No. 16-66

In the Supreme Court of the United States

ROBERT DAVID MCNEESE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, under *Freeman* v. *United States*, 564 U.S. 522 (2011), petitioner is eligible for a sentence reduction pursuant to 18 U.S.C. 3582(c)(2) based on a retroactive amendment to the Sentencing Guidelines, when petitioner was sentenced after entering a binding Federal Rule of Criminal Procedure 11(c)(1)(C) plea agreement that required a specific sentence that is not expressly tied to the Guidelines.

TABLE OF CONTENTS

Page

Opinions below ... 1
Jurisdiction ... 1
Statement ... 1
Argument ... 10
Conclusion ... 19

TABLE OF AUTHORITIES

Cases:

Brown v. *United States*, 132 S. Ct. 1003 (2012) ... 10
Cutter v. *Wilkinson*, 544 U.S. 709 (2005) ... 13
Dillon v. *United States*, 560 U.S. 817 (2010) ... 2
Freeman v. *United States*, 564 U.S. 522 (2011) ... *passim*
Graham v. *Florida*, 560 U.S. 48 (2010) ... 15
Gregg v. *Georgia*, 428 U.S. 153 (1976) ... 7, 10, 13
Grutter v. *Bollinger*, 539 U.S. 306 (2003) ... 17
Marks v. *United States*, 430 U.S. 188 (1977) ... 7, 10, 13, 15
Nichols v. *United States*, 511 U.S. 738 (1994) ... 14, 17
Pleasant v. *United States*, 134 S. Ct. 824 (2013) ... 10
Romano v. *Oklahoma*, 512 U.S. 1 (1994) ... 15
United States v. *Benitez*, 822 F.3d 807 (5th Cir. 2016) ... 15
United States v. *Brown*, 653 F.3d 337 (4th Cir. 2011), cert. denied, 132 S. Ct. 1003 (2012) ... 15, 16
United States v. *Browne*, 698 F.3d 1042 (8th Cir. 2012), cert. denied, 133 S. Ct. 1616 (2013) ... 15
United States v. *Davis*, 825 F.3d 1014 (9th Cir. 2016) ... 16, 17
United States v. *Dixon*, 687 F.3d 356 (7th Cir. 2012) ... 15
United States v. *Duvall*:
705 F.3d 479 (D.C. Cir. 2013) ... 18
740 F.3d 604 (D.C. Cir. 2013) ... 14, 15, 16, 17

Cases—Continued: Page

United States v. *Elder*, 90 F.3d 1110 (6th Cir.), cert. denied, 519 U.S. 1016 (1996), and 519 U.S. 1131 (1997) 13

United States v. *Epps*, 707 F.3d 337 (D.C. Cir. 2013) 16, 17

United States v. *Garrett*, 758 F.3d 749 (6th Cir. 2014) 7

United States v. *Goddard*, 542 Fed. Appx. 753 (11th Cir. 2013), cert. denied, 134 S. Ct. 1044 (2014) 16

United States v. *Graham*, 704 F.3d 1275 (10th Cir. 2013) 15

United States v. *Lawson*, 686 F.3d 1317 (11th Cir.), cert. denied, 133 S. Ct. 568 (2012) 16

United States v. *Rivera-Martinez*, 665 F.3d 344 (1st Cir. 2011), cert. denied, 133. S. Ct. 212 (2012) 15

United States v. *Thompson*, 682 F.3d 285 (3d Cir. 2012) 15

United States v. *White*, 429 Fed. Appx. 43 (2d Cir. 2011) 16

United States v. *Williams*, 504 U.S. 36 (1992) 13

Statutes, guidelines and rules:

18 U.S.C. 3553(a) 2, 6, 18

18 U.S.C. 3553(e) 12

18 U.S.C. 3582(c) 12, 18

18 U.S.C. 3582(c)(2) .... *passim*

21 U.S.C. 841(a)(1) 4

21 U.S.C. 841(b)(1)(C) 1, 4

21 U.S.C. 846 .... 1, 4

28 U.S.C. 994(a)(2)(C) 2

United States Sentencing Guidelines:

§ 1B1.10(b)(2)(A) 11, 12

Guideline and rules—Continued: Page
§ 1B1.10(b)(2)(B) 11
§ 1B1.10, comment. (n.3) 11
§ 2D1.1(b)(16) (2012) 5
§ 3B1.3 5
§ 3E1.1 5
§ 5K1.1 12
App. C:
Amend. 782 (Supp. Nov. 1, 2014) 6, 7, 10
Amend. 788 (Supp. Nov. 1, 2014) 6
Fed. R. Crim. P.:
Rule 11(c)(1) 18
Rule 11(c)(1)(C) 2, 3, 4, 7, 14
Rule 35(b) 12

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-19) is reported at 819 F.3d 922. The order of the district court (Pet. App. 20-30) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 18, 2016. The petition for a writ of certiorari was filed on July 11, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of Tennessee, petitioner was convicted of conspiracy to distribute and possess with intent to distribute oxycodone, in violation of 21 U.S.C. 841(b)(1)(C) and 846. Pet. App. 31-32. He was sentenced to 63 months of imprisonment, to be followed by three years of supervised re-

lease. *Id.* at 33-34. On May 6, 2015, the district court denied petitioner's motion for a sentencing reduction under 18 U.S.C. 3582(c)(2). Pet. App. 20-30. The court of appeals affirmed. *Id.* at 1-19.

1. A district court generally "may not modify a term of imprisonment once it has been imposed." 18 U.S.C. 3582(c); see *Dillon* v. *United States*, 560 U.S. 817, 819 (2010). A modification may be permissible, however, "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*)." 18 U.S.C. 3582(c)(2). In such a case, Section 3582(c)(2) gives the district court discretion to "reduce the term of imprisonment[] after considering" the statutory sentencing factors set out in 18 U.S.C. 3553(a) —but only "if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. 3582(c)(2); see 28 U.S.C. 994(a)(2)(C) (authorizing the Commission to promulgate policy statements "regarding * * * the sentence modification provisions set forth in section[] * * * 3582(c)").

Federal Rule of Criminal Procedure 11(c)(1)(C) provides that the defendant and the government may agree in a plea agreement on "a specific sentence" as "the appropriate disposition of the case" and that "such a recommendation or request binds the court once the court accepts the plea agreement." In *Freeman* v. *United States*, 564 U.S. 522 (2011), this Court addressed "whether defendants who enter into [Rule 11(c)(1)(C)] plea agreements that recommend a particular sentence as a condition of the guilty plea may be eligible for relief under § 3582(c)(2)" in light of

that provision's requirement that the original sentence have been "based on" the Sentencing Guidelines. *Id.* at 525 (plurality opinion of Kennedy, J.).

Freeman did not produce a majority opinion. A plurality of four Justices concluded that a "district judge's decision to impose a sentence" may be "based on the Guidelines even if the defendant agrees to plead guilty under Rule 11(c)(1)(C)," because the district judge must consider the Guidelines and calculate the defendant's relevant Guidelines range when deciding whether to accept the plea agreement. 564 U.S. at 526, 529-534 (plurality opinion). According to the plurality, "[Section] 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.

Concurring in the judgment, Justice Sotomayor concluded that a sentence imposed pursuant to a Rule 11(c)(1)(C) agreement generally will be "based on" the agreement itself, not on the district court's Guidelines calculations, because such an agreement is binding once accepted and, "[a]t the moment of sentencing, the court simply implements the terms of the agreement it has already accepted." *Freeman*, 564 U.S. at 535-536. That is so even though "the parties to a [Rule 11(c)(1)(C)] agreement may have considered the Guidelines in the course of their negotiations." *Id.* at 537; see *id.* at 538 (rejecting argument that courts must "engage in a free-ranging search through the parties' negotiating history in search of a Guidelines sentencing range that might have been relevant to the agreement or the court's acceptance of it"). Justice

Sotomayor further concluded, however, that "if a [Rule 11(c)(1)(C)] agreement expressly uses a Guidelines sentencing range applicable to the charged offense to establish the term of imprisonment, and that range is subsequently lowered by the United States Sentencing Commission, the term of imprisonment is 'based on' the range employed and the defendant is eligible for sentence reduction under § 3582(c)(2)." *Id.* at 534; accord *id.* at 536-540. In finding that standard met in Freeman's case, Justice Sotomayor noted that the plea agreement expressly stated that Freeman "agrees to have his sentence determined pursuant to the Sentencing Guidelines" and that the "agreement employed * * * the bottom end" of the applicable Guidelines range. *Id.* at 542 (citation omitted).

Chief Justice Roberts, writing for himself and three other justices, dissented, concluding that a defendant who pleads guilty in exchange for a specific sentence pursuant to a Rule 11(c)(1)(C) agreement is never eligible for a sentence reduction under Section 3582(c)(2). The dissent reasoned that the sentence of a defendant who enters a Rule 11(c)(1)(C) agreement is always "based on" the agreement. *Freeman*, 564 U.S. at 544-546 (Roberts, C.J., dissenting).

2. In November 2012, petitioner pleaded guilty pursuant to a Rule 11(c)(1)(C) plea agreement to one count of conspiracy to distribute and possess with intent to distribute oxycodone, in violation of 21 U.S.C. 846 and 21 U.S.C. 841(a)(1) and (b)(1)(C). Pet. App. 31-32; see Plea Agreement 1-11. The agreement stated that petitioner and the government "agree that a sentence of 63 months in prison * * * is the appropriate disposition of this case" and that "this sentence takes into account the cooperation and assistance pro-

vided to law enforcement in this investigation." Plea Agreement 6. The plea agreement also provided that petitioner was responsible for an oxycodone equivalent of 2999.92 kilograms of marijuana. *Id.* at 5-6. But "[a]side from some language limiting the scope of [petitioner's] waiver of appeal," the plea agreement "nowhere mentioned or adverted to the Sentencing Guidelines or any range of punishment from which the sixty-three-month sentence derived." Pet. App. 5.

In advance of sentencing, the probation office prepared a Presentence Investigation Report (PSR), which applied the 2012 Sentencing Guidelines. The PSR concluded that petitioner was responsible for the oxycodone equivalent of 2999.925 kilograms of marijuana, corresponding to a base offense level of 32. Pet. App. 5; PSR ¶¶ 28-29. The PSR also applied a two-level enhancement for abusing a position of trust (Sentencing Guidelines § 3B1.3); a three-level reduction for acceptance of responsibility (Sentencing Guidelines § 3E1.1); and a two-level reduction under the "safety-valve" provision (Sentencing Guidelines § 2D1.1(b)(16) (2012)). See Pet. App. 5-6. The resulting offense level of 29, combined with a criminal history category of I, yielded an advisory Guidelines sentencing range of 87 to 108 months of imprisonment. *Id.* at 6.

At sentencing, the district court—expressing concern that the 63-month sentence contemplated by the parties in the plea agreement might be too low—explained that it could "accept the plea agreement and impose the agreed upon sentence or reject the plea agreement and give the defendant an opportunity to withdraw his guilty plea." Pet. App. 6 (internal ellipsis omitted). The government advocated for the 63-

month sentence, stating that petitioner had accepted responsibility and assisted law enforcement and that "all that has been factored into this agreed upon sentence." *Ibid.* The government also told the court that "a 3 level reduction" from the Guidelines range set forth in the PSR would yield a range of "63 to 78 months." 6/3/13 Sent. Tr. (Tr.) 4; see *id.* at 7.

The district court ultimately accepted the plea agreement, stated that petitioner had "gotten the benefit of what in effect is a downward departure motion," and sentenced petitioner to 63 months of imprisonment. Pet. App. 6; see Tr. 36-37 (court accepting plea agreement and stating that it "takes into account the nature and circumstances of the offense, takes into account [petitioner's] history and characteristics, it takes into account the advisory Guidelines range because even though the sentence agreed upon is 24 months below the bottom of the otherwise applicable guideline range * * * there are easily explainable and identifiable bases for doing that; and the agreement takes into account all the factors set forth in" 18 U.S.C. 3553(a)). In the Statement of Reasons accompanying the judgment, the court stated that the sentence was "outside the advisory guideline system" and "imposed pursuant to * * * [a] binding plea agreement"—and the court did not check the box for a non-Guidelines sentence imposed pursuant to a "government motion." 6/24/13 Statement of Reasons 3; see Pet. App. 23.

3. In 2014, the United States Sentencing Commission issued Amendment 782 to the Sentencing Guidelines which, when made retroactive by Amendment 788, had the effect of lowering the base offense level for a defendant like petitioner by two levels. Pet.

App. 7, 24. On November 25, 2014, petitioner invoked Amendment 782 and asked the district court to reduce his sentence under 18 U.S.C. 3582(c)(2). Pet. App. 7.

The district court denied the motion. Pet. App. 20-30. The court concluded that petitioner was not eligible for relief under Section 3582(c)(2) because he "was sentenced pursuant to an 11(c)(1)(C) plea agreement" and not "based on" a Sentencing Guidelines range that was later reduced. *Id.* at 24-30.

The district court explained that in *United States* v. *Garrett*, 758 F.3d 749 (6th Cir. 2014), the Sixth Circuit held that Justice Sotomayor's concurrence in *Freeman* was the controlling opinion of the Court under *Marks* v. *United States*, 430 U.S. 188 (1977), which provides that in a case that lacks a majority opinion the Court's holding is "that position taken by those Members who concurred in the judgment[] on the narrowest grounds." *Id.* at 193 (quoting *Gregg* v. *Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, J.)); see Pet. App. 24-25 (citing *Garrett*, 758 F.3d at 755). The standard set forth in the *Freeman* concurrence, the district court explained, is that "for [a] defendant" sentenced pursuant to a Rule 11(c)(1)(C) plea agreement "to be eligible for a sentence reduction under § 3582(c)(2), the agreement must employ[] a particular Guidelines sentencing range to establish the term of imprisonment." Pet. App. 26 (brackets in original) (quoting *Garrett*, 758 F.3d at 757) (citation and internal quotation marks omitted). Under that standard, "what the sentencing judge said and did is largely irrelevant; instead, what matters" for making the "based on" determination called for under Section 3582(c)(2) "is the agreement itself." *Id.* at. 25 (citation and internal quotation marks omitted).

The district court ruled that in this case the plea agreement did not refer to the Guidelines or employ any Guidelines sentencing range in setting the 63-month sentence. Pet. App. 28-30. Indeed, the court stated, "the Plea Agreement neither lists the base offense level for the agreed-upon amount of drugs, the defendant's suspected criminal history category, nor a specific guidelines range," and thus "fails to supply" even "enough information for the Court to make the necessary inferences to calculate a specific range." *Id.* at 28-29; see *id.* at 29.

4. The court of appeals affirmed. Pet. App. 1-19. The court agreed that Justice Sotomayor's opinion in *Freeman* is controlling and that under that opinion "a Rule 11(c)(1)(C) sentence may be 'based on' a sentencing range for purposes of 18 U.S.C. 3582(c)(2)" only "if 'the basis for the specified term is a Guidelines sentencing range' that is 'evident from the plea agreement.'" *Id.* at 2 (quoting *Freeman*, 564 U.S. at 539 (Sotomayor, J., concurring in the judgment)); see *id.* at 11-12. In other words, the court explained, a "defendant's sentence—for purposes of § 3582(c)(2)—is based on a guideline range *only when* that guideline range is *explicitly* referenced in a plea agreement." *Id.* at 12 (brackets and internal quotation marks omitted).

In this case, the court of appeals found, petitioner's "plea agreement makes no mention of a Guidelines sentencing range, nor is it evident in any other way from the agreement that his sentence is based on such a range." Pet. App. 3; see *id.* at 12-13 (petitioner's "plea agreement nowhere mentions a sentencing range"); *id.* at 14 ("no sentencing range is 'evident' from [petitioner's] plea agreement"); *id.* at 15 ("no

indication" in the plea agreement "that [petitioner's] sixty-three-month sentence had anything to do with the Guidelines"). Accordingly, the court stated, "[t]his is exactly the kind of case that Justice Sotomayor explained does not satisfy § 3582(c)(2)." *Ibid.*; see *ibid.* ("if a Rule 11(c)(1)(C) agreement does not contain any references to the Guidelines, there is no way of knowing whether the agreement used a Guidelines sentencing range to establish the term of imprisonment") (brackets and internal quotation marks omitted). The court noted that while the *Freeman* agreement "gave Justice Sotomayor *all* of the tools necessary to calculate a Guidelines sentencing range," including "an offense level and a criminal-history category," petitioner's "plea agreement does not." *Id.* at 14; see *id.* at 16 ("it would have required clairvoyance to conclude" from the plea agreement that petitioner's 63-month sentence was somehow justified, as petitioner claimed, by "a downward adjustment of exactly three levels under the flexible downward-departure provision of § 5K1.1" and by application of other particular Guidelines provisions); *ibid.* ("nothing in [Justice Sotomayor's] *Freeman* concurrence suggests that the parties' knowledge, unexpressed or later expressed, should make any difference so long as a sentencing range is not evident from the agreement itself") (brackets and internal quotation marks omitted).

The court of appeals also rejected petitioner's argument that his plea agreement is ambiguous and that principles of lenity therefore counsel in favor of affording him Section 3582(c)(2) relief. Pet. App. 17-18. The court relied on the fact that petitioner's plea agreement "includes *no* reference to a Guidelines range or, for that matter, to § 2D1.1(c)" of the Sen-

tencing Guidelines (the drug quantity provision that was retroactively amended by Amendment 782). *Id.* at 19. Moreover, the court observed, even if the agreement were ambiguous, such ambiguity would work against petitioner "since it is hard to see how an ambiguous reference [to the Guidelines] could be explicit or express." *Ibid.* (brackets and internal quotation marks omitted).

ARGUMENT

Petitioner contends (Pet. 7-19) that this Court's review is warranted to resolve a conflict about whether Justice Sotomayor's concurring opinion in *Freeman* v. *United States*, 564 U.S. 522 (2011), is controlling. This case presents a poor vehicle for resolving that question, because petitioner is ineligible for the relief he sought in the district court regardless of which *Freeman* opinion controls. In any event, the court of appeals correctly decided that Justice Sotomayor's *Freeman* opinion represents the "position taken by those Members who concurred in the judgment[] on the narrowest grounds," *Marks* v. *United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg* v. *Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, J.)), and this Court's review of that decision is not warranted.[1]

1. This case is not an appropriate vehicle for review of the question presented in the petition because petitioner could not obtain any relief even if that question were resolved in his favor. He is ineligible for modification of his term of imprisonment pursuant to

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[1] This Court has previously denied review in cases raising the issue of whether Justice Sotomayor's *Freeman* opinion is controlling. See, *e.g.*, *Pleasant* v. *United States*, 134 S. Ct. 824 (2013); *Brown* v. *United States*, 132 S. Ct. 1003 (2012).

Section 3582(c)(2) under the *Freeman* plurality's interpretation of that provision as well as under Justice Sotomayor's interpretation.

Section 3582(c)(2) allows for a sentencing reduction only "if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. 3582(c)(2). Such "binding policy statement[s] governing § 3582(c)(2) motions place[] considerable limits on district court discretion." *Freeman*, 564 U.S. at 531 (plurality opinion).

One such policy statement provides that a district court "shall not reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) * * * to a term that is less than the minimum of the amended guideline range." Sentencing Guidelines § 1B1.10(b)(2)(A). Only a single exception to that bar exists: when "the term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing *pursuant to a government motion to reflect the defendant's substantial assistance to authorities*." Sentencing Guidelines § 1B1.10(b)(2)(B) (emphasis added).

That exception is not satisfied here. Although the plea agreement and the government's position at sentencing reflected that the 63-month term of imprisonment set forth in the plea agreement related in part to petitioner's assistance, the government never made a motion for a substantial-assistance reduction. See Sentencing Guidelines § 1B1.10, comment. (n.3) (discussing the limitation in Section 1B1.10(b)(2)(B), emphasizing the requirement that the initial sentence be imposed pursuant to a government substantial-assistance motion, and identifying the three specific

"provisions authorizing such a government motion": Sentencing Guidelines § 5K1.1, 18 U.S.C. 3553(e), and Fed. R. Crim. P. 35(b)). In denying petitioner's request for Section 3582(c)(2) relief, the district court acknowledged that its sentence was not "pursuant to" any such government motion.[2] See Pet. App. 22 n.1 ("Section 1B1.10 provides one exception to the rule that a defendant may not receive a sentence below the amended guideline range—namely, if the defendant originally received a below-guideline sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities. That is not the case here.") (citation and internal quotation marks omitted); see also 6/24/13 Statement of Reasons 3 (checking the box for a sentence "imposed pursuant to" a "binding plea agreement" and leaving blank the box for a non-Guidelines sentence imposed pursuant to "government motion").

Accordingly, if petitioner were resentenced under Section 3582(c), the lowest sentence he could receive would be "the minimum of the amended guideline range." Sentencing Guidelines § 1B1.10(b)(2)(A). Here, the minimum of the amended range is 70 months of imprisonment, see Pet. App. 24—a sentence that is seven months longer than the 63-month term of imprisonment that the district court already imposed, and that petitioner presumably therefore does not want. The plurality's approach in *Freeman* to interpreting the "based upon" language in Section 3582(c)(2) would not alter that result, because the plurality did not authorize district courts to disregard the requirement in that provision to hew to the Sentencing Com-

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[2] The government also made this argument in the court of appeals, see Gov't C.A. Br. 15-17, but the court did not reach it.

mission's binding policy statements. This Court's consideration of whether the *Freeman* plurality's approach should be applied by lower courts, and of how lower courts should approach a set of opinions like the ones in *Freeman*, see Pet. 18-19, therefore could not change the outcome of petitioner's case in any way.[3]

2. In any event, the court of appeals was correct that Justice Sotomayor's concurring opinion in *Freeman* constitutes the controlling opinion of the Court, Pet. App. 11-12, and further review of that determination is not warranted.[4]

a. The general rule for ascertaining the holding of a case that lacks a majority opinion is that "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment[] on the narrowest grounds." *Marks*, 430 U.S. at 193 (quoting *Gregg*, 428 U.S. at 169 n.15). In some cases, there may be no "'narrowest grounds' that represents

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[3] In addition, this case is a poor vehicle because petitioner did not raise his current argument in the court of appeals, where he argued only that he qualified for relief under application of Justice Sotomayor's "controlling" approach. Pet. C.A. Br. 1. Although an existing precedent in that court had found that Justice Sotomayor's *Freeman* opinion governed the analysis, see *id.* at 20, petitioner should nevertheless have preserved the issue. See *United States* v. *Williams*, 504 U.S. 36, 41 (1992); see also *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view."). Contrary to petitioner's contention (Pet. 17), a single "but see" citation to a contrary authority was insufficient to alert the court to a challenge to circuit law. See, *e.g.*, *United States* v. *Elder*, 90 F.3d 1110, 1118 (6th Cir.), cert. denied, 519 U.S. 1016 (1996), and 519 U.S. 1131 (1997).

[4] The petition presents only the question whether Justice Sotomayor's concurring opinion in *Freeman* controls, see Pet. i; it does not seek review of the court of appeals' application to petitioner's case of the rule of decision set forth in that opinion.

the Court's holding," *Nichols* v. *United States*, 511 U.S. 738, 745 (1994), but *Freeman* is not such a case.

In *Freeman*, Justice Sotomayor took a narrower view than the plurality of when a Rule 11(c)(1)(C) defendant is eligible for a sentence reduction. The plurality stated that a defendant is eligible for Section 3582(c)(2) relief "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," 564 U.S. at 530 (plurality opinion), but Justice Sotomayor concluded that eligibility exists only if the plea agreement tied the recommended sentence to the Guidelines range in express terms, *id.* at 534-535 (Sotomayor, J., concurring in the judgment).

Under the plurality's standard, the district court invariably will use the Guidelines range in question to approve the agreement or to sentence the defendant where the agreement itself "expressly use[d]" (*Freeman*, 564 U.S. at 534-535 (Sotomayor, J., concurring in the judgment)) that range to arrive at the stipulated sentence. The opinion concurring in the judgment is therefore narrower than the plurality opinion and represents the controlling standard for Section 3582(c)(2) eligibility in cases involving a Rule 11(c)(1)(C) agreement. See *id.* at 532 (plurality opinion) (noting that Justice Sotomayor's concurring opinion reflects "an intermediate position"); see also, *e.g.*, *United States* v. *Duvall*, 740 F.3d 604, 611-612 (D.C. Cir. 2013) (Kavanaugh, J., concurring in denial of rehearing en banc) (stating that the plurality in *Freeman* concluded that "sentences in cases with Rule 11(c)(1)(C) plea agreements are *always* 'based on' a Guidelines sentencing range," the dissenters "con-

cluded that Rule 11(c)(1)(C) sentences are *never* 'based on' a Guidelines sentencing range," and Justice Sotomayor "concluded that Rule 11(c)(1)(C) sentences are *sometimes* 'based on' a Guidelines sentencing range," and observing that "'sometimes' is a middle ground between 'always' and 'never'"); see generally *Graham* v. *Florida*, 560 U.S. 48, 59-60 (2010); *Romano* v. *Oklahoma*, 512 U.S. 1, 9 (1994); *Marks*, 430 U.S. at 193-194.[5]

The dissent in *Freeman* acknowledged that the standard in Justice Sotomayor's opinion concurring in the judgment would be the one applied by courts going forward. 564 U.S. at 550-551 (Roberts, C.J., dissenting). And ten courts of appeals have concluded that Justice Sotomayor's opinion is controlling. See Pet. App. 11-12; *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 (8th Cir. 2012), cert. denied, 133 S. Ct. 1616 (2013); *United States* v. *Dixon*, 687 F.3d 356, 359-360 (7th Cir. 2012); *United States* v. *Thompson*, 682 F.3d 285, 289-290 (3d Cir. 2012); *United States* v. *Rivera-Martinez*, 665 F.3d 344, 347-348 (1st

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[5] Put another way, a majority of the *Freeman* Court would agree with whatever result flowed from the application of Justice Sotomayor's concurring opinion. "[W]hen Justice Sotomayor concludes that a plea agreement was based on the Guidelines, she would agree with the result reached under [the plurality opinion]. When she concludes that a plea agreement was not based on the Guidelines, she would agree with the result reached under [the dissenting opinion]." *Duvall*, 740 F.3d at 612 (Kavanaugh, J., concurring in denial of rehearing en banc); see, *e.g.*, *United States* v. *Brown*, 653 F.3d 337, 340 & n.1 (4th Cir. 2011), cert. denied, 132 S. Ct. 1003 (2012); *United States* v. *Rivera-Martinez*, 665 F.3d 344, 347-348 (1st Cir. 2011), cert. denied, 133 S. Ct. 212 (2012).

Cir. 2011), cert. denied, 133 S. Ct. 212 (2012); *United States* v. *White*, 429 Fed. Appx. 43, 47 (2d Cir. 2011) (unpublished); *United States* v. *Brown*, 653 F.3d 337, 340 & n.1 (4th Cir. 2011), cert. denied, 132 S. Ct. 1003 (2012); see also *United States* v. *Lawson*, 686 F.3d 1317, 1321 n.2 (11th Cir.) (per curiam) (stating that Justice Sotomayor's opinion "can be viewed as the holding in *Freeman*"), cert. denied, 133 S. Ct. 568 (2012); *United States* v. *Goddard*, 542 Fed. Appx. 753, 755 (11th Cir. 2013) (per curiam) (unpublished) (stating that "in *Lawson* we noted that Justice Sotomayor's concurrence is the holding in *Freeman*"), cert. denied, 134 S. Ct. 1044 (2014).

b. Petitioner relies on decisions of the D.C. Circuit and the Ninth Circuit adopting the approach taken in the *Freeman* plurality opinion. See Pet. 16-17 (citing *United States* v. *Davis*, 825 F.3d 1014 (9th Cir. 2016) (en banc), and *United States* v. *Epps*, 707 F.3d 337 (D.C. Cir. 2013)). Those courts concluded that they were free to adopt that approach on the ground that "there is no controlling opinion in *Freeman*," *Epps*, 707 F.3d at 350, because "no rationale" was "common to a majority of the Justices," *Davis*, 825 F.3d at 1016. In a few scenarios, they asserted, a defendant would prevail under Justice Sotomayor's approach but not under the plurality's, and thus the plurality's opinion is in some respects the narrower one. See *Epps*, 707 F.3d at 350; *id.* at 351-352; *Davis*, 825 F.3d at 1016, 1023-1024.

That conclusion is incorrect. "[I]n splintered cases, there are multiple opinions precisely *because* the Justices did not agree on a common rationale." *Duvall*, 740 F.3d at 613 (Kavanaugh, J., concurring in denial of rehearing en banc). And no scenario exists under

which a defendant could prevail under Justice Sotomayor's approach but the plurality would disagree. For instance, if a sentencing court considers and rejects a stipulated-to Guidelines range in a plea agreement on policy grounds but nevertheless imposes the agreed-upon sentence without regard to that range—one of the scenarios on which *Davis* and *Epps* relied, see *Davis*, 825 F.3d at 1023-1024 (citing *Epps*, 707 F.3d at 350 n.8)—then Section 3582(c)(2) relief would be available under both the plurality opinion in *Freeman* and under Justice Sotomayor's concurring opinion, because the plea agreement expressly contemplated a Guidelines range and the judge expressly used the Guidelines range as the starting point for determining what sentence to impose. See *Freeman*, 564 U.S. at 529 (plurality opinion) ("Even where the judge varies from the recommended range, * * * 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 sense a basis for the sentence."); *id.* at 539 (Sotomayor, J., concurring in the judgment); see also *Davis*, 825 F.3d at 1037-1038 (Bea, J., dissenting); *Duvall*, 740 F.3d at 614-615 (Kavanaugh, J., concurring in denial of rehearing en banc).

c. In any event, disagreement in the courts of appeals about the application of *Freeman* is of limited significance and does not warrant this Court's review.[6]

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[6] When the Court has chosen to review a dispute about the application of *Marks* to a fractured decision, it has revisited the underlying question addressed in that decision rather than "pursu[ing] the *Marks* inquiry to the utmost logical possibility." *Nichols*, 511 U.S. at 745-746; see *Grutter* v. *Bollinger*, 539 U.S. 306, 325 (2003). Petitioner does not advance that approach here. And this case

Which of the *Freeman* opinions controls is "likely to be a relatively short-lived issue for the courts," because plea agreements can—as Justice Sotomayor's *Freeman* opinion suggested—be drafted to avoid any controversies about whether the sentence set forth in such an agreement is "based upon" the Guidelines. See *United States* v. *Duvall*, 705 F.3d 479, 484 n.2 (D.C. Cir. 2013) ("At oral argument, the Assistant U.S. Attorney indicated that the U.S. Attorney's Office now drafts Rule 11(c)(1)(C) plea agreements with an eye to avoiding later litigation on the *Freeman* issue. Doing so is consistent with Justice Sotomayor's suggestion.") (citing *Freeman*, 564 U.S. at 541-542 (Sotomayor, J., concurring in the judgment)). And even where the plea agreement in question predates such drafting improvements, the difference between the approach taken by the plurality and the approach taken by Justice Sotomayor matters in only a small subset of cases: those in which the district court accepts a Rule 11(c)(1) plea agreement that contains a binding sentence, the agreement fails to mention the Guidelines as a basis for the sentence but the district court relies on the Guidelines as part of its analytical framework, the Sentencing Commission subsequently lowers the relevant sentencing range retroactively while the defendant is still serving the sentence, a motion for Section 3582(c) relief is made, the Commission's binding policy statements do not bar the defendant from obtaining that relief, and the district court would exercise its discretion to permit relief (while taking into account applicable factors set forth in 18 U.S.C. 3553(a) and the advantages already

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would be a poor vehicle for clarifying the *Marks* analysis for the reasons discussed in the text.

gained by the defendant in connection with the plea agreement, such as dismissal of other charges). Petitioner's own case does not fit within that narrow subset. See pp. 11-12, *supra* (citing Pet. App. 22 n.1).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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