

No. _____

In the Supreme Court of the United States

October Term, 2017

MELISSA QUINTANILLA, MARTI GAIL MCPHERSON, MICHAEL SCOTT
COOKSEY, LATOYA LATRICE GOLDEN, AND DAVID WAYNE FRAZIER, JR.,
PETITIONERS,

v.

UNITED STATES OF AMERICA

**PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

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QUESTIONS PRESENTED FOR REVIEW

Section 3582(c)(2) of Title 18 of the United States Code provides that a district court may reduce a term of imprisonment after it has been imposed if the defendant “has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission . . . if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.” Effective November 1, 2014, Amendment 782 reduced the quantity-determined base offense levels in the drug-trafficking offense guideline, §2D1.1, by two levels. U.S.S.G. App. C, amend. 782. The Commission also made the lower base offense levels retroactively applicable to people who were sentenced under previous versions of that guideline. U.S.S.G. App. C, amend. 788; *see also* U.S.S.G. §1B1.10(d), p.s. (Nov. 2014) (listing amendment 782 as a covered amendment).

The questions presented by these cases, wherein the Fifth Circuit held that petitioners’ sentences for drug offenses were not based on the amended drug guideline but instead on the career offender guideline, are:

1. Whether a defendant’s sentence, for purposes of resentencing pursuant to 18 U.S.C. § 3582(c)(2), can be “based on” an amended Chapter Two guideline even if the career offender guideline, §4B1.1, results in a higher Guidelines range.
2. Whether Application Note 1 of policy statement §1B1.10 impermissibly limits the jurisdiction of district courts to entertain a motion to reduce a sentence.

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Petitioners ask that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on August 16, 2017.

PARTIES TO THE PROCEEDING

The caption of this case names all parties to the proceeding in the court whose judgment is sought to be reviewed. Petitioners' motions for resentencing pursuant to 18 U.S.C. § 3582(c)(2) were resolved in separate proceedings in the U.S. District Court. The Government appealed each case separately to the Fifth Circuit, which consolidated them for

purposes of oral argument and issued one decision addressing all cases. Because Petitioners share the same interest in overturning the court of appeal's judgment, they jointly file this petition with this Court. *See* SUP. CT. R. 12.4.

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OPINION BELOW

A copy of the opinion of the court of appeals, *United States v. Quintanilla, et al.*, 868 F.3d 315 (5th Cir. 2017), is attached to this petition as Appendix A.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit were entered on August 16, 2017. This petition is filed within 90 days after entry of judgment. *See* SUP. CT. R. 13.1. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

FEDERAL STATUTE INVOLVED

Section 3582(c)(2) of Title 18 U.S.C. is attached to this petition as Appendix B.

FEDERAL GUIDELINE INVOLVED

Policy Statement §1B1.10 of the U.S. Sentencing Guidelines is attached to this petition as Appendix C.

STATEMENT

Each Petitioner was convicted of a drug offense prior to November 1, 2014, when Amendment 782 to the U.S. Sentencing Guidelines became effective. Amendment 782 reduced the quantity-determined base offense levels in the drug-trafficking offense guide-

line, §2D1.1, by two levels. U.S.S.G. App. C, amend. 782. The Commission also made the lower base offense levels retroactively applicable to people who were sentenced under previous versions of that guideline. U.S.S.G. App. C, amend. 788; *see also* U.S.S.G. §1B1.10(d), p.s. (Nov. 2014) (listing amendment 782 as a covered amendment).

In their original sentencings, the presentence reports calculated offense levels pursuant to the drug guideline, §2D1.1, that were lower than the offense levels ultimately adopted by the district court by virtue of the operation of the career offender guideline, §4B1.1. All Petitioners received downward departures and were sentenced below the range recommended by the career offender guideline.

In light of Amendments 782 and 788, each Petitioner filed a pro se motion to reduce his or her sentence pursuant to 18 U.S.C. § 3582(c)(2). The district court then appointed the Federal Public Defender to represent them. The Government filed responses in opposition to the reduction motions, arguing that each Petitioner was ineligible for a sentence reduction because he or she had been sentenced as a career offender.

Citing *Freeman v. United States*, 564 U.S. 522 (2011), the district court found that each Petitioner was eligible for a reduction

because his or her original sentence was “based on” the amended guideline §2D1.1 and that a sentence reduction was consistent with the U.S. Sentencing Commission’s policy statements. The court noted that each Petitioner had received a sentence below the career offender guideline range. It also relied in part upon *United States v. Jackson*, 678 F.3d 442 (6th Cir. 2012), wherein the Sixth Circuit recognized that “[w]hen the original sentencing judge decides to vary from the career offender guideline range to some other range, it is fair to say that the sentence imposed is ‘based on’ the adopted range and not the career offender range. At least two ranges are in play, and it is a fiction to look at the sentence and say only one range exists.” *Jackson*, 678 F.3d at 444. The court granted Petitioners’ motions and imposed reduced sentences in each case.

The Government appealed, arguing that Petitioners were not eligible for sentence reductions because their sentences were based on the career offender guideline. The Government did not challenge the extent of the reductions. Petitioners responded that they were eligible for reductions under § 3582(c)(2) because their sentences were “based on” the drug guideline and that any policy statement purporting to limit their eligibility was not “applicable.” *See* § 3582(c)(2) (“the court may reduce the term of imprisonment

. . . if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission”). They preserved for further review the argument that the sentencing reductions were correct under the *Freeman* plurality’s reasoning and interpretation of § 3582(c)(2).

The Fifth Circuit reversed the district court’s judgments and reinstated the sentences that were in effect before the reductions. It explained that Fifth Circuit precedent requires a court to “look only to the highest guideline range applicable at the time [the defendant] seeks resentencing” in determining under policy statement §1B1.10 what guideline range is “applicable to that defendant.” *Quintanilla*, 868 F.3d at 321 (citing *United States v. Anderson*, 591 F.3d 789 (5th Cir. 2009), and *United States v. Banks*, 770 F.3d 346 (5th Cir. 2014)). Because “the career offender guideline range under § 4B1.1 was higher than the drug quantity guideline range under § 2D1.1,” the court concluded that all sentences were “based on” §4B1.1, not §2D1.1. *Id.* The district court could not re-sentence Petitioners because Amendment 782 did not lower the guideline range under §4B1.1. *Id.*

The Fifth Circuit concluded that Petitioners’ argument that “§ 3582(c)(2)’s use of ‘based on’ is broad enough to include the district court’s reasoning that a sentence is ‘based on’ § 2D1.1 even if

the § 2D1.1 drug quantity guideline range was lower than the § 4B1.1 career offender guideline range . . . is foreclosed by the *Anderson/Banks* rule[.]” *Id.* at 322.

REASONS FOR GRANTING THE WRIT

I. The Court Should Clarify That a Defendant’s Sentence Is “Based On” an Amended Chapter Two Guideline Even if the Application of Chapter Four Results in a Higher Guidelines Range.

In the past decade, the U.S. Sentencing Commission has amended guideline §2D1.1 and made those amendments retroactive three times. *See* U.S.S.G. App. C, amends. 706, 713 (reducing levels for crack cocaine, effective November 1, 2007); U.S.S.G. App. C, amends. 750, 759 (reducing levels for crack cocaine, effective November 1, 2011); U.S.S.G. App. C, amends. 782, 788 (reducing most drug offense levels by two levels, effective November 1, 2014). These reductions have prompted defendants to file motions for sentence reductions,¹ pursuant to 18 U.S.C. § 3582(c)(2), and twice resulted in this Court addressing the resentencing process. *See Freeman v. United States*, 564 U.S. 522 (2011); *Dillon v. United States*, 560 U.S. 817 (2010).

¹ In fiscal year 2015, criminal appeals increased nationwide by 15%. The Administrative Office of U.S. Courts attributes this growth to “a 45 percent rise in appeals by persons convicted of drug offenses, most of them seeking reductions in their sentences following the implementation of the United States Sentencing Commission’s Amendment 782, which adjusted by two levels the Drug Quantity Table used for sentencing pursuant to 18 U.S.C. §3582(c).” U.S. Courts, *Federal Judicial Caseload Statistics 2016*, <http://www.uscourts.gov/statistics-reports/federal-judicial-case-load-statistics-2016>.

This Petition specifically addresses whether defendants convicted of drug trafficking offenses and sentenced as career offenders are eligible for resentencing when the Commission amends the drug offense guideline, §2D1.1. Defendants categorized as career offenders potentially face a higher offense level and higher criminal history category than they would have otherwise received under the normal operation of the Guidelines. *See* U.S.S.G. §4B1.1. Indeed, higher advisory Guidelines resulted for more than 9 of 10 career offenders in fiscal year 2014. U.S. Sentencing Comm’n, *Report to Congress: Career Offender Sentencing Enhancements* 21, App. B-3 (Aug. 2016) [hereinafter “*USSC Report*”].² And nearly three-quarters (74.1%) of the 2,269 career offenders sentenced in fiscal year 2014 were convicted of drug trafficking offenses. *USSC Report* 19. Thus, Petitioners’ circumstances are far from unusual.

Section 3582(c)(2) of Title 18 of the United States Code provides that a district court may reduce a term of imprisonment after it has been imposed if the defendant “has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission[.]”

² The *USSC Report* is available at https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607_RtC-Career-Offenders.pdf.

In *Freeman v. United States*, this Court held that pleading guilty pursuant to a Federal Rule of Criminal Procedure 11(c)(1)(C) agreement was not a categorical bar to receiving a sentence reduction under 18 U.S.C. § 3582(c)(2). 564 U.S. 522, 525–26 (2011) (Kennedy, J., plurality); *id.* at 539–40 (Sotomayor, J., concurring). The justices disagreed as to whether the sentence was based on the amended guideline or based on the plea agreement, which provided for a particular sentence. *Id.* at 525. A plurality of the Court believed “§ 3582(c)(2) modification proceedings should be available to permit the district court to revisit a prior sentence to *whatever extent the sentencing range in question was a relevant part of the analytic framework the judge used to determine the sentence* or to approve the agreement.” *Id.* at 530 (emphasis added). The concurring and dissenting justices believed that the sentence was based on the agreement and that, in general,³ allowing for resentencing would disturb the parties’ agreement. *Id.* at 536–37 (Sotomayor, J., concurring); *id.* at 544 (Roberts, C.J., dissenting).

³ Justice Sotomayor concurred with the result because she reasoned that the defendant is eligible for resentencing if the agreement explicitly incorporates the Guidelines. *Freeman*, 564 U.S. at 538–39 (Sotomayor, J., concurring).

Lower courts have struggled to apply the fractured *Freeman* opinion. The Ninth and D.C. Circuits decided that neither the plurality's nor the concurrence's reasoning was binding because neither was the logical subset of the other. *United States v. Davis*, 825 F.3d 1014, 1016 (9th Cir. 2016); *United States v. Epps*, 707 F.3d 337, 350 (D.C. Cir. 2013). These courts of appeals decided the plurality's reasoning was more persuasive and have adopted it. *Davis*, 825 F.3d at 116; *Epps*, 707 F.3d at 351. The other regional circuits concluded that Justice Sotomayor's concurrence, which allows resentencing only when the agreement incorporates the Guidelines as a basis for the sentence, is binding.⁴

Petitioners' cases do not involve a Rule 11(c)(1)(C) agreement. Thus, there is no tension between the operation of the Guidelines and any agreement between the parties. *Compare with Freeman*, 564 U.S. at 531 (Kennedy, J., plurality), 536 (Sotomayor, J., concurring), 549 (Roberts, C.J., dissenting). Instead, these cases present a different, but related question: whether a sentence is based

⁴ See *United States v. Benitez*, 822 F.3d 807, 811 (5th Cir. 2016); *United States v. Graham*, 704 F.3d 1275, 1278 (10th Cir. 2013); *United States v. Browne*, 698 F.3d 1042, 1045–46 (8th Cir. 2012); *United States v. Dixon*, 687 F.3d 356, 359–60 (7th Cir. 2012); *United States v. Thompson*, 682 F.3d 285, 289–90 (3d Cir. 2012); *United States v. Smith*, 658 F.3d 608, 611 (6th Cir. 2011); *United States v. Rivera-Martinez*, 665 F.3d 344, 348 (1st Cir. 2011).

on an amended drug guideline that was calculated in the process of arriving at a defendant's Guidelines range when that range was ultimately governed by the career offender guideline, §4B1.1, which produced a higher range than the drug offense guideline, §2D1.1. In particular, in all of these cases, Petitioners were sentenced below that career offender guideline range.

Applying the *Freeman* plurality's reasoning to Petitioners' circumstances, being sentenced as a career offender should not be a categorical bar to receiving a § 3582(c)(2) sentence reduction because the drug offense guideline was part of the analytical framework that the district court used to arrive at Petitioners' sentences.

The Guidelines require a court to determine the base offense level pursuant to Chapter Two and apply any appropriate adjustments from Chapter Three before determining whether any adjustments from Chapter Four, such as the career offender guideline, apply. U.S.S.G. §1B1.1(a)(2)–(6). Thus, for a career offender convicted of a drug offense, the starting point of the sentencing calculation is the drug offense guideline, §2D1.1. That base offense level is included in the presentence report and, in these cases and many others, is a stark contrast to the career offender base offense

level.⁵ And the career offender guideline also automatically places the defendant in criminal history category VI regardless of how many criminal history points he or she may have.⁶ U.S.S.G. §4B1.1(b).

Thus, in Petitioners' cases, even though the drug offense guideline did not produce the final range, it was part of "the analytic framework the judge used to determine the sentence." *Freeman*, 564 U.S. at 530. And it influenced the ultimate sentence chosen by the court, particularly where, as here, the ultimate sentences were lower than the career offender guideline range. *Cf. Molina-Martinez v. United States*, 136 S. Ct. 1338, 1345 (2016) ("Even if the sentencing judge sees a reason to vary from the Guidelines, 'if the judge uses the sentencing range as the beginning point to explain the decision to deviate from it, *then the Guidelines are in a real*

⁵ In fiscal year 2014, 78.9% of career offenders received an increase in offense level by operation of §4B1.1. *USSC Report* 21.

⁶ In fiscal year 2014, 58.7% of career offenders would not have been in criminal history category VI but for the operation of the career offender guideline. *USSC Report* 21. For example, McPherson's total offense level under §2D1.1 was 23, but under §4B1.1 it was 31. His criminal history category would have been IV but for the operation of the career offender guideline to make it VI. His advisory Guidelines range under §2D1.1 would have been 70 to 87 months; under §4B1.1, it was 188 to 235 months. The district court granted a two-level downward departure and imposed a 151-month sentence, the bottom of the adjusted range.

sense the basis for the sentence.” (quoting *Peugh v. United States*, 569 U.S. 530, 133 S. Ct. 2072, 2083 (2013), which quoted *Freeman*, 564 U.S. at 529 (emphasis in *Molina-Martinez*)).

The sentencing court has the expertise to determine to whether the sentencing decision was based on the lower drug guideline range. *Cf. Freeman*, 564 U.S. at 532 (rejecting a categorical bar that “would prevent district courts from making an inquiry that is within their own special knowledge and expertise”) (Kennedy, J., plurality). Here, the district court expressly determined that the sentences were based on the amended drug guideline. A categorical bar to eligibility simply because a defendant was sentenced as a career offender would improperly foreclose inquiry as to the basis for the sentence and, therefore, eligibility for resentencing. *Cf. id.*

The Court should clarify *Freeman* by considering this related, but different question. *See Nichols v. United States*, 511 U.S. 738, 745–46 (1994) (“This degree of confusion following a splintered decision . . . is itself a reason for reexamining that decision”). Doing so will provide clarity to the circuits regarding this frequent and recurring issue. And the Court should ultimately adopt the reasoning of the *Freeman* plurality—that a sentence reduction pursuant to § 3582(c) is available to a defendant provided that the Guidelines range “was a relevant part of the analytic framework the

judge used to determine the sentence or to approve the agreement,” *Freeman*, 564 U.S. at 529 (Kennedy, J., plurality)—and apply it to Petitioners’ cases, finding them eligible for a sentence reduction.

II. The Court Should Clarify That the Sentencing Court, Not the Sentencing Commission, Determines a Court’s Power to Reduce a Sentence Pursuant to § 3582(c)(2).

In holding that “a defendant may not obtain a reduction under Amendment 782 if his or her sentence was calculated from the higher career offender guideline range under § 4B1.1,” *Quintanilla*, 868 F.3d at 320, the Fifth Circuit relied not only on its erroneous interpretation of “based on” but also the language in § 3582(c)(2) that a reduction must be consistent with “applicable policy statements issued by the Sentencing Commission.” § 3582(c)(2).

But statutory language makes clear that the court, not the Sentencing Commission, determines a defendant's eligibility for a sentence reduction pursuant to § 3582(c)(2).⁷ The Commission has the authority to decide "whether to amend the Guidelines, [28 U.S.C.] § 994(o), and . . . whether and to what extent an amendment will be retroactive, [28 U.S.C.] § 994(u)." *Dillon v. United States*, 560 U.S. 817, 826 (2010). The district court, however, determines a defendant's eligibility for a sentence reduction by deciding whether the defendant's sentence was based on the amended guideline.

⁷ Section 3582(c)(2) provides that, in the case of a defendant who has been *sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered* by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, *the court may reduce the term of imprisonment*, after considering the factors set forth in section 3553(a) to the extent that they are applicable, *if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission*. (emphasis added).

§ 3582(c)(2). The Commission then provides guidance as to the permissible extent of the reduction. *See* § 3582(c)(2), § 994(u);⁸ *Dillon*, 560 U.S. at 827.

The first step, or clause, of § 3582(c)(2) (“based on”) is not dependent upon the Commission’s policy statements. The court determines whether the defendant was sentenced “based on” a guideline range that was lowered by the Commission. § 3582(c)(2); *see* 18 U.S.C. § 3231 (vesting subject-matter jurisdiction for criminal cases in federal courts). For those eligible, the court then has the discretion to reduce the sentence, after considering 18 U.S.C. § 3553(a) factors, “if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.” § 3582(c)(2). The last clause of § 3582(c)(2) invoking applicable policy statements does not modify the first clause regarding eligibility. Rather, the last clause, an adverbial clause, modifies the action

⁸ Section 994(u) provides:

If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.

of the single independent clause in the provision: “the court may reduce the term of imprisonment.” § 3582(c)(2). The applicable policy statements are relevant as to the extent of the reduction. *Dillon*, 560 U.S. at 821 (finding that, post-*Booker*⁹, the Commission still had “authority to revise the Guidelines, [§ 994(o),] and to determine when and to what extent a revision will be retroactive, § 994(u)”).¹⁰

Accordingly, the district court—not the Sentencing Commission—determines its own power to entertain a motion to reduce a sentence after the Commission decides a guideline amendment is retroactive. To hold otherwise would read into § 3582(c)(2) nonexistent language delegating to the Commission the authority to limit the court’s jurisdiction through the Commission’s policy statements. Such delegation would require clear language. *Sebelius v. Auburn Regional Med. Ctr.*, 133 S. Ct. 817, 824 (2013); cf. *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990) (delegating authority to administrative agency to promulgate standards does not empower agency “to regulate the scope of judicial power vested

⁹ *United States v. Booker*, 543 U.S. 220 (2005).

¹⁰ The Supreme Court in *Dillon* allowed the Sentencing Commission to bind the courts regarding the extent of reduction, but it did not hold that the Commission can limit the courts’ jurisdiction to act at all under § 3582(c)(2). 560 U.S. at 827–28.

by the statute”). Section 3582(c)(2) lacks any clear language delegating to the Commission authority to limit a court’s jurisdiction. Whatever power Congress delegated to the Commission, it did not include the power to redefine or restrict the jurisdiction of the federal courts. *See* § 3582(c)(2); 28 U.S.C. § 994. Yet, this is precisely what the Commission attempted to do by defining, in a 2011 amendment to Application Note 1(A), “applicable guideline range” to exclude departures that considered the amended guideline.¹¹

Policy statement §1B1.10(a)(2) claims that a reduction “is not consistent with this policy statement and therefore is not authorized” if the amendment “does not have the effect of lowering the defendant’s applicable guideline range.” Prior to the 2011 amendment, the First and Second Circuits held that a court could reduce

¹¹ U.S.S.G. App. C, amend. 759. As amended, application note 1(A) states,

Eligibility for consideration under 18 U.S.C. § 3582(c)(2) is triggered only by an amendment listed in subsection (c) that lowers the applicable guideline range (*i.e., the guideline range that corresponds to the offense level and criminal history category determined pursuant to §1B1.1(a), which is determined before consideration of any departure provision in the Guidelines Manual or any variance*).

U.S.S.G. §1B1.10, comment. (n.1(A)) (amended language in italics).

the term of imprisonment pursuant to § 3582(c)(2) whenever a sentence was explicitly based on or determined by the drug offense guideline range even if the defendant was also subject to the career-offender guideline.¹² Similarly, the Third and Fourth Circuits recognized that relief was available if the defendant was sentenced within the drug offense guideline by virtue of a departure under guideline §4A1.3 for overrepresentation of criminal history.¹³ Some circuits have stated that these holdings were abrogated by the Commission’s 2011 amendment, but those cases did not analyze the Commission’s power to effectively rewrite § 3582(c)(2), nullify *Freeman*, and limit courts’ jurisdiction.¹⁴

¹² See *United States v. Cardoso*, 606 F.3d 16, 21 (1st Cir. 2010); *United States v. McGee*, 553 F.3d 225, 230 (2d Cir. 2008); see also *United States v. Rivera*, 662 F.3d 166, 177 (2d Cir. 2011) (holding that when the judge departs or varies from the career-offender range to a lower range for any reason, the sentence imposed was “based on” the lower range and that range is the “applicable guideline range”).

¹³ See *United States v. Flemming*, 617 F.3d 252, 259–65 (3d Cir. 2010) (addressing 2001 version of Guidelines); *United States v. Munn*, 595 F.3d 183, 189–95 (4th Cir. 2010); see also *United States v. Wesson*, 583 F.3d 728, 732 (9th Cir. 2009) (recognizing possibility of § 3582(c)(2) eligibility if court found career-offender status overstated seriousness of criminal history).

¹⁴ See, e.g., *United States v. Muldrow*, 844 F.3d 434 (4th Cir. 2016); *United States v. Steele*, 714 F.3d 751, 756 (2d Cir. 2013); *United States v. Barney*, 672 F.3d 228, 231–32 (3d Cir. 2012).

The Sentencing Commission amended Application Note 1(A) of policy statement §1B1.10 to address the “conflicting interpretations about when, if at all, the court applies a departure provision before determining the ‘applicable guideline range’ for purposes of §1B1.10.” U.S.S.G. App. C, amend. 759. The Commission adopted the approach of the Sixth, Eighth, and Tenth Circuits and amended Note 1(A) “to clarify that the applicable guideline range referred to in §1B1.10 is the guideline range determined . . . before any consideration of any departure provision in the *Guidelines Manual* or any variance.” App. C, amend. 759.

Through the amendment, the Sentencing Commission attempted to limit courts’ jurisdiction to entertain a motion to reduce; it did not simply provide guidance for the extent of the permissible reduction.¹⁵ See § 3582(c)(2) (requiring the extent of the reduction to be consistent with “*applicable* policy statements” (emphasis added)); cf. *Freeman*, 564 U.S. at 532 (Kennedy, J., plurality) (“a categorical bar on § 3582(c)(2) relief . . . would prevent district courts from making an inquiry that is within their own special

¹⁵ Policy statement §1B1.10(b), in contrast, addresses the extent of the reduction, an issue that Congress permissibly delegated to the Commission. See § 3582(c)(2); *Dillon*, 560 U.S. at 827. Construing §1B1.10(b) to be binding is consistent with § 994(u), *Dillon*, and *Freeman*.

knowledge and expertise”). Because § 3582(c)(2) refers to policy statements only for the extent of, not eligibility for, a reduction, Congress did not delegate the authority to the Commission to alter § 3582(c)(2)’s eligibility criteria.

The amendment to Application Note 1(A), should be disregarded as inconsistent with § 3582(c)(2) and, thus, inapplicable and nonbinding. *See Stinson v. United States*, 508 U.S. 36, 38 (1993) (Guidelines commentary that violates the Constitution or a federal statute is not authoritative). Note 1(A) defines the guideline term “applicable guideline range” in a manner that excludes terms of imprisonment that were in fact “based on” the drug guideline. *See* § 3582(c)(2); *cf. Freeman*, 564 U.S. at 530 (Kennedy, J., plurality), 539–40 (Sotomayor, J., concurring). The plurality and concurring opinions in *Freeman* interpreted the term “based on” in the first clause of § 3582(c)(2) in a manner that can include a sentence within or otherwise tied to the drug guideline range by virtue of a departure or variance from the career-offender guideline range. *See Freeman*, 564 U.S. at 530 (Kennedy, J., plurality); *id.* at 539 (Sotomayor, J., concurring). The Commission then issued commentary defining “applicable guideline range” to exclude such sentences. *See* App. C, amend. 759; §1B1.10 comment. (n.1(A)). When commentary issued by the Commission conflicts with a federal

statute as interpreted by the Supreme Court, the commentary is invalid and “must give way.” *United States v. LaBonte*, 520 U.S. 751, 757 (1997); *see also Stinson*, 508 U.S. at 38. The statute controls.

Here, the district court held that Petitioners’ sentences were based on guideline §2D1.1. As such, the court had the authority to reduce their sentences in a manner consistent with the applicable policy statements. The Court should take this opportunity to ensure Petitioners and others similarly situated receive proper consideration of their sentence reduction motions.

CONCLUSION

FOR THESE REASONS, Petitioners respectfully request that this Honorable Court grant a writ of certiorari, vacate the opinion of the court of appeals, and remand the case for further review.

Respectfully submitted.

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