Nos. 15-30309, 15-30310, 15-30315, 15-30347, 15-30351, 15-30352, 15-30353, 15-30354, 15-30377, 15-30383, 15-30385, 15-30391, 16-30000, 16-30004, 16-30040, 16-30041, 16-30089, 16-30090, 16-30162, 16-30170, 16-30199, 16-30294, 17-30013

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOSE HERNANDEZ-MARTINEZ, et al.,

Defendants-Appellants.

Appeal from the United States District Court,
for the District of Oregon, Portland Division
No. 3:98-cr-00572-MO-8; The Honorable Michael W. Mosman

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STATEMENT OF JURISDICTION

These consolidated cases are appeals from the denial of retroactive sentence reductions sought by federal defendants in the District of Oregon under U.S.S.G. Amendment 782 and 18 U.S.C. § 3582(c)(2). The district courts had jurisdiction under 18 U.S.C. § 3231 to decide whether authority existed to reduce the defendants' sentences. The district courts denied the sentence reductions based on the categorical ineligibility of each defendant. Timely notices of appeal were filed in accordance with Rule 4(b)(1) of the Federal Rules of Appellate Procedure. Jurisdiction is conferred on this Court by 18 U.S.C. § 3742(a) and 28 U.S.C. §§ 1291 and 1294(1). The dates of the orders denying sentence reductions and the notices of appeal for each defendant are as follows:

- Jose Luis Hernandez-Martinez, No. 15-30309: motion denied 10/09/15 (ER 2); notice of appeal filed 10/15/15 (ER 276).[1]
- Efigenio Aispuro-Aispuro, No. 15-30310: motion denied 10/09/15 (ER 3); notice of appeal filed 10/15/15 (ER 277).
- Alejandro Renteria-Santana, No. 15-30315: motion denied 10/15/15 (ER 5); notice of appeal filed 10/19/15 (ER 341).

[1] "ER" refers to the Appellants' Excerpt of Record, and "SOR" refers to the statement of reasons submitted under seal pursuant to Circuit Rule 27-13(d). The cases of Mr. Hernandez-Martinez and Mr. Aispuro-Aispuro involve the same individual in separate cases that resulted in concurrent sentences.

- Bartolo Favela Gonzales, No. 15-30347: motion denied 11/04/15 (ER 6), notice of appeal filed 11/13/15 (ER 427).

- Jose Garcia-Zambrano, No. 15-30351: motion denied 11/13/15 (ER 8), notice of appeal filed 11/20/15 (ER 491).

- Edwin Magana-Solis, No. 15-30352: motion denied 11/13/15 (ER 9), notice of appeal filed 11/20/15 (ER 508).

- Diego Bermudez-Ortiz, No. 15-30353: motion denied 11/13/15 (ER 10), notice of appeal filed 11/20/15 (ER 520).

- Luis Pulido-Aguilar, No. 15-30354: motion denied 11/05/15 (ER 21), notice of appeal filed 11/20/15 (ER 595).

- Jose Carranza Gonzalez, No. 15-30377: motion denied 12/04/15 (ER 64), notice of appeal filed 12/14/15 (ER 633).

- Eduardo Bocanegra-Mosqueda, No. 15-30383: motion denied 12/15/15 (ER 65), notice of appeal filed 12/16/15 (ER 696).

- Aleksander Gorbatenko, No. 15-30385: motion denied 12/10/15 (ER 102), notice of appeal filed 12/16/15 (ER 737).

- Roberto Cervantes-Esteva, No. 15-30391: motion denied 12/15/15 (ER 103), notice of appeal filed 12/21/15 (ER 796).

- Obdulio Alvarado-Ponce, No. 16-30000: motion denied 12/23/15 (ER 109), notice of appeal filed 12/29/15 (ER 826).

- Omar Perez-Medina, No. 16-30004: motion denied 12/29/15 (ER 111), notice of appeal filed 01/08/16 (ER 862).

- Julian Alarcon Castaneda, No. 16-30040: motion denied 02/05/16 (ER 126), notice of appeal filed 02/09/16 (ER 903).

- Sergio Aguilar-Sahagun, No. 16-30041: motion denied 02/05/16 (ER 157), notice of appeal filed 02/09/16 (ER 930).

- Moises Lopez-Prado, No. 16-30089: motion denied 03/25/16 (ER 172), notice of appeal filed 04/06/16 (ER 983).

- Pablo Barajas Lopez, No. 16-30090: motion denied 03/31/16 (ER 186), notice of appeal filed 04/06/16 (ER 1015).

- Francisco Javier Cardenas-Coronel, No. 16-30162: motion denied 06/27/16 (ER 199), notice of appeal filed 07/06/16 (ER 1110).

- Kao Saechao, No. 16-30170: motion denied 07/07/16 (ER 204), notice of appeal filed 07/14/16 (ER 1143).

- Angel Ramirez-Arroyo, No. 16-30199: motion denied 08/29/16 (ER 205), notice of appeal filed 08/29/16 (ER 1159).

- Franky Enrique Alvarado-Gomez, No. 16-30294: motion denied 11/29/16 (ER 206), notice of appeal filed 11/30/16 (ER 1180).

- Oscar Francisco Macias-Ovalle, No. 17-30013: motion denied 01/26/17 (ER 207), notice of appeal filed 01/26/17 (ER 1218).

STATEMENT OF ISSUES

On November 1, 2011, the Sentencing Commission amended its policy statement regarding retroactive Guidelines amendments to exclude sentence reduction consideration for defendants who were previously granted downward departures and variances. This Court in *United States v. Padilla-Diaz*, 862 F.3d 856, 861 (9th Cir. 2017), upheld the Commission's amended policy statement against challenges that the exclusion promoted unwarranted disparity. The Court reasoned that sentence reduction proceedings under 18 U.S.C. § 3582(c)(2) are acts of lenity that need not satisfy the statutory purposes of sentencing. After *Padilla-Diaz*, the Supreme Court in *Hughes v. United States*, 138 S. Ct. 1765, 1775 (2018), concluded that § 3582(c)(2) should be construed to incorporate the purposes of sentencing and to avoid unwarranted disparity. This appeal presents three questions for review:

I. Does the reasoning and mode of analysis in *Hughes* undercut the precedential value of *Padilla-Diaz*?

II. In light of *Hughes*, is the exclusion of defendants who previously received departures and variances from consideration for the benefit of retroactive Guidelines amendments in irreconcilable conflict with 18 U.S.C. § 3582(c)(2) and with statutory directives that all sentencing policies and practices must avoid unwarranted sentencing disparity?

III. In light of *Hughes*, does the exclusion of defendants who previously received departures and variances from consideration for the benefit of retroactive Guidelines amendments violate equal protection by irrationally limiting the benefit of Guidelines amendments to those offenders who did not merit downward sentencing adjustments?

RELEVANT GUIDELINES AND STATUTORY PROVISIONS

The statute that authorizes district courts to reduce sentences based on retroactive amendments to the relevant Sentencing Guidelines states:

> **(c) Modification of an Imposed Term of Imprisonment.**—The court may not modify a term of imprisonment once it has been imposed except that—
>
> * * * *
>
> (2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

18 U.S.C. § 3582(c)(2); Add. 1-2.[2] "If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced." 28 U.S.C. § 994(u).

[2] Pursuant to Ninth Circuit Rule 28-2.7, the Addendum accompanying this brief includes the verbatim text of the relevant statutes and Guidelines provisions at the pages referenced in this brief.

The Sentencing Commission's relevant policy statement in U.S.S.G. § 1B1.10 has evolved from its first iteration in 1989. Add. 25. Until 2011, no prior version of the policy statement limited eligibility for sentence reductions following retroactive Guidelines amendments based on whether the defendant's original sentence involved a variance or departure. Add. 25-41.

By a 2011 amendment, the Commission for the first time altered the policy statement to limit eligibility for defendants who received a downward variance or departure from the Guidelines range at sentencing based on any factor other than substantial assistance:

> (2) Limitation and Prohibition on Extent of Reduction.—
>
> > (A) Limitation.—Except as provided in subdivision (B), the court shall not reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement to a term that is less than the minimum of the amended guideline range determined under subdivision (1) of this subsection.
> >
> > (B) Exception for Substantial Assistance.—If the term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing pursuant to a government motion to reflect the defendant's substantial assistance to authorities, a reduction comparably less than the amended guideline range determined under subdivision (1) of this subsection may be appropriate.

U.S.S.G. § 1B1.10(b) (2011); Add. 3-4. The addendum contains the current version of U.S.S.G. § 1B1.10 as well as historical versions along with the Commission's explanations for each substantive amendment. Add. 24.

The Sentencing Commission's purpose and duties are set out in 28 U.S.C. §§ 991(b) and 994. In § 991(b)(1), Congress instructed the Sentencing Commission that its purpose is to establish "sentencing policies and practices" that advance certain goals, including "avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices[.]" 28 U.S.C. § 991(b)(1); Add. 5. In § 994(f), Congress stated that the Commission's promulgated guidelines "shall promote the purposes set forth in section 991(b)(1), with particular attention to the requirements of subsection 991(b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted sentence disparities." 28 U.S.C. § 994(f); Add. 10.

In 18 U.S.C. § 3553(a), Congress set out the factors courts must consider when imposing sentences, including the overarching instruction to impose sentences "sufficient, but not greater than necessary," to achieve the goals of sentencing. Add.

15. Under subsection (a)(6) of the statute, sentencing judges must consider not only the Guidelines promulgated by the Commission, but they must also independently consider the need to avoid unwarranted disparities. 18 U.S.C. § 3553(a)(6) ("The court, in determining the particular sentence to be imposed, shall consider . . . the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct[.]"). Add. 15-16.

Rule 11(c) of the Federal Rules of Criminal Procedure governs the types of plea agreements available in federal court. A plea agreement entered under Rule 11(c)(1)(C) permits a sentencing agreement regarding particular Guidelines provisions and sentences that "binds the court once the court accepts the plea agreement." Add. 21-22. A plea agreement entered under Rule 11(c)(1)(B) is similar but permits agreement to a sentencing recommendation that "does not bind the court." Add. 22.

STATEMENT OF THE CASE

Nature of the Case

These are appeals from the denial of eligibility for retroactive sentence reductions under U.S.S.G. Amendment 782 and 18 U.S.C. § 3582(c)(2) by Oregon district court judges based on enforcement of the Sentencing Commission's 2011 policy statement, U.S.S.G. § 1B1.10(b)(2)(A), excluding from eligibility defendants who received downward variances or departures at the original sentencing.

Relevant Facts and Procedural History

In 2014, the Sentencing Commission determined that the base offense levels for drug offenders in the Sentencing Guidelines provided an overly-harsh starting point for the sentencing judge's determination of the appropriate term of imprisonment. U.S.S.G. app. C, amend. 782, at 70-73 (Reason for Amendment) (Supp. 2016). To address this issue, the Commission adopted Amendment 782, an across-the-board two-level reduction in the Drug Quantity Table for most drug types and quantities. *Id.* at 64-66. The Commission applied Amendment 782 retroactively. U.S.S.G. app. C, amend. 788, at 65-87 (Supp. 2016).

The petitioners in this case are all federal defendants whose Guidelines ranges were subsequently lowered by Amendment 782. However, each of the petitioners received downward variances of two levels or more from the otherwise-applicable

range. In twelve of the cases, the government recommended a downward variance as part of a non-binding plea agreement entered under Rule 11(c)(1)(B) of the Federal Rules of Criminal Procedure. In three cases, the government recommended a downward variance as part of a binding plea agreement entered under Rule 11(c)(1)(C). In the remaining seven cases, the sentencing judge granted a downward variance after the defendant pleaded guilty without a plea agreement or was found guilty at trial, sometimes with the government's recommendation. None of the downward sentencing adjustments were premised on the defendant's substantial assistance to the government or the sentencing judge's finding that the Drug Quantity Table required too harsh a starting point:

- Jose Luis Hernandez-Martinez, also known as Efigenio Aispuro-Aispuro: Based on a plea agreement covering two separate cases that set the applicable Guidelines, the government recommended pursuant to Rule 11(c)(1)(C), and the Court granted, a downward variance to 132 months from 168 months, which was the low end of the otherwise applicable range for each of the cases at Criminal History Category I. ER 209, 228-29, 254-55; SOR 2, 5. The defense in its Amendment 782 motion sought a reduction to the mandatory minimum of 120 months. ER 229.

- Alejandro Renteria-Santana: Based on a plea agreement that set the applicable Guidelines, the government recommended pursuant to Rule 11(c)(1)(B), and the Court granted, a downward variance to 108 months from 135 months, which was the low end of the otherwise applicable range at Criminal History Category I, a variance of two levels. ER 280, 284, 297; SOR 8. The defense in its Amendment 782 motion sought a reduction to 87 months. ER 295.

- Bartolo Favela Gonzales: Based on a plea agreement that set the applicable Guidelines, the government recommended pursuant to Rule 11(c)(1)(C), and the Court granted, a downward variance to 188 months from 324 months, which was the low end of the otherwise applicable range at Criminal History Category V, a variance of four levels. ER 343-44, 348, 383; SOR 11. The defense in its Amendment 782 motion sought a reduction to 135 months. ER 380, 398.

- Jose Garcia-Zambrano: Based on a plea agreement that set the applicable Guidelines, the government recommended pursuant to Rule 11(c)(1)(B) a downward variance to 108 months from 135 months, which was the low end of the otherwise applicable range at Criminal History Category I, a variance of two levels. ER 429, 459. The sentencing judge granted the recommended variance and an additional four-level variance to 70 months. ER 434, 459; SOR 14. The defense in its Amendment 782 motion sought a reduction to 57 months. ER 440.

- Edwin Magana-Solis: Based on a plea agreement that set the applicable Guidelines, the government recommended pursuant to Rule 11(c)(1)(B) a downward variance to 70 months from 135 months, which was the low end of the otherwise applicable range at Criminal History Category I, a variance of six levels. ER 459, 492; SOR 17. The sentencing judge granted the recommended variance and an additional one-level variance to 63 months. ER 503. The defense in its Amendment 782 motion sought a reduction to 57 months. ER 440.

- Diego Bermudez-Ortiz: Based on a plea agreement that set the applicable Guidelines, the government recommended pursuant to Rule 11(c)(1)(B) a downward variance to 70 months from 135 months, which was the low end of the otherwise applicable range at Criminal History Category I, a variance of six levels. ER 459-60, 509; SOR 20. The sentencing judge granted the recommended variance and an additional two-level variance to 57 months. ER 515. The defense in its Amendment 782 motion sought a reduction to 46 months. ER 440.

- Luis Pulido-Aguilar: After the defendant entered a guilty plea with no plea agreement, the government recommended a downward variance to 188 months from 235 months, which was the low end of the otherwise applicable range at Criminal History Category III, a variance of two levels. ER 570. The sentencing judge granted the recommended variance and an additional two-level variance to 151 months. ER 540; SOR 23-24. The defense in its Amendment 782 motion sought a reduction to 121 months. ER 546.

- Jose Carranza Gonzalez: Based on a plea agreement that set the applicable Guidelines the government recommended pursuant to Rule 11(c)(1)(B), and the Court granted, a downward variance to 72 months from 188 months, which was the low end of the otherwise applicable range at Criminal History Category IV. ER 597, 600, 613; SOR 26-27. The defense in its Amendment 782 motion sought a reduction to 59 months. ER 616.

- Eduardo Bocanegra-Mosqueda: Based on a plea agreement that set the applicable Guidelines, the government recommended pursuant to Rule 11(c)(1)(B) a downward variance to 87 months from 168 months, which was the low end of the otherwise applicable range at Criminal History Category I. ER 634, 670. The sentencing judge granted the recommended variance and an additional two-level variance to 70 months. ER 639; SOR 29-30. The defense in its Amendment 782 motion sought a reduction to 57 months. ER 645.

- Aleksander Gorbatenko: Based on a plea agreement that set the applicable Guidelines, the government recommended pursuant to Rule 11(c)(1)(B), and the Court granted, a downward variance to 132 months from 188 months, which was the low end of the otherwise applicable range at Criminal History Category I. ER 698; SOR 31. The final sentence of 126 months reflected a six-month adjustment to achieve concurrency with a state sentence. SOR 32. The defense in its Amendment 782 motion sought a reduction to 108 months. ER 718.

- Roberto Cervantes-Esteva: Based on a plea agreement that set the applicable Guidelines, the government recommended pursuant to Rule 11(c)(1)(B), a sentence of 108 months, which was the low end of the otherwise applicable range at Criminal History Category III. ER 738, 769. The sentencing judge granted an opposed four-level variance on defense motion to 72 months. ER 741; SOR 34-35. The defense in its Amendment 782 motion sought a reduction to 60 months. ER 748.

- Obdulio Alvarado-Ponce: Based on a plea agreement that set the applicable Guidelines, the government recommended pursuant to Rule 11(c)(1)(B), a sentence of 168 months, which was the low end of the otherwise applicable range at Criminal History Category III. ER 797, 825. The sentencing judge granted a four-level variance on defense motion to 110 months. ER 802, SOR 37. The defense in its Amendment 782 motion sought a reduction to 87 months. ER 807.

- Omar Perez-Medina: Based on a plea agreement that set the applicable Guidelines, the government recommended pursuant to Rule 11(c)(1)(B), and the Court granted, a downward variance to 78 months from 135 months, which was the low end of the otherwise applicable range at Criminal History Category III, a variance of five levels. ER 827, 834, 843; SOR 40-41. The defense in its Amendment 782 motion sought a reduction to 70 months, the length of a concurrent non-drug sentence. ER 845.

- Julian Alarcon Castaneda: Based on a plea agreement that set the applicable Guidelines, the government recommended pursuant to Rule 11(c)(1)(B), and the Court granted, a downward variance to 121 months from 188 months, which was the low end of the otherwise applicable range at Criminal History Category II. ER 862, 869, 879; SOR 44-48. The defense in its Amendment 782 motion sought a reduction to the mandatory minimum of 120 months. ER 883.

- Sergio Aguilar-Sahagun: Based on a plea agreement that set the applicable Guidelines, the government recommended pursuant to

Rule 11(c)(1)(B), and the Court granted, a downward variance to 121 months from 151 months, which was the low end of the otherwise applicable range at Criminal History Category II. ER 905, 910, 923; SOR 47. The defense in its Amendment 782 motion sought a reduction to the mandatory minimum of 120 months. ER 926.

- Moises Lopez-Prado: Based on a plea agreement that set the applicable Guidelines, the government recommended pursuant to Rule 11(c)(1)(C), and the Court granted, a downward variance to 132 months from 188 months, which was which was the low end of the otherwise applicable range at Criminal History Category II, a variance of four levels. ER 935-38, 963, 946; SOR 50-51. The defense in its Amendment 782 motion sought a reduction to mandatory minimum of 120 months. ER 954.

- Pablo Barajas Lopez: After conviction at a jury trial, the government recommended a sentence of 300 months, a downward variance from 360 months, which was the low end of the otherwise applicable range at Criminal History Category I. ER 984, 998; SOR 55. The sentencing judge granted the recommended variance and an additional variance to 180 months. ER 999-1000; SOR 55. The defense in its Amendment 782 motion sought a reduction to 135 months. ER 1012.

- Francisco Javier Cardenas-Coronel: Based on a plea agreement that set the applicable Guidelines, the government recommended pursuant to Rule 11(c)(1)(B), and the Court granted, a downward variance to 70 months from 108 months, which was the low end of the otherwise applicable range at Criminal History Category III, a variance of four levels. ER 1018, 1028, 1093; SOR 57-58. The defense in its Amendment 782 motion sought a reduction to 60 months because of the effect of a mandatory minimum sentence. ER 1046.

- Kao Saechao: Based on a plea agreement that set the applicable Guidelines, the government recommended pursuant to Rule 11(c)(1)(B) a downward variance to 110 months from 121

months, which was at the low end of the otherwise applicable range at Criminal History Category IV, a variance of one level. ER 1113, 1138; SOR 61-62. The sentencing judge granted the recommended variance and an additional three-level variance to 85 months. ER 1119; SOR 61-62. The defense in its Amendment 782 motion sought a reduction to 70 months. ER 1128.

- Angel Ramirez-Arroyo: After a jury trial, the Court granted a downward variance to a sentence of 240 months from a life sentence, which was the otherwise applicable range at Criminal History Category I. ER 1144, 1147, 1154; SOR 64. The defense in its Amendment 782 motion sought a reduction to 188 months. ER 1156.

- Franky Enrique Alvarado-Gomez: Based on a plea agreement that set the applicable Guidelines under Rule 11(c)(1)(B), the court granted a downward variance to 90 months, below the low end of the otherwise applicable range of 108 months at Criminal History Category I. ER 1174-72, SOR 67. The defense in its Amendment 782 motion sought a reduction to 70 months. ER 1177.

- Oscar Francisco Macias-Ovalle: The defendant pleaded guilty based on a plea agreement that set the applicable Guidelines under Rule 11(c)(1)(B). ER 1181, 1184. The sentencing judge granted a downward variance to 210 months from 292 months, the low end of the otherwise applicable range at Criminal History Category I. ER 1189; SOR 70. The defense in its Amendment 782 motion sought a reduction to 168 months. ER 1189.

Because of the downward variances, each of the petitioners was deemed ineligible for any sentence reduction following Amendment 782 based on U.S.S.G. § 1B1.10(b)(2)(A), even though their initial Guidelines computations and their ultimate sentences were based on the old Drug Quantity Table that was two-levels

too harsh. The defendants appealed from the denial of eligibility for relief. Their appeals were held in abeyance pending the disposition of the consolidated appeal in *Padilla-Diaz*, which involved statutory and constitutional challenges to the policy statement rendering defendants who received downward variances and non-cooperation departures ineligible for sentence reduction consideration.

On July 5, 2017, this Court issued its opinion in *Padilla-Diaz* and upheld the policy statement against the defendants' challenges. The Court denied the *Padilla-Diaz* consolidated petition for rehearing and rehearing en banc on November 3, 2017, and the Supreme Court denied the consolidated petition for certiorari on March 19, 2018. *Padilla-Diaz*, No. 15-30279, Docket Nos. 53, 56. However, while the *Padilla-Diaz* appeal was pending, the Supreme Court granted certiorari in several cases to resolve questions regarding the construction of sentence reduction authority under 18 U.S.C. § 3582(c)(2) following retroactive Guidelines amendments.

The Supreme Court issued its decisions in *Hughes* and *Koons v. United States*, 138 S. Ct. 1783 (2018), on June 4, 2018. In *Hughes*, the Court revisited its fractured decision in *Freeman v. United States*, 564 U.S. 522 (2011), regarding the eligibility for § 3582(c)(2) sentence reductions of defendants who received agreed sentences under Rule 11(c)(1)(C). In *Koons*, the Court considered the eligibility for § 3582(c)(2) sentence reductions of defendants whose sentences were determined by

reference to mandatory minimum statutes. The defendants in the present case requested and received deferral of their briefing schedules to address the effect of the new Supreme Court authority on the panel decision in *Padilla-Diaz*.

Standard of Review

This Court reviews de novo the proper construction of a statute. *Padilla-Diaz*, 862 F.3d at 860. The denial of a sentence reduction is reviewed for abuse of discretion. *Id.* at 859. A district court abuses its discretion if it does not apply the correct law. *Id.*at 860; *see also Koon v. United States*, 518 U.S. 81, 100 (1996) (a sentencing court by definition abuses its discretion when it makes an error of law regarding the extent of its sentencing authority).

Custody Status

The defendants' current places of custody and projected release dates are as follows:

- Jose Luis Hernandez-Martinez, released 01/29/2016;
- Alejandro Renteria-Santana, released 04/19/2018;
- Bartolo Favela Gonzales, FMC Fort Worth, projected release date 09/03/2031;
- Jose Garcia-Zambrano, released 12/23/2016;
- Edwin Magana-Solis, released 07/07/2016;
- Diego Bermudez-Ortiz, released 01/15/2016;

- Luis Pulido-Aguilar, FCI Hazelton, projected release date 04/18/2021;
- Jose Carranza Gonzalez, released 03/31/2017;
- Eduardo Bocanegra-Mosqueda, released 12/02/2016;
- Aleksander Gorbatenko, USP Allenwood, projected release date 04/11/2020;
- Roberto Cervantes-Esteva, released 06/13/2017;
- Obdulio Alvarado-Ponce, CI Big Spring, projected release date 08/01/2020;
- Omar Perez-Medina, released 04/20/2018;
- Julian Alarcon Castaneda, CI Adams County, projected release date 06/26/2020;
- Sergio Aguilar-Sahagun, FCI Beaumont Low, projected release date 03/31/2019;
- Moises Lopez-Prado, CI Adams County, projected release date 05/13/2021;
- Pablo Barajas Lopez, CI Giles W. Dalby, projected release date 07/23/2020;
- Francisco Javier Cardenas-Coronel, released 05/26/2017;
- Kao Saechao, FCI Sheridan, projected release date 02/04/2019;
- Angel Ramirez-Arroyo, FCI Allenwood Low, projected release date 10/16/2025;
- Franky Enrique Alvarado-Gomez, CI Great Plains, projected release date 01/30/2022;

- Oscar Francisco Macias-Ovalle, FCI Fort Dix, projected release date 08/11/2023.[3]

SUMMARY OF ARGUMENT

In *Padilla-Diaz*, this Court rejected statutory and constitutional challenges to U.S.S.G. § 1B1.10(b)(2)(A), the policy statement enacted by the Commission in 2011 that excludes defendants who previously received downward departures and variances from consideration for the benefit of retroactive Guidelines amendments. The Court decided *Padilla-Diaz* without the benefit of the Supreme Court's later decision in *Hughes*, which held that a defendant who enters a plea agreement containing a binding sentencing recommendation under Rule 11(c)(1)(C) is generally eligible for a sentence reduction under 18 U.S.C. § 3582(c)(2) following a retroactive Guidelines amendment so long as the Guidelines range was part of the framework the district court relied on in imposing the sentence or accepting the agreement. The statutory construction in *Hughes* undercut the reasoning and mode of analysis of this Court's decision in *Padilla-Diaz*, thereby rendering it invalid as precedent.

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[3] For those appellants who have been released from the term of imprisonment to serve a term of supervised release, the appeals are not moot because an erroneous determination of ineligibility for the sentence reduction provides a basis for reduction of the term of supervised release pursuant to Application Note 7 of U.S.S.G. § 1B1.10. *See also Mujahid v. Daniels*, 413 F.3d 991, 994-95 (9th Cir. 2005); *Gunderson v. Hood*, 268 F.3d 1149, 1153 (9th Cir. 2001).

Specifically, this Court in *Padilla-Diaz* recognized that the categorical exclusion of defendants who had received downward variances and departures would produce "anomalous" results: "[S]entences that were initially tailored to avoid unwarranted disparities and to account for individualized circumstances will now converge at the low end of the amended [pre-variance and departure] guideline range." 862 F.3d at 861. However, this Court upheld the exclusion, reasoning that sentence reduction proceedings under § 3582(c)(2) are "acts of lenity" that are "not constrained by the general policies underlying initial sentencing or even plenary resentencing proceedings." *Id.*

The Supreme Court's decision in *Hughes* is inconsistent with the *Padilla-Diaz* premise that § 3582(c)(2) proceedings are "not constrained" by general sentencing policies. The Supreme Court in *Hughes* repeatedly returned to the Sentencing Reform Act's basic principles and purposes to construe the scope of a court's sentence reduction authority under § 3582(c)(2), especially embracing the need to avoid unwarranted disparities. *Hughes* confirmed that, as a general rule, federal sentences are "based on" the Guidelines range, even when the ultimate sentence imposed is below that range. Under *Hughes*, the purposes of sentencing are relevant to sentence reduction proceedings, and those purposes are thwarted when defendants whose sentences would have been lower if the amended guideline had been in place

at the time of sentencing are excluded from consideration for the benefits of the retroactive amendment.

Moreover, *Hughes* interpreted § 3582(c)(2) to *require* sentence reduction discretion whenever the retroactively amended guideline forms part of the "framework" of the sentence. Section 1B1.10(b)(2)(A) conflicts with the statute as interpreted by *Hughes* because it categorically excludes a significant portion of statutorily eligible defendants from consideration for a reduction. The Commission decides when a Guidelines amendment should operate retroactively, and it decides policies to guide implementation of such amendments, but the Commission cannot contravene the statutory definition of sentence reduction eligibility in § 3582(c)(2). *Hughes* instructs that § 3582(c)(2) must be construed in accordance with its remedial purpose. This Court in *Padilla-Diaz* mistakenly took a stinting view of the scope of § 3582(c)(2) that prohibits sentencing judges from recalibrating sentences that would have been lower if the sentencing judge had not relied on an overly-harsh Guidelines range.

The *Hughes* analysis also requires recalibration of the *Padilla-Diaz* equal protection analysis. With the clarification of the remedial purpose of § 3582(c)(2), and the firm statement that the Guidelines provide the framework that guide the "ultimate sentence" in most cases, the asserted justifications for excluding

defendants whose pre-variance and departure Guidelines ranges were overly harsh from consideration for a sentence reduction fail. The exclusion arbitrarily and irrationally distinguishes between classes of defendants that *Hughes* instructs are not differently situated for purposes of consideration for sentence reductions under § 3582(c)(2).

After *Hughes*, the policy statement in § 1B1.10(b)(2)(A) should be held invalid, and each defendant in the present case should be deemed eligible for the sentencing judge to exercise discretion to reduce the sentence. Their exclusion from eligibility conflicts with the plain meaning of § 3582(c)(2) because each defendant's ultimate sentence was based on a Guidelines range that was subsequently reduced and made retroactive. The exclusion promotes unwarranted disparity in sentencing. The Court should reverse the denial of § 3582(c)(2) relief and remand for the sentencing courts to exercise available discretion to reduce the original sentences by up to two levels.

ARGUMENT

I. In Light Of *Hughes*, The Exclusion In U.S.S.G. § 1B1.10(b)(2)(A) Of Defendants Who Previously Received Downward Departures And Variances From Consideration For The Benefit of Retroactive Guidelines Amendments Is In Irreconcilable Conflict With 18 U.S.C. § 3582(c)(2) And With The Statutory Directives That All Sentencing Policies And Practices Must Avoid Unwarranted Sentencing Disparity.

"[W]here the reasoning or theory of our prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority, a three-judge panel should consider itself bound by the later and controlling authority, and should reject the prior circuit opinion as having been effectively overruled." *Miller v. Gammie*, 335 F.3d 889, 892-93 (9th Cir. 2003) (en banc). The en banc Court in *Miller* made clear that not only the narrow holding but the reasoning and mode of analysis of the intervening authority are relevant to determining whether a new Supreme Court opinion has undercut an earlier panel opinion. 335 F.3d at 899-900. "[T]he issues decided by the higher court need not be identical in order to be controlling." *Id*. at 900.

The reasoning and mode of analysis in *Hughes* constitutes later and controlling authority that is inconsistent with the earlier panel decision in *Padilla-Diaz*. The Supreme Court's reasoning in *Hughes* is inconsistent with the view of *Padilla-Diaz* that § 3582(c)(2) proceedings are isolated acts of lenity that are "not constrained by the general policies underlying the initial sentence." 862 F.3d at 861.

On the contrary, the Court in *Hughes* made clear that § 3582(c)(2) proceedings must adhere to the purposes of the Sentencing Reform Act, including avoiding unwarranted disparity. Moreover, *Hughes* interpreted § 3582(c)(2) to require sentence reduction discretion whenever the retroactively amended guideline forms part of the framework of the ultimate sentence. Section 1B1.10(b)(2)(A) conflicts with the statute as interpreted by *Hughes* because it thwarts the goals of just and proportional sentencing, and it categorically disqualifies a significant portion of statutorily eligible defendants from consideration for a sentence reduction.

A. In *Padilla-Diaz*, This Court Rejected Challenges To § 1B1.10(b)(2)(A) By Reasoning That § 3582(c)(2) Proceedings Are Congressional Acts Of Lenity That Are Not Constrained By General Sentencing Policies.

Section 3582(c)(2) allows district judges to reduce sentences when a defendant "has been sentenced to a term of imprisonment *based on* a sentencing range that has subsequently been lowered by the Sentencing Commission" (emphasis added). Judges may lower sentences in that situation "after considering the factors set forth in section 3553(a) to the extent they are applicable, if such a reduction is consistent with the applicable policy statements issued by the Sentencing Commission." *Id.* Up until 2011, the Commission's policy statement implementing § 3582(c)(2) recognized sentence reduction eligibility for all defendants whose applicable Guidelines range was reduced by a retroactive

amendment, permitting judges to honor previously awarded downward departures and variances. However, the version that became effective in November 2011 for the first time rendered defendants who originally received downward variances or departures for reasons other than substantial assistance ineligible for further reductions.

In *Padilla-Diaz*, the government at the initial sentencing agreed to recommend sentences that included variances or departures below the otherwise applicable Guidelines range pursuant to plea agreements entered under Rule 11(c)(1)(B) of the Federal Rules of Criminal Procedure.[4] The sentencing judges followed the recommendations for lower sentences based on mitigating factors in each of the cases. *Padilla-Diaz*, 862 F.3d at 859. Each of the defendants was later barred from eligibility by § 1B1.10(b)(2)(A).

On appeal, the defendants in *Padilla-Diaz* argued that the post-2011 version of § 1B1.10 conflicts with the overarching congressional mandate to the Commission in 28 U.S.C. § 991(b)(1) because it nullifies departures and variances from the Guidelines range that were necessary to meet the statutory requirement of achieving a sentence sufficient but not greater than necessary under § 3553(a).

[4] The details of the agreed recommendations are set out in the briefing. Appellants' Opening Brief, *United States v. Padilla-Diaz*, 2016 WL 1081282, *4-10 (9th Cir. Mar. 10, 2016).

Specifically, the defendants argued that the premise of the exclusion—that a judge imposing a sentence below the Guidelines range has paid less heed to the range than a judge imposing a sentence within, or even above, that range—was flawed. In all sentencings, the Guidelines range serves as the "starting point and the initial benchmark" for determining the "sufficient, but not greater than necessary," sentence. *Gall v. United States*, 552 U.S. 38, 44, 49 (2007). A court imposing a sentence must first correctly calculate the applicable Guidelines range, and then consider the non-Guidelines factors set forth in § 3553(a) to impose a sentence "sufficient, but not greater than necessary," to meet the purposes of sentencing. *United States v. Carty*, 520 F.3d 984, 991 (9th Cir. 2008) (en banc).

As the *Padilla-Diaz* defendants pointed out, the Guidelines play no less of a role when variances and departures are contemplated. A judge imposing an outside-Guidelines sentence must "consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance." *Carty*, 520 F.3d at 991 (quoting *Gall*, 552 U.S. at 50). Thus, "[e]ven if the sentencing judge sees a reason to vary from the Guidelines, 'if the judge uses the sentencing range as the beginning point to explain the decision to deviate from it, *then the Guidelines are in a real sense the basis for the sentence*.'" *Peugh v. United States*, 569 U.S. 530, 542 (2013) (emphasis in *Peugh*) (quoting *Freeman v. United States*, 564 U.S.

522, 529 (2011) (plurality opinion)). The Supreme Court has recognized that, regardless of the discretion to deviate, the Guidelines range has an empirically proven influence on judges' sentencing decisions. *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1346 (2016) ("'[W]hen a Guidelines range moves up or down, offenders' sentences [tend to] move with it.'") (quoting *Peugh*, 569 U.S. at 544).

As the defendants in *Padilla-Diaz* argued, the § 1B1.10(b)(2)(A) exclusion renders a defendant ineligible for a benefit granted to other defendants based solely on the fact that the sentencing judge found sufficient mitigating circumstances to justify a below-Guidelines sentence. The exclusion thus thwarts the framework established by the Guidelines because it necessarily alters the relationship of a defendant's sentence to the Guidelines range and to the sentences of other defendants, including co-defendants. It requires courts to ignore the fact that departures and variances from the Guidelines range, as retroactively amended, remain necessary to ensure fairness, to avoid unwarranted disparity, and to account for individualized circumstances.

The government in *Padilla-Diaz* defended the restriction in § 1B1.10(b)(2)(A) by reliance on the principle articulated in *Dillon v. United States*, 560 U.S. 817, 831 (2010), that sentence reductions under 18 U.S.C. § 3582(c)(2) are limited adjustments to an otherwise final sentence, not plenary resentencings. The

defendants in *Padilla-Diaz* argued that *Dillon* supports the conclusion that sentence reduction proceedings may not be used to categorically alter the relationship of a defendant's sentence to the Guidelines range or to the sentences of other defendants. The defendant in *Dillon* had been sentenced pursuant to the mandatory Guidelines regime in place before *United States v. Booker*, 543 U.S. 220 (2005). 560 U.S. at 823. When the Commission made the amendment to the crack cocaine guideline retroactive in 2008, Mr. Dillon argued for a complete resentencing during the § 3582(c)(2) proceedings, with renewed consideration of the § 3553(a) factors under the now-advisory Guidelines. *Dillon*, 560 U.S. at 825.

The Supreme Court disagreed with Mr. Dillon's characterization of § 3582(c)(2) as authorizing a "sentencing" or "resentencing" proceeding, because the statute only gives courts power to "reduce" an otherwise final sentence. Understanding § 3582(c)(2) as a "narrow exception to the rule of finality," the Court in *Dillon* held that "proceedings under that section do not implicate the interests identified in *Booker*." 560 U.S. at 827-28. Because the judge must "[t]ak[e] the original sentence as given, any facts found by a judge at a § 3582(c)(2) proceeding do not serve to increase the prescribed range of punishment; instead, they affect only the judge's exercise of discretion within that range." *Id.* at 828. The Court also explained that "any mistakes committed at the initial sentencing" are not "imposed

anew if they are not corrected" in § 3582(c)(2) proceedings because § 3582(c)(2) leaves in place all sentencing decisions other than those affected by the guideline amendment. *Id.* at 831.

Dillon's reasoning for exempting § 3582(c)(2) proceedings from *Booker* principles is their limited nature, in which courts must "leave all other guideline application decisions unaffected." *Id.* at 831 (citing U.S.S.G. § 1B1.10(b)(1)). The defendants in *Padilla-Diaz* argued that the Commission's exclusion of eligibility for defendants who received departures and variances does exactly the opposite: it disrupts departure and variance decisions that were intended to promote fairness and avoid unwarranted disparity.

In the Court's opinion in *Padilla-Diaz*, the Court never rejected the defendant's contention that the § 1B1.10(b)(2)(A) exclusion promotes unwarranted disparity. To the contrary, the Court opined, "Defendant's argument has some appeal." *Padilla-Diaz*, 862 F.3d at 861. "[D]efendants who originally had lower sentences may be awarded the same sentences in § 3582(c)(2) proceedings as offenders who originally had higher sentences." *Id.* Thus, "sentences that were initially tailored to avoid unwarranted disparities and to account for individualized circumstances will now converge at the low end of the amended guideline range." *Id.* The Court agreed that the result was "anomalous," *id.*, and "will sometimes

produce unequal and arguably unfair results." *Id.* at 862. Nonetheless, the Court upheld the Commission's policy statement. Citing *Dillon*, the Court reasoned that § 3582(c)(2) is a "congressional act of lenity" that is "not constrained by the general policies underlying initial sentencing or even plenary resentencing proceedings." *Padilla-Diaz*, 862 F.3d at 861.

B. Contrary To *Padilla-Diaz*'s Premise That § 3582(c)(2) Proceedings Are Acts Of Lenity Outside The Scope Of General Sentencing Policies, *Hughes* Adopted The Full "Framework" Of Guidelines Sentencing, Including Avoidance Of Unwarranted Disparities, As Applying To § 3582(c)(2) Proceedings.

Following the panel decision in *Padilla-Diaz*, the Supreme Court construed the statutory framework for sentence reductions under § 3582(c)(2) in *Hughes*. The "reasoning" and "mode of analysis" of *Hughes* is now the controlling authority that this Court must apply under *Miller*. The overarching message from *Hughes* is that, contrary to the approach in *Padilla-Diaz*, eligibility for sentence reductions based on retroactive amendments must take into account the full statutory structure for sentencing outlined in the Sentencing Reform Act.

The Court in *Hughes* revisited the question of whether a sentence imposed pursuant to a binding "Type-C" plea agreement under Rule 11(c)(1)(C) is "based on" the defendant's Guidelines range for purposes of sentence reduction eligibility under § 3582(c)(2). 138 S. Ct. at 1773. The Court had originally addressed that issue

in *Freeman*, but "[n]o single interpretation or rationale in *Freeman* commanded a majority of the Court," and the lower courts were unable to agree on what controlling principle to draw from the Court's fractured decision. *Hughes*, 138 S. Ct. at 1771. Accordingly, the Court considered the issue again with the goal of not only resolving the particular case in front of it, but also giving "the necessary guidance to the federal district courts and to the courts of appeals" regarding the correct interpretation of § 3582(c)(2). *Id.* at 1772.

In *Hughes*, the parties entered a Type-C plea agreement that agreed to a 180-month sentence, eight months below the otherwise applicable Guidelines range of 188 to 235 months. 138 S. Ct. at 1774. Amendment 782 reduced the Guidelines range to 151 to 188 months. *Id.* Mr. Hughes filed a sentence reduction motion, but he was deemed ineligible for a reduced sentence "because his plea agreement did not expressly rely on a Guidelines range." *Id.* The Court held "that a sentence imposed pursuant to a Type-C agreement is 'based on' the defendant's Guidelines range so long as that range was part of the framework the district court relied on in imposing the sentence or accepting the agreement." *Id.* at 1775.

Throughout its analysis, the Court in *Hughes* made clear that the policies and principles underlying federal sentencing inform the construction of § 3582(c)(2). For example, the Court repeatedly relied on the goal of "uniformity in sentencing

imposed by different federal courts for similar criminal conduct." *Id.* at 1774 (quoting *Molina-Martinez*, 136 S. Ct. at 1342) (internal quotation marks omitted); *see also Hughes*, 138 S. Ct. at 1775 ("The post-*Booker* federal sentencing scheme aims to achieve uniformity by ensuring that sentencing decisions are anchored by the Guidelines."). The Court commented that the *Freeman* decision produced "unwarranted disparities" in the exercise of sentence reduction authority that had nothing to do with the extent to which the original sentence was tied to the reduced Guidelines range. *Id.* at 1774-75.

The Court also specifically stated that § 3582(c)(2) contributes to the "broader purposes" of the Sentencing Reform Act to "'create a comprehensive sentencing scheme in which those who commit crimes of similar severity under similar conditions receive similar sentences.'" *Hughes*, 138 S. Ct. at 1776 (quoting *Freeman*, 564 U.S. at 533). "Section 3582(c)(2) contributes to that goal by ensuring that district courts may adjust sentences imposed pursuant to a range that the Commission concludes [is] too severe, out of step with the seriousness of the crime and the sentencing ranges of analogous offenses, and inconsistent with the Act's purposes." *Id.*

In addition to referring back repeatedly to the purposes of sentencing, the Court in *Hughes*, in the context of retroactive Guidelines proceedings, emphasized

that the Guidelines "remain the foundation of federal sentencing decisions." *Id.* at 1775 (citing *Peugh*, 569 U.S. at 544, and *Molina-Martinez*, 136 S. Ct. at 1346). The Court recognized that this remains true regardless of whether the sentence imposed is outside of the Guidelines range. *Id.* at 1775. As the Court said, "These cases [*Peugh* and *Molina-Martinez*] confirm that the Guidelines remain a basis for almost all federal sentences." *Id.* at 1777. Accordingly, the Court determined that in "the typical sentencing case," and as "the general rule," the Guidelines range forms the basis of a defendant's sentence for purposes of § 3582(c)(2). *Id.* at 1775-76. The Court concluded that "there is no reason a defendant's eligibility for relief should turn on the form of his plea agreement." *Id.* at 1777.

In her concurring opinion, Justice Sotomayor further emphasized the need to avoid disparity in sentence reduction proceedings, citing it as a primary motivating factor for her decision to join the majority in its construction of § 3582(c)(2). 138 S. Ct. at 1779-80 (Sotomayor, J., concurring). She stated, "The integrity and legitimacy of the criminal justice system depend upon consistency, predictability, and evenhandedness." *Id.* at 1779. She explained that joining the majority would "ensure clarity and stability in the law" and would "promote 'uniformity in sentencing imposed by different federal courts for similar criminal conduct.'" *Id.* (citing *Molina-Martinez*, 136 S. Ct. at 1342). She stressed the need to avoid "inconsistencies

and disparities" and to "ensure that similarly situated defendants are subject to a uniform rule." *Id.* at 1779-80. And she decided that the majority opinion "studiously adheres" to the "firmly established" rule "that the Guidelines remain the foundation of federal sentencing decisions." *Id.* at 1780 (internal quotation marks omitted).

The Court's decision in *Hughes* locks in place the position of § 3582(c)(2) retroactive amendment motions in the larger context of other sentencing statutes. By its strong reliance on *Molina-Martinez* and *Peugh*, neither of which involved § 3582(c)(2) sentencing, the Court reinforced its description of the central and pervasive role of Guidelines in the imposition of the ultimate sentence:

> [T]his Court's precedents since *Freeman* have further confirmed that the Guidelines remain the foundation of federal sentencing decisions. In *Peugh*, for example, the Court held that the *Ex Post Facto* Clause prohibits retroactive application of amended Guidelines that increase a defendant's sentencing range. The Court reasoned that, *Booker* notwithstanding, the Guidelines remain "the lodestone of sentencing." And in *Molina-Martinez*, the Court held that in the ordinary case a defendant suffers prejudice from a Guidelines error because of "the systemic function of the selected Guidelines range."

Hughes, 138 S. Ct. at 1775 (citations omitted). The opinion in *Hughes* forecloses statutory constructions inconsistent with the understanding that retroactive amendments are an important component of the global Guidelines framework for ensuring that sentencing decisions remain fair and equitable.

In reliance on the purposes of sentencing and the pivotal role of the Guidelines in sentencing, the Court in *Hughes* construed § 3582(c)(2) as giving district courts discretion to reduce a defendant's sentence whenever a retroactive amendment has provided "a new starting point" for the sentence. *Id.* at 1775-76 ("In general, § 3582(c)(2) allows district courts to reconsider a prisoner's sentence based on a new starting point—that is, a lower Guidelines range—and determine whether a reduction in the prisoner's sentence is appropriate."); *id.* at 1778 "[R]elief under § 3582(c)(2) should be available to permit the district court to reconsider a prior sentence to the extent the prisoner's Guidelines range was a relevant part of the framework the judge used to accept the agreement or determine the sentence."). The Court expressed this in the clearest possible terms: "In federal sentencing the Guidelines are a district court's starting point, so when the Commission lowers a defendant's Guidelines range the defendant will be eligible for relief under § 3582(c)(2) absent clear demonstration, based on the record as a whole, that the court would have imposed the same sentence regardless of the Guidelines." *Id.* at 1776. *Hughes*' broad and definitive language cannot be read to support a rule that categorically excludes from eligibility defendants whose sentences vary or depart from the Guidelines range.

Without the benefit of *Hughes*, the *Padilla-Diaz* panel concluded that "sentence reductions [under § 3582(c)(2)] are not constrained by the general policies underlying initial sentencing or even plenary resentencing proceedings." 862 F.3d at 861. The opinion in *Padilla-Diaz* therefore concluded that § 3582(c)(2) is "a congressional act of lenity" that is exempt from the general rules for federal sentencing. *Id.* (citing *Dillon*, 560 U.S. at 826). That position is untenable after the Supreme Court in *Hughes* unequivocally placed the goals of the Sentencing Reform Act front and center in the construction of § 3582(c)(2).

Contrary to the earlier panel decision, *Hughes* adopted the defendants' assertion in *Padilla-Diaz* that the Guidelines provide the "framework" for *all* sentencing decisions, including sentence reductions based on retroactive Guidelines amendments. *Compare Hughes*, 138 S. Ct. at 1775 (describing importance of Guidelines framework to all sentencing decisions) *with Padilla-Diaz*, 2016 WL 1081282, at *15-21 (same). The mode of analysis in *Hughes* establishes that proceedings under § 3582(c) are indeed "constrained" by general sentencing policies. 138 S. Ct. at 1776. And *Hughes* recognized that arbitrarily denying sentence reduction eligibility to defendants whose sentences were imposed in reliance on an overly-harsh range creates unwarranted disparity, contrary to the goals of the Sentencing Reform Act and § 3582(c)(2). 138 S. Ct. at 1776-77 (Section 3582(c)(2)

contributes to the goal of avoiding disparity by "ensuring that district courts may adjust sentences imposed pursuant to a range that the Commission concludes [is] too severe, out of step with the seriousness of the crime and the sentencing ranges of analogous offenses, and inconsistent with the Act's purposes."). As recognized in *Padilla-Diaz*, the Commission's commentary 'must give way' if it is at odds with the plain language of the statute[.]" 862 F.3d at 861 (quoting *United States v. LaBonte*, 520 U.S. 751, 757 (1997)).

The Court in *Hughes* made no more than passing reference to the decision in *Dillon*, the opinion cited by the panel in *Padilla-Diaz* to place § 3582(c) outside the framework of other sentencing statutes. The defendants in *Hughes*, as with the defendants here and those in *Padilla-Diaz*, did not seek to import into sentence reduction proceedings the type of modifications to the original sentence that the Court in *Dillon* prohibited. Rather, the argument in *Hughes*, as it was in *Padilla-Diaz*, was that sentence reduction authority exists when the amended Guidelines range formed any part of the basis for the sentence. In context, *Dillon*'s reference to § 3582(c)(2) as an "act of lenity" supports a construction of § 3582(c)(2) to permit exercise of judicial discretion to the full extent that a retroactive amendment reduced the defendant's Guidelines range: "§ 3582(c)(2) represents a congressional act of

lenity *intended to give prisoners the benefit of later enacted adjustments to the judgments reflected in the Guidelines*. *Dillon*, 560 U.S. at 828 (emphasis added).

This Court must reevaluate the *Padilla-Diaz* decision in light of intervening Supreme Court authority that is clearly inconsistent with the assumptions of the earlier ruling. A limited sentence reduction proceeding should not categorically disturb the original sentencing court's rulings regarding factors that require a variance from the Guidelines range. By nullifying downward variances and non-cooperation departures previously found to be appropriate, the 2011 version of § 1B1.10(b)(2) injects disparity, nullifies individual sentencing determinations that were keyed to the original Guidelines range, and fails to "leave all other guideline applications unaffected" within the framework of *Dillon* and the structure of § 3582(c) articulated in *Hughes*. The Court should hold that the reasoning and mode of analysis in *Hughes* supersedes and invalidates *Padilla-Diaz*.

C. Contrary To The Holding Of *Padilla-Diaz*, The Supreme Court Interpreted § 3582(c)(2) In *Hughes* To Require That District Courts Have Discretion To Reduce The Sentence Of A Defendant Whose "Ultimate Sentence" Was "Based On" The Reduced Guidelines Range.

Aside from undermining *Padilla-Diaz*'s reasoning regarding the statutory framework of § 3582(c)(2)'s sentence reduction authority, *Hughes* provided a new interpretation of § 3582(c)(2) that conflicts with the Commission's categorical exclusion of sentence reduction eligibility for defendants who received departures

and variances. Specifically, the Court interpreted "based on" in § 3582(c)(2) to include cases in which the "ultimate sentence" includes departures and variances from the Guidelines range. *Id.* at 1776 (stating the "general rule that a defendant's Guidelines range is both the starting point and a basis for his *ultimate sentence*") (emphasis added).

While *Padilla-Diaz* approved the Commission's decision to exclude a wide swath of the least culpable defendants from eligibility for sentence reduction consideration, the Court in *Hughes* made clear that "the Guidelines remain a basis for *almost all* federal sentences." *Id.* at 1777 (emphasis added). The Court interpreted § 3582(c)(2) to require that defendants be "eligible for relief" except in the rare case when the Guidelines are not any part of the basis for the ultimate sentence:

> In federal sentencing the Guidelines are a district court's starting point, so when the Commission lowers a defendant's Guidelines range the defendant *will be eligible* for relief under § 3582(c)(2) absent clear demonstration, based on the record as a whole, that the court would have imposed the same sentence regardless of the Guidelines.

Id. at 1776 (emphasis added). The Court reiterated the rule several times:

- "In general, § 3582(c)(2) allows district courts to reconsider a prisoner's sentence based on a new starting point—that is, a lower Guidelines range—and determine whether a reduction in the prisoner's sentence is appropriate." *Id.* at 1775-76.

- "Accordingly, relief under § 3582(c)(2) should be available to permit the district court to reconsider a prior sentence to the extent the prisoner's Guidelines range was a relevant part of the framework the judge used to accept the agreement or determine the sentence." *Id.* at 1778.

The *Hughes* construction of the relevant statute provided the definitive explanation of what the law means and has always meant. *United States v. Aguilera-Rios*, 769 F.3d 626, 631 (9th Cir. 2014) ("A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction.") (citing *Rivers v. Roadway Express Inc.*, 511 U.S. 298, 312-13 (1994)).

The Court in *Hughes* explained that its interpretation of the eligibility criteria in § 3582(c)(2) was consistent with the portion of § 1B1.10, upheld in *Dillon*, requiring courts to "substitute only the [retroactive] amendments listed in subsection (d) for the corresponding guidelines provisions that were applied when the defendant was sentenced and . . . leave all other guideline application decisions unaffected." *Hughes*, 138 S. Ct. at 1777 (quoting § 1B1.10(b)(1)). The Court noted that "the Commission's policy statement 'seeks to isolate whatever marginal effect the since-rejected Guideline had on the defendant's sentence.'" *Id.* at 1778 (quoting *Freeman*, 564 U.S. at 530). Employing reasoning similar to that advocated by the unsuccessful defendants in *Padilla-Diaz*, the Court in *Hughes* determined that making relief under

§ 3582(c)(2) available whenever the reduced Guidelines range was "a relevant part of the framework the judge used to accept the [plea] agreement or determine the sentence" best advances the purposes of the Sentencing Reform Act. *Id.* at 1778. The sentencing judges' decisions at the initial sentencing regarding departures and variances were previously included as "guideline application decisions" and should be preserved in sentence reduction proceedings.

When the policy statements in the Guidelines are inconsistent with their statutory authorization, the commentary must give way to the statute. *LaBonte*, 520 U.S. at 757; *see generally Stinson v. United States*, 508 U.S. 36, 38 (1993) ("commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline."). The Commission does not have authority to institute a policy statement inconsistent with the authorizing statute. *See Mistretta v. United States*, 488 U.S. 361, 387 (1989) (federal courts are authorized to make rules "not inconsistent with the statutes or constitution of the United States") (quoting *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9-10 (1941)). Section 1B1.10(b)(2) impermissibly renders categorically *ineligible* for relief a class of defendants who are statutorily *eligible* for relief under § 3582(c)(2) as interpreted in *Hughes*.

Although the Court in *Hughes* recognized that the Commission has authority to promulgate policy statements guiding district courts in the exercise of the available discretion, the Court made clear that it is the statute that must determine a defendant's *eligibility* for relief. *Id.*at 1777 ("And in any event, '[w]hat is at stake in this case is a defendant's eligibility for relief, not the extent of that relief.'") (quoting *Freeman*, 564 U.S. at 532); *see also* 28 U.S.C. § 994(u) (authorizing the Commission to "specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment . . . may be reduced" following a retroactive amendment to the Guidelines).

Section 1B1.10(b)(2)(A) categorically precludes the exercise of judicial discretion for defendants whose mitigating circumstances warranted a sentence lower than the amended Guidelines range. Eligibility is distinct from the permissible limits on the extent of a sentence reduction. Because *Hughes* establishes that departure and variance sentences are, in the typical case, no less "based on" the Guidelines range than within-Guidelines sentences, the Commission's exclusion of reduction authority is impermissible.

The Supreme Court's decision in *Koons*, decided on the same day as *Hughes*, confirms that the statute, not the Commission's policy statement, must govern determinations of eligibility. In *Koons*, the Supreme Court considered whether

defendants whose substantial assistance to the government qualified them for sentences less than the statutory mandatory minimum are eligible for relief under § 3582(c)(2). Because the sentences were "based on" the statutory mandatory minimum and substantial assistance, not the subsequently lowered sentencing range, the Court held that the defendants were ineligible for relief under § 3582(c)(2). *Koons*, 138 S. Ct. at 1787.

In *Koons*, the Court made clear that the Commission's policy statement cannot trump statutory eligibility under § 3582(c)(2):

> But the Commission's policy statement cannot alter § 3582(c)(2), which applies only when a sentence was "based on" a subsequently lowered range. The Sentencing Commission may limit the application of its retroactive Guidelines amendments through its "'applicable policy statements.'" But policy statements cannot make a defendant eligible when § 3582(c)(2) makes him ineligible.

138 S. Ct. at 1790 (citations omitted). For the same reason, the policy statement cannot make a defendant ineligible for relief when the defendant is statutory eligible under the definition of "based on" in § 3582(c)(2).

In *Hughes*, the Court expressly recognized that *Koons*'s holding regarding sentences that were in fact "based on" mandatory minimum sentences constituted a "narrow exception" to the general applicability of the Guidelines' relevance to the ultimate sentence: "[C]ases like *Koons* are a narrow exception to the general rule that, in most cases, a defendant's sentence will be 'based on' his Guidelines range."

Hughes, 138 S. Ct. at 1776 (citing *Koons*, 138 S. Ct. at 1788-90). But if the § 1B1.10(a)(2) exclusion is left in place, this "narrow exception" would exclude up to 38 percent of drug trafficking defendants from a sentence reduction, representing the percentage of federal drug defendants who received downward departures or variances, not including substantial assistance departures, from their sentences between 2012 and 2017.[5] Excluding those cases from eligibility would alter the conclusion in *Hughes* that, as a general rule, sentences including departures and variances are "based on" the Guidelines range and are therefore eligible for sentence reduction consideration when the Guidelines framework is retroactively reduced.

[5] Between 2012 and 2017, the Sentencing Commission reported 126,524 drug trafficking sentences. U.S. Sentencing Commission, *Interactive Sourcebook*, Sentences Relative to the Guideline Range By Each Primary Offense Category (Option 2: Five Categories) (http://isb.ussc.gov). Of those defendants, 20,797, or 16.4 percent, received non-cooperation government sponsored sentences below the Guidelines range; 27,990, or 22.1 percent, received defense requested sentences below the Guidelines range; and 30,683, or 24.3 percent, received substantial assistance departures under U.S.S.G. 5K1.1. *Id*.

II. In Light Of *Hughes*, Excluding The Class Of Defendants Who Received Downward Variances And Non-Cooperation Departures From Consideration For Sentence Reductions Violates The Equal Protection Clause By Irrationally Limiting The Benefit Of Guidelines Amendments To Those Offenders Who Were Determined To Lack Mitigating Circumstances Sufficient To Warrant Downward Sentencing Adjustments.

By disregarding the context provided by *Hughes*, the current version of § 1B1.10(b)(2)(A) draws an irrational and arbitrary distinction between those defendants who received a downward variance or non-cooperation departure at the time of their original sentencing and those who did not. The individuals denied eligibility are those about whom the sentencing court previously found that a below-Guidelines sentence was "sufficient, but not greater than necessary," to carry out the purposes of federal sentencing under § 3553(a). By contrast, the individuals who are eligible to receive a retroactive reduction are those who were determined to require a longer, within- or above-Guidelines sentence under the § 3553(a) factors. Although the Commission found that the "initial benchmark" that empirically influenced the sentence for all of these defendants was overly harsh, the classification prohibits consideration for sentence reductions only for those who previously were determined to be the *most* deserving of comparably lower sentences, while allowing the full reduction for *less* deserving defendants. *See Mellouli v. Lynch*, 135 S. Ct.

1980, 1982 (2015) (treating less serious offenses more harshly than more serious offenses "makes scant sense").

Irrational and arbitrary classifications violate the equal protection clause. *Chapman v. United States*, 500 U.S. 453, 465 (1991). A law that distinguishes between classes may not be upheld unless the distinction is rationally related to a legitimate state interest and is not "so attenuated as to render the distinction arbitrary or irrational." *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 589 (9th Cir. 2008) (citing *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446 (1985)). The classification must be "narrow enough in scope and grounded in sufficient factual context . . . to ascertain some relation between the classification and the purpose it serve[s]." *Romer v. Evans*, 517 U.S. 620, 632 (1996) ("[E]ven in the ordinary equal protection case calling for the most deferential of standards, [courts] insist on knowing the relation between the classification adopted and the object to be attained").

The irrationality of the disqualification of those with previous downward variances is demonstrated by the hypothetical of two defendants who were convicted of the same crime and had similar criminal histories and identical Guidelines ranges. For one defendant, the original sentencing court found that, because of that person's history and characteristics, a sentence below the Guidelines range was sufficient, but

not greater than necessary, to provide just punishment, afford future deterrence, and protect the public. The court therefore granted a two-level downward variance to that defendant. For the other defendant, the court found no similar reason for a lower sentence, determined that a longer sentence was necessary to carry out the purposes of § 3553(a), and granted no variance at all. The effect of § 1B1.10(b)(2)(A) is that the latter defendant—the one without mitigating personal characteristics—is eligible to receive a full, two-level retroactive sentence reduction, while the former defendant, is not. The two defendants are likely to serve the same sentence, despite the fact that one of them was found to be less deserving of a lower sentence than the other.[6]

And this is not the worst of the unwarranted disparities produced by § 1B1.10(a)(2) in its present form. For example, the drug kingpin who coerces an underling would be eligible for a significant reduction, while the underling, who received a two-level encouraged departure for imperfect coercion under U.S.S.G. § 5K2.12, would be categorically ineligible. So would the mentally ill defendant

[6] Statistics tracking implementation of Amendment 782 establish that, in districts comprising the Ninth Circuit, courts granted 72 percent of motions filed under 18 U.S.C. § 3582(c)(2). *See* U.S.S.C., *2014 Drug Guidelines Amendment Retroactivity Data Report*, at 4 (Table 1). In the District of Oregon, where appellants were sentenced, the courts granted an even greater percentage—99.2 percent—of all motions by eligible defendants.

who received an encouraged below-Guidelines sentence for diminished capacity under U.S.S.G. § 5K2.13. The same is true of the almost limitless grounds for variances under § 3553(a). And the initial downward variance may well be with the government's agreement, as many of these petitioners' cases demonstrate, which cancels out the benefit from a negotiated guilty plea.

The *Padilla-Diaz* opinion admitted but understated the effect of the categorical disqualification, stating that it "will sometimes produce unequal and arguably unfair results." 862 F.3d at 862. In fact, the Court failed to identify any scenario in which the disqualification would *not* produce unfair results, especially given judicial discretion to deny reductions to avoid windfalls, such as where the sentencing judge anticipated the basis for the retroactive amendment. Under the policy statement, defendants who received variances or departures from the Guidelines range based on mitigating circumstances will always be categorically excluded from eligibility for a sentencing reduction, whereas defendants who did not have mitigating circumstances meriting a below-Guidelines sentence will always be eligible for the average 25-month reduction in prison time and have a very good chance of actually receiving it.

The panel in *Padilla-Diaz* denied the equal protection challenge based on two purported justifications for § 1B1.10(b)(2): simplicity and encouragement of

cooperation. The panel's analysis was flawed because, with the benefit of the statutory context established in *Hughes*, the "challenged classification could not reasonably be viewed to further" either of its "asserted purposes" in a rational manner. *Lazy Y Ranch*, 546 F.3d at 590-91.

First, the classification did not advance simplicity. The prior rule made eligibility for a sentence reduction turn on the single question of whether the Guidelines range was lowered by a retroactive amendment. This rule was simple and predictable: it permitted courts to incorporate all types of departures as well as variances into sentence reduction proceedings, and it properly made the amendment itself the only lodestar for determining whether and to what extent a defendant was eligible for a reduction. Eligibility now depends on at least three questions: (1) whether the Guidelines range has been reduced, (2) if so, whether the defendant received a below-Guidelines sentence, and, if so, (3) whether the below-Guidelines sentence resulted from substantial assistance to the government or implementation of a concurrent sentence. *See United States v. D.M.*, 869 F.3d 1133, 1143-44 (9th Cir. 2017) (noting the lack of clarity in the policy statement and invoking the rule of lenity to conclude that a "comparably less" sentence reduction may incorporate departures and variances not attributable to substantial assistance); *United States v. Brito*, 868 F.3d 875, 881-82 (9th Cir. 2017) (variances to achieve concurrency as

part of the "term of imprisonment" do not disqualify defendants from eligibility for sentence reductions based on retroactive Guidelines amendment). Aside from the analysis required to apply *Hughes* to the question of eligibility, *D.M.* and *Brito* alone belie any claim of simplicity.

Second, there is no factual grounding for the panel's speculation that the classification incentivizes cooperation. Although the rational basis test does not require an evidentiary record, the test nevertheless requires that a justification be grounded in fact and reality, and speculation about possible rational bases must be reasonable. *See Heller v. Doe*, 509 U.S. 312, 320 (1993) (speculation, while permissible, must be "rational"); *Lazy Y Ranch*, 546 F.3d at 590-91; *Lewis v. Thompson*, 252 F.3d 567, 590 (2d Cir. 2001) (justification for the law may not rely on factual assumptions that exceed the bounds of rational speculation). Neither the Commission nor the panel provided any empirical basis for the belief that a defendant deciding whether to cooperate will place any weight whatsoever on a hypothetical future benefit from a hypothetical retroactive guideline amendment, as opposed to the concrete sentencing concessions already authorized for cooperators. Even less so is there any indication that barring sentence reduction eligibility for other defendants—those with mitigating factors unrelated to cooperation—would impact the persuasiveness of that fictional incentive, especially since defendants

who do not cooperate, and thus who do not receive any type of mitigating adjustment at all, are eligible for the full benefit of retroactive Guidelines amendments.

And even if the change in the Commission's policy in fact advanced simplicity or incentivized cooperation, the rule would still be irrational because it creates sentencing disparity in order to solve problems that do not exist. A rule premised on a defendant's height, initial of last name, or hair color might be simpler to implement, but it would not be rational because it would not serve the purposes of sentencing. Likewise, the Commission could not rationally eliminate all departure provisions other than U.S.S.G. § 5K1.1 in the original sentencing context in order to incentivize cooperation because departures serve other important sentencing interests. Jettisoning those interests wholesale would require a proven need and proven outcomes to be rational. Just so here. Attempting to incentivize cooperation by barring sentence reductions in cases where courts imposed below-guideline sentences for other valid reasons does nothing to advance any legitimate sentencing goal, at the grave cost of undermining the fairness of individualized sentencing and encouraging unwarranted disparity in violation of the governing principles articulated in *Hughes*.

The crux of the problem with § 1B.10(b)(2) is the extreme disconnect between the scope of any purported problem and the Commission's identified solution: the

cure is worse than the imagined disease. Rational basis review invalidates a measure whose "sheer breadth" is "discontinuous with the reasons offered for it." *Romer*, 517 U.S. at 632, 635 (rejecting justifications where "[t]he breadth of the [measure] is so far removed from these particular justifications that we find it impossible to credit them"). The provision here serves to eliminate almost all justified deviations below the amended Guidelines range.

The Supreme Court's intervening opinion in *Hughes* confirms that § 1B1.10(b)(2)(A)'s exclusion is irrational because departure and variance sentences are "based on" the Guidelines range to the same extent as within-Guidelines sentences. A reduction in the Guidelines range upon which the defendant's sentence was based establishes a "reasonable probability" that the defendant "will spend more time in prison than the District Court otherwise would have considered necessary." *See Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1908 (2018) (holding that errors in calculating a defendant's Guidelines range should ordinarily be corrected on plain error review). Section § 3582(c)(2) should allow relief to those defendants, rather than requiring them to linger in prison to serve a sentence based on a since-rejected, excessive range.

Where erroneously harsh Guidelines ranges are identified and deemed worthy of retroactive application, there are no compelling reasons for leaving defendants to

serve unnecessary incarceration. *See Rosales-Mireles*, 138 S. Ct. at 1908 ("In considering claims [of Guidelines miscalculation], then, 'what reasonable citizen wouldn't bear a rightly diminished view of the judicial process and its integrity if courts refused to correct obvious errors of their own devise that threaten to require individuals to linger longer in federal prison than the law demands?'") (quoting *United States v. Sabillon-Umana*, 772 F.3d 1328, 1333-34 (10th Cir. 2014) (Gorsuch, J.)). The meager rationales put forth by the Commission offer scant support for a provision that disrupts the very purpose of retroactive Guidelines amendments and injects disparity into proceedings that are meant to ameliorate injustice, inconsistently with the statutory framework described in *Hughes*. The policy statement violates equal protection, or, at least, § 3582(c)(2) should be construed to avoid serious equal protection issues. *See Clark v. Martinez*, 543 U.S. 371, 380-81 (2005).

III. The Defendants Are Statutorily Eligible For Exercise Of The District Court's Sentence Reduction Discretion Because The Policy Statement That Categorically Disqualifies Them From The Benefits Of Retroactive Amendments Is Invalid.

With the guidance from *Hughes*, this is an easy case for reversal, and the cases should be remanded for the sentencing judges to make the determination whether to grant a sentence reduction. Supreme Court precedent now recognizes that the goals of the Sentencing Reform Act guide the administration of retroactive Guidelines

amendments and that all sentences "based on" the Guidelines framework, including when the ultimate sentence incorporates a downward departure or variance, are statutorily eligible for sentence reduction consideration under § 3582(c)(2). By promulgating retroactive Amendment 782, the Commission determined that the framework for each of these defendants' sentences started unduly high, yet the Commission's unprecedented modification to U.S.S.G. § 1B1.10 excluded the defendants from eligibility for any sentence reduction based solely on having received a downward departure or variance at the initial sentencing. The resulting interference with the sentencing courts' decisions regarding the relationship of the sentence to the Guidelines range promotes unwarranted disparity and runs contrary to the *Hughes* opinion's construction of § 3582(c)(2) as a remedy in which other Guidelines application decisions remain unaffected.

The Court in *Hughes* determined that the defendant's sentence in that case—which was eight months below the Guidelines range prior to variance—was "based on" the Guidelines range and that the sentencing judge had authority, after reviewing all sentencing factors under § 3553(a), to determine whether a sentence reduction was appropriate:

> In this case the District Court accepted Hughes' Type-C agreement after concluding that a 180-month sentence was consistent with the Sentencing Guidelines. The court then calculated Hughes' sentencing range and imposed a sentence that the court deemed "compatible" with

> the Guidelines. Thus, the sentencing range was a basis for the sentence that the District Court imposed. That range has "subsequently been lowered by the Sentencing Commission," so Hughes is eligible for relief under § 3582(c)(2).

Hughes, 138 S. Ct. at 1778. Each of the defendants in the present cases had their sentences calculated under the Guidelines, the variances and departures were granted after consideration of the Guidelines, many by agreement of the parties, and the ultimate sentences were "based on" the Guidelines just as was the case in *Hughes*. Each defendant is therefore just as eligible under the statute as Mr. Hughes.

For example, twelve of the defendants bargained for a sentence two levels or more below the Guidelines range and negotiated away valuable litigation rights for that benefit. Under the current version of U.S.S.G. § 1B1.10(b)(2)(A), those twelve defendants now have a sentence that is within, or at least two levels closer to, the amended Guidelines range, placing them in the same position as a defendant who did not strike the same bargain, who fully litigated pretrial motions or went to trial, and, accordingly, negotiated no variance, but who received the retroactive benefit of Amendment 782. The fact that a defendant enters a plea agreement under Rule 11(c)(1)(B) rather than Rule 11(c)(1)(C) as in *Hughes* makes no difference in eligibility under § 3582(c)(2): "[T]here is no reason a defendant's eligibility for relief should turn on the form of his plea agreement." *Hughes*, 138 S. Ct. at 1777.

Even in the cases of defendants who received sentences below the Guidelines range without a formal government agreement, such as those defendants who exercised their Sixth Amendment rights to trial or who entered a guilty plea without a plea agreement, the departures and variances remain an integral part of the sentencing judge's calculus, designed to accomplish all of the sentencing purposes of § 3553(a), including avoidance of unwarranted disparity. Their exclusion from consideration for a reduction alters the relationship of their sentence to the Guidelines range and to the sentences of other defendants who received the benefit of Amendment 782. The § 1B1.10(b)(2) restriction, in effect, replaces warranted disparities with unwarranted disparities, in violation of the Commission's statutory directives in § 991(b)(1) and § 994(f).

Without guidance from *Hughes*, the *Padilla-Diaz* panel concluded that it must disregard the skewing impact of § 1B1.10(b)(2)(A) based on its conclusion that, as "a congressional act of lenity," the implementation of retroactive ameliorative amendments is "not constrained by the general policies underlying initial sentencing or even plenary resentencing proceedings." 862 F.3d at 861. *Hughes* repeatedly confirms that is not the case. Further, in explicit terms, § 991(b)(1) applies to "sentencing policies and practices," which include § 3582(c)(2) proceedings. *See* 28 U.S.C. § 994(a)(2)(C) (referencing sentence modification under § 3582(c)(2) as an

"aspect of sentencing or sentence implementation[.]"). It makes sense to treat sentence reduction proceedings under § 3582(c)(2) as an aspect of sentencing given that the outcome will determine the actual time defendants must serve in prison, and the statute expressly instructs courts to consider § 3553(a) and its principle of parsimony.

Hughes made clear that § 3582(c)(2) proceedings promote fairness and proportionality by ensuring adherence to previous sentencing decisions. If the Commission can use sentence reduction proceedings to systemically alter sentencing courts' decisions regarding the relationship of the sentence to the Guidelines range, as the Commission has done here, then § 3582(c)(2) not only fails to implement but subverts the purposes of the Sentencing Reform Act. Under the reasoning of *Hughes*, this Court should hold that each defendant is categorically eligible for the sentencing court's exercise of discretion under § 3582(c)(2) to determine whether a sentence reduction is appropriate considering the sentencing factors under § 3553(a).

Conclusion

For the foregoing reasons, the Court should reverse the denial of the motions for reductions of sentence in each of the consolidated cases and remand for the sentencing judge to exercise available discretion, guided by § 3553(a) and the valid

aspects of the Commission's policy statement in § 1B1.10, to reduce the sentences imposed by up to two levels downward.

Respectfully submitted this 17th day of September, 2018.

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	**Nos. 15-30309, 15-30310,**
	)	**15-30315, 15-30347,**
Plaintiff-Appellee	)	**15-30351, 15-30352,**
	)	**15-30353, 15-30354,**
v.	)	**15-30377, 15-30383,**
	)	**15-30385, 15-30391,**
JOSE HERNANDEZ-MARTINEZ, et al.	)	**16-30000, 16-30004,**
	)	**16-30040, 16-30041,**
Defendants-Appellants.)		**16-30089, 16-30090,**
	)	**16-30162, 16-30170,**
	)	**16-30199, 16-30294,**
	)	**17-30013**
	)	

STATEMENT OF RELATED CASES

I, Stephen R. Sady, undersigned counsel of record for defendants-appellants, state pursuant to the Ninth Circuit Court of Appeals Rule 28-2.6, that I know of no other cases that should be deemed related.

Dated this 17th day of September, 2018.

/s/ Stephen R. Sady
Stephen R. Sady
Attorney for Defendants-Appellants

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	**Nos. 15-30309, 15-30310,**
	)	**15-30315, 15-30347,**
Plaintiff-Appellee	)	**15-30351, 15-30352,**
	)	**15-30353, 15-30354,**
v.	)	**15-30377, 15-30383,**
	)	**15-30385, 15-30391,**
JOSE HERNANDEZ-MARTINEZ, et al.	)	**16-30000, 16-30004,**
	)	**16-30040, 16-30041,**
Defendants-Appellants.)		**16-30089, 16-30090,**
	)	**16-30162, 16-30170,**
	)	**16-30199, 16-30294,**
	)	**17-30013**
	)	

CERTIFICATE OF COMPLIANCE

I certify that:

This brief complies with the length limits permitted by Ninth Circuit Rule 32-1. The brief is 12,696 words, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Dated this 17th day of September, 2018.

/s/ Stephen R. Sady
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Attorney for Defendants-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on September 17, 2018, I electronically filed the foregoing Consolidated Opening Brief of Appellants with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Jill C. Dozark
Jill C. Dozark