No._____

IN THE SUPREME COURT OF THE UNITED STATES

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ABDIRAHMAN KHEYRE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether, when Congress makes only "applicable policy statements issued by the Sentencing Commission" binding in proceedings under 18 U.S.C. § 3582(c)(2), a court may enforce as binding a substantive limitation found only in commentary to the policy statement?

PARTIES TO THE PROCEEDING

Petitioner, Abdirahman Kheyre, is the defendant/appellant in these proceedings and is serving a sentence of 180 months of imprisonment. The United States of America is the Respondent, was the plaintiff in the district court, and the appellee in the Ninth Circuit.

STATEMENT OF RELATED PROCEEDINGS

Counsel for Petitioner is not aware of any related proceedings in state or federal courts, or in this Court, directly related to this case under Supreme Court Rule 14.1(b)(iii).

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

OPINION BELOW

Petitioner, Abdirahman Kheyre, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit. *United States v. Kheyre*, 176 F.4th 1169 (9th Cir. 2026).

JURISDICTION

The Ninth Circuit published its decision on May 11, 2026. *See* Appendix A (Ninth Circuit's opinion). The Ninth Circuit denied a timely petition for rehearing and a suggestion for rehearing en banc. *See* Appendix B (order denying rehearing, July 29, 2026). This Court has jurisdiction under 28 U.S.C. § 1254(1).

The district court had jurisdiction over Mr. Kheyre's offense under 18 U.S.C. § 3231. Mr. Kheyre filed a motion for a sentencing reduction under 18 U.S.C. §

3582(c)(2). The Ninth Circuit had jurisdiction over the appeal under 28 U.S.C. § 1291.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 3553(b)(1) states:

> (b)Application of Guidelines in Imposing a Sentence.—
>
> (1)In general.—
> Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

18 U.S.C. Section 3582(c)(2) provides as follows:

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

consistent with applicable policy statements issued by the Sentencing Commission.

28 U.S.C. § 994(a)(2)(C):

> (2) general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in section 3553(a)(2) of title 18, United States Code, including the appropriate use of—
> (C) the sentence modification provisions set forth in sections 3563(c), 3564, 3573, and 3582(c) of title 18;

FEDERAL SENTENCING GUIDELINES INVOLVED

United States Sentencing Guidelines § 1B1.10 is the policy statement that governs sentence reductions under 18 U.S.C. § 3582(c)(2). It provides that:

> (b) DETERMINATION OF REDUCTION IN TERM OF IMPRISONMENT.— (1) IN GENERAL.—In determining whether, and to what extent, a reduction in the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement is warranted, the court shall determine the amended guideline range that would have been applicable to the defendant if the amendment(s) to the guidelines listed in subsection (d) had been in effect at the time the defendant was sentenced. In making such determination, the court shall substitute only the amendments listed in subsection (d) for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected.
>
> Application Notes: 1. Application of Subsection (a).—
>
> (A) Eligibility.—Eligibility for consideration under 18 U.S.C. § 3582(c)(2) is triggered only by an amendment listed in subsection (d) that lowers the applicable guideline range (i.e., the guideline range that corresponds to the offense level and criminal history category determined pursuant to §1B1.1(a)(1)–(7), which is determined before consideration of Part K of Chapter Five and §1B1.1(b)). Accordingly, a

> reduction in the defendant's term of imprisonment is not authorized under 18 U.S.C. § 3582(c)(2) and is not consistent with this policy statement if: (i) none of the amendments listed in subsection (d) is applicable to the defendant; or (ii) an amendment listed in subsection (d) is applicable to the defendant but the amendment does not have the effect of lowering the defendant's applicable guideline range because of the operation of another guideline or statutory provision (e.g., a statutory mandatory minimum term of imprisonment).

STATEMENT OF THE CASE

Mr. Kheyre pled guilty in a drug case. *Kheyre*, 176 F.4th at 1171. The plea agreement called for an adjusted guideline range of 235 to 293 months prior to any departure. *Id.* at 1172. The parties then jointly requested a departure under U.S.S.G. § 5K2.0 for a combination of circumstances and described the departure as a two-level reduction. *Id.* The district court granted the departure and imposed a fifteen-year sentence. *Id.* After Amendment 821[1] eliminated Mr. Kheyre's status points, the amended range was 168 to 210 months if the original departure was included, and 210 to 262 months if it were excluded. *Id.* at 1176.

The district court relied on the commentary, excluded the departure, and denied relief reasoning that Mr. Kheyre was ineligible because his 180-month sentence was below the amended range calculated without the departure. *Id.* at 1173. The district court also stated that, even if Mr. Kheyre were eligible, it would not reduce the sentence. *Id.*

On appeal, Mr. Kheyre argued that the policy statement required the district

[1] U.S.S.G. App. C, amend. 821.

court to leave the original departure unaffected as a guideline application decision. Appellant's Opening Brief ("AOB") at 1. He also argued that § 3582(c)(2) requires consistency with "applicable policy statements," not commentary, and that Congress's omission of commentary from the governing statute, 18 U.S.C. Section 3582(c)(2), was purposeful. AOB 1, 11, 19-21.

The Ninth Circuit affirmed on the ground that § 1B1.10 itself unambiguously excludes departures from the amended guideline-range calculation. Applying *Kisor v. Wilkie*, 588 U.S. 558, 139 S. Ct. 2400, 204 L. Ed. 2d 841 (2019), the panel reasoned that the Guidelines consistently treat a departure as a sentence imposed outside the "applicable guideline range," relied on the definition of "departure" in U.S.S.G. § 1B1.1's commentary, the language of § 5K2.0, § 1B1.10(b)(2)(B)'s substantial-assistance exception, and concluded that departures are not part of the amended guideline range. *Kheyre*, 176 F.4th at 1177. The panel therefore held that Mr. Kheyre's prior § 5K2.0 departure could not be carried forward, making his 180-month sentence lower than the amended range and rendering him ineligible for relief. It did not reach the district court's alternative discretionary ruling. *Id.*

Mr. Kheyre sought rehearing and rehearing en banc, which the Ninth Circuit denied. *United States v. Kheyre*, No. 24-7529, 2026 LX 493554 (9th Cir. July 29, 2026).

REASONS FOR GRANTING THE WRIT

Supreme Court Rule 10(c) recognizes certiorari as appropriate when a court of appeals has decided an important federal question in conflict with relevant

decisions of this Court or has decided an important question of federal law that should be settled by this Court. Rule 10(a) separately recognizes the Court's supervisory authority when a court of appeals has "so far departed from the accepted and usual course of judicial proceedings" as to warrant its exercise.

Both considerations support review. Mr. Kheyre contends that the Ninth Circuit's decision conflicts with this Court's precedents concerning the limits of statutory and delegated authority. Moreover, the Ninth Circuit resolved the case on a rationale neither party advanced and without supplemental briefing: that U.S.S.G. § 1B1.10 unambiguously excludes departures from the applicable guideline range. In doing so, the Ninth Circuit failed to address its own prior decision recognizing that the courts of appeals had divided over the meaning of the policy statement and that the Sentencing Commission adopted commentary specifically to resolve that disagreement. *See United States v. Ornelas*, 825 F.3d 548, 551-52, 556 (9th Cir. 2016). The Ninth Circuit's unbriefed decision rationale allowed it to avoid the statutory question the parties had litigated, providing an additional reason for this Court to exercise its supervisory authority.

1. Congress Expressly Distinguished Policy Statements From Commentary in 18 U.S.C. § 3582(c)(2)

Mr. Kheyre's argument begins with the text of § 3582(c)(2). Congress was specific about the rules governing retroactive Guidelines reductions. A court may reduce an otherwise final sentence only where the statutory prerequisites are satisfied and "if such a reduction is consistent with applicable policy statements

issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(2). The statute separately directs the court to consider "the factors set forth in section 3553(a) to the extent that they are applicable." *Id.*

The statutory structure confirms that Congress's reference to "applicable policy statements" in § 3582(c)(2) does not silently encompass commentary. Elsewhere in the same federal sentencing scheme, Congress expressly distinguished among "the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission." 18 U.S.C. § 3553(b)(1). Congress therefore understood policy statements and commentary to be different Commission materials and knew how to refer to commentary expressly when it wished courts to consider it.

Dillon v. United States, 560 U.S. 817 (2010), confirms the significance of that structure. Section 3582(c)(2) does not authorize a full resentencing governed by the ordinary rules applicable at an original sentencing. Rather, it authorizes only a "limited adjustment to an otherwise final sentence" within the framework Congress created for sentence-modification proceedings. *Id.* at 826. Indeed, *Dillon* held that 18 U.S.C. § 3553(a) enters the analysis only because § 3582(c)(2) expressly directs courts to consider those factors at the second step of the inquiry. *Id.* at 826-27. Thus, courts conducting § 3582(c)(2) proceedings do not import the general sentencing regime wholesale. They are confined to the statutory framework Congress enacted for sentence modifications, including those provisions Congress expressly incorporated, and the limitations Congress expressly imposed.

In *Esteras v. United States*, 606 U.S. 185, 195-96 (2025,), this Court applied

the canon of negative implication to the same statutory sentencing scheme. When considering the sentence for violations of supervised release, 18 U.S.C. § 3583(e) expressly incorporated eight of the ten considerations contained in § 3553(a). The Court held that the omission of the other two meant that Congress did not intend courts to consider them. *Id.* at 195. The inference had "particular force" because Congress selected from an "established series," making the omissions conspicuous and meaningful. *Id.* (quoting *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 81 (2002)). The surrounding statutory structure confirmed the inference. *Id.* at 195-96.

The same reasoning applies here. Congress expressly distinguished policy statements from commentary in § 3553(b)(1), demonstrating that it understood them to be different forms of Commission action. Yet in § 3582(c)(2), Congress made only applicable policy statements binding. As in *Esteras*, the omission is significant because Congress demonstrated elsewhere in the same statutory scheme that it knew how to refer to the omitted category. Giving commentary independent binding effect in a § 3582(c)(2) proceeding would disregard that distinction and extend the statute beyond the authority Congress expressly conferred.

2. Agencies Cannot Disregard the Procedure Set out by the Statute

This Court has likewise recognized that an agency must respect Congress's choice of the mechanism through which binding rules may be adopted. In *Azar v. Allina Health Services*, 587 U.S. 566 (2019), Congress required the agency to use notice-and-comment procedures when establishing or changing a substantive legal standard governing Medicare. The agency could not avoid that requirement by

announcing the rule through a different form of agency action. *Id.* at 574-581. The same principle applies here. Congress specified that binding restrictions in § 3582(c)(2) proceedings come from "applicable policy statements." The Commission cannot obtain the same binding legal effect by placing the restriction in commentary instead.

This Court has repeatedly emphasized that sentence-modification authority is bounded by the limits Congress enacted. In *Concepcion v. United States*, 597 U.S. 481 (2022), the Court contrasted ordinary sentencing discretion with proceedings under § 3582(c)(2), explaining that Congress there "expressly cabined district courts' discretion" by requiring adherence to the Sentencing Commission's policy statements. *Id.* at 494. *Dillon* made clear that § 3582(c)(2) is a narrow exception to the finality of criminal judgments and permits only the limited adjustment Congress authorized. *Dillon*, 560 U.S. at 824-26. And in *United States v. LaBonte*, 520 U.S. 751 (1997), this Court held that however broad the Commission's authority may be, it "must bow to the specific directives of Congress." *Id.* at 757. Those decisions reinforce the same principle applied in *Rutherford* and *Rico*: neither courts nor the Sentencing Commission may enlarge the authority Congress granted or substitute a different mechanism for the one Congress chose.

3. *Rutherford* and *Rico* Confirm the Primacy of the Operative Statute

In *Rutherford v. United States*, 146 S. Ct. 1320 (2026), this Court considered whether the Sentencing Commission could authorize a sentence reduction under 18

U.S.C. § 3582(c)(1)(A)(i) based on sentencing disparities created by Congress's change to the stacking of mandatory minimum sentences under 18 U.S.C. § 924(c). 146 S. Ct. at 1326. The Sentencing Commission had issued a policy statement allowing courts to consider that disparity even though Congress had expressly made the § 924(c) amendment nonretroactive. *Id.* at 1329. This Court held that the Commission could not use a policy statement to override Congress's judgment that the statutory change would not apply retroactively. *Id.* at 1330.

This demonstrates that the Sentencing Commission does not enjoy a free-floating power to legislate. The Sentencing Commission's power comes directly from the statutes that enable it and it extends no further.

Rico v. United States, 607 U.S. 609 (2026), applies this analysis to the Sentencing Reform Act. The backdrop of *Rico* was a Ninth Circuit rule that automatically extended a defendant's term of supervised release while the supervisee was an absconder. 607 U.S. at 612, 146 S. Ct. at 951. The Sentencing Reform Act, however, contained no such provision; instead, it contained detailed provisions governing when supervised release begins and ends, when it may be extended, when it may be tolled, and when a court retains jurisdiction after the term expires. *Id.* But none authorized the Ninth Circuit's automatic-extension rule. This Court reversed: the "quantity" and specificity of Congress's instructions made the omission significant, and the Court concluded that the Ninth Circuit's rule was an "adornment to Congress's work," not a permissible interpretation of it. 607 U.S. at 617, 146 S. Ct. at 954. Whatever the policy arguments supporting the rule, the

Court explained, courts are "not free to rewrite the directions Congress has provided." 607 U.S. at 622, 146 S. Ct. at 957.

Together, *Rutherford* and *Rico* confirm that neither courts nor the Sentencing Commission may disregard the limitations Congress imposed on their authority. Those decisions reinforce the central question presented here: whether the Commission may accomplish through commentary that which Congress decreed that it act through policy statements.

4. The Commentary is Acting as Binding Authority

The history of Application Note 1(A) confirms that the commentary performed substantive work that the policy statement itself did not. In Amendment 759, the Commission made substantive changes to § 1B1.10, including changes to the limitations on sentence reductions in subsection (b)(2). But when addressing the separate question whether departures were included in the "applicable guideline range," the Commission chose a different approach. Acknowledging that the courts of appeals had adopted conflicting interpretations, the Commission resolved that disagreement by amending Application Note 1(A), leaving the operative language of U.S.S.G. § 1B1.10(b)(1) unchanged. *See* U.S.S.G. App. C, amend. 759, Reason for Amendment; *United States v. Ornelas*, 825 F.3d at 551-52, 556. Thus, in the same amendment, the Commission demonstrated that it knew how to change the binding policy statement but chose instead to resolve this particular disagreement through commentary. The question presented is whether Congress authorized that choice to have binding effect.

That distinction is not merely one of labels. Congress expressly authorized the Commission to promulgate "general policy statements" concerning application of the Guidelines and specifically concerning sentence modification under § 3582(c). 28 U.S.C. § 994(a)(2)(C). Congress did not similarly authorize the Commission to promulgate commentary as an independent source of binding law. As this Court explained in *Stinson v. United States*, 508 U.S. 36 (1993), although the Sentencing Reform Act recognizes commentary, commentary "unlike a legislative rule, is not the product of delegated authority for rulemaking." 508 U.S. at 44. The Commission itself likewise treats policy statements and commentary as distinct forms of agency action. *See* U.S.S.G. § 1B1.7. And, as the United States acknowledged at oral argument in *Beaird v. United States*, No. 25-5343, commentary cannot "quite be considered the same thing as a policy statement."[2] The distinction matters here because Congress did not make every pronouncement of the Commission binding in § 3582(c)(2). It selected one particular instrument—"applicable policy statements issued by the Sentencing Commission." Treating commentary as independently capable of imposing the same binding eligibility restriction erases the distinction Congress drew and gives commentary authority Congress expressly assigned to policy statements.

5. The Ninth Circuit's Unbriefed Ground of Decision Supports Review Under Rule 10(a)

The Ninth Circuit decided the case on a ground unbriefed by the Parties.

[2] https://www.supremecourt.gov/oral_arguments/argument_transcripts/2026/25-

Applying *Kisor*, the Ninth Circuit held that U.S.S.G. § 1B1.10 itself unambiguously excludes departures and therefore concluded that it could decide Mr. Kheyre's eligibility without relying on Application Note 1(A). *United States v. Kheyre*, 176 F.4th at 1177. But the Commission's own history -- and the decisions that treated Application Note 1(A) as resolving the prior disagreement -- demonstrate why the statutory question cannot simply be avoided by declaring the policy statement unambiguous.

Uncited by the Ninth Circuit was its decision in *United States v. Ornelas*, 825 F.3d 548, 551-52, 556 (9th Cir. 2016), which gave the history of the policy statement and explained that courts of appeals had divided over whether departures were included in the "applicable guideline range" and that the Commission adopted Amendment 759 and revised Application Note 1(A) to resolve that disagreement. Without even a nod to *Ornelas*, the Ninth Circuit reversed course and held that § 1B1.10 had an unambiguous meaning all along. More remarkably, in applying *Kisor* to reach that conclusion, the Ninth Circuit began with another piece of commentary—the definition of "departure" in § 1B1.1, Application Note 1(F). *Kheyre*, 176 F.4th at 1176-77. The resulting reasoning is impossible to square with the history of the provision: the court treated commentary as necessary to establish that the policy statement is unambiguous while simultaneously holding that the commentary adopted specifically to resolve a circuit conflict over that policy statement was unnecessary. Adversarial briefing would

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have allowed the parties to address that tension before it became a published rule governing future § 3582(c)(2) proceedings.

The manner in which the Ninth Circuit reached its decision is not faithful to the record as it does not even mention the argument that Mr. Kheyre made: that policy statements are the only thing that can be considered under § 3582(c)(2). The government defended Application Note 1(A) on the ground that § 1B1.10 was ambiguous and the commentary permissibly resolved that ambiguity. At oral argument, the government expressly told the panel that "you have to use the commentary" and agreed that § 1B1.10 was ambiguous. Although a court of appeals may resolve a properly presented issue on a legal rationale not advanced by the parties, this Court's rules identify as a consideration supporting certiorari whether a court of appeals has "so far departed from the accepted and usual course of judicial proceedings" as to warrant an exercise of this Court's supervisory power. Sup. Ct. R. 10(a). That concern is implicated here because the panel's unbriefed rationale allowed it to avoid the statutory question the parties actually litigated and produced a published rule without adversarial briefing on the Commission's own history, Amendment 759, or *Ornelas*. *See United States v. Sineneng-Smith*, 590 U.S. 371, 375-76 (2020); *Day v. McDonough*, 547 U.S. 198, 210 (2006).

The difficulty is not merely that the Ninth Circuit decided the case on a ground neither party advanced. It is that the ground it selected permitted the court to avoid the statutory question presented while disregarding the Commission's own explanation of why Application Note 1(A) was necessary. The Commission identified

conflicting judicial interpretations of the policy statement and amended its commentary to resolve them. The Ninth Circuit nevertheless held that the policy statement was unambiguous, relying in part on other commentary to reach that conclusion. The result was a published decision that treated commentary as unnecessary to resolve the very question for which the Commission had adopted it, without addressing whether Congress authorized the Commission to impose the disputed limitation through commentary in the first place.

6. *Beaird v. United States*, 146 S. Ct. 2553 (2026).

The importance of the question is independently confirmed by this Court's grant of certiorari in *Beaird v. United States*, No. 25-5343. There, the Court granted review to decide whether *Stinson v. United States*, 508 U.S. 36 (1993), "still correctly states the rule for the deference that courts must give the commentary to the Sentencing Guidelines." *Beaird* concerns the legal force courts should give Guidelines commentary generally. This case presents a narrower and antecedent statutory question: whatever deference commentary may otherwise receive, may commentary impose a binding eligibility restriction where Congress specifically made "applicable policy statements" controlling?

7. The Question Presented is Important and Recurring.

The question presented arises in a large and growing number of cases. Section 3582(c)(2) provides a mechanism for retroactive sentence reductions when the Sentencing Commission lowers guideline ranges. Those proceedings occur

routinely in federal courts and affect thousands of defendants nationwide. *See* U.S. Sentencing Comm'n, *Retroactivity Data Reports*; U.S. Sentencing Comm'n, Annual Sourcebook of Federal Sentencing Statistics. The Commission's recent amendments, including Amendment 821, have generated a new wave of motions seeking relief.

In each such case, courts must determine eligibility for relief under U.S.S.G. § 1B1.10. And in a substantial number of cases, that determination turns not on the text of the policy statement as interpreted through the commentary. Application Note 3 to § 1B1.10 is frequently dispositive, operating as a threshold bar to relief where the defendant's original sentence fell below the amended guideline range. It does not merely affect the extent of a reduction; it determines whether a defendant is eligible for relief at all. And because § 3582(c)(2) proceedings recur whenever the Commission makes amendments retroactive, the issue will continue to arise across the federal system.

This case also presents a suitable vehicle for resolving the question. Although the district court stated alternatively that it would deny a reduction even if Mr. Kheyre were eligible, the Ninth Circuit expressly declined to reach Mr. Kheyre's challenge to that ruling. *Kheyre*, 176 F.4th at 1177. The judgment below therefore rests on the court of appeals' conclusion that Mr. Kheyre was categorically ineligible for relief. If that conclusion is incorrect, the unresolved challenge to the district court's alternative ruling can be addressed on remand.

The importance of the question extends beyond sentencing administration. Congress directed that sentence reductions be governed by policy statements issued

by the Sentencing Commission. Allowing commentary to impose binding eligibility restrictions permits the Commission to exercise authority through a vehicle Congress did not authorize, raising fundamental questions about the allocation of lawmaking authority within the federal sentencing scheme. At bottom, the Congress wrote a law telling the Sentencing Commission to resolve issues regarding retroactive guidelines reductions by policy statements. For whatever reason, the Sentencing Commission did not follow the path that Congress laid out. This agency only exists to the extent Congress enabled it. Congress never gave the Commission the ability to resolve retroactivity issues with binding commentary. This Court's intervention is warranted to ensure that sentence reduction proceedings are governed by the statutory framework Congress enacted, not by extra-statutory limitations imposed by an unelected agency.

CONCLUSION

On the basis of the foregoing, the Court should grant the petition for a writ of certiorari.

DATED: 10/16/2026

Respectfully submitted,

/s/ David Zugman
Counsel for Kheyre