No. 17-5716

In the Supreme Court of the United States

TIMOTHY D. KOONS, KENNETH JAY PUTENSEN, RANDY FEAUTO, ESEQUIEL GUTIERREZ, AND JOSE MANUEL GARDEA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Eighth Circuit Court of Appeals erred in holding, contrary to the opinion of the Fourth Circuit Court of Appeals, that defendants whose initial advisory guideline sentencing range was below a statutory mandatory minimum and who were subsequently sentenced below that minimum after the district court granted a government motion for reduction in sentence for substantial assistance pursuant to 18 U.S.C. § 3553(e), are not eligible for further reduction in sentence under 18 U.S.C. § 3582(c)(2) and retroactive sentencing guideline Amendment 782, which lowered the base offense levels assigned to most drug quantities?

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae, the National Association of Federal Defenders, formed in 1995, is a nationwide, non-profit, volunteer organization whose membership is comprised of attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act. NAFD attorneys represent tens of thousands of individuals sentenced in federal court each year, and have represented thousands of individuals in proceedings under 18 U.S.C. § 3582(c)(2), some similarly situated to petitioners. The issue presented in this case is of great importance to our work and to the welfare of our clients.

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[1] The parties to the case have consented in writing to the filing of this brief. Sup. Ct. R. 37.3(a). No counsel for a party authored any part of this brief, and no person or entity other than amicus curiae made a monetary contribution to the preparation or submission of this brief. Sup. Ct. R. 37.6.

INTRODUCTION

AND SUMMARY OF THE ARGUMENT

To be eligible for a discretionary sentence reduction under 18 U.S.C. § 3582(c)(2), a defendant must satisfy two conditions: (1) he was originally "sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission," and (2) "such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." § 3582(c)(2). The two conditions require distinct, if related, inquiries: a retrospective determination that the defendant's original sentence was "based on" a subsequently-lowered "sentencing range" as required by the statute, and a prospective determination that the amendment has "the effect of lowering the defendant's applicable guideline range" as required by the relevant policy statement.[2]

This case involves only the first condition. The issue is whether the sentences of defendants initially subject to mandatory minimum terms for drug crimes, but relieved of those terms under 18 U.S.C. § 3553(e) and U.S.S.G. § 5K1.1, were "based on" U.S.S.G. § 2D1.1(c)—a guideline that sets forth "sentencing

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[2] U.S.S.G. § 1B1.10(a)(2)(B). Relevant to this second condition, the policy statement further provides that when, as here, the district court had the authority to impose a sentence below a mandatory minimum pursuant to a § 3553(e) motion, "the amended guideline range shall be determined without regard to the operation of §5G1.1," that is, without regard to the otherwise applicable mandatory minimum. *Id.*, § 1B1.10(c); U.S.S.G. app. C, amend. 780 (2014).

ranges" that have subsequently been lowered by the Sentencing Commission.

The Eighth Circuit answered with a categorical "no." It reasoned that U.S.S.G. § 5G1.1(b) establishes the mandatory minimum as the "guidelines range," such that "the advisory sentencing range became irrelevant." *United States v. Koons*, 850 F.3d 973, 977 (8th Cir. 2017) (internal citation omitted). Thus, the court said, when a district court grants a § 3553(e) motion, it "must use the mandatory minimum as the starting point," and any reduction "must be based exclusively on assistance-related considerations." *Id.* (internal citations omitted). Hence, the Eighth Circuit concluded, petitioners' prison terms were solely "based on" their "statutory mandatory minimum sentence[s] and [their] substantial assistance."[3] *Id.*

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[3] The court of appeals "accept[ed]" that the Commission lowered petitioners' guidelines ranges through Amendment 780's addition of U.S.S.G. § 1B1.10(c), *Koons*, 850 F.3d at 976 n.1, thus satisfying the condition that a sentence reduction be "consistent with applicable policy statements issued by the Sentencing Commission," *id.* at 977. At the same time, it suggested that the Commission had no authority to promulgate Amendment 780, asserting that § 1B1.10(c) "ignores" § 3582(c)(2)'s "based on" requirement. *Id.* at 978-79. But the instruction to determine whether the original sentence was "based on" a "sentencing range" is directed to the district courts, *see* 18 U.S.C. § 3582(c)(2), and is "an inquiry that is within their own special knowledge and expertise." *Freeman v. United States*, 564 U.S. 522, 532 (2011). The Commission did not purport to interpret that term, but to clarify its own policy statement. *See* U.S.S.G., app. C, amend. 780 (2014) (reason for amendment) (explaining that amendment resolves a circuit conflict over "when, if at all, § 1B1.10 provides that a statutory minimum continues to limit the amount by which a defendant's sentence may be reduced under 18 U.S.C. § 3582(c)(2) when the defendant's original sentence was below

Employing similar reasoning, six other courts of appeals have likewise held, categorically, that the sentences of prisoners like petitioners initially subject to a mandatory minimum can never be "based on" a "sentencing range" subsequently lowered by the Commission, despite the district court's grant of a substantial assistance motion and regardless whether the district court relied on the guideline range in imposing sentence.[4] But two circuits have held, correctly as a matter of law and actual practice, that the sentences of prisoners in petitioners' circumstances may indeed be "based on" a subsequently lowered "sentencing range."[5]

The Eighth Circuit's categorical bar to eligibility for a sentence reduction for defendants in petitioners' circumstances is contrary to the relevant statutes,

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the statutory minimum due to substantial assistance"). In doing so, the Commission acted well within its power to "specify under what circumstances and by what amount" sentences may be retroactively reduced. 28 U.S.C. § 994(u).

[4] *See United States v. Roa-Medina*, 607 F.3d 255, 259-60 (1st Cir. 2010); *United States v. Williams*, 551 F.3d 182, 187 (2d Cir. 2009); *United States v. Carter*, 595 F.3d 575, 576-80 (5th Cir. 2010); *United States v. Johnson*, 747 F.3d 915, 917 (7th Cir. 2014); *United States v. Jackson*, 577 F.3d 1032, 1034-36 (9th Cir. 2009); *United States v. C.D.*, 848 F.3d 1286, 1288-93 (10th Cir. 2017).

[5] *See In re Sealed Case*, 722 F.3d 361, 364-66, 368-71 (D.C. Cir. 2013); *United States v. Savani*, 733 F.3d 56, 67 (3d Cir. 2013); *id.* at 71-72 (Fuentes, J., concurring). These circuits also held that such a reduction was "consistent with applicable policy statements issued by the Sentencing Commission," in that an amendment to the drug guidelines had "the effect of lowering the defendant's applicable guideline range." *See In re Sealed Case*, 722 F.3d at 366-68; *Savani*, 733 F.3d at 58, 61-67.

contrary to the guidelines and policy statements, contrary to actual sentencing practice in the district courts, and contrary to the principles of fairness and justice underlying all of these.

ARGUMENT

I. The Eighth Circuit's Categorical Rule Is Contrary to the Governing Statutes and This Court's Construction of Section 3582(c)(2)'s Threshold Condition for Eligibility, "Based On."

A. The plain meaning of the governing statutes compels the conclusion that petitioners are eligible for sentence reductions.

What it means, under § 3582(c)(2), to be "based on" a "sentencing range" is answered by the seminal governing statutes Congress enacted over thirty years ago. This Court should read the statutes as written.

Section 3553(a) sets out the "[f]actors to be considered in imposing a sentence." One of those factors appears in subsection (a)(3): "the kinds of sentences available." When the statutory minimum is ten years, only a sentence of at least ten years is "available" under subsection (a)(3).

Another one of those factors to be considered appears in subsection (a)(4): "the sentencing range." Congress directed that the Sentencing Commission, "in the guidelines . . . shall, for each category of offense involving each category of defendant, establish a sentencing range." 28 U.S.C. § 994(b). And it

explained to the courts that the "sentencing range" was to be established by the Commission through its "guidelines" with the same two parameters: "the applicable category of offense," later known as the offense level, "committed by the applicable category of defendant," later known as the criminal history category. 18 U.S.C. § 3553(a)(4)(A). In other words, this "sentencing range" that Congress directed the courts to consider would be the range corresponding to the offense level and criminal history category on the sentencing table that Congress expected the Commission to create.[6] *See* U.S.S.G. Ch. 1, Pt. A(1) (stating that the Commission "is required to prescribe guideline ranges that . . . coordinat[e] the offense behavior categories with the offender characteristic categories.").

Obviously, when a statutory minimum is higher than the Commission's "sentencing range," the "sentences available" under subsection (a)(3) would eclipse the "sentencing range" under subsection (a)(4). But, Congress directed that "[u]pon motion of the Government" under 18 U.S.C. § 3553(e), "the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance."[7] When a defendant is "relieved of" an "otherwise applicable mandatory minimum" through the § 3553(e) "mechanism," *Dorsey v. United States*, 567

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[6] 18 U.S.C. §§ 3553 and 3582(c)(2), as well as 28 U.S.C. § 994(b), were enacted with the Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 212(a), § 217(a).

[7] 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n) were enacted with the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § § 1007, 1008.

U.S. 260, 285 (2012), all term-of-months sentences are "available" under § 3553(a)(3). In the case of a cooperator whose otherwise applicable mandatory minimum has been rendered inoperable by § 3553(e), Congress certainly expected that the sentence would be "based on" the "sentencing range" that it directed both the Commission to establish in 28 U.S.C. § 994(b) and the courts to consider in 18 U.S.C. § 3553(a)(4)(A), viz., the "sentencing range" corresponding to the offense level and criminal history category on the sentencing table. Indeed, Congress directed in § 3553(e) that the sentencing judge "shall" impose sentence "in accordance with the guidelines," which of course means that "sentencing range."

Thus, when Congress referred in § 3582(c)(2) to a term of imprisonment "based on" a "sentencing range"—and that term was imposed on a cooperator after a § 3553(e) motion—Congress expected that the "sentencing range" would be the one corresponding to the offense level and criminal history category on the sentencing table, the one called the "sentencing range" in 28 U.S.C. § 994(b) and 18 U.S.C. § 3553(a)(4).

Notwithstanding the straightforward language of the governing statutes, the Eighth Circuit, and several other courts of appeals, have relied on U.S.S.G. § 5G1.1(b) to hold that a mandatory minimum is the applicable "guideline range" before and after any retroactive amendment to the guidelines, and notwithstanding a § 3553(e) motion. But Congress could not have intended that the mandatory minimum, labeled the "guideline sentence" by § 5G1.1(b), would be the "sentencing range" under 18 U.S.C. § 3582(c)(2), 18 U.S.C. § 3553(a)(4), or 28

U.S.C. § 994(b). For one thing, § 5G1.1(b) did not exist until three years after Congress enacted those statutes in 1984.[8] More important, a mandatory minimum is not a "sentencing range" established by the Commission in the "guidelines" based on a defendant's offense level and criminal history, and a defendant is "not assigned a new offense level or criminal history category by operation of the mandatory minimum." *United States v. Savani*, 733 F.3d 56, 63 n.5 (3d Cir. 2013); *see also In re Sealed Case*, 722 F.3d 361, 369 (D.C. Cir. 2013) (appellant's "mandatory minimum cannot correspond to his offense level and criminal history because it is a creature of statute, unaffected by those variables.").

Moreover, by its own terms, § 5G1.1(b) does not apply following a motion by the government under § 3553(e). U.S.S.G. § 5G1.1(b) ("Where a *statutorily required* minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence." (emphasis added)). Because no minimum is "statutorily required" upon grant of a motion under § 3553(e), the "applicable guideline range" applies. Section 5G1.1(b) itself does no work. It simply states what would be true by operation of law *if* no mechanism for relief from a mandatory minimum applied, and it simply labels the mandatory minimum the "guideline sentence." This artificial designation is surely not what Congress had in mind when it provided for sentence reductions for defendants whose sentences were "based on" a "sentencing range"

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[8] U.S.S.G. § 5G1.1 did not exist until November 1, 1987. *See* U.S.S.G. § 5G1.1, Historical Note.

subsequently lowered by the Sentencing Commission. The Commission, of course, cannot lower a mandatory minimum.

At the same time Congress enacted § 3582(c)(2), it gave the Commission broad authority to "specify under what circumstances and by what amount" sentences may be retroactively reduced. 28 U.S.C. § 994(u). The Commission exercised that authority to ensure that defendants like petitioners are eligible for relief under the second condition —"consisten[cy] with applicable policy statements issued by the Sentencing Commission." In 2014, the Commission clarified that when a district court had the authority to impose a sentence below a mandatory minimum pursuant to a § 3553(e) motion, "then for purposes of this policy statement the amended guideline range shall be determined without regard to the operation of §5G1.1." U.S.S.G. § 1B1.10(c); *id*., app. C, amend. 780 (2014).

In doing so, the Commission resolved a conflict between the circuits. Four circuits had held that the bottom of the amended "guideline range" is the mandatory minimum pursuant to § 5G1.1 notwithstanding a § 3553(e) motion at the original sentencing, such that a retroactive amendment does not "have the effect of lowering the defendant's applicable guideline range," U.S.S.G. § 1B1.10(a)(2)(B).[9] Three other circuits had held that,

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[9] *See United States v. Golden*, 709 F.3d 1228, 1231-33 (8th Cir. 2013); *United States v. Glover*, 686 F.3d 1203, 1204, 1206-08 (11th Cir. 2012); *United States v. Joiner*, 727 F.3d 601, 604-09 (6th Cir. 2013); *United States v. Johnson*, 732 F.3d 109, 111-15 (2d Cir. 2013).

under such circumstances, the bottom of the amended guideline range is the bottom of the amended guideline range as determined by the Sentencing Table, such that defendants are eligible for relief.[10] *See* U.S.S.G. app. C, amend. 780 (reason for amendment). The 2014 policy statement assures that—whatever the circuit rule—§ 5G1.1 does not operate to determine the amended guideline range for purposes of eligibility under the policy statement.

Congress created § 3582(c)(2) to allow retroactive sentence reductions for defendants sentenced to a term of imprisonment "based on" a "sentencing range" that the Sentencing Commission later concluded was too harsh. And it created § 3553(e) to encourage cooperation with authorities in the investigation and prosecution of others. As far as Congress and its statutes are concerned, there is no justification for categorically depriving cooperators of § 3582(c)(2) relief, much less an arbitrary subset of cooperators, simply because their guideline ranges were below a mandatory minimum of which they have been relieved.

B. The Eighth Circuit's categorical rule is contrary to this Court's construction of the term "based on."

While this Court did not settle in *Freeman v. United States*, 564 U.S. 522 (2011), on a single interpretation of the term "based on" in the context of Fed. R. Crim. P. 11(c)(1)(C) pleas, the plurality's

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[10] *See United States v. Wren*, 706 F.3d 861, 862-63 (7th Cir. 2013); *Savani*, 733 F.3d at 61-67; *In re Sealed Case*, 722 F.3d at 366-70.

general definition of the term and its reasoning in rejecting a "categorical bar" in that case are instructive in this context. *See id.* at 535 (agreeing with the plurality "in the normal course" but stating that sentencing under Rule 11(c)(1)(C) agreements "is different") (Sotomayor, J., concurring). As the plurality observed:

> In every case the judge must exercise discretion to impose an appropriate sentence. This discretion, in turn, is framed by the Guidelines. And the Guidelines must be consulted, in the regular course, whether the case is one in which the conviction was after a trial or after a plea, including a plea pursuant to an agreement that recommends a particular sentence.

Id. at 525-26 (plurality opinion).

The same is true when a court sentences a defendant pursuant to a § 3553(e) motion. Section 3553(e) itself requires the district court to impose sentence "in accordance with the guidelines," and also "in accordance" with the relevant "policy statement," which in turn provides that the court "may depart from the guidelines." U.S.S.G. § 5K1.1. The sentence "may therefore be based on the Guidelines," *Freeman*, 564 U.S. at 526 (plurality opinion), even though the defendant was initially subject to a mandatory minimum, and even if the Eighth Circuit is correct that the court must start at the mandatory minimum.

If the district court later determines in ruling on a § 3582(c)(2) motion that its "decision to impose a

sentence [was] based on a range later subject to retroactive amendment, § 3582(c)(2) permits a sentence reduction." *Freeman*, 564 U.S. at 526 (plurality opinion). The district court should "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." *Id*. at 530. Given that § 3553(e) requires imposition of sentence "in accordance" with the guidelines, and that § 5K1.1 permits a departure "from the guidelines," there can be no legal justification for a rule dictating that the guidelines were categorically *not* a relevant part of the analytic framework.

Indeed, the Eighth Circuit's "categorical bar" would "prevent district courts from making an inquiry that is within their own special knowledge and expertise," a statutorily required "inquiry into the reasons for a judge's sentence." 564 U.S. at 532-33 (plurality opinion).

> What is at stake in this case is a defendant's eligibility for relief, not the extent of that relief. Indeed, even where a defendant is permitted to seek a reduction, the district judge may conclude that a reduction would be inappropriate. District judges . . . can rely on the frameworks they have devised to determine whether and to what extent a sentence reduction is warranted in any particular case.

Id. at 532 (plurality opinion).

The outcomes in *Savani* and *In Re Sealed Case* are consistent with this framework. In those cases, the courts of appeals reasoned that the defendants were legally eligible for sentence reductions and remanded for district court determinations on the facts of each case. *See Savani*, 733 F.3d at 67 ("Because the district courts that sentenced these defendants either held that the defendant was not eligible for a reduction because of the mandatory minimum or did not state whether the § [3582(c)(2)] motion was being denied as a matter of law because of the mandatory minimum or a matter of discretion, we will vacate the orders and remand the . . . cases to their respective courts for further proceedings in accord with *Freeman* . . . and with the discretion of the district courts."); *In re Sealed Case*, 722 F.3d at 370 ("Because the district court has authority to reduce the appellant's sentence, we remand for further § 3582(c)(2) proceedings . . . so that the district court may consider whether the facts of the appellant's case warrant a reduced sentence."). The same result is appropriate in petitioners' cases, given that the district court relied on the guideline ranges, at least in part, in imposing petitioners' original sentences. Pet. Br. at 3-10, 22-24.

II. District Court Practice Across the Nation Accords with the Correct Reading of Section 3553(e) and the Relevant Guidelines and Policy Statements, Basing Sentences for Cooperating Defendants on the Guideline Range.

A. The correct reading of Section 3553(e) and the relevant policy statements requires that courts base substantial assistance sentences on the applicable guideline range.

The correct reading of § 3553(e) is that when the "statutory minima … lie above the range of sentences the Sentencing Commission thinks best," in exchange for assistance, "the prosecutor can remove the barrier to the use of the guideline range." *United States v. Wills*, 35 F.3d 1192, 1193 (7th Cir. 1994) (Easterbrook, J., dissenting on other grounds); *see also Dorsey*, 567 U.S. at 285 (Section 3553(e) is one of "two mechanisms through which an offender may escape an otherwise applicable mandatory minimum"); *In re Sealed Case*, 722 F.3d at 366 ("granting the § 3553(e) motion freed the district court to use the guideline range and disregard the mandatory minimum"). And even if the Eighth Circuit were correct that the no-longer-applicable mandatory minimum must be the starting point, nothing in § 5K1.1 or any other provision indicates that the district court may not consider the guideline range in determining the ending point.

The Eighth Circuit's premise that a sentence imposed under 18 U.S.C. § 3553(e) must be "based on" the statutory mandatory minimum is incorrect as a matter of law. To the contrary, § 3553(e) and related

statutes and Guideline provisions render the mandatory minimum inoperable in the wake of the government's substantial assistance motion, and specify that the district court shall instead impose sentence in accordance with the guidelines and policy statements.

As discussed above, the statutory language is clear that a sentence for substantial assistance "shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission." 18 U.S.C. § 3553(e). Congress also directed the Commission to "assure that the guidelines reflect the general appropriateness of imposing a lower sentence than otherwise imposed, including a sentence that is lower than that established by statute as a mandatory minimum, to take account of a defendant's substantial assistance." 28 U.S.C. § 994(n).

The guidelines and policy statements reflect Congress's directives. As in any case, a cooperator's sentencing determination begins by first calculating the applicable guideline range, pursuant to U.S.S.G. § 1B1.1(a)(1)-(7)—by reference to the offense level and criminal history category. When a mandatory minimum applies in a non-cooperation case, § 1B1.1(a)(8) then requires reference to § 5G1.1(b), which states that "[w]here a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum shall be the guideline sentence." But, where the government has made a § 3553(e) motion, no mandatory minimum is "statutorily required." In such a case, § 5G1.1(b) has no influence on the applicable guideline range, and sentencing

proceeds to § 1B1.1(b) (the "court shall then consider Parts H and K of Chapter Five") and consideration of § 5K1.1.

Pursuant to 28 U.S.C. § 994(n), and as referenced in § 3553(e), the Commission promulgated policy statement § 5K1.1. Section 5K1.1 does two things. First, it states that "[u]pon motion of the government stating that the defendant has provided substantial assistance," the court "may depart *from the guideline range*" (emphasis added), not from the "guideline sentence" referenced in § 5G1.1(b). Thus, when, as is typical, the government has moved under both § 3553(e) and § 5K1.1, § 3553(e) authorizes a sentence below the no-longer-applicable mandatory minimum "in accordance with the guidelines," and the policy statement authorizes a departure "from the guideline range." Second, § 5K1.1 provides a non-exhaustive list of considerations that "may guide the district court when it selects a sentence below the statutory minimum, as well as when it selects a sentence below the Guidelines range." *Melendez v. United States*, 518 U.S. 120, 129 (1996).

These considerations "may include, but are not limited to" the significance and usefulness of the cooperation; the truthfulness, completeness and reliability of any information or testimony provided; the nature and extent of the defendant's assistance; any injury suffered or any danger or risk of injury to the defendant or his family; and the timeliness of the defendant's assistance. U.S.S.G. § 5K1.1(a)(1)-(5). "The nature, extent, and significance of assistance can involve a broad spectrum of conduct that must be evaluated by the court on an individual basis. Latitude

is, therefore, afforded the sentencing judge to reduce a sentence based upon variable relevant factors, including those listed above." *Id.*, comment. (backg'd.).

Given this wide "latitude," courts of appeals have held in numerous cases that district courts may consider factors that are embodied in other aspects of the guidelines in determining the extent of a reduction upon motion of the government under 18 U.S.C. § 3553(e), U.S.S.G. § 5K1.1, or Rule 35(b), including the nature and seriousness of the offense, the defendant's criminal history, proportionality among more and less culpable co-defendants, and the prosecutor's charging decisions.[11] Because the factors

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[11] A court must "at a bare minimum" consider the listed factors, may consider the "many and varied" mitigating factors that can "fairly be said to touch upon" the defendant's cooperation, and may consider factors unrelated to cooperation in limiting the extent of a departure. *United States v. Mariano*, 983 F.2d 1150, 1156-57 & n.6 (1st Cir. 1993); *see also United States v. Davis*, 679 F.3d 190, 191, 193, 197 (4th Cir. 2012) (district court properly considered violent nature of offense of conviction, criminal history, and prior reduction under § 5K1.1 in determining reduction under Rule 35(b)); *United States v. Winebarger*, 664 F.3d 388, 395, 397 (3d Cir. 2011) (district court properly considered seriousness of offense); *United States v. Grant*, 636 F.3d 803, 817 (6th Cir. 2011) (listing factors courts may consider in determining extent of reduction under § 3553(e) and § 5K1.1, including proportionality between more and less culpable defendants, criminal history, and seriousness of the crime); *United States v. Chapman*, 532 F.3d 625, 627-29 (7th Cir. 2008) (district court properly considered "defendants' prior criminal histories and the seriousness of their offenses" in sentencing them at high end of their new guideline ranges); *United States v. Casiano*, 113 F.3d 420, 431 (3d Cir. 1997) (district court properly considered "seriousness of the crime" and "impact on the victim"); *United States v. Manella*, 86 F.3d 201, 202 & n.3, 205 (11th Cir. 1996) (court may consider nature,

the district courts may consider are "not limited," nothing prohibits them from considering the applicable guideline range under § 2D1.1 in imposing a sentence upon motion of the government under § 3553(e). Indeed, § 3553(e) requires district courts to impose sentence "in accordance" with that range, and § 5K1.1 expressly authorizes them to depart below that range. As demonstrated below, they frequently do both.

B. District courts routinely impose sentences below or within the applicable guideline range, and otherwise base sentences on that range, in cases like those of petitioners.

To determine whether district courts in fact base sentences on the applicable guideline range when such range is below a mandatory minimum following substantial assistance motions under 18 U.S.C. § 3553(e), amicus surveyed 89 Federal Defender offices across the nation.[12] In all, 88 offices responded.

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circumstances and seriousness of offense, and sentence that would have been imposed absent motion in deciding "to what extent a defendant's sentence should be reduced for substantial assistance"); *United States v. Webster*, 54 F.3d 1, 4 (1st Cir. 1995) (district court may reduce sentence upon motion under § 5K1.1 to offset consecutive mandatory minimum sentence, and properly considered the "seriousness of the defendant's criminal conduct"); *United States v. Alvarez*, 51 F.3d 36, 38-41 (5th Cir. 1995) (district court may base decision to depart only on defendant's substantial assistance, but there is no limitation on what it may consider in determining extent of departure, including relative culpability).

[12] Defenders have offices in 91 of the 94 federal judicial districts. The Northern and Southern Districts of Iowa, headed by the Federal Defender on the merits brief, were not surveyed.

Responses from defenders in seven offices were not counted because either the defenders reported that there were no such cases in their district (five responses), or the practice in the district was indiscernible (two responses). Thus, 81 responses were included.

In the large majority of districts—78% (63 of 81)—judges expressly based sentences in whole or in part on the applicable guideline range. In 69% (56 of 81) districts, the applicable guideline range was the starting point or the ending point for substantial assistance departures. In 23 of those districts, some or all judges used the applicable guideline range as the starting point; in seven districts, some or all judges used the applicable guideline range as the presumptive ending point for a departure from the mandatory minimum; and 26 other districts were mixed, with most judges using the applicable guideline range as the starting point and some judges using it as the presumptive ending point. In another 8.6% (7 of 81) districts, judges used the applicable guideline range in some way to determine the extent of the departure from the mandatory minimum. A few defenders in districts where judges now depart only from the mandatory minimum noted that, before the circuit required otherwise, they departed from the applicable guideline range. In most districts, the government always or nearly always moves under both § 3553(e) and § 5K1.1.

The survey was conducted from January 10 through 25, 2018. Records of the survey are on file with amicus.

Defenders in many offices provided comments demonstrating that, in their districts, once a § 3553(e) motion has been made, the mandatory minimum plays essentially no role in judges' sentencing determinations. The response from one of the defender offices in the First Circuit explained that:

> [T]he practice in any case where the judge could go below the mandatory minimum (safety valve, substantial assistance) is that, once it is legal to breach the mandatory minimum, the judges ignore the mandatory minimum and use the guideline range as if it were any other sentencing.

A defender office in the Fourth Circuit reported a similar practice, illustrated by the example of a former client:

> [The client] pleaded to conspiracy to distribute 50 grams or more of crack, and faced a 120-month mandatory minimum in 2007. The otherwise applicable guidelines were 87-108. The Government filed a substantial assistance motion asking for a 50% reduction, and specifically said that meant it was asking the court "to impose a sentence within a range of 43-54 months." The Court imposed 43 months, 50% off the low end of the guideline range.

Another office in the Fourth Circuit reported that "when the government files a § 3553(e) motion, the

mandatory minimum is now gone, and the parties make arguments based on the otherwise applicable guideline range."

An office in the Eighth Circuit explained:

> Once the court grants the motion, the mandatory minimum is gone. When the government files a § 3553(e) motion only, the court departs to a sentence within the guideline range. But the government nearly always files under both § 5K1.1 and § 3553(e), and the court departs from the guideline range. This has always been our position, the government's position, and Probation's position too.

Other offices in the Eighth Circuit reported that some judges "use 'the key' that unlocks the mandatory minimum and then depart from the guideline range," and that judges in the district "go to the applicable guideline range and then determine the amount of departure without consideration of the mandatory minimum."

Likewise, an office in the Sixth Circuit reported that "the § 3553(e) motion removes the effect of the mandatory minimum, and the starting point becomes the properly calculated guideline range." An office in the Second Circuit reported that "[t]he judge essentially disregards the mandatory minimum altogether, starts at the guidelines range, and then decides whether or not to depart downward from the guidelines range." An office in the Fifth Circuit reported:

> Some judges go directly to the guideline range and ignore the mandatory minimum when there is a § 3553(e) motion. They conduct a sentencing as if there is no mandatory minimum. Cooperation and mitigation are argued by the defense for the court to go below the guideline range, and the mandatory minimum is ignored by the parties.

An office in the Ninth Circuit reported that "as long as the government files a § 3553(e) motion, the judges treat the mandatory minimum as if it never applied and guide their sentencing decision by the relevant guidelines and the government's assessment of the cooperation."

An office in the Tenth Circuit reported that "once the mandatory minimum has been pierced, the focus returns to the original guideline range, then the court applies any substantial assistance departure from there." Another office in the Tenth Circuit reported:

> In our district, the departure was always from the guideline range. Yes, the ordinary guideline range. In fact, I have never seen references to § 5G1.1(b). It is definitely the practice in this district to depart from the ordinary guideline range.

In petitioners' cases, the government moved for reduced sentences under both § 3553(e) and § 5K1.1. Accordingly, the judge was not only empowered to disregard the mandatory minimum and required to

impose sentence in accordance with the guidelines, but was also authorized to depart below the guideline range. Under Eighth Circuit law, however, the district court was required to use the mandatory minimum as the "starting point," and to base the "reduction below the statutory minimum . . . exclusively on assistance-related considerations," apparently excluding the applicable guideline range. *Koons*, 850 F.3d at 977. Even so, the district court not only calculated, but consulted, and in three of the five cases sentenced within, the range determined under § 2D1.1. Pet. Br. at 3-10, 22-24. And in Mr. Gutierrez's case, the judge determined that the applicable guideline range of 188-235 months was "flaw[ed]," and thus varied upward to 300 months, then departed downward from 300 months to 192 months based on substantial assistance, a sentence squarely within the applicable guideline range. *Id*. at 10.

Yet, the Eighth Circuit held that petitioners were not eligible for § 3582(c)(2) sentence reductions because their sentences were not "based on" the subsequently lowered guideline range. *Koons*, 850 F.3d at 974. And the Eighth Circuit is not alone in maintaining that sentences were not "based on" the applicable guideline range in the face of record evidence demonstrating that the district court in fact relied on the guideline range. *See*, *e.g.*, *United States v. Roa-Medina*, 607 F.3d 255, 259-60 (1st Cir. 2010); *United States v. Carter*, 595 F.3d 575, 578-79 (5th Cir. 2010).

In contrast, the Third and D.C. Circuits, which reject a categorical bar, recognize that the applicable guideline range in fact plays a role. *See Savani*, 733

F.3d at 65 (observing that when the government files a motion under § 3553(e) and § 5K1.1, "courts often depart below both the guideline range and the mandatory minimum"); *In re Sealed Case*, 722 F.3d at 366 (observing that the district court reduced the sentence not only from the mandatory minimum but from the guideline range, and concluding that the record left "no doubt" that the "guideline range was 'a relevant part of the analytic framework'" and that the sentence was therefore "based on" the guideline range).

Given how substantial assistance motions operate in practice, along with the Eighth Circuit's errors in interpreting the relevant statutes and guidelines, its categorical rule that the sentences of defendants like petitioners' can never be "based on" a subsequently lowered guideline range is deeply flawed. The very different outcomes reached by the Third and D.C. Circuits are not only legally correct, they align with the practice in the majority of courts—including the district court in petitioners' cases. As in *Savani* and *In re Sealed Case*, remand is appropriate here, particularly given that the district court calculated, considered, and in some cases sentenced within, the guideline range. Pet Br. at 3-10, 22-24; *see Savani*, 733 F.3d at 67; *In re Sealed Case*, 722 F.3d at 370.

III. The Principles Underlying the Sentencing Reform Act Favor the Petitioners' Eligibility for Sentence Reductions.

A. Congress intended Section 3582(c)(2) to promote fairness and reduce arbitrary outcomes.

The retroactivity mechanism in § 3582(c)(2) is a component part of the Sentencing Reform Act of 1984 ("SRA").[13] The SRA was "aimed at strengthening the consistency, rationality, and effectiveness of federal sentencing," H.R. Rep. No. 103-460 (1994), and at "provid[ing] certainty and fairness" in sentencing while "avoiding unwarranted sentencing disparities," and "maintaining sufficient flexibility" for judicial discretion in individual cases, 28 U.S.C. § 991(b)(1)(B).

To effectuate these purposes, Congress directed the Sentencing Commission not only to promulgate, but to "periodically . . . review and revise" the Sentencing Guidelines. 28 U.S.C. § 994(o). The Commission was to continually "measure the degree to which sentencing . . . practices are effective in meeting the purposes of sentencing," § 991(b)(2), and to ensure that the guidelines reflect "advancement in knowledge of human behavior as it relates to the criminal justice process," § 991(b)(1)(C).

Congress recognized that an inevitable corollary of continual review would be that guidelines applied in already final sentences might later be judged inaccurate, unjust, or out of step with the community's views. Congress intended § 3582(c)(2)'s retroactivity

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[13] Pub. L. 98–473, Title II, ch. II, 98 Stat. 1987, 1987-2040.

provision to blunt the worst of this. *See* S. Rep. No. 98-225, at 121, 180 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182; *see also Freeman*, 564 U.S. at 534 (plurality opinion) ("Congress enacted § 3582(c)(2) to remedy systemic injustice.").

B. The retroactive application of an amendment demonstrates a reasoned judgment that the change is significant enough to compel reconsideration of existing sentences.

The Commission wields its retroactivity power carefully and does not exercise it except under compelling circumstances. In evaluating retroactivity, it considers the purpose of the amendment, the magnitude of the change in the guideline range, and the difficulty of applying the amendment retroactively. U.S.S.G. § 1B1.10, comment. (backg'd.). Over its history, the Commission has selected only thirty amendments, of the more than 800 promulgated, for retroactive application. *See* U.S.S.G. § 1B1.10(d) (listing retroactive amendments). Some retroactive amendments were relatively modest adjustments, but several reflect the Commission's determination to prevent major injustice, to settle significant legal questions, and/or to correct fundamental problems in the Guidelines' structure.

Perhaps the most prominent retroactive amendments have concerned the drug weight table, U.S.S.G. § 2D1.1(c). In 2008 and 2011, the Sentencing Commission made retroactive amendments to the base offense levels for crack cocaine to ameliorate "urgent and compelling" doubts about the 100:1 crack-to-powder ratio. U.S.S.G. app. C, amend. 713 (2008)

(reason for amendment) (approving the retroactive application of Amendment 706); *cf. Kimbrough v. United States*, 552 U.S. 85, 98-99 (2007) (citing U.S. Sentencing Comm'n, *Report to Congress: Cocaine and Federal Sentencing Policy* 8 (2007)). Similarly, in 2014, the Commission retroactively reduced the base offense levels for *all* drugs because "[experience] indicate[s] that setting the base offense levels above the mandatory minimum penalties is no longer necessary to provide adequate incentives to plead guilty or otherwise cooperate with authorities." U.S.S.G. app. C, amend. 782 (2014) (reason for amendment); *see also* Hon. Patti B. Saris, *A Generational Shift for Federal Drug Sentences*, 52 Am. Crim. L. Rev. 1, 17 (2015) (Amendment 782's "modest[]" reductions reflected Commission's view that "immediate steps were necessary" to address growing concern over unproductively harsh drug sentences, where needed legislative reform "may take time" and thus come too late).

C. Section 3553(e) and Section 3582(c)(2) are not inconsistent and should operate in a complementary fashion.

Section 3582(c)(2) is an exception to the rule of finality, unrelated to the sentencing provisions under which leniency is earned for substantial assistance, and fairly applied to those who cooperated and obtained § 3553(e) relief from a mandatory minimum.

The legislative backdrop here evinces two distinct purposes: to encourage cooperation by rewarding substantial assistance with leniency at sentencing and to assure that sentencing policy is implemented fairly over time. These purposes are effected through

separate provisions: § 3553(e), which grants judges greater flexibility and discretion in sentencing cooperators; and § 3582(c)(2), which provides judges the authority to reconsider even final sentences in light of retroactive amendments to the Sentencing Guidelines. No statute, guideline, or policy rationale requires that those who receive the benefit of § 3553(e) should not also receive § 3582(c)(2) consideration. The Commission recognized this in U.S.S.G. § 1B1.10(b)(2)(B) (authorizing reductions in sentence for cooperators). *Cf. United States v. Williams*, 103 F.3d 57, 58 (8th Cir. 1996) (permitting § 3553(e) motion in § 3582(c)(2) proceeding "[i]n order that a defendant may receive the full benefit of both a change in the sentencing range *and* the assistance the defendant has previously rendered").

With § 3582(c)(2), Congress created a mechanism for system-wide reconsideration, and discretionary correction, of the final sentences of defendants whose terms of imprisonment were based on a since-discredited guideline. Between 2008 and 2016, 53,645 defendants were resentenced pursuant to § 3582(c)(2).[14] The retroactive application of Amendment 706 (the crack amendment) alone prompted the resentencing of nearly 8,000 defendants, reducing their sentences by an average of two and a half years.[15] The impact of Amendment 782—the

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[14] U.S. Sentencing Comm'n, Interactive Sourcebook of Federal Sentencing Statistics, Table 62, https://isb.ussc.gov/Login (last visited Jan. 25, 2018).

[15] As of December 2014, 7,748 defendants had been resentenced, with an average reduction of 30 months (representing a 19.9% decrease). U.S. Sentencing Comm'n, *Final Crack Retroactivity Data Report Fair Sentencing Act*, Table 1,

retroactive amendment at issue in this case—has been even more profound: over 30,000 resentencings, with an average reduction of just over two years' imprisonment.[16] During that period, however, many others were denied reductions by operation of rules like the Eighth Circuit's.[17]

D. The Eighth Circuit's rule creates unwarranted disparity and unjust results, in contravention of the goals of the Sentencing Reform Act.

In addition to its legal flaws, the Eighth Circuit's rule operates in an arbitrary and punitive way vis-à-vis cooperating defendants. Under the Eighth Circuit's rule, defendants with less serious offenses and less serious criminal histories will remain incarcerated longer than defendants with more serious offenses and criminal histories. This is because

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Table 8 (2014), available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/fair-sentencing-act/Final_USSC_Crack_Retro_Data_Report_FSA.pdf (average reduction analysis excluded 830 defendants given time-served sentences).

[16] As of September 30, 2017, 30,116 defendants have had their sentences reduced under Amendment 782, with an average reduction of 25 months (representing a 17.2% decrease). U.S. Sentencing Comm'n, *2014 Drug Guidelines Amendment Retroactivity Data Report*, Table 7 (2017) available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/drug-guidelines-amendment/20171101-Drug-Retro-Analysis.pdf (average reduction analysis excluded 735 defendants given time-served sentences).

[17] As of September 30, 2017, 2,952 defendants were denied relief for the reason that the "statutory mandatory minimum controls sentence." *Id.*, Table 8. Some fraction of those were defendants like petitioners.

defendants whose original guideline ranges exceeded the mandatory minimum in whole or in part may receive a departure under § 3553(e) and a retroactive reduction, while those whose original guideline range fell below the mandatory minimum are denied retroactive relief, under the theory that their sentences were based solely on the mandatory minimum.

The guideline range typically exceeds the mandatory minimum when the defendant has greater criminal history, or receives an aggravating role adjustment, or receives a guideline increase for any of the many aggravating factors listed in § 2D1.1(b), including possession of a weapon, or the use, threat or direction of violence. The guideline range typically is less than the mandatory minimum when the guideline range was reduced because the defendant's role in the offense was minor or minimal, and/or because the defendant accepted responsibility. The examples below illustrate the problem.[18]

In the first example, Aaron is the more serious offender, having been convicted of a crime involving 150 grams of crack cocaine, compared to Barry's 50 grams. Despite identical original sentences, only Aaron, the more serious offender, is eligible for § 3582(c)(2) relief under the Eighth Circuit's rule, simply because his applicable guideline range exceeded the mandatory minimum, whereas Barry's did not:

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[18] These examples are not to minimize petitioners' offenses or their criminal histories; rather, they demonstrate the logical and equitable flaws in the Eighth Circuit's approach.

	AARON	BARRY
Drug Amount	150 grams crack cocaine	50 grams crack cocaine
Mandatory Minimum	120 months	120 months
Offense Level[19]	32	30
Criminal History Category	I	I
Guideline Range	121-151 months	97-121 months
§ 3553(e) Motion?	Granted	Granted
Original Sentence	60 months	60 months
Eligible for § 3582 under 8th Circuit's view?	**Yes**	**No**

The same result obtains from applying the Eighth Circuit's approach to defendants with differing criminal histories—the defendant with the more serious criminal history, Clay, receives a reduction under the retroactive amendment, whereas the one with the less serious criminal history, Dale, does not:

[19] We have used here the 2006 version of the Federal Sentencing Guidelines Manual, *available at* https://www.ussc.gov/guidelines/archive/2006-federal-sentencing-guidelines-manual.

	CLAY	DALE
Drug Amount	50 grams crack cocaine	50 grams crack cocaine
Mandatory Minimum	120 months	120 months
Offense Level[20]	29	29
Criminal History Category	IV	I
Guideline Range	121-151 months	87-108 months
§ 3553(e) Motion?	Granted	Granted
Original Sentence	60 months	60 months
Eligible for § 3582 under 8th Circuit's view?	**Yes**	**No**

The Eighth Circuit's rule leaves these outcomes unexplained. Worse, the data show that the outcomes are not consonant with the goals of the Sentencing Reform Act. The second example—highlighting criminal history—is a stark demonstration of this. Sentencing Commission studies show that Dale (with

[20] We have used here the 2006 version of the Federal Sentencing Guidelines Manual, *available at* https://www.ussc.gov/guidelines/archive/2006-federal-sentencing-guidelines-manual.

his less serious criminal history) is less likely to be a repeat offender or to pose a danger to his community than Clay. *See* U.S.S.G. § 4A1.3, comment. (n.3); *see also* U.S. Sentencing Comm'n, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines, a Component of the Fifteen Year Report on the U.S. Sentencing Commission's Legislative Mandate* (2004). Yet, under the Eighth Circuit's approach, Dale will remain incarcerated longer than Clay, because Clay is—inexplicably—eligible for a further reduction in his sentence under § 3582(c)(2), but Dale is not.

Moreover, under the Eighth Circuit's approach, defendants who went to trial or pled guilty and did not cooperate will receive reductions under a retroactive amendment, while those who cooperated with the government—often putting themselves and their families at risk[21]—frequently will be entitled to *no*

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[21] A 2014 study commissioned by the Administrative Office of the U.S. Courts showed the risk to cooperators to be real and widespread. District judges reported 571 instances of physical or economic harms or threats to cooperators between 2012 and 2015, including reports of 31 murders. Margaret S. Williams et al., Fed. Judicial Ctr., *Survey of Harm to Cooperators: Final Report*, at 8, 10, 63-64 (2016), *available at* https://www.fjc.gov/sites/default/files/2016/Survey%20of%20Harm%20to%20Cooperators%20-%20Final%20Report.pdf. Due to these risks, the Bureau of Prisons frequently places cooperators in administrative segregation for their own protection. *United States v. McCraney*, 99 F. Supp. 3d 651, 655 (E.D. Tex. 2015). In segregation, a cooperator "has no access to classes or general outdoor recreation and is not eligible to receive the 'good time credit' that can be earned by inmates on the yard. Thus, any 'protection' that the [disciplinary segregation unit] provides comes with severe drawbacks." *Id.*

benefit from the amended guideline.[22]

The government controls all of this. Prosecutors have sole authority over charging decisions, including the drug amount charged in the indictment and whether to increase the mandatory minimum from 5 to 10 years, or from 10 years to 20 years, or to mandatory life, by filing a notice of enhancement for one or more prior convictions for a "felony drug offense." *See* 21 U.S.C. § 851. These prosecutorial decisions directly influence a defendant's decision to plead, cooperate, or go to trial.

There has long been discomfort with this power of prosecutors to charge—or not charge—an offense carrying a mandatory minimum, or to seek—or not seek—a recidivist enhancement. *See*, *e.g.*, David Bjerk, *Making the Crime Fit the Penalty: The Role of Prosecutorial Discretion Under Mandatory Minimum Sentencing*, 48 J. Law & Econ. 591, 622 (Oct. 2005) ("[P]rosecutors generally have the discretion to prosecute a defendant for a lesser charge than the initial arrest charge, and the use of such discretion can have dramatic effects on sentencing with respect to mandatory sentencing laws.").[23] The government's use

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[22] In addition to being nonsensical, these results run contrary to Congress's and the Commission's goal of avoiding unwarranted disparity in sentencing. *See* 28 U.S.C. § 991(b)(1)(B); *cf. Freeman*, 564 U.S. at 533 (plurality opinion) (noting the irrationality of a rule that "would permit the very disparities the Sentencing Reform Act seeks to eliminate").

[23] *See also* Angela Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 Iowa L. Rev. 393, 408 (2001) ("The charging decision is arguably the most important prosecutorial power. . . . In federal and state jurisdictions governed by sentencing guidelines, these decisions

of § 851 enhancements, in particular, has been proven to create racial and geographic disparity. *See United States v. Young*, 960 F. Supp. 2d 881, 885-902 (N.D. Iowa 2013) (discussing Sentencing Commission data); *cf. United States v. LaBonte*, 520 U.S. 751, 779-80 (1997) (Breyer, J., dissenting) (comparing guidelines and mandatory minimum sentencing). The Eighth Circuit's rule compounds the unfairness of these unreviewable and often invisible decisions.

"There is no good reason to extend the benefit of the Commission's judgment [to retroactively reduce the drug guidelines] only to an arbitrary subset of defendants" because their applicable guideline ranges were above an applicable mandatory minimum, and to deprive another subset of defendants of that benefit because their guideline ranges were below it. *Freeman*, 564 U.S. at 533 (plurality opinion). "Congress enacted § 3582(c)(2) to remedy systemic injustice, and the approach" of the Eighth Circuit "would undercut a systemic solution." *Id.* at 534. The Eighth Circuit's rule and the illogical outcomes that flow from it cannot be squared with Congress's goals in § 3582(c)(2) of promoting fairness in sentencing by allowing for the retroactive correction of injustices, and in § 3553(e) of encouraging cooperation through leniency. Courts have an "obligation to construe statutes so that they carry out the will, real or attributed, of the lawmaking branch of the government." 2A Sutherland, Statutes and Statutory

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often predetermine the outcome of a case since the sentencing judge has little, if any, discretion in determining the length, nature, or severity of the sentence.").

Construction § 45.05 (4th ed. 1984). The Eighth Circuit's rule fails this test.

CONCLUSION

The Eighth Circuit's rule is incorrect, illogical, and unfair. Section 3553(e) and the Sentencing Guidelines authorize courts imposing sentences in substantial assistance cases to rely upon the applicable U.S.S.G. § 2D1.1 guideline range, which has subsequently been lowered by the Sentencing Commission. Like other defendants sentenced based on the applicable § 2D1.1 guideline range, whether in whole or in part, petitioners are eligible for reductions in sentence under the retroactive amendment. Any other result would be contrary to the canons of statutory construction, to federal criminal practice, and to basic principles of justice. For these reasons, amicus National Association of Federal Defenders urges the Court to rule in favor of the petitioners.

Respectfully submitted,

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