No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

ARTEMIO RAMIREZ-ARROYO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

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. The rule excludes thousands of prisoners serving very long sentences from consideration for sentence reductions, even though their sentences were "based on" the Guidelines under 18 U.S.C. § 3582(c)(2) as construed in *Hughes v. United States*, 138 S. Ct. 1765 (2018). This case challenges the Ninth Circuit's rejection of both statutory and constitutional challenges to the disparities created by the Commission's policy statement and presents two exceptionally important questions regarding the substantive limits of the Commission's authority and the needless incarceration of prisoners during the coronavirus pandemic:

> Is the Sentencing Commission's policy statement implementing retroactive guideline amendments invalid to the extent it excludes a subset of prisoners whose sentences were based on the same overly harsh guideline from eligibility for a sentence reduction, because the exclusion thwarts the purposes of sentencing as set out by Congress in 18 U.S.C. § 3553(a), 28 U.S.C. § 991(b), and 28 U.S.C. § 994(f)?
>
> Under the equal protection component of the Due Process Clause, does the exclusion of defendants who established grounds for downward 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?

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Petition for Writ of Certiorari

The petitioner, Artemio Ramirez-Arroyo, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Opinions Below

On February 6, 2020, the Ninth Circuit filed its unpublished opinion (Appendix 1) summarily affirming the district court's denial of the petitioner's motion for a sentence reduction under retroactive guideline Amendment 782, based on *United States v. Hernandez-Martinez*, 933 F.3d 1126 (9th Cir. 2019). The *Hernandez-Martinez* opinion is set out at Appendix 4. The district court entered its ruling finding no jurisdiction to consider the petitioner's motion under 18 U.S.C. § 3582(c)(2) on March 15, 2019. Appendix 2.

Jurisdictional Statement

The Ninth Circuit entered its final order in this case on February 6, 2020. This petition is timely under Supreme Court Rule 13.3 and the Court's Order dated March 19, 2020, extending the deadline for filing any petition for a writ of certiorari to 150 days. 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 24). 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 29).

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 31. 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 32).

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 17). 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 amendment 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 22-23).

D. Sentencing Guidelines Provisions

The Sentencing Commission's policy statement on retroactive application of ameliorative amendments is U.S.S.G. § 1B1.10. Appendix 34. 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 below the Guidelines range. Appendix 41-75 (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).

Statement of the Case

This case raises statutory and constitutional challenges to 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. Although the rule irrationally promotes unwarranted disparity and disrupts individualized sentencing determinations, the Ninth Circuit has twice upheld it on the grounds that sentence reductions are acts of lenity that are "not constrained" by the purposes of sentencing. *Hernandez-Martinez*, 933 F.3d at 1134; *United States v. Padilla-Diaz*, 862 F.3d 856 (9th Cir. 2017). The district court and the Ninth Circuit relied on those decisions here to deny Mr. Ramirez-Arroyo sentence reduction eligibility, even though his sentence was undisputedly "based on" the subsequently amended Guidelines range.

A. The Ninth Circuit Has Twice Rejected Statutory And Constitutional Challenges to § 1B1.10(b)(2)(A), Despite Finding That The Provision Disrupts Individualized Sentencing Determinations.

In *Padilla-Diaz*, the Ninth Circuit agreed with the petitioner that § 1B1.10(b)(2)(A) disrupts individualized sentencing determinations and skews sentences toward the Guidelines range:

> [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. Nevertheless, the court 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 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[.]" *Padilla-Diaz*, 862 F.3d at 862.

After *Padilla-Diaz*, this Court issued an intervening opinion in *Hughes v. United States*, 138 S. Ct. 1765 (2018). *Hughes* addressed a distinct issue under § 3582(c)(2)—whether sentences imposed following binding plea agreements entered under Rule 11(c)(1)(C) are "based on" the Guidelines range for purposes of statutory eligibility for a reduced sentence. However, the Court's reasoning established that sentence reductions under § 3582(c)(2) are integral to the statutory framework of the Sentencing Reform Act. *Hughes*, 138 S. Ct. at 1776. They "ensur[e] 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*. 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.

Following *Hughes*, the Ninth Circuit reaffirmed *Padilla-Diaz*, doubling down on the premise that sentence reduction proceedings under § 3582(c)(2) are "not constrained by the general policies underlying initial sentencing or even plenary resentencing proceedings." *Hernandez-Martinez*, 933 F.3d at 1133. The Ninth Circuit distinguished *Hughes* based on its holding, ignoring its rationale, because *Hughes* addressed an issue of statutory eligibility. 933 F.3d at 1134 ("But *Hughes* did *not* conclude that general sentencing policies constrain 3582(c) proceedings.") (emphasis in original)). The court

again relied on language in *Dillon* to approve placing policy statements implementing retroactive guideline amendments beyond the limits of "general sentencing polices":

> [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*.

933 F.3d at 1134 (emphasis added) (citations omitted); *see also id.* at 1136 n.9 (reaffirming *Padilla-Diaz*'s equal protection holding).

B. Although Mr. Ramirez-Arroyo's Sentence Was "Based On" The Retroactively Reduced Guidelines Range, The District Court And The Ninth Circuit Relied On § 1B1.10(b)(2)(A) To Deny Sentence Reduction Eligibility.

Mr. Ramirez-Arroyo entered a guilty plea on July 5, 2011, to one count of conspiracy to distribute and possess with intent to distribute 500 grams or more of methamphetamine and cocaine in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), (b)(1)(C), and 846.[1] In the plea agreement, the parties agreed that the offense involved "at least 1,500 grams of actual methamphetamine" and "the distribution of more than 5 kilograms of cocaine" for a base offense level of 38. The government promised to recommend a sentence within the advisory Guidelines range. The agreement did not restrict the defendant's right to seek a variance from the Guidelines range based on 18 U.S.C. § 3553(a) factors.

[1] The facts presented are based on the presentence investigation report and uncontroverted facts presented below.

The presentence report concluded that the offense involved 3,168 grams of actual methamphetamine, triggering a base offense level of 38. The presentence report recommended a two-level enhancement for possession of a firearm as well as a two-level reduction for acceptance of responsibility. At total offense level 38 and criminal history category V, the pre-amendment advisory Guidelines range was 360 months to life.

At sentencing, the government did not exercise its option to recommend a sentence within the Guidelines range, but instead recommended a below-Guidelines sentence of 240 months based on the defendant's "limited educational background" and the need to avoid sentencing disparity with his codefendants. The defense sought the ten-year mandatory minimum sentence and noted that Mr. Ramirez-Arroyo "left school after the first grade – to work picking lemons – and is illiterate in any language, unable to sign his name[.]"

The Court adopted the advisory Guidelines calculations from the presentence report and followed the recommendation of both the government and the probation office to impose a below-Guidelines sentence of 240 months, a variance of about four levels. As bases for the variance, the Court cited the extent to which the Guidelines range was driven by drug quantity, the fact that the Guidelines failed to reflect the defendant's specific circumstances, and the need to avoid disparity with codefendants:

> So I accept the drop under § 3553(a), the variance that's been recommended, because I think that [a] higher sentence is unfair, driven by somewhat artificial factors. But when I take all the factors into account, including this defendant's limited training and impoverished background, I believe that [240 months] represents the correct sentence in this case, in light of all the other defendants, as well.

In 2014, three years after Mr. Ramirez-Arroyo's sentence was imposed, the Sentencing Commission determined that the base offense levels for drug offenders in the Sentencing Guidelines provided an overly-harsh starting point for the sentencing judge's determination of the appropriate term of imprisonment. U.S.S.G. app. C, amend. 782, at 70-73 (Reason for Amendment) (Supp. 2016). To address this issue, 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). Amendment 782 retroactively lowered Mr. Ramirez-Arroyo's base offense level under the Drug Quantity Table from level 38 to level 36. His amended Guidelines range is now 292 to 365 months, starting six years lower than the range used as a starting point for his original sentencing.

Based on Amendment 782, Mr. Ramirez-Arroyo filed a motion for sentence reduction under 18 U.S.C. § 3582(c)(2) on August 2, 2018. The district court denied relief, concluding that Mr. Ramirez-Arroyo was ineligible for any sentence reduction because his original sentence, though based on the higher base offense level in the previous version of the Drug Quantity Table, was already below the low-end of the amended Guidelines range. Appendix 2-3 (citing U.S.S.G. § 1B1.10(b)(2)(A) and *United States v. Padilla-Diaz*, 862 F.3d 856 (9th Cir. 2017)).

On appeal, the Ninth Circuit summarily affirmed based on its opinion in *Hernandez-Martinez*, again rejecting the argument that this Court's intervening decision in *Hughes*

was inconsistent with the Ninth Circuit's view that the basic sentencing statutes do not apply to sentence reduction proceedings following retroactive Guidelines amendments. Appendix 1. The petitioner now seeks 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.

Mr. Ramirez-Arroyo is in the custody of the Bureau of Prisons, at FCI Victorville Medium II, with a projected release date of June 5, 2027. As of today's date, eight inmates have active COVID-19 infections at that facility, two staff members are infected, and one staff member is deemed "recovered." Bureau of Prisons, *COVID-19 Cases*, www.bop.gov/coronavirus/ (last accessed July 5, 2020, at 7:45 a.m.).

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 substantive rule-making power regarding eligibility for retroactive Guidelines amendments. Because the sentence reduction limitation in U.S.S.G. § 1B1.10(b)(2)(A) is inconsistent with Congress's directive to the Commission, set forth 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 the sentencing judge to exercise its sentence reduction discretion, guided by the sentencing considerations set out in 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 opinions in *Dillon* and *Hughes*, 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 such 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.

Ensuring 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. The coronavirus pandemic makes it all the more critical that this Court intervene. The prisons are in crisis,

with mass infections resulting in serious illness and fatalities. Negating an irrational limitation on sentence reduction authority will help ameliorate the crisis while assuring that no defendant is forced to "to linger longer in federal prison than the law demands[.]" *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1908 (2018) (quoting *United States v. Sabillon-Umana*, 772 F.3d 1328, 13-34 (10th Cir. 2014) (Gorsuch, J.)).

I. The Commission's Policy Statement Categorically Barring Prisoners From Sentence Reduction Because Of Downward Variances Or Departures From The Guidelines Range Is Inconsistent With Controlling Sentencing Statutes.

The Commission's policy statement categorically barring prisoners who received downward variances and non-cooperation departures from receiving a sentence reduction following a retroactive guideline amendment violates the plain meaning of the applicable sentencing statutes. It denies sentence reduction eligibility to a class of defendants whose sentences are "based on" the Guidelines range, in violation of 18 U.S.C. § 3582(c)(2). And it denies individual flexibility and builds disparity into the system, in violation 28 U.S.C. §§ 991(b) and 994(f), because it prohibits amelioration of sentences only to those defendants who established mitigation at their original sentencings, while making relief available to more culpable defendants. *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).

A. Retroactive Sentence Reduction Authority Is Integral To Achieving The Sentencing Reform Act's Goals Of Consistency And Fairness.

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, this Court has consistently concluded that the sentencing range recommended by the advisory 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.

This Court's opinion in *Hughes* establishes that sentence reductions under 18 U.S.C. § 3582(c)(2) are an integral part of the Sentencing Reform Act's statutory framework and are critical to implementing its policies of fairness, certainty, and avoiding unwarranted disparity. By statute, the Commission must 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." 28 U.S.C. § 994(o). 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). Permitting district courts to "adjust sentences imposed pursuant to a range that the Commission concludes is too severe" furthers the aims of sentencing. *Hughes*, 138 S. Ct. at 1776-77 (internal quotation marks and alterations omitted). Therefore, sentence reductions promote the "overarching" instruction that sentences should be sufficient, but not greater than necessary, to accomplish the purposes of sentencing. *Pepper v. United States*, 562 U.S. 476, 491 (2011) (citing 18 U.S.C. § 3553(a)(2)).

B. The Policy Statement Thwarts The Statutory Aims Of The Sentencing Reform Act By Arbitrarily Barring Sentence Reductions For Defendants Sentenced Below The Guidelines Range.

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. *Hughes*, 138 S. Ct. at 1776-77. Yet, when the Commission concludes that the Guidelines range for

a class of offenders was set too high, the sentence reduction limitation of § 1B1.10(b)(2)(A) permits the benefit of the reduced Guidelines range only to those defendants who received within or above-Guidelines sentences, while prohibiting it to those defendants with individual mitigating circumstances that justified downward variances and departures. The policy statement 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 from 1989 onward followed the fundamental rule that a defendant's eligibility for sentence reduction based on a retroactive guideline amendment 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 41-75 (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.

Unwarranted disparity is built into the policy statement's approach. For example, consider 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 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. Yet § 1B1.10(b)(2)(A) renders a defendant categorically *ineligible* for the full benefit of the amendment, even when the below-Guidelines sentence derives from an encouraged ground for departure, or one of the innumerable unrelated bases for variance under 18 U.S.C. § 3553(a). *See, e.g.*, U.S.S.G. § 5K2.12 (imperfect coercion); U.S.S.G. § 5K2.13 (diminished capacity); 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)

(establishing that courts rarely cite disagreement with the Guidelines range as a basis for variance).

C. At Least Four Circuits Have Recognized That § 1B1.10(b)(2)(A) Promotes Unwarranted Disparity, But Have Erroneously Found The Provision Exempt From The General Aims Of Sentencing.

At least four circuits—the First, Second, Fifth, and Ninth—have recognized the inequity that flows from § 1B1.10(b)(2)(A), but erroneously upheld the provision. In *Padilla-Diaz*, the Ninth Circuit agreed that the limitation "will sometimes produce unequal and arguably unfair results." 862 F.3d at 862. The court elaborated that § 1B1.10(b)(2)(A) disrupts 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*.

Similarly, in *United States v. Leatch*, the Fifth Circuit acknowledged the merit of the defendant's position that § 1B1.10(b)(2)(A) "undermine[s] the sentencing goal of proportionality between himself and his codefendants[.]" 858 F.3d 974, 979 (5th Cir. 2017). In *Leatch*, the defendant received a downward departure from the Guidelines range to a lower criminal history category pursuant to U.S.S.G. § 4A1.3(b). *Id.* at 976. 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. The Fifth Circuit found that any unfairness 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.").

D. Neither *Hughes* Nor *Dillon* Nor The Sentencing Statutes Themselves Provides Any Basis To Uphold A Policy Statement That Thwarts The Sentencing Reform Act's Aims By Irrationally Limiting Sentence Reduction Eligibility For Defendants Sentenced Below The Guidelines Range.

The Circuits' conclusion that the Sentencing Commission has carte blanche policy control over retroactive sentence reduction proceedings derives from a misconstruction of this Court's opinion in *Dillon*, disregard of this Court's controlling reasoning and mode of analysis in *Hughes*, and disregard of the statutes' plain meanings. This Court should intervene to vindicate the controlling rule and ensure consistency and fairness in sentencing.

1. *Dillon* Affirmed The Principle That Courts Considering Sentence Reductions Should Strive To Isolate The Impact Of The Guideline Amendment And Leave All Other Sentencing Determinations Intact.

The Ninth Circuit and other courts have adhered to the mistaken view that, in describing § 3582(c)(2) as an "act of lenity," *Dillon* unmoored retroactive Guidelines amendments from the underlying sentencing statutes. In fact, *Dillon*, which was decided before the Commission's 2011 amendment to § 1B1.10, promoted the aims of sentencing by establishing that sentence reduction proceedings should isolate the impact of the guideline amendment and leave in place all other sentencing determinations made at the original sentencing. The current § 1B1.10(b)(2)(A) does the opposite and systematically disrupts individual sentencing determinations *other than* those impacted by a retroactive amendment.

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 the Sixth Amendment rule announced in *Booker*.

In rejecting that constitutional 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. The Court characterized sentence reduction proceedings as an "act of lenity" to make the point that they 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 Circuits' approach of untethering sentence reduction proceedings from the general aims of sentencing. First, the Court's *Booker* analysis involved the constitutional requirements of the Sixth Amendment requiring jury findings for facts that increase the statutory mandatory minimum sentence. 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, as § 1B1.10(b)(2)(A) purports to do.

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

2. This Court's Controlling Reasoning In *Hughes* Requires Construction Of Sentence Reduction Authority To Adhere To The Sentencing Reform Act's Aims.

If *Dillon* left any doubt in the matter, *Hughes* firmly establishes that § 3582(c)(2) proceedings are part and parcel of the Guidelines framework, subject to the same statutory limitations and purposes. 138 S. Ct. at 1775-78. The Court in *Hughes* emphasized that the Sentencing Guidelines are central to the aims of consistency and fairness and provide an anchor for all sentencing determinations. *Id.* at 1775-76. While sentence reductions under § 3582(c)(2) may not be constitutionally compelled, the authority to grant reductions nevertheless plays an important role in advancing the statutory aims of the Sentencing Reform Act. Permitting a sentence reduction when a Guidelines range moves downward "ensur[es] 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. The Court broadly construed § 3582(c)(2) to serve those purposes, holding 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.

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. Although *Hughes* addressed a different question of statutory eligibility, it expressly relied on the Sentencing Reform Act's policies and purposes to interpret the statutory text. Its reasoning and mode of analysis controls the present case. *See Ramos v. Louisiana*, 140 S. Ct. 1390, 1404 (2020) ("It is usually a judicial decision's reasoning—its *ratio decidendi*—that allows it to have life and effect in the disposition of future cases.").

3. The Plain Statutory Meaning Requires Policy Statements Governing Retroactive Sentence Reductions To Promote The Aims Of Sentencing.

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. Section 991(b) establishes that the "purpose[]" of the Sentencing Commission is to "establish sentencing policies and practices" that advance certain goals. Congress could not have intended to undermine the statutory sentencing framework that it enacted by allowing promulgation of rules untethered to Congress's statutory directives. *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 empower the Commission to establish policies and practices that 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.

E. The Ninth Circuit's Holding That The Sentencing Commission Has Authority, Without Notice-And-Comment Review, To Independently Promulgate Policy Statements That Thwart The Statutory Sentencing Directives, Risks Violating The Separation Of Powers And Non-Delegation Doctrines.

Establishing that the Sentencing Commission's policy statement is tethered to the purposes defined in the Sentencing Reform Act's animating statutes is especially important in light of this Court's recent opinions on agency deference and the non-delegation doctrine. 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.

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). Those 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).

Unlike guidelines, the Commission can issue policy statements like § 1B1.10 without passing through 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 advisory only, the policy statement in § 1B1.10 is binding on the courts 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.

In this Court's reassessment of agency deference, the Court emphasized that, in the absence of genuine ambiguity, there is no plausible reason for agency deference. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019). "To defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create de facto a new regulation. *Id*. (quoting *Christensen v. Harris Cty.*, 529 U.S. 576, 588 (2000)). Here, the relevant sentencing statutes are not ambiguous in defining the goals that the Commission's promulgated policies must advance. By holding that the Commission may ignore those unambiguous congressional directives, the lower courts have allowed the Commission, through a mere policy statement, to effectively promulgate a new substantive guideline that did not go through the public notice and comment procedures required under the Sentencing Reform Act. 28 U.S.C. 994(o) and (p).

Moreover, permitting the Commission to promulgate binding policy statements that thwart the aims of sentencing would run afoul of the non-delegation doctrine. The first step in non-delegation analysis is to engage in the same type of statutory construction implicated in *LaBonte* and *Stinson*:

> The constitutional question is whether Congress has supplied an intelligible principle to guide the delegee's use of discretion. So the answer requires construing the challenged statute to figure out what task it delegates and what instructions it provides.

Gundy v. United States, 139 S. Ct. 2116, 2123 (2019). Here, the statutes only delegate to the Commission discretion to operate within the defined boundaries of the unambiguous sentencing policies. If those policies do not "constrain" the Commission in implementing binding restrictions on retroactive sentence reductions, then the delegation supplies no guiding principle for the Commission's exercise of discretion.

This Court's opinion in *Hughes* makes crystal clear that the Sentencing Reform Act's basic directives apply to the implementation of retroactive guidelines. "[O]nce a court interprets the statute, it may find that the constitutional question all but answers itself." *Kisor*, 139 S. Ct. at 2415; *see also Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984) ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."). Any close analysis of the relevant statutes forecloses the conclusion that retroactive guidelines amendments are "not constrained" by the underlying statutes.

F. A Sentencing Policy That Promotes Unwarranted Disparity Without Advancing Another Legitimate And Important Purpose Of Sentencing Cannot Survive Rational Basis Scrutiny.

Irrational and arbitrary sentencing classifications violate the Equal Protection Clause. *Chapman v. United States*, 500 U.S. 453, 465 (1991). Here, the lower courts have upheld a sentencing policy that four circuits have admitted promotes unwarranted disparity based on unproven and speculative justifications. To the extent the statutes could be considered ambiguous—which they cannot—the Court should apply the doctrine of constitutional avoidance to assure that serious constitutional problems with executive branch law-making are avoided by construing the general sentencing statutes fully apply to retroactive guidelines. *Clark v. Martinez*, 543 U.S. 371, 381 (2005) (The doctrine of constitutional avoidance "is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts."). To avoid serious constitutional doubt, this Court should hold that the Sentencing Commission's policies implementing retroactive guideline amendments must be consistent with and advance the statutory aims of sentencing.

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 requires 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 fair and proportionate sentencing.

To avoid serious constitutional doubt, this Court should grant review to clarify that the Commission's policy statement implementing retroactive guideline amendments must adhere to the statutory aims of sentencing.

II. The Question Is Exceptionally Important Because It Impacts The Liberty Of Thousands of Federal Prisoners, Involves Millions Of Taxpayer Dollars, And Has The Potential To Ameliorate The Coronavirus Crisis In The Federal Prisons.

This Court's rules recognize that certiorari should be granted when a case involves "an important question of federal law that has not been, but should be, settled by this Court." Supreme Court Rule 10(c). This case presents just such an issue because the Court's leadership has the capacity to mitigate the crisis caused by the coronavirus pandemic in the federal prisons, while sending a national message that institutional actors

should place the highest priority on swiftly and responsibly responding to the current emergency.

COVID-19 has now infected over 11.4 million people worldwide, including over 2.8 million victims in the United States. *COVID-19 Dashboard by the Center for Systems Science and Engineering (CSSE) at Johns Hopkins University (JHU),* JOHNS HOPKINS UNIVERSITY & MEDICINE, https://coronavirus.jhu.edu/map.html (last visited July 6, 2020, at 8:38 a.m.). Over 535,000 global deaths have resulted from the virus, with nearly 130,000 deaths attributed to COVID-19 in the United States. *Id*.

The lower courts have explained that the health risks from coronavirus—to inmates, guards, and the community at large—are exacerbated by large prison populations.

> Prisoners are particularly vulnerable to infection due to the nature of their incarceration. *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Mar. 23, 2020), https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html (last visited July 1, 2020). Specifically, prisoners are unable to adequately follow social distancing and sanitary guidelines recommended to avoid the spread of infection.

United States v. Hanson, No. 6:13-cr-00378-AA-1, 2020 WL 3605845, at *3 (D. Or. July 2, 2020) (granting compassionate release). The virus is especially dangerous in prisons because the necessities of group living environments encourage spread of the disease. *See* Megan Wallace et al., *COVID-19 in Correctional Detention Facilities—United States, February–April 2020*, 69 MORBIDITY & MORTALITY WEEKLY REPORT 587, 587 (May 15, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/mm6919e1.htm (identifying "crowded

dormitories, shared lavatories, limited medical and isolation resources, daily entry and exit of staff members and visitors, continual introduction of newly incarcerated or detained persons, and transport of incarcerated or detained persons in multiperson vehicles for court-related, medical, or security reasons" as exacerbating factors); *see also United States v. Gakhal*, No. 15 CR 470-1, 2020 WL 3529904, at *2 (N.D. Ill. June 30, 2020) (citing the CDC's warning and confirming the difficulty of social distancing in jails and prisons and granting compassionate release).

Since the first confirmed case of the coronavirus in the federal prison system in late March, a total of 7,163 federal inmates and 762 BOP staff members have contracted the disease. *COVID-19*, BOP, www.bop.gov/coronavirus/ (providing daily tallies of confirmed infections) (last visited July 6, 2020, at 7:53 a.m.). The BOP has been unable to control the spread of the virus both within prison walls and into new facilities. *See United States v. Richardson*, No. 2:17-CR-00048-JAM, 2020 WL 3402410, at *4 (E.D. Cal. June 19, 2020) (finding "the BOP failed to curtail the spread of the virus at Terminal Island" and granting compassionate release); *United States v. Burrill*, No. 17-CR-00491-RS-1, 2020 WL 1846788, at *2 (N.D. Cal. Apr. 10, 2020) ("The CDC's dire predictions [about COVID-19's risk to incarcerated individuals] have borne out in correctional institutions around the country."). There are currently confirmed active COVID-19 cases in 84 BOP facilities and 33 residential reentry centers. *COVID-19*, BOP, (last visited July 6, 2020, at 7:53 a.m.). Ninety-four inmates and one BOP staff member have died. *Id*.

To date, the need for radical reductions in prison population in light of COVID-19 has been addressed in only two limited forums. First, through the CARES Act, Congress expanded the Bureau of Prisons authority to designate prisoners to home confinement to alleviate the strain on the besieged federal prison system. But the Bureau of Prisons has placed many restrictions on eligibility for home confinement, denying relief to those prisoner most vulnerable to coronavirus unless they meet unrelated criteria. Critically, home confinement is not available to the approximately 27 percent of drug defendants who are not citizens of the United States. *See* Paul Hofer, *Excel Worksheet for Federal Defenders*, Sentencing Resource Counsel Project (Dec. 14, 2018) (filtered by type of offense "OFFTYPSB" and citizenship status "CITIZEN").[2]

Second, the lower courts have also found "extraordinary and compelling reasons" to grant compassionate release to prisoners vulnerable to coronavirus who, because of their incarceration, cannot protect themselves from exposure to the disease. *See, e.g.*, *Hanson*, 2020 WL 3605845, at *3. Yet, these narrow avenues of relief can address the desperate over-crowding only through the limited microcosm of an individual case. A decision by this Court here has the potential to affect the liberty of thousands of federal prisoners at

[2] The data used for this analysis 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 this particular analysis has 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 and are publicly available at the Commission's website.

grave human and fiscal cost. The Sentencing Commission has already taken the systemic view that a vast number of prisoners were sentenced pursuant to an overly-harsh Guidelines range. Lifting a concededly unfair restriction on those prisoners receiving statutorily-permitted sentence reductions would provide an immediate, meaningful response to over-crowding, reducing coronavirus risks for inmates, staff, and surrounding communities alike.

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). Although this case involves a guideline amendment rather than a guideline error, the same general reasoning applies. Mr. Ramirez-Arroyo, like similarly situated defendants, was sentenced under a Guidelines range that the Commission later determined was too high. There is a reasonable probability that his sentence would have been lower if premised on the amended range. Indeed, courts have routinely granted sentence reductions for eligible defendants following Amendment 782, including those who already received substantial assistance departures. U.S. Sentencing Commission, *2014 Drug Guidelines Amendment Retroactivity Data Report* (Table 1 and Table 7) (Aug. 2018) (https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/drug-guidelines-amendment/20180829-Drug-Retro-Analysis.pdf).

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, implicating up to 8,000 federal defendants. *See* Hofer, *supra* (filtering to include drug offenders sentenced under the Drug Quantity Table before Amendment 782 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). 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 sentence reductions of one year each, well under the average rate and extent of reductions to date, the Court's ruling could void 4,000 years of unnecessary over-incarceration.

Moreover, aside from the human cost, the validity of the Commission's policy statement has immense fiscal importance. The Commission intended Amendment 782 to enhance public safety by diverting resources currently 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 costs of inmate health care in light of the coronavirus pandemic.

The importance of the questions presented here will not diminish over time. When the coronavirus emergency eventually abates, and as the remaining prisoners sentenced before Amendment 782 are released, the Commission will continue to exercise unbridled discretion over all future Guidelines amendments. This Court should intervene now.

Conclusion

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

Dated this 6th day of July, 2020.

/s/ Stephen R. Sady
Stephen R. Sady

/s/ Elizabeth G. Daily
Elizabeth G. Daily
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