No. 17-155

IN THE

Supreme Court of the United States

ERIK LINDSEY HUGHES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The government advocates a position that five Justices rejected in *Freeman*: that a sentence imposed following a C-type agreement that recommends a specific term of imprisonment is never based on the Guidelines. Its theory is that § 3582(c)(2) fixates on the moment of sentencing, regardless of what actually caused the judge to accept the agreement and impose the sentence, or what drove the agreement itself. That argument ignores the rule that a legally relevant cause need not be the *last* one. And it ignores the clear link between Guidelines and sentence set out in the statutory scheme and demonstrated by this record.

The government further urges the Court not to clarify *Freeman*—because deciding anything but the application of *Marks* "is contrary to the thrust of petitioner's argument at the certiorari stage." Respondent's Br. (RB) 17. Nonsense. The government objected similarly, in its Brief in Opposition, that the *Freeman* issue could pretermit evaluating *Marks*, and the Court granted review without limiting the questions presented. The Court may address those questions as it sees fit.

As for *Marks*, the Court should reject the government's unprecedented theories. The government first asserts, with minimal elaboration, that the *Freeman* concurrence controls because it occupies a "middle ground." But *Marks* never speaks of a "middle ground," and the government never explains how a rationale rejected by eight Justices can be the law of the land. "*Marks* is workable … only when one opinion

is a logical subset of other, broader opinions," a condition not satisfied here. *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc).

The government alternatively contends that even if no opinion "qualifies as narrowest under *Marks*," a lower court must "run[] a case through multiple opinions"—including dissents—"to establish which litigant would prevail under the views of five Justices." RB14. That theory misapprehends why decisions are afforded precedential effect. "Legal opinions are important … after all, for the *reasons* they give, not the *results* they announce." Antonin Scalia, *Dissents*, OAH Mag. of Hist., Fall 1998, at 18. Giving each bare vote precedential effect would depart from centuries of practice. The Court should decline that invitation.

ARGUMENT

I. Mr. Hughes Is Eligible For Relief Under § 3582(c)(2) Because His Sentence Was Based On The Guidelines.

A. A sentence is "based on" the Guidelines when the Guidelines bear a reasonably close connection to it.

1. Mr. Hughes is eligible to seek relief under § 3582(c)(2) because his sentence was based on a Guidelines range that subsequently was reduced. The judge accepted the plea agreement and imposed the sentence only because he concluded that the sentence was consistent with the Guidelines. Opening Brief (OB) 35-37. As a matter of plain meaning, a sentence is "based on" the Guidelines when, as here, they were

a "supporting part" of the sentence. OB14 (discussing definitions). Under established principles of causation, a cause must simply bear a reasonably close relation to the result. OB15-17.

The government agrees that plain meaning governs, and points to many of the same definitions. RB39-40. From there, however, it makes arguments about causation that Prosser wouldn't recognize and that conflict with this Court's precedents. For instance, the government suggests, "based on" does not implicate proximate cause. RB46. This Court has said otherwise. OB15; *cf. Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 9 (2010) ("by reason of" requires but-for and proximate cause).

Elsewhere, the government suggests there can only be *one* relevant cause. RB47. But it never disputes the basic principle that it is "common" for an event to have multiple proximate causes. OB16 (quoting *Staub v. Proctor Hosp.*, 562 U.S. 411, 420 (2011)). And, as the Opening Brief shows (OB19-22), a sentence can be based on both the parties' agreement and the judge's rationale.

To avoid these basic causation principles, the government takes two tacks. The first is a semantic daisy chain. It plucks out one favored definition ("foundation"); transmogrifies it into "legal foundation," RB15, 39, a term of its own invention; and then equates it with "critical" or "determinative legal components," RB42, 46. If by this the government means the Guidelines are not important to the sentence, that is incorrect. The court cannot accept the plea agreement or

impose the sentence without considering the Guidelines, and commonly relies on them to justify the sentence. OB24-25; *infra* 5. If instead the government means that the Guidelines must "alone" determine the sentence, RB41, that would render § 3582(c)(2) a nullity. No one cause is ever determinative; a judge is required to consider multiple factors before imposing any sentence. 18 U.S.C. § 3553(a).

Second, the government suggests decisions interpreting "based upon" in the FSIA support some different standard. RB39-42, 46. On the contrary, as the Opening Brief explains (OB15), those cases illustrate that a "base" or "foundation" is a necessary element with a close connection to the result—i.e., a proximate cause. Under the FSIA, a legal "action" is "based upon" the "essentials" of the suit. 28 U.S.C. § 1605; *see OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 397 (2015). The innocent domestic acts in those cases were not bases for the plaintiffs' claims because they were far removed from the tortious conduct abroad. *Saudi Arabia v. Nelson*, 507 U.S. 349, 358 (1993); *Sachs*, 136 S. Ct. at 396.[1] In the sentencing context, the plea

[1] Moreover, any departure from standard causation principles would have been attributable to FSIA-related concerns. *Sachs*, for instance, cautioned that through artful pleading, a plaintiff could make "virtually any" foreign injury actionable, "effectively thwart[ing] the Act's manifest purpose." *Id.* at 396-97; *see also id.* at 397 n.2 (noting the decision's "limited" "reach").

agreement and the judge's assessment of the agreement and sentence both are essential. OB19-23.[2]

2. Applying basic causation principles, there are two ways a C-type sentence can be "based on" a Guidelines range. The first is when the judge relies on the Guidelines. OB19-20. It is the judge who imposes sentence, and he cannot do so without determining that the sentence is acceptable because of, or in spite of, the Guidelines range. *Freeman v. United States*, 564 U.S. 522, 529 (2011) (plurality); 18 U.S.C. § 3553(a)(4); U.S.S.G. § 6B1.2(c). Thus, even under the government's test, the judge's rationale is a "critical legal component" of the sentence. Second, the plea agreement also may be a basis for the sentence; it is the impetus for the sentencing proceedings and, once accepted, binds the court. OB20-22. If that agreement relies on the Guidelines, the Guidelines are a basis for

[2] The government is wrong (RB42) to rely on decisions interpreting Civil Rule 60(b)(5), which permits relief from a judgment "based on an earlier judgment that has been reversed or vacated." The context is entirely different. Massive disruption would result "'were courts compelled to re-litigate past cases whenever they glimpsed a material change in decisional law.'" *Manzanares v. City of Albuquerque*, 628 F.3d 1237, 1240 (10th Cir. 2010). Moreover, the cases support Petitioner. Rule 60(b)(5) is not met if the earlier decision was "only precedent"; a later decision is only "based on" an earlier decision that is "necessary" to it. *Lubben v. Selective Serv. Sys. Local Bd. No. 27*, 453 F.2d 645, 650 (1st Cir. 1972). Accordingly, a sentence is *not* "based on" the Guidelines just because the judge consults them, but *is* "based on" a Guidelines range the judge relies on to justify the sentence.

the sentence unless the judge disclaims reliance on them. OB27-28.[3]

Much of the government's response reduces to the idea that, at sentencing, a judge rubber-stamps the sentence based on the agreement he previously accepted. *E.g.*, RB43, 48, 50, 54. This argument fails for multiple reasons.

First, it ignores that judges ordinarily consider the agreement in tandem with sentencing. OB18-19, 22. That is the procedure recommended by the Sentencing Commission. U.S.S.G. § 6B1.1(c) & cmt. It also is what happened here. OB8, 22-23. During a single proceeding, the judge considered the Guidelines range and determined that the sentence "complie[d]… with the[ir] spirit." Pet. App. 32a-33a.

The government's narrow focus on the moment of sentencing also ignores that a proximate cause need not be the last one. OB22. Regardless when the court assesses the agreement—whether at the time of sentencing, as here, or before—the judge cannot accept a

[3] The government is wrong that this standard is difficult to administer. RB47 n.4. If the judge calculates the Guidelines range but disregards it and imposes the sentence for non-Guidelines reasons, the sentence is not based on the Guidelines. If the judge imposes a sentence in part *because of* the Guidelines range, the sentence bears a direct relation to, and is based on, the Guidelines. Usually the judge's statements and the parties' explanations on the record will answer the question. *Freeman*, 564 U.S. at 530-31 (plurality). Occasionally, if the record is not clear, a court may look to the agreement to fill any gaps. OB20-22. The government has identified no difficulty applying that standard in the courts that do so.

plea agreement and impose a sentence without determining that the sentence is justified. OB18-19, 25-26; U.S.S.G. § 6B1.2(c).

That a proximate cause requires a "direct relation" between a cause and an effect, RB47, does not change the result. The government's cases merely reaffirm the uncontroversial principle that a proximate cause cannot be "'too remote,' 'purely contingent,' or 'indirec[t].'" *Hemi*, 559 U.S. at 9; OB16. The judge's rationale is not "somewhere along the causal chain." RB15. It is a "direct" cause of accepting the agreement and imposing the sentence; it is essential to the sentence, and legally required. *Supra* 5; OB18-19. The same may be true of the agreement itself. OB20-22.

3. For similar reasons, U.S.S.G. § 1B1.10(b) does not support the government. RB49. That policy statement limits the scope of resentencing, making clear that under § 3582(c)(2), a court merely substitutes amended Guidelines provisions for those "that were applied when the defendant was sentenced." § 1B1.10(b)(1). In short, it prohibits plenary resentencing. *Dillon v. United States,* 560 U.S. 817, 831 (2010). According to the government, this provision means that when the defendant is sentenced pursuant to a C-type plea agreement, only the *agreement* is "applied," not the Guidelines. In short, it would treat this limitation on the *scope* of resentencing as prohibiting sentence reductions following C-type plea agreements. This, however, would be a highly unnatural way to say, "Section 3582 does not apply to C-type agreements."

In fact, Congress made clear that C-type sentences *can* "appl[y]" the Guidelines. 18 U.S.C. 3742(c) forbids *some* appeals from C-type sentences—but explicitly permits appeals concerning an "'incorrect application of the sentencing guidelines.'" OB23, 29. Plainly, therefore, C-type sentences may entail "application of the sentencing guidelines." Tellingly, the government addresses this provision only in a footnote, offers a cursory denial, and protests that we cited only one precedent. RB45 n.3. But the statute is clear, and there are more decisions too. *United States v. Carrozza*, 4 F.3d 70, 86 n.12 (1st Cir. 1993); *United States v. Rodriguez*, No. 92-2065, 1992 WL 309843, at *1 (7th Cir. Oct. 27, 1992); *see also United States v. Yemitan*, 70 F.3d 746, 748 (2d Cir. 1995).

B. The Government's rule is inconsistent with § 3582(c)(2)'s purposes.

1. The government contends that allowing defendants who enter into C-type agreements to seek sentence reductions would deprive the government of the benefit of some bargain. RB52-53. That argument was correctly rejected in *Freeman*. 564 U.S. at 531 (plurality), 540-41 (concurrence); OB34-35. That the government may have made "substantial concessions" (RB52) "has nothing to do with whether a sentence is 'based on' the Guidelines." 564 U.S. at 531 (plurality).

And when a sentence *is* based on the Guidelines, there is every reason to revisit the plea negotiation. That is because the Guidelines are not just another factor. *Id.* at 538 (concurrence); *see* OB23-26; NACDL Br. 5-8. Changing the Guidelines range alters the

very "foundation" of the agreement. And if the government believes it made such great concessions that a sentence reduction is unwarranted, it may urge a court to deny relief. 564 U.S. at 541 n.6 (concurrence); U.S.S.G. § 1B1.10, cmt. n.1(B)(i).

The government also invokes finality, RB38-39, 43-45, and argues that defendants who enter into plea bargains surrender the benefit of any later change in the law, RB51-52, 55. By that logic, however, sentence reductions would be foreclosed for defendants who enter into A- and B-type plea agreements, which plainly is wrong. And concerns about finality are misplaced, given that § 3582(c)(2) is expressly retroactive. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994). In addition, presuming that defendants who enter into C-type agreements have silently waived § 3582(c)(2) eligibility runs contrary to ordinary principles of contract law and special concerns governing waivers in plea agreements. OB35.

Ultimately, the government's argument rests on the faulty premise that § 3582(c)(2) sentence reductions are bad for the government and good for defendants. But § 3582(c)(2) applies only when the Commission has determined sentence reductions to be socially valuable. The Commission adopted Amendment 782, for example, after concluding that reducing the prison population would free up resources for public safety measures without increasing recidivism or affecting incentives to plead guilty. OB8-9; Berman Br. 8-13.

2. A rule excluding C-type defendants from § 3582(c)(2) would create arbitrary disparities the

statute is designed to avoid. OB28-33. The government's claimed policy considerations do not prove otherwise.

First, the government observes that defendants can gain concessions from the government by entering into plea agreements. RB52. But this proves too much; it also would bar sentence reductions for A- and B-type defendants. *Second*, the government speculates that a defendant who obtains § 3582(c)(2) relief could fare better than a "defendant … sentenced after the Guidelines change had occurred" because the judge in the former case might afford relief that a prosecutor in the latter case would not. RB54. But this also is true of other types of plea agreements, and ignores the countervailing disparities caused by the government's rule. OB29-31. *Third*, the government says defendants who enter into C-type agreements should be treated differently because they "agree[] to a specific sentence." RB53. But regardless the type of plea agreement at issue, a retroactively reduced sentence may differ from it. The government offers no authority that the supposed "windfall" to defendants is limited to, or even most pronounced for, C-type agreements.

Equally arbitrary is the distinction the government draws between a sentencing *range* (which, it says, qualifies for § 3582(c)(2) relief) and a term of months (which it says does not). RB48-49. On this view, a sentence would be "based on" the Guidelines if a C-type agreement recommended a Guidelines range of 160-200 months and the judge imposed a 180-month sentence. But a sentence would *not* be

"based on" the Guidelines if the agreement recommended (and the judge imposed) a 180-month sentence while explaining that this term falls in the middle of the Guidelines range. This result is utterly counterintuitive. It is at odds with the government's own anti-retroactivity arguments, which logically would foreclose relief in both situations. And it means that eligibility for § 3582(c)(2) relief will be predicated on the way the prosecutor draws up the plea agreement, a factor over which a defendant usually has little control. NACDL Br. 9-11; OB31-33.

C. Mr. Hughes is eligible to seek relief.

The government never explicitly disputes that, under Mr. Hughes's reading of § 3582(c)(2), he will prevail. And properly so: The Guidelines range bore a direct and close connection to his sentence. OB35-37.

At times, however, the government does offer contrary suggestions. None changes the result. The government maintains (RB54) that the judge did not calculate the Guidelines range until after accepting the agreement. That is an implausible mincing of the transcript. The judge made clear that he "considered … the sentencing guidelines," as he was legally required to do, and determined that the agreement "complies" with their "spirit," Pet. App. 32a-33a; OB36, before accepting the agreement. He then discussed the Guidelines range with the parties, confirming his previous calculations. Pet. App. 36a (range discussed with the parties was "what [he] had originally put down").

Elsewhere, the government says there is no proof the judge would have refused to accept the agreement (or the prosecutor would have offered a better deal), had the amended Guidelines been in effect at the time of sentencing. RB54-55. But what judge ever would say, "Under hypothetical Guidelines that don't exist today, here's the sentence I would impose"? Certainly the statute does not impose this unorthodox evidentiary burden. What matters is that the Guidelines range was an important factor underlying the sentence, as it was here. OB36-37.

The government also speculates that the *agreement* may not have been based on the Guidelines. RB54. The government's extra-record musings are even worse than the ill-advised effort to "engage in a free-ranging search through the parties' negotiating history" that every Justice in *Freeman* rejected. 564 U.S. at 538 (concurrence), 532-33 (plurality), 551 (dissent). Regardless of how the parties arrived at the recommended sentence, the Guidelines are a basis for the sentence because the judge relied on them.

II. The Court Of Appeals Erred By Treating The *Freeman* Concurrence As Binding.

The government urges the Court to retain the splintered *Freeman* decision and offer no further guidance to lower courts, on the theory that *Freeman* is binding so there is nothing more to be done. But the government never acknowledges that its position would mean giving binding effect to a rationale that eight Justices rejected. It never confronts the fact that its position is predicated on giving precedential weight to dissenting votes. And it never mentions that

the government itself repeatedly has advanced the "logical subset" test, including in this Court. If the Court is to retain *Marks* at all, the logical-subset test is the only approach consistent with longstanding rules about judicial reasoning and majority decision-making.

A. The government's criticisms of the logical-subset test lack merit.

1. A non-majority opinion embodies a narrowest ground only when its reasoning is a logical subset of opinions joined by a majority of Justices. OB38-44. Any other approach would turn minority views into nationwide precedent, and would be hopelessly indeterminate. OB44-51. The government responds that this test is contrary to *Marks* itself. RB22. Not so. *Marks* did not define "narrowest grounds," and the decisions *Marks* interpreted confirm that one opinion is narrower when it is a logical subset of another.

Specifically, *Marks* treated the plurality in *Memoirs v. Massachusetts* as controlling where two other Justices "concurred on broader grounds"—i.e., "that the First Amendment provides an absolute shield" against obscenity prosecutions. 430 U.S. 188, 193 (1977); OB40-42. As the government previously has explained, the two absolutist Justices in *Memoirs* "'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.'" Petition for Writ of Certiorari, *United States v. McWane, Inc.*, No. 08-223, 2008 WL 3884295, at *21 (U.S. Aug. 21, 2008) (emphasis added) (quoting *King*, 950 F.2d at 781);

Brief in Opposition, *Tyrrell v. United States*, No. 08-910, 2009 WL 1354417, at *7-8 (U.S. May 13, 2009).[4]

The government also argues (RB22) that the logical-subset rule is wrong because *Marks* applies only when "no single rationale explaining the result enjoys the assent of five Justices." 430 U.S. at 193. But in context, this phrase plainly refers to the lack of a majority *opinion*. Just sentences earlier, *Marks* discussed a prior decision "in which a majority united in a *single opinion announcing the rationale* behind the Court's holding." *Id.* (emphasis added). Even when five Justices do not formally join a single opinion, there can be shared reasoning among the opinions supporting the judgment. OB43-44. Thus, the government previously has explained, "[i]n some (if not most) fractured decisions, the narrowest rationale adopted by one or more Justices who concur in the judgment will be the only controlling principle on which a majority of the Court's Members agree." *McWane* Pet. *20. The logical-subset test is not remotely "contrary to forty years of precedent." RB22.

[4] The opinions in *Furman v. Georgia*, 408 U.S. 238 (1972), also share a logical relationship, as the plurality noted in *Gregg v. Georgia*, 428 U.S. 153 (1976). OB41-42. The three Justices who believed the death penalty "unconstitutional in all circumstances" or "pregnant with discrimination" would logically agree with two Justices who took the narrower view that the death penalty is "unconstitutional when administered in an arbitrary and capricious manner." *King*, 950 F.2d at 781 (describing *Furman*). This was the critical "view" in *Furman*, 428 U.S. at 188 n.36, as was made clear by the same footnote in *Gregg* that spoke of "narrowest grounds," *id.* at 169 n.15.

2. The government argues that the logical-subset test is "irreconcilable" with "later applications of *Marks*." RB26. It cites *Graham v. Florida*, 560 U.S. 48, 59-60 (2010), which refers to the plurality in *Harmelin v. Michigan*, 501 U.S. 957 (1991), as "controlling." But *Graham* did not cite *Marks* or explain whether the *Harmelin* plurality represented a "narrowest ground." In fact, the proportionality rules in *Harmelin* were logical subsets. But ultimately, *Graham* didn't even rely on *Harmelin*, which was not "suited for considering" the Eighth Amendment question in *Graham*. 560 U.S. at 61.

O'Dell v. Netherland, 521 U.S. 151 (1997), is an equally slim reed. *O'Dell* (unlike *Graham*) mentioned *Marks*, but without analysis. In two brief passages, it said that, even "taking" Justice White's concurrence in *Gardner v. Florida*, 430 U.S. 349 (1977) as the narrowest grounds, that opinion did not dictate a subsequent rule for purposes of *Teague v. Lane*. 521 U.S. at 160, 162. These unelaborated references offer little guidance.

B. The government's approach to *Marks* is untenable.

1. Having abandoned the logical-subset test, the government cobbles together snippets of cases to derive a two-part description of what it says the Court previously has done: (1) follow the "middle-ground opinion falling between plurality and dissenting views that produces results accepted by five Justices in every case," or (2) "ask[] which litigant would have prevailed under the rationales of at least five Justices

by running the facts at hand through multiple opinions." RB18-19. Which of these two very different things a court should do when, the government never says.

We address each of the government's approaches individually, but first, more fundamentally, it is the government's position rather than ours that "cannot be squared with *Marks*." RB22. Each of the government's alternatives would have a lower court count dissenting votes in determining an opinion's precedential value. *E.g.*, RB17 (arguing that Petitioner is ineligible for resentencing "under the approaches of five Justices in *Freeman*," four of whom dissented). *Marks*, however, is explicit that the Court's holding is "'that position taken by those Members *who concurred in the judgment[]* on the narrowest grounds.'" 430 U.S. at 193 (emphasis added). *O'Dell* likewise considered which opinion "provid[ed] the narrowest grounds of decision among the Justices *whose votes were necessary to the judgment*." 521 U.S. at 160 (emphasis added). A dissenter, of course, votes *against* the judgment.

If dictum has no stare decisis effect, OB46, then *a fortiori* a dissent does not. Dissenting opinions "cannot form part of the *ratio decidendi* of a case [because] they are not reasons for the order made by the court …." A.M. Honoré, *Ratio Decidendi: Judge and Court*, 71 Law Q. Rev. 196, 198 (1955). Dissents may be written for different audiences, or different purposes, and they do not establish nationwide precedent. *See* Agricultural Interests Br. 17-19 (citing authorities); Sackett Br. 12; Ryan C. Williams, *Questioning* Marks, 69 Stan. L. Rev. 795, 818-19, 851-52 (2017).

2. The government's proposed rules each suffer from additional defects.

First, the government asserts, with no real explanation, that "middle-ground opinion[s]" get precedential effect. RB18. What a middle ground is, the government never quite says. The government cites two supposed "middle-ground" cases, *id.*, but they are hardly instructive.[5] And if "middle ground" were a rule, surely it would have been applied numerous times by now, rather than in passing statements in two cherry-picked cases. That, however, has not been the norm. *E.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (declining to treat concurrence in a 4-1-4 split in *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), as controlling under *Marks*). Replacing "narrowest grounds" with "middle ground" hardly would provide clarity to lower courts.

The closest the government comes to defining this term is a suggestion that an opinion is a middle ground when it "produces results accepted by five Justices in every case." RB18. This test is indeterminate and illegitimate. It requires relying on dissenting votes. *Supra* 16. It will require defining what makes a particular ground "middle" and what it means for a

[5] The first is *Graham*, discussed above (at 17). In the other, *Panetti v. Quarterman*, the Court did cite *Marks*, and concluded that a prior concurrence by Justice Powell controlled because it "offered a more limited holding" than the plurality. 551 U.S. 930, 949 (2007). But *Panetti* was a case involving a logical subset. *See* Williams, *supra*, at 842 ("[A] procedure failing Justice Powell's relaxed due process test would also fail [the plurality's] preferred standard."). Neither case approved looking at dissents.

splintered decision "always" to "achieve majority-favored results." RB34. *But cf.* RB31 (criticizing other *Marks* approaches for their supposedly "uncertain inquiry"). It will necessitate the same assessment of "idiosyncratic hypothetical[s]" that the government elsewhere faults. RB37. And it will privilege opinions that may appear to be in the middle only because no Justice has joined them—and give them precedential force even when a majority of Justices disagree with their rationale. OB47; *McWane* Pet. *23. That extraordinary result runs contrary to all reason, and the government never squarely defends it (having previously disavowed it).

3. The balance of the government's argument is devoted to an alternative inquiry it calls "the *Marks* approach," but which has little to do with *Marks*. The government says precedent is created whenever a lower court can determine "which litigant would have prevailed under the rationales of at least five Justices by running the facts at hand through multiple opinions." RB19. That bears no resemblance to *Marks*, which requires looking for the "narrowest grounds" of a decision. In opposing our petition for certiorari, the government embraced *Marks* itself, arguing that *Freeman* has a "'narrowest grounds' that represents the Court's holding." Br. in Opp. 10. Now, the lion's share of the government's argument is devoted to its alternative, vote-counting algorithm.

But when there is not even a "narrowest" opinion, there cannot be binding precedent. The government's approach mistakenly views precedent as merely predicting votes of individual Justices, without regard for the reasoning that produces them. But this Court

acts—and creates precedent—through *reasoned* opinions. OB39-40, 45-46. "Those who apply the rule to particular cases, must of necessity expound and interpret that rule." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); *accord* William J. Brennan, Jr., *In Defense of Dissents*, 37 Hastings L.J. 427, 435 (1986) ("[A] court may not simply announce, without more, that it has adopted a rule to which all must adhere. … Courts *derive* legal principles, and have a duty to explain *why* and *how* a given rule has come to be."); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 5 (1959) ("[A] position cannot be divorced from its supporting reasons; the reasons are, indeed, a part and most important part of the position ….").

The government claims support from isolated statements in opinions that do not even mention *Marks*. RB19, 35-36. The per curiam decision in *Bobby v. Dixon*, for example, merely concluded that no opinion in *Missouri v. Seibert*, 542 U.S. 600 (2004), created clearly established law justifying habeas relief. 565 U.S. 23, 31-32 (2011). In *City of Ontario v. Quon*, the Court said nothing about *Marks*, and found it "not necessary to resolve" whether a prior plurality controlled; indeed, the plaintiff would lose under any judgment-supporting standard in the prior decision. 560 U.S. 746, 757 (2010).[6] The government has not

[6] The government's other citations (RB19) are further afield. In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, the Court referred to the votes of dissenting Justices, but only to show that a four-Justice plurality could not overrule prior

identified any case in which the Court called for "running the facts at hand through multiple opinions" of a fractured decision when no narrowest ground can be identified. RB19. Were this approach required, and if it provided the certainty the government claims, the Court would have employed it in the cases where the Court instead declined to "'pursue the *Marks* inquiry'" and proceeded directly to the merits. *Grutter*, 539 U.S. at 325 (quoting *Nichols v. United States*, 511 U.S. 738, 745-46 (1994)).

C. The *Freeman* concurrence is neither a logical subset nor a "middle ground."

Under the logical-subset test, the government cannot prevail, and it does not contend otherwise. The concurrence is not a "common denominator of the Court's reasoning." *King*, 950 F.2d at 781; OB5-6, 51-52.

Nor is the *Freeman* concurrence a "middle ground." Once dissenting votes are set aside, the concurrence does not "produce[] results accepted by five Justices in every case," RB18, because there are cases "in which [the *Freeman* concurrence] would allow a sentence reduction but the plurality would not," RB34.

First, a defendant would prevail under the concurrence, but not the plurality, if his plea agreement was based explicitly on the Guidelines but the court

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precedent. 460 U.S. 1, 17-18 (1983). And *United States v. Jacobsen* quoted a lead opinion and dissent, but did not specify their precedential force, if any. 466 U.S. 109, 115-17 (1984).

declined to apply the Guidelines for policy reasons. OB53-54. The government's only response (RB34) is to change the hypothetical. It quotes the plurality's observation that a sentence may still be based on the Guidelines, "[e]ven where the judge varies from the recommended range," so long as "the judge uses the sentencing range as the beginning point to explain the decision to deviate from it." 564 U.S. at 529-30. That is correct, as we have said. OB26. But our example here posits a judge who declines to rely on the Guidelines altogether. OB28.

Second, a defendant would prevail under the concurrence, but not the plurality, if the parties agreed to one range but the court concluded that another range applied—because of either a mistake or the parties' indifference. OB54-55. The government disagrees (RB35), but its sole support is the plurality's statement that the Guidelines are part of a judge's "'analytic framework.'" *Id.* What mattered to the plurality, however, was "the analytic framework the judge used to determine the sentence." 564 U.S. at 530. If the plea agreement used a range that later was lowered, but "the judge used" a range that remained the same, the defendant would only be eligible for resentencing under the concurrence.

D. Judicial administration would be better served by abandoning *Marks* than by adopting the government's approach.

The best alternative to the logical-subset test is not the government's; it would be returning to true majority rule. OB38-40. *Marks* has generated uncer-

tainty and confusion. OB55-59. The government responds that *Marks* is cited a lot. RB32 (citing Richard Re, *Beyond the* Marks *Rule* 11 (Jan. 5, 2018), https://tinyurl.com/y8wwqnnn (forthcoming Harv. L. Rev.)). But the scholar who compiled those citations explains that they reflect widespread confusion: "[T]he cases that are most often '*Marks*'d' have tended to generate intractable circuit splits," and "[o]ther frequently *Marks*'d cases … have yielded little guidance." Re Br. 16. Nor has the government shown that those decisions support its newfound theory of *Marks*.

Next, the government says its approach would further "'[v]ertical stare decisis'" and "national uniformity." RB19-20. That assertion is predicated on the superficial notion that more precedent is better than less. RB20, 31-32. All things being equal, of course that is true. But the government's approach will not generate precedent or uniformity.

Uniformity exists when precedent is clear. *Marks* hasn't created such clarity. *See* OB48-51. The government therefore pins its hopes on its extra-*Marks* vote-counting algorithm. RB18-19, 33, 35-37; *supra* 18-20. But that "corollary" to *Marks* applies only when there is no "narrowest ground." *United States v. Duvall*, 740 F.3d 604, 611 (D.C. Cir. 2013) (Kavanaugh, J.). By its terms, therefore, it matters only when there is no rationale embraced by a majority, and so all it can do is predict votes. RB36. A mere bottom line, however, in the absence of a governing rationale, does little to "'promote[] the evenhanded, predictable, and consistent development of legal *principles*.'" *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015) (em-

phasis added). That doesn't mean that splintered decisions are "good for one day only," RB19; they still provide guidance. But actual *precedent* "is generally concerned with reasons and rationales, not mere outcomes." Re Br. 3; Wechsler, *supra*, at 19-20 ("The virtue or demerit of a judgment turns … entirely on the reasons that support it …."); *supra* 18-19. That is why judgments issued by an evenly divided Court generate no precedent, despite yielding a clear outcome: "judgment affirmed." RB28.

The Court's own practices belie the idea that uniformity must be pursued at all costs. The discretionary certiorari docket lets some circuit splits persist while allowing "the experience of … thoughtful colleagues on the district and circuit benches" to "yield insights (or reveal pitfalls) [the Court] cannot muster guided only by [its] own lights." *Maslenjak v. United States*, 137 S. Ct. 1918, 1931 (2017) (Gorsuch, J., concurring in part and concurring in the judgment); *see* OB58; Re Br. 13. Encouraging lower courts to short-circuit their legal reasoning in favor of predictive vote-counting will diminish the quality of that percolation. The government's further claim that any approach other than its own will cause "disuniformity," RB22, presumes that circuit splits inevitably will ensue that the Court never will resolve—and ignores the conflicts created by *Marks* itself. And its assertions about inconsistent results (for instance, between Freeman and his hypothetical co-defendant, RB29), simply assume that a lower court will reach the wrong answer.

Nor is the government's approach supported by "administrability considerations." RB30. The government concedes that often, and perhaps in this very case, it will not be possible to identify a "middle ground." RB14. And the government's vote-counting approach presents its own difficulties. It applies only in circumstances where a legal question is sufficiently complicated that the Court splintered and there was no middle ground. And, it will require lower courts—in those already-difficult contexts—to "run" the facts through at least three opinions. It will provide no answers when the dissenting justices "did not address the question" that divided the Justices concurring in the judgment. *Abbas v. Foreign Policy Grp., LLC*, 783 F.3d 1328, 1337 (D.C. Cir. 2015) (Kavanaugh, J.). And even in the best of all worlds, it could only dictate results in certain cases, not create precedent.

The better rule is the logical-subset approach, which merely requires a court to assess whether one rule nests within another, OB42-43, and which does establish precedent. Contrary to the government's warnings (RB31), this rule has proven simple to apply,[7] as the government surely recognized when advocating this rule previously. And if the Court is wary of *Marks*, the simplest rule of all is that only majority opinions have precedential force. That rule would

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[7] *Compare United States v. Epps*, 707 F.3d 337 (D.C. Cir. 2013), *with United States v. Davis*, 825 F.3d 1014 (9th Cir. 2016) (en banc) (agreeing that no opinions in *Freeman* are logical subsets); *compare United States v. Ray*, 803 F.3d 244, 271-72 (6th Cir. 2015), *with United States v. Carrizales-Toledo*, 454 F.3d 1142, 1151 (10th Cir. 2006) (same, with respect to *Missouri v. Seibert*).

avoid the mess made by *Marks*, and would create salutary incentives for the Court to coalesce around narrow majorities. OB58-59. The government's approach offers no such advantages.

CONCLUSION

The Court should reverse or vacate the decision below.

Respectfully submitted,

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