No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JUAN CARLOS OSORTO,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

A. Fitzgerald Hall, Esq.
Federal Defender

Lynn Palmer Bailey, Esq.
Counsel of Record
Florida Bar No. 0605751
Federal Defender's Office
200 West Forsyth Street, Suite 1240
Jacksonville, Florida 32202
Telephone: (904) 232-3039
E-mail: lynn_bailey@fd.org

QUESTION PRESENTED

In 2016, the United States Sentencing Commission promulgated United States Sentencing Guideline (USSG) § 2L1.2(b)(3), which applies exclusively to noncitizens and increases the range of imprisonment based on a prior conviction incurred after a noncitizen's first removal from the United States but before the instant illegal reentry prosecution. The same such conviction already increases the noncitizen's range of imprisonment by enhancing his criminal history score under USSG § 4A1.1. Approximately 3,000 noncitizens every year face longer terms of imprisonment because of the compound use of their prior convictions under § 2L1.2(b)(3).

In *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976), this Court limited the extent to which federal agencies receive deferential rational basis review when it comes to discrimination against noncitizens. On procedural-due-process grounds, this Court invalidated a policy promulgated by a federal agency that treated noncitizens differently from citizens and deprived them of liberty. But in a fractured decision applying *Hampton*, the Eleventh Circuit held below that the Sentencing Commission's promulgation of § 2L1.2(b)(3) satisfied procedural due process and did not violate the equal protection guarantee of the Fifth Amendment to the Constitution.

The question presented is:

Whether USSG § 2L1.2(b)(3) is unconstitutional.

LIST OF PARTIES

Petitioner, Juan Carlos Osorto, was the defendant in the district court and the appellant in the court of appeals. Respondent, the United States of America, was the prosecutor in the district court and the appellee in the court of appeals.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution

Statutes

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Juan Carlos Osorto, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION AND ORDER BELOW

The Eleventh Circuit's published opinion affirming Mr. Osorto's sentence is provided in Appendix A.

STATEMENT OF JURISDICTION

The Eleventh Circuit issued its opinion on April 20, 2021. This petition is timely filed under Supreme Court Rule 13.1 and this Court's Order of March 19, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides:

> No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

The Fourteenth Amendment to the United States Constitution provides:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor 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. . . .

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

> (a) In general
> Subject to subsection (b), any alien who--
> (1) has been denied admission, excluded, deported, or removed or has departed the United States while

an order of exclusion, deportation, or removal is outstanding, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under Title 18, or imprisoned not more than 2 years, or both.

(b) Criminal penalties for reentry of certain removed aliens Notwithstanding subsection (a), in the case of any alien described in such subsection--

(1) whose removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under Title 18, imprisoned not more than 10 years, or both;

(2) whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both;

(3) who has been excluded from the United States pursuant to section 1225(c) of this title because the alien was excludable under section 1182(a)(3)(B) of this title or who has been removed from the United States pursuant to the provisions of subchapter V, and who thereafter, without the permission of the Attorney General, enters the United States, or attempts to do so, shall be fined under Title 18 and imprisoned for a period of 10 years, which sentence shall not run concurrently with any other sentence.[ ] or

(4) who was removed from the United States pursuant to section 1231(a)(4)(B) of this title who thereafter, without the permission of the Attorney General, enters, attempts to enter, or is at any time

found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be fined under Title 18, imprisoned for not more than 10 years, or both.

For the purposes of this subsection, the term "removal" includes any agreement in which an alien stipulates to removal during (or not during) a criminal trial under either Federal or State law.

(c) Reentry of alien deported prior to completion of term of imprisonment

Any alien deported pursuant to section 1252(h)(2)[ ] of this title who enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be incarcerated for the remainder of the sentence of imprisonment which was pending at the time of deportation without any reduction for parole or supervised release. Such alien shall be subject to such other penalties relating to the reentry of deported aliens as may be available under this section or any other provision of law.

(d) Limitation on collateral attack on underlying deportation order

In a criminal proceeding under this section, an alien may not challenge the validity of the deportation order described in subsection (a)(1) or subsection (b) unless the alien demonstrates that--

(1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;

(2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and

(3) the entry of the order was fundamentally unfair.

United States Sentencing Guideline § 2L1.2 provides:

(a) Base Offense Level: 8

(b) Specific Offense Characteristics

(1) (Apply the Greater) If the defendant committed the instant offense after sustaining--

(A) a conviction for a felony that is an illegal reentry offense, increase by 4 levels; or

(B) two or more convictions for misdemeanors under 8 U.S.C. § 1325(a), increase by 2 levels.

(2) (Apply the Greatest) If, before the defendant was ordered deported or ordered removed from the United States for the first time, the defendant engaged in criminal conduct that, at any time, resulted in--

(A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, increase by 10 levels;

(B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, increase by 8 levels;

(C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, increase by 6 levels;

(D) a conviction for any other felony offense (other than an illegal reentry offense), increase by 4 levels; or

(E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by 2 levels.

(3) (Apply the Greatest) If, after the defendant was ordered deported or ordered removed from the United States for the first time, the defendant engaged in criminal conduct that, at any time, resulted in--

(A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, increase by 10 levels;

(B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, increase by 8 levels;

(C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, increase by 6 levels;

> (D) a conviction for any other felony offense (other than an illegal reentry offense), increase by 4 levels; or
> (E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by 2 levels.

RELEVANT LEGAL BACKGROUND

1. United States Sentencing Guideline § 2L1.2

United States Sentencing Guideline (USSG) § 2L1.2 determines the offense level of a noncitizen convicted of illegally reentering the United States after removal in violation of 8 U.S.C. § 1326. The United States Sentencing Commission amended § 2L1.2 on November 1, 2016, by adding subsection (b)(3), a new offense-level enhancement on the vertical axis of the Sentencing Table of up to ten levels for a noncitizen's prior conviction incurred after the noncitizen's first removal but before the immediate § 1326 sentencing. *See* USSG § 2L1.2, amend. 802 (eff. Nov. 1, 2016). The Guidelines consider the same prior conviction again and separately by assessing criminal history points, which determine the criminal history category on the horizontal axis of the Sentencing Table, under USSG § 4A1.1.

2. Fifth and Fourteenth Amendment Doctrines of Due Process and Equal Protection

"The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws." *United States v. Windsor*, 570 U.S. 744, 774 (2013); *see also Hampton v. Mow Sun Wong*, 426 U.S. 88, 100, 103 (1976). But as this Court has stated, the equal protection of the laws afforded by the Fifth Amendment's Due Process Clause

and the Fourteenth Amendment's Equal Protection Clause is "not always coextensive." *Hampton*, 426 U.S. at 100. State discrimination based on alienage, or noncitizenship, is "inherently suspect and subject to close judicial scrutiny" under the Fourteenth Amendment. *Graham v. Richardson*, 403 U.S. 365, 372 (1971). But because Congress and the President are charged with "the responsibility for regulating the relationship between the United States" and our noncitizen visitors, this Court has afforded rational basis review under the Fifth Amendment to classifications based on alienage, or noncitizenship, made by Congress and the President. *Mathews v. Diaz*, 426 U.S. 67, 83 (1976). When federal agencies treat noncitizens differently from citizens, the framework of *Hampton* applies.

STATEMENT OF THE CASE

1. Mr. Osorto is a native and citizen of Honduras who illegally reentered the United States after being removed by immigration authorities in 2010. After he reentered, he was convicted of a state felony offense in Florida in 2018. Immigration authorities found him and initiated a federal prosecution for illegal reentry under 8 U.S.C. § 1326. Mr. Osorto pled guilty to being an alien—or noncitizen—found voluntarily in the United States after removal without having received the requisite permission to apply for readmission, in violation of 8 U.S.C. § 1326(a), (b)(2).[1]

The district court determined Mr. Osorto's offense level by applying United

[1] Mr. Osorto uses the term "noncitizen" as equivalent to the statutory term "alien." *See Nasrallah v. Barr,* 590 U.S. ---, 140 S. Ct. 1683, 1689 n.2 (2020); *see also Murugan v. United States Att'y Gen.*, -- F.4th --, 2021 WL 3732271, at *8 n.1 (11th Cir. Aug. 24, 2021) (Martin, J., dissenting).

States Sentencing Guideline (USSG) § 2L1.2. His 2018 Florida conviction added four levels pursuant to § 2L1.2(b)(3)(D) and two criminal history points pursuant to USSG § 4A1.1(b). Mr. Osorto's advisory guidelines were ultimately calculated at an offense level of 19 and a criminal history category of III, which established an imprisonment range of 37-46 months.

Mr. Osorto objected to the use of his 2018 Florida conviction to increase both his offense level on the vertical axis of the sentencing table and his criminal history category on the horizontal axis. He asserted that it violated his constitutional right to equal protection of the law because the compound use of his prior conviction—particularly on the vertical axis—applies to noncitizens but not citizens. The district court overruled his objection and sentenced him to 37 months' imprisonment, to be followed by three years of supervised release, and a $ 100 special assessment.

2. On appeal, Mr. Osorto challenged the constitutionality of § 2L1.2(b)(3), arguing that the duplicative, or compound, use of his 2018 criminal conviction to increase both his offense level and his criminal history treated noncitizens differently from citizens and violated his right to equal protection of the law. Moreover, Mr. Osorto asserted that *Hampton* provided the proper analytical framework to evaluate the constitutionality of § 2L1.2(b)(3) because the Sentencing Commission, rather than Congress or the President, promulgated the guideline.

The Eleventh Circuit applied *Hampton* but rejected Mr. Osorto's arguments and affirmed his sentence. *United States v. Osorto*, 995 F.3d 801 (11th Cir. 2021) (Appendix A). Judge Martin filed an opinion concurring in part and dissenting in

part. *Id.* at 824-28 (Martin, J., concurring in part and dissenting in part).[2]

REASONS FOR GRANTING THE WRIT

The *Osorto* majority's "approach to *Hampton* undermines the very framework its ruling instructed [courts] to follow." 995 F.3d at 828 (Martin, J., concurring in part and dissenting in part). For Mr. Osorto and approximately 3,000 similarly situated noncitizens every year, "that error leads to the preservation of a Sentencing Guideline that . . . unconstitutionally deprives noncitizens of their liberty." *Id.*

I. The Eleventh Circuit's ruling is wrong.

To be sure, "the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government." *Mathews v. Diaz*, 426 U.S. 67, 81 (1976). But "the federal power over noncitizens is [not] so plenary that any agent of the National Government may arbitrarily subject all . . . noncitizens to different substantive rules from those applied to citizens." *Hampton*, 426 U.S. at 101. Rather, before a deprivation of liberty occurs, "due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve" an "overriding national

[2] In the Eleventh Circuit, Mr. Osorto also challenged the constitutionality of § 2L1.2(b)(2). He acknowledged, and both the majority and concurring judges agreed, that the prior circuit precedent of *United States v. Adeleke*, 968 F.2d 1159, 1160-61 (11th Cir. 1992), bound the panel and foreclosed his challenge to § 2L1.2(b)(2). *Osorto*, 995 F.3d at 808, 812; *id.* at 824 (Martin, J., concurring in part and dissenting in part). In *Adeleke*, the Eleventh Circuit did not apply the *Hampton* analysis to an older version of § 2L1.2(b)(2). *See Osorto*, 995 F.3d at 812. But, the *Osorto* majority held, even if it were not bound by *Adeleke*, it would uphold § 2L1.2(b)(2) as constitutional under *Hampton*. *See Osorto*, 995 F.3d at 812. Mr. Osorto does not challenge § 2L1.2(b)(2) in this Petition.

interest" that justifies the otherwise discriminatory rule. *Id.* at 103. Accordingly, to satisfy due process under the Fifth Amendment, the government must show that the rule—here, § 2L1.2(b)(3)—was "expressly mandated by the Congress or the President," enabling the federal courts to "presume that any interest which might rationally be served by the rule did in fact give rise to its adoption." *Id.* Alternatively, the government may show that "the agency which promulgates the rule has direct responsibility for fostering or protecting that [overriding national] interest," in which case the federal courts may "reasonably . . . presume[ ] that the asserted interest was the actual predicate for the rule." *Id.* "That presumption would, of course, be fortified by an appropriate statement of reasons identifying the relevant interest." *Id.*

A. Neither Congress nor the President expressly mandated § 2L1.2(b)(3), and any post-2016 acquiescence to § 2L1.2(b)(3) does not serve as an express statutory or Presidential command.

It is undisputed that neither Congress nor the President required § 2L1.2(b)(3). *Osorto*, 995 F.3d at 814; *see also id.* at 825 (Martin, J., concurring in part and dissenting in part) ("Plainly, with § 2L1.2(b)(3), the Commission did not implement a rule or policy expressly mandated or approved by Congress or the President."). The lack of an express directive from Congress or the President to promulgate § 2L1.2(b)(3) should end this part of the inquiry. But to the extent that Congress may have, at best, acquiesced in § 2L1.2(b)(3) following the 2016 amendment, *see Osorto*, 995 F.3d at 815, *Hampton* requires judicial review of the extent to which Congress or the President has considered § 2L1.2(b)(3) and the nature

of the authority specifically delegated to the Sentencing Commission. *Hampton*, 426 U.S. at 105.

The *Osorto* majority relied on "Congress's enactment and amendment of § 1326(b)" as evidence "that Congress has approved of the national interest that [§ 2L1.2(b)(3)] promotes." *Osorto*, 995 F.3d at 816. According to the *Osorto* majority, § 1326(b) represents "Congress's approval of a national policy to deter noncitizens from illegally reentering the United States after a criminal conviction." *Id.* Then the majority "construe[d] the congressional policy judgment behind § 1326(b)" as "deterrence of those who have been deported and who have other convictions[ ] from illegally reentering the United States again." *Id.* at 817. But as the dissent pointed out, the majority read § 1326(b), *Hampton*, and Congressional expressions of policy preferences too broadly. *Id.* (Martin, J., concurring in part and dissenting in part) at 825 ("this reads both § 1326(b) and *Hampton* too broadly"), 826 (indicating that the majority "read Congressional expressions of policy preferences too broadly").

Subsection (b) of § 1326 is titled "Criminal penalties for reentry of certain removed noncitizens." 8 U.S.C. § 1326(b). The subsection describes four categories of noncitizens subject to ten- or twenty-year terms of imprisonment, rather than the two years that otherwise applies to noncitizens reentering the United States after removal in § 1326(a). *See* 8 U.S.C. § 1326(b)(1)-(4). Mr. Osorto fell within the second category, the text of which states:

> Notwithstanding subsection (a), in the case of any noncitizen described in such subsection—

> . . .
> (2) whose removal was subsequent to a conviction for commission of an aggravated felony, such noncitizen shall be fined under such title, imprisoned not more than 20 years, or both[.]

8 U.S.C. § 1326(b)(2). Similarly, subsection (1) prescribes a ten-year penalty for a noncitizen "whose removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony)." 8 U.S.C. § 1326(b)(1).[3]

As such, the plain text of § 1326(b) applies only to noncitizens "whose removal was *subsequent*" to certain convictions. 8 U.S.C. § 1326(b)(1)-(2) (emphasis added). As Judge Martin pointed out, § 1326(b)(1)-(2) does not explicitly endorse the specific policy embodied by § 2L1.2(b)(3)—which increases penalties for noncitizens whose first removal was *before* a conviction. *Osorto*, 995 F.3d at 826 (Martin, J., concurring in part and dissenting in part). Moreover, "*Hampton* directs us not to construe indications of endorsement by Congress or the President too broadly." *Id.* *Hampton* rejected "a number of [ ] indicia of Congress's endorsement" of the agency's rule, including that the Commission "duly reported" the rule to Congress, which never repudiated it. *Id.* (cleaned up). And *Hampton* required more than reliance on "general policy preferences" expressed by Congress and the President to constitute

[3] The other two categories do not refer to a noncitizen's prior convictions. Subsection (3) applies to noncitizens who have been excluded from the United States pursuant to 8 U.S.C. § 1225(c) because they were excludable under 8 U.S.C. § 1182(a)(3)(B) or removed pursuant to the provisions of subchapter V. 8 U.S.C. § 1326(b)(3). Subsection (4) applies to noncitizens who were removed pursuant to 8 U.S.C. § 1231(a)(4)(B). 8 U.S.C. § 1326(b)(4).

endorsement of the specific rule adopted by the agency. *Id.*

As Judge Martin correctly summarized, "*Hampton* limits the extent to which federal agencies should receive extremely deferential rational basis review when it comes to alienage discrimination." *Id.* By "read[ing] Congressional expressions of policy preferences too broadly," the *Osorto* majority "undermine[d] both the constitutional rights of noncitizens and the exclusive authority of Congress and the President to decide when differential treatment of noncitizens is truly necessary." *Id.*

In addition, *Hampton* requires more than reliance on "general policy preferences," and the *Osorto* majority erred by reading a general deterrence policy into § 1326(b). *See id.* First, "such a policy is not expressly addressed in § 1326(b)." *Id.* "Indeed, even the Sentencing Commission noted that § 1326(b) supplied the rationale for § 2L1.2(b)(2) but not § 2L1.2(b)(3)." *Id.* (citing USSG am. 802, Reason for Amendment). Second, absent something more direct, the *Osorto* majority erred by "presum[ing] that Congress thought that something so remote from an actual unlawful reentry had a deterrent effect." *Id.* at 827. In sum, Congress neither explicitly mandated nor endorsed the differential treatment of noncitizens in § 2L1.2(b)(3).

B. The Sentencing Commission has not justified the deprivation of noncitizens' liberty caused by § 2L1.2(b)(3) with an overriding national interest properly within its business.

Hampton's second query asks whether the federal agency promulgating the rule "has direct responsibility for fostering or protecting" the "overriding national

interest" asserted by the federal government as justification for a discriminatory rule. 426 U.S. at 103; *see also id.* at 114-16. If so, then "it may reasonably be presumed that the asserted interest was the actual predicate for the rule[,]" especially where evidenced by "an appropriate statement of reasons identifying the relevant interest." *Id.* at 103.

In *Hampton*, this Court observed that the Civil Service Commission had no responsibility for foreign affairs, treaty negotiations, establishment of immigration quotas or conditions of entry, or naturalization policies. 426 U.S. at 114. Rather, the Civil Service Commission performed "a limited and specific function"—promoting an efficient federal service. *Id.* Accordingly, the only "overriding national interest" asserted by the federal government that was "properly the business" of the Civil Service Commission was "the administrative desirability of having one simple rule excluding all noncitizens when it is manifest that citizenship is an appropriate and legitimate requirement for some important and sensitive positions." *Id.* at 115; *see also id.* at 104 (describing the government's asserted interest as "need[ing] . . . undivided loyalty in certain sensitive positions [that] clearly justifies a citizenship requirement in at least some parts of the federal service, and . . . the broad exclusion serves the valid administrative purpose of avoiding the trouble and expense of classifying those positions which properly belong in executive or sensitive categories").

The *Hampton* Court swiftly rejected this "administrative convenience" justification for the Civil Service Commission's discriminatory rule for three reasons.

Id. at 115. First, nothing indicated that the agency "actually made any considered evaluation of the relative desirability of a simple exclusionary rule on the one hand, or the value to the service of enlarging the pool of eligible employees on the other." *Id.* Second, no reasonable inference could be drawn that the claimed administrative burden would be a particularly onerous task. *Id.* Third, and most significantly, this Court emphasized "the quality of the interest at stake," and identified "the public interest in avoiding the wholesale deprivation of employment opportunities caused by the Commission's indiscriminate policy." *Id.* This public interest outweighed the "hypothetical justification" for the rule, and this Court rejected administrative convenience as a justification for the discriminatory rule. *Id.* at 115-16.

The *Osorto* majority identified the Sentencing Commission's stated rationale for § 2L1.2(b)(3) as "provid[ing] for incremental punishment to reflect the varying levels of culpability and risk of recidivism reflected in illegal reentry defendants' prior convictions." 995 F.3d at 817 (quoting USSG am. 802, Reason for Amendment). And the majority concluded that "the promulgation of guidelines that reasonably could be expected to have the effect of deterring illegal reentries of those who have committed other crimes is entirely consistent with the Sentencing Commission's duties and responsibilities." *Id.* at 817-18.

But, "[i]n the absence of a justification that recognizes the discriminatory effect of § 2L1.2(b)(3) and explains why differential treatment is necessary to advance an 'overriding national interest,'" the Sentencing Commission has not met its burden under *Hampton*. *Id.* at 828 (Martin, J., concurring in part and dissenting in part).

As Judge Martin points out, even if § 2L1.2(b)(3) advances the Sentencing Commission's broader interest in reflecting the seriousness of certain offenses or risk of recidivism, the Commission has not explained why those interests have not been adequately addressed by other means that apply to citizens and noncitizens alike.[4] *Id.* at 827. "For example, the sentences that already apply to those underlying offenses or the inclusion of those offenses in a defendant's criminal history calculation may already reflect the seriousness of the offense and the risk of recidivism." *Id.*

Nor does the record show that the Sentencing Commission made a considered evaluation of "the effectiveness of harsher sentences as a deterrent or the values or goals that varying sentences help to promote," as *Hampton* requires. *Id.* at 827; *see also Hampton*, 426 U.S. at 115 (looking for indications that the agency "actually made any considered evaluation of the relative desirability of a simple exclusionary rule on the one hand, or the value to the service of enlarging the pool of eligible employees on the other"). Moreover, while § 2L1.2(b)(2) "acts to deter unlawful reentry, . . . [t]here is no similar immigration-related deterrence value, at least none expressly endorsed by Congress, that animates § 2L1.2(b)(3)." *Osorto*, 995 F.3d at 827 (Martin, J., concurring in part and dissenting in part). Finally, as *Hampton* instructs, the

[4] In addition, the Sentencing Commission's rationale may be within its purview as it pertains to punishment generally, but it does not explain why differential treatment is necessary to advance an overriding national interest. And while lengthening a term of imprisonment to punish a recidivist may theoretically deter someone from committing the same type of crime, here § 2L1.2(b)(3) does not use a prior reentry to deter a future reentry. All it does is lengthen the term of imprisonment for the illegal reentry that already occurred based on a subsequent conviction for something other than illegal reentry.

"quality of the interest at stake" matters, and the *Osorto* majority "never explains why the need to reflect culpability or risk of recidivism outweighs the right of noncitizens to equal treatment, especially given the weight of the liberty interest at stake: freedom from imprisonment." *Id.* at 828 (cleaned up).

As in *Hampton*, the agency here—the Sentencing Commission—has not properly justified the disparate treatment of noncitizens in § 2L1.2(b)(3) and has not satisfied procedural due process. The guideline does not receive deferential rational-basis review and cannot survive an equal-protection analysis. The Eleventh Circuit's decision below is wrong.

II. The question presented is extremely important.

In recent years, § 2L1.2(b)(3) has applied to around 3,000 noncitizens each year. Specifically, 2,836 noncitizens received a sentencing enhancement under § 2L1.2(b)(3) in fiscal year 2020.[5] The previous year, the number of noncitizens receiving enhancements under § 2L1.2(b)(3) was even higher at 3,474.[6] That amounts to 14% of defendants sentenced under § 2L1.2.[7] *See supra* n.5 (noting that

[5] *See* U.S. Sent'g Comm'n, *Use of Guidelines and Specific Offense Characteristics, Offender Based, FY2020* at 56 (available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/Use_of_SOC_Offender_Based.pdf) (last accessed Sept. 16, 2021).

[6] *See* U.S. Sent'g Comm'n, *Use of Guidelines and Specific Offense Characteristics, Offender Based, FY2019* at 58 (available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/2019/Use_of_SOC_Offender_Based.pdf) (last accessed Sept. 16, 2021).

[7] Of the 2,812 defendants receiving enhancements in fiscal year 2020, 370 received a ten-level enhancement under § 2L1.2(b)(3)(A); 912 received an eight-level enhancement under § 2L1.2(b)(3)(B); 282 received a six-level enhancement under § 2L1.2(b)(3)(C); 1248 received a four-level enhancement under § 2L1.2(b)(3)(D); and 3 received a two-level enhancement under § 2L1.2(b)(3)(E). *See supra* n.5.

§ 2L1.2 applied to 19,563 defendants in fiscal year 2020).

Thus, approximately 3,000 noncitizens see their offense level increased on the vertical axis of the Sentencing Table *and* their criminal history score increased on the horizontal axis by a Sentencing Guideline--§ 2L1.2(b)(3)—that applies only to them. Simply put, these 3,000 people face a greater loss of liberty under a guideline that can never apply to a citizen. The "weight of the liberty interest at stake: 'freedom from imprisonment'" cannot be stronger. *Osorto*, 995 F.3d at 828 (Martin, J., concurring in part and dissenting in part) (quoting *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001)); *see also Hampton*, 426 U.S. at 115 (minding the significance of the "quality of the interest at stake"). The question presented is important.

In addition, because these noncitizens are imprisoned for longer terms before immigration authorities reinstate their removal orders, American taxpayers foot the bill for increased incarceration costs. At $107.85 per day per federal inmate in a federal facility, those 3,000 inmates collectively cost taxpayers $ 323,550 each additional day they are imprisoned under § 2L1.2(b)(3) before they are deported to their countries of origin. *See* Annual Determination of Average Cost of Incarceration Fee (COIF), 86 Fed. Reg. 49,060 (Sept. 1, 2021).

Osorto is also problematic as it misinterprets the roles the three branches of government must maintain in the area of immigration. Questions relating to immigration and the relationship between the United States and noncitizen visitors "are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary." *Mathews*, 426 U.S. at 81-82; *see also Osorto*, 995

F.3d at 810-11. Indeed, the federal government's "power over aliens is of a political character and therefore subject only to narrow judicial review." *Hampton*, 426 U.S. at 101 n.21; *see also Mathews*, 426 U.S. at 81-82. But crucially, the judiciary was called upon to review a rule promulgated by a federal agency, not Congress or the President. *Osorto*, 995 F.3d at 811. So "if [the courts] read Congressional expressions of policy preferences too broadly, as [the *Osorto* majority does, they] undermine . . . the exclusive authority of Congress and the President to decide when differential treatment of noncitizens is truly necessary." *Osorto*, 995 F.3d at 826 (Martin, J., concurring in part and dissenting in part). Reading too much into § 1326(b) to uphold the constitutionality of § 2L1.2(b)(3) risks inserting the judiciary where it does not belong.

III. This case presents an excellent vehicle to resolve the question presented.

Mr. Osorto preserved this issue in the district and appellate courts. After briefing and oral argument in the Eleventh Circuit, the Court of Appeals issued a 2-to-1 published opinion with one judge writing a dissent on the question presented. Mr. Osorto's case is an excellent vehicle to resolve the constitutionality of § 2L1.2(b)(3).

CONCLUSION

For the foregoing reasons, this Court should grant Mr. Osorto's petition for writ of certiorari.

Respectfully submitted,

A. Fitzgerald Hall, Esq.
Federal Defender

/s/ Lynn Palmer Bailey
Lynn Palmer Bailey, Esq.
Florida Bar No. 0605751
Federal Defender's Office
200 W. Forsyth Street, Suite 1240
Jacksonville, FL 32202
Telephone: (904) 232-3039
E-mail: lynn_bailey@fd.org
Counsel of Record for Petitioner