No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MARIO ROBERTO BONILLA-DIAZ,

***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

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QUESTIONS PRESENTED

I. Whether Mr. Bonilla-Diaz's *in absentia* removal order, which issued when he was ten years old and forms the basis for his illegal reentry conviction, is subject to rescission or otherwise invalid.

II. Whether United States Sentencing Guideline (U.S.S.G) § 2L1.2(b)(3), which applies exclusively to noncitizens and increases the range of imprisonment, violates procedural due process and the equal protection guarantee of the Fifth Amendment.

ADDITIONAL RELATED PROCEEDINGS

UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

United States v. Mario Roberto Bonilla-Diaz
Appeal Nos. 21-13223-HH and 21-13335-HH
Judgment Date: January 5, 2023

UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF FLORIDA

United States v. Mario Roberto Bonilla-Diaz
Case No. 8:21-cr-155-RAL-CPT
Judgment Date: September 16, 2021

LIST OF PARTIES

Petitioner, Mario Roberto Bonilla-Diaz, 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 Roberto Bonilla-Diaz, 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The Eleventh Circuit's unpublished opinion affirming Mr. Bonilla-Diaz sentence is provided in Appendix A.

STATEMENT OF JURISDICTION

The United States District Court for the Middle District of Florida had original jurisdiction over Mr. Mario Roberto Bonilla-Diaz, *See* Appendix A. This petition is timely filed under Supreme Court Rule 13.1. The jurisdiction of this Court is invoked pursuant to 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 (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.[1] 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* U.S.S.G. § 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 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*

[1] Mr. Bonilla-Diaz 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).

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. Bonilla-Diaz is a native and citizen of Honduras. In March 2004, when he was 10 years old, immigration officials in Brownsville, Texas apprehended him, along with his mother and two minor brothers. They released him on his own recognizance. When he failed to appear at his removal hearing in Orlando, Florida on October 7, 2004, the immigration judge ordered him removed *in absentia.*

Six years later, when he was 16, he was arrested for aggravated robbery in Harris County, Texas. According to a police affidavit, he and a peer attempted to rob a woman and her son with a BB gun in a parking lot, though they left the scene when the woman said they had no money. After being detained for almost a year

after his arrest, Mr. Bonilla-Diaz pled guilty and was sentenced to five years' imprisonment. He filed an appeal, but it was dismissed. In April 2015, shortly after his release to parole, immigration officials executed the outstanding 2004 order of removal *in absentia* and deported Mr. Bonilla-Diaz to Honduras.

While in Honduras—a country he left when he was six years old, Mr. Bonilla-Diaz restarted his life. He had a girlfriend and several jobs, ultimately working in a family-owned machinery repair shop. But in late 2017, Mara Salvatrucha (MS-13) members asked him to join and attempted to extort him. When he refused, MS-13 members threatened the lives of him and his family and shot at them. So in 2018, Mr. Bonilla-Diaz, his girlfriend, and their child fled to the United States. Upon arrival, his girlfriend and daughter were allowed to apply for asylum, but he was not. He was arrested and charged with illegal reentry in violation of 8 U.S.C. § 1326. He pled guilty and served a 24-month sentence. Upon release in April 2020, immigration authorities reinstated the 2004 *in absentia* removal order and returned him to Honduras.

In August 2020, Mr. Bonilla-Diaz reentered the United States and lived with his girlfriend and daughter in Tampa, Florida, until immigration authorities found him in March 2021. He pled guilty to a second illegal reentry and admitted violating his supervised release from the first illegal reentry conviction.

2. Mr. Bonilla-Diaz's guideline imprisonment range was 46 to 57 months, based on a total offense level of 19 and a criminal history category of IV. Mr. Bonilla-Diaz's 2019 illegal reentry conviction enhanced his offense level by four and added three

points to his criminal history score. *See* U.S.S.G. § 2L1.2(b)(1)(A). His 2011 Texas robbery conviction—which occurred while the *in absentia* removal order was outstanding—enhanced his offense level by ten and added three points to his criminal history score. *See id.* § 2L1.2(b)(3)(A).

Mr. Bonilla-Diaz objected to his guidelines on equal-protection grounds, arguing that it improperly penalized noncitizens, though he conceded that the Eleventh Circuit had rejected the argument in *Osorto*. The district court overruled the objection and sentenced him to 42 months.

3. On appeal, Mr. Bonilla-Diaz challenged the constitutionality of § 2L1.2, arguing that § 2L1.2(b)(3) violates his Fifth Amendment right to equal protection by discriminating impermissibly based on alienage. But, as he conceded, the Eleventh Circuit held that his argument was foreclosed by its precedents, *Osorto*, 995 F.3d at 821-22, and *United States v. Adeleke*, 968 F.2d 1159, 1160-61 (11th Cir. 1992). The Eleventh Circuit affirmed his judgment.

REASONS FOR GRANTING THE WRIT

I. Review of Mr. Bonilla-Diaz's *in absentia* removal order–and the conviction based on it–is needed.

When he was 10 years old, Mr. Bonilla-Diaz was ordered removed *in absentia*. That 2004 *in absentia* removal order was first executed in 2015 and reinstated in 2020. It also served as the basis for his § 1326 illegal reentry convictions in 2019 and 2021.

Currently pending before this Court are several petitions for certiorari asking this Court to address *in absentia* removal orders. *See Garland v. Singh*, No. 22-884 (filed

Mar. 10, 2023); *Campos-Chaves v. Garland*, No. 22-674 (filed Jan. 18, 2023); *Dacostagomez-Aguilar v. Garland*, No. 22-775 (filed Feb. 14, 2023). Should the Court grant one of these petitions, the ultimate decision could impact Mr. Bonilla-Diaz's *in absentia* removal order and § 1326 conviction. Therefore, on this issue, Mr. Bonilla-Diaz respectfully requests that this Court hold his petition pending its consideration of these other petitions, and any like them, and then dispose of Mr. Bonilla-Diaz's petition as appropriate.

II. The Eleventh Circuit's *Osorto* decision conflicts with *Hampton*.

In 2016, the United States Sentencing Commission promulgated 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 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 U.S.S.G. § 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 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. Osorto*, 995

F.3d 801 (11th Cir.), *cert. denied*, 142 S. Ct. 470 (2021), 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. In *Osorto*—which binds 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. Bonilla-Diaz 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.*

A. The Eleventh Circuit's ruling in *Osorto* 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. 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.*

1. 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). *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 even if Congress 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. Bonilla-Diaz 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).[2]

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 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

[2] 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).

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 U.S.S.G. 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).

2. The Sentencing Commission has not justified the deprivation of noncitizens' liberty caused by § 2L1.2(b)(3) with an overriding national interest that is 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 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 alike.[3] *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 "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

[3] 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.

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.

B. The question presented is extremely important.

Every year, § 2L1.2(b)(3) applies to Mr. Bonilla-Diaz, Mr. Osorto, and around 3,000 other noncitizens. Specifically, 2,878 noncitizens received a sentencing enhancement under § 2L1.2(b)(3) in fiscal year 2021.[4] That number is consistent with or lower than fiscal years 2020 (applying 2,836 § 2L1.2(b)(3) enhancements) and 2019 (applying 3,474 § 2L1.2(b)(3) enhancements).[5] And it amounts to 25% of

[4] *See* U.S. Sent'g Comm'n, *Use of Guidelines and Specific Offense Characteristics, Offender Based, FY2021* at 138-39 (available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/2021/Ch2_Offender _Based.pdf) (last accessed April 5, 2023). Of the 2,878 defendants receiving enhancements in fiscal year 2021, 530 received a ten-level enhancement under § 2L1.2(b)(3)(A); 1,044 received an eight-level enhancement under § 2L1.2(b)(3)(B); 341 received a six-level enhancement under § 2L1.2(b)(3)(C); 960 received a four-level enhancement under § 2L1.2(b)(3)(D); and 3 received a two-level enhancement under § 2L1.2(b)(3)(E).

[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 April 5, 2023); 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 April 5, 2023).

defendants sentenced under § 2L1.2.[6]

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

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[6] *See supra* n.4 (noting that § 2L1.2 applied to 11,552 defendants in fiscal year 2021).

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.

Mr. Bonilla-Diaz is one of many defendants bound by *Osorto*—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 the foregoing reasons, this Court should hold or grant Mr. Bonilla-Diaz's petition for writ of certiorari.

Respectfully submitted,

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