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,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

A few years ago, the United States Sentencing Commission sought input on how to handle "proceedings under 18 U.S.C. § 3582(c) when the defendant was convicted of an offense carrying a mandatory minimum sentence but nonetheless received a sentence below the mandatory minimum at the original sentencing after providing substantial assistance to the government." U.S. Dep't of Justice, U.S. Department of Justice Views on the Proposed Amendments to the Federal Sentencing Guidelines and Issues for Comment Published by the U.S. Sentencing Commission in the Federal Register on January 17, 2014, at 3 (Mar. 6, 2014).[1] "[F]or proportionality reasons and to properly account for substantial assistance," the Department of Justice urged the Commission "to permit a reduction from the applicable guideline range without regard to any mandatory minimum." *Id.* at 4.

The Department maintained that this solution not only "makes good sense as a policy," but also comports with relevant federal statutes. *Id.* at 3. "The correct application of sentencing law," the Department explained, "requires a district court that has granted a § 3553(e) motion for a reduced sentence to consider the properly calculated § 2D1.1 range when determining the appropriate sentence." *Id.* at 4. Furthermore, "under § 3553(e), those defendants are not subject to any mandatory minimum, regardless of . . . [what] the Guidelines Manual" might have indicated at the time of the original sentencing. *Id.*

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[1] https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20140326/public-comment-DOJ.pdf.

The Government now argues that the very Guidelines amendments it advocated—and the Commission adopted—are unlawful. The Government says that when crafting a sentence in the situation here, 18 U.S.C. § 3553(e) requires a district court to "disregard[]" the § 2D1.1 range because that range can "play[] no role" in determining an appropriate sentence after granting a substantial assistance motion. U.S. Br. 44, 48. Moreover, according to the Government, all defendants in this situation remain "subject to [the] statutory minimum." *Id.* 28.

The Government was right the first time. Defendants in petitioners' situation are eligible under Section 3582(c)(2) for sentence reductions because—as the D.C. Circuit has held, and district courts across the country recognize as a matter of practice—the federal sentencing law required courts in the situation here to consider defendants' U.S.S.G. § 2D1.1 ranges as part of their sentencing calculus. Even if the Government were correct that petitioners' original sentences had to be anchored to the statutory minimums that their substantial assistance rendered inapplicable, it would not matter. That anchoring would have been a function of U.S.S.G. § 5G1.1(b)—not Section 3553(e)—and Amendment 782's retroactivity package makes clear that § 5G1.1(b) plays no role in calculating *amended* sentencing ranges. At the very least, petitioners' sentences were "based on" their guidelines ranges because those ranges necessarily informed how far downward to depart from the statutory minimums.

The structure and objectives of the Sentencing Reform Act confirm that defendants in petitioners' position should be eligible for sentence reductions. Not only did the Government take this view until its recent flip, but the Sentencing Commission's independent

judgment that defendants such as petitioners are eligible for resentencing warrants this Court's respect. This is especially so because allowing sentence modifications here is necessary to avoid creating unwarranted sentencing disparities. The Government's newfound position, by contrast, would give rise to serious inequities. That is exactly what the Sentencing Reform Act "seek[s] to combat." *Dorsey v. United States*, 567 U.S. 260, 277 (2012).

I. Petitioners' sentences were "based on" sentencing ranges the Commission has lowered because Section 3553(e) freed the district court from any requirement to impose sentences in accordance with statutory minimums.

A. Petitioners' sentences were "based on" their U.S.S.G. § 2D1.1 ranges.

The Government does not dispute that district courts must calculate guidelines ranges for all cooperators "that correspond[] to [their] offense level[s] and criminal history categor[ies]." U.S. Br. 23 (citation omitted); *see also* 18 U.S.C. § 3553(a)(4) (courts "shall consider" "the kinds of sentence and the sentencing range established for—(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines . . . ."). But the Government contends that where a cooperating defendant is subject to a statutory minimum sentence, his sentence cannot be "based on" that range because district courts must "disregard[]" the ranges in favor of the statutory minimum. U.S. Br. 44. Put another way, the Government argues that cooperators' U.S.S.G. § 2D1.1 ranges cannot be "sentencing ranges" under 18 U.S.C. § 3582(c)(2) because such ranges "must . . . be 'consistent with all

pertinent provisions' of federal criminal law," and statutory minimums trump guidelines ranges that recommend lower sentences. U.S. Br. 22, 24-25 (citation omitted).

Whatever the merits of this argument in the mine-run of cases, it fails to account for the effect of 18 U.S.C. § 3553(e) here. When a district court grants a motion under Section 3553(e) for a reduced sentence that reflects the defendant's substantial assistance, the court is freed from any obligation to anchor its sentence to a mandatory minimum, thereby restoring the relevance of the guidelines sentencing range. This conclusion flows from the statute's text, along with every other interpretive touchstone.

1. *Text.* The Government contends that "[t]he plain language" of Section 3553(e) "anchors any resulting sentence to the 'level established by statute as a minimum sentence.'" U.S. Br. 29 (citation omitted). But the text of Section 3553(e) says no such thing: It instructs, instead, that when the district court grants a substantial assistance motion, "[s]uch sentence shall be imposed in accordance with *the guidelines and policy statements* issued by the Sentencing Commission." 18 U.S.C. § 3553(e) (emphasis added). As the Government itself explained in *Melendez v. United States*, "That language means . . . that, in cases in which the government seeks a sentence below a statutory minimum, the Commission's guidelines and policy statements govern the court's exercise of discretion in imposing such a reduced sentence." Br. of United States at 19-20, *Melendez v. United States*, 518 U.S. 120 (1996) ("U.S. *Melendez* Br.").

Faced with this statutory language, the Government disregards its position in *Melendez* and

tries to limit the language's scope. According to the Government now, Section 3553(e)'s instruction to impose a sentence "in accordance with the guidelines" refers only to the factors in U.S.S.G. § 5K1.1 for crafting a departure based on a defendant's assistance—instead of the Guidelines as a whole. *See* U.S. Br. 25, 32, 35. Thus, the Government now continues, a court that grants a Section 3553(e) motion must still treat the otherwise applicable mandatory minimum as the presumptive sentence—instead of starting with the applicable guidelines range and then departing, as appropriate, based on the U.S.S.G. § 5K1.1 factors.

This reading of Section 3553(e) is untenable. As the *Melendez* Court emphasized, Section 3553(e) "states that the '*sentence*' shall be imposed in accordance with the Guidelines and policy statements, not that the '*departure*' shall occur, or shall be authorized, in accordance with the Guidelines and policy statements." *Melendez*, 518 U.S. at 129 n.9 (emphasis added). Consequently, nothing in Section 3553(e)'s text precludes a court that grants a substantial assistance motion from considering *all* of the relevant guidelines (including the § 2D1.1 range), not just those designed to aid in evaluating a defendant's cooperation. *See Melendez*, 518 U.S. at 129-30; NACDL Br. 10-11.

Neither of the Government's other textual arguments fares any better. The Government asserts that Section 3553(e)'s title—"Limited Authority to Impose a Sentence Below a Statutory Minimum"—forbids a court from considering non-assistance-related guidelines in crafting a sentence. U.S. Br. 29-30, 33. This Court, however, has long followed "the wise rule that the title of a statute and the heading of

a section cannot limit the plain meaning of the text." *Bhd. of R. Trainmen v. Balt. & Ohio R. Co.*, 331 U.S. 519, 528-29 (1947). At any rate, the phrase "limited authority" simply limits a court's authority to set aside a statutory minimum to the situation where the prosecution makes a substantial assistance motion. The phrase does not restrict the court, after granting such a motion, from considering the applicable guidelines range. *See United States v. Calle*, 796 F. Supp. 853, 860-61 (D. Md. 1992).

The Government also asserts that Section 3553(e)'s explanation that a district court may impose a sentence below an otherwise applicable statutory minimum "so as to *reflect* a defendant's substantial assistance" indicates that such a sentence must be anchored to the statutory minimum. U.S. Br. 32-33 (emphasis added) (quoting 18 U.S.C. § 3553(e)). But the word "reflect" cannot bear the weight the Government places upon it. The statute uses the phrase "so as to reflect" (in place of a more active phrase such as "if the court finds") simply because the prosecution, not the court, determines whether a defendant has provided substantial assistance. *See Melendez*, 518 U.S. at 125-26; *id.* at 133-34 (Breyer. J., concurring in part and dissenting in part). And as petitioners have explained, the word "reflect" means "to make apparent." Petr. Br. 33 (quoting and citing dictionaries). A sentence under Section 3553(e) thus "reflects" a defendant's substantial assistance simply by being lower than it otherwise would be. Petr. Br. 33 & n.11.[2]

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[2] For the same reasons, the Government's reliance on the word "reflect" in a now-superseded version of Federal Rule of Criminal Procedure 35(b), *see* U.S. Br. 34-35, is unavailing.

2. *Structure*. The Government next avers that a comparison between Section 3553(e) and 18 U.S.C. § 3553(f)—the "safety valve" provision—shows that the former "authorizes only an anchored departure from, not the complete elimination of, [a] statutory minimum." U.S. Br. 31. Both statutes, however, share equivalent operative language. Section 3553(e) instructs courts to impose sentences "in accordance with the guidelines." 18 U.S.C. § 3553(e). And Section 3553(f) says that "the court shall impose a sentence pursuant to [the] guidelines."

The Government focuses on the fact that Section 3553(f) also contains the phrase "without regard to any statutory minimum sentence." U.S. Br. 31. In the Government's view, the absence of that phrase in Section 3553(e) demonstrates that that provision does not permit courts to set aside statutory minimums. That assertion is incorrect. Section 3553(e) expressly authorizes courts to impose sentences "below a level established by statute as a minimum sentence." This language—just like the "without regard to" language in Section 3553(f)—allows defendants to "escape" otherwise applicable mandatory minimums, *Dorsey v. United States*, 567 U.S. 260, 285 (2012), and instead to receive sentences based on the Guidelines. *See also United States v. Phillips*, 382 F.3d 489, 499 (5th Cir. 2004) ("[A] district court may impose a sentence of imprisonment below a statutory minimum for a drug crime only if: (1) the Government makes a motion pursuant to 18 U.S.C. § 3553(e) asserting the defendant's substantial assistance to the Government; or (2) the defendant meets the 'safety valve' criteria set forth in 18 U.S.C. § 3553(f).").

In any event, the Government is wrong that the canon presuming that different words in different

provisions mean different things applies here. Although Section 3553(f) is the "very next provision" in the U.S. Code, U.S. Br. 31, it was enacted eight years after Section 3553(e). And while the Government asserts that differently worded provisions presumably mean different things even when "the two subsections were enacted at different times," the only case the Government cites for that proposition is *United States v. Fausto*, 484 U.S. 439 (1988). *See* U.S. Br. 31. That case, however, is inapposite. It involved the situation where two dueling statutes speak to the same issue, requiring the Court to try to "'make sense' [of them] in combination." *Fausto*, 484 U.S. at 453. In that special context, the Court strains to differentiate later-enacted laws from earlier-enacted ones to make both work as part of an "integrated statutory scheme." *Id.* at 452-53.

The situation here is different; subsection (e) and later-enacted subsection (f) do not work together or otherwise depend on each other. In this context, where the later-enacted law "'do[es] not seek to clarify an earlier enacted general term' and 'do[es] not depend for [its] effectiveness upon clarification, or a change in the meaning of an earlier statute,'" the later law is "'*beside the point*' in reading the first enactment." *Gutierrez v. Ada*, 528 U.S. 250, 257-58 (2000) (emphasis added) (quoting *Almendarez-Torres v. United States*, 523 U.S. 224, 237 (1998)); *accord Johnson v. United States*, 559 U.S. 133, 143 (2010). That is, in the circumstances here, the earlier statute (Section 3553(e)) must be construed on its own terms.

3. *Legislative history*. Nothing in Section 3553(e)'s legislative history suggests that Congress intended courts to anchor sentences under that provision to statutory minimums. The Government nevertheless

maintains that allowing courts to impose sentences under Section 3553(e) without regard to statutory minimums would frustrate the goal expressed in the President's message transmitting the proposed legislation to Congress. That goal, according to the Government, was to "obviate any need for prosecutors to . . . charg[e] 'a less serious offense'" as a means of rewarding cooperators. U.S. Br. 36-37 (quoting Message from the President of the United States Transmitting the Drug Free America Act of 1986, H.R Doc. 99-266, at 118 (1986 Message)).

If this was indeed the President's reason for proposing Section 3553(e), it is the Government's position—not petitioners'—that would thwart that objective. If the sentences of defendants who cooperate must be tied to statutory minimums, subject to reduction only according to the quality of their assistance, then prosecutors would still have an incentive to charge lesser offenses to truly free the defendants from statutory minimums. And that would make it less likely that defendants' crimes of conviction would "reflect accurately" their true conduct. U.S. Br. 37 (quoting 1986 Message at 118).

4. *Case law.* Unable to build an argument from first principles, the Government attempts to defend its new position by relying on case law. The Government points in particular to *Melendez*, where the Court described Section 3553(e) as related to Congress's edict to the Sentencing Commission in 28 U.S.C. § 994(n) to "constrain[] the district court's discretion in choosing a specific sentence after the Government moves for a departure below the statutory minimum." U.S. Br. 35 (quoting 518 U.S. at 129).

This quotation from *Melendez*, however, says nothing about anchoring sentences to a statutory

minimum that a defendant's substantial assistance renders inapplicable. Instead, the quotation simply notes, before *United States v. Booker*, 543 U.S. 220 (2005), when the Guidelines were binding, that sentences under Section 3553(e) had to be imposed in strict conformance with the Guidelines—like any other sentence not controlled by a statutory directive. *See also* U.S. *Melendez* Br. 20 (making same point). Insofar as this Court has spoken since to the methodology a court should use to craft a sentence after granting a Section 3553(e) motion, it has instructed that the court is "relieved of application of a mandatory minimum"—just as in the safety valve context. *Dorsey*, 567 U.S. at 285.

The Government also asserts that "every court of appeals to consider th[e] issue" has held that sentences under Section 3553(e) "must use the mandatory minimum as the starting point." U.S. Br. 29 (quotation marks and citation omitted). Not so. The D.C. Circuit (per Griffith, J., joined by Garland, C.J., and Rogers, J.), has held that "granting [a] § 3553(e) motion free[s] the district court to use the guideline range and disregard the mandatory minimum." *In re Sealed Case*, 722 F.3d 361, 366 (D.C. Cir. 2013). Judge Easterbrook has likewise explained—in a dissent this Court vindicated in *Melendez*—that when a court grants a Section 3553(e) motion, it "remove[s] the barrier to the use of [a] guideline range" that lies below an otherwise binding statutory minimum. *United States v. Wills*, 35 F.3d 1192, 1198 (7th Cir. 1994); *see also* Petr. Br. 29-31 (citing other authority).

To be sure, other courts of appeals have issued opinions holding that Section 3553(e) requires sentences to be anchored to statutory minimums rendered inapplicable by defendants' substantial

assistance. *See* U.S. Br. 29 (citing cases).[3] But to state the obvious: this Court sits to resolve circuit splits and to set the law straight. Moreover, this Court need not worry that doing so here will create any kind of upheaval. As the National Association of Federal Defenders explains (and the Government does not dispute), sentencing courts across the country regularly use U.S.S.G. § 2D1.1 ranges as anchors or targets in crafting sentences under the circumstances here, even in districts where the practice is ostensibly prohibited. NAFD Br. 18-24. In fact, they commonly do so *at the Government's behest*. *See id.*; U.S. Br. 41.

5. *Consequences*. The Government's new reading of Section 3553(e) would also have unwelcome consequences. Indeed, for all of the Government's backtracking in this Court, it is noteworthy that nowhere in its brief does the Government disavow its earlier representation that "the correct policy is fairly clear": Defendants who provide substantial assistance to the Government should receive reduced sentences "without respect to any mandatory minimum." U.S. Dep't of Justice, U.S. Department of Justice Views on the Proposed Amendments to the Federal Sentencing

[3] The Government overstates the number of courts that have so held. Some of the cases the Government cites treat the mandatory minimum as the starting point, as the Eighth Circuit did here, *as a function of U.S.S.G. § 5G1.1(b)*, not Section 3553(e). *See, e.g.*, *United States v. Joiner*, 727 F.3d 601, 609 (6th Cir. 2013) (applying precedent derived from *United States v. Stewart*, 306 F.3d 295, 332 (6th Cir. 2002), which held, due to "language in USSG § 5G1.1(b)," that the statutory minimum must be the starting point). As noted below, the Commission has now made clear that § 5G1.1(b) does not require (or even allow) such anchoring. *See* U.S.S.G. § 1B1.10(c); *infra* at 15-16.

Guidelines and Issues for Comment Published by the U.S. Sentencing Commission in the Federal Register on January 17, 2014, at 4 (Mar. 6, 2014).[4]

Making sentencing reductions available to cooperators such as petitioners would also further *congressional* objectives of "impos[ing] a sentence sufficient, but not greater than necessary . . . to reflect the seriousness of the offense," 18 U.S.C. § 3553(a)(2), and "rewarding cooperation with the authorities," *United States v. Williams*, 808 F.3d 253, 262 (4th Cir. 2015) (internal quotation marks and citation omitted). Mandatory minimums "disrupt th[e] carefully crafted and calibrated [guidelines] system by imposing one-size-fits-all punishments" that often overestimate defendants' culpability. FAMM Br. 8; *see also id.* at 9-20 (collecting authorities). Accordingly, as the Fourth Circuit has explained, Section 3553(e) is designed to

> moderate the rigorous inflexibility of mandatory sentences where the offender has rendered substantial assistance to the Government. The prospect of securing substantial-assistance motions from the prosecutors encourages defendants to aid in investigations and prosecutions of their coconspirators and criminal cohorts. That inducement is a powerful tool for more effective law enforcement[.]

Williams, 808 F.3d at 262 (internal quotation marks and citation omitted).

The only cost of that "powerful tool," under petitioners' construction of Section 3553(e), is that

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[4] https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20140326/public-comment-DOJ.pdf.

cooperators are sentenced like everybody else. That is, cooperators have their sentences grounded first and foremost in the guidelines ranges corresponding to their offense levels and criminal history categories. And this trade-off is more than fair to the Government. Section 3553(e) gives the Government total control over whether a sentence below the minimum should be imposed. *See Melendez*, 518 U.S. at 125-30. If the Government indeed makes such a request, a court should be free—just as Section 3553(e) indicates—to impose a sentence consistent with *all* of the Guidelines, untethered to the inapplicable statutory minimum.

B. It does not matter that the district court in this case tethered petitioners' sentences to the inapplicable statutory minimums.

The Government next argues that whatever the proper construction of Section 3553(e) may be, petitioners' sentences cannot have been "based on" guidelines ranges because the district court in these cases never suggested it "was influenced by a calculation of the guidelines without regard to the applicable statutory minimums." U.S. Br. 41; *see also id.* at 43. This contention is unpersuasive.

1. A defendant's eligibility for a sentence reduction under Section 3582(c)(2) should not depend on whether the district court correctly applied Section 3553(e) or the Guidelines at the defendant's original sentencing. Any other rule would create unjustified—indeed, intolerable—sentencing disparities, adding insult to injury for defendants who were sentenced incorrectly in the first instance. *See Dorsey*, 567 U.S. at 279 (Court should avoid creating unjustified disparities through sentence modification proceedings); NACDL Br. 18-20.

Accordingly, as the Government itself posits elsewhere in its brief, "no need exists to examine each case to determine whether the sentencing court may have erroneously" applied the law at the original sentencing. U.S. Br. 46. All that matters is whether a district court properly applying the law at the defendant's original sentencing would have needed to consult a sentencing range that the Commission subsequently lowered. Petr. Br. 19; *see also Freeman v. United States*, 564 U.S. 522 (2011). Insofar as the range "was a relevant part of the analytic framework," *Freeman*, 564 U.S. at 530 (plurality opinion), that the judge should have used to determine the sentence, the defendant is eligible for a sentence modification.

For all the reasons explained above in Part I.A, such is the case here. Indeed, even if the Government were correct that the amended sentencing range must have been "a foundational part" of the original sentencing, U.S. Br. 44 (citation omitted), the result here would be the same. Under the plain text of Section 3553(e), the district court should have used petitioners' U.S.S.G. § 2D1.1 ranges as the foundations for their calculations—or at least should have used the ranges as targets for their sentences. *See supra* at 4-6.

Nothing in U.S.S.G. § 5G1.1(b) is to the contrary. As petitioners have explained, that provision applies only when there is a "statutorily *required* minimum sentence." And the whole point of granting a motion under Section 3553(e) is that once a substantial assistance motion has been granted, there is no longer a "required" minimum sentence. Petr. Br. 25-26; *see also* NACDL Br. 5.

The Government's only response is that a comment in the Guidelines "describes a Section 3553(e) motion as an event that 'may justify a sentence *below a statutorily required minimum sentence*'"—a description the Government maintains "cannot be squared with" treating U.S.S.G. § 5G1.1(b) as inapplicable here. U.S. Br. 27 (quoting U.S.S.G. § 5K1.1 cmt. n.1). That comment just explains that granting a Section 3553(e) motion may justify a sentence below the otherwise binding statutory minimum; it does not say the resulting sentence must be *anchored* to that minimum. As to the anchoring question, the text of § 5K1.1 says that "the court may depart *from the guidelines.*" U.S.S.G. § 5K1.1 (emphasis added). Furthermore, another comment in the Guidelines, which the Government ignores, confirms that a substantial assistance motion "waive[s]" an otherwise binding statutory minimum. U.S.S.G. § 2D1.1 cmt. n.24; *see also* U.S.S.G. app. C, amend. 570, reason for amend. (Supp. 2016) (A defendant "who is the beneficiary of a Government substantial assistance motion under 18 U.S.C. § 3553(e)[] is not subject to any statutory minimum term of supervised release.").

2. Even if U.S.S.G. § 5G1.1(b) required the district court to use statutory minimums as the starting points for crafting petitioners' sentences, petitioners are still eligible for relief. The Government acknowledges that such starting points—assuming for the moment they were correct—qualified as "sentencing ranges" under Section 3582(c)(2). U.S. Br. 23-24. And the Sentencing Commission subsequently made clear in Amendment 782's retroactivity package that such amended ranges "shall be determined without regard to the operation of § 5G1.1." U.S.S.G § 1B1.10(c); *see also* U.S.S.G

§ 1B1.10(d). Accordingly, there can be no doubt that whatever the proper sentencing range may have been at the time of petitioners' sentencings, the range "has subsequently been lowered by the Sentencing Commission," just as Section 3582(c)(2) requires. *See* Petr. Br. 26-27.

II. Even if Section 3553(e) requires courts to tether sentences to statutory minimums, petitioners' sentences were still "based on" their U.S.S.G. § 2D1.1 sentencing ranges.

Petitioners explained in their opening brief that even if the Government were correct that Section 3553(e) requires sentences to be anchored to statutory minimums, petitioners' sentences were still "based on" their U.S.S.G. § 2D1.1 sentencing ranges because such ranges at the very least are relevant to how far downward a court should depart within "the outer limit" allowed by the nature and extent of a defendant's assistance. Petr. Br. 33-34 (citation omitted). The Government grudgingly admits that Section 3553(e) "potentially" leaves district courts at least this residual power to consider defendants' U.S.S.G. § 2D1.1 ranges. U.S. Br. 39. And Section 3582(c)(2) "permit[s] the district court to revisit a prior sentence *to whatever extent* the sentencing range in question" was relevant at the original sentencing. *Freeman v. United States*, 564 U.S. 522, 530 (2011) (plurality opinion) (emphasis added). The Government nevertheless says the authority to consider a U.S.S.G. § 2D1.1 range to limit the extent of a downward departure does not satisfy Section 3582(c)(2)'s "based upon" requirement because such consideration "is the functional equivalent of varying upward from the statutory minimum before granting an award for substantial assistance." U.S. Br. 40.

This is a puzzling contention. Regardless of whether a defendant's U.S.S.G. § 2D1.1 range is used to "vary[] upward" from a statutory minimum or to limit a downward departure, the range is inescapably "a relevant part of the analytic framework the judge use[s] to determine the sentence," *Freeman*, 564 U.S. at 530 (plurality opinion). The § 2D1.1 range under these circumstances is likewise part of the "foundation for the term of imprisonment," *id.* at 535 (Sotomayor, J., concurring in the judgment). This reality is especially apparent where, as here, defendants' sentences ultimately fell within their § 2D1.1 ranges, indicating that the district court had those ranges "in his or her mind" when crafting the sentences. Petr. Br. 23 (quoting *Public Hearings on Proposed Amendments to the Federal Sentencing Guidelines* 255 (Mar. 13, 2014) (statement of Robert Zauzmer, on behalf of U.S. Dep't of Justice)); *see also United States v. Parral-Dominguez*, 794 F.3d 440, 448 & n.9 (4th Cir. 2015) (collecting sources describing the "psychological presumption" that guidelines ranges create).

If for no other reason than this, the decision below must be reversed. A defendant is eligible under Section 3582(c)(2) for a sentence reduction if he was "sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission." 18 U.S.C. § 3582(c)(2). Even under the Government's view of federal sentencing law, deviations in this setting from statutory minimums are influenced in part by the U.S.S.G. § 2D1.1 ranges that the Sentencing Commission has now lowered.

III. The structure and purposes of the Sentencing Reform Act confirm that petitioners are entitled to seek sentence reductions.

The Government acknowledges that "the current version of Section 1B1.10"—part of Amendment 782's retroactivity package—"makes clear that such defendants [as petitioners] should be eligible for reductions from the Commission's perspective." U.S. Br. 50. Yet the Government tells this Court to pay no heed to that perspective because "to the extent the Commission's directives conflict with those of Congress, [they] 'must give way.'" *Id.* (quoting *United States v. LaBonte*, 520 U.S. 751, 757 (1997)). This response misses the point. Congress itself has decreed that the Commission's informed views matter in assessing who should be eligible for sentence reductions under Section 3582(c)(2). And especially where, as here, the Commission deems a class of defendants eligible for sentence modifications to avoid unwarranted disparities, this Court should respect that determination.

1. This case is the polar opposite of *LaBonte*, the precedent the Government cites as grounds for disregarding the Commission's views. In that case, the Commission adopted an amendment that was "at odds with" the "plain language" of Congress's instructions to the Commission in 28 U.S.C. § 994(h). 520 U.S. at 757.

Here, by contrast, the Commission's promulgations flow directly from the neighboring directive in Section 994(u), which instructs: "If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall

specify in what circumstances . . . the sentences of prisoners serving terms of imprisonment for the offense may be reduced." 28 U.S.C. § 994(u). Consequently, the Commission has acted within its "[b]road" "discretion," or "latitude," *LaBonte*, 520 U.S. at 757, 760, to implement Congress's instructions in a wise and effective manner. *See also Dillon v. United States*, 560 U.S. 817, 826 (2010). And because the Commission has not clearly transgressed any other limitation in the Sentencing Reform Act, this Court should respect this "preferred means" of determining which defendants are eligible for sentencing modifications under Section 3582(c)(2). Petr. Br. 38.

2. The Government agrees that the Court should avoid construing Section 3582(c)(2) to create new and unwarranted sentencing disparities. U.S. Br. 54. The Government's position, however, would do just that, while petitioners' would generate uniformity.

a. The Government contends that its position would not result in unwarranted disparities because "a court in a sentence-reduction proceeding" regarding a cooperator whose original § 2D1.1 range was *above* the statutory minimum but who received a sentence below the minimum "could not disregard the [statutory] minimum." U.S. Br. 57. This is incorrect. Under U.S.S.G. § 1B1.10(b)(1) (which the Government does not challenge), a court in a Section 3582(c)(2) proceeding must substitute the amended § 2D1.1 guideline range for the original one "and shall leave all other guideline application decisions unaffected." This command "means that the new [§ 2D1.1] range must *not* be reset to equal the presumptive statutory minimum." *United States v. Wren*, 706 F.3d 861, 864 (7th Cir. 2013) (emphasis added). In other words, "if § 5G1.1 did not affect the original calculation, it does

not come into play when a court considers the effect of a retroactive change to the Guidelines." *Id.* at 863. Accordingly, the Government's position would indeed create dramatic and unwarranted disparities between defendants whose original § 2D1.1 ranges were above the statutory minimum and those whose were below. *See* Petr. Br. 40-42.

b. No comparable problem arises under petitioners' approach. The Government asserts that petitioners' approach would create unjustified disparities "between them and defendants who were sentenced at the same time for identical offenses but who did not provide substantial assistance." U.S. Br. 56. "The guidelines and the relevant statutes," however, "have long recognized that defendants who provide substantial assistance are differently situated than other defendants and should be considered for a sentence below a guideline or statutory minimum even when defendants who are otherwise similar" are not. *See* U.S.S.G. app. C amend. 759 (Reason for Amendment). And the Commission explained as part of Amendment 782's retroactivity package that allowing cooperators such as petitioners to obtain sentence reductions "ensures that [such defendants] have the opportunity to receive the full benefit of a reduction that accounts for that assistance." *Id.* amend. 780 (Reason for Amendment).

The Government also maintains that petitioners' approach would allow defendants whose § 2D1.1 ranges were below the statutory minimum to obtain original "unwarranted relief" because, "if sentenced for the first time today," Sections 3553(e) and U.S.S.G. § 5G1.1(b) would require their substantial assistance departures to be "calculated from th[e] statutory minimum." U.S. Br. 55. But for the reasons explained

above, Section 3553(e) does not require such anchoring. *See supra* at 4-13. Nor does U.S.S.G. § 5G1.1(b), *see supra* at 14-15—a reality made all the more clear by the Sentencing Commission's recent clarification that courts should calculate amended ranges under the circumstances "without regard to the operation of § 5G1.1." U.S.S.G. § 1B1.10(c); *see also supra* at 15-16. In short, defendants today should be sentenced just as petitioners seek to have their sentences modified.

In any event, "[w]hat is at stake in this case is a defendant's eligibility for relief, not the extent of that relief." *Freeman*, 564 U.S. at 532 (plurality opinion). If a district court, based on its "continuing professional commitment . . . to a consistent sentencing policy," reasonably believes a Section 3582(c)(2) reduction should be limited or even denied to avoid a "windfall," it may act accordingly. *Id.* But there is no warrant for shutting the door entirely to the class of defendants at issue here.[5]

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[5] The Government argues that Putensen is ineligible for Section 3582(c)(2) relief "for the additional reason that he accepted a presidential commutation of his sentence" to 188 months in prison. *See* U.S. Br. 58 n.*. The Government, however, did not raise this argument in the Eighth Circuit or its Brief in Opposition. Particularly because of the argument's "complex nature" and "broad implications," this Court should deem the argument waived. *Baldwin v. Reese*, 541 U.S. 27, 34 (2004). At the very most, the issue should be left for remand. Contrary to the Government's contention, Putensen's commutation did not wipe out his original sentence; it merely amended it. *See United States v. Benz*, 282 U.S. 304, 311 (1931); *Duehay v. Thompson*, 223 F. 305, 307-08 (9th Cir. 1915). So he retains the right to finish litigating his pending appeal claiming that his sentence should be reduced to a term shorter than the commuted sentence. *See In re Ross*, 140 U.S. 453, 480 (1891).

3. Any lingering doubt as to the outcome here should be resolved in petitioners' favor. The Government does not dispute that, to the extent the federal sentencing law at issue here is ambiguous, the rule of lenity requires it to be construed against locking defendants into excessive sentences. *See* Petr. Br. 42-43. And, if nothing else, it should be beyond cavil that the Government's proposed constructions of Sections 3553(e) and 3582(c)(2) are not "unambiguously correct," *United States v. Granderson*, 511 U.S. 39, 54 (1994).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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