

No. \_\_\_\_\_

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**In The**  
**Supreme Court of the United States**

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**MARIO HERNANDEZ-GALARZA,**  
*Petitioner,*

v.

**UNITED STATES OF AMERICA,**  
*Respondent.*

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**On Petition for a Writ of Certiorari to the**  
**United States Court of Appeals**  
**for the Eleventh Circuit**

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**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTION PRESENTED

In 2016, the United States Sentencing Commission promulgated United States Sentencing Guideline (U.S.S.G.) § 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. The same conviction already increases the noncitizen's range of imprisonment by enhancing his criminal history score under U.S.S.G. § 4A1.1. Around 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 in cases involving 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 in *United States v. Osorio*, 995 F.3d 801 (11th Cir. 2021), *cert. denied sub nom. Osorio, Juan C. v. United States*, 2021 WL 5167891 (U.S. Nov. 8, 2021) (No. 21-5747), 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. Mr. Hernandez-Galarza and every other noncitizen facing sentencing under § 2L1.2(b)(3) in the Eleventh Circuit is now bound by *Osorio*.

The question presented is: whether U.S.S.G. § 2L1.2(b)(3) is unconstitutional.

## **LIST OF PARTIES**

Petitioner, Mario Hernandez-Galarza, 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.

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## **PETITION FOR A WRIT OF CERTIORARI**

The Petitioner, Mario Hernandez-Galarza, respectfully petitions for a writ of certiorari to review the Eleventh Circuit's judgment.

### **OPINION AND ORDER BELOW**

The Eleventh Circuit's opinion, *United States v. Hernandez-Galarza*, No. 20-13912, 2021 WL 3626785 (11th Cir. Aug. 17, 2021), is provided in the petition appendix ("Pet. App.") at 1A-3A. The Eleventh Circuit addressed this issue in its published opinion, *United States v. Osorio*, 995 F.3d 801 (11th Cir. 2021), *cert. denied sub nom. Osorio, Juan C. v. United States*, 2021 WL 5167891 (U.S. Nov. 8, 2021) (No. 21-5747), provided at Pet. App. 4A-39A.

### **STATEMENT OF JURISDICTION**

The Eleventh Circuit issued its decision on August 17, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Mr. Hernandez-Galarza has timely filed this petition pursuant to Supreme Court Rule 13.1.

### **RELEVANT CONSTITUTIONAL, STATUTORY, AND GUIDELINES 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.<sup>[1]</sup> 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)<sup>[1]</sup> 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 (U.S.S.G.) § 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.<sup>1</sup> 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 his or her first removal but before the immediate § 1326 sentencing. *See U.S.S.G. § 2L1.2, amend. 802 (eff. Nov. 1, 2016).* The Guidelines consider the same prior conviction separately by assessing criminal history points, which determine the criminal history category on the horizontal axis of the Sentencing Table, under U.S.S.G. § 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 noncitizenship, is “inherently suspect and subject to close judicial scrutiny” under the Fourteenth Amendment. *Graham v. Richardson*, 403 U.S. 365, 372 (1971). 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 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.

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<sup>1</sup> Mr. Hernandez-Galarza uses the term “noncitizen” as equivalent to the statutory term “alien.” *See Nasrallah v. Barr*, 140 S. Ct. 1683, 1689 n.2 (2020); *see also Pereira v. Sessions*, 138 S. Ct. 2015, 2110 n.1 (2018).

## STATEMENT OF THE CASE

1. Mr. Hernandez-Galarza is a native and citizen of Mexico. In 2014, after being convicted of state felony offenses in Florida, Mr. Hernandez-Galarza was removed by immigration authorities. He was later found to be voluntarily in the United States without the consent of the Attorney General or the Secretary of Homeland Security to reapply for admission to the United States. A federal grand jury indicted Mr. Hernandez-Galarza under 8 U.S.C. § 1326(a) and (b)(2). He pleaded guilty to that offense.

The district court determined Mr. Hernandez-Galarza's offense level by applying U.S.S.G. § 2L1.2. All but one of Mr. Hernandez-Galarza's prior convictions occurred before he was deported. Under § 2L1.2(b)(2)(C), he received 6 levels for three pre-deportation convictions; under § 2L1.2(b)(3)(B), he received 8 levels for one post-deportation conviction. He also received criminal history points under Chapter Four of the guidelines for these same pre- and post-deportation state convictions. Mr. Hernandez-Galarza's advisory guidelines were ultimately calculated at an offense level of 19 and a criminal history category of VI, which established an imprisonment range of 63 to 78 months' imprisonment. The district court imposed a downward variance of 48 months' imprisonment, followed by a 3-year term of supervised release, without objection from the parties.

2. On appeal, Mr. Hernandez-Galarza challenged the constitutionality of U.S.S.G. § 2L1.2, arguing that § 2L1.2(b)(3) violates his Fifth Amendment right to equal protection by discriminating impermissibly based on alienage. After the Eleventh Circuit issued its opinion in *United States v. Osorio*, 995 F.3d 801 (11th Cir. 2021), *cert. denied sub nom. Osorio, Juan C. v. United States*, 2021 WL 5167891 (U.S. Nov. 8, 2021) (No. 21-5747), which rejected the same argument, the Eleventh Circuit granted the government's motion for summary affirmance based

on now-binding precedent. Pet. App. at 3A.<sup>2</sup>

## REASONS FOR GRANTING THE WRIT

In *Osorio*, which now binds Mr. Hernandez-Galarza and every noncitizen's constitutional challenge to U.S.S.G. § 2L1.2(b)(3) in the Eleventh Circuit, the "approach to *Hampton* undermines the very framework its ruling instructed [circuit courts] to follow." 995 F.3d at 828 (Martin, J., concurring in part and dissenting in part). For Mr. Hernandez-Galarza and around 3,000 similarly situated noncitizens around the country 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 in *Osorio* 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 interest" that justifies the otherwise discriminatory rule. *Id.* at 103. Thus, 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

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<sup>2</sup> Mr. Hernandez-Galarza also challenged the constitutionality of U.S.S.G. § 2L1.2(b)(2) on appeal. He acknowledged that prior precedent foreclosed his argument. *See United States v. Adeleke*, 968 F.2d 1159, 1160-61 (11th Cir. 1992). Indeed, in both *Osorio* and the decision below, the Eleventh Circuit held that *Adeleke* bound the panel to find that § 2L1.2(b)(2) did not violate a noncitizen's right to equal protection. *See* Pet. App. at 3A. Mr. Hernandez-Galarza does not challenge § 2L1.2(b)(2) in this Petition.

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.**

Neither Congress nor the President required § 2L1.2(b)(3). *Osorio*, 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 even if Congress acquiesced in § 2L1.2(b)(3) following the 2016 amendment, *see Osorio*, 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 *Osorio* 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.” *Osorio*, 995 F.3d at 816. According to the *Osorio* 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 (suggesting 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. Hernandez-Galarza 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).<sup>3</sup>

As a result, 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

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<sup>3</sup> 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).

§ 2L1.2(b)(3)—which increases penalties for noncitizens whose first removal was *before* a conviction. *Osorio*, 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 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 *Osorio* 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 *Osorio* 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 U.S.S.G. am. 802, Reason for Amendment). Second, absent something more direct, the *Osorio* 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 revealed 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 onerous. *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 *Osorio* 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 U.S.S.G. 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.<sup>4</sup> *Id.* at

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<sup>4</sup> In addition, the Sentencing Commission’s rationale may be within its purview as it pertains to

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).” *Osorio*, 995 F.3d at 827 (Martin, J., concurring in part and dissenting in part). Finally, as *Hampton* instructs, the “quality of the interest at stake” matters, and the *Osorio* 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-

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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.

protection analysis. The Eleventh Circuit’s decision in *Osorio* is wrong.

## **II. The question presented is extremely important.**

In recent years, § 2L1.2(b)(3) has applied to Mr. Osorio, Mr. Hernandez-Galarza, and around 3,000 other noncitizens. Specifically, 2,836 noncitizens received a sentencing enhancement under § 2L1.2(b)(3) in fiscal year 2020.<sup>5</sup> The year before, the number of noncitizens receiving enhancements under § 2L1.2(b)(3) was even higher at 3,518.<sup>6</sup> That amounts to 14% of defendants sentenced under § 2L1.2.<sup>7</sup> *See supra* n.5 (noting that § 2L1.2 applied to 19,753 defendants in fiscal year 2020).

Thus, around 3,000 noncitizens every year 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. *Osorio*, 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”).

In addition, because these noncitizens are imprisoned for longer terms before immigration

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<sup>5</sup> See U.S. Sent’g Comm’n, *Use of Guidelines and Specific Offense Characteristics, Offender Based, FY2020* at 56 (available at <https://tinyurl.com/236jxknr>) (last accessed Nov. 8, 2021).

<sup>6</sup> See U.S. Sent’g Comm’n, *Use of Guidelines and Specific Offense Characteristics, Offender Based, FY2019* at 58 (available at <https://tinyurl.com/a6ybw4zv>) (last accessed Nov. 8, 2021).

<sup>7</sup> Of the 2,836 defendants receiving enhancements in fiscal year 2020, 371 received a ten-level enhancement under § 2L1.2(b)(3)(A); 916 received an eight-level enhancement under § 2L1.2(b)(3)(B); 286 received a six-level enhancement under § 2L1.2(b)(3)(C); 1260 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.

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).

The *Osorio* decision is also problematic as it misinterprets the roles the three branches of government must maintain around 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 Osorio*, 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 asked to review a rule promulgated by a federal agency, not Congress or the President. *Osorio*, 995 F.3d at 811. So “if [the courts] read Congressional expressions of policy preferences too broadly, as [the *Osorio* majority does, they] undermine . . . the exclusive authority of Congress and the President to decide when differential treatment of noncitizens is truly necessary.” *Osorio*, 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.

Mr. Hernandez-Galarza is one of many defendants bound by *Osorio*—an opinion that challenges this Court’s longstanding framework in *Hampton* and upholds a guideline provision that deprives noncitizens of their constitutional right to equal protection under the law. The question presented is extremely important.

## CONCLUSION

For these reasons, this Court should grant Mr. Hernandez-Galarza's petition for a writ of certiorari.

Respectfully submitted,

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