Diaz*, this Court decided in *Hughes* that a sentence imposed following a "Type-C" binding plea agreement (under Federal Rule of Criminal Procedure 11(c)(1)(C)) will usually be "based on" the Guidelines range, permitting statutory eligibility for sentence reductions under § 3582(c)(2). In its reasoning, this Court elaborated on the critical role of the Guidelines range in the overall sentencing framework, 138 S. Ct. at 1775-77. The Court also explained that sentence reduction proceedings under

§ 3582(c)(2) contribute to the "broader purposes" of the Sentencing Reform Act. *Id.* at 1776.

In this case, the petitioners argued on appeal that the decision in *Padilla-Diaz* was no longer tenable under the reasoning of *Hughes*, given the Court's recognition of the purpose of sentence reduction proceedings and the prime role of the Guidelines range at sentencing. The Ninth Circuit, however, adhered to its prior ruling, finding that the two cases were not in direct conflict because *Hughes* addressed an issue of statutory eligibility and did not render any holding about statutory constraints on the Sentencing Commission's policy statement. Appendix 5 ("But *Hughes* did *not* conclude that general sentencing policies constrain 3582(c) proceedings." (emphasis in original)). The court held:

> [N]othing in *Hughes* upended the Court's statement in *Dillon* that § 3582(c)(2) sentence reduction proceedings are acts of lenity . . . or *Padilla-Diaz*'s reasoning, based on *Dillon*, that such proceedings are therefore not ordinarily constrained by general sentencing policies. . . . We are therefore bound by *Padilla-Diaz*'s conclusion regarding the interplay between the Guidelines policy statement contained in § 1B1.10(b)(2) and § 3582(c)(2).

Appendix 5-6 (citations omitted). By footnote, the Ninth Circuit concluded that it was also bound by *Padilla-Diaz*'s equal protection ruling. Appendix 7 n.9.

The petitioners now seek review on the merits of the Ninth Circuit's ruling upholding the limitation in U.S.S.G. § 1B1.10(b)(2)(A) against statutory and constitutional challenge. Each petitioner is either still in custody serving a term of imprisonment or on supervised release and eligible for partial remediation through modification of the term of supervised release pursuant to Application Note 7 of U.S.S.G. § 1B1.10.

Reasons For Granting The Writ

Although Congress delegated to the Sentencing Commission significant authority to amend the Guidelines and to determine when and how Guidelines amendments should be given retroactive effect, that authority is not without limits. This case asks the Court to consider the important federal question of what boundaries in the statutory structure of the Sentencing Reform Act and the constitutional requirements of Equal Protection and Due Process apply to the Commission's policy-making power regarding eligibility for retroactive Guidelines amendments. Because the sentence reduction limitation of § 1B1.10(b)(2)(A) is inconsistent with the purpose of the Commission, set forth by Congress in 28 U.S.C. § 991(b), to "avoid[] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct," and forces judges to forego sentence reductions for irrational and arbitrary reasons, the Court should invalidate the policy statement and remand for sentencing judges to exercise their sentencing discretion, guided by 18 U.S.C. § 3553(a).

Only this Court can provide the review requested because the lower courts are entrenched in the view, based on a mistaken reading of this Court's opinion in *Dillon*, that the Commission's power to restrict sentence reductions is "not constrained" by statutory sentencing policies. Neither the statutory structure nor this Court's precedent permit that super-deference. Sentence reduction proceedings are squarely within the "sentencing policies and practices" governed by 28 U.S.C. § 991(b). And this Court's reasoning in *Dillon*, as confirmed by *Hughes*, presumes that sentence reduction proceedings will serve

the ameliorative purpose of permitting defendants to benefit from later adjustments to overly harsh Guidelines, while leaving all other sentencing determinations undisturbed. The Sentencing Commission's decision to exclude a deserving class of defendants whose sentences were premised on the amended Guidelines range irrationally thwarts the purposes of sentencing with no grounding in logic or empirical data.

Assuring that the Commission exercises its authority within the boundaries of rational sentencing policy is a question with exceptional impact because the liberty of thousands of federal prisoners is at stake, potentially totaling hundreds of years of unwarranted incarceration at the cost of millions in taxpayer dollars. This Court has recognized that fairness in sentencing is integral to public faith in judicial proceedings. *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1908 (2018). In an epoch of mass incarceration, the Court should reject lower court decisions conferring on the Commission virtually unreviewable power to arbitrarily limit courts' sentence reduction discretion.

A. The Limitation Of Sentence Reductions For Defendants Sentenced Below The Guidelines Range Promotes Unwarranted Disparity, Contrary To The Aims Of The Sentencing Reform Act.

The starting point in this case is the role of sentence reduction proceedings under 18 U.S.C. § 3582(c)(2) in the Guidelines-controlled sentencing scheme. As a general rule, sentences below the Guidelines range are imposed based on the same Guidelines framework as sentences within and above the Guidelines range. By permitting the benefit of a reduced Guidelines range only to those defendants who deserved within or above-Guidelines sentences, and prohibiting it to those defendants with individual mitigating

circumstances that justified downward variances and departures, the Commission's policy statement effectively institutionalizes unwarranted disparities by washing out the effects of warranted disparities between differently situated defendants.

1. Retroactive Guidelines Amendments Are A Critical Component Of The Sentencing Reform Act's Goal Of Achieving Greater National Uniformity In Sentencing.

Congress enacted the Sentencing Reform Act, which implemented the guideline sentencing system, to ameliorate what it perceived to be the "unjustified" and "shameful" consequences of indeterminate sentencing, prime among them the "great variation among sentences imposed by different judges upon similarly situated offenders." *Mistretta v. United States*, 488 U.S. 361, 366 (1989). Congress's goal was "to create a comprehensive sentencing scheme in which those who commit crimes of similar severity under similar conditions receive similar sentences." *Hughes*, 138 S. Ct. at 1776. Congress enshrined the goal of avoiding unwarranted disparity in at least three of the statutes comprising the Sentencing Reform Act:

- 18 U.S.C. § 3553(a) (directing judges imposing sentence to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct");
- 28 U.S.C. § 991(b)(1)(B) (defining the Sentencing Commission's purpose to "establish sentencing policies and practices" that "avoid[] unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct");
- 28 U.S.C. § 994(f) (requiring that the Commission promulgate guidelines "with particular attention" to the goal of "reducing unwarranted sentence disparities").

The Sentencing Guidelines are the Sentencing Reform Act's primary tool for avoiding unwarranted disparity. *Hughes*, 138 S. Ct. at 1775 ("The post-*Booker* federal sentencing scheme aims to achieve uniformity by ensuring that sentencing decisions are anchored by the Guidelines."). "The Sentencing Guidelines provide the framework for the tens of thousands of federal sentencing proceedings that occur each year." *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1342 (2016). Procedurally, a court imposing a sentence must first correctly calculate the applicable Guidelines range, then consider the non-Guidelines factors set forth in § 3553(a), to accomplish the "overarching" statutory directive to impose a sentence "sufficient, but not greater than necessary," to meet the purposes of sentencing. *Kimbrough v. United States*, 552 U.S. 85, 101 (2007). In that way, the Guidelines range serves as the "starting point and the initial benchmark" for determining the sentence, while allowing individualized consideration of the unique factors that warrant differential sentencing in each case. *Molina-Martinez*, 136 S. Ct. at 1345 (quoting *Gall v. United States*, 552 U.S. 38, 49 (2007)).

Although the Guidelines are now advisory, not mandatory, *see United States v. Booker*, 543 U.S. 220 (2005), this Court has consistently concluded that the sentencing range recommended by the Guidelines exerts a singular force at sentencing and on appeal, directly influencing how long a person is deprived of liberty. *See Molina-Martinez*, 136 S. Ct. at 1345-46. The Guidelines' influence does not recede when variances and departures are granted. A judge imposing an outside-Guidelines sentence (whether above or below the range) must "consider the extent of the deviation and ensure that the justification is

sufficiently compelling to support the degree of the variance." *Gall*, 552 U.S. at 50. That is why, "when a Guidelines range moves up or down, offenders' sentences [tend to] move with it." *Peugh v. United States*, 569 U.S. 530, 544 (2013). In the "usual case," sentences that include downward variances and departures are still "based on" the defendant's Guidelines range. *Hughes*, 138 S. Ct. at 1776-77.

The Commission's authority to amend guidelines and give those amendments retroactive effect is integral to the Sentencing Reform Act's goals. Section 994(o) requires the Commission to periodically "review and revise" the Guidelines based on input from "authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system." When the Commission "reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses," it must then "specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced." 28 U.S.C. § 994(u). The corresponding authority of sentencing courts in § 3582(c)(2) to reduce sentences following retroactive Guidelines amendments "contributes to [the Sentencing Reform Act's goal of avoiding unwarranted disparity] by ensuring that district courts may adjust sentences imposed pursuant to a range that the Commission concludes is too severe, out of step with the seriousness of the crime and the sentencing ranges of analogous offenses, and inconsistent with the Act's purposes." *Hughes*, 138 S. Ct. at 1776-77 (internal quotation marks and alterations omitted).

2. As Amended in 2011, The Current Version Of § 1B1.10 Actually Promotes, Rather Than Avoids, Unwarranted Disparity.

When the Commission concludes that the Guidelines range for a class of offenders is too high, granting sentence reduction consideration only to an arbitrary subset of offenders impacted by that change is irrational and promotes disparity. The sentence reduction limitation of § 1B1.10(b)(2)(A) runs afoul of the Sentencing Reform Act's aim to avoid unwarranted sentencing disparities because it negates warranted differences between the sentences of differently situated offenders based on reasons unrelated to the impact of the Guidelines amendment.

Prior to 2011, every version of § 1B1.10 followed the fundamental rule that a defendant's eligibility for sentence reduction consideration should be based on the impact of the amendment to the defendant's Guidelines range, with all other decision from the initial sentencing remaining undisturbed. Appendix 186-220 (historical versions of § 1B1.10). As amended in 2011, § 1B1.10(b)(2)(A) now deviates from this basic premise, drawing an irrational and arbitrary distinction between those defendants who received downward variances or non-cooperation departures at the time of their original sentencing and those who did not, regardless that the Guidelines range—the "initial benchmark" that empirically influenced the sentence—for both groups of defendants was overly harsh. The class of defendants ineligible for a reduction in their actual time in prison are those about whom the sentencing court previously found that a below-Guidelines sentence was "sufficient, but not greater than necessary," to carry out the purposes of federal sentencing

under § 3553(a). By contrast, the defendants who remain eligible to receive a retroactive reduction are those who were determined to require a longer, within- or above-Guidelines sentence under the § 3553(a) factors.

The irrationality of this approach is illustrated by considering two defendants convicted of the same crime with similar criminal histories and identical Guidelines ranges. For one defendant, the original sentencing court found that, because of that person's unique history and characteristics, a sentence below the Guidelines range was sufficient but not greater than necessary to provide just punishment, to afford future deterrence, and to protect the public. The court therefore granted that defendant a two-level downward variance. For the other defendant, the court found no similar reason for a lower sentence, determined that a sentence within the Guidelines range was necessary to carry out the purposes of § 3553(a), and granted no variance at all. The effect of § 1B1.10(b)(2)(A) is that the latter defendant—the one with no mitigating personal characteristics—is eligible to receive a full, two-level retroactive sentence reduction, while the former defendant is ineligible for any reduction at all. The two defendants are now likely to serve the same sentence, despite the fact that one of them was found to be less deserving of a lower sentence than the other. Treating less serious offenses more harshly than more serious offenses "makes scant sense[.]" *See Mellouli v. Lynch*, 135 S. Ct. 1980, 1982 (2015).

The Ninth Circuit in *Padilla-Diaz* admitted the inequity, stating that § 1B1.10(b)(2)(A) "will *sometimes* produce unequal and arguably unfair results." 862 F.3d at 862 (emphasis added). In fact, the inequity is built into the system because judges can

deny sentence reductions as a matter of discretion when warranted by individual circumstances, such as to avoid a windfall where the court anticipated the amendment at the initial sentencing or disregarded the range altogether. However, disparate results arise when comparing any defendant deemed to qualify for an encouraged departure ground under the Guidelines or the almost limitless grounds for variance under § 3553(a) with defendants lacking similar individual mitigation. A drug kingpin who coerced an underling would be eligible for a significant sentence reduction, while the underling, who received a two-level departure for imperfect coercion under U.S.S.G. § 5K2.12, would be categorically ineligible. A mentally ill defendant who received a below-Guidelines sentence for diminished capacity under U.S.S.G. § 5K2.13 would be ineligible for a sentence reduction, whereas a defendant without a similar condition would be eligible.[1]

Because the Commission's amendment occurred in 2011, before this Court in decisions like *Peugh*, *Molina-Martinez*, *Rosales-Mireles*, and *Hughes* fully defined the critical and influential role of the advisory Guidelines in sentencing, the Commission may have concluded that a judge imposing a below-Guidelines sentences had disregarded the Guidelines range. But this Court's precedent now makes clear that any such conclusion would be in error. In every case, the judge at sentencing must correctly calculate and

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[1] Almost all reasons given for granting a downward variance involve the individual circumstances of the defendant, rather than general disregard of the Guidelines. U.S. Sentencing Commission, INTERACTIVE SOURCEBOOK, *Reasons Given by the Sentencing Courts for Sentences Below the Guideline Range With Booker/18 U.S.C. § 3553* (Fiscal Years 2008 to 2017) (http://isb.ussc.gov).

carefully consider the recommended Guidelines range. Regardless of whether the judge imposes a sentence within, below, or above the range based on the purposes of sentencing and the individualized factors identified in 18 U.S.C. § 3553(a), the Guidelines remain "in a real sense, the basis for the sentence." *Molina-Martinez*, 136 S. Ct. at 1345 (emphasis omitted). Thus, just as § 1B1.10 properly permits sentence reductions for defendants with sentences *above* the Guidelines range, nothing in the law supports differential sentence reduction eligibility based solely on the fact that the sentencing judge found sufficient mitigating circumstances to justify a *downward* variance or departure at the original sentencing.

By promulgating retroactive Amendment 782, the Commission determined that the framework for each of these petitioners' sentences started unduly high. The Commission's unprecedented modification to U.S.S.G. § 1B1.10 in 2011 to exclude them from eligibility for sentence reduction consideration should be held invalid because it negates warranted differences in offenders' sentences and institutionalizes unwarranted disparity, contrary to the statutory directives of the Sentencing Reform Act.

B. Only This Court Is In A Position To Correct The Circuits' Entrenched Position That Sentence Reduction Proceedings Are Not Constrained By The Statutory Policies Of The Sentencing Reform Act.

The Commission is an unusual agency with unusual power. Nominally located in the judicial branch, yet authorized by Congress to exercise legislative power in the form of sentencing guidelines, the Commission has significant power to influence federal sentences. *See generally Mistretta*, 488 U.S. 361. Careful checks on that power are critical

to ensuring that it cannot be used to thwart the Sentencing Reform Act's aims of uniformity and fairness in sentencing. This case asks the Court to grant certiorari because the lower courts have become entrenched in the mistaken view, based on a misreading of this Court's precedent, that the Commission's policy statement governing retroactive guideline amendments is virtually immune from review, even when the policy thwarts the purposes of sentencing. The resulting super-deference is irreconcilable with the statutory structure and this Court's precedent.

1. The Commission's § 1B1.10 Policy Statement Warrants Careful Review Because Of Its Binding Impact And The Lack Of Procedural Safeguards In Its Promulgation.

In the ordinary course, the Commission's power to promulgate guidelines is constitutional only to the extent that those guidelines are first subject to notice-and-comment and hearing requirements, 28 U.S.C. § 994(x), as well as congressional review, 28 U.S.C. § 994(p). These requirements make the Commission "fully accountable to Congress." *Mistretta*, 488 U.S. at 393-94. Accountability to the legislative branch is crucial; if the Commission could bypass congressional review and notice and comment in enacting its guidelines, it would "unit[e] legislative and judicial authority in violation of the separation of powers." *United States v. Havis*, 927 F.3d 382, 386 (6th Cir. 2019).

In addition to the procedural safeguards attendant upon the Commission's promulgation of guidelines, the courts provide substantive review of the guidelines and will hold them invalid if they conflict with congressional directives to the Commission. *See United States v. LaBonte*, 520 U.S. 751, 757 (1997) (holding that the Commission's

broad discretion to formulate guidelines "must bow to the specific directives of Congress"); *Stinson v. United States*, 508 U.S. 36, 38 (1992) (recognizing that the Commission's authority to promulgate commentary interpreting the guidelines is limited by statutory and constitutional standards).

Unlike guidelines, the policy statements such as § 1B1.10 do not require notice-and-comment, public hearing, or congressional review. 28 U.S.C. § 994(a)(1), (a)(2) & (x); *see United States v. Tercero*, 734 F.3d 979, 984 (9th Cir. 2013). And unlike guidelines, which are only advisory, the policy statement in § 1B1.10 has binding effect on the courts' sentence reduction authority under 18 U.S.C. § 3582(c)(2). *Dillon*, 560 U.S. at 833 ("[A]fter *Booker*, the Commission retains at least some authority to bind the courts[.]").

In light of its binding effect and lack of procedural checks, robust substantive review of U.S.S.G. § 1B1.10 is warranted to ensure that the Commission does not abuse its authority to implement retroactive Guidelines amendments in a manner that interferes with unrelated sentencing decisions.

2. The Circuits Recognize That § 1B1.10(b)(2)(A) Produces Incongruous And Unfair Results, But Have Misinterpreted This Court's Precedent As Exempting The Policy Statement From Substantive Review For Consistency With The Sentencing Reform Act's Aims.

Based on a mistaken reading of this Court's decision in *Dillon*, the Circuits have concluded that the Sentencing Commission's use of § 1B1.10 is virtually unrestricted so long as the policy survives rational basis scrutiny. The Ninth Circuit decision at issue here, and its earlier ruling in *Padilla-Diaz*, provide the most striking example of the Circuits'

hands-off approach. In *Padilla-Diaz*, the court agreed with the defendants' position that § 1B1.10(b)(2)(A) would disrupt the carefully crafted decisions of the original sentencing judge intended to reflect differences in individual culpability: "[S]entences that were initially tailored to avoid unwarranted disparities and to account for individualized circumstances will now converge at the low end of the amended guideline range." *Padilla-Diaz*, 862 F.3d at 861. But the Ninth Circuit declined to invalidate that result, citing *Dillon* to conclude that proceedings under § 3582(c)(2) are "congressional acts of lenity" that are "not constrained" by the purposes of sentencing set forth in 991(b)(1). *Id.*

Other Circuits, as well, have found that § 1B1.10(b)(2)(A) thwarts the aims of sentencing, but concluded that no remedy is available. In *United States v. Leatch*, the district court at sentencing found that the defendant's criminal history category was overrepresented and departed downward to a lower category pursuant to U.S.S.G. § 4A1.3(b). 858 F.3d 974, 976 (5th Cir.), *cert. denied*, 138 S. Ct. 401 (2017). Following Amendment 782, the court concluded that it could not include the criminal history departure in determining the amended Guidelines range. Accordingly, the defendant was deemed ineligible for a full two-level sentence reduction. On appeal, the defendant argued that § 1B1.10(b)(2)(A) "undermine[s] the sentencing goal of proportionality between himself and his codefendants[.]" *Id.* at 979. The Fifth Circuit acknowledged the merit of that position but found that it was not remediable: "The failure to incorporate the goals of sentencing into a provision constituting 'a congressional act of lenity intended to give prisoners the benefit of later enacted adjustments to the judgments reflected in the

Guidelines' does not render the proceedings unjust." *Id.* at 979 (citing *Dillon*, 560 U.S. at 828).

The Second Circuit and the First Circuit also felt compelled to defer to the Commission's policy, no matter its unfairness. In *United States v. Montanez*, the First Circuit "question[ed] why a court should not have the discretion to give defendants the benefit of section 4A1.3 departures during the sentencing reduction proceedings." 717 F.3d 287, 294 (2d Cir. 2013). The court pointed out that "[a] criminal history category that exaggerates a defendant's past crimes during an initial sentencing will continue to do so at a reduction." *Id.* But, again citing *Dillon*, the court concluded that "Congress has given the Commission the authority to resolve these policy questions." *Id.* at 295; *accord United States v. Hogan*, 722 F.3d 55, 63 (1st Cir. 2013) ("We are troubled by the extent to which the amended policy statement and Application Notes severely limit the number of defendants (receiving below-guideline sentences at initial sentencing based on § 4A1.3 departures unrelated to substantial assistance) who will be able to obtain relief under § 3582(c)(2) in light of the crack-cocaine guideline amendments. Despite our concerns, in these instances the district court's hands, as they were in this case, will be tied.").

The Circuits' conclusion that the Commission has carte blanche policy control over retroactive sentence reduction proceedings presents an important federal question that this Court should review. As a matter of statutory construction, § 1B1.10 is not exempt from review. Section 991(b)(1) by its explicit terms applies to "sentencing policies and practices," which includes § 3582(c)(2) proceedings. *See* 28 U.S.C. § 994(a)(2)(C)

(referencing sentence modification under § 3582(c)(2) as "an aspect of sentencing or sentence implementation"). And it only makes sense to treat § 3582(c)(2) proceedings as an aspect of sentencing given that they impact the actual time defendants must serve in prison.

The Ninth Circuit's conclusion that § 991(b) is merely aspirational—that it "is a general statement of the Commission's goals . . . not a specific directive to which all sentencing policies must conform," *Padilla-Diaz*, 862 F.3d at 861—finds no support in statute or reason. The statute provides:

> (b) The purposes of the United States Sentencing Commission are to--
>
> (1) establish sentencing policies and practices for the Federal criminal justice system that--
>
> (A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;
>
> (B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and
>
> (C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process[.]

28 U.S.C. § 991(b)(1).

Congress could not have intended to grant the Commission authority to undermine the statutory sentencing framework that it enacted by allowing promulgation of rules untethered to Congress's statutory directives to the Commission and to the sentencing

judges. *See Gonzales v. Oregon*, 546 U.S. 243, 267 (2006) (Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions[.]") (quoting *Whitman v. American Trucking Assns. Inc.*, 531 U.S. 457, 468 (2001)). It would defy logic for Congress to define the purposes of the Commission but then grant the Commission authority to undermine those purposes. *See Setser v. United States*, 566 U.S. 231, 238 (2012) (finding "implausible" a statutory construction that would leave the effectiveness of statutory rules to the "discretion" of an executive agency). Thus, while § 994(u) authorizes the Commission to determine "in what circumstances and by what amount" sentences may be reduced following ameliorative amendments, § 991(b) leaves no room for the Commission to exercise that authority in a manner that promotes rather than avoids unwarranted disparity and thwarts individualized sentencing.

3. This Court's Reference In *Dillon* To § 3582(c)(2) As A Congressional "Act Of Lenity" Does Not Exempt The Commission's Policy Statement From Substantive Review.

Citing *Dillon*, the Ninth Circuit asserted that sentence reduction proceedings are "not constrained" by ordinary sentencing policies because they are an "act of lenity." *See Padilla-Diaz*, 862 F.3d at 861 (citing *Dillon*, 560 U.S. at 826, 828). But the Ninth Circuit's view misunderstands the import of *Dillon*, which was decided before the Commission's 2011 amendment to § 1B1.10.

The defendant in *Dillon* had been sentenced pursuant to the mandatory guideline regime in place before *Booker*, when variances based on 18 U.S.C. § 3553(a) factors were prohibited. *Id.* at 823. Dillon received a sentence at the bottom of the Guidelines range, the

lowest sentence permitted, although the sentencing judge expressed dissatisfaction with that result. *Id.* When the Commission retroactively amended the crack cocaine guideline in 2008, Dillon argued that the court during the § 3582(c)(2) proceedings should give renewed consideration to granting a variance based on § 3553(a) under the now-advisory Guidelines, even though the Commission's policy statement did not permit such consideration unless a variance had been granted at sentencing. *Id.* at 825. Dillon argued that treating § 1B1.10 and the amended Guidelines range as binding would violate *Booker*.

In rejecting that argument, this Court disagreed with Dillon's characterization of § 3582(c)(2) as authorizing a "sentencing" or "resentencing" proceeding. *Id.* at 825. The Court explained that the statute only gives courts power to "reduce" an otherwise final sentence. *Id.* at 825-26. "Congress intended to authorize only a limited adjustment to an otherwise final sentence and not a plenary resentencing proceeding." *Id.* at 826. Further, sentence reductions are not constitutionally compelled: "§ 3582(c)(2) represents a congressional act of lenity *intended to give prisoners the benefit of later enacted adjustments to the judgments reflected in the Guidelines*." *Id.* at 828 (emphasis added). Given the limited scope of § 3582(c)(2), the Court held that "proceedings under that section do not implicate the interests identified in *Booker*," because the original sentence is taken "as given," and "any facts found by a judge at a § 3582(c)(2) proceeding do not serve to increase the prescribed range of punishment; instead, they affect only the judge's exercise of discretion within that range." *Id.* at 828.

Nothing about *Dillon* supports the Ninth Circuit's approach here. First, the Court's *Booker* analysis involved the constitutional requirements of the Sixth Amendment relating to sentencing. The Court had no occasion to consider what statutorily-based policy considerations restrict the Commission's authority. Second, the key aspect of the *Dillon* opinion is that it presumed a proceeding in which "all other guideline application decisions" remain unaffected. *Id.* at 831 (quoting U.S.S.G. § 1B1.10(b)(1)). The judge must take the original sentence "as given," *id.* at 828, so that the determination of eligibility under § 3582(c)(2) depends solely on the impact of the retroactive amendment, without reconsidering any other aspects of the original sentence. The Court did not consider whether the Commission could *preclude* judges from replicating previously granted departures and variances.

Finally, nothing in *Dillon* sets sentence reduction proceedings aside from the normal aims of sentencing. The Court recognized that sentence reduction proceedings impact the ultimate sentence that a defendant must serve. By emphasizing the "act of lenity" language, the Circuits have disregarded the remainder of that sentence, in which this Court acknowledged that § 3582(c)(2) proceedings are intended to give prisoners "the benefit of later enacted adjustments to the judgments reflected in the Guidelines." *Id.* at 828. Although the Court in *Dillon* recognized that Congress gave the Commission a "substantial role" in determining what retroactive impact to assign to a particular guideline amendment, the Court never suggested that the Commission's role permits it to adopt rules that thwart the purposes of sentencing. The policy statement that the Commission adopted after *Dillon*

was decided undermines downward departure and variance decisions that were intended to promote fairness and to avoid unwarranted disparities.

4. This Court's Opinion In *Hughes* Confirms That Sentence Reduction Proceedings Are Integral To The Sentencing Reform Act's Overall Statutory Framework.

Following *Dillon*, this Court's opinion in *Hughes* cements the conclusion that sentence reduction proceedings are integral to the Guidelines sentencing structure and so should not be exempt from substantive review for consistency with the Sentencing Reform Act . The Court in *Hughes* recognized that, while it may not be constitutionally compelled, § 3582(c)(2) plays an important role in the statutory framework of the Sentencing Reform Act "by ensuring that district courts may adjust sentences imposed pursuant to a range that the Commission concludes is too severe, out of step with the seriousness of the crime and the sentencing ranges of analogous offenses, and inconsistent with the Act's purposes." *Id.* at 1776. To serve that statutory purpose, the Court held that "relief under § 3582(c)(2) should be available . . . to the extent the prisoner's Guidelines range was a relevant part of the framework the judge used to accept the [plea] agreement or determine the sentence." *Id.* at 1778. For the same reason, relief should be equally available when the Guidelines range was a relevant part of the framework that the original sentencing court used to grant a downward departure or variance. *Id.* at 1777.

By restricting eligibility for defendants who received downward departures and variances, but whose sentences were equally driven by the later adjusted Guidelines range, the § 1B1.10 policy statement systemically alters sentencing courts' decisions regarding

the relationship of the sentence to the Guidelines range. The result is disruption of the individualized decisions crafted to protect against unwarranted disparity. Neither *Dillon* nor *Hughes* permits that result.

C. The Court Should Grant Review To Clarify The Constitutional Standard For Assessing Whether An Asserted Classification Is Insufficiently Grounded In Fact Or Too Attenuated From A Legitimate Government Interest To Survive Rational Basis Scrutiny.

Aside from addressing whether the Commission's policy statement thwarts the Sentencing Reform Act's statutory interests, there is also a fundamental question about how the lower courts apply rational basis scrutiny to important sentencing policies. This Court's precedent already makes clear that irrational and arbitrary sentencing classifications violate the Equal Protection Clause. *Chapman v. United States*, 500 U.S. 453, 465 (1991). A law that distinguishes between classes may not be upheld unless the distinction is rationally related to a legitimate government interest and is not "so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446 (1985). The classification must be "narrow enough in scope and grounded in a sufficient factual context . . . to ascertain some relation between the classification and the purpose it serve[s]." *Romer v. Evans*, 517 U.S. 620, 632-33 (1996). "[E]ven in the ordinary equal protection case calling for the most deferential of standards, [courts] insist on knowing the relation between the classification adopted and the object to be attained." *Id.* at 632.

However, the Ninth Circuit's approval of § 1B1.10(b)(2)(A)'s discrimination against recipients of downward variances and departures was based on the government's assertion of "at least two rational bases": simplicity and encouragement of cooperation. *Padilla-Diaz*, 862 F.3d at 862. Yet, in upholding the policy statement, the courts have failed to identify any empirical support establishing that the challenged classification in fact furthers the proposed rationales, nor have courts considered whether the scope of the exclusion vastly exceeds the claimed justifications.

First, the classification does not advance simplicity. The prior rule had made eligibility for a sentence reduction turn on the single question of whether the Guidelines range had been retroactively amended. Courts had authority to incorporate both departures and variances into sentence reduction proceedings. That standard made the amendment itself the only lodestar for determining whether and to what extent a defendant was eligible for a reduction. Following the 2011 amendment to § 1B1.10, eligibility is more complex. It now depends on at least three questions: (1) whether the Guidelines range has been reduced, (2) if so, whether the defendant received a below Guidelines sentence, and if so, (3) whether the below-Guidelines sentence resulted from substantial assistance to the government.

Second, there is no factual grounding for the speculation that the exclusion incentivizes cooperation. Although the rational basis test does not require an evidentiary record, this Court should require that a justification be grounded in fact and reality: speculation about possible rational bases must be reasonable. *See Heller v. Doe*, 509 U.S.

312, 320 (1993) (speculation, while permissible, must be "rational"). Congress intended the Commission's role, in particular, to be informed by empirical support and input from outside authorities. Here, the raw speculation that § 1B1.10(b)(2)(A) might incentivize cooperation was not reasonable. Cooperation agreements are, in reality, based on the upfront, concrete sentencing concessions already authorized for cooperators, not a hypothetical future benefit from a hypothetical retroactive guideline amendment. There is no basis to find that barring sentence reduction eligibility for a separate category of defendants with different mitigating factors will increase the persuasiveness of any perceived incentive, especially when defendants who do not cooperate at all and receive a within-Guidelines sentence are categorically eligible for the full benefit of retroactive Guidelines amendments.

Further, even if the change in the Commission's policy in fact advanced a legitimate government purpose, the rule would still be irrational because it creates sentencing disparity in order to solve problems that do not exist. Rational basis review invalidates a measure whose "sheer breadth" is "discontinuous with the reasons offered for it." *Romer*, 517 U.S. at 632, 635 (rejecting justifications where "[t]he breadth of the [measure] is so far removed from these particular justifications that we find it impossible to credit them"). A rule premised on a defendant's height, last name, or date of birth might be simpler to implement than 1B1.10, but it would not be rational because it would not serve the purposes of sentencing. Likewise, in the initial sentencing context, eliminating all departure provisions other than U.S.S.G. § 5K1.1 might incentivize cooperation, but it would not be

rational because departures serve a variety of other important sentencing interests. Jettisoning those interests wholesale would require a proven need and proven outcomes to be rational. Just so here. Attempting to incentivize cooperation by barring sentence reductions in cases where courts imposed below-Guidelines sentences for other valid reasons does nothing to advance any legitimate sentencing goal, at undue cost to just and proportionate sentencing.

This Court should grant review to clarify that, aside from merely identifying a potential legitimate government interest, courts must consider whether the classification in fact advances that interest and, additionally, whether its scope is too attenuated to be rational. Section 1B1.10(b)(2)(A)'s categorical exclusion of deserving defendants from sentence reduction eligibility does not survive that test because the rule does not furthers the proposed rationales, and its broad scope vastly exceeds the claimed justifications.

D. The Federal Question Presented Is Exceptionally Important Because It Impacts The Liberty Of A Large Number Of Defendants Who Are Serving Sentences Greater Than Necessary To Accomplish The Legitimate Goals Of Sentencing.

The Court should grant review because the scope of the Sentencing Commission's authority to control sentence reduction proceedings is a question of fundamental importance: it has the potential to impact the liberty of thousands of federal prisoners at grave human and fiscal cost.

In *Rosales-Mireles*, this Court held in the plain error context: "When a defendant is sentenced under an incorrect Guidelines range—*whether or not the defendant's ultimate*

sentence falls within the correct range—the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error." 138 S. Ct. at 1907 (quoting *Molina-Martinez*, 136 S. Ct. at 1345) (emphasis added). Thus, the Court has held that even a slight error in determining the Guidelines range establishes a "reasonable probability" that the defendant "will spend more time in prison than the District Court otherwise would have considered necessary," which justifies resentencing. *Id.* at 1908. Although this case involves a guideline amendment rather than a guideline error, the same general reasoning applies. Here, each of the petitioners was sentenced under a Guidelines range that the Commission later determined was too high. Thus, there is a reasonable probability that each of the petitioners' sentences would have been lower if premised on the amended range.

Empirical evidence bears out application of the *Rosales-Mireles* reasoning to Guidelines amendments because the majority of courts have routinely granted sentence reductions for eligible defendants, including those who already received substantial assistance departures. The Commission's reports indicate that courts to date have granted 62.9 percent of sentence reduction motions filed under Amendment 782, with an average sentence reduction of 25 months.[2] Most denials were on grounds of eligibility, rather than based on the sentencing court denying a reduction as a matter of discretion.

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[2] U.S. Sentencing Commission, *2014 Drug Guidelines Amendment Retroactivity Data Report* (Table 1 and Table 7) (Aug. 2018) (https://www.ussc.gov/sites/

Although a ruling in this case would impact the Commission's authority going forward with respect to all future guideline amendments, the class of prisoners serving too long in prison based on Amendment 782 alone is extensive. Using data files provided by the Sentencing Commission, an estimated 8,000 federal defendants could be implicated. This number includes those offenders sentenced before Amendment 782 lowered the Drug Quantity Table who received sentences below the Guidelines range for reasons other than substantial assistance, excluding career offenders and those defendants sentenced to the statutory mandatory minimum.[3] As reflected in *Rosales-Mireles* and court rulings to date, many of those individuals would in fact receive sentence reductions if the Court finds § 1B1.10(b)(2)(A)'s current limitation invalid. If even half of the eligible defendants were granted a sentence reduction of one year, well under the average rate and extent of reductions to date, the Court's ruling could implicate 4,000 years of unnecessary incarceration.

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default/files/pdf/research-and-publications/retroactivity-analyses/drug-guidelines-amendment/20180829-Drug-Retro-Analysis.pdf).

[3] The data used for these analyses were extracted from the U.S. Sentencing Commission's Individual Offender Datafiles by Dr. Paul J. Hofer, Policy Analyst, Sentencing Resource Counsel Project, Federal Public and Community Defenders, and former Special Projects Director, U.S. Sentencing Commission. Although these particular analyses have not been performed or published by the Commission, the underlying data are the same as the data used in the Commission's annual Sourcebook of Federal Sentencing Statistics. The underlying data are publicly available at the Commission's website.

Adding to the human cost of incarceration, the impact of § 1B1.10(b)(2)(A) falls primarily on minority populations. Black and Hispanic individuals represent 72 percent of all federal drug trafficking defendants and 90 percent of the defendants granted sentence reductions under Amendment 782 to date. As the district court in *United States v. Haynes* observed, "Courts may no longer ignore the possibility that the mass incarceration of nonviolent drug offenders has disrupted families and communities and undermined their ability to self-regulate, without necessarily deterring the next generation of young men from committing the same crimes." 557 F. Supp. 2d 200, 203 (D. Mass. 2008).

Moreover, the validity of the Commission's policy statement has immense fiscal impact. The Commission intended Amendment 782 to enhance public safety by diverting resources previously used to house prisoners to other rehabilitation and crime prevention efforts. U.S.S.G. app. C, at 73 (Supp. 2016) (Reason for Amendment) (observing that "federal prisons are now 32 percent overcapacity, and drug trafficking offenders account for approximately 50 percent of the federal prison population"). One year of federal imprisonment for an individual costs an average of $36,299.25. Dep't of Justice, *Annual Determination of Average Cost of Incarceration*, 83 Fed. Reg. 18863-01, 2018 WL 1991524 (April 30, 2018). The 4,000 estimated years of unnecessary incarceration at issue here comes at a cost exceeding $145 million. The impact of a ruling in this case could divert that additional funding to federal prisons for increased staffing, much-needed facility maintenance, and to offset the rising costs of inmate health.

The importance of the questions presented here will not diminish over time. While the remaining prisoners sentenced before Amendment 782 will dwindle as their sentences expire, the Commission will continue to exercise unbridled discretion over all future Guidelines amendments. If the current policy remains in place, thousands of future sentence reduction motions could be adjudicated based on the same irrational limit in § 1B1.10(b)(2)(A).

Conclusion

For the foregoing reasons, the Court should issue a writ of certiorari.

Dated this 12th day of November, 2019.

Stephen R. Sady

Elizabeth G. Daily
Attorneys for Petitioners

No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

JOSE HERNANDEZ-MARTINEZ, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit

CERTIFICATE OF SERVICE AND MAILING

I, Stephen R. Sady, counsel of record and a member of the Bar of this Court, certify that pursuant to Rule 29.3, service has been made of the within MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR WRIT OF CERTIORARI on the counsel for the respondent by depositing in the United States Post Office, in Portland, Oregon, on November 12, 2019, first class postage prepaid, an exact and full copy thereof addressed to:

Noel Francisco
Solicitor General of the United States
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Washington, DC 20530-0001

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Further, the original and eleven copies were mailed to the Honorable Scott S. Harris, Clerk of the United States Supreme Court, by depositing them in a United States Post Office Box, addressed to 1 First Street, N.E., Washington, D.C., 20543, for filing on this 12th day of November, 2019, with first-class postage prepaid.

Additionally, I electronically filed the foregoing MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR WRIT OF CERTIORARI by the using the Supreme Court's Electronic filing system on November 12, 2019.

Dated this 12th day of November, 2019.

Stephen R. Sady
Attorney for Petitioners

Subscribed and sworn to before me this 12th day of Nov., 2019.

Janan Stoll
Notary Public of Oregon