No. 16-999

In the Supreme Court of the United States

RAYMOND NEGRÓN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST 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.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 837 F.3d 91. The order of the district court (Pet. App. 32a-33a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 14, 2016. On November 30, 2016, Justice Breyer extended the time within which to file a petition for a writ of certiorari to and including February 11, 2017, and the petition was filed on February 10, 2017. 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 District of New Hampshire, petitioner was convicted of distributing a controlled substance, in violation of 21 U.S.C. 841(a)(1); selling a

firearm to a prohibited person, in violation of 18 U.S.C. 922(d)(1); possessing an unregistered firearm, in violation of 26 U.S.C. 5861(d), 5841, and 5871; and possessing a firearm with an obliterated serial number, in violation of 18 U.S.C. 922(k). Pet. App. 69a-71a. He was sentenced to 144 months of imprisonment, to be followed by three years of supervised release. *Id.* at 72a-74a. In July 2015, the district court denied petitioner's motion for a sentencing reduction under 18 U.S.C. 3582(c)(2). Pet. App. 32a-33a. The court of appeals affirmed. *Id.* at 1a-9a.

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). If a defendant meets that requirement, the district 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." *Ibid.*

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. a. In 2011 and 2012, petitioner repeatedly sold oxycodone and cocaine to a confidential source. Plea Agreement 7-10. Petitioner also sold an assault rifle to the confidential source for $1200, even though petitioner knew that the purchaser was a convicted felon. *Ibid.*

In March 2012, law enforcement officers executed a no-knock warrant to search petitioner's home and found petitioner inside "wielding a machete over his head in such a way [that] it appeared to the officers that he was going to charge at them." Plea Agreement 10. Inside the apartment, officers discovered, among other things, scales, cell phones, night vision glasses, multiple watches and other pieces of jewelry, drugs (including some "located behind a ceiling tile in the kitchen area"), a sawed-off shotgun with an obliterated serial number, and ammunition. *Id.* at 11.

b. On August 22, 2012, petitioner was charged with various controlled substances offenses and firearms offenses. In June 2013, pursuant to a Rule 11(c)(1)(C) plea agreement, petitioner pleaded guilty to distribution of oxycodone and cocaine; possession with intent to distribute oxycodone and cocaine; unlawful sale of a firearm to a prohibited person; possession of an unregistered firearm; and possession of a firearm with an obliterated serial number. Plea Agreement 1. The plea agreement stated that the government would move to dismiss the remaining count of the indictment: possession of a short-barreled shotgun during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c). Plea Agreement 2, 14 (stating that "[i]nherent in this agreement is an understanding * * * that the United States will forebear from prosecuting its charged violation of [18 U.S.C.] 924(c)"); see Pet. App. 3a. That count carried a mandatory minimum sentence of 120 months of imprisonment consecutive to any other sentence imposed. See *ibid.*

The plea agreement also addressed sentencing. Plea Agreement 2, 14; see Pet. App. 3a. The parties agreed to "jointly recommend that the court impose a

sentence of 144 months [of imprisonment], which they further agree is a reasonable and appropriate disposition in this case." Plea Agreement 14; see *id.* at 18-20 (waiver of petitioner's right to challenge his sentence on appeal or on collateral review). The plea agreement "did not state a base level offense, applicable Guidelines range, or criminal history category." Pet. App. 3a. It referred to the Guidelines only to state that the district court was "required to consider the United States Sentencing Guidelines as advisory guidelines," Plea Agreement 13; see *id.* at 13-14 (explaining that "any estimate" petitioner may have received of "the probable sentence or the probable sentencing range within the advisory Sentencing Guidelines" was "not binding"), and to set forth the government's agreement not to oppose a finding of acceptance of responsibility if petitioner met the requirements, *id.* at 15-16.

At a Rule 11 hearing, petitioner stated that he understood that his plea agreement "is binding on the court" and that "if the court determines that it will accept that agreement, then it will impose the sentence that [he] and the government have agreed to." 6/10/13 Rule 11 Tr. 9. Petitioner also stated that he understood that he had agreed to be sentenced to 144 months of imprisonment and that he would benefit from that agreement through the government's dismissal of the Section 924(c) count, which carries a lengthy mandatory minimum sentence. *Id.* at 9-10.

c. In advance of sentencing, the Probation Office prepared a Presentence Investigation Report (PSR), which applied the 2012 Guidelines. PSR ¶ 31. The PSR stated that petitioner was responsible for the marijuana equivalent of 157.709 kilograms (because he

was responsible for 18.27 grams of oxycodone and 176.5 grams of cocaine), which corresponded with a base offense level of 26. PSR ¶ 32. The PSR then applied a two-level enhancement because petitioner possessed a firearm in connection with the offense (Sentencing Guidelines § 2D1.1(b)(1)) and a three-level reduction for acceptance of responsibility (Sentencing Guidelines § 3E1.1). PSR ¶¶ 33, 47-48. The resulting total offense level of 25, combined with a criminal history category of I, yielded an advisory Guidelines sentencing range of 57 to 71 months of imprisonment. PSR ¶¶ 49, 57, 83. The PSR noted that the plea agreement contains "a binding stipulation that the parties will request a 144-month term of imprisonment in this case which is above the advisory guideline range as determined by the probation officer." PSR ¶ 84.

d. At sentencing, the district court accepted the PSR (with exceptions that are not relevant here) and agreed that petitioner had a total offense level of 25 and a criminal history category of I, with a resulting advisory Guidelines sentencing range of 57 to 71 months of imprisonment. Pet. App. 3a; see *id.* at 55a-58a. As the parties requested, the court sentenced petitioner to the agreed-upon sentence of 144 months of imprisonment. *Id.* at 61a.

In imposing sentence, the district court explained that it had "considered the sentencing range under the advisory guidelines, the policies underlying those guidelines, and all of the sentencing factors set forth in [18 U.S.C.] 3553(a)." Pet. App. 64a. Among other things, the court highlighted (1) the parties' stipulated sentence in the Rule 11(c)(1)(C) plea agreement and the government's promise in that agreement to move

to dismiss the Section 924(c) count; (2) the "significant amount of drugs" involved in petitioner's "serious" offenses; and (3) the fact that the "gun offenses aggravate the nature of this case." *Id.* at 64a-65a. The court also noted that the recommended 144-month sentence "is slightly over twice the high end of the advisory guideline in this case" and that "[i]n recommending th[e 144-month] sentence, the parties have considered the defendant's age, his lack of a serious criminal record, the fact that he has had no previous criminal incarceration and the fact that the government agreed to dismiss Count 9 which carried a mandatory minimum 120-month consecutive imprisonment." *Ibid.*

The district court concluded that the 144-month sentence is "justified under all of the circumstances in this case." Pet. App. 66a. The court explained that the sentence is "sufficient, but it is not more than necessary," to punish petitioner, to deter him and others, to promote respect for the law and protect society, to account for "the rationale presented by the parties for their 11(c)(1)(C) recommendation, which included the dismissal of Count 9," and to account for petitioner's individual characteristics. *Ibid.*

3. In May 2015, the district court's clerk's office notified petitioner that he was "potentially eligible to seek a sentence reduction" under Amendment 782 to the Sentencing Guidelines, and the court appointed counsel to represent him in the matter. D. Ct. Doc. 44 (May 5, 2015); Sentencing Guidelines App. C Supp., Amend. 782 (Nov. 1, 2014). In a subsequent Supplemental PSR, the Probation Office stated that petitioner was ineligible for a Section 3582(c)(2) sentence reduction because his "plea agreement did not ex-

pressly use a guideline sentencing range to establish the * * * term of imprisonment." Supp. PSR ¶ 6 (citing *Freeman*).

Petitioner argued that he was eligible for a reduction under Justice Sotomayor's *Freeman* concurrence and that the district court should reduce his sentence to 115 months of imprisonment. See Pet. Sent. Mem. 1-7; Pet. App. 12a-15a. The government disagreed, noting that the plea agreement did not set forth a Guidelines range or the information that one would need to derive such a range. See, *e.g.*, D. Ct. Doc. 51, at 2-3 (July 1, 2015). The government also explained that the 144-month sentence was well above the high end of the Guidelines range "because the government forbore a 924(c) offense that would have been 120 months, so there's a whole constellation of facts beyond the guideline range that went into this stipulated disposition that the parties reached about what is the appropriate resolution of the case." Pet. App. 21a; see *id.* at 23a (government arguing that "this sentence wasn't really based on the guidelines, it was based on the government's decision to forebear").

Relying "reluctantly" on the First Circuit's decision in *United States* v. *Rivera-Martínez*, 665 F.3d 344 (2011), cert. denied, 133 S. Ct. 212 (2012), which held that Justice Sotomayor's opinion in *Freeman* controls, see *id.* at 348, the district court denied relief. Pet. App. 29a. The court stated that if petitioner had been eligible for a sentence reduction, the court would have reduced his sentence to 116 months. *Ibid.*

4. The court of appeals affirmed. Pet. App. 1a-9a. The court applied *Rivera-Martínez* and concluded that, because petitioner's plea agreement contained neither a base offense level nor a criminal history

category, his term of imprisonment was not "based on a Guidelines sentencing range." *Id.* at 5a-6a.

The court of appeals rejected petitioner's arguments that a Guidelines range could be inferred from the plea agreement. First, the court ruled that "the fact that the district court performed Guidelines calculations before deciding whether to accept the agreement" does not establish that the sentence was "based on" the Guidelines, because district courts are required, even under Rule 11(c)(1)(C), to "calculate the defendant's base offense level and [criminal history category] to determine whether the sentence negotiated by the parties is acceptable." Pet. App. 6a-7a (brackets and internal quotation marks omitted).

Second, the court of appeals concluded that "[t]he inclusion of admitted facts" in the plea agreement "does not necessarily demonstrate that th[e] parties intended to base [petitioner's] sentence on a particular base offense level." Pet. App. 7a. The court observed that those facts "merely helped the district court perform the Guidelines analysis necessary to its review of the agreement"—as evidenced by the fact that the district court relied on the PSR, which contained information outside of the four corners of the plea agreement, to determine petitioner's criminal history category. *Ibid.*

Third, the court of appeals concluded that the plea agreement did not "implicitly reference[]" a criminal history category. Pet. App. 7a. The court explained that the absence of any reference to a criminal history category in the plea agreement could well mean that that the parties "view[ed] other factors besides [petitioner's] Guidelines range as important to determining his sentence." *Id.* at 7a-8a.

Fourth, the court of appeals disagreed with petitioner's argument that the "plea agreement must have been based on a Guidelines sentencing range because his stipulated sentence is roughly double the high end of the Guidelines sentencing range." Pet. App. 8a. That fact, the court reasoned, could be explained by the district court's decision to "factor[] into its [sentencing] analysis" the government's agreement "to dismiss count nine of [the] indictment, which carried a mandatory minimum consecutive sentence of 120 months' imprisonment." *Ibid.*; see *ibid.* ("In other words, non-Guidelines factors also explained [petitioner's] proposed sentence.").

Finally, the court of appeals rejected petitioner's contention that his sentence was based on the Guidelines because the plea agreement, in a few "generic" references, stated that the district court would consider the advisory Guidelines range and that the government would not oppose a reduction for acceptance of responsibility. Pet. App. 8a-9a. The court of appeals reasoned that those references show only "that the Guidelines would play some amorphous role in the parties' negotiations and the district court's analysis of the plea" and do not establish that petitioner's "term of imprisonment was based on a Guidelines sentencing range." *Id.* at 9a.

ARGUMENT

Petitioner contends (Pet. 7-27) 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 issue, most notably because petitioner never raised the issue at any earlier stage in this case. In any event, the

court of appeals correctly decided that Justice Sotomayor's concurring opinion in *Freeman* 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.)); see Pet. App. 5a, and petitioner does not dispute that the court correctly applied that opinion to deny relief. This Court's review of that decision is not warranted.[1]

1. Although petitioner now contends (Pet. 23-27) that Justice Sotomayor's concurring opinion in Freeman should not be regarded as controlling, petitioner failed to raise that argument in either the district court or the court of appeals. Instead, he argued in both courts that Justice Sotomayor's opinion provided the framework for analysis of his Section 3582(c)(2) eligibility.

In the district court, petitioner acknowledged, and did not challenge, the court of appeals' earlier holding that Justice Sotomayor's opinion in *Freeman* controls. See Pet. Sent. Mem. 4-5 & n.2; see also *id.* at 6 (as-

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[1] This Court has recently denied review in numerous cases raising the issue of whether Justice Sotomayor's *Freeman* opinion is controlling. See, *e.g.*, *Blaine* v. *United States*, 137 S. Ct. 1329 (2017) (No. 16-6574) (cert. denied Mar. 20, 2017); *Fuentes* v. *United States*, 137 S. Ct. 627 (2017) (No. 16-6132) (cert. denied Jan. 9, 2017); *Chapman* v. *United States*, 137 S. Ct. 625 (2017) (No. 16-5969) (cert. denied Jan. 9, 2017); *McNeese* v. *United States*, 137 S. Ct. 474 (2016) (No. 16-66) (cert. denied Nov. 14, 2016); *Pleasant* v. *United States*, 134 S. Ct. 824 (2013) (No. 13-6147); *Brown* v. *United States*, 565 U.S. 1148 (2012) (No. 11-6385). Other petitions raising this issue are currently pending. See, *e.g.*, *Gilmore* v. *United States* (No. 16-7953); *Sullivan* v. *United States* (No. 16-7182).

serting petitioner's eligibility for a sentencing reduction and citing in support portions of Justice Sotomayor's concurring opinion in *Freeman*); Pet. App. 12a-13a. Similarly, in the court of appeals, petitioner specifically relied on, and argued that he was eligible for relief under, Justice Sotomayor's opinion in *Freeman*. See Pet. C.A. Br. 17-18; see also *id.* at 23 (citing Justice Sotomayor's *Freeman* opinion and the court of appeals' decision in *Rivera-Martínez*). Despite the district court's statement that it was "reluctantly * * * bound by" circuit precedent on the *Freeman* issue, Pet. App. 29a, on appeal petitioner failed to preserve a challenge to that precedent or to argue that the court of appeals should revisit the issue in light of subsequent developments in other courts. In light of that failure, petitioner should not be heard to raise that claim for the first time in this Court.

2. In any event, the decision of the court of appeals is correct, and any disagreement on the issue is of limited significance.[2]

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

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[2] The petition presents 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.

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 the 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 "concluded 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.

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 the denial of rehearing en banc); see, *e.g.*, *United States* v. *Brown*, 653 F.3d 337, 340 & n.1 (4th Cir. 2011), cert. denied, 565 U.S. 1148 (2012); *United States* v. *Rivera-Martínez*, 665 F.3d 344, 347-348 (1st Cir. 2011), cert. denied, 133 S. Ct. 212 (2012).

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. 5a & n.3; *United States* v. *Hughes*, 849 F.3d 1008, 1011-1015 (11th Cir. 2017); *United States* v. *Benitez*, 822 F.3d 807, 811 (5th Cir. 2016) (per curiam); *United States* v. *Garrett*, 758 F.3d 749, 757 (6th Cir. 2014); *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. *Weatherspoon*, 696 F.3d 416, 422 (3d Cir. 2012), cert. denied, 133 S. Ct. 1301 (2013); *United States* v. *White*, 429 Fed. Appx. 43, 47 (2d Cir. 2011); *Brown*, 653 F.3d at 340 & n.1; see also *United States* v. *Leonard*, 844 F.3d 102, 108-109 (2d Cir. 2016) (acknowledging nonbinding Second Circuit precedent ruling that Justice Sotomayor's concurring opinion in *Freeman* controls, but finding that the result in the case before the court was the same under both the plurality and concurring opinions in *Freeman*).

b. Petitioner's reliance on decisions of the D.C. Circuit and the Ninth Circuit adopting the approach taken in the *Freeman* plurality opinion is misplaced. See Pet. 9-11, 25-26 (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*" because no rationale was common to a majority of the Justices. *Epps*, 707 F.3d at 350; see *Davis*, 825 F.3d at 1016. In a few scenarios, the courts 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 350-352; see also *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 the 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 Guidelines range in a plea agreement on policy grounds but nevertheless imposes the agreed sentence—one of the scenarios on which *Epps* relied, see *Epps*, 707 F.3d at 350 n.8; see also *Davis*, 825 F.3d at 1023-1024—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 the 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.[3]

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[3] Petitioner suggests (Pet. 16-20) that this case would also present an opportunity for this Court to consider more abstractly how the *Marks* analysis should be conducted. When the Court has chosen to review a dispute about the application of *Marks* to a fractured decision, however, 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 ask this Court to re-examine the underlying question at

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)).[4] 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

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issue in *Freeman*. See Pet. i; see also *Dixon*, 687 F.3d at 359 (*Marks* is "easy to apply" to *Freeman*). And this case would be a poor vehicle for clarifying the *Marks* analysis for the reasons discussed in the text.

[4] Petitioner's suggestion (Pet. 15) that plea agreements cannot be drafted to avoid such controversies is mistaken. Prosecutors and defense lawyers entering into plea negotiations can fairly be presumed to know the governing legal rule. As such, the parties can contract around any potential *Freeman* issues by, for example, entering into a Rule 11(c)(1)(A) or (B) agreement; making clear in the plea agreement that the agreed-upon sentence is (or is not) "based on" a Guidelines calculation; or agreeing that the defendant will, as a condition of pleading guilty, waive the right to seek Section 3582(c)(2) relief. See *Freeman*, 564 U.S. at 541 (Sotomayor, J., concurring in the judgment).

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, see 18 U.S.C. 3582(c)(2); Sentencing Guidelines § 1B1.10(b), 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 gained by the defendant in connection with the plea agreement, such as dismissal of other charges, see, *e.g.*, *Dillon* v. *United States*, 560 U.S. 817, 825-828 (2010)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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