In The

Supreme Court of the United States

GUY HARVEY SPRUHAN, IV,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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Dated August 24, 2021

QUESTIONS PRESENTED

1. Is the limitation in U.S.S.G. § 1B1.10, which prohibits proportional sentence reductions for defendants who have previously received variances or departures, in irreconcilable conflict with the statutory directive in 28 U.S.C. § 991(b)(1)(B) that the Sentencing Commission's policies and practices must avoid unwarranted sentencing disparity?

2. Does the application of the current version of § 1B1.10 violate the Equal Protection Clause by prohibiting a proportional reduction for defendants who were originally deemed deserving of departures or variances, while allowing such a reduction for defendants who originally received longer, within-guideline sentences?

PARTIES TO THE PROCEEDING

The petitioner is Guy Harvey Spruhan, Jr., who was denied a reduction in his sentence below.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Guy Harvey Spruhan, IV, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals is reported at *United States v. Spruhan*, 989 F.3d 266 (4th Cir. 2021) and reprinted in Appendix 1a. The district court's opinion denying Mr. Spruhan's motion for a sentence reduction under 18 U.S.C. § 3582(c)(2) is reported at *United States v. Spruhan*, No. 5:13-cr-00030, 2019 WL 5566545 (W.D. Va. Oct. 28, 2019).

JURISDICTIONAL STATEMENT

The Fourth Circuit entered its final order in this case on March 2, 2021. 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 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.

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.

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

A. The underlying offense and plea agreement.

Mr. Spruhan was indicted for conspiracy to distribute methamphetamine on December 5, 2013. JA 12. On June 30, 2014, Mr. Spruhan pled guilty pursuant to a written plea agreement under Federal Rule of Criminal Procedure 11(c)(1)(C) that included a stipulation to 15 kilograms of methamphetamine. JA 22. The parties also agreed that Mr. Spruhan would be sentenced to a term of incarceration within the range of 144 to 180 months. JA 21. At the time of sentencing, the Presentence Investigation Report assigned Mr. Spruhan an offense level was 37 and a criminal history category of III, placing him in the sentencing guideline range of 262 to 327 months. JA 111. On October 9, 2014, the district court sentenced him to a term of 180 months on one count of conspiracy to distribute methamphetamine. JA 31.

B. Motion for a sentence reduction prior to *Hughes*.

On December 1, 2014, Mr. Spruhan filed a *pro se* motion for a reduction of his sentence under 18 U.S.C. § 3582(c)(2) and Amendment 782 to the sentencing guidelines. JA 37. On April 28, 2015, Mr. Spruhan moved to withdraw his motion stating that the action was frivolous under the law at the time. JA 41. This was true under the governing rule from *Freeman v. United States*, 564 U.S. 522 (2011). The court dismissed the motion without prejudice on May 21, 2015. JA 43.

C. Post-*Hughes* motion for a sentence reduction.

On June 4, 2018, the Supreme Court issued an opinion in *Hughes v. United States*, 138 S. Ct. 1765 (2018) affirming that "a sentence imposed pursuant to a Type-C agreement is 'based on' the defendant's Guideline range so long as that range was part of the framework the district court relief on in imposing the sentence or accepting the agreement." Mr. Spruhan filed a new *pro se* motion for a sentence reduction two months later. JA 44. In his motion, Mr. Spruhan argued that he was eligible for a reduction because his plea agreement pursuant to Rule 11(c)(1)(C) was based on the drug guidelines as interpreted by *Hughes* because the guidelines were part of the framework the district court relied on in determining his sentence. *Id.* (citing *Hughes*, 138 S. Ct. at 1175).

On August 13, 2018, Mr. Spruhan, through counsel, filed an amended motion to reduce his sentencing in light of *Hughes*, presenting additional arguments for a sentence of 144 months. JA 52. In specific, Mr. Spruhan argued a proportionate reduction from the low-end of his amended drug weight guideline range of 210 to 262 months was appropriate because the policy statement in § 1B1.10(b)(2)(A) that purported to prevent such a reduction conflicted with the Sentencing Commission's statutory directive in 28 U.S.C. § 991(b)(1)(B), and also that any such limitation violated the Equal Protection Clause. *Id.*

In opposition, the Government generally argued that Mr. Spruhan was ineligible for a reduction under U.S.S.G. § 1B1.10 because he was already serving a

sentence below the amended guideline range that would apply to his case. JA 69. The district court then specifically ordered the Government to respond to the arguments advanced by Mr. Spruhan that (1) § 1B1.10(b)(2) (A) was in irreconcilable conflict with the statutory directive stated in 28 U.S.C. § 991(b)(1)(B); and (2) that denying a sentence reduction under 28 U.S.C. § 991(b)(1)(B) would not violate the Equal Protection Clause. JA 72.

After a round of additional briefing, the district court ruled on October 25, 2019, that the sentencing guidelines were part of the framework for Mr. Spruhan's sentence and therefore he was entitled to review following *Hughes*. JA 86. But the court found that the limitation in § 1B1.10(b)(2)(A) precluded his motion to reduce his sentence following Amendment 782, relying on the reasoning from *United States v. Padilla-Diaz*, 862 F.3d 856 (9th Cir. 2017). *Id.*

On October 31, 2020, Mr. Spruhan timely noticed his appeal. JA 97. On appeal, Mr. Spruhan reasserted his eligibility for the same reasons. The Government reiterated its opposition. After hearing oral argument on January 26, 2021, the Fourth Circuit issued an opinion affirming the district court's denial of Mr. Spruhan's motion, finding that "§ 1B1.10(b)(2) does not irreconcilably conflict with 28 U.S.C. § 991(b)" and does not violate the Equal Protection Clause. *United States v. Spruhan*, 989 F.3d 266 (4th Cir. 2021).

REASON FOR GRANTING THE WRIT

The Sentencing Commission's policy statement in § 1B1.10(b)(2)(A) can "produce unequal and arguably unfair results." *United States v. Padilla-Diaz*, 862 F.3d 856, 862 (9th Cir. 2017). It 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." *Id.* at 861. The Fifth Circuit agrees that § 1B1.10(b)(2)(A) "undermine[s] the sentencing goal of proportionality between himself and his codefendants[.]" *United States v. Leatch*, 858 F.3d 974, 979 (5th Cir. 2017). And the Second Circuit has "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." *United States v. Montanez,* 717 F.3d 287, 294 (2d Cir. 2013). Afterall, "[a] criminal history category that exaggerates a defendant's past crimes during an initial sentencing will continue to do so at a reduction." *Id. 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").

Yet the Courts of Appeals to consider this issue have allowed the Sentencing Commission to act without restraint, and without regard for the express will of Congress. By interpreting the Sentencing Reform Act as almost wholly aspirational, the Sentencing Commission (which has not had a voting quorum since December of 2018 to even change its own policy statements) presently has no check or balance. Is there any limit on the Commission's ability to deviate from the most fundamental goal of sentencing – to avoid unwarranted disparities? The answer will be no, unless this Court grants certiorari.

I. The Commission's policy statement categorically barring defendants with non-cooperation variances or departures from proportional sentence reductions 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 functionally 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). Furthermore, it denies individual flexibility and builds disparity into the system, in violation 28 U.S.C. §§ 991(b) and 994(f), because it restricts reduction of sentences only for 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, including 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 influence of the Guidelines 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. Section 1B1.10(b)(2)(A) 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 decisions from the initial sentencing remaining undisturbed. 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 anyway. 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 *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 at 979. 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 *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 at 294. 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 Hogan*, 722 F.3d at 63 ("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*, inattention to this Court's controlling reasoning in *Hughes*, and disregard of the statutes' plain meanings. This Court should intervene to 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.

Several circuit 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. *See Padilla-Diaz*, 862 F.3d at 861; *Leatch*, 858 F.3d at 979. 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 resentence him 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. This 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 3582(c)(2) proceeding do not serve to increase the prescribed range of punishment; instead, they affect only the range." *Id.* at 828.

Nothing about *Dillon* supports the untethering of 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 *Dillo*n 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 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. *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 Fourth 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" finds no support in statute or reason. *Spruhan*, 989 F.3d at 269 (quoting *Padilla-Diaz*, 862 F.3d at 861). 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.

II. Holding that the purposes of the Sentencing Reform Act do not meaningfully bind the Sentencing Commission violates concepts of non-delegation doctrine and separation of powers.

The Court's increased attention on the role of non-delegation doctrine and the limits that apply to agency deference make the relationship between the Sentencing Commission's policy statement and the Sentencing Reform Act ripe for review. The Commission has a large scope of legislative power as well as a massive impact on the judicial branch. Because of this, the Sentencing Commission's joint positioning combined with its authority to bind the hands of many actors necessitates regular oversight to ensure that its delegated objectives are appropriately accomplished and its aim to promote uniform and fair sentences is met.

The Commission has the power to promulgate binding policy statements upon the judiciary. Where these policy statements may run counter to the general goals of sentencing, they cannot stand under non-delegation doctrine. The primary constitutional question is "whether Congress has supplied an intelligible principle to guide the delegee's use of discretion." *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019). Thus, a statute must follow the principle and its statutory boundaries. The aims of the Sentencing Reform Act were to reduce sentencing disparities between similarly situated defendants. If Congress's delegating statutes, including the purposes of the statute, do not restrict the Commission's discretion for creating retroactive sentence reductions, then delegation doctrine has no teeth and cannot supply a meaningful intelligible principle.

Allowing agencies to *both* decide the major policy questions *and* regulate and enforce those objectives runs afoul of the nondelegation doctrine—because fairness in sentencing is a major policy question. *Paul v. United States*, 140 S. Ct. 342 (Mem.) (2019) (Kavanaugh, J., concurring in denial of certiorari). There is no doubt that sentencing is a major policy concern, considering the direct and indirect impact that it has on millions of Americans, as well as its importance in racial justice initiatives. This suggests that it may be a larger concern than Congress gives it credit for, and could be the sort of "major question" that requires a more restrictive delegation in the first instance. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)

(discussing the "major questions" exception to *Chevron* deference where Congress implicitly reserves the power to regulate certain areas of law due to their importance).

If delegation is proper generally, the Court should still be careful to defer directly to the Sentencing Commission in this instance. If there is no genuine and intractable ambiguity in the guiding statute, no deference scheme should apply. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019). The various sentencing statutes enacted by Congress clearly define the goals and purposes that the Commission must adhere to in its policies. The court below and other lower courts have all allowed the Commission to ignore these ambiguous directives on the idea that purposes are not binding combined with the lower procedural thresholds of policy statements. Thus, a simple policy statement can now create a new substantive guideline that courts must follow without notice and comment procedures required by the Sentencing Reform Act. *See* 28 U.S.C. 994(o) and (p). That cannot be correct. To allow this to continue would permit an agency, "under the guise of interpreting a regulation, to create de facto a new regulation." *Kisor*, 139 S. Ct. at 2415 (quoting *Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000)).

The Court's recent decision in *Hughes* proves that even general principles can apply to the Commission's policy statements. Section 3582(c)(2) hearings firmly come under the framework of the Guidelines, and thus Congress's directives should apply in full. *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."). Congress had a clear intent for the Sentencing Commission to effectuate, leaving no room in the delegation to interpret the directives differently. Thus, even retroactive guideline amendments must be constrained by the underlying statutes for a proper delegation of power.

Further, all Sentencing Commission guidelines are subject to notice-and-comment rulemaking, hearings, and congressional review. 28 U.S.C. §§ 994(p), (x); *see also Mistretta v. United States*, 488 U.S. 361, 393–94 (1989) (establishing that these administrative procedures make the Sentencing Commission "fully accountable" to Congress). Policy statements, however, are not subject to these procedural requirements. *See* 28 U.S.C. § 994(a)(1), (A)(2) & (x). However, they are still fully binding on the courts under 18 U.S.C. § 3582(c)(2) with fewer procedural checks than other agencies. *See United States v. Tercero*, 734 F.3d 979, 984 (9th Cir. 2013) (following a D.C. Circuit decision noting that the Sentencing Commission's structure as an independent agency not guided by the Administrative Procedure Act absolves it of review under an "arbitrary and capricious" standard and mandatory notice and comment rulemaking under that Act). If the Court does not take this opportunity to review U.S.S.G. § 1B1.10, the Commission will have the opportunity to continue to abuse its authority to implement retroactive changes to the Guidelines.

The Fourth Circuit below was incorrect in holding that the Sentencing Commission acted in accordance with a nonbinding directive from Congress. This

Court's holdings in *United States v. LaBonte*, 520 U.S. 751 (1997) and *Stinson v. United States*, 508 U.S. 36 (1992) support a stronger view of the impact that the purposes established in § 991(b) have on the Commission's goals. The Commission's strong discretion is necessarily limited by directives set out by Congress, as well as broad constitutional goals. If the purposes of the Act, which should directly drive the goals of the guidelines, are not a strict enough directive, that frustrates present understandings of administrative law and delegation.

The Ninth Circuit in *United States v. Ramirez-Arroyo*, No. 19-30054, 2020 WL 5633672 (9th Cir. Feb. 6, 2020), following *United States v. Hernandez-Martinez*, 933 F.3d 1126 (9th Cir. 2019) and *United States v. Padilla-Diaz*, 862 F.3d 856 (9th Cir. 2017) was also incorrect in its interpretation of the Sentencing Commission's policy statement after *Hughes*. The general thrust of *Hughes* suggests that unwarranted sentencing disparities and uniformity are key values of the Sentencing Reform Act and the resultant Guidelines. *See Hughes*, 138 S. Ct. at 1773, 1774. While the facts in *Hughes* differ from Mr. Spruhan and other similarly situated defendants, the import of the purposes should not be any different. The Ninth Circuit should have reexamined and changed its holding in *Padilla-Diaz* as a result of *Hughes*, rather than asserting them compatible. *See Hernandez-Martinez*, 933 F. 3d at 1135–36 (declining to follow defendants' argument and finding no conflict).

Overall, these disparities caused by the policy statement frustrate the ability of defendants like Mr. Spruhan, who were rightfully given departures due to a variety of

circumstances, like age, (lack of) knowledge of scheme, or mental health and capacity, to receive warranted reductions in their sentences. Perhaps, they could even stay in prison longer than others similarly situated based on criminal history alone or those with *harsher* criminal records and penalties in the first instance. Surely, that is a disparity that is unwarranted and cannot meet the overall purposes of the Guidelines or Congress's intent.

III. Applying § 1B1.10(b)(2)(A) to deny sentence reductions to defendants who previously received variances or non-cooperation departures violates the Equal Protection Clause.

The current version of § 1B1.10 has a second independent and fatal problem. This policy statement violates the Equal Protection Clause classifying defendants for purposes of sentence reduction eligibility without a rational basis for doing so. The policy arbitrarily creates two classes of defendants who did not receive cooperation departures at the time of sentencing--those who received guideline sentences and those who received below-guideline departures or variances. For no rational reason, only the first class may receive a sentence modification under 18 U.S.C. § 3582(c)(2). Four circuit courts have admitted that this policy promotes unwarranted sentencing disparity based on unproven and speculative justifications. *Padilla-Diaz*, 862 F.3d at 862; *Leatch*, 858 F.3d at 979; *Montanez*, 717 F.3d at 294; *United States v. Hogan*, 722 F.3d at 63.

Irrational and arbitrary classifications violate the Equal Protection Clause. *Chapman v. United States*, 500 U.S. 453, 465 (1991). Laws that distinguish between

classes will be upheld if the distinction is rationally related to a legitimate state interest, but the state "may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446 (1985). For example, courts have recognized that equal protection considerations prohibit granting credit for presentence custody to more serious offenders while denying them to less serious ones. *Dunn v. United States*, 376 F.2d 191 (4th Cir. 1967) ("Denial of credit … where others guilty of crimes of the same or greater magnitude automatically receive credit, would entail an arbitrary discrimination within the power and hence the duty of the court to avoid.").

Rational basis review, while deferential, nonetheless requires that the action taken by the agency must actually further the stated purpose. The Supreme Court has cautioned that "even the standard of rationality … must find some footing in the realities of the subject addressed by the legislation." *Heller v. Doe*, 509 U.S. 312, 231 (1993). In order for a court to uphold the policy statement in § 1B1.10 under rational basis review, the Sentencing Commission must have legitimately stated a basis for the action it took and the reviewing court must inquire into whether the action actually furthers the stated purpose. While rational basis does not require a perfect fit between the means and ends, a court "may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne*, 473 U.S. at 446. Moreover, where the "sheer breadth" of an act is

"discontinuous with the reasons offered for it," it cannot survive rational basis review. *Romer v. Evans*, 517 U.S. 620, 632 (1996).

Because Mr. Spruhan could not "negate 'every conceivable basis which might support' § 1B1.10(b)(2)" the Fourth Circuit upheld the policy statement as rationally related to a legitimate government interest. *Spruhan*, 989 at 270. The court observed that, "[u]nder rational basis review, a policy statement will be upheld if it is supported by at least one 'plausible' rationale." *Id.* (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993) (citations omitted)). As to that plausible rationale, the Fourth Circuit found that "the Government's interests in 'reducing complexity, litigation, and disparities,' and 'encouraging defendants to continue cooperating with' authorities" adequately supported the disparate treatment demanded by § 1B1.10(b)(2). *Id.* (quoting Response Br. at 26–27). The court observed that "§ 1B1.10(b)(2) undoubtedly streamlines sentence reduction proceedings by narrowing the class of eligible defendants" and that it is "'plausible' that eligibility for a sentence reduction might induce some defendants to cooperate with the Government." *Id.* (quoting *Beach Commc'ns, Inc.*, 508 U.S. at 313).

The Fourth Circuit's analysis is incorrect because the classification promulgated by the guideline does not reasonably further either of these two stated purposes. The relationship between the stated goal and the action taken by the Commission need not be a perfect fit, but this distinction is "so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne*, 473 U.S. at 446. Additionally, in upholding the

policy statement, the two Circuits to have considered the issue failed to identify any empirical support establishing that the challenged classification in fact furthers the proposed rationales in any way, and did not consider whether the scope of the exclusion vastly exceeds the purported justifications.

First, the classification created by § 1B1.10(b)(2)(A) did not advance simplicity. Pre-2011, whether a defendant was eligible for a sentence reduction was contingent on whether the Guidelines sentencing range had been retroactively amended. Under that rule, a defendant was eligible to receive a proportionate reduction below an amended guideline range, consistent with the original departure or variance imposed by the district court at the original sentencing. Indeed, "[i]f the original 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, a reduction comparably less than the amended guideline range … may be appropriate." U.S.S.G. § 1B1.10(b)(2)(B) (effective Mar. 3, 2008).

The simplicity in the former rule was overturned following the 2011 amendment to § 1B1.10(b), which heightened, and complicated, the eligibility requirements. Indeed, reduction eligibility now depends on multiple factors, including whether the Guidelines range has been reduced, whether the original sentence was a below Guidelines sentence, and whether the below- Guidelines sentence was the result of substantial assistance. To the extent simplicity is plausibly related to less

litigation, there is no evidence to support that the current iteration of § 1B1.10(b) has resulted in less litigation.

A further problem is that the stated rationale of simplicity, or avoiding litigation, would be so broad that virtually any action taken by the Commission could be argued to meet those goals. The Commission could, for example, allow sentence reductions only for defendants whose last names begin with the letter "A," or defendants born on a certain day of the month. Such classifications would certainly further the purposes of avoiding litigation and undue complexity. They would not, however, be rational. Under *Dunn*, discussed above, sentencing consideration cannot be granted to less deserving defendants while withholding eligibility from more deserving ones.

Second, there is no factual support for the assertion that the policy limitation incentivizes cooperation with the government. While the rational basis test does not mandate evidentiary support, speculation about possible rational bases has to at least be reasonable. *See Heller*, 509 U.S. at 320 (nothing that speculation, while permissible, must be "rational"). Here, noting that § 1B1.10(b)(2)(A) might encourage cooperation is not reasonable. First and foremost, cooperation agreements are by nature based on concrete sentencing concessions, not hypothetical predictions about future decisions the Sentencing Commission may or may not make about retroactive guideline amendments. Additionally, there is no reason to assume that classifying defendants into two separate categories will incentivize cooperation, especially when such

categorization enables one class of defendants to not cooperate and still be eligible for a sentence reduction as long as they received a within-Guidelines sentence.

The rational basis test requires that the court inquire into the action taken by the agency to be sure there is "some footing in the realities of the subject addressed by the legislation." *Heller*, 509 U.S. at 21. Here the agency action is not rooted in reality, the connection between the action and the goal is insufficient, and the result is arbitrary.

CONCLUSION

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

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