No. 16-999

IN THE

Supreme Court of the United States

RAYMOND NEGRÓN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals For The First Circuit

REPLY BRIEF FOR PETITIONER

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QUESTION PRESENTED*

Under 18 U.S.C. § 3582(c)(2), a criminal defendant is eligible to receive a sentence reduction whenever the United States Sentencing Commission retroactively reduces the Sentencing Guidelines range for the defendant's crime, so long as the defendant's original sentence was "based on" that Guidelines range. In *Freeman v. United States*, 564 U.S. 522 (2011), this Court issued a fragmented, 4–1–4 set of opinions on the question whether a defendant is eligible for such a reduction after he enters into a binding plea agreement under Federal Rule of Criminal Procedure 11(c)(1)(C). A four-Justice plurality held that, as long as the sentencing judge based his decision to accept the plea agreement on the relevant Guidelines, the defendant is eligible for a reduction. Justice Sotomayor, in a lone concurrence, held that a defendant should instead be eligible for a sentence reduction only if the parties made the Guidelines range clear on the face of the plea agreement.

The question presented is whether lower courts are bound by the rationale of Justice Sotomayor's concurrence—with which all other Justices in *Freeman* expressly disagreed—on the theory that it is the "narrowest grounds" under *Marks v. United States*, 430 U.S. 188 (1977).

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* This question presented is identical to the question presented in the petition, save for the correction of a typo.

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STATUTE

REPLY BRIEF FOR PETITIONER

This petition is an ideal vehicle for deciding a critical, recurring question that has deeply divided the circuits: whether lower courts are bound by the rationale of Justice Sotomayor's concurrence in *Freeman v. United States*, 564 U.S. 522 (2011)—with which all other Justices expressly disagreed—on the theory that it is the "narrowest grounds" under *Marks v. United States*, 430 U.S. 188 (1977).

The Government, apparently, agrees on most of those points. The Government does not contest that the question presented has resulted in an extensive circuit split, which has grown even since the initial filing of the petition. The Government does not contest that, should this Court reverse the decision below, Petitioner Raymond Negrón will obtain the sentence reduction he seeks. And the Government does not seriously contest the importance of the question whether there is a controlling opinion in *Freeman*. Instead, the government makes three erroneous arguments.

First, the Government claims that Negrón failed to argue below that Justice Sotomayor's opinion is not controlling. But Negrón *did* raise this issue below, and, even if he had not, both the district court and the First Circuit addressed it, with the First Circuit explaining that it "controll[ed]" the appeal. Pet. App. 5a n.3. This Court has repeatedly explained that it will resolve issues addressed by the lower courts, regardless of whether the petitioner raised a specific argument.

Second, the Government asserts that the issue is unimportant because prosecutors can draft plea

agreements to skirt around the issue. The petition already refuted that argument. Pet. 15. Indeed, the *Freeman* plurality itself rejected this idea, and with good reason. Such an argument *assumes* the correctness of the Government's position, as plea agreements are only a potential work-around in the circuits that already apply Justice Sotomayor's *Freeman* concurrence.

Third, the Government mistakenly defends the decision below. The Government proposes a "results" based approach to analyzing fragmented decisions of this Court, which is a flawed and inappropriate methodology that even the First Circuit below did not apply. But even if it were the correct approach, the decision below would still be wrong, as Justice Sotomayor's *Freeman* concurrence is simply not a "narrower" opinion than that of the *Freeman* plurality.

I. THIS PETITION PROVIDES AN IDEAL VEHICLE TO ADDRESS WHETHER JUSTICE SOTOMAYOR'S *FREEMAN* CONCURRENCE IS CONTROLLING.

The Government argues that Negrón failed to raise this issue below, but the Government is wrong, and, in any event, the Government's argument is irrelevant. Both lower courts addressed the argument, and this Court has repeatedly made clear that, where lower courts have addressed an issue, there is no barrier or even inconvenience to this Court's review.

As an initial matter, Negrón *did* raise this issue in the courts below. At Negrón's sentencing hearing, his attorney argued that the *Freeman* plurality should control, explaining that the "plurality" rule is

"what we believe the law should be and would be the fair and just law." Pet. App. 17a–18a. And at the court of appeals, Negrón made clear that the district court denied him relief only because the court considered itself bound by the First Circuit's previous decision in *United States v. Rivera-Martinez*, 665 F.3d 344 (1st Cir. 2011). *See* Appellant's Brief, *United States v. Negrón*, 837 F.3d 91 (1st Cir. 2016) (No. 15-1898) 2016 WL 1084899, *16 ("[R]eluctantly, I'm bound by the *Rivera-Martinez* case . . . ." (quoting district court)). But even *if* Negrón "fail[ed] to make this exact *argument* below," such a failure would not "preclude[] its assertion here," because the "*issue* was raised in the lower courts." *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 678 n.27 (2001) (emphasis added). The question whether Justice Sotomayor's *Freeman* concurrence is controlling is "merely an argument in support" of Negrón's claim that he is entitled to a sentence reduction under 18 U.S.C. § 3582(c)(2). *Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 245–46 n.2 (2000). Indeed, this Court should be especially willing to address arguments like this one, where binding circuit precedent precluded Negrón from making a sustained argument until now, and the question is purely legal.

A powerful indication that the argument *was* raised below is that both lower courts addressed it, which is sufficient for this Court's review, regardless. The district court made clear that it believed the "plurality . . . in the *Freeman* case" was the correct rule. Pet. App. 16a. The First Circuit was also clear on the issue, as it "acknowledge[d]" the contrary precedents of the Ninth and D.C. Circuits, but it

nonetheless "view[ed] *Rivera-Martinez* as controlling Negrón's appeal." Pet. App. 5a n.3. That is, the First Circuit viewed this issue as *controlling Negrón's appeal*, and yet the Government now asserts that the Court should sidestep this petition on account of a failure to raise that "controlling" issue. That position is untenable, as this Court has repeatedly held that "[i]t suffices for [the Court's] purposes that the court below passed on the issue presented." *United States v. Williams*, 504 U.S. 36, 41 (1992); *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) ("Our practice permits review of an issue not pressed so long as it has been passed upon." (citation omitted)).

Outside of this attempt to sow confusion, the Government does not attempt to argue that this petition is anything less than an ideal vehicle. The issue was clearly addressed by both lower courts. The district court helpfully declared that it would have found Negrón "eligible" for a "reduction to 116 months," but for contrary caselaw. Pet. App. 29a. There is no question of this Court's jurisdiction. And there is no question of the efficaciousness of this Court's review.

II. WHETHER JUSTICE SOTOMAYOR'S *FREEMAN* CONCURRENCE IS CONTROLLING IS AN IMPORTANT AND RECURRING ISSUE THAT CONTINUES TO ARISE FREQUENTLY.

Negrón's petition identified several reasons why the question presented is important, almost none of which the Government contests, and the three months since Negrón's initial filing have demonstrated how critical and far-reaching this question remains. The Government merely relies on

a boilerplate argument that Negrón already refuted in his petition.

1. As the petition previously explained—and the Government does not contest—sentencing guideline revisions affect tens of thousands of prisoners, the vast majority of whom pleaded guilty. Pet. 12–14. The petition also noted the unusually large number of appellate decisions that have issued in the short time since *Freeman*. Pet. 13–14.

In the three-and-a-half months since Negrón filed his petition, federal courts of appeals have issued more than ten additional decisions that implicate this question.[1] And at least one court, the Eleventh Circuit, issued a fully-reasoned decision that joins the majority view on this issue. *United States v. Hughes*, 849 F.3d 1008, 1013 (11th Cir. 2017). That decision was wrong, but it reinforces the need for this Court's review. The Eleventh Circuit rejected the "common denominator" or "logical subset" rule that the Ninth and D.C. Circuits have applied. *Id.* at

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[1] *See, e.g.*, *United States v. Hughes*, 849 F.3d 1008, 1013 (11th Cir. 2017); *United States v. Jordan*, 853 F.3d 1334, 1339 (10th Cir. 2017); *United States v. May*, 855 F.3d 271, 276–77 (4th Cir. 2017); *United States v. Maupin*, No. 16-7103, 2017 WL 1828959, at *1 (4th Cir. May 5, 2017) (per curiam); *United States v. Quinn*, No. 16-3306, 2017 WL 1149085, at *2 (10th Cir. Mar. 28, 2017); *United States v. Bekteshi*, No. 16-40778, 2017 WL 1134735, at *1 (5th Cir. Mar. 24, 2017) (per curiam); *United States v. Jenkins*, No. 16-7197, 2017 WL 1012999, at *1 (4th Cir. Mar. 15, 2017) (per curiam); *United States v. Renfrow*, No. 15-3792, 2017 WL 781516, at *1 (8th Cir. Feb. 28, 2017) (per curiam); *United States v. Gonzalez*, No. 15-3097-CR, 2017 WL 730267, at *2 (2d Cir. Feb. 23, 2017); *United States v. Anguiera*, No. 16-176, 2017 WL 659937, at *2 (2d Cir. Feb. 15, 2017).

1014 (citations omitted). Instead, the Eleventh Circuit purported to apply a "results"-based approach, looking to what rule would garner a majority of justices in a given case. *Id.* at 1015. The Eleventh Circuit expands the conflict over both the question presented by this petition and the broader question of how to analyze fragmented decisions under *Marks*.

2. The Government also seeks to minimize the issue's importance by asserting that prosecutors can write plea agreements to make this issue disappear. But as the petition already explained, this argument assumes the Government's conclusion. The plea agreement is a controlling document only under Justice Sotomayor's concurrence; under the *Freeman* plurality's rule, the Government's proposed plea agreement fix will have almost no effect at all. That is, the Government assumes the correctness of its position and then declares that its position makes the issue unimportant.

This approach would also extend power to prosecutors that Congress did not intend. There is no indication in 18 U.S.C. § 3582(c)(2) that Congress intended prosecutors to have another chip to bargain with. Instead, the statute is directed at the *court*, as the *Freeman* plurality specifically noted. *Freeman*, 564 U.S. at 532–33. Plea-bargaining is itself a critical stage of the criminal justice system. As this Court has held, given its prevalence, plea-bargaining "is not some adjunct to the criminal justice system; it *is* the criminal justice system." *Missouri v. Frye*, 566 U.S. 134, 144 (2012). Granting prosecutors the power to give or withhold potential future sentence reductions is itself a substantive decision with great

effect on the bargaining power of defendants. Indeed, the *Freeman* plurality rejected the notion that plea agreements should control the outcomes of these cases, explaining that such a solution would "permit the very disparities the Sentencing Reform Act seeks to eliminate." *Freeman*, 564 U.S. at 533. Relying on plea-bargaining is not a panacea that avoids the question presented, but rather an erroneous, Government-friendly, substantive decision in its own right.[2]

III. THE FIRST CIRCUIT IS WRONG.

Finally, the Government erroneously argues that the decision below is correct—though, notably, using a different rationale than the First Circuit employs.

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[2] The Government notes a number of petitions for certiorari that are either currently pending or previously denied. Opp. 12 n.1. One was denied before the circuit split had even developed. *Brown v. United States*, 565 U.S. 1148 (2012) (No. 11-6385). Another did not raise the same issue. *Pleasant v. United States*, 134 S. Ct. 824 (2013) (No. 13-6147). Two more are currently pending. *Gilmore v. United States* (No. 16-7953); *Sullivan v. United States* (No. 16-7182). The remainder all exhibited significant vehicle issues. *E.g., Blaine v. United States*, 137 S. Ct. 1329 (2017) (No. 16-6574) (not clear what the defendant's applicable Guidelines range *was*); *McNeese v. United States*, 137 S. Ct. 474 (2016) (No. 16-66) (the petitioner was ineligible for a sentence reduction regardless of *Freeman*); *Chapman v. United States*, 137 S. Ct. 625 (2017) (No. 16-5969) (the lower court never mentioned the issue, much less addressed it); *Fuentes v. United States*, 137 S. Ct. 627 (2017) (No. 16-6132) (*pro se* petition where the district court's reasons for denying the reduction were not wholly clear).

None of these petitions provide the ideal vehicle that the present case does, but the substantial number of petitions does further establish that the issue is recurring and important.

According to the Government, Justice Sotomayor's *Freeman* concurrence is "narrower" than the plurality because, under the plurality view, when a sentencing court accepts a C-type plea agreement, that decision is "*always* 'based on'" the Guidelines. Opp. 14 (quoting *United States v. Duvall*, 740 F.3d 604, 611–12 (D.C. Cir. 2013) (Kavanaugh, J., concurring in the denial of rehearing *en banc*)). And because a sentencing court would "always" base its decision on the Guidelines, the plurality would "always" grant relief when Justice Sotomayor's concurrence would do so. Accordingly, Justice Sotomayor's concurrence is controlling because it is the opinion that would produce "result[s]" that a majority of this Court would approve of. Opp. 15.

This argument is wrong on multiple levels. First, the Government improperly uses a "results" analysis rather than a "logical subset" analysis. "[F]ractured Supreme Court decision[s] should only bind the federal courts of appeal when a majority of the Justices agree upon a single underlying rationale and one opinion can reasonably be described as a logical subset of the other." *United States v. Davis*, 825 F.3d 1014, 1021–22 (9th Cir. 2016) (en banc). As explained in the petition, the "results" approach improperly grants authority to dissents, treats as binding a legal rationale that a majority of justices have rejected, and calls for a prediction about what this Court *would* do in the future, a fortune-telling enterprise that circuit courts should not undertake. Pet. 23–24. Here, for instance, the plurality and concurrence "agree on very little except the judgment." *Freeman*, 564 U.S. at 544 (Roberts, C.J.,

dissenting). Trying to divine a rule from such disagreement is a fool's errand.

Second, even if the "results" approach were appropriate, the Government takes unfounded liberties with its view of the plurality opinion in *Freeman*. Nowhere does the *Freeman* plurality suggest that a sentencing court's decision will "*always*" be based on the Guidelines, even in those cases where the plea agreement includes a Guidelines range. Indeed, the plurality made clear that it was no more than "likely" that a sentencing judge would base his decision on the Guidelines. *Freeman*, 564 U.S. at 534. "Likely" is a far cry from "always."

Third, whether one applies the results approach or the logical subset approach, it is clear that Justice Sotomayor's concurrence is neither a "middle ground," Opp. 15 (citation omitted), nor a "logical subset" of the plurality opinion. Indeed, as already explained in the petition, there are simple scenarios in which a sentencing court would grant relief under the *Freeman* concurrence but not the *Freeman* plurality, establishing that the concurrence is neither a "subset" of the plurality nor an accurate bellwether of the Court's likely future results. Pet. 25–26. If a sentencing judge rejects the plea agreement's Guidelines range but accepts the agreement anyway, it is Justice Sotomayor's concurrence that would potentially grant future relief, not the plurality. Or, if the plea agreement explicitly contains a Guidelines range, but the sentencing judge relies on a different Guidelines range before accepting the agreement, any future sentence reduction would depend on *which* Guidelines range was modified. If the district

court's Guidelines range were later retroactively modified, only the *Freeman* plurality would grant relief. If the Guidelines range proposed by the parties were later retroactively modified, only the *Freeman* concurrence would grant relief.

These examples are not merely abstract hypotheticals. For instance, in *United States v. Hill*, No. 15-30349, 2017 WL 318829, at *1 (9th Cir. Jan. 23, 2017), the parties agreed to a Guidelines range that was *lower* than what the sentencing court held to apply; that is, the plea agreement contained one range, but the district court calculated a different, higher range. *See* Appellee's Brief, *Hill*, 2017 WL 318829 (No. 15-30349), 2016 WL 4425962, *11. Accordingly, the district court rejected a later motion for a sentencing reduction because, even reducing the Guidelines range that it had previously calculated, the defendant would not be eligible for any reduction in sentence. The Ninth Circuit affirmed, applying the *Freeman* plurality view. *Hill*, 2017 WL 318829. Under the *Freeman* concurrence, however, the defendant *would* have been eligible for a reduction, based on the resulting reduction to the *parties'* agreed-upon Guidelines range.

Whether as a logical matter or a practical matter, the decision of the First Circuit—and the Government's position—is wrong. But even if there is disagreement on that point, this is a significant issue on which circuits disagree in reasoned opinions. There is, at the very least, a highly disputed, highly important question worthy of this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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