No. _____

IN THE
Supreme Court of the United States

C.D,
E.F., and
G.H.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals For The Tenth Circuit

Petition for a Writ of Certiorari

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QUESTIONS PRESENTED

The Sentencing Commission recognizes the value of defendants who substantially assist the government, and has amended the Sentencing Guidelines to ensure that these defendants are eligible for sentence reductions under 18 U.S.C. § 3582(c)(2) in the wake of retroactive guideline amendments. Yet the Tenth Circuit sua sponte held here—parting ways with two other circuits, the Sentencing Commission, and the government—that defendants who are granted substantial-assistance departures from statutory mandatory minimum sentences that are higher than their guideline ranges are categorically ineligible for § 3582(c)(2) sentence reductions.

The government waived any challenge to eligibility here in both the district court and the Tenth Circuit. Ordinarily, this waiver would have precluded the Tenth Circuit from ruling on eligibility. But the Tenth Circuit found itself bound to rule after also holding—in conflict with several other circuits as well as with the recent teachings of this Court—that district courts lack not only authority but *jurisdiction* to consider an ineligible defendant's sentence-reduction motion.

The questions presented are:

1. Whether the sentence-modification limits in 18 U.S.C. § 3582 are jurisdictional.

2. Whether a substantial-assistance departure from a statutory mandatory minimum sentence that is higher than the defendant's guideline range categorically renders that defendant ineligible for a § 3582(c)(2) sentence reduction.

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PETITION FOR WRIT OF CERTIORARI

Petitioners C.D., E.F., and G.H.[1] respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Tenth Circuit panel opinion is published at 848 F.3d 1286 (2017), and is included as Appendix A. The Tenth Circuit's unpublished order denying rehearing en banc is included as Appendix E. The district court orders denying the requested sentence reductions are included as Appendix B (*C.D.*), Appendix C (*E.F.*), and Appendix D (*G.H.*).

JURISDICTION

The United States District Court for the District of Kansas had jurisdiction under 18 U.S.C. § 3231, which provides the federal district courts with exclusive jurisdiction over offenses against the United States.

The petitioners timely appealed the district court denials of their respective motions for sentence reduction to the United States Court of Appeals for the Tenth Circuit under 28 U.S.C. § 1291 and 18 U.S.C. § 3742. After consolidating the appeals, the Tenth Circuit held in a published opinion that the petitioners were ineligible for relief, and remanded the cases with instructions for the district court to dismiss the petitioners' motions for lack of jurisdiction. The Tenth Circuit denied rehearing en

[1] The Tenth Circuit referred to these petitioners by non-identifying initials in an effort to protect their safety and anonymity as government cooperators. Pet. App. 2a n.*. We follow suit here, and have substituted the initials selected by the Tenth Circuit for each respective petitioners' full name in the captions in the district court orders included in the Appendix.

banc in an order filed March 22, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY & GUIDELINE PROVISIONS INVOLVED

The following are set out in full in the appendix:

18 U.S.C. § 3231 (District courts), as Appendix F.

18 U.S.C. § 3553 (Imposition of a sentence), as Appendix G.

18 U.S.C. § 3582 (Imposition of a sentence of imprisonment), as Appendix H.

Fed. R. Crim. P. 35 (Correcting or Reducing a Sentence), as Appendix I.

USSG § 1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)), as Appendix J.

STATEMENT OF THE CASE

This case presents the important and long-debated question whether 18 U.S.C. § 3582—a general sentencing statute that, in part, limits a district court's authority to reduce a defendant's prison sentence—is a jurisdictional statute. This case also presents the Court with an opportunity to clarify which cooperating defendants who substantially assist the government are eligible for sentence reductions based on retroactive guideline amendments.

The government conceded the petitioners' sentence-reduction eligibility in both the district court and the Tenth Circuit. The Tenth Circuit—driven by its belief that eligibility is jurisdictional—sua sponte rejected that concession. Because the answer to either the jurisdictional or eligibility question is outcome-determinative for the petitioners, this case is perfectly situated for deciding both questions. And review is warranted given the impact of jurisdictional rulings, the frequency with which the

Sentencing Commission retroactively amends the guidelines, the large number of motions such amendments often generate, and the large number of defendants who receive substantial-assistance departure sentences.

A. Legal Background

1. Every criminal defendant's sentence is subject to two considerations: a statutory range and a guideline range. The statutory range is mandatory; the district court must sentence the defendant within that range unless a statutory exception applies. The guideline range, in contrast, is advisory; it "merely guide[s] the exercise of a court's discretion in choosing an appropriate sentence within the statutory range." *Beckles v. United States*, 137 S.Ct. 886, 892 (2017). The Sentencing Commission has fulfilled its duty to promulgate guidelines "consistent with all pertinent provisions of any Federal statute," 18 U.S.C. § 994(a), by incorporating statutory limits into the guidelines. Specifically, the guidelines instruct that after a district court has determined the "guideline range," USSG § 1B1.1(a)(7), the district court must then determine the "sentencing requirements," USSG § 1B1.1(a)(8), including "how the statutorily authorized maximum sentence, or a statutorily required minimum sentence, may affect the determination of a sentence under the guidelines," USSG § 5G1.1 comment. If, for instance, the defendant's guideline range falls below a statutory mandatory minimum sentence, then that statutory sentence "shall be the guideline sentence." USSG § 5G1.1(b).

2. A criminal defendant who is facing a statutory mandatory minimum sentence may seek relief from the statute either before or after sentencing by helping the

government in exchange for the government's motion to, in effect, waive the statutory minimum:

> Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

18 U.S.C. § 3553(e); *see also* Fed. R. Crim. P. 35(b)(1) ("Upon the government's motion made within one year of sentencing, the court may reduce a sentence if the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person."); Fed. R. Crim. P. 35(b)(4) ("When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute.").

Once the government so moves, the district court is no longer bound by the statute, and the statute no longer controls the defendant's guideline sentence. Instead, the district court simply determines the guideline range, and proceeds from there. 18 U.S.C. § 3553(e). The Sentencing Commission notes this effect of the government's waiver in its application notes to the controlled-substances guideline:

> Where a mandatory (statutory) minimum sentence applies, this mandatory minimum sentence may be "waived" and a lower sentence imposed (including a downward departure), as provided in 28 U.S.C. § 994(n), by reason of a defendant's "substantial assistance in the investigation or prosecution of another person who has committed an offense." See §5K1.1 (Substantial Assistance to Authorities).

USSG § 2D1.1, comment. (n.24).

3. Federal law authorizes district courts to reduce the prison terms of eligible defendants after retroactive guideline amendments:

> [I]n 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.

18 U.S.C. § 3582(c)(2).

The "applicable policy statements issued by the Sentencing Commission" appear at USSG § 1B1.10.[2] This Court has held that "§ 3582(c)(2) requires the court to follow the Commission's instructions in § 1B1.10 to determine the prisoner's eligibility for a sentence modification and the extent of the reduction authorized." *Dillon*, 560 U.S. at 827. A defendant is eligible for a sentence modification under § 1B1.10 if "the guideline range applicable to that defendant has subsequently been lowered" by a retroactive guideline amendment. USSG § 1B1.10(a)(1). This language echoes the statute, which, again, authorizes reductions for defendants with sentences "based on a sentencing range that has subsequently been lowered." 18 U.S.C. § 3582(c)(2).

Ordinarily, a defendant subject to a statutorily required minimum sentence (say, 240 months in prison) that is higher than the defendant's original guideline range (say, 140-175 months in prison) will not be eligible for modification. That is because

[2] Unlike the guidelines rendered advisory in *United States v. Booker*, 543 U.S. 220 (2005), the provisions of § 1B1.10 are binding. *Dillon v. United States*, 560 U.S. 817, 819 (2010).

"[w]here a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence *shall be the guideline sentence*." USSG § 5G1.1(b) (emphasis added). This trumping mechanism continues to apply even after a retroactive amendment. *See* USSG §§ 1B1.10(a)(2)(B), (b)(1). Since this defendant's restricted guideline range will remain at 240 months even after a retroactive amendment, the range applicable to him will never be lowered, and he will never be eligible for a § 3582(c)(2) reduction.

But eligibility works differently for the cooperating defendant whose original guideline range was trumped by a statutory minimum, but who was sentenced below the statutory minimum after the government filed a § 3553(e) or Rule 35(b) substantial-assistance motion. *See* USSG Supp. App. C Amend. 780 (Nov. 1, 2014). On November 1, 2014, absent any disapproval from Congress, Amendment 780 went into effect. *Id*. This amendment, which now appears as USSG § 1B1.10(c), instructs courts to calculate the amended guideline range of substantial-assistance defendants *without regard to statutory minimums*:

> Cases Involving Mandatory Minimum Sentences and Substantial Assistance.—If the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities, then for purposes of this policy statement the amended guideline range shall be determined without regard to the operation of § 5G1.1 (Sentencing on a Single Count of Conviction) and § 5G1.2 (Sentencing on Multiple Counts of Conviction).

USSG § 1B1.10(c).

Section 1B1.10(c) was adopted to ensure "that defendants who provide substantial assistance to the government in the investigation and prosecution of others have the opportunity to receive the full benefit of a [guideline] reduction that accounts for that assistance." USSG Supp. App. C Amend. 780 (Reason for Amendment) (Nov. 1, 2014). In so acting, the Commission "recognized the value to our system of justice of those cooperating defendants who provide substantial assistance to the authorities." *United States v. Williams*, 808 F.3d 253, 260 (4th Cir. 2015). And it fulfilled its statutory duty to "assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance." 18 U.S.C. § 994(n).

4. Another guideline that came into effect on November 1, 2014, was Amendment 782, which retroactively lowered the guideline base offense levels by 2 levels for many drug quantities. USSG Supp. App. C Amend. 782 (2014). Amendment 782 was designed as a modest corrective (within existing statutory parameters) to drug penalties now recognized as unjustifiably harsh. Honorable Patti B. Saris, *A Generational Shift for Federal Drug Sentences*, 52 AM. CRIM. L. REV. 1, 17 (2015). By lowering base offense levels across drug types, it was believed that Amendment 782 "would permit resources otherwise dedicated to housing prisoners to be used to reduce overcrowding, enhance programming designed to reduce the risk of recidivism, and to increase law enforcement and crime prevention efforts, thereby enhancing public

safety." *Id.* at 21 (citing testimony from Department of Justice and other stakeholders).

B. District Court Proceedings

Each of the three petitioners in this consolidated appeal pleaded guilty in front of the same district court judge to conspiring to distribute crack cocaine in violation of 21 U.S.C. §§ 841(a)(1) and 846. Each petitioner's guideline range was far lower than 240 months. But each petitioner had a prior felony drug conviction that triggered a 240-month statutory mandatory minimum sentence under 21 U.S.C. § 841(b)(1)(A). That 240 months became each petitioner's projected "guideline sentence" under § 5G1.1(b).

But each petitioner cooperated with the government, and the government moved the district court to impose a sentence below the statutory minimum in each case.[3] Thus, at each petitioner's sentencing, the district court noted in its Statement of Reasons "that the [statutory] mandatory minimum does not apply." CD R2.1448 at 1-2; EF R2.535 at 1-2; GH R2.411 at 1-2. The district court then determined that each petitioner's "advisory guideline range" was 240 months,[4] and noted that "[t]he court departs from the advisory guideline range." *Id.* The district court's sentence for each

[3] Below-statute sentences were authorized in C.D.'s and G.H.'s cases by 18 U.S.C. § 3553(e), and in E.F.'s case by Rule 35(b).

[4] Under our reading of the law, this determination was erroneous. The statute no longer applied to trigger the 240-month "guideline sentence" under § 5G1.1. The district court should have determined that the guideline range was the pre-§ 5G1.1(b) range. *See* 18 U.S.C. § 3553(e) (a substantial-assistance sentence "shall be imposed in accordance with the guidelines"). But none of the petitioners appealed from the district court's determination of the starting point for their substantial-assistance departures.

petitioner roughly reflected his pre-§ 5G1.1(b) guideline range (the lower that range, the greater the departure from the 240-months):

Petitioner	Total offense level	Criminal history	Cooperation	Pre-240 month § 5G1.1(b) GL range	Substantial-assistance sentence
CD No. 15-3318 PSR R2.1346	29	IV	Prepared to testify, but not used. R2.1433	121-151 months	180 months R1.1451 R2.1448
EF No. 16-3024 PSR R2.379	29	III	Prepared to testify, but not used. R2.531	108-135 months	170 months R2.534 R2.535
GH No. 16-3033 PSR R2.324	25	IV	Testified at a jury trial. R2.404	84-105 months	151 months R1.410 R2.411

On November 1, 2014, Amendment 782 came into effect, lowering the base offense levels for crack cocaine, among other drugs. USSG Supp. App. C Amend. 782 (2014). The Kansas Federal Public Defender and the government agreed that each of these cooperating petitioners was eligible and should receive a reduction under the amendment. These agreements were consistent with each petitioner's case history. In addition to assisting the government, none of the petitioners had been found to have possessed guns, committed violence, involved minors, obstructed justice, held a leadership role, or maintained a drug-involved premises in connection with his respective offense. CD R2.1346; EF R2.379; GH R2.324. The parties therefore submitted agreed sentence-reduction orders to the district court.

The district court declined to sign any of the agreed orders. Instead, the district court issued lengthy, nearly identical, sua sponte memorandum orders denying each petitioner's requested reduction. Pet. App. 13a, 30a, 48a. In each order, the district

court opined at length that it did not believe that cooperators who received substantial-assistance departures should be eligible for further relief under § 3582(c)(2). *Id.* Additionally, the district court questioned the authority of the Sentencing Commission to make such cooperators eligible for sentence reductions. *Id.* But the district court ultimately concluded that the petitioners were eligible, after which the court perfunctorily denied each reduction. *Id.*

C. Tenth Circuit Proceedings

The petitioners each timely appealed, challenging the district court's merits denials in three ways. First, they argued that the district court's lengthy policy disagreement with § 1B1.10(c) demonstrated an erroneous de facto refusal to give effect to the defendants' eligibility. Second, they argued that the district court erroneously interpreted § 1B1.10(b)(2)(B)—which suggests a reduction method that "may be appropriate" in certain cases—to limit what the court could do for the petitioners. Third, they argued that the district court relied on a hypothetical sentencing disparity to deny their requested reductions, while ignoring a real disparity that its ruling created.

The Tenth Circuit consolidated the appeals before argument. At argument, the panel questioned counsel about the petitioners' § 3582(c)(2) eligibility. We argued that the issue of eligibility was not before the panel. It had not been briefed, given both the government's agreement that the defendants were eligible and the district court's finding of eligibility. We asked the panel to invite supplemental briefing if the panel was inclined to consider the issue sua sponte (a request that went unanswered).

When the panel questioned the government, the government again conceded eligibility.

The panel did not reach the merits of the appellate issues raised by the petitioners and briefed by the parties. Instead, it sua sponte held that defendants who are granted substantial-assistance departures from statutory mandatory minimum sentences that are higher than their guideline ranges are *categorically* ineligible for § 3582(c)(2) sentence reductions. Since the government had conceded eligibility, the panel was only able to reach eligibility by deeming it a question of jurisdictional import. Pet. App. 17a-11a ("the Government cannot concede a court's criminal jurisdiction where it does not exist").

The panel then opined that the petitioners' substantial-assistance departure sentences were not "based on" the guidelines as required by § 3582(c)(2). Rather, in the panel's view, these sentences were "based on" the statutory mandatory minimum. The panel believed that this conclusion was dictated by Tenth Circuit precedent in *United States v. White*, 765 F.3d 1240 (10th Cir. 2014)—an inapt case that did not involve a substantial-assistance departure.[5] The panel concluded that the district court lacked jurisdiction to consider sentence-reduction requests made by cooperating defendants in the petitioners' posture. Pet. App. 17a-11a.

[5] In *White*, the Tenth Circuit held that a firearms defendant was ineligible for a § 3582(c)(2) sentence reduction because his guideline was controlled by a statutory mandatory minimum. 765 F.3d at 1246. There was no substantial-assistance motion or departure in the case. The defendant faced the same statutorily controlled guideline sentence both before and after the guideline amendment he invoked, and he was therefore not "sentenced to a term of imprisonment based on a sentencing range that ha[d] subsequently been lowered." *Id*. at 1245-46.

The petitioners timely petitioned for rehearing en banc, asking the full court to consider both the jurisdictional and eligibility questions presented here. The Tenth Circuit denied the petition in a summary order. Pet. App. 66a.[6]

REASONS FOR GRANTING THE WRIT

1. Whether 18 U.S.C. § 3582 Is A Jurisdictional Statute Is An Important Question That Has Divided The Circuits, And Was Wrongly Decided By The Tenth Circuit.

A. The circuit courts cannot agree whether, or to what extent, 18 U.S.C. § 3582 is a jurisdictional statute.

Congress enacted 18 U.S.C. § 3582 as part of the Sentencing Reform Act of 1984. Among other provisions, the statute directs that a judgment of conviction that includes a prison sentence "is a final judgment," and that a court "may not modify a term of imprisonment once it has been imposed" except as expressly permitted. 18 U.S.C. § 3582(b)–(c). One permitted exception is sentence reductions for eligible defendants based on retroactive guideline amendments. 18 U.S.C. § 3582(c)(2).

In the decades since its enactment, every circuit court but one has at some point assumed or concluded—at times with little to no analysis—that § 3582's sentence-modification limits are not just authoritative, but jurisdictional.[7] The only circuit court that has apparently never applied a jurisdictional label to this statute is the

[6] The order noted that "[t]he Honorable Neal M. Gorsuch did not participate in the consideration of the *Petition for Rehearing En Banc*." Pet. App. 66a n.*.

[7] *See, e.g., United States v. Griffin*, 524 F.3d 71, 84-85 (1st Cir. 2008); *United States v. Regalado*, 518 F.3d 143, 150-51 (2d Cir. 2008); *United States v. Washington*, 549 F.3d 905, 914-17 (3d Cir. 2008); *United States v. Dunphy*, 551 F.3d 247, 252 (4th Cir. 2009); *United States v. Bridges*, 116 F.3d 1110, 1112-13 (5th Cir. 1997); *United States v. Williams*, 607 F.3d 1123, 1125-26 (6th Cir. 2010); *United States v. Smith*, 438 F.3d 796, 799 (7th Cir. 2006); *United States v. Auman*, 8 F.3d 1268, 1271-73 (8th Cir. 1993); *United States v. Leniear*, 547 F.3d 668, 672, 674 (9th Cir. 2009); *United States v. Smartt*, 129 F.3d 539, 541 (10th Cir. 1997); *United States v. Mills*, 613 F.3d 1070, 1071, 1078 (11th Cir. 2010).

D.C. Circuit. *See United States v. Smith*, 467 F.3d 785 (D.C. 2006). In *Smith*, the D.C. Circuit noted § 3582's "somewhat jurisdictional flavor," but recognized that this Court's modern jurisprudence "calls into question a jurisdictional reading of § 3582." *Id*. at 788 (discussing *Eberhart v. United States*, 546 U.S. 12 (2005)). The D.C. Circuit avoided the jurisdictional question by resolving the issue in *Smith* on alternate grounds, 467 F.3d at 788-89, and that circuit has not, it seems, revisited the question since.

The case that gave the D.C. Circuit pause when it came to classifying § 3582 as jurisdictional was just one in a series of cases in which this Court has "attempted to brush away confusion" about the distinction between jurisdictional prerequisites and nonjurisdictional (even if inflexible) claim-processing rules. *Eberhart*, 546 U.S. at 16 (Fed. R. Crim. P. 33's time limit *not* jurisdictional).[8] Since *Eberhart*, this Court has repeatedly cautioned that "when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character." *Arbaugh*, 546 U.S. at 516; *accord, e.g., Wong*, 135 S.Ct. at 1632; *Auburn*, 133 S.Ct. at 825. As stated in *Arbaugh*, "[i]f the Legislature *clearly states* that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and

[8] *See also, e.g., United States v. Kwai Fun Wong*, 135 S.Ct. 1625 (2015) (28 U.S.C. § 2401(b)'s time limits *not* jurisdictional); *Sebelius v. Auburn Regl. Med. Ctr*., 133 S.Ct. 817 (2013) (42 U.S.C. § 1395oo(a)(3)'s time limit *not* jurisdictional); *Gonzalez v. Thaler*, 565 U.S. 134 (2012) (28 U.S.C. § 2254(c)(3)'s certificate-of-appealability content requirement *not* jurisdictional); *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428 (2011) (38 U.S.C. § 7266(a)'s time limit *not* jurisdictional); *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010) (17 U.S.C. § 411(a)'s precondition to copyright-infringement suit *not* jurisdictional); *Bowles v. Russell*, 551 U.S. 205 (2007) (28 U.S.C. § 2107(a)'s time limit *is* jurisdictional); *Arbaugh v. Y & H Corp.,* 546 U.S. 500 (2006) (42 U.S.C. § 2000e's employee-numerosity prerequisite for civil-rights suit *not* jurisdictional); *Kontrick v. Ryan*, 540 U.S. 443 (2004) (Fed. R. Bankr. 4004's time limits *not* jurisdictional).

litigants will be duly instructed and will not be left to wrestle with the issue." 546 U.S. at 515-16 (emphasis added).

Despite this Court's efforts "[t]o ward off profligate use of the term 'jurisdiction,'" *Auburn*, 133 S.Ct. at 824, only two circuit courts (discussed below) have explicitly changed course when it comes to § 3582. The remaining courts, including the Tenth Circuit, are either "less than meticulous" in their rulings (thereby obscuring the issue), *Arbaugh*, 546 U.S. at 511, or else explicitly continue to stand their "jurisdictional" ground. This circuit confusion dates back to § 3582's 1984 enactment, is entrenched, and demonstrates that the circuit courts are in need of still further guidance from this Court when it comes to identifying jurisdictional limits.

1. Two circuit courts have published decisions squarely rejecting the view that § 3582(c)(2) eligibility is jurisdictional. *See United States v. Johnson*, 732 F.3d 109 (2d Cir. 2013); *United States v. Taylor*, 778 F.3d 667 (7th Cir. 2015).

In *Johnson*, the district court reduced the defendant's sentence under § 3582(c)(2). The defendant appealed, challenging the district court's calculation as yielding an insufficient reduction. On appeal, the **Second Circuit** held that the defendant was not eligible for *any* reduction, but it affirmed the district court's order nonetheless because the government had not challenged eligibility. In a footnote, the Second Circuit acknowledged the view of other circuit courts that § 3582(c)(2) eligibility is jurisdictional, but rejected that view in light of *Kontrick* and *Arbaugh*. 732 F.3d at 116 n. 11.[9]

[9] The Second Circuit held that the district court's jurisdiction in the § 3582(c)(2) context was "conferred by 28 U.S.C. § 1331." 732 F.3d at 116 n.11. That statute grants federal district courts "original

In *Taylor*, the **Seventh Circuit** resolved an inter-circuit split and clarified that "district courts have subject-matter jurisdiction over—that is, the power to adjudicate—a § 3582(c)(2) motion even when authority to *grant* a motion is absent because the statutory criteria are not met." 778 F.3d at 670 (emphasis in original). The Seventh Circuit reasoned first that the statute "is not part of a jurisdictional portion of the criminal code," and second that this Court decided a § 3582(c)(2) eligibility question in *Freeman v. United States*, 564 U.S. 522 (2011), "without referring to the statute's limits as jurisdictional." *Id.* at 671.

2. The **Eighth Circuit** used the jurisdictional label through at least 2009. *See United States v. Harris*, 574 F.3d 971, 973 (8th Cir. 2009) (because § 3582 limits the district court's sentence-reduction authority, the district court "correctly concluded that it lacked jurisdiction" to reconsider original decision to run federal sentence consecutive to state sentence); *United States v. Gamble*, 572 F.3d 472 (8th Cir. 2009) (where defendant ineligible for § 3582(c)(2) reduction, "the district court was without jurisdiction to revisit Gamble's sentence"). But without explicitly considering whether the district courts truly lacked jurisdiction, or merely lacked authority, *Harris* and *Gamble* appear to be no more than the sort of "drive-by jurisdictional rulings" that this Court has held "should be accorded 'no precedential effect.'" *Arbaugh*, 546 U.S. at 511 (citation omitted). In recent years, the Eighth Circuit appears to have dropped

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jurisdiction of all *civil* actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (emphasis added). The more obvious fit may be 18 U.S.C. § 3231, which grants federal district courts original jurisdiction "of all offenses against the laws of the United States." *See United States v. Spaulding*, 802 F.3d 1110, 1128 (10th Cir. 2015) (Gorsuch, J., dissenting from majority's characterization of § 3582 as jurisdictional and emphasizing that § 3231's "unqualified" general grant of jurisdiction "does not end after sentencing or any other artificial period of time").

the jurisdictional label (though, again, without explicit consideration). *See e.g., United States v. Koons, et al.,* 850 F.3d 973 (8th Cir. 2017) (holding that defendants were ineligible for a § 3582(c)(2) reduction without mentioning district court's jurisdiction); *United States v. Long*, 757 F.3d 762 (8th Cir. 2014) (same); *United States v. Reeves*, 717 F.3d 647 (8th Cir. 2013) (same). *Cf. United States v. Allmon*, 702 F.3d 1034 (8th Cir. 2012) (in action challenging sentence modification under § 3582(d), reciting parties' respective positions regarding district court's "jurisdiction," but ruling only on district court's "authority").

3. Four other circuit courts have held that limits on renewed or successive § 3582(c)(2) motions are not jurisdictional—but those circuits have not otherwise backed away from earlier holdings that other aspects of § 3582 *are* jurisdictional. *See United States v. Weatherspoon*, 696 F.3d 416 (3d Cir. 2012); *United States v. May*, 855 F.3d 271 (4th Cir. 2017); *United States v. Trujillo*, 713 F.3d 1003 (9th Cir. 2013); *United States v. Anderson*, 772 F.3d 662 (11th Cir. 2014).

The defendant in *Weatherspoon* was originally denied a § 3582(c)(2) sentence reduction on grounds of ineligibility. He filed a second motion after a change in the law suggested that he might be eligible after all. When the district court denied his second motion, the defendant appealed. On appeal, the government argued that the district court lacked jurisdiction to consider the second motion. The **Third Circuit** agreed that the statute's silence with respect to successive motions may indeed mean that "a defendant is only entitled to one bite at the apple." 696 F.3d at 421. But, the court noted, "it does not follow that this restriction goes to the subject matter

jurisdiction of the district court." *Id*. Relying on *Arbaugh's* "clearly states" test, the Third Circuit explained that "a rule derived from congressional silence does not support an inference that Congress has 'clearly stated' its intent to limit a district court's jurisdiction to one § 3582(c)(2) motion." *Id*. The Third Circuit thus concluded that any restriction on successive § 3582(c)(2) motions "is not a limitation on the district court's subject matter jurisdiction." *Id*. Having assured itself of the district court's jurisdiction to *consider* the defendant's successive motion, the Third Circuit nonetheless held that the district court lacked jurisdiction to *grant* the defendant's motion. In the Third Circuit's view, he was ineligible: "[H]is sentence was not 'based on' the Guidelines and the District Court lacked jurisdiction to reduce his sentence under 18 U.S.C. § 3582(c)(2)." *Id*. at 425; *see also United States v. Freeman*, 659 Fed. Appx. 94, 98 (3d Cir. 2016) (reaffirming precedent while acknowledging Seventh Circuit's contrary view in *Taylor*), *cert. den. sub nom Freeman v. United States*, No. 16-7146 (petition denied May 15, 2017).

In *May*, the district court sua sponte denied the defendant a § 3582(c)(2) sentence reduction three months after the Sentencing Guidelines were retroactively amended. The defendant unsuccessfully moved for reconsideration. On appeal, the **Fourth Circuit** affirmed the district court's denial of reconsideration. But the Fourth Circuit first questioned whether the district court even had jurisdiction to reconsider its original order. Recognizing that any limit on motions to reconsider § 3582(c)(2) orders was merely implied by the statute's silence on the matter, the circuit court could not say that Congress had clearly ranked that limit as jurisdictional. 855 F.3d at 275.

The court "therefore conclude[d] that the implied prohibition on § 3582(c)(2)-based motions for reconsideration . . . is non-jurisdictional." *Id*. But the court did not mention, much less abrogate, other circuit precedent holding that Sentencing Guideline limits on the extent of § 3582(c)(2) reductions *are* jurisdictional. *See, e.g., Dunphy*, 551 F.3d at 252.

In *Trujillo*, the **Ninth Circuit** rejected the government's argument that the district court lacked jurisdiction to entertain the defendant's second § 3582(c)(2) motion based on the same guideline amendment. 713 F.3d at 1006-07. But the Ninth Circuit held fast to the view that, absent exceptions, the statute's "bar against modifications is jurisdictional." *Id*. at 1006; *see also United States v. Spears*, 824 F.3d 908, 916 (9th Cir. 2016) (post-*Trujillo* decision affirming again that, where defendant deemed ineligible for reduction, "[i]t follows that the district court did not have jurisdiction under § 3582(c)(2) to modify Spears' sentence").

The defendant in *Anderson* moved the district court for a sentence reduction based on a retroactive guideline amendment. The district court denied the motion and the Eleventh Circuit affirmed. The defendant later filed a "renewed motion" under the same amendment. The district court denied this motion as well. On appeal, the **Eleventh Circuit** held as a preliminary matter that the district court had jurisdiction to hear the defendant's renewed § 3582(c)(2) motion: "[B]ecause there is no clearly expressed jurisdictional limitation on a district court's ability to hear successive motions based on the same amendment, this Court holds that it would be improper to read one into the statute." 772 F.3d at 667. But the Eleventh Circuit

made clear its continued belief that the express eligibility limits in the statute *are* jurisdictional. *Id*. at 666 (noting defendant's agreement that "generally, district courts do not have jurisdiction to modify a sentence once it has been imposed"), 668 (when an amendment does not lower the defendant's guideline range, "the statute does not give the district court jurisdiction to modify a defendant's sentence").

4. The remaining circuit courts continue to hold, as the **Tenth Circuit** did here, that § 3582 is a jurisdictional statute notwithstanding *Eberhart* and this Court's other jurisdiction-testing decisions. *See, e.g., United States v. Griffin*, 524 F.3d 71, 84-85 (**1st Cir.** 2008) ("Our conclusion that Rule 35(a) [which derives from § 3582(c)] is jurisdictional is consistent with both *Eberhart* and *Bowles*."); *United States v. Garcia*, 606 F.3d 209, 212 n.5 (**5th Cir.** 2010) ("The district court's jurisdiction to correct or modify a defendant's sentence is limited to those specific circumstances enumerated by Congress in 18 U.S.C. § 3582."); *United States v. Williams*, 607 F.3d 1123, 1125 (**6th Cir.** 2010) ("Section 3582 sets forth a *statutory* basis for limiting the district courts' jurisdiction to modify a previously imposed sentence.") (emphasis original; internal marks and citation omitted).

The Tenth Circuit here acknowledged that it was "cognizant of recent Supreme Court cases that caution us not to label a statutory limitation as jurisdictional absent a clear Congressional directive." Pet. App. 5a n.2 (citing *Auburn*). But it believed itself bound by Tenth Circuit precedent "[u]ntil an intervening Supreme Court decision, en banc review, or Congressional action tells us otherwise." *Id*. The Tenth Circuit then

declined the opportunity to address the issue en banc, leaving it up to this Court or Congress to "tell[ ] us otherwise." *Id.*; Pet App. 66a-67a.

5. Finally, even within the circuits that treat § 3582 as a jurisdictional statute, there have been dissenting voices. In *United States v. Spaulding*, 802 F.3d 1110 (10th Cir. 2015), for instance, then-Judge Gorsuch dissented from the majority's characterization of § 3582 as jurisdictional: "I do not doubt the statutory command is important and mandatory and must be observed when asserted. But using traditional tools of statutory interpretation, it's equally clear to me that § 3582(c) doesn't strip the district court of any of its preexisting post-judgment jurisdiction and is instead and again a claim-processing rule." *Id.* at 1128-34; *accord United States v. Spears*, 824 F.3d 908, 917-19 (9th Cir. 2016) (Tashima, J., dissenting from majority's "conflat[ion of] the jurisdictional analysis with an analysis of the merits" of defendant's § 3582(c)(2) motion); *United States v. Sandoval-Flores*, 665 Fed. Appx. 655, 656 n.1 (10th Cir. 2016) (panel opining that treating § 3582(c)(2) eligibility as nonjurisdictional "is the better approach," but adhering to circuit precedent treating statute as jurisdictional).

The circuit courts have had ample time to settle whether, and to what extent, § 3582 is a jurisdictional statute. And yet they have been unable to do so. Review is necessary, for only this Court's guidance will resolve the issue.

B. The cost of labeling § 3582 jurisdictional makes this a question of "considerable practical importance."

This Court has granted certiorari with some frequency in the past decade to address jurisdictional questions.[10] In prioritizing these cases, this Court has recognized that whether a rule is jurisdictional is a question that "is not merely semantic but one of considerable practical importance for judges and litigants." *Henderson*, 562 U.S. at 434. This is because "federal courts have an independent obligation to ensure that they do not exceed the scope of their jurisdiction, and therefore they must raise and decide jurisdictional questions that the parties either overlook or elect not to press." *Id*. (citing *Arbaugh,* 546 U.S. at 514). This is so even if the parties affirmatively waive enforcement of the rule in question—one "harsh consequence[ ]" of the jurisdictional label. *Kwai Fun Wong*, 135 S.Ct. at 1625.[11]

If neither party challenges the district court's jurisdiction, and it is only later discovered lacking, "many months of work on the part of the attorneys and the court may be wasted." *Henderson,* 562 U.S. at 434-35. On the other hand, if a rule is not jurisdictional, then a party's failure to invoke it (or a concession that it does not apply) waives the right to enforce it. *See Arbaugh*, 546 U.S. at 510-11 (noting that civil defendant's failure to speak to statutory requirement before trial would preclude it from raising issue after trial if requirement not jurisdictional); *United States v.*

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[10] *See* note 8, above.

[11] This Court indicated the importance of the jurisdictional label yet again when it granted the petition for certiorari in *Hamer v. Neighborhood Housing Services of Chicago*, S.Ct. No. 16-658 (petition granted Feb. 27, 2017). But *Hamer*, like many of this Court's jurisdiction-testing cases, *see* n.4, *supra*, involves a time limit (Fed. R. App. P. 4(a)(5)(C)). This case, in contrast, involves the district court's sentencing authority—an issue that neither earlier time-limit decisions nor *Hamer* can resolve.

Johnson, 732 F.3d 109, 117 (2d Cir. 2013) (government's failure to cross-appeal district court's sentence-reduction ruling on eligibility grounds precluded circuit court from vacating ruling on that basis).

This latter situation—a party declining to invoke a rule—arises with great frequency in the § 3582(c)(2) context, as evidenced by the government's eligibility concessions in this and the other cooperator cases discussed above. The Kansas district courts granted 407 sentence reductions after Amendment 782. *U.S. Sentencing Comm'n 2014 Drug Guidelines Amendment Retroactivity Data Report* Table 1 (May 2017).[12] Records kept by the Kansas Federal Public Defender suggest that approximately 95% of those reductions were decided by agreed order. In other words, the government conceded eligibility in hundreds of cases in just one district. If eligibility is a jurisdictional question, then the district courts were obligated to independently examine eligibility in every one of those cases. It is essential to the allocation of resources for district courts to be "duly instructed" what their obligations are, and not "left to wrestle with the issue." *Arbaugh*, 546 U.S. at 515-16. The jurisdictional label has a significant impact on district courts in the § 3582(c)(2) context, and its appropriateness should be decided before the next retroactive guideline amendment.

C. These consolidated cases are ideal for deciding the jurisdictional question.

These consolidated cases are ideal for deciding the question presented for several reasons. First, the Tenth Circuit's sua sponte eligibility analysis was only appropriate

[12] Available at https://perma.cc/G7G3-6AXE.

if § 3582 is a jurisdictional statute. The government conceded eligibility. If eligibility is not a jurisdictional question, then the Tenth Circuit would not have decided the issue over the government's concession. *See Wood v. Milyard*, 132 S.Ct. 1826, 1834-35 (2012) (Tenth Circuit abused discretion in sua sponte addressing timeliness of habeas petition where state chose not to challenge timeliness); *Hale v. Fox*, 829 F.3d 1162, 1167 n.3 (10th Cir. 2016) (declining to address 28 U.S.C. § 2241 timing issue where government "waived or at least forfeited a timing objection"; citing *Wood*); *McCormick v. Parker*, 821 F.3d 1240, 1245-46 (10th Cir. 2016) (declining to address state's procedural-default argument where state failed to take advantage of previous invitation to raise the issue; citing *Wood*). If this Court were to hold that § 3582 is not a jurisdictional statute, then, with eligibility conceded, the petitioners would be entitled to a decision by the Tenth Circuit on the merits of their appeals.

Second, these cases arise on direct review from the denial of each petitioner's properly filed motion for sentence reduction. The jurisdictional question was squarely decided by the Tenth Circuit in a published opinion. Despite the panel's acknowledgment of "recent Supreme Court cases that caution us not to label a statutory limitation as jurisdictional absent a clear Congressional directive," Pet. App. 5a n.2, the panel relied on the jurisdictional label and the Tenth Circuit summarily denied the petition for en banc review. The jurisdictional question is ripe for decision by this Court.

Finally, these cases present this Court with an opportunity to address not one but two important, recurring questions: whether § 3582 is a jurisdictional statute, and

whether cooperators in the petitioners' posture are eligible for sentence reductions (see reasons for granting the writ with respect to eligibility below).

D. The Tenth Circuit was wrong to label § 3582 jurisdictional.

1. This Court has adopted a "readily administrable bright line" for deciding whether to label a statutory limit jurisdictional. *Auburn*, 133 S.Ct. at 824. Absent a clear statement from Congress that the limit is jurisdictional, "courts should treat the restriction as nonjurisdictional." *Id.* In asking whether Congress has clearly spoken to the issue, this Court considers whether the provision at issue "is located in a provision 'separate' from those granting federal courts subject-matter jurisdiction." *Reed Elsevier*, 559 U.S. at 164; *accord Arbaugh*, 546 U.S. at 515. This Court also considers "context, including this Court's interpretations of similar provisions in many years past." *Auburn*, 133 S.Ct. at 824 (citations omitted).

The Tenth Circuit acknowledged that whether § 3582(c)(2) eligibility is jurisdictional "is certainly debatable." Pet. App. 5a n.2. The Tenth Circuit also acknowledged "recent Supreme Court cases that caution us not to label a statutory limitation as jurisdictional absent a clear Congressional directive." *Id.* (citing *Auburn*). But the panel felt itself bound by circuit precedent[13] "[u]ntil an intervening Supreme Court decision, en banc review, or Congressional action tells us otherwise." *Id*. That circuit precedent is wrong, for several reasons.

First, § 3582 does not look like a jurisdictional statute. It appears in a short chapter (Chapter 227) titled "Sentences." Its coverage ranges from sentencing factors

[13] The panel cited *United States v. White*, 765 F.3d 1240 (10th Cir. 2014), which in turn relied on *United States v. Blackwell*, 81 F.3d 945 (10th Cir. 1996).

to sentence modifications to non-association orders. Nowhere in the statute does the word "jurisdiction" appear. And there is no other clear statement from Congress in the statute that its limits are jurisdictional.

Second, § 3582's placement several chapters below provisions that Congress clearly marked as jurisdictional further suggests its nonjurisdictional nature. The criminal code is carefully arranged by subject matter in a pattern that roughly follows the progress of a criminal case, with the jurisdictional provisions clustered together:

Title 18, Part II—Criminal Procedure
Chapter 201 General Provisions
Chapter 203 Arrest and Commitment
Chapter 204 Rewards for Information Concerning Terrorist Acts & Espionage
Chapter 205 Searches and Seizures
Chapter 206 Pen Registers and Trap and Trace Devices
Chapter 207 Release and Detention Pending Judicial Proceedings
Chapter 208 Speedy Trial
Chapter 209 Extradition
Chapter 211 Jurisdiction and Venue
Chapter 212 Military Extraterritorial Jurisdiction
Chapter 212A Extraterritorial Jurisdiction over Certain Offenses
Chapter 213 Limitations
Chapter 215 Grand Jury
Chapter 216 Special Grand Jury
Chapter 217 Indictment and Information
Chapter 219 Trial by United States Magistrates
Chapter 221 Arraignment, Pleas and Trial
Chapter 223 Witnesses and Evidence
Chapter 224 Protection of Witnesses
Chapter 225 Verdict
Chapter 227 Sentences
Chapter 228 Death Sentence
[Postconviction, appeals, contempts, and miscellaneous chapters]

The general grant of jurisdiction in Chapter 211 both illustrates what a jurisdictional statute looks like and supplies the district court with its sentencing and sentence-modification jurisdiction:

> The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.
>
> Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof.

18 U.S.C. § 3231.

Finally, this Court has never described either § 3582 or subsection (c)(2) of that statute in jurisdictional terms. In *Dillon*, this Court spoke of the "power" and "authority" that the statute bestows on district courts, but it never used the label "jurisdiction." 560 U.S. at 819-31. Even more probative of the question is this Court's decision in *Freeman*. There the government argued that defendants who enter into Rule 11(c)(1)(C) agreements should be categorically barred from § 3582(c)(2) relief, reasoning that their sentences were "based on" their agreements rather than the guidelines. 564 U.S. at 532. What was "at stake" in the case was "a defendant's eligibility for relief." *Id.* In three separate opinions, five justices agreed that Mr. Freeman was eligible, while four justices opined that Rule 11(c)(1)(C) defendants should never be eligible. But not one justice even hinted that eligibility was a jurisdictional question. The Tenth Circuit was wrong to conclude otherwise.

2. This Court Should Decide The Eligibility Of Cooperating Defendants For § 3582(C)(2) Sentence Reductions To Ensure That The Circuits Reward Those Who Assist The Government With Consistency.

A. The circuit courts are split three to two on whether cooperators with guideline ranges below their statutory mandatory minimums are eligible for sentence reductions.

The circuit courts do not agree about the eligibility of cooperators for sentence reductions under § 3582(c)(2). The debate concerns cooperators whose pre-§ 5G1.1(b) guideline ranges were entirely below their statutory mandatory minimums, and whose statutory mandatory minimums were in effect waived by a government-sponsored substantial-assistance motion. *See* 18 U.S.C. § 3553(e); Fed. R. Crim. P. 35(b)(4).

1. The **Fourth Circuit** held in *United States v. Williams*, 808 F.3d 253 (4th Cir. 2015), that a cooperator in this position is eligible for a reduction. In *Williams*, the defendant was subject to a statutory mandatory minimum of 240 months' imprisonment. His pre-§ 5G1.1(b) guideline range was 130-162 months; by operation of § 5G1.1(b), his projected guideline sentence was 240 months. But the district court granted the government's substantial-assistance-departure motion and sentenced the defendant to 180 months. *Id*. at 256. Some years later, the defendant moved for a sentence reduction under Amendments 750 (reducing offense levels for cocaine base), 780 (creating § 1B1.10(c)), and 782 (reducing offense levels for drug crimes). The probation officer and the government agreed that the defendant was eligible for the requested reduction. The district court disagreed and denied the motion. Relying on existing Fourth Circuit precedent, the district court reasoned that the defendant's original sentence was based solely on the statute and not on the guidelines; therefore

he had not been sentenced "based on a sentencing range that has subsequently been lowered by the Sentencing Commission" as required by § 3582(c)(2). The Fourth Circuit reversed.

The Fourth Circuit explained that the outcome was controlled by this Court's opinion in *Dillon v. United States*, 560 U.S. 817 (2010), and § 1B1.10(c) (which the Fourth Circuit held abrogated existing circuit precedent). *Dillon* instructed district courts to look to § 1B1.10 "*to determine the prisoner's eligibility*," 808 F.3d at 257 (quoting *Dillon*; emphasis in *Williams*), and § 1B1.10(c) directs that "the amended guideline range shall be determined without regard to the operation of § 5G1.1." Without § 5G1.1(b), the defendant's amended guideline range was 77-96 months. This was lower than his original range (both before and after the operation of § 5G1.1(b)), and he was therefore eligible for a reduction. 808 F.3d at 263, *but see id. at* 263-66 (Traxler, J., dissenting on theory that defendant's sentence was based on statutory mandatory minimum rather than on guideline). The Fourth Circuit remanded the case to the district court, which then reduced the defendant's sentence from 180 months to 58 months. *See United States v. Williams*, D. M.D. N.C. No. 1:07-CR-429-6 (order filed Jan. 21, 2016).

In *United States v. Battles*, 664 Fed. Appx. 491 (6th Cir. 2016), the **Sixth Circuit** reversed a sentence-reduction denial because the district court failed to adequately explain its ruling. The defendant in *Battles* had a pre-§ 5G1.1(b) guideline range of 168-210 months; his statutory mandatory minimum and § 5G1.1(b) restricted guideline range were both 240 months. At the original sentencing, the district court

granted a substantial-assistance departure to 210 months. The defendant continued to provide substantial assistance to the government, and the district court subsequently lowered his sentence even further, to 144 months. When the defendant later sought a sentence reduction under Amendment 782, both the probation officer and the government agreed that he was eligible. The district court also appeared to agree that the defendant was eligible, but the district court exercised its discretion to deny any reduction "based on the entire record." *Id*. at 493. On appeal, the Sixth Circuit reversed on grounds that the district court failed to adequately explain its reasons. *Id*. In discussing the district court's ruling, the Sixth Circuit inferred that "perhaps the district court felt that Battles's sentence had already been reduced enough." *Id*. But, the Sixth Circuit held, "the guidelines make clear that defendants who have received substantial assistance reductions remain eligible for § 3582(c)(2) reductions. *See* USSG § 1B1.10(c)." *Id*. at 495-96. The Sixth Circuit remanded the case to the district court for further proceedings. *Id*. The sentence-reduction motion remains pending there as of this writing. *See United States v. Battles*, W.D. Mich. No. 1:07-CR-281 (supplemental sentencing memoranda filed Jan. 31, 2017).

2. The **Tenth Circuit**, the **Eighth Circuit** and the **Ninth Circuit** have all held that cooperators whose pre-§ 5G1.1(b) guideline ranges were below their statutory mandatory minimums are not eligible for § 3582(c)(2) sentence reductions. Pet. App. 1a-12a (three consolidated defendants); *see also United States v. Koons, et al.,* 850 F.3d 973 (8th Cir. 2017), *reh. den.* (8th Cir. May 25, 2017) (five consolidated defendants); *United States v. Rodriguez-Soriano*, 855 F.3d 1040 (9th Cir. 2017) (one

defendant). In each of these cases (as in *Williams*), the government agreed that the defendants were eligible for sentence reductions. Pet. App. 6a-7a; *Koons*, 850 F.3d at 977; *Rodriguez-Soriano*, 855 F.3d at 1044. And yet in each of these cases, the circuit court rejected the position of both parties and concluded that the defendants' substantial-assistance departure sentences were not guideline sentences, but rather were based solely on their statutory mandatory minimums; therefore their sentences were not "based on a sentencing range that has subsequently been lowered by the Sentencing Commission" as required by § 3582(c)(2). Pet. App. 9a-11a; *Koons*, 850 F.3d at 978-79; *Rodriguez-Soriano*, 855 F.3d at 1044-46.

This circuit split may not be as deep or as long-standing as the disagreement about jurisdiction. But the eligibility question is less likely to reach circuit courts in jurisdictions where the parties both agree that defendants in the petitioners' posture are eligible, and the district courts reduce their sentences. With no party appealing from those sentence reductions, the circuits in which they were granted will not have an opportunity to weigh in. And the conflict is already entrenched: The Tenth, Eighth, and Ninth Circuits all acknowledged the contrary holding of the Fourth Circuit in *Williams*, and declined to follow it (siding instead with the *Williams* dissent). Pet. App. 7a n.3; *Koons*, 850 F.3d at 978; *Rodriguez-Soriano*, 855 F.3d at 1042 n.1. The issue is unlikely to work itself out at the circuit level; meanwhile Mr. Williams in the Fourth Circuit saw his 180-month sentence reduced to 58 months while Petitioner C.D.'s 180-month sentence still stands. Review is necessary to ensure the nationwide uniformity of cooperator eligibility for sentence reductions.

B. The eligibility question is an important one given the crucial role cooperators play in the criminal-justice system, and given the frequency and impact of retroactive guideline amendments.

1. "The guidelines and the relevant statutes have long recognized that defendants who provide substantial assistance are differently situated than other defendants." USSG Supp. App. C Amend. 780 (Reason for Amendment) (Nov. 1, 2014). This is the result of Congress, the Sentencing Commission, and this Court working to ensure that cooperators are duly rewarded. *See, e.g.,* 18 U.S.C. § 3553(e); 28 U.S.C. § 924(n); Fed. R. Crim. P. 35(b); USSG § 1B1.10(c). As the Fourth Circuit emphasized in *Williams*, substantial-assistance departures are a "powerful tool for more effective law enforcement, and placing restrictions on sentence-reduction eligibility for cooperating defendants . . . would weaken that tool." 808 F.3d at 262. The Tenth Circuit's eligibility decision excludes an entire category of cooperators—and the least culpable cooperators at that (those with guideline ranges *below* their statutory minimums)—from sentence-reduction eligibility. This exclusion creates a disparity inconsistent with the goals of the controlling substantial-assistance provisions:

> A contrary ruling [excluding cooperators with guideline ranges below their statutory minimums] would permit cooperating defendants with Guidelines ranges above their statutory minimums—perhaps due to extensive criminal histories or severe offense conduct—to nevertheless secure sentencing relief under § 3582(c)(2). On the other hand, cooperating defendants such as Williams, whose Guidelines ranges are entirely below their statutory minimums, would be denied relief. Such a disparity should not occur within the category of defendants who should benefit from Amendment 780: those "who provide substantial assistance to the government in the investigation and prosecution of others." See USSG app. C, amend. 780 (Supp. 2014). Moreover, Amendment 780

> makes no distinction among such defendants, and we lack the authority to create one.

Williams, 808 F.3d at 261-62.

Given the "value to our system of justice of those cooperating defendants who provide substantial assistance to the authorities," *Williams*, *id*. at 260, the eligibility of these cooperators for sentence reductions is an important question that should be addressed by this Court.

2. The possibility of future retroactive guideline amendments is not speculative. The Sentencing Commission has retroactively amended the guidelines 30 times to date. *See* USSG § 1B1.10(d) (listing retroactive amendments). The Commission undoubtedly will do so again. And retroactive amendments can affect large numbers of cases. Over thirty thousand defendants, for instance, successfully moved for a reduction under Amendment 782, seeing, on average, a 17.2% decrease in their sentences. *See U.S. Sentencing Comm'n 2014 Drug Guidelines Amendment Retroactivity Data Report* Tables 1, 7 (May 2017). It is not known how many of those defendants were cooperators, but Commission statistics show that, from at least fiscal years 2010 through 2016, district courts have granted from 7,443 to 9,677 substantial-assistance departures *each year*. *U.S. Sentencing Comm'n Data Reports* Table 8 (2010-2016).[14] This figure suggests the existence of a large pool of cooperators who may seek sentence reductions in the future. The eligibility of cooperating defendants for relief, and the jurisdictional consequences of § 3582(c)(2)'s eligibility

[14] Available at http://www.ussc.gov/research/data-reports/geography.

requirements, are questions of exceptional importance that should be decided by this Court.

3. "Congress enacted § 3582(c)(2) to remedy systemic injustice." *Freeman*, 564 U.S. at 533. The statute furthers the goals of the Sentencing Reform Act "by ensuring that district courts may adjust sentences imposed pursuant to a range that the Commission concludes are too severe, out of step with the seriousness of the crime and the sentencing ranges of analogous offenses, and inconsistent with the Act's purposes." *Id*. But systemic injustice cannot be remedied, nor the Sentencing Reform Act's goals furthered, when the lower courts interpret § 3582(c)(2) differently. This Court has twice before guided the lower courts with respect to § 3582(c)(2). *See Freeman,* 564 U.S. at 526-44 (addressing impact of plea agreements on § 3582(c)(2) eligibility); *Dillon*, 560 U.S. at 819-30 (addressing *Booker's* applicability in § 3582(c)(2) proceedings). This Court's guidance is needed again.

C. The Tenth Circuit was wrong about the eligibility question.

The Tenth Circuit was wrong when it concluded that cooperators whose guideline ranges fall below their statutory mandatory minimum sentences are categorically ineligible for § 3582(c)(2) sentence reductions. The panel's conclusion that such cooperators' substantial-assistance departure sentences are not "based on" the guidelines but rather are "based on" on the statutory minimums is inconsistent with the plain language of the statute:

> Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an

> offense. *Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission* pursuant to section 994 of title 28, United States Code.

18 U.S.C. § 3553(e) (emphasis added). The statute requires that substantial-assistance departures be based on the guidelines. The Tenth Circuit's holding to the contrary was wrong.

The statute and the guidelines work in tandem. The guidelines first instruct district courts to walk through seven steps, applying the guidelines at **step seven** to "[d]etermine the guideline range . . . that corresponds to the offense level and criminal history category." USSG § 1B1.1(a)(1)-(7). In C.D.'s case, for instance, the guideline range that corresponded to offense level 29 and criminal-history category IV was 121-151 months of imprisonment. USSG Ch. 5 Pt. A. The guidelines then instruct district courts to determine, at **step eight**, "the sentencing requirements" that apply to that particular guideline range. USSG § 1B1.1(a)(8) (cross-referencing Chapter Five, Parts B through G). Those sentencing requirements include statutory minimum sentences. USSG § 5G1.1(b). In C.D.'s case, absent any § 3553(e) motion, the statutory minimum sentence of 240 months of imprisonment would have become C.D.'s guideline sentence. *Id.*

But under § 3553(e), once the government moves for a substantial-assistance departure, the "sentencing requirements" at step eight no longer include the statutory mandatory minimum. At that point, § 3553(e) plainly requires (and Rule 35(b) likewise implies), that the defendant's sentence "shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission

pursuant to section 994 of title 28, United States Code." 18 U.S.C. § 3553(e). In other words, once the statutory minimum is off the table, the district court must base its sentence on the advisory guidelines.

Whether that sentence must be anchored by the defendant's guideline range (step seven), or instead by § 5G1.1(b) (step eight), is a matter of some dispute in the circuits. *Compare In re Sealed Case*, 722 F.3d 361 (D.C. Cir. 2013) (holding that a substantial-assistance motion "waive[s]" the statutory minimum and returns the district court to the defendant's pre-§ 5G1.1(b) guideline range), *with United States v. Diaz*, 546 F.3d 566, 568 (8th Cir. 2008) (holding that "the appropriate point from which to depart downward" for a substantial-assistance departure is § 5G1.1(b); citing similar decisions from other circuits). But under either reading, a cooperator who receives a substantial-assistance departure, and whose offense level is later reduced, will have been "sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission." 18 U.S.C. § 3582(c)(2).

Take C.D.'s guideline calculation. If a substantial-assistance motion nullifies the operation of § 5G1.1(b), then a cooperator in C.D.'s position will have been sentenced "based on" his pre-§ 5G1.1(b) guideline range, and that range will have subsequently been lowered by Amendment 782:

GL range applicable to defendant at sentencing	Amended GL range	GL range subsequently lowered?
Offense level 29 & criminal-history category IV. GL range = **121-151 months**.	Offense level 27 & criminal-history category IV. GL range = **100-125 months**.	Yes.

The result is the same even if § 5G1.1(b) is the appropriate anchor. Even then, the district court must be said to have departed from that guideline rather than from the statute (since the statute was off the table under § 3553(e)).[15] And the guidelines instruct district courts to calculate a defendant's *amended* guideline range "without regard to the operation of 5G1.1." USSG § 1B1.10(c). Thus, a cooperator in C.D.'s position will have been sentenced "based on" his § 5G1.1(b) guideline range, and, again, that range will have been subsequently been lowered by Amendment 782:

GL range applicable to defendant at sentencing	Amended GL range	GL range subsequently lowered?
GL range of 121-151 months trumped by § 5G1.1(b). GL range = **240 months**.	GL range of 100-125 months, *not* trumped by statutory minimum of 240 months. GL range = **110-137 months**.	Yes.

In either case, the Tenth Circuit should have recognized that those who risk their safety to help the government categorically clear § 3582(c)(2)'s "based on a sentencing range that has subsequently been lowered" eligibility hurdle.

D. These consolidated cases are ideal for deciding the eligibility question.

These cases arise on direct review from the denial of each petitioner's properly filed motion for sentence reduction. As with the jurisdictional issue, the eligibility question was squarely decided by the Tenth Circuit in a published opinion after which

[15] This fact is evident in the district court's Statement of Reasons for each petitioner here. In each case, in addition to noting "that the [statutory] mandatory minimum does not apply" in light of the defendant's substantial assistance, the district court determined that the defendant's "advisory guideline range" was 240 months and noted that "[t]he court departs *from the advisory guideline range*." CD R2.1448 at 1-2; EF R2.535 at 1-2; GH R2.411 at 1-2 (emphasis added).

the Tenth Circuit summarily denied the petition for en banc review. And again, these cases present this Court with an opportunity to address not one but two important, recurring questions: whether § 3582 is a jurisdictional statute, and whether cooperators in the petitioners' posture are eligible for sentence reductions.

CONCLUSION

For the above reasons, this Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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