No. 17-155

In the Supreme Court of the United States

ERIK LINDSEY HUGHES, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
JOHN P. CRONAN
Acting Assistant Attorney General
ERIC J. FEIGIN
RACHEL P. KOVNER
Assistants to the Solicitor General
ROSS B. GOLDMAN
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the lower courts correctly applied the rule in *Marks* v. *United States*, 430 U.S. 188 (1977), for interpreting divided decisions of this Court, when they denied petitioner a sentence reduction on the ground that he would be ineligible for such a reduction under the approaches of five Justices in *Freeman* v. *United States*, 564 U.S. 522 (2011).

2. If the issue addressed in *Freeman* is revisited, whether a defendant who was sentenced under a plea agreement containing a specific sentence that was binding on the district court under Federal Rule of Criminal Procedure 11(c)(1)(C) may seek a sentence reduction under 18 U.S.C. 3582(c)(2), which authorizes the reduction of a sentence that was "based on a sentencing range that has subsequently been lowered by the Sentencing Commission."

TABLE OF CONTENTS

Page

Table of Contents—Continued Page

TABLE OF AUTHORITIES

Cases: Page

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes, guidelines, and rules:

Miscellaneous—Continued: Page

In the Supreme Court of the United States

No. 17-155

ERIK LINDSEY HUGHES, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 849 F.3d 1008. The order of the district court (Pet. App. 16a-30a) is not published in the Federal Supplement but is available at 2015 WL 13344902.

JURISDICTION

The judgment of the court of appeals was entered on February 27, 2017. On May 22, 2017, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including July 27, 2017, and the petition was filed on that date. The petition was granted on December 8, 2017. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES, RULE, AND GUIDELINES PROVISIONS INVOLVED

The relevant statutes, provisions of the Federal Rules of Criminal Procedure, and provisions of the U.S.

Sentencing Guidelines are reprinted in an appendix to this brief. App., *infra*, 1a-27a.

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Georgia, petitioner was convicted of conspiracy to possess with intent to distribute at least 500 grams of methamphetamine, in violation of 21 U.S.C. 841(b)(1)(A)(viii) and 846, and possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. 3a, 16a-17a. Pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C), petitioner and the government entered into a plea agreement that stipulated a 180-month sentence. The district court accepted the agreement and imposed the specified term of imprisonment, to be followed by five years of supervised release. Pet. App. 17a. The U.S. Sentencing Commission later retroactively amended the Sentencing Guidelines for most drug offenses. Petitioner moved for a sentence reduction under 18 U.S.C. 3582(c)(2). The district court denied that motion, Pet. App. 16a-30a, and the court of appeals affirmed, *id.* at 1a-15a.

1. a. Rule 11 provides that "[a]n attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement." Fed. R. Crim. P. 11(c)(1). The rule then "divides plea agreements into three types, based on what the [g]overnment agrees to do." *United States* v. *Hyde*, 520 U.S. 670, 675 (1997). In the type at issue here—sometimes called a "type C" agreement, see *ibid.*, because it is described in subparagraph (C) of Rule 11(c)(1)—the government and the defendant agree on aspects of the sentence that bind the sentencing court if the plea is accepted. More specifically, the rule provides:

> the plea agreement may specify that an attorney for the government will:
>
> * * *
>
> (C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

Fed. R. Crim. P. 11(c)(1). The rule further permits the district court to "accept [a type C] agreement, reject it, or defer a decision until the court has reviewed the presentence report." Fed. R. Crim. P. 11(c)(3)(A).

Consistent with the "bind[ing]" nature of a type C agreement once it is "accept[ed]" by the district court (Fed. R. Crim. P. 11(c)(1)(C)), the court is required, upon accepting the agreement, to "inform the defendant that * * * the agreed disposition will be included in the judgment." Fed. R. Crim. P. 11(c)(4). Similarly, if the court rejects such an agreement, the court must, *inter alia*, "advise the defendant" that it is "not required to follow the plea agreement and give the defendant an opportunity to withdraw the plea." Fed. R. Crim. P. 11(c)(5)(B).

b. In the Sentencing Reform Act of 1984 (SRA), Pub. L. No. 98-473, Tit. II, ch. II, 98 Stat. 1987, Congress created the Sentencing Commission and charged it with promulgating sentencing guidelines and policy statements "regarding application of the guidelines or any other aspect of sentencing or sentence implementation," 28 U.S.C. 994(a)(1) and (2). Congress also charged the Commission with periodically reviewing and revising its

guidelines. 28 U.S.C. 994(*o*). When the Commission reduces the recommended term of imprisonment for a particular offense, it may 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). As a result, the Commission has "the unusual explicit power to decide whether and to what extent its amendments reducing sentences will be given retroactive effect." *Braxton* v. *United States*, 500 U.S. 344, 348 (1991) (emphasis omitted).

A court generally "may not modify a term of imprisonment once it has been imposed." 18 U.S.C. 3582(c); see *Dillon* v. *United States*, 560 U.S. 817, 819 (2010). But an exception permits a modification "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*)." 18 U.S.C. 3582(c)(2). In such a case, Section 3582(c)(2) gives a court discretion to "reduce the term of imprisonment," after considering the statutory sentencing factors set out in 18 U.S.C. 3553(a), but only "if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. 3582(c)(2); see 28 U.S.C. 994(a)(2)(C).

The Commission has addressed such sentence reductions in a policy statement contained in Sentencing Guidelines § 1B1.10. Section 1B1.10 limits the availability of sentence reductions to cases involving the Guidelines amendments listed in subsection (d) of that policy statement. *Id.* § 1B1.10(a)(1). It additionally provides that no reduction is permitted if, *inter alia*, "[the] amendment listed in subsection (d) does not have the

effect of lowering the defendant's applicable guideline range." *Id.* § 1B1.10(a)(2)(B).

c. In *Freeman* v. *United States*, 564 U.S. 522 (2011), this Court addressed "whether defendants who enter into [Rule 11(c)(1)(C)] plea agreements that recommend a particular sentence as a condition of the guilty plea may be eligible for relief under § 3582(c)(2)" in light of Section 3582(c)(2)'s limitation of eligibility to defendants whose sentences were "based on" the Sentencing Guidelines. *Id.* at 525 (opinion of Kennedy, J.).

A plurality of four Justices concluded that a "district judge's decision to impose a sentence" may be deemed to be "based on the Guidelines even if the defendant agrees to plead guilty under Rule 11(c)(1)(C)." *Freeman*, 564 U.S. at 526 (opinion of Kennedy, J.). The plurality reasoned that the district judge must consider the Guidelines and calculate the defendant's Guidelines range when deciding whether to accept the plea agreement. *Id.* at 529-534. It concluded that Section "3582(c)(2) modification proceedings should be available to permit the district court to revisit a prior sentence to whatever extent the sentencing range in question was a relevant part of the analytic framework the judge used to determine the sentence or to approve the agreement." *Id.* at 530.

Justice Sotomayor concurred in the judgment, adopting what the plurality described as "an intermediate position" between the plurality and the dissent. *Freeman*, 564 U.S. at 532 (opinion of Kennedy, J.). Justice Sotomayor concluded that a sentence imposed under a Rule 11(c)(1)(C) agreement is "based on" the agreement itself, not on the district court's determinations of the Sentencing Guidelines. *Id.* at 535-536 (Sotomayor, J., concurring in the judgment). She observed that a Rule 11(c)(1)(C) agreement is binding once accepted

and that "[a]t the moment of sentencing, the court simply implements the terms of the agreement it has already accepted." *Ibid.* Justice Sotomayor took the view, however, that a defendant who entered into a Rule 11(c)(1)(C) agreement could be eligible for a sentence reduction if the plea agreement expressly tied the defendant's sentence to the Sentencing Guidelines. *Id.* at 534; accord *id.* at 536-540.

Four Justices dissented. *Freeman*, 564 U.S. at 544-551 (Roberts, C.J., dissenting). The dissenting Justices concluded that a defendant who pleads guilty pursuant to a Rule 11(c)(1)(C) agreement is never eligible for a sentence reduction under Section 3582(c)(2). The dissent reasoned, like Justice Sotomayor, that the sentence of such a defendant is "based on" the binding plea agreement rather than on the Sentencing Guidelines calculations of the district court. *Id.* at 544-546. The dissenters concluded that a Rule 11(c)(1)(C) defendant would be ineligible for a sentence reduction regardless of whether his plea agreement indicated that the Sentencing Guidelines were the basis for the parties' agreement on the specified term. The dissenters emphasized that even in such a case, the district court simply applied the fixed term or range in the plea agreement when imposing the sentence. *Id.* at 547-548.

2. Petitioner was a member of a methamphetamine trafficking ring in Georgia. He was indicted by a federal grand jury on drug and gun charges. Presentence Investigation Report (PSR) ¶¶ 12-22. The first count of the indictment charged petitioner with conspiring to possess with intent to distribute at least 500 grams of methamphetamine, in violation of 21 U.S.C. 841(b)(1)(A)(viii) and 846. Indictment 1. Because petitioner had three prior drug felonies at the time of the offense, he faced a

mandatory sentence of life imprisonment on the drug-conspiracy count if the government filed an information advising the court of petitioner's prior drug convictions. See 21 U.S.C. 841(b)(1)(A) (providing statutory minimum sentence of life imprisonment for a conviction "after two or more prior convictions for a felony drug offense"); 21 U.S.C. 851(a) (explaining that recidivist penalties are triggered by government's filing of a prior felony information); see also PSR ¶¶ 39, 43-44, 50. The remaining counts charged petitioner with possession of at least 50 grams of methamphetamine with intent to distribute, possession of a firearm following felony convictions, and possession of a firearm with an obliterated serial number. Indictment 1-3.

Petitioner pleaded guilty under a Rule 11(c)(1)(C) plea agreement in which the parties stipulated to the imposition of a sentence of 180 months of imprisonment. See Pet. App. 50a-66a (plea agreement). The agreement allowed petitioner to plead guilty to only two charges—the drug-conspiracy and gun-possession counts—with the government agreeing to dismiss the remaining counts. *Id.* at 54a-55a. In addition, the government agreed not to file the prior felony information that would have raised the statutory minimum sentence on the drug-conspiracy count from ten years of imprisonment to life imprisonment. *Ibid.*; see *id.* at 56a.

The plea agreement did not incorporate, cross-reference, or attempt to calculate petitioner's Guidelines range, either in agreeing to the 180-month sentence or otherwise. See Pet. App. 50a-66a. The agreement specified that petitioner "understands that, before imposing sentence in this case, the Court will be required to consider, among other factors, the provisions of the United States Sentencing Guidelines and that,

under certain circumstances, the Court has discretion to depart from those Guidelines." *Id.* at 54a. It then specified, however, that petitioner's plea was "entered under the specific provisions of Rule 11(c)(1)(C)" and that the agreed-upon sentence of 180 months "would bind the Court to impose this particular custodial sentence if the Court accepts this plea agreement." *Ibid.*

The district court accepted petitioner's guilty plea and took the plea agreement under advisement until sentencing. D. Ct. Doc. 53 (Dec. 19, 2013). At the start of the subsequent sentencing hearing, the court accepted the Rule 11(c)(1)(C) agreement. Pet. App. 32a-33a. The court stated that it had determined that the agreement "will result in a reasonable sentence that's in the best interest of the Government, the best interest of society, and the best interest of" petitioner, after consulting the PSR, the plea agreement, the advisory Sentencing Guidelines, and the guidance concerning individualized sentencing set forth at 18 U.S.C. 3553(a). Pet. App. 32a-33a.

After the district court accepted the plea agreement and bound itself to impose the specified sentence, the court calculated petitioner's precise range of imprisonment under the advisory Sentencing Guidelines. Pet. App. 33a-36a. It agreed with the Probation Office that petitioner's offense level was 31, which reflected the quantity of methamphetamine for which petitioner was responsible, with a downward adjustment for acceptance of responsibility. *Ibid.*; see PSR ¶¶ 31, 37-38. In addition, the court determined that petitioner fell into Criminal History Category VI—the highest category. Pet. App. 35a-36a. Taking petitioner's offense level and criminal history category together, the court

determined that the advisory Sentencing Guidelines range was 188 to 235 months of imprisonment. *Id.* at 36a.

Before imposing the sentence, the district court heard statements from petitioner, several of his family members, and attorneys for petitioner and the government. Pet. App. 37a-43a. Petitioner, his counsel, and the government each asked the court to impose sentence in accordance with the binding plea. *Id.* at 41a-43a. In doing so, petitioner and the government each noted that petitioner could have been exposed to a mandatory life sentence in the absence of the plea deal. *Id.* at 42a-43a (government counsel stating that the government had recommended the plea deal and the 180-month sentence "in light of the fact that [petitioner] was facing life without parole with his prior convictions" and in light of the underlying offense conduct); *id.* at 43a (petitioner's statement).

The district court imposed the agreed-upon 180-month sentence. Pet. App. 44a. It stated "that in the opinion of the Court the Government ha[d] acted very reasonably in connection with their recommendation in this case and defense counsel ha[d] acted very reasonably with his recommendation in this case as to what each lawyer believes to be a fair and reasonable sentence" and that the court was "convinced it ha[d] imposed a reasonable sentence." *Id.* at 47a.

3. Amendment 782 to the Sentencing Guidelines, which was proposed before petitioner was sentenced and adopted later that year, reduced by two levels the base offense level associated with most drug offenses, which is determined by the type and quantity of drugs involved. Sentencing Guidelines App. C Supp., Amend. 782 (Nov. 1, 2014). The Commission made the amend-

ment retroactively applicable to sentences that had already been imposed. *Id.* Amend. 788. Under the Guidelines as amended, petitioner's offense level would have fallen two levels to 29, and his advisory Guidelines range would have been 151 to 188 months of imprisonment. Pet. App. 4a.

4. Petitioner filed a pro se motion under 18 U.S.C. 3582(c)(2), asking the district court to reduce his agreed-upon 180-month sentence in light of Amendment 782. Pet. App. 71a-76a.

The district court denied the motion. Pet. App. 16a-30a. The court concluded that Justice Sotomayor's concurrence in the judgment was the controlling opinion in *Freeman*. *Id.* at 25a. And it concluded that petitioner was ineligible for a sentence reduction under Justice Sotomayor's approach because it was "abundantly clear that [petitioner's] sentence was not linked or tied to the Sentencing Guidelines." *Id.* at 28a.

5. The court of appeals affirmed. Pet. App. 1a-15a.

Like the district court, the court of appeals concluded that Justice Sotomayor's opinion in *Freeman* controlled petitioner's eligibility for a sentence reduction. Pet. App. 5a-14a. It observed that this Court had held in *Marks* v. *United States*, 430 U.S. 188 (1977), that "[w]hen a fragmented [Supreme] Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." Pet. App. 7a (quoting *Marks*, 430 U.S. at 193) (internal quotation marks omitted).

The court of appeals determined that "Justice Sotomayor's opinion in *Freeman* provides the narrowest ground of agreement because her concurring opinion

establishes the least far-reaching rule." Pet. App 8a (brackets and internal quotation marks omitted). It reasoned that the *Freeman* plurality would treat defendants who entered binding pleas under Rule 11(c)(1)(C) as always eligible for a sentence reduction under Section 3582(c)(2), while Justice Sotomayor would treat such defendants as sometimes eligible. *Ibid.* Justice Sotomayor's opinion, the court concluded, was controlling because it "provides a legal standard that produces results with which a majority of the Court in *Freeman* would agree." *Id.* at 12a. The court noted that its analysis accorded with the decisions of eight other circuits. *Id.* at 9a.

The court of appeals observed that "two circuits deviate from this majority view" on the ground that a divided decision of this Court establishes no precedent for future cases unless one of the opinions supporting the disposition was "a 'logical subset' of another, broader opinion" with which it shared a common rationale. Pet. App. 9a-10a (citations omitted). The court concluded that the common-rationale requirement was inconsistent with this Court's statements in *Marks* and with this Court's application of the *Marks* rule. *Id.* at 10a-12a.

After analyzing petitioner's plea agreement, the court of appeals found no error in the district court's determination that petitioner was ineligible for relief under Justice Sotomayor's framework. Pet. App. 14a-15a.

6. Petitioner sought certiorari, arguing that "[t]he lower courts are hopelessly confused over how to apply *Marks*," leading to divergence in the application of decisions like *Freeman*, and that "[t]his court should address the *Marks* question now." Pet. 1; see Pet. 10-31.

SUMMARY OF ARGUMENT

This case presents a circuit conflict concerning whether this Court's divided decisions have precedential effect when a majority of this Court reaches a result, but divides on reasoning. This Court should decide this case by resolving that conflict and reaffirming the rule of *Marks* v. *United States*, 430 U.S. 188, 193 (1977), that divided decisions establish binding precedent without regard to whether a majority of Justices share common reasoning. Because the court of appeals acted in accordance with that principle when it found petitioner ineligible for a sentence reduction in light of this Court's decision in *Freeman* v. *United States*, 564 U.S. 522 (2011), its decision should be affirmed. If this Court elects instead to reconsider *Freeman*, it should hold that a defendant who pleads guilty in exchange for a specific sentence pursuant to an agreement under Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure is not eligible for a sentence reduction under 18 U.S.C. 3582(c)(2), because his sentence is not "based on" a subsequently lowered Guidelines range, *ibid.*

I. The court of appeals correctly treated this Court's decision in *Freeman* as precedential under *Marks* even though no single rationale in *Freeman* drew the support of a majority of this Court.

A. *Marks* set out a rule for determining the governing law "[w]hen a fragmented Court decides a case, and no single rationale explaining the result enjoys the assent of five Justices." 430 U.S. at 193. In such cases, "the holding of the Court may be viewed as that position taken by those members who concurred in the judgments on the narrowest grounds." *Ibid.* (citation omitted). In applying *Marks*, this Court has either identified a specific opinion that generates results with which

five Justices would agree or simply analyzed whether a litigant would have prevailed under the rationales of at least five Justices by running the facts through multiple opinions. Either approach ensures that lower courts decide cases in a manner consistent with the views of a majority of Justices in the relevant precedent.

Marks reflects sound principles of judicial administration. It implements the basic principle that lower courts must decide cases in conformity with decisions of this Court. It ensures evenhanded treatment of similarly situated litigants. And it enables this Court to give constitutional and statutory provisions the same application nationwide—even when Members of this Court disagree on the reasoning behind that application.

B. Petitioner's challenges to the application of *Marks* in his case are unsound.

Petitioner's contention that a decision of this Court has no precedential effect unless at least five Justices supporting the judgment do so based on common reasoning cannot be reconciled with *Marks* and other decisions. *Marks* directly stated that its interpretive guidance applies when "no single rationale explaining the result enjoys the assent of five Justices." 430 U.S. at 139. And in *Marks* and other decisions, this Court has treated as controlling the opinions that would generate results favored by a majority—even when no common rationale attracted majority support. A common-reasoning requirement, moreover, would disserve the values that underlie this Court's interpretive rules. It would strip this Court of the ability to create nationwide uniformity when Members of this Court reach common results through different rationales. And it

would undermine the evenhanded administration of justice, by subjecting similarly situated litigants to different outcomes.

This Court should also reject petitioner's proposal to replace *Marks* with a rule under which only decisions with majority opinions receive precedential status. That approach would undermine uniformity, evenhandedness, and predictability to an even greater degree than petitioner's shared-reasoning proposal. And the handful of cases petitioner invokes that have found difficulty applying *Marks* to particular decisions do not justify overruling the four-decade-old *Marks* precedent. Courts of appeals have issued more than 400 decisions using *Marks* to construe more than 100 of this Court's precedents, indicating that *Marks*' application is straightforward in the mine-run of cases.

Finally, petitioner is mistaken in contending that *Freeman* has no precedential effect because, in his view, Justice Sotomayor's opinion concurring in the judgment is not narrower than the plurality position in every application. That argument is flawed in its initial premise, because Justice Sotomayor's opinion occupies a middle ground between the plurality and dissent. But in any event, petitioner is mistaken in suggesting that decisions of this Court lack precedential authority unless a single narrowest opinion would generate majority-supported results in all cases. This Court has made clear that when uncertainty exists as to whether a particular opinion qualifies as narrowest under *Marks*, courts may simply determine which litigant should prevail by running a case through multiple opinions to establish which litigant would prevail under the views of five Justices. Petitioner does not dispute that

he is ineligible for a sentence reduction under that approach.

II. Should this Court elect to resolve petitioner's case by reconsidering the question presented in *Freeman*, it should likewise affirm the decision below. A defendant who pleads guilty in exchange for a specific sentence under a Rule 11(c)(1)(C) agreement is not eligible for a sentence reduction under 18 U.S.C. 3582(c)(2), because his sentence is not "based on" a subsequently lowered Guidelines range, *ibid.*

Section 3582(c)(2) permits a district court to "reduce the term of imprisonment" of a defendant who had been "sentenced to a term of imprisonment based on a sentencing range that has been subsequently lowered by the Sentencing Commission." 18 U.S.C. 3582(c)(2). A defendant who pleads guilty in exchange for a specific sentence under Rule 11(c)(1)(C), and receives the sentence in his plea agreement, does not satisfy that requirement. As five Justices concluded in *Freeman*, the sentence of such a defendant is "based on" the plea agreement, not on the defendant's Guidelines range. This Court's decisions holding that a claim is "based upon" only its core or fundamental basis, *OBB Personenverkehr AG* v. *Sachs*, 136 S. Ct. 390 (2015); *Saudi Arabia* v. *Nelson*, 507 U.S. 349 (1993), make clear that the term "based on" in Section 3582(c)(2) refers to a sentence's legal foundation, not to other factors that might fall somewhere along the causal chain leading to the sentence's imposition. When a defendant pleads guilty pursuant to Rule 11(c)(1)(C), the parties' sentencing agreement binds the district court once it accepts the plea agreement, whether or not the stipulated sentence or sentencing range correlates to the defendant's Guidelines range.

The Sentencing Commission's implementation of its authority to constrain the availability of sentence reductions separately precludes sentence reductions for defendants who receive specific sentences pursuant to Rule 11(c)(1)(C) plea agreements. The binding policy statement in Sentencing Guidelines § 1B1.10(b)(1) allows a reduction only to account for the amendment of a Guideline that was "applied when the defendant was sentenced." But when a defendant is sentenced under a Rule 11(c)(1)(C) agreement to a specific sentence, the Guidelines are not "applied" at sentencing with respect to that component of the sentence.

Petitioner's construction of Section 3582(c)(2) and Section 1B1.10 would give defendants an unwarranted windfall by allowing them to retain—and improve upon—the benefits of their plea agreements while depriving the government of its own benefits under those bargains. In exchange for the certainty of a specific sentence under Rule 11(c)(1)(C), the government often makes substantial concessions: it agrees to give up the right to seek a sentence higher than the one specified in the agreement and, as this case illustrates, may also dismiss charges and forgo available enhancements. Section 3582(c)(2) does not permit a defendant to hold the government to its concessions yet seek to relieve himself of his own.

ARGUMENT

The conflict among the courts of appeals presented by this case and pressed in the petition for a writ of certiorari concerns the extent to which lower courts are bound by decisions of this Court when no single opinion attracted the support of a majority of Justices. Most circuits treat such decisions as establishing binding law under the rule set forth in *Marks* v. *United States*,

430 U.S. 188, 193 (1977), and decide cases in a manner consistent with the views of at least five Members of this Court in the divided case. That approach serves nationwide uniformity and ensures that similarly situated litigants are treated alike. Petitioner, however, urges this Court to adopt a minority approach under which the Court's decisions in *Freeman* v. *United States*, 564 U.S. 522 (2011), and other divided cases would result in no binding law at all. That approach cannot be squared with *Marks* or sound principles of judicial administration and should be rejected.

Petitioner's suggestion (Br. 10, 12, 37) that this Court resolve this case by reconsidering *Freeman*, rather than by applying *Marks*, is contrary to the thrust of petitioner's argument at the certiorari stage. See, *e.g.*, Pet. Cert. Reply Br. 8. And it would render irrelevant to the disposition of petitioner's case the *Marks* conflict that petitioner urged this Court to resolve. But should this Court elect to resolve this case by reconsidering *Freeman*, it should affirm the decision below. A defendant who pleads guilty in exchange for a specific sentence under Federal Rule of Criminal Procedure 11(c)(1)(C) is not eligible for a sentence reduction under 18 U.S.C. 3582(c)(2), because his sentence is not "based on" a subsequently lowered Guidelines range, *ibid.*

I. THE COURT OF APPEALS CORRECTLY DETERMINED THAT PETITIONER IS INELIGIBLE FOR A SENTENCE REDUCTION BY APPLYING THIS COURT'S PRECEDENT

The court of appeals' decision should be affirmed on the ground that it represents a correct application of this Court's rule in *Marks* to the divided decision in *Freeman*. Petitioner does not dispute that, under the approaches of five Justices in *Freeman*—including under Justice Sotomayor's middle-ground concurrence—

he is not eligible for a sentence reduction under 18 U.S.C. 3582(c)(2). Accordingly, the lower courts correctly denied him relief.

A. *Marks* Gives Divided Decisions Of This Court Binding Effect In Future Cases

1. In *Marks*, this Court provided a rule for determining the governing law established by a decision in which the Members of the Court do not agree on a rationale. "When a fragmented Court decides a case, and no single rationale explaining the result enjoys the assent of five Justices," *Marks* held, "'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" 430 U.S. at 193 (quoting *Gregg* v. *Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)). Because an opinion "concurr[ing] in the judgments on the narrowest grounds" occupies a "middle ground" between Justices with broader and narrower views, *Marks* ensures that "lower courts will decide cases consistently with the opinions of a majority of the Supreme Court in the relevant precedent." *United States* v. *Duvall*, 740 F.3d 604, 610 (D.C. Cir. 2013) (Kavanaugh, J., concurring in the denial of rehearing en banc).

This Court, in applying *Marks*, has not invariably required that one single opinion itself encapsulate the Court's holding. Often, as in *Marks* itself, the Court has designated as controlling a middle-ground opinion falling between plurality and dissenting views that produces results accepted by five Justices in every case. See, *e.g.*, *Graham* v. *Florida*, 560 U.S. 48, 59-60 (2010); *Panetti* v. *Quarterman*, 551 U.S. 930, 949 (2007); *Marks*, 430 U.S. at 193. On other occasions, however,

this Court has taken a different route to the same basic result—asking which litigant would have prevailed under the rationales of at least five Justices by running the facts at hand through multiple opinions. See, *e.g.*, *Bobby* v. *Dixon*, 565 U.S. 23, 30-32 (2011) (per curiam); *City of Ontario* v. *Quon*, 560 U.S. 746, 757 (2010) (plaintiff's claim failed because "two * * * approaches—the plurality's and Justice Scalia's"—each indicated that the plaintiff was not entitled to relief); see also, *e.g.*, *United States* v. *Jacobsen*, 466 U.S. 109, 115-117 (1984) (determining that an earlier case established that "the legality of [a] governmental search must be tested by the scope of the antecedent private search" because that proposition was accepted by a single-Justice concurrence and a four-Justice dissent); *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 16-17 (1983) (similar). Both methods decide cases consistently with the views of a majority of this Court.

2. The *Marks* approach reflects sound principles of judicial administration. This Court decides cases in the manner supported by five Justices, even if Members of this Court divide as to reasoning—affirming lower-court judgments that are consistent with the views of a majority of Justices, and reversing lower-court judgments that are not. See, *e.g.*, *Freeman*, 564 U.S. at 534 (opinion of Kennedy, J.). The *Marks* rule ensures that such decisions of this Court are not just good for one day only. It guarantees that lower courts resolve future cases in the way that they would have been resolved if this Court had granted review. *Marks* thereby implements the judicial-hierarchical principle sometimes referred to as "[v]ertical stare decisis," which "requires lower courts to follow applicable Supreme Court rulings

in every case." *Duvall*, 740 F.3d at 609 (Kavanaugh, J., concurring in the denial of rehearing en banc).

In doing so, *Marks* serves the purposes that underlie this Court's interpretive rules more generally, by "'promot[ing] the evenhanded, predictable, and consistent development of legal principles, foster[ing] reliance on judicial decisions,'" and "sav[ing] parties and courts the expense of endless relitigation." *Kimble* v. *Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015) (citation omitted). It facilitates the "evenhanded" and "consistent" administration of justice between similarly situated litigants, *ibid.* (citation omitted), by ensuring that "whether the majority vote is produced by the adoption of one rationale or two, the rule of law made" in a decision of this Court will "produce the same result in the next applicable case," *United States* v. *Davis*, 825 F.3d 1014, 1036 (9th Cir. 2016) (en banc) (Bea, J., dissenting). And it enhances this Court's ability to provide "predictable" and "consistent" meaning to federal law, *Kimble*, 135 S. Ct. at 2409 (citation omitted), by enabling this Court to create national uniformity on the scope of statutory and constitutional provisions when a majority of this Court embraces a particular result, even if Members of the Court diverge in their reasoning. That is critical because federal constitutional and statutory provisions are "generally intended to have uniform nationwide application." *Mississippi Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 43 (1989) (discussing statutes); see *Martin* v. *Hunter's Lessee*, 14 (1 Wheat.) U.S. 304, 347-348 (1816) (discussing the Constitution).

B. The Court of Appeals Correctly Applied The Principles Of *Marks*

The court of appeals correctly applied the principles of *Marks* to this Court's decision in *Freeman* when it concluded that petitioner was not eligible for a reduction in his agreed-upon sentence. The court determined that Justice Sotomayor's opinion, which took an "intermediate position" between the plurality and the dissent, *Freeman*, 564 U.S. at 532 (opinion of Kennedy J.), was the opinion concurring in the *Freeman* judgment on the narrowest ground; that petitioner was not entitled to a sentence reduction under that opinion; and that five Members of the *Freeman* Court would agree with that result. Pet. App. 8a-13a. Petitioner does not dispute that, under the approaches of five Justices in *Freeman*, he is not eligible for a sentence reduction under 18 U.S.C. 3582(c)(2). Instead, he argues that the court of appeals was free to disregard the opinions of five Justices in *Freeman* because, in petitioner's view, *Freeman* established only a judgment and no rule of decision for future cases. Petitioner's arguments are unsound.

1. Petitioner's "common reasoning" approach is mistaken

Petitioner first contends (Br. 38-51) that divided decisions like *Freeman* have no precedential value beyond creating a judgment unless there is "common reasoning" between plurality and concurring opinions. Pet. Br. 45 (requiring "common reasoning" and stating that a concurrence cannot qualify as controlling on the ground that it "produces results with which a majority of the Court would agree") (citation, ellipses, and emphasis omitted); see *id.* at 51 ("Shared results without shared rationales generate only judgments."); see also, *e.g.*, *id.* at 51-52. That argument is contrary to forty

years of precedent and would create unjustifiable disuniformity in the lower courts.

a. Petitioner's "common reasoning" requirement cannot be squared with Marks *and other decisions of this Court*

i. *Marks* made plain that its guidance is designed to identify precedential rules in precisely those cases in which petitioner would deem *Marks* inapplicable. *Marks* expressly stated that its narrowest-concurrence rule governs when "*no single rationale explaining the result enjoys the assent of five Justices*." 430 U.S. at 193 (emphasis added). Petitioner does not address that language in *Marks*. And he points to no passage in any decision of this Court stating that *Marks* applies only when plurality and concurring opinions share "common reasoning," Pet. Br. 45, or treating an analysis of whether common reasoning exists as a precondition to application of the *Marks* rule.

The *Marks* Court's own application of the rule it announced undermines petitioner's reading of that decision even further. *Marks* treated as controlling a three-Justice plurality opinion that took a narrower approach than other opinions, based upon reasoning that was not shared by a majority of the Court. In the prior decision that *Marks* addressed, this Court had divided among multiple approaches to the First Amendment protection of sexually explicit materials. See *A Book Named 'John Cleland's Memoirs of a Woman of Pleasure'* v. *Attorney Gen.*, 383 U.S. 413 (1966) (*Memoirs*). A three-Justice plurality concluded that the book at hand was constitutionally protected because it was not obscene, applying a test focused on whether the book was "utterly without redeeming social value." *Id* at 418 (opinion of Brennan, J.). Justice Stewart found the

book constitutionally protected under a different test. See *id.* at 421; *Mishkin* v. *New York*, 383 U.S. 502, 518 (1966) (Stewart, J., dissenting). Justices Black and Douglas concluded that the book was constitutionally protected on the view that the First Amendment is "an absolute shield against governmental action aimed at suppressing obscenity." *Marks*, 430 U.S. at 193; see *Memoirs*, 383 U.S. at 421; *id.* at 426 (Douglas, J., concurring in the judgment); see also *Ginzburg* v. *United States*, 383 U.S. 463, 476 (1966) (Black, J., dissenting). The three remaining Justices dissented on the ground that the State could treat the work as unprotected obscenity even if it was not without redeeming social value. See *Memoirs*, 383 U.S. at 441-442 (Clark, J., dissenting); *id.* at 455-459 (Harlan, J., dissenting); *id.* at 460-461 (White, J., dissenting).

This Court's determination in *Marks* that *Memoirs*'s plurality "constituted the holding of the Court and provided the governing standards," *Marks*, 430 U.S. at 194, directly contradicts petitioner's conception of the *Marks* rule. The judgment in the case depended on the vote of either Justice Black or Justice Douglas (or both), each of whom rejected the existence of any obscenity framework—including the plurality's. *Marks* itself accordingly recognized that the views in the plurality opinion "never commanded the assent of more than three Justices." *Id.* at 192.

Petitioner seeks to reconcile *Marks'* application of the *Marks* doctrine with his position by asserting that "Justice Black and Douglas had to agree, as a logical consequence of their own position" with the plurality's view that "anything with redeeming social value is not obscene." Pet. Br. 41 (citation omitted). But that is a shared-results analysis, not the shared-reasoning rule

that petitioner advocates. While Justice Black's and Justice Douglas's repudiation of obscenity doctrine meant they would agree with the result of any opinion finding First Amendment protection on any basis, Justices Black and Douglas disavowed the social-value-based reasoning that the plurality used. As one commentator has put it, those Justices "would never have accepted the plurality's three-part obscenity test, or any other obscenity test for that matter." Mark Alan Thurmon, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 Duke L.J. 419, 432 (1992).

ii. Petitioner's shared-reasoning requirement is equally irreconcilable with *Gregg*, where the *Marks* rule originated. *Gregg* addressed the rule to be drawn from *Furman* v. *Georgia*, 408 U.S. 238 (1972) (per curiam), in which five Justices wrote separate opinions concluding that application of Georgia's death-penalty statute was unconstitutional. *Gregg,* 428 U.S. at 169 & n.15. Justices Brennan and Marshall concluded that the death penalty was always unconstitutional. *Furman*, 408 U.S. at 305-306 (Brennan, J., concurring); *id.* at 370-371 (Marshall, J. concurring). Three other Justices found Georgia's death-penalty scheme unconstitutional as applied: Justices Stewart and White because the penalty was imposed on "a capriciously selected random handful" of defendants, *id.* at 309-310 (Stewart, J., concurring); see *id.* at 313 (White, J., concurring), and Justice Douglas because the penalty was imposed in a discriminatory manner, *id.* at 255-257 (Douglas, J., concurring). Although the five opinions "certainly did not have a 'common rationale,'" *Duvall*, 740 F.3d at 613 n.3 (Kavanaugh, J., concurring in the denial of rehearing en banc), the *Gregg* plurality nevertheless determined that

Justice Stewart and Justice White's approach was controlling, because "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds," *Gregg,* 428 U.S. at 169 n.15.

Petitioner attempts to square *Gregg* with his shared-reasoning requirement (Br. 41-42) by observing that some Justices in *Gregg* "held a law to be facially unconstitutional and others thought it constitutional in certain applications." But again, that shows only that five Justices agreed on the results in cases where those constitutional theories intersected—not that the relevant Justices shared common reasoning. In fact, the Justices writing narrow opinions applied different reasoning than the Justices writing categorical ones. Compare *Furman*, 408 U.S. at 305-306 (Brennan, J., concurring) (concluding that capital punishment was unconstitutional as offensive to human dignity, in light of various factors) and *id.* at 358-360 (Marshall, J., concurring) (concluding that capital punishment was unconstitutional because it was "excessive and unnecessary" and "morally unacceptable"), with *id.* at 309-310 (Stewart, J., concurring) (finding Georgia's application of the death penalty to violate the Eighth Amendment because the penalty is "freakishly imposed" on a "capriciously selected random handful") and *id.* at 313 (White, J., concurring) (similarly concluding that Georgia's application of the death penalty was unconstitutional because "the death penalty is exacted with great infrequency even for the most atrocious cases and there is no meaningful basis for distinguishing the few cases in which it is imposed from the many in which it is not").

iii. This Court's later applications of *Marks* are equally irreconcilable with petitioner's shared-reasoning requirement.

Graham, *supra*, for example, identified a controlling opinion for this Court from a decision in which the Court's divided opinions adopted divergent reasoning. Two Justices in *Harmelin* v. *Michigan*, 501 U.S. 957 (1991), in an opinion by Justice Scalia, rejected a defendant's Eighth Amendment challenge to the proportionality of his sentence on the ground that "the Eighth Amendment contains no proportionality guarantee" in non-capital cases. *Id.* at 965; see *id.* at 994. Three Justices concurred, but they explained that their "approach to the Eighth Amendment proportionality analysis differ[ed]" from the approach in Justice Scalia's opinion; those Justices concluded that the Eighth Amendment barred "grossly disproportionate" sentences in the non-capital context and that the petitioner's sentence was constitutional under that standard. *Id.* at 996-997 (Kennedy, J., concurring in part and concurring in the judgment); see *id.* at 1005. Three dissenting Justices applied a more stringent Eighth Amendment test and concluded that the petitioner's sentence was unconstitutional. *Id.* at 1009-1027 (White, J., dissenting). Although the "narrow proportionality" principle of the plurality was not shared by the other opinions in *Harmelin*, each of the opinions in *Graham* treated the plurality opinion taking a middle-ground approach as the "controlling" opinion on proportionality. *Graham*, 560 U.S. at 59-60; see *id.* at 85 (Stevens, J., concurring); *id.* at 87 (Roberts, C.J., concurring in the judgment); *id.* at 104 (Thomas, J., dissenting); *id.* at 124-125 (Alito, J., dissenting).

Similarly, if petitioner's shared-reasoning requirement were correct, this Court would not have held that Justice White's concurring opinion in *Gardner* v. *Florida*, 430 U.S. 349 (1977), constituted controlling law. See *O'Dell* v. *Netherland*, 521 U.S. 151, 162 (1997) (describing Justice White's concurrence as "the rule of *Gardner*" under *Marks*). This Court concluded that Justice White's opinion was controlling because it "provid[ed] the narrowest grounds of decision among the Justices whose votes were necessary to the judgment." *Id.* at 160 (citing *Marks*, 430 U.S. at 193). But Justice White's opinion differed from the three-Justice plurality opinion, which was also necessary to the disposition of the case, not only in its reasoning but in the very constitutional amendment on which it was premised. See *Gardner*, 430 U.S. at 351, 358-362 (opinion of Stevens, J.) (plurality finding deprivation of due process of law); *id.* at 362-363 (opinion of White, J., concurring in the judgment) (finding violation of the Eighth Amendment).

iv. The decisions on which petitioner relies (Br. 45-46) provide no support for his position. None addresses (as *Marks* does) how lower courts should apply a decision that generates a majority disposition but not a majority opinion.

The Court in *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), stated that lower courts must give precedential effect to both the result and the reasoning of a majority opinion. *Id.* at 67 ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound."). But it neither considered the precedential effect of decisions without majority opinions nor suggested that when a particular result is supported by a majority of this Court, a lower court is free to disregard

this Court's decision if the Members of this Court did not agree on a rationale.

And the Court in *Hertz* v. *Woodman*, 218 U.S. 205 (1910), explained that decisions of this Court have no precedential effect when a majority does not even agree on the proper result, and thus leaves a lower court decision in effect through an affirmance by an equally divided court. *Id.* at 213-214. Such cases, *Hertz* explained, cannot be said to reflect any majority agreement on "principles of law involved." *Id.* at 213. In contrast, the divided decisions that *Marks* addresses do reach a result, and thus a holding, on the question before the Court. And, such decisions—unlike affirmances by an equally divided court—make it possible for lower courts to decide future cases in a manner that a majority of this Court would favor.

b. Petitioner's "common reasoning" approach is unsound

"[T]he idea that a court's holding, adopted by a majority of judges, must have a rationale common throughout the majority" to create binding authority is inconsistent with how the judicial system ordinarily operates. *Davis*, 825 F.3d at 1036 (Bea, J., dissenting). This Court should not replace *Marks* with an approach that demands that sort of common rationale in order for this Court's divided decisions to have precedential effect.

i. As previously noted, this Court has emphasized the importance of interpretive rules that give federal statutes "predictable" and "consistent" meanings. *Kimble*, 135 S. Ct. at 2409 (citation omitted); see *Holyfield*, 490 U.S. at 43; cf. Sup. Ct. R. 10. Under petitioner's approach, however, constitutional and statutory provisions addressed by this Court could well carry

dramatically different interpretations across the country, which would persist so long as the composition of the Court remained stable, unless a Justice experienced a change of heart or signed onto reasoning that the Justice did not accept. And on constitutional questions, no other branch of the government could restore nationwide uniformity absent a constitutional amendment.

Similarly, while this Court has stressed the importance of "evenhanded" administration of justice, *Kimble*, 135 S. Ct. at 2409 (citation omitted), under petitioner's approach, similarly situated litigants would face different outcomes depending on whether their case happened to be the one in which this Court granted certiorari. The defendant in *Freeman*, for example, would obtain relief, but a co-defendant whose case presented the same issue would be out of luck, simply because his case did not happen to be the vehicle in which certiorari was granted. Indeed, under petitioner's approach, even a co-defendant whose petition for certiorari was pending in this Court at the same time as Freeman's could be denied relief. If this Court followed its usual practice of granting the co-defendant's petition, vacating the decision below, and remanding the case for further consideration, the lower court could deny relief without applying *Freeman* because, under petitioner's approach, the division of reasoning in *Freeman*'s opinions would deprive that decision of precedential effect. Cf. *Goins* v. *United States*, 564 U.S. 1051 (2011) (granted, vacated, and remanded in light of *Freeman*); *Rivera-Martinez* v. *United States*, 564 U.S. 1051 (2011) (same); *Carrigan* v. *United States*, 564 U.S. 1051 (2011) (same). The *Marks* rule recognizes that such a regime is unacceptable in circumstances where the agreement

of a majority of the Court on a particular legal outcome can be ascertained.

ii. None of petitioner's arguments justifies abandoning the *Marks* rule in favor of a common-reasoning requirement.

Petitioner contends that it is irrational for a concurring opinion with a unique rationale to be treated as controlling under *Marks*, asserting that such application of the *Marks* rule "would turn a single opinion that lacks majority support into national law." Pet. Br. 42 (citation and internal quotation marks omitted). But giving effect to a middle-ground concurrence that produces outcomes supported by five Justices does not privilege the views of a single Justice. Instead, it produces outcomes with which a majority of this Court agrees and is consistent in each application with the reasoning of not only the concurrence's author but also at least four other Justices.

Second, petitioner suggests (Br. 45) that administrability considerations support a shared-reasoning analysis. But the *Marks* rule is not especially difficult to apply, and, at minimum, it is more administrable than petitioner's shared-reasoning test. Petitioner suggests that "run[ning] the facts and circumstances of the current case through [each of] the tests articulated in the Justices' various opinions," Pet. Br. 49 (citation omitted), involves a "high degree of difficulty," *id.* at 48. But applying legal reasoning articulated by Members of this Court to particular facts and circumstances is a familiar task for lower courts. It is exactly what they do in applying this Court's majority opinions. Petitioner provides no reason why that task becomes "a project fit for oracles" in plurality cases, *id.* at 49, simply because it

involves more than one opinion. Lower courts are readily able to apply their expertise to determine whether two tests, rather than just one, are satisfied on a particular set of facts. Although some factual patterns may present hard cases or be indeterminate under particular decisions, that is also the case for decisions with majority opinions.

Petitioner's shared-reasoning approach would be much harder to administer than *Marks*. Petitioner would replace the familiar task of applying opinions to particular facts with a vague inquiry that has no parallel to the functions that lower courts usually perform—namely, ascertaining whether the reasoning in one opinion is properly described as "subsumed by that of another." Pet. Br. 44. When Justices reach the same result without a majority opinion, their reasoning will almost certainly be similar in some respects and dissimilar in other respects. Petitioner would increase the complexity of lower courts' responsibilities by replacing a familiar inquiry into bottom-line outcomes with an uncertain inquiry into the extent of divergence in opinions' reasoning.

2. *This Court should not replace* Marks *with a rule under which only majority opinions have precedential effect*

This Court should decline petitioner's alternative suggestion that it overrule *Marks* and replace its rule with one under which "only opinions joined by a majority of Justices" receive "precedential status." Pet. Br. 55 (emphasis omitted); see *id.* at 55-59. Replacing *Marks* with a majority-only rule would undermine uniformity, evenhandedness, and predictability, *Kimble*, 135 S. Ct. at 2409, to an even greater degree than petitioner's shared-reasoning proposal, by giving precedential weight to even fewer of this Court's decisions.

Petitioner offers no sound reason to replace the more-than-40-year-old *Marks* rule with a majority-only rule notwithstanding those costs.[1] Petitioner principally asserts that *Marks* is "unworkable" and has created "disarray" in the lower courts, Pet. Br. 57 (citation and internal quotation marks omitted), relying heavily on a handful of cases noting difficulty in applying *Marks* to particular decisions. See, *e.g.*, *Nichols* v. *United States*, 511 U.S. 738, 745 (1994) (stating that the *Marks* "test is more easily stated than applied *to the various opinions supporting the result in*" *Baldasar* v. *Illinois*, 446 U.S. 222 (1980) (per curiam)) (emphasis added).

But the existence of some difficult cases does not justify abandoning the *Marks* rule. Courts of appeals have issued more than 400 decisions in the past several decades applying *Marks* to interpret more than 100 divided decisions of this Court. Richard M. Re, *Beyond the Marks Rule* 11 (Jan. 5, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3090620. Their ability to apply *Marks* in this way demonstrates that *Marks* is not

---

[1] Petitioner states (Pet. Br. 58) that overruling *Marks* would constitute "a return to the historical norm" before that decision. But the precedential status of divided decisions before *Marks* "was unclear." *Duvall*, 740 F.3d at 610 (Kavanaugh, J., concurring in the denial of rehearing en banc) (citing Joseph M. Cacace, Note, *Plurality Decisions in the Supreme Court of the United States: A Reexamination of the* Marks *Doctrine After* Rapanos *v.* United States, 41 Suffolk U. L. Rev. 97, 104-105 (2007); Justin Marceau, *Plurality Decisions: Upward-Flowing Precedent and Acoustic Separation*, 45 Conn. L. Rev. 933, 948-949 (2013)); see Comment, *Supreme Court No-Clear-Majority Decisions: A Study in* Stare Decisis, 24 U. Chi. L. Rev. 99, 101 & n.12 (1956); *id.* at 101-153 (cataloguing decisions and interpretations); see also Linda Novak, Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 Colum. L. Rev. 756, 767-778 (1980).

difficult to apply in the mine-run of cases. Cf. *Duvall*, 740 F.3d at 611 (Kavanaugh, J., concurring in the denial of rehearing en banc) ("In interpreting most splintered Supreme Court decisions, the *Marks* rule is not especially complicated."). To the extent that courts sometimes struggle with identifying a single narrowest opinion, see, *e.g.*, *Nichols*, 511 U.S. at 745, this Court can make their work easier by making clear that they can simply determine which litigant would prevail in the case at hand under the approaches of at least five Justices, as this Court itself has done.

3. **Freeman *does not lack precedential effect on the theory that no single opinion in that case qualifies as the narrowest***

Petitioner alternatively argues (Br. 52-55) that this Court's decision in *Freeman* has no precedential effect because, in his view, the "intermediate position" in Justice Sotomayor's opinion concurring in the judgment, *Freeman*, 564 U.S. at 532 (opinion of Kennedy, J.), is not narrower than the plurality position in every application. In making that argument, petitioner does not dispute that he himself would be ineligible for a sentence reduction under Justice Sotomayor's intermediate approach, or that the application of Justice Sotomayor's approach in his case yields an outcome supported by five Justices. Instead, he contends that because he can posit *other* idiosyncratic cases in which, in his view, Justice Sotomayor's opinion would not achieve a majority result, *Freeman* lacks precedential authority in *any* case. That contention misunderstands both the opinions in *Freeman* and the inquiry under *Marks*.

a. As a threshold matter, petitioner's argument is flawed in its premise that Justice Sotomayor's opinion

does not reflect an intermediate position that will always achieve majority-favored results. As the courts of appeals that apply a shared-results approach to *Marks* have concluded, the opinions in *Freeman* can be described as taking "always," "sometimes," and "never" approaches to the eligibility of Rule 11(c)(1)(C) defendants for sentence reductions under Section 3582(c)(2), with Justice Sotomayor's approach embracing the "middle ground between 'always' and 'never,'" *Duvall*, 740 F.3d at 612 (Kavanaugh, J. concurring in the denial of rehearing en banc); see Pet. 18-19 (compiling cases). Petitioner errs in asserting the existence of rare cases in which Justice Sotomayor would allow a sentence reduction but the plurality would not.

Petitioner first posits (Br. 53-54) a situation in which (i) the plea agreement "incorporates the Guidelines and settles on a Guidelines range"; (ii) the district court rejects the stipulated range on policy grounds; but (iii) the court nevertheless imposes the stipulated sentence for reasons unrelated to the Guidelines range. But contrary to petitioner's suggestion, the plurality as well as the concurrence would permit a sentence reduction in that circumstance. The plurality indicated that, in its view, a Guidelines range that the sentencing court is legally required to consider may be deemed the basis of a sentence even when a court decided to deviate from it. See *Freeman*, 564 U.S. at 529-530 (opinion of Kennedy, J.) ("Even where the judge varies from the recommended range * * * 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 a basis for the sentence."); see also *Davis*, 825 F.3d at 1037-1038 (Bea, J., dissenting); *Duvall*, 740 F.3d at 614-

615 (Kavanaugh, J., concurring in the denial of rehearing en banc).

Petitioner additionally posits (Br. 54) that Justice Sotomayor would allow relief but the plurality would not in an unusual case in which (i) the Rule 11(c)(1)(C) agreement "invokes the Guidelines and recommends a sentence at the bottom of a specified range"; (ii) the district court finds that the parties applied the wrong Guideline; but (iii) the court accepts the agreement and imposes the stipulated sentence. Again, however, the plurality and Justice Sotomayor would treat that situation similarly. Neither approach would generally consider a sentence to be "based on" a legal mistake, or a legally irrelevant consideration. See *Freeman*, 564 U.S. at 530 (opinion of Kennedy, J.); *id.* at 535 (Sotomayor, J., concurring in the judgment). But to the extent that an incorrectly calculated Guidelines range could become "the basis or foundation for the term of imprisonment" under Justice Sotomayor's approach because the court was legally required to consider it by virtue of its incorporation in a Rule 11(c)(1)(C) agreement, *id.* at 535, it would also be "a relevant part of the analytic framework" under the plurality's approach, *id.* at 530 (opinion of Kennedy, J.).

b. In any event, because no dispute exists that five Justices in *Freeman* would have found petitioner ineligible for a sentence reduction, petitioner was not eligible for such a reduction regardless of the outcome of the alternative cases that he posits. This Court has made clear that one permissible method of discerning whether a litigant should prevail under *Marks* is simply to run the facts of the case through multiple opinions to determine whether the litigant would win or lose under the views of five Justices. See, *e.g.*, *Dixon*, 565 U.S. at 31-32

(concluding that a litigant would have lost under the approach of the plurality and the approach of a single-Justice concurrence); *Quon*, 560 U.S. at 757; cf. *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 16-17 (finding a proposition established because the concurring and dissenting opinions formed a majority in support of that proposition).

Significantly, this Court has used that simple approach when some question existed as to which single opinion should be deemed controlling. In *Quon*, the Court found that because a plaintiff would not be entitled to relief under the approaches of five Justices in a prior decision, no need existed to identify a particular opinion from that decision as the narrowest. See 560 U.S. at 757 (stating that while "petitioners and respondent start from the premise that the *O'Connor* plurality controls * * * [i]t is not necessary to resolve whether that premise is correct" because "[t]he case can be decided by determining that the search" at issue was reasonable under both the plurality and concurrence approaches).

Indeed, it is "common sense" that in the "rare no-narrowest-opinion cases, the lower court still must strive to reach the result that a majority of the Supreme Court would have reached in the current case, if such a result can be ascertained," instead of treating this Court's precedent as non-binding. *Duvall*, 740 F.3d at 616 (Kavanaugh, J., concurring in the denial of rehearing en banc). Petitioner offers no sound reason why, "[b]ecause Justice Sotomayor's approach would allegedly lead to relief in some small subset of Section 3582(c)(2) cases where the other eight Justices would deny relief," lower courts should be liberated in every case to follow any approach—even when "a majority of

the Supreme Court would definitely disagree with the result achieved" by doing so. *Ibid.*

Petitioner's interpretation of *Marks*, moreover, would make its application much more complex. Lower courts would be unable to resolve cases by determining how this Court would decide them. Instead, they would have to figure out how various Justices of this Court would decide *every* case in order to determine whether to give a divided decision of this Court precedential weight in *any* case. Petitioner's own case illustrates how he would turn easy cases into hard ones. Despite the absence of disagreement about how each of the opinions in *Freeman* would resolve his straightforward case, he would have the result of his case turn on a court's assessment of every idiosyncratic hypothetical that a litigant or judge might posit.

II. DEFENDANTS WHO PLEAD GUILTY IN EXCHANGE FOR SPECIFIC SENTENCES PURSUANT TO RULE 11(c)(1)(C) ARE NOT ELIGIBLE FOR SENTENCE REDUCTIONS UNDER 18 U.S.C. 3582(c)(2)

Deciding petitioner's case based upon *Marks,* as petitioner urged at the certiorari stage, would resolve the circuit conflict presented in this case and clarify the application of Section 3582(c)(2) to future Rule 11(c)(1)(C) defendants. But if this Court instead elects to decide petitioner's case by revisiting the issue addressed in *Freeman*—a course that would render the *Marks* question irrelevant to petitioner's case[2]—it should hold that

---

[2] Petitioner's case would be removed from *Marks'* domain not only if this Court reconsidered *Freeman* and reached a majority opinion but also if this Court decided the application of *Freeman* to petitioner's case in divided opinions. That is because, irrespective of how *Marks* is understood, this Court's decisions in divided cases generate binding judgments in the case at hand. See, *e.g.*, *Freeman*,

defendants who plead guilty pursuant to Rule 11(c)(1)(C) are ineligible for Section 3582(c)(2) sentence reductions because their sentences are "based on" their binding plea agreements, not the Sentencing Guidelines.

A. Section 3582(c)(2) Represents A Narrow Exception To The Rule That A Sentence Of Imprisonment May Not Be Modified

As this Court has repeatedly recognized, finality is "essential to the operation of our criminal justice system." *Teague* v. *Lane*, 489 U.S. 288, 309 (1989) (plurality opinion); see *United States* v. *Frady*, 456 U.S. 152, 166 (1982). Once a sentence becomes final, a district court may not alter that sentence except as Congress allows. See, *e.g.*, *United States* v. *Addonizio*, 442 U.S. 178, 189 & n.16 (1979).

Consistent with those principles, Congress has provided that a court generally "may not modify a term of imprisonment once it has been imposed." 18 U.S.C. 3582(c). That command is subject to three narrow exceptions, designed to serve as "safety valves" for prisoners serving already-imposed sentences. S. Rep. No. 225, 98th Cong., 1st Sess. 121 (1983) (1983 Senate Report).

The exception in 18 U.S.C. 3582(c)(2) provides that a court "may reduce the term of imprisonment" of a defendant who was "sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission." Before granting such a reduction, the court must consider the sen-

---

564 U.S. at 534 (opinion of Kennedy, J.) (reversing judgment below in divided case); Pet. Br. 51 (acknowledging that cases endorsing "[s]hared results without shared rationales" generate binding judgments in the case at hand).

tencing factors set out in 18 U.S.C. 3553(a), "to the extent that they are applicable." 18 U.S.C. 3582(c)(2). The statute also instructs that such a reduction cannot be granted unless it "is consistent with applicable policy statements issued by the Sentencing Commission." *Ibid.* As the Court observed in *Dillon* v. *United States*, 560 U.S. 817 (2010), "Section 3582(c)(2)'s text, together with its narrow scope, shows that Congress intended to authorize only a limited adjustment to an otherwise final sentence and not a plenary resentencing proceeding." *Id.* at 826.

B. Defendants Who Plead Guilty In Exchange For Specific Sentences Under Rule 11(c)(1)(C) Plea Agreements Are Sentenced "Based On" Their Plea Agreements, Not Based On Any Guidelines Range

The exception to sentence finality in Section 3582(c)(2) does not apply to defendants who plead guilty in exchange for specific sentences under Rule 11(c)(1)(C) plea agreements, because such defendants are sentenced "based on" their plea agreements, not based on any Sentencing Guidelines range.

1. A defendant's sentence is "based on" a calculation of the Guidelines range only when that calculation is the foundation of the defendant's sentence

"When interpreting a statute," the Court "give[s] words their ordinary or natural meaning." *Pasquantino* v. *United States*, 544 U.S. 349, 356 (2005) (quoting *Leocal* v. *Ashcroft*, 543 U.S. 1, 9 (2004)). Here, the natural meaning of "based on" refers to the legal foundation of a sentence.

The verb phrase to "base on" or to "base upon" means "to use as a base or basis for," and the noun "base" means "the fundamental part of something:

basic principle." *Webster's Third New International Dictionary* 180 (1981) (definition 2 of verb "base"; definition 3a of noun "base"); see *The American Heritage Dictionary* 148 (4th ed. 2000) (definition 4 of noun "base": "[t]he fundamental principle or underlying concept of a system or theory"); 1 *The Oxford English Dictionary* 977 (2d ed. 1989) (definition 2.a of noun "base": "*fig[urative]* Fundamental principle, foundation, groundwork"; sense II of noun "base": "The main or most important element or ingredient, looked upon as its fundamental part."); *Webster's New International Dictionary* 225 (2d ed. 1957) (definition 4.a of "base": "[t]he main or chief ingredient of anything, viewed as its fundamental element or constituent"). In accordance with that standard definition, this Court has held on multiple occasions that a cause of action is "based upon" only the events that provide the foundation for the elements of the legal claim—not any other events that may be causally connected to the cause of action.

In *Saudi Arabia* v. *Nelson*, 507 U.S. 349 (1993), this Court considered a clause in the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1602 *et seq.*, permitting suit against a foreign state when "the action is based upon a commercial activity carried on in the United States by the foreign state," 28 U.S.C. 1605(a)(2). The plaintiffs were a husband and wife who sued Saudi Arabia and its state-owned hospital for torts against the husband, allegedly in retaliation for his reporting hazards at the hospital where he had worked (in Saudi Arabia) after being recruited and hired (in the United States) by the defendants. 507 U.S. at 352-354. Giving "based upon" its "natural meaning," the Court explained that the "based upon" provision reached only the "conduct that forms the 'basis,' or 'foundation,' for a

claim" or "the 'gravamen of the complaint'"—that is, "those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." *Id.* at 357 (citations omitted). It was therefore insufficient that recruiting and hiring activities in the United States were "connect[ed] with" or "led to the conduct that eventually injured [the plaintiffs]." *Id.* at 358. Instead, the Court held that the plaintiffs' suit was "based upon" the tortious acts committed in Saudi Arabia. *Ibid.* The Court explained that the suit could not be "based upon" the defendants' earlier activities, despite their causal connection to the suit, because "those facts alone entitle the [plaintiffs] to nothing." *Ibid.*

In *OBB Personenverkehr AG* v. *Sachs*, 136 S. Ct. 390 (2015), the Court again made clear that a claim is only "based upon" the core or fundamental basis of the claim. *OBB Personenverkehr* concerned whether a plaintiff's tort and contract claims arising from a railway accident could be described as "based upon a commercial activity carried out in the United States," when the plaintiff bought her train ticket in the United States and was then injured boarding a train in Austria. *Id.* at 392-393 (citation omitted). This Court explained that *Nelson* "teaches that an action is 'based upon' the 'particular conduct' that constitutes the 'gravamen' of the suit." *Id.* at 396; see *ibid.* (indicating that a court must "zero[] in on the core of the[] suit"). Even though the ticket sale in the United States formed a part of the plaintiff's claims and bore a causal connection to the plaintiff's injuries, the Court concluded that the plaintiff's claims were not "based upon" that domestic conduct because "the conduct constituting the gravamen of [the plaintiff's] suit" consisted of the events in Austria that directly caused the plaintiff's injury. *Id.* at 396-397.

Dictionary definitions, *Nelson*, and *OBB Personenverkehr* all indicate that the term "based on" in Section 3582(c)(2) refers to a sentence's critical legal components, not other factors that might fall somewhere along the causal chain leading to the sentence's imposition. That construction additionally aligns with the construction of "based on" that lower courts have adopted in the highly analogous context of district courts' authority to reopen civil judgments. Under Federal Rule of Civil Procedure 60(b)(5), a district court may provide relief from a final judgment when that judgment "is based on an earlier judgment that has been reversed or vacated." Courts have consistently emphasized the narrow nature of that authorization, concluding that it "is limited to cases in which the present judgment is based on the prior judgment in the sense of claim or issue preclusion. It does not apply merely because a case relied on as precedent * * * has since been reversed." 11 Charles Alan Wright et al., *Federal Practice and Procedure* § 2863, at 451-453 (3d ed. 2012) (footnote omitted) (citing cases); see also, *e.g.*, *Manzanares* v. *City of Albuquerque*, 628 F.3d 1237, 1240 (10th Cir. 2010).

2. The foundation of the sentence of a defendant who pleads guilty under Rule 11(c)(1)(C) is the plea agreement, not a Guidelines range

As five Members of this Court concluded in *Freeman*, when a defendant pleads guilty in exchange for a specific sentence pursuant to Rule 11(c)(1)(C), "it is the binding plea agreement that is the foundation for the term of imprisonment to which the defendant is sentenced." *Freeman*, 564 U.S. at 535 (Sotomayor, J., concurring in the judgment); see *id.* at 544 (Roberts, C.J., dissenting). Accordingly, the defendant's sentence is

"based on" the plea agreement, rather than any Guidelines calculations.

a. Under Rule 11(c)(1)(C), a defendant and the government may agree in a plea agreement "that a specific sentence or sentencing range is the appropriate disposition of the case," and "such a recommendation or request binds the court once the court accepts the plea agreement." Fed. R. Crim. P. 11(c)(1)(C). Rule 11(c)(4) further provides that "[i]f the court accepts the plea agreement, * * * the agreed disposition will be included in the judgment." Fed. R. Crim. P. 11(c)(4).

The district court thus has no authority to modify the parties' sentencing bargain once it accepts that kind of plea agreement. See Fed. R. Crim. P. 11(c)(1)(C), (3)(A), and (4). Unlike, for example, plea agreements under Rule 11(c)(1)(B), in which the government agrees to make a non-binding sentence recommendation or agrees not to oppose a defendant's sentencing request, the parties' stipulation to a sentence in a type C agreement is so critical that a defendant may withdraw the guilty plea if the court does not accept the parties' sentencing stipulation. See Fed. R. Crim. P. 11(c)(5)(B); see also Fed. R. Crim. P. 11 advisory committee's note (1979 Amendment) ("critical to a type * * * (C) agreement is that the defendant receive the * * * agreed-to sentence").

Accordingly, where the parties agree on a sentence in a Rule 11(c)(1)(C) plea agreement and the court accepts their agreement, the resulting sentence is "based on" the agreement, not on any other considerations. The terms of the agreement are the foundation of the sentence and the superseding factor entitling the defendant to the sentence he receives, even though other

factors doubtless influenced the parties' decisions to enter the agreement and the district court's decision to accept it. See *Freeman*, 564 U.S. at 536 (Sotomayor, J., concurring in the judgment) ("The term of imprisonment imposed by the sentencing judge is dictated by the terms of the agreement entered into by the parties, not the judge's Guidelines calculation."); *id.* at 544 (Roberts, C.J., dissenting) (similar).

b. The context in which Section 3582(c)(2) was adopted reinforces that conclusion. By the time Congress enacted the SRA in 1984, Rule 11(c)(1)(C) pleas were well-established as a mechanism "to bind the district court and allow the Government and the defendant to determine what sentence he will receive." *Freeman*, 564 U.S. at 536 (Sotomayor, J., concurring in the judgment); see *id.* at 537 (noting that at the time of the SRA's enactment, it was "well understood that, under Rule 11, the term of imprisonment stipulated in a (C) agreement bound the district court once it accepted the agreement"); see also, *e.g.*, *United States* v. *French*, 719 F.2d 387, 389 & n.2 (11th Cir. 1983) (per curiam), cert. denied, 466 U.S. 960 (1984); *United States* v. *Thompson*, 680 F.2d 1145, 1150 (7th Cir.), cert. denied, 459 U.S. 1089 (1982), and 459 U.S. 1108 (1983); *United States* v. *Stevens*, 548 F.2d 1360, 1362 (9th Cir.), cert. denied, 430 U.S. 975 (1977).

Had Congress wished to authorize district courts to retroactively revise sentences of Rule 11(c)(1)(C) defendants against this backdrop, it could easily have done so. For example, it could have made Section 3582(c)(2) applicable to any "defendant whose underlying sentencing range was subsequently lowered by the Sentencing Commission, whether or not that range was applied at sentencing." But Congress instead limited

sentence reductions to sentences "based on" a sentencing range that is later amended. That choice is significant because Congress would have been aware that after a district court accepted a Rule 11(c)(1)(C) agreement, it was bound to sentence the defendant in accordance with the terms of the agreement, irrespective of the defendant's Guidelines range. See *Bowen* v. *Massachusetts*, 487 U.S. 879, 896 (1988) (noting "well-settled presumption that Congress understands the state of existing law when it legislates").

Petitioner is mistaken in arguing (Br. 29) that the absence of an explicit reference to Rule 11(c)(1)(C) defendants in the text of Section 3582 indicates that district courts may revise such defendants' sentences. Congress did place such defendants outside Section 3582(c)(2) through the language it enacted—by authorizing sentence reductions for only defendants whose terms of imprisonment were "based on a sentencing range that has subsequently been lowered by the Sentencing Commission," 18 U.S.C. 3582(c)(2). That language does not, naturally read, reach defendants whose sentences were imposed based on binding Rule 11(c)(1)(C) agreements. And the natural reading of the statutory language is particularly sensible in light of the history of Rule 11(c)(1)(C) agreements as setting binding sentences that district courts lacked the authority to alter. It is unlikely that Congress intended Section 3582(c)(2) "to fundamentally alter the way in which Rule 11(c)(1)(C) operates" without "any indication from the statutory text or legislative history" signaling that intent. *Freeman*, 564 U.S. at 537 (Sotomayor, J., concurring in the judgment).[3]

---

[3] Petitioner contends (Br. 23) that the conclusion that sentences under Rule 11(c)(1)(C) are never "based on" the Guidelines is "at

c. Petitioner proposes (Br. 13-20) that Section 3582(c)(2)'s language allowing reduction of a sentence "based on" a subsequently amended Sentencing Guideline is best understood to call for application of common-law proximate-cause principles from the tort context. See Pet. Br. 16 (citing W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 43, 300 (5th ed. 1984) and Restatement (Second) of the Law of Torts § 431 (1965)). But this Court's decisions construing the term "based upon" in federal statutes creating causes of action, see pp. 40-42, *supra*, provide by far the most apposite guide to the federal statutory language here. Petitioner does not address those cases' guidance that a claim is "based upon" only its "core" or "foundation"—*i.e.*, its determinative legal components—and not on other, less central, factors.

In any event, the application of tort-law proximate-cause principles would confirm the determination of five Justices in *Freeman* that the sentence of a Rule

---

odds with" a provision of the SRA that permits defendants to appeal any sentence "imposed as a result of an incorrect application of the sentencing guidelines," 18 U.S.C. 3742(a)(2). That provision, however, does not employ the term "based on." And even if Section 3582(c)(2) and Section 3742(a)(2) have identical scope, nothing in Section 3742(a)(2) indicates that a defendant who enters a binding agreement for a specified sentence under Rule 11(c)(1)(C) can appeal under Section 3742(a)(2). Petitioner cites only one circuit case that has permitted such an appeal, see Pet. Br. 23 (citing *United States* v. *Smith*, 918 F.2d 664, 668-669 (6th Cir. 1990) (per curiam), cert. denied, 498 U.S. 1125 (1991)), and the result it reached is inconsistent with Congress's intent in enacting the SRA that "a sentence consistent with a plea agreement cannot be appealed," 1983 Senate Report 153. Congress could, and evidently did, view sentences imposed pursuant to Rule 11(c)(1)(C) plea agreements not to "result" from an "application of the sentencing guidelines," 18 U.S.C. 3742(a)(2).

11(c)(1)(C) defendant is "based on" the terms of the binding plea agreement and not on Guidelines calculations. As this Court has repeatedly held, tort-law proximate cause requires a "*direct* relation between the injury asserted and the injurious conduct alleged," *Bank of Am. Corp.* v. *City of Miami*, 137 S. Ct. 1296, 1306 (2017) (emphasis added; citation omitted), and "the general tendency" is "not to stretch proximate causation beyond the first step," *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 134 S. Ct. 1377, 1394 (2014) (citation and internal quotation marks omitted); see *Bank of Am.*, 137 S. Ct. at 1306 (same); *Hemi Grp., LLC* v. *City of New York*, 559 U.S. 1, 10 (2010) (same). The direct cause of the sentence of a Rule 11(c)(1)(C) defendant is the binding plea agreement. Background Guidelines calculations, in contrast, are one of many possible indirect influences on the agreement that the parties reach and the district court accepts.[4]

d. Although five Members of this Court agreed in *Freeman* that the sentence of a defendant who enters a binding plea under Rule 11(c)(1)(C) is based only upon

---

[4] Petitioner's request for a loose proximate-cause standard would also create serious administrability problems. In petitioner's view (Br. 23) the Sentencing Guidelines would "often" but "not always" bear a sufficiently close connection to a sentence to allow a sentence reduction under Section 3582(c)(2). For example, the Guidelines would be a proximate cause if a court "used the Guidelines range to justify" the sentence, including as "the beginning point to explain the decision to deviate" from the Sentencing Guidelines. Pet. Br. 26 (citation and internal quotation marks omitted). But the Sentencing Guidelines would not be a proximate cause if the district court "merely consults" the Sentencing Guidelines. *Id.* at 27. That highly indeterminate inquiry into the weight that the Sentencing Guidelines received at particular sentencings would be unlikely to yield consistent and predictable results.

the defendant's binding plea agreement, Justice Sotomayor concluded that defendants who enter such pleas may be eligible for resentencing under Section 3582(c)(2) in limited circumstances. 564 U.S. at 539-542. Justice Sotomayor initially observed that when a Rule 11(c)(1)(C) agreement "call[s] for the defendant to be sentenced within a particular Guidelines sentencing range," the defendant's sentence will be based on the Guidelines because the district court must apply the Guidelines in sentencing such a defendant. *Id.* at 538. Justice Sotomayor then further wrote that a Rule 11(c)(1)(C) defendant could also establish that his sentence was "based on" the Guidelines in cases in which an agreement "provide[s] for a specific term of imprisonment * * * but also make[s] clear that the basis for the specified term is a Guidelines sentencing range applicable to the offense to which the defendant pleaded guilty." *Id.* at 539.

That latter extension is unwarranted, because the district court's sentence in a Rule 11(c)(1)(C) case is "based on" only the terms in the plea agreement. See pp. 39-45, *supra*; *Freeman*, 564 U.S. at 535 (Sotomayor, J., concurring in the judgment); *id.* at 544 (Roberts, C.J., dissenting). So long as the agreement calls on the district court to impose a specified sentence—rather than to apply a provision of the Sentencing Guidelines—prefatory considerations that may have influenced the parties in selecting the agreement's terms are legally irrelevant. See *id.* at 547 (Roberts, C.J., dissenting) ("Only a court can sentence a defendant, so there is no basis for examining why the parties settled on a particular prison term."); see also, *e.g.*, Restatement (Second) of the Law of Contracts § 214 (1981) (limiting circumstances under which court may consider "[a]greements

and negotiations prior to or contemporaneous with the adoption of a writing"). The district court's implementation of the plea agreement is not a function of how the parties arrived at that agreement; it is a function of the agreement itself.

C. The Sentencing Commission's Limitations Confirm That Defendants Sentenced Under Rule 11(c)(1)(C) Plea Agreements Are Ineligible For Section 3582(c)(2) Reductions

The Sentencing Commission's implementation of its authority under Section 3582(c)(2) to constrain the availability of sentence reductions likewise precludes reductions for defendants who receive specific sentences under Rule 11(c)(1)(C) plea agreements.

Section 3582(c)(2) requires any sentence reduction to be "consistent with applicable policy statements issued by the Sentencing Commission," which are binding on the district court. 18 U.S.C. 3582(c)(2); see *Dillon*, 560 U.S. at 827. Under the Commission's instructions in Sentencing Guidelines § 1B1.10, a court considering a sentence reduction is permitted to "substitute only" those retroactively amended provisions that "correspond[]" to the "guideline provisions that were *applied when the defendant was sentenced*" and must "leave all other guideline application decisions unaffected." *Ibid.* (quoting *id.* § 1B1.10(b)(1)) (emphasis added). The Commission has thereby made sentence reductions available only insofar as it has amended Guidelines that actually "were applied when the defendant was sentenced." *Id.* § 1B1.10(b)(1).

The act of imposing a specific sentence pursuant to a type C plea agreement involves no "appli[cation]" of the Guidelines at the time of sentencing. Sentencing Guidelines § 1B1.10(b)(1). By the time the sentencing occurs

(*i.e.*, the time that is relevant under Section 1B1.10(b)(1)), the district court has already accepted the plea agreement. The court does not "appl[y]" the Sentencing Guidelines at that point but instead imposes the specific sentence to which the parties agreed. *Ibid.* Although petitioner discusses whether his sentence was "based on" the Sentencing Guidelines, he does not (and could not plausibly) argue that the Guidelines were actually "applied when [he] was sentenced." *Ibid.*[5]

D. Using Section 3582(c)(2) To Reduce A Sentence That Was Required Under Rule 11(c)(1)(C) Inappropriately Vitiates The Terms Of The Parties' Agreement

Petitioner's construction of Section 3582(c)(2) would give defendants an unjustified windfall by allowing them to retain all the benefits of their plea agreements (here, the dismissal of counts and an agreement that the government would not file an information triggering a mandatory life sentence) while depriving the government of a principal benefit of its Rule 11(c)(1)(C) bargains (the guarantee of a particular sentence or sentencing range).

---

[5] The interpretation of Section 3582(c)(2) adopted by five Justices in *Freeman* is also consistent with Sentencing Guidelines § 6B1.2, which sets out standards for the acceptance of Rule 11(c)(1)(C) plea agreements. See *Freeman*, 564 U.S. at 529 (opinion of Kennedy, J.) (discussing Sentencing Guidelines § 6B1.2 (2011)). That section requires courts to determine whether an agreed-upon sentence is outside a defendant's Sentencing Guidelines range and to state the reasons for a non-Guidelines sentence. Sentencing Guidelines § 6B1.2. But it does not require that Rule 11(c)(1)(C) sentences adhere to the Sentencing Guidelines or transform the imposition of the binding sentence in the plea agreement into an application of the Sentencing Guidelines themselves. *Ibid.* (stating that a binding plea agreement for an out-of-Guidelines sentence may be accepted for any "justifiable reasons").

1. Plea agreements are essential to the administration of criminal justice

This Court recognized long ago that "[t]he disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining,' is an essential component of the administration of justice." *Santobello* v. *New York*, 404 U.S. 257, 260 (1971); see also *Missouri* v. *Frye*, 566 U.S. 134, 143 (2012); Fed. R. Crim. P. 11 advisory committee's note (1974 Amendment).

Plea bargaining "flows from the 'mutuality of advantage' to defendants and prosecutors, each with his own reasons for wanting to avoid trial." *Bordenkircher* v. *Hayes*, 434 U.S. 357, 363 (1978) (quoting *Brady* v. *United States*, 397 U.S. 742, 752 (1970)). For example, "a great many" defendants are "motivated at least in part by the hope or assurance of a lesser penalty than might be imposed if there were a guilty verdict after trial to judge or jury," while the government may obtain a "more promptly imposed punishment" and preserve prosecutorial resources by avoiding trial. *Brady*, 397 U.S. at 752; see *Frye*, 566 U.S. at 144.

Consistent with the contractual nature of plea agreements, the parties to such agreements are generally held to the bargains struck through their negotiations. See, *e.g.*, *United States* v. *Hyde*, 520 U.S. 670, 671 (1997) (holding that a defendant was not entitled to withdraw a guilty plea before the agreement was accepted by court, absent a "fair and just reason," under language now located at Fed. R. Crim. P. 11(d)(2)(B)); *Santobello*, 404 U.S. at 262 (holding that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be part of the inducement or consideration, such promise must be fulfilled"); *Brady*,

397 U.S. at 757. Thus, a plea agreement remains binding even after a favorable change in the law that would have benefitted the defendant, because the "possibility" of such a change "occurring after a plea is one of the normal risks that accompany a guilty plea." *United States* v. *Sahlin*, 399 F.3d 27, 31 (1st Cir. 2005); accord *United States* v. *Robinson*, 587 F.3d 1122, 1129 (D.C. Cir. 2009); *United States* v. *Silva*, 413 F.3d 1283, 1284 (10th Cir. 2005); *United States* v. *Bownes*, 405 F.3d 634, 636-638 (7th Cir.), cert. denied, 546 U.S. 926 (2005).

2. The government's construction of Section 3582(c)(2) preserves the parties' bargain

In addition to being inconsistent with the nature of a type C agreement, permitting a defendant who pleaded guilty in exchange for a specific sentence to obtain a Section 3582(c)(2) sentence reduction would result in unjustified benefits to the defendant, at the government's expense.

a. In exchange for obtaining the certainty of a specific sentence under Rule 11(c)(1)(C), the government often makes substantial concessions. The government may be willing to accept a lower, compromise sentence than the one it would seek under a non-binding Rule 11(c)(1)(B) agreement. It may also agree to dismiss charges, as it did here. And it may agree not to file recidivist enhancements, like the one available in this case, which would have triggered a mandatory life sentence.

The parties' contractual bargain, which is binding on the court after it accepts a Rule 11(c)(1)(C) agreement, would be negated if Section 3582(c)(2) were construed to grant the court discretion to lower an agreed-upon sentence in light of a later amendment to the Sentencing Guidelines. In seeking a sentence reduction under

that provision, a defendant is not attempting to withdraw his guilty plea and place the parties back in their original positions. Instead, he is seeking to retain the benefits he received under the agreement, while at the same time obtaining a lower sentence than the one to which he and the government agreed. But by entering a type C plea agreement, petitioner bargained away the possibility of a lower sentence in exchange for concessions from the government and certainty about the sentence he would receive. In such circumstances, permitting the sentencing court to exercise discretion under Section 3582(c)(2) to reduce petitioner's sentence would result in an unjustified windfall to him.

b. Petitioner argues (Br. 30-31) that holding Rule 11(c)(1)(C) defendants to their bargains "arbitrarily distinguish[es] between similarly situated defendants"—those who entered in to Rule 11(c)(1)(C) agreements and those who did not. But those two groups of defendants are not similarly situated, because, as noted above, a defendant who agrees to a specific sentence under Rule 11(c)(1)(C) gets benefits that other defendants do not. No arbitrariness results from requiring defendants who received benefits during the plea bargaining process to be bound by the concessions that they made in return. See *Pepper* v. *United States*, 562 U.S. 476, 502-503 (2011) (concluding that "disparities resulting from the normal trial and sentencing process" are not the "unwarranted sentencing disparities" among similar defendants that are to be avoided under the SRA).

c. Petitioner also argues (Br. 31-32) that holding Rule 11(c)(1)(C) defendants to their bargains creates unjustified disparities among Rule 11(c)(1)(C) defendants. But such disparities would be created by petitioner's approach, not the government's.

Petitioner would allow a defendant who bargained for a fixed sentence to seek a reduction based on a change to the Sentencing Guidelines even when no evidence indicates that the government would have entered a deal for a lower sentence had the defendant been sentenced after the Guidelines change had occurred. Thus, simply by virtue of an earlier sentencing date, some Rule 11(c)(1)(C) defendants will receive a benefit over later-sentenced defendants.

This case illustrates that point. The parties settled on a 180-month sentence, which falls halfway between the statutory minimum if the government did not file any prior felony information and the minimum if the government filed an information noting only one of petitioner's prior drug felonies. See 21 U.S.C. 841(b)(1)(A). The parties' agreement did not tether the 180-month sentence to any Guidelines calculation, or even make such a calculation. And the 180-month sentence fell outside of the Guidelines range. There is thus no indication that the government would have offered petitioner a more favorable bargain had Amendment 782 been in effect.

There is likewise no indication that the district court would have refused to accept the plea agreement if the parties had reached their bargain after Amendment 782 was enacted. While the court indicated that the advisory Sentencing Guidelines were one factor among the many that it considered in deciding whether to approve the agreement, Pet. App. 44a, 47a-48a, it made precise determinations of petitioner's criminal history category, offense level, and advisory Guidelines range only after it had accepted the plea agreement and bound itself to impose the stipulated sentence, *id.* at 32a-36a. And the other considerations bearing on petitioner's

sentence make it highly unlikely that the court would have disapproved the bargain had the already-proposed Amendment 782 been in effect. As the district court was aware, the government agreed as part of the deal to forgo filing an information concerning multiple prior drug felonies that would have raised petitioner's statutory minimum sentence from ten years to life. By giving some Rule 11(c)(1)(C) defendants the opportunity to obtain reduced sentences to which there is no evidence the government would have agreed, petitioner would create unwarranted disparities with later-sentenced defendants who have no similar opportunity to improve their bargains.

Petitioner suggests (Br. 30-31) that his approach avoids unwarranted disparities between earlier- and later-sentenced Rule 11(c)(1)(C) defendants when the earlier-sentenced defendant might have been offered a better deal had a later amendment been in effect. But an earlier-sentenced defendant's inability to benefit from a later change in the law is not an unjustified disparity, because defendants who plead guilty generally assume the risk that later changes in the law would have benefited them. See, *e.g.*, *Brady*, 397 U.S. at 757 (recognizing that generally "a voluntary plea of guilty intelligently made in light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise"). They forgo the possibility of benefiting from future developments in return for increased certainty and the bargained-for benefits of a plea. See, *e.g.*, *United States* v. *Porter*, 405 F.3d 1136, 1145 (10th Cir.) (noting that in a plea deal, "each side foregoes certain rights and assumes certain risks in exchange for a degree of cer-

tainty as to the outcome," and "[o]ne such risk is a favorable change in the law"), cert. denied, 546 U.S. 980 (2005). Construing Section 3582(c)(2) to preclude sentence reductions for defendants who plead guilty in exchange for a specific sentence appropriately preserves the parties' bargain and works no injustice.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
JOHN P. CRONAN
Acting Assistant Attorney General
ERIC J. FEIGIN
RACHEL P. KOVNER
Assistants to the Solicitor General
ROSS B. GOLDMAN
Attorney

FEBRUARY 2018

APPENDIX

1. 18 U.S.C. 3582 provides:

Imposition of a sentence of imprisonment

(a) FACTORS TO BE CONSIDERED IN IMPOSING A TERM OF IMPRISONMENT.—The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation. In determining whether to make a recommendation concerning the type of prison facility appropriate for the defendant, the court shall consider any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2).

(b) EFFECT OF FINALITY OF JUDGMENT.—Notwithstanding the fact that a sentence to imprisonment can subsequently be—

(1) modified pursuant to the provisions of subsection (c);

(2) corrected pursuant to the provisions of rule 35 of the Federal Rules of Criminal Procedure and section 3742; or

(3) appealed and modified, if outside the guideline range, pursuant to the provisions of section 3742;

a judgment of conviction that includes such a sentence constitutes a final judgment for all other purposes.

(c) MODIFICATION OF AN IMPOSED TERM OF IMPRISONMENT.—The court may not modify a term of imprisonment once it has been imposed except that—

(1) in any case—

(A) the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that—

(i) extraordinary and compelling reasons warrant such a reduction; or

(ii) the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c), for the offense or offenses for which the defendant is currently imprisoned, and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community, as provided under section 3142(g);

and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission; and

(B) the court may modify an imposed term of imprisonment to the extent otherwise ex-

pressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure; and

(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.

(d) INCLUSION OF AN ORDER TO LIMIT CRIMINAL ASSOCIATION OF ORGANIZED CRIME AND DRUG OFFENDERS.—The court, in imposing a sentence to a term of imprisonment upon a defendant convicted of a felony set forth in chapter 95 (racketeering) or 96 (racketeer influenced and corrupt organizations) of this title or in the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 801 et seq.), or at any time thereafter upon motion by the Director of the Bureau of Prisons or a United States attorney, may include as a part of the sentence an order that requires that the defendant not associate or communicate with a specified person, other than his attorney, upon a showing of probable cause to believe that association or communication with such person is for the purpose of enabling the defendant to control, manage, direct, finance, or otherwise participate in an illegal enterprise.

2. 18 U.S.C. 3742 provides:

Review of a sentence

(a) APPEAL BY A DEFENDANT.—A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11)[1] than the maximum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

(b) APPEAL BY THE GOVERNMENT.—The Government may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

---

[1] See References in Text note below.

(3) is less than the sentence specified in the applicable guideline range to the extent that the sentence includes a lesser fine or term of imprisonment, probation, or supervised release than the minimum established in the guideline range, or includes a less limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11)[1] than the minimum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

The Government may not further prosecute such appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General.

(c) PLEA AGREEMENTS.—In the case of a plea agreement that includes a specific sentence under rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure—

(1) a defendant may not file a notice of appeal under paragraph (3) or (4) of subsection (a) unless the sentence imposed is greater than the sentence set forth in such agreement; and

(2) the Government may not file a notice of appeal under paragraph (3) or (4) of subsection (b) unless the sentence imposed is less than the sentence set forth in such agreement.

(d) RECORD ON REVIEW.—If a notice of appeal is filed in the district court pursuant to subsection (a) or (b), the clerk shall certify to the court of appeals—

(1) that portion of the record in the case that is designated as pertinent by either of the parties;

(2) the presentence report; and

(3) the information submitted during the sentencing proceeding.

(e) CONSIDERATION.—Upon review of the record, the court of appeals shall determine whether the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and

(A) the district court failed to provide the written statement of reasons required by section 3553(c);

(B) the sentence departs from the applicable guideline range based on a factor that—

(i) does not advance the objectives set forth in section 3553(a)(2); or

(ii) is not authorized under section 3553(b); or

(iii) is not justified by the facts of the case; or

(C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title and the reasons for the imposition of the particular sentence, as stated by the district

court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and, except with respect to determinations under subsection (3)(A) or (3)(B), shall give due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts.

(f) DECISION AND DISPOSITION.—If the court of appeals determines that—

(1) the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(2) the sentence is outside the applicable guideline range and the district court failed to provide the required statement of reasons in the order of judgment and commitment, or the departure is based on an impermissible factor, or is to an unreasonable degree, or the sentence was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and—

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(3) the sentence is not described in paragraph (1) or (2), it shall affirm the sentence.

(g) SENTENCING UPON REMAND.—A district court to which a case is remanded pursuant to subsection (f)(1) or (f)(2) shall resentence a defendant in accordance with section 3553 and with such instructions as may have been given by the court of appeals, except that—

(1) In determining the range referred to in subsection 3553(a)(4), the court shall apply the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that were in effect on the date of the previous sentencing of the defendant prior to the appeal, together with any amendments thereto by any act of Congress that was in effect on such date; and

(2) The court shall not impose a sentence outside the applicable guidelines range except upon a ground that—

(A) was specifically and affirmatively included in the written statement of reasons required by section 3553(c) in connection with the previous sentencing of the defendant prior to the appeal; and

(B) was held by the court of appeals, in remanding the case, to be a permissible ground of departure.

(h) APPLICATION TO A SENTENCE BY A MAGISTRATE JUDGE.—An appeal of an otherwise final sentence imposed by a United States magistrate judge may be taken to a judge of the district court, and this section shall apply (except for the requirement of approval by the Attorney General or the Solicitor General in the case of a Government appeal) as though the appeal were to a court of appeals from a sentence imposed by a district court.

(i) GUIDELINE NOT EXPRESSED AS A RANGE.—For the purpose of this section, the term "guideline range" includes a guideline range having the same upper and lower limits.

(j) DEFINITIONS.—For purposes of this section—

(1) a factor is a "permissible" ground of departure if it—

(A) advances the objectives set forth in section 3553(a)(2); and

(B) is authorized under section 3553(b); and

(C) is justified by the facts of the case; and

(2) a factor is an "impermissible" ground of departure if it is not a permissible factor within the meaning of subsection (j)(1).

3. Fed. R. Crim. P. 11 provides in pertinent part:

Pleas

* * * * *

(c) Plea Agreement Procedure.

(1) In General. An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will:

(A) not bring, or will move to dismiss, other charges;

(B) recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request does not bind the court); or

(C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sen-

tencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

(2) Disclosing a Plea Agreement. The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.

(3) Judicial Consideration of a Plea Agreement.

(A) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report.

(B) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request.

(4) Accepting a Plea Agreement. If the court accepts the plea agreement, it must inform the defendant that to the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the agreed disposition will be included in the judgment.

(5) Rejecting a Plea Agreement. If the court rejects a plea agreement containing provisions of the type specified in Rule 11(c)(1)(A) or (C), the court must do the following on the record and in open court (or, for good cause, in camera):

(A) inform the parties that the court rejects the plea agreement;

(B) advise the defendant personally that the court is not required to follow the plea agreement and give the defendant an opportunity to withdraw the plea; and

(C) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.

(d) Withdrawing a Guilty or Nolo Contendere Plea. A defendant may withdraw a plea of guilty or nolo contendere:

(1) before the court accepts the plea, for any reason or no reason; or

(2) after the court accepts the plea, but before it imposes sentence if:

(A) the court rejects a plea agreement under 11(c)(5); or

(B) the defendant can show a fair and just reason for requesting the withdrawal.

* * * * *

4. United States Sentencing Guidelines § 1B1.10 (2014) provides:

Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)

(a) Authority.—

(1) In General.—In a case in which a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (d) below, the court may reduce the defendant's term of imprisonment as provided by 18 U.S.C. § 3582(c)(2). As required by 18 U.S.C. § 3582(c)(2), any such reduction in the defendant's term of imprisonment shall be consistent with this policy statement.

(2) Exclusions.—A reduction in the defendant's term of imprisonment is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. § 3582(c)(2) if—

(A) none of the amendments listed in subsection (d) is applicable to the defendant; or

(B) an amendment listed in subsection (d) does not have the effect of lowering the defendant's applicable guideline range.

(3) Limitation.—Consistent with subsection (b), proceedings under 18 U.S.C. § 3582(c)(2) and this policy statement do not constitute a full resentencing of the defendant.

(b) Determination of Reduction in Term of Imprisonment.—

(1) In General.—In determining whether, and to what extent, a reduction in the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement is warranted, the court shall determine the amended guideline range that would have been applicable to the defendant if the amendment(s) to the guidelines listed in subsection (d) had been in effect at the time the defendant was sentenced. In making such determination, the court shall substitute only the amendments listed in subsection (d) for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected.

(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.

(C) Prohibition.—In no event may the reduced term of imprisonment be less than the term of imprisonment the defendant has already served.

(c) Cases Involving Mandatory Minimum Sentences and Substantial Assistance.—If the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities, then for purposes of this policy statement the amended guideline range shall be determined without regard to the operation of § 5G1.1 (Sentencing on a Single

Count of Conviction) and § 5G1.2 (Sentencing on Multiple Counts of Conviction).

(d) Covered Amendments.—Amendments covered by this policy statement are listed in Appendix C as follows: 126, 130, 156, 176, 269, 329, 341, 371, 379, 380, 433, 454, 461, 484, 488, 490, 499, 505, 506, 516, 591, 599, 606, 657, 702, 706 as amended by 711, 715, 750 (parts A and C only), and 782 (subject to subsection (e)(1)).

(e) Special Instruction.—

(1) The court shall not order a reduced term of imprisonment based on Amendment 782 unless the effective date of the court's order is November 1, 2015, or later.

Commentary

Application Notes:

1. *Application of Subsection (a).—*

(A) Eligibility.—Eligibility for consideration under 18 U.S.C. § 3582(c)(2) is triggered only by an amendment listed in subsection (d) that lowers the applicable guideline range (i.e., the guideline range that corresponds to the offense level and criminal history category determined pursuant to § 1B1.1(a), which is determined before consideration of any departure provision in the Guidelines Manual or any variance). Accordingly, a reduction in the defendant's term of imprisonment is not authorized under 18 U.S.C. § 3582(c)(2) and is not consistent with this policy statement if: (i)

none of the amendments listed in subsection (d) is applicable to the defendant; or (ii) an amendment listed in subsection (d) is applicable to the defendant but the amendment does not have the effect of lowering the defendant's applicable guideline range because of the operation of another guideline or statutory provision (e.g., a statutory mandatory minimum term of imprisonment).

(B) Factors for Consideration.—

(i) In General.—Consistent with 18 U.S.C. § 3582(c)(2), the court shall consider the factors set forth in 18 U.S.C. § 3553(a) in determining: (I) whether a reduction in the defendant's term of imprisonment is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).

(ii) Public Safety Consideration.—The court shall consider the nature and seriousness of the danger to any person or the community that may be posed by a reduction in the defendant's term of imprisonment in determining: (I) whether such a reduction is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).

(iii) Post-Sentencing Conduct.—The court may consider post-sentencing conduct of the defendant that occurred after imposition of the term of imprisonment in determin-

ing: (I) whether a reduction in the defendant's term of imprisonment is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).

2. *Application of Subsection (b)(1).—In determining the amended guideline range under subsection (b)(1), the court shall substitute only the amendments listed in subsection (d) for the corresponding guideline provisions that were applied when the defendant was sentenced. All other guideline application decisions remain unaffected.*

3. *Application of Subsection (b)(2).—Under subsection (b)(2), the amended guideline range determined under subsection (b)(1) and the term of imprisonment already served by the defendant limit the extent to which the court may reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement. Specifically, as provided in subsection (b)(2)(A), if the term of imprisonment imposed was within the guideline range applicable to the defendant at the time of sentencing, the court may reduce the defendant's term of imprisonment to a term that is no less than the minimum term of imprisonment provided by the amended guideline range determined under subsection (b)(1). For example, in a case in which: (A) the guideline range applicable to the defendant at the time of sentencing was 70 to 87 months; (B) the term of imprisonment imposed was 70 months; and (C) the amended guideline range determined under subsection (b)(1) is 51 to 63 months, the court*

may reduce the defendant's term of imprisonment, but shall not reduce it to a term less than 51 months.

If the term of imprisonment imposed was outside the guideline range applicable to the defendant at the time of sentencing, the limitation in subsection (b)(2)(A) also applies. Thus, if the term of imprisonment imposed in the example provided above was not a sentence of 70 months (within the guidelines range) but instead was a sentence of 56 months (constituting a downward departure or variance), the court likewise may reduce the defendant's term of imprisonment, but shall not reduce it to a term less than 51 months.

Subsection (b)(2)(B) provides an exception to this limitation, which applies 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. In such a case, the court may reduce the defendant's term, but the reduction is not limited by subsection (b)(2)(A) to the minimum of the amended guideline range. Instead, as provided in subsection (b)(2)(B), the court may, if appropriate, provide a reduction comparably less than the amended guideline range. Thus, if the term of imprisonment imposed in the example provided above was 56 months pursuant to a government motion to reflect the defendant's substantial assistance to authorities (representing a downward departure of 20 percent below the min-

imum term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing), a reduction to a term of imprisonment of 41 months (representing a reduction of approximately 20 percent below the minimum term of imprisonment provided by the amended guideline range) would amount to a comparable reduction and may be appropriate.

The provisions authorizing such a government motion are § 5K1.1 (Substantial Assistance to Authorities) (authorizing, upon government motion, a downward departure based on the defendant's substantial assistance); 18 U.S.C. § 3553(e) (authorizing the court, upon government motion, to impose a sentence below a statutory minimum to reflect the defendant's substantial assistance); and Fed. R. Crim. P. 35(b) (authorizing the court, upon government motion, to reduce a sentence to reflect the defendant's substantial assistance).

In no case, however, shall the term of imprisonment be reduced below time served. See subsection (b)(2)(C). Subject to these limitations, the sentencing court has the discretion to determine whether, and to what extent, to reduce a term of imprisonment under this section.

4. *Application of Subsection (c).—As stated in subsection (c), if the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities, then for purposes of*

this policy statement the amended guideline range shall be determined without regard to the operation of § 5G1.1 (Sentencing on a Single Count of Conviction) and § 5G1.2 (Sentencing on Multiple Counts of Conviction). For example:

(A) Defendant A is subject to a mandatory minimum term of imprisonment of 120 months. The original guideline range at the time of sentencing was 135 to 168 months, which is entirely above the mandatory minimum, and the court imposed a sentence of 101 months pursuant to a government motion to reflect the defendant's substantial assistance to authorities. The court determines that the amended guideline range as calculated on the Sentencing Table is 108 to 135 months. Ordinarily, § 5G1.1 would operate to restrict the amended guideline range to 120 to 135 months, to reflect the mandatory minimum term of imprisonment. For purposes of this policy statement, however, the amended guideline range remains 108 to 135 months.

To the extent the court considers it appropriate to provide a reduction comparably less than the amended guideline range pursuant to subsection (b)(2)(B), Defendant A's original sentence of 101 months amounted to a reduction of approximately 25 percent below the minimum of the original guideline range of 135 months. Therefore, an amended sentence of 81 months (representing a reduction of approximately 25 percent below the minimum of the amended

guideline range of 108 months) would amount to a comparable reduction and may be appropriate.

(B) Defendant B is subject to a mandatory minimum term of imprisonment of 120 months. The original guideline range at the time of sentencing (as calculated on the Sentencing Table) was 108 to 135 months, which was restricted by operation of § 5G1.1 to a range of 120 to 135 months. See § 5G1.1(c)(2). The court imposed a sentence of 90 months pursuant to a government motion to reflect the defendant's substantial assistance to authorities. The court determines that the amended guideline range as calculated on the Sentencing Table is 87 to 108 months. Ordinarily, § 5G1.1 would operate to restrict the amended guideline range to precisely 120 months, to reflect the mandatory minimum term of imprisonment. See § 5G1.1(b). For purposes of this policy statement, however, the amended guideline range is considered to be 87 to 108 months (i.e., unrestricted by operation of § 5G1.1 and the statutory minimum of 120 months).

To the extent the court considers it appropriate to provide a reduction comparably less than the amended guideline range pursuant to subsection (b)(2)(B), Defendant B's original sentence of 90 months amounted to a reduction of approximately 25 percent below the original guideline range of 120 months. Therefore, an amended sentence of 65 months (representing a re-

duction of approximately 25 percent below the minimum of the amended guideline range of 87 months) would amount to a comparable reduction and may be appropriate.

5. *Application to Amendment 750 (Parts A and C Only).—As specified in subsection (d), the parts of Amendment 750 that are covered by this policy statement are Parts A and C only. Part A amended the Drug Quantity Table in § 2D1.1 for crack cocaine and made related revisions to the Drug Equivalency Tables in the Commentary to § 2D1.1 (see § 2D1.1, comment. (n.8)). Part C deleted the cross reference in § 2D2.1(b) under which an offender who possessed more than 5 grams of crack cocaine was sentenced under § 2D1.1.*

6. *Application to Amendment 782.—As specified in subsection (d) and (e)(1), Amendment 782 (generally revising the Drug Quantity Table and chemical quantity tables across drug and chemical types) is covered by this policy statement only in cases in which the order reducing the defendant's term of imprisonment has an effective date of November 1, 2015, or later.*

   A reduction based on retroactive application of Amendment 782 that does not comply with the requirement that the order take effect on November 1, 2015, or later is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. § 3582(c)(2).

   Subsection (e)(1) does not preclude the court from conducting sentence reduction proceedings and en-

tering orders under 18 U.S.C. § 3582(c)(2) and this policy statement before November 1, 2015, provided that any order reducing the defendant's term of imprisonment has an effective date of November 1, 2015, or later.

7. Supervised Release.—

(A) Exclusion Relating to Revocation.—Only a term of imprisonment imposed as part of the original sentence is authorized to be reduced under this section. This section does not authorize a reduction in the term of imprisonment imposed upon revocation of supervised release.

(B) Modification Relating to Early Termination.—If the prohibition in subsection (b)(2)(C) relating to time already served precludes a reduction in the term of imprisonment to the extent the court determines otherwise would have been appropriate as a result of the amended guideline range determined under subsection (b)(1), the court may consider any such reduction that it was unable to grant in connection with any motion for early termination of a term of supervised release under 18 U.S.C. § 3583(e)(1). However, the fact that a defendant may have served a longer term of imprisonment than the court determines would have been appropriate in view of the amended guideline range determined under subsection (b)(1) shall not, without more, provide a basis for early termination of supervised release. Rather, the court should take into account the to-

tality of circumstances relevant to a decision to terminate supervised release, including the term of supervised release that would have been appropriate in connection with a sentence under the amended guideline range determined under subsection (b)(1).

8. *Use of Policy Statement in Effect on Date of Reduction.—Consistent with subsection (a) of § 1B1.11 (Use of Guidelines Manual in Effect on Date of Sentencing), the court shall use the version of this policy statement that is in effect on the date on which the court reduces the defendant's term of imprisonment as provided by 18 U.S.C. § 3582(c)(2).*

Background: Section 3582(c)(2) of Title 18, United States Code, provides: "[I]n 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."

This policy statement provides guidance and limitations for a court when considering a motion under 18 U.S.C. § 3582(c)(2) and implements 28 U.S.C. § 994(u), which provides: "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." The Supreme Court has concluded that proceedings under section 3582(c)(2) are not governed by United States v. Booker, 543 U.S. 220 (2005), and this policy statement remains binding on courts in such proceedings. See Dillon v. United States, 560 U.S. 817 (2010).

Among the factors considered by the Commission in selecting the amendments included in subsection (d) were the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range under subsection (b)(1).

The listing of an amendment in subsection (d) reflects policy determinations by the Commission that a reduced guideline range is sufficient to achieve the purposes of sentencing and that, in the sound discretion of the court, a reduction in the term of imprisonment may be appropriate for previously sentenced, qualified defendants. The authorization of such a discretionary reduction does not otherwise affect the lawfulness of a previously imposed sentence, does not authorize a reduction in any other component of the sentence, and does not entitle a defendant to a reduced term of imprisonment as a matter of right.

The Commission has not included in this policy statement amendments that generally reduce the maximum of the guideline range by less than six months. This criterion is in accord with the legislative history of 28 U.S.C. § 994(u) (formerly § 994(t)), which states: "It should be noted that the Committee does not expect

that the Commission will recommend adjusting existing sentences under the provision when guidelines are simply refined in a way that might cause isolated instances of existing sentences falling above the old guidelines[*] *or when there is only a minor downward adjustment in the guidelines. The Committee does not believe the courts should be burdened with adjustments in these cases." S. Rep. 225, 98th Cong., 1st Sess. 180 (1983).*

[*] So in original. Probably should be "to fall above the amended guidelines".

5. United States Sentencing Guidelines § 6B1.2(c) (2014) provides:

Standards for Acceptance of Plea Agreements (Policy Statement)

(c) In the case of a plea agreement that includes a specific sentence (Rule 11(c)(1)(C)), the court may accept the agreement if the court is satisfied either that:

(1) the agreed sentence is within the applicable guideline range; or

(2) (A) the agreed sentence is outside the applicable guideline range for justifiable reasons; and (B) those reasons are set forth with specificity in the statement of reasons form.