No. _____

IN THE SUPREME COURT OF THE UNITED STATES

EDUVIGES AYALA-BELLO & WALTER VELEZ-GONZALEZ,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Kara Hartzler
Counsel of record
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, California 92101
Telephone: (619) 234-8467

Keith H. Rutman, Esq.
Attorney at Law
501 West Broadway, Suite 1650
San Diego, CA. 92101-3541
Telephone: 619-237-9072

Attorneys for Petitioners

QUESTION PRESENTED

Along the U.S./Mexico border, the Department of Justice has criminally prosecuted thousands of noncitizens for illegal entry, a petty offense that carries a maximum sentence of six months. But during their prosecutions, the DOJ treats these individuals differently than U.S. citizens charged with similarly-serious crimes. Citizens receive citations, are not arrested, and often obtain an alternative resolution. Noncitizens are arrested, incarcerated, and offered no option other than a conviction and jail time.

Ms. Ayala-Bello and Mr. Velez-Gonzalez challenged this agency policy on equal protection grounds, arguing that strict scrutiny applies to disparate treatment on the basis of alienage. While their case was pending, the Eleventh Circuit relied on this Court's decision in *Hampton v. Wong*, 426 U.S. 88 (1976), to hold that rational basis does not necessarily apply to citizenship-based distinctions created by *agencies*, rather than by the President or Congress. Six days later the Ninth Circuit disagreed, holding that *any* federal policy that treats citizens and noncitizens differently receives rational basis review.

The question presented is:

Whether agency policies that distinguish on the basis of citizenship automatically receive rational basis review.

PARTIES, RELATED PROCEEDINGS, AND RULE 29.6 STATEMENT

The parties to the proceeding below were Petitioners Eduviges Ayala-Bello and Walter Velez-Gonzalez and the United States. There are no nongovernmental corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

All proceedings directly related to the case, per Rule 14.1(b)(iii), are as follows:

- *United States v. Ayala-Bello*, U.S. District Court for the Southern District of California, Order issued, September 25, 2019.
- *United States v. Ayala-Bello*, No. 19-50366, U.S. Court of Appeals for the Ninth Circuit. Opinion issued April 26, 2021.
- *United States v. Ayala-Bello*, No. 19-50366, U.S. Court of Appeals for the Ninth Circuit. Order denying petition for panel rehearing and rehearing en banc. July 8, 2021.

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Federal Cases **Page(s)**

Federal Statutes

Federal Rules

IN THE SUPREME COURT OF THE UNITED STATES

EDUVIGES AYALA-BELLO & WALTER VELEZ-GONZALEZ,
Petitioner,

- v. -

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Eduviges Ayala-Bello and Walter Velez-Gonzalez respectfully petition for a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit entered on July 8, 2021.

INTRODUCTION

In the Southern District of California, the Department of Justice has two separate "tracks" for prosecuting federal crimes. For petty offenses—defined as crimes with a maximum sentence of six months or less—the government issues a citation and sends a notice in the mail for the accused to appear at an informal hearing several months in the future. At this hearing (where no judge is even present), the prosecuting attorney usually offers an alternative resolution that avoids a conviction and any jail time.

But for more serious crimes, the DOJ follows the traditional path typically associated with criminal offenses—it arrests the individual, formally files charges

against them, and incarcerates them. On this track, the DOJ rarely offers an alternative resolution, and the individual nearly always ends up with a conviction and jail time.

But the DOJ created an exception to this system. Even though first-time illegal entry under 8 U.S.C. § 1325 is a petty offense, the DOJ puts everyone it charges with this crime in the more serious track—arresting them, shackling them, jailing them, opposing bond, and refusing to offer them any alternative resolution. It does so even though statistics show that asylum seekers like Ms. Ayala-Bello and Mr. Velez-Gonzalez are *more* likely to show up for their hearings than citizens charged with a petty offense. In short, the DOJ has an open policy of treating noncitizens charged with § 1325 worse than citizens charged with an equally serious crime.

To determine whether this policy violates equal protection, Ms. Ayala-Bello and Mr. Velez-Gonzalez asked the Ninth Circuit to apply strict scrutiny. Forty-five years ago, this Court held in *Hampton v. Wong*, 426 U.S. 88 (1976), that while rational basis review applies to citizenship-based distinctions created by Congress or the President, the same is not necessarily true for distinctions created by *administrative agencies*. Although the Eleventh Circuit recently followed *Hampton*, the Ninth Circuit ignored it, granting agencies the same broad deference to create citizenship-based distinctions as the executive and legislative branches. Because this creates a circuit split, defies precedent, and strips courts of any meaningful oversight of the administrative state, the Court should grant certiorari.

OPINION BELOW

The Court of Appeals affirmed Ms. Ayala-Bello's and Mr. Velez-Gonzalez's convictions for illegal entry under 8 U.S.C. § 1325. *See United States v. Ayala-Bello,* 955 F.3d 710 (9th Cir. 2021) (attached here as Appendix A). Ms. Ayala-Bello and Mr. Velez-Gonzalez then petitioned for panel rehearing and rehearing en banc. On July 8, 2021, the panel denied their petition for panel rehearing, and the full court declined to hear the matter en banc. *See* Appendix B.

JURISDICTION

On April 26, 2021, the Court of Appeals affirmed Ms. Ayala-Bello's and Mr. Velez-Gonzalez's convictions. *See* Appendix A. On July 8, 2021, the Court of Appeals denied rehearing. *See* Appendix B. The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Due Process Clause of the Fifth Amendment of the United States Constitution states, in part:

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

Section 1325(a) of Title 8 states:

> Any alien who (1) enters or attempts to enter the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) attempts to enter or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall, for the first commission of any such offense, be fined under title 18 or imprisoned not more than 6 months, or both, and, for a subsequent commission of any such offense, be fined under title 18, or imprisoned not more than 2 years, or both.

STATEMENT OF THE CASE

Eduwiges Ayala-Bello is an indigenous woman who worked as a nurse in Guerrero, Mexico. Her common-law husband, Walter German Velez-Gonzalez, is also indigenous and worked for the Mexican government on various agricultural development projects. Both Ms. Ayala-Bello and Mr. Velez-Gonzalez were repeatedly attacked by individuals associated with drug traffickers who believed that Mr. Velez-Gonzalez's agricultural projects interfered with the cultivation of poppies. As a result of these attacks, Ms. Ayala-Bello and Mr. Velez-Gonzalez fled to the United States and crossed the border in February 2019 seeking asylum.

Agents arrested Ms. Ayala-Bello and Mr. Velez-Gonzalez several miles north of the Mexican border. After their arrest, agents took them to a Border Patrol station, where they were crammed into freezing cells, given little food and water, and forced to sleep on a concrete floor. Two days later, they were taken to court in the same clothes they were arrested in, without having the chance to bathe, brush their teeth, or use any hygienic products.

Before court, Ms. Ayala-Bello and Mr. Velez-Gonzalez met with their appointed attorneys while shackled in a converted parking garage. The prosecutor never offered Ms. Ayala-Bello and Mr. Velez-Gonzalez a fine or other alternative disposition that would have allowed them to avoid a conviction. Instead, their attorneys advised them that their only options were to plead guilty or go to trial.

A judge granted Ms. Ayala-Bello and Mr. Velez-Gonzalez bond, and they took their cases to trial. Before trial, their attorneys filed a motion to dismiss the charge

on the basis that their prosecutions violated equal protection. This motion pointed out that while § 1325 has a maximum sentence of six months and is thus a federal petty offense, *see* 18 U.S.C. § 19, it is the *only* petty offense in the Southern District of California where the accused is arrested, detained, shackled, convicted, and forced to serve jail time. By contrast, thousands of U.S. citizens charged with petty offenses in the same district are cited, released, and able to resolve their charges through a dismissal or other alternative disposition.

Ms. Ayala-Bello and Mr. Velez-Gonzalez also argued that this policy could not be attributed to any concerns that they would fail to appear. They submitted uncontested statistics showing that § 1325 defendants were nearly 10% *more likely* to appear for court than citizens charged with petty offenses. Ms. Ayala-Bello's and Mr. Velez-Gonzalez's own attendance record supported these statistics—after their release on bond, Ms. Ayala-Bello and Mr. Velez-Gonzalez faithfully appeared at eight of their nine hearings, missing only one hearing as a result of injuries they suffered in a car accident on their way to that hearing. Because the DOJ's citizenship-based charging policy was subject to strict scrutiny, Ms. Ayala-Bello and Mr. Velez-Gonzalez contended that it could not show a compelling reason for treating them differently than citizens prosecuted for equally-serious crimes.

The district court denied the equal protection motion. While admitting that alienage is an element of § 1325, it held that the decision to treat Ms. Ayala-Bello and Mr. Velez-Gonzalez worse than similarly-charged citizens fell within the DOJ's

discretion. At their bench trial several months later, the district court then found them guilty and sentenced both to time served. They appealed to the Ninth Circuit.

In a published opinion, a split panel of the Ninth Circuit affirmed the convictions—albeit for different reasons. *See United States v. Ayala-Bello*, 995 F.3d 710, 713 (9th Cir. 2021) (Appendix A). The majority explained that the decision of whether to resolve a petty offense by "issu[ing] a citation instead of making an arrest" is left up to the DOJ. *Id.* at 713. But to the extent the DOJ "makes docketing assignments based on the defendant's citizenship status," the majority held that it would still review this policy "under the rational basis test." *Id.* at 715. The majority applied a blanket rule that "[f]ederal classifications based on alienage receive rational basis review," making no distinction between policies made by the Congress or the President and policies made by agency officials. *Id.* (citing *Mathews v. Diaz*, 426 U.S. 67, 83 (1976)). *See also id.* ("The policy at issue is federal, so at most the rational basis test would apply to docketing assignments based on alienage."). Finding a rational basis for the DOJ's policy of treating noncitizens like Ms. Ayala-Bello and Mr. Velez-Gonzalez differently than citizens charged with petty offenses, the majority affirmed. *Id.* at 715–16.

In a concurrence, Judge Watford disagreed with the majority's conclusion that "*all* federal laws that classify on the basis of alienage are exempt from heightened scrutiny." *Id.* at 717 (emphasis added). He noted that while "[i]t is true that in *Mathews v. Diaz*, [426 U.S. 67 (1976)], the Supreme Court suggested that a lower tier of scrutiny applies to federal distinctions between citizens and non-

citizens," that case "concerned non-citizens' eligibility for Medicare benefits, not the process they are afforded as part of a criminal prosecution." *Id.* Nevertheless, Judge Watford concurred because he would have applied rational basis review for reasons not relating to Ms. Ayala-Bello's and Mr. Velez-Gonzalez's citizenship. *See id.*

Ms. Ayala-Bello and Mr. Velez-Gonzalez filed a petition for panel rehearing and rehearing en banc. They argued that the majority overlooked a key exception to *Mathews v. Diaz* for alienage-based classifications created by administrative agencies set forth in *Hampton*. In fact, *Hampton* expressly rejected the government's "extreme position"—that "federal power over aliens is so plenary that *any agent* of the National Government" may create classifications distinguishing between citizens and noncitizens. *Hampton*, 426 U.S. at 101–02 (emphasis added). They also pointed out that the week before the Ninth Circuit issued its decision, the Eleventh Circuit had relied on *Hampton* to determine whether to apply strict scrutiny or rational basis to a provision in the United States Sentencing Guidelines.

Nevertheless, the panel denied Ms. Ayala-Bello and Mr. Velez-Gonzalez's petition for panel rehearing, and the full court declined to hear the matter en banc. This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

I.

The Ninth Circuit's Holding Conflicts With This Court's and the Eleventh Circuit's Precedent Mandating That Agency-Created Citizenship Distinctions Do Not Automatically Receive Rational Basis Review.

The Court should grant certiorari because the Ninth Circuit has decided an important federal question in a way that conflicts with a relevant decision of this Court and the Eleventh Circuit. *See* Supreme Court Rule 10(a) & (c).

In the seminal case of *Mathews v. Diaz*, this Court applied rational basis to a federal law that denied Medicare benefits to some noncitizens, explaining that "Congress regularly makes rules that would be unacceptable if applied to citizens." 426 U.S. 67, 80 (1976). But on the same day, the Court delivered its opinion in *Hampton*, 426 U.S. 88, which struck down an *agency* rule preventing noncitizens from holding federal employment positions. While recognizing the broad deference courts owe the President and Congress on immigration issues, *Hampton* rejected the government's "extreme position" that "federal power over aliens is so plenary that any agent of the National Government" may create classifications distinguishing between citizens and noncitizens. *Hampton*, 426 U.S. at 101–02. Without direct oversight from the executive and legislative branches, *Hampton* explained, such agency-created rules may "arbitrarily" deprive a "discrete class of persons of an interest in liberty on a wholesale basis." *Id.* at 101, 103.

To determine the level of deference afforded federal citizenship-based distinctions, *Hampton* held that a court must first consider whether the policy

under review was "made by Congress and the President." *Id.* at 105. If it was, rational basis automatically applies. But if the policy came from an agency, the court does not necessarily apply the lowest level of deference—instead it considers whether the agency's policy serves an "overriding national interest," whether the agency has "direct responsibility for fostering or protecting that interest," and whether "the asserted interest was the actual predicate for the rule." *Id.* at 103. Applying these inquiries, *Hampton* struck down the employment rule, concluding that the agency's purported interests did not "provide an acceptable rationalization" and were not "justified by reasons which are properly the concern of that agency." *Id.* at 116.

Recently, the Eleventh Circuit applied this framework in a criminal context. *See United States v. Osorto*, 995 F.3d 801 (11th Cir. 2021). There, a defendant convicted of the related offense of illegal reentry under 8 U.S.C. § 1326 argued that the sentencing guidelines created by a federal agency (the U.S. Sentencing Commission) "discriminate against noncitizens by counting their prior convictions twice—once in the offense level and a second time in the Guidelines' criminal-history calculation." *Id.* at 808. While the panel split over which level of scrutiny ultimately applied, both the majority and the dissent agreed that *Hampton* controlled—i.e., that in analyzing equal protection challenges to agency policies not expressly ordered by Congress or the President, rational basis applies only if the rule protects a national interest, the agency had direct responsibility for that interest, and the agency's reasons motivated the policy. *See id.* at 810–20, 24–27. So

while the panel disagreed on whether these factors ultimately required strict scrutiny, none of the judges doubted that "*Hampton* limits the extent to which federal agencies should receive extremely deferential rational basis review when it comes to alienage discrimination." *Id.* at 826 (Martin, J., dissenting).

But six days later, the Ninth Circuit blindly applied rational basis review to an agency-created policy without first considering whether the *Hampton* factors permitted it. Like the Eleventh Circuit, the Ninth Circuit confronted an equal protection challenge to a citizenship-based distinction in a criminal prosecution. And like the Eleventh Circuit, that citizenship-based distinction was made—not by the President or Congress—but by a federal agency (the Department of Justice). But unlike the Eleventh Circuit, the Ninth Circuit never applied the *Hampton* factors, instead making the blanket statement that "[f]ederal classifications based on alienage receive rational basis review." *Ayala-Bello*, 995 F.3d at 715. Even after Ms. Ayala-Bello and Mr. Velez-Gonzalez filed a petition for panel and en banc rehearing pointing out that this holding contradicted *Hampton* and created an intercircuit split with the Eleventh Circuit, *see* Appendix B, the Ninth Circuit declined to amend its opinion or address the issue in any way.

The Ninth Circuit's refusal to align its standard of review with this Court's and the Eleventh Circuit's precedent will create national inconsistency and confusion in the nation's equal protection jurisprudence. In cases reviewing agency policy, the Eleventh Circuit (and presumably the remaining ten circuits that abide by *Hampton*) do not afford agencies the same reflexive deference they give Congress

and the President. Instead, these eleven circuits will view the agency's rules with a more critical eye, requiring that their citizenship-based distinctions either emanate from a direct executive or legislative mandate or else were "actually intended" to serve an "overriding national interest." *Hampton*, 426 U.S. at 103. By contrast, the Ninth Circuit will take a hands-off approach to reviewing agency policies by applying rational basis—a level of scrutiny that "almost all laws" can pass. *D.C. v. Heller*, 554 U.S. 570, 629 n.27 (2008). *See also F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 323 n.3 (1993) (Stevens, J., concurring) (noting that it is "difficult to imagine" a classification that would not pass rational basis review); *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 881 (1985) (recognizing that rational basis is "not difficult to establish"). These diverging levels of scrutiny virtually guarantee that judicial review of the same agency policies will produce inconsistent and contradicting outcomes.

II.

This Case Raises Important Questions of Deference to Agency Policies.

The Court should grant certiorari in this case to consider critical questions surrounding the appropriate level of judicial deference to agency policies. In recent years, members of this Court have expressed grave concerns over cases that grant federal agencies a highly deferential standard of review in their interpretation of statutes. *See, e.g., Gutierrez-Brizuela v. Lynch,* 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) (calling for the overturning of *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and *National Cable*

& Telecommunications Assn. v. Brand X Internet Services, 545 U.S. 967 (2005)). Similar concerns have arisen over deference to an agency's interpretation of its own regulations. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2425 (2019) (Gorsuch, J., concurring, joined by Thomas, J.; Kavanaugh, J.; and Alito, J.) (disagreeing with decision to uphold *Auer v. Robbins*, 519 U.S. 452 (1997)). As Justice Gorsuch has explained, these deferential standards "permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design." *Gutierrez-Brizuela*, 834 F.3d at 1149.

The Ninth Circuit's flouting of *Hampton* provides yet another example of compelled deference to unelected agency bureaucrats. Yet here it is even worse. Unlike deference to an agency's interpretation of a Congressionally-enacted law (*Chevron*) or a written regulation (*Auer*), the opinion here requires judicial deference to an agency's *unwritten policy*—one subject to the whims of lower-level federal employees. Not only that, the Ninth Circuit's rejection of *Hampton* means that courts must defer to agency policies that were not direct mandates from Congress or the President. And to cap it off, this deference must be extended to *constitutional issues* such as equal protection, which fall squarely within this Court's scope of judicial review. In essence, the Ninth Circuit dispenses with any notion of separation of powers by insulating agency policies from judicial review, leaving agencies free to enact unconstitutional policies that are dangerously unmoored from the elected branches of government.

This agency free-for-all could permit disparate treatment that both benefits *and* disfavors citizens. For instance, the DOJ's policy in this case treated citizens charged with a petty offense more favorably than noncitizens charged with the same. But it is possible to imagine agency policies that might favor *noncitizens* over citizens. For instance, the Department of Labor could issue more stringent wage and workplace protections for undocumented workers who are subject to greater employer exploitation, or the Department of Health and Human Services could offer increased benefits to children whose parents have been deported, or the IRS could grant tax exemptions to individuals on work visas—the list goes on and on. In each of these situations, the government could point to a rational basis for its citizenship-based classifications that would effectively insulate it from judicial review on a constitutional issue.

Furthermore, the criminal justice system is not well served by the DOJ's creation of a two-tiered track for citizens and noncitizens. For instance, under the Ninth Circuit's holding, nothing would prevent the DOJ from arresting all noncitizens charged with a federal crime while allowing all citizens to remain free (or vice versa). Inevitably, more of the arrestees would plead guilty due to the coercive effect of incarceration, while the non-arrestees would have an incentive to take their cases to trial to delay any prison time. Prosecutors could also charge arrestees more harshly, refuse to offer them plea bargains, recommend higher sentences, and treat them worse than non-arrestees in every respect, regardless of the defendant's individual characteristics. And as the Ninth Circuit itself admitted,

the DOJ could easily justify any and all of these policies by citing to the executive's plenary power over immigration and relying on "rational speculation unsupported by evidence or empirical data." *Ayala-Bello*, 995 F.3d at 716 n.3. In other words, there would be nothing to stop the DOJ from creating a "separate but unequal" criminal justice system based on one's citizenship. Because this unprecedented level of deference to agency policy would raise serious separation-of-powers concerns, the Court should grant certiorari.

III.

This Case Provides an Ideal Vehicle to Resolve the Issue.

This case presents a simple, clean vehicle to rein in the Ninth Circuit's expansive deference to agency policies not mandated by Congress or the President. At every stage of the proceedings, Ms. Ayala-Bello and Mr. Velez-Gonzalez preserved their challenge to the DOJ's policy and argued that rational basis did not apply. The Ninth Circuit disagreed. In their petition for panel and en banc rehearing, Ms. Ayala-Bello and Mr. Velez-Gonzalez then went one step further and asked the Ninth Circuit to amend its decision to avoid creating a circuit split with the Eleventh Circuit and an unlawful departure from this Court's decision in *Hampton.* The Ninth Circuit refused. Because Ms. Ayala-Bello and Mr. Velez-Gonzalez have given the Ninth Circuit every opportunity to conform its holding to controlling precedent regarding agency deference, this case provides a well-preserved record for the Court to take up the issue.

CONCLUSION

To curtail the Ninth Circuit's expansive deference to agency policies not created by Congress or the President, Ms. Ayala-Bello and Mr. Velez-Gonzalez respectfully request that the Court grant their petitions for a writ of certiorari.

Respectfully submitted,

Date: October 1, 2021

s/ Kara Hartzler
KARA HARTZLER
Counsel of Record
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, California 92101
Telephone: (619) 234-8467

Keith H. Rutman
Attorney at Law
501 West Broadway, Suite 1650
San Diego, CA. 92101-3541
Telephone: 619-237-9072

Attorneys for Petitioners