No. 16-9672

IN THE SUPREME COURT OF THE UNITED STATES

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

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the provision of 18 U.S.C. 3582(c)(2) limiting eligibility for discretionary sentence reductions to defendants who were sentenced "based on a sentencing range that has subsequently been lowered by the Sentencing Commission" is a nonjurisdictional prerequisite that a court is foreclosed from examining sua sponte.

2. Whether a defendant who is subject to a statutory mandatory minimum sentence, but who substantially assisted the government and received a sentence below the mandatory minimum pursuant to 18 U.S.C. 3553(e), is eligible for a further sentence reduction under 18 U.S.C. 3582(c)(2), when the Sentencing Commission retroactively lowers the advisory Sentencing Guidelines range that would have applied in the absence of the statutory mandatory minimum.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 848 F.3d 1286. The opinion of the district court in petitioner C.D.'s case (Pet. App. 13a-29a) is not published in the Federal Supplement but is available at 2015 WL 8492029.[1] The opinion of the district court in petitioner E.F.'s case (Pet. App. 30a-47a) is reported at 158 F. Supp. 3d 1171. The opinion of the district court in petitioner G.H.'s case (Pet. App. 48a-65a) is

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[1] The court of appeals referred to petitioners by non-identifying initials to protect their anonymity as government cooperators. Pet. App. 2a n.*; see Pet. 1 n.l.

not published in the Federal Supplement but is available at 2016 WL 408917.

JURISDICTION

The judgment of the court of appeals was entered on February 22, 2017. A petition for rehearing was denied on March 22, 2017 (Pet. App. 66a-67a). The petition for a writ of certiorari was filed on June 20, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following guilty pleas in the United States District Court for the District of Kansas, petitioners C.D., E.F., and G.H. were convicted, in separate criminal cases, of conspiracy to manufacture and distribute crack cocaine, in violation of 21 U.S.C. 841(a)(1) and 846. They were sentenced, respectively, to 180, 170, and 151 months in prison, to be followed by ten years of supervised release in each case. Pet. App. 3a; see C.D. Original J. 2-3; E.F. Amended J. 3-4; G.H. Original J. 2-3. Petitioners subsequently moved to reduce their sentences pursuant to 18 U.S.C. 3582(c)(2). Pet. App. 3a. The district court denied their motions. Id. at 13a-65a. In a consolidated appeal, the court of appeals vacated the district court's decisions and remanded with instructions to dismiss petitioners' motions for lack of jurisdiction. Id. at 4a.

1. An investigation by the Kansas City, Kansas, office of the Drug Enforcement Administration uncovered a broad conspiracy to distribute large quantities of marijuana, cocaine, and cocaine base (crack cocaine) in the Kansas City area. See, e.g., C.D. Presentence Investigation Report ¶¶ 67-81. A 112-count superseding indictment filed in October 2012 in the District of Kansas charged 50 defendants, including petitioners, with numerous drug offenses. Id. ¶ 7. Petitioners were charged with conspiracy to manufacture, to possess with intent to distribute, and to distribute, 280 grams or more of crack cocaine, in violation of 21 U.S.C. 846 and 841(a)(1). After guilty pleas pursuant to plea agreements, each petitioner was convicted of that conspiracy offense. See Pet. App. 2a.

Because each petitioner had a prior felony drug conviction, each was subject to a statutory mandatory-minimum sentence of 20 years in prison under 21 U.S.C. 841(b)(1)(A). Pet. App. 2a. That mandatory minimum was also the sentence indicated by the federal Sentencing Guidelines, pursuant to Sentencing Guidelines § 5G1.1(b), which provides that "[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." The Probation Office calculated that the advisory guidelines range that would have applied had petitioners not been subject to the statutory mandatory minimum

was 121 to 151 months in petitioner C.D.'s case, 108 to 135 months in petitioner E.F.'s case, and 84 to 105 months in petitioner G.H.'s case. Pet. App. 15a n.3, 32a n.3, 50a n.3.

In each case, the government moved for a departure from the mandatory minimum sentence, pursuant to 18 U.S.C. 3553(e), to reflect petitioners' substantial assistance in prosecuting other criminal defendants. The district court granted the motions and sentenced petitioner C.D. to 180 months in prison, petitioner E.F. to 170 months in prison, and petitioner G.H. to 151 months in prison. Pet. App. 3a.[2] In arriving at those sentences, the district court relied on the statutory mandatory minimum of 240 months, which became the "guideline sentence" under Sentencing Guidelines § 5G1.1(b), not on the advisory guidelines ranges that would have applied if petitioners had not been subject to the mandatory minimum, see Pet. App. 2a, 10a n.4. Petitioners did not contest that approach. See Pet. 8 n.4.

2. a. A court generally "may not modify a term of imprisonment once it has been imposed." 18 U.S.C. 3582(c). One exception is specified in 18 U.S.C. 3582(c)(2), which provides that a court "may reduce" the sentence 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

[2] In petitioner E.F.'s case, the government filed -- and the district court granted -- the substantial-assistance motion after the initial sentencing. See Fed. R. Crim. P. 35(b).

Commission," ibid., after considering the applicable statutory sentencing factors set forth in 18 U.S.C. 3553(a), "if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission," 18 U.S.C. 3582(c)(2).

b. In November 2014, the Sentencing Commission issued Amendment 782 to the Sentencing Guidelines, which reduced by two levels the base offense level corresponding to certain drug quantities. Sentencing Guidelines App. C Supp., Amend. 782 (Nov. 1, 2014). The Commission also made Amendment 782 retroactive, with the caveat that a court may "not order a reduced term of imprisonment based on Amendment 782 unless the effective date of the court's order is November 1, 2015, or later." Id. Amend. 788 (Nov. 1, 2014).

c. Citing Amendment 782, petitioners moved for reductions of their sentences under Section 3582(c)(2). The government agreed that petitioners were eligible for sentence reductions, and, after "negotiat[ion]" between the government and petitioners' counsel, "the parties submitted an agreed order" in each case proposing a specific sentence reduction. Pet. App. 14a (proposed reduction from 180 to 149 months in petitioner C.D.'s case); id. at 30a (proposed reduction from 170 to 140 months in petitioner E.F.'s case); id. at 48a (proposed reduction from 151 to 121 months in petitioner G.H.'s case). The district court agreed that petitioners were eligible for sentence reductions under Section

3582(c)(2), but "after considering the factors set forth in section 3553(a)," 18 U.S.C. 3582(c)(2), the court exercised its discretion to deny any reductions, see Pet. App. 20a, 37a, 55a; see also Pet. App. 6a. In exercising its discretion, the district court gave "significant weight to the seriousness of the offense" committed by petitioners and "significant weight to 'the need to avoid unwarranted sentencing disparities'" among similarly situated defendants. Id. at 28a, 46a, 64a (quoting 18 U.S.C. 3553 (a)). The court also recognized that the adoption of Amendment 782 did not alter the mandatory minimum that would become the guideline sentence under Section 5G1.1(b). Id. at 28a, 46a & n.13, 64a & n.14.

3. Petitioners appealed, and their cases were consolidated for decision by the court of appeals. The government filed an opposition brief contending that the district court had "properly applied" Section 3582(c)(2) by concluding that petitioners were eligible for sentence reductions and then exercising its discretion to deny their motions based on the sentencing factors in Section 3553(a). Gov't C.A. Br. 13, 18-19.

The court of appeals vacated the district court's decisions with instructions to dismiss petitioners' motions for lack of jurisdiction. Pet. App. 1a-12a. The court explained that 18 U.S.C. 3582(c)(2) "plainly" establishes "three distinct hurdles" that a defendant "must overcome * * * before he may obtain a

sentencing reduction" under that provision. Pet. App. 5a. First, a defendant must "show he was sentenced based on a guideline range the Sentencing Commission lowered subsequent to defendant's sentencing." Ibid. Second, a defendant "must establish his request for a sentence reduction is consistent with the Commission's policy statements related to" Section 3582(c)(2). Ibid. Third, a defendant "must convince the district court he is entitled to relief in light of the applicable sentencing factors found in 18 U.S.C. 3553(a)." Id. at 6a.

The court of appeals concluded that the district court had erred by denying petitioners' motions under the "third hurdle" without addressing the "first hurdle" -- that a defendant's initial sentence be "based on" a guidelines range subsequently lowered by the Sentencing Commission. Pet. App. 6a & n.3. The court stated that the government had "conceded" petitioners' eligibility for a sentence reduction in the district court and on appeal, but explained that under binding circuit precedent, "this first prerequisite to [Section] 3582(c)(2) relief presents a matter of statutory interpretation bearing on the district court's jurisdiction" and that the government "cannot concede a court's criminal jurisdiction where it does not exist." Id. at 5a, 7a; see id. at 5a & n.2 (observing that panel was required to adhere to United States v. White, 765 F.3d 1240, 1245 (10th Cir. 2014), cert. denied, 135 S. Ct. 1009 (2015)).

The court of appeals then explained that petitioners did not satisfy the "first prerequisite" for a Section 3582(c)(2) sentence reduction because their sentences were "'based on' the statute establishing the mandatory minimum rather than the applicable guideline range." Pet. App. 5a, 9a. The court acknowledged that petitioners had received sentences below the mandatory minimum after the government filed substantial assistance motions, but reasoned that petitioners' sentences were nevertheless not "based on" the drug-quantity guidelines range subsequently lowered by the Commission in Amendment 782, because a court cannot grant a substantial assistance departure "on the basis of factors other than substantial assistance." Id. at 11a. The court of appeals accordingly vacated the district court's decisions and remanded with directions to dismiss petitioners' sentence reduction motions for lack of jurisdiction. Id. at 12a.

ARGUMENT

Petitioners contend (Pet. 12-26) that the court of appeals erred in examining their eligibility for sentence reductions under 18 U.S.C. 3582(c)(2) notwithstanding the parties' agreement on that issue. They further contend (Pet. 27-37) that the Sentencing Commission's adoption of Amendment 782 made them eligible to be considered for a sentence reduction under 18 U.S.C. 3582(c)(2) without regard to the fact that they were subject to statutory mandatory minimums. Both contentions lack merit, and neither

warrants this Court's review. Although the government initially agreed that petitioners were eligible for sentence reductions under Section 3582(c)(2), the court of appeals was not precluded from determining otherwise. And the government has reconsidered its view and now agrees with the decision below and the Eighth Circuit's decision in United States v. Koons, 850 F.3d 973 (2017), petition for cert. pending, No. 17-5716 (filed Aug. 22, 2017), that defendants in petitioners' position do not meet Section 3582(c)(2)'s eligibility requirements. In any event, this case would be an especially unsuitable vehicle for reviewing any question relating to Section 3582(c)(2)'s eligibility requirement, because the district court viewed petitioners as eligible for sentence reductions under that provision but nevertheless determined in its discretion that such reductions would not be appropriate.[3]

1. Section 3582(c)(2) sets forth a "narrow exception[]" to the "rule of finality" that generally governs federal criminal sentences. Freeman v. United States, 564 U.S. 522, 526 (2011) (plurality opinion). Section 3582(c)(2) provides in full:

> [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

[3] Other pending petitions also raise the second question presented by petitioners here. See Kasowski v. United States, No. 16-9649 (filed June 16, 2017); Richter v. United States, No. 16-9695 (filed June 20, 2017); Koons, No. 17-5716, supra; Rodriguez-Soriano v. United States, No. 17-6292 (filed Oct. 6, 2017).

> 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).

Petitioners contend that a court may examine the threshold criterion for a sentence reduction under Section 3582(c)(2) -- that the defendant's sentence was "based on a sentencing range that has subsequently been lowered by the Sentencing Commission" -- only when that criterion is disputed by the government. 18 U.S.C. 3582(c)(2). In petitioners' view, so long as the government believes the defendant to be eligible for a sentence reduction, a court is invariably bound to treat him as such for purposes of granting one, irrespective of the soundness of the government's belief. That is incorrect.

A nonjurisdictional limitation, unlike a jurisdictional one, can be forfeited or waived. See, e.g., United States v. Cotton, 535 U.S. 625, 630 (2002). And in some circumstances, it is an abuse of discretion for a court to examine sua sponte an issue that a party has waived. See Wood v. Milyard, 566 U.S. 463, 474 (2012). But a party's concession on a nonjurisdictional question of law -- such as the proper interpretation of a statute -- generally is "not binding" on a court. Grove City Coll. v. Bell, 465 U.S. 555, 562 n.10 (1984); see also, e.g., NASA v. Nelson, 562

U.S. 134, 163 n.* (2011) (Scalia, J., concurring in the judgment) ("We are not bound by a litigant's concession on an issue of law."); Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp., 561 U.S. 89, 120 n.4 (2010) (Sotomayor, J., dissenting) ("[T]his Court is not bound by a party's concession in our interpretation of a statute."); Garcia v. United States, 469 U.S. 70, 79 (1984) ("It is our responsibility to interpret the intent of Congress in enacting [a statute], irrespective of petitioners' or respondent's prior or present views.").

Because the court of appeals was free to interpret the "based on" requirement in Section 3582(c)(2) regardless of the parties' shared position, review of the court of appeals' characterization of the requirement as jurisdictional would have little practical effect on the disposition of this case. See United States v. Taylor, 778 F.3d 667, 670 (7th Cir. 2015) (describing the "practical differences" between the labels as "minimal" in this context). Viewing the "based on" requirement as nonjurisdictional would eliminate the court's obligation to determine whether that requirement was satisfied. See, e.g., ibid.; United States v. Johnson, 732 F.3d 109, 116 n.11 (2d Cir. 2013). But it would not eliminate the court's power to make that determination. And having made the determination in this case that petitioners are ineligible for relief, the court of appeals would be unlikely simply to disregard that determination even if this Court were to hold that

the requirement is not jurisdictional. Although the court of appeals would need to amend the disposition specified in its opinion -- in particular, it would need to affirm the denial of relief on the merits, rather than directing dismissal of petitioners' motions "for lack of jurisdiction," Pet. App. 11a -- doing so would not affect petitioners' entitlement to sentence reductions or the length of the prison terms they are serving.[4]

This case would accordingly not be a suitable vehicle for reviewing any circuit conflict about whether, and to what extent, the eligibility criteria for a discretionary sentencing reduction under 18 U.S.C. 3582(c)(2) are jurisdictional. In asserting such a conflict, petitioners identify no decision in which a court of appeals has viewed itself as bound by the government's concession that a defendant is eligible for such a reduction. Indeed, in other cases similar to this one, courts of appeals have reviewed the eligibility question notwithstanding the government's concession. See, e.g., United States v. Rodriguez-Soriano, 855 F.3d 1040, 1044 (9th Cir. 2017), petition for cert. pending, No. 17-6292 (filed Oct. 6, 2017); Koons, 850 F.3d at 977; United States

[4] As discussed further below, the court of appeals would also be able to affirm on the alternative ground that, regardless of whether petitioners were eligible for sentence reductions under Section 3582(c)(2), the district court did not abuse its discretion in declining to grant such reductions after assessing the sentencing factors in Section 3553(a).

v. Williams, 808 F.3d 253, 256 (4th Cir. 2015). Review of the first question presented is accordingly not warranted.

2. The court of appeals correctly resolved the eligibility question in this case.

a. The plain text of Section 3582(c)(2) explicitly creates a threshold eligibility requirement that limits relief to cases in which the defendant's sentence was "based on a sentencing range that has subsequently been lowered by the Sentencing Commission." 18 U.S.C. 3582(c)(2); see Freeman, 564 U.S. at 527 (plurality opinion); id. at 534-535 (Sotomayor, J., concurring in the judgment); id. at 544-545 (Roberts, C.J., dissenting). That threshold eligibility requirement renders Section 3582(c)(2) inapplicable to defendants who were sentenced pursuant to a statutory mandatory minimum sentence that exceeds the otherwise-applicable guidelines range. Such a defendant's sentence was not "based on a sentencing range that has subsequently been lowered by the Sentencing Commission." 18 U.S.C. 3582(c)(2). It was "based on" the mandatory minimum, which also became "the guideline sentence" under Sentencing Guidelines § 5G1.1(b), and which the district court was "bound" to enforce, Kimbrough v. United States, 552 U.S. 85, 107 (2007).

In such a case, the Sentencing Commission does not "subsequently * * * lower[]" the applicable "sentencing range" when, as in its adoption of Amendment 782, it lowers the sentencing

range that would apply if a defendant were not subject to a mandatory minimum. 18 U.S.C. 3582(c)(2). The Commission, in fact, could not lower a sentencing range premised on a mandatory minimum, because the "Commission does not have the authority to amend [a] statute." Neal v. United States, 516 U.S. 284, 290 (1996). The Commission policy statement governing Section 3582(c)(2) sentence reductions expressly recognizes as much, noting that a sentence reduction "is not authorized under 18 U.S.C. § 3582(c)(2)" if an amendment to the Guidelines "does not have the effect of lowering the defendant's applicable guideline range because of the operation of another guideline or statutory provision (e.g., a statutory mandatory minimum term of imprisonment)." Sentencing Guidelines § 1B1.10, comment. (n.1(A) (emphasis omitted)).

b. A defendant is likewise not sentenced "based on a sentencing range that has subsequently been lowered by the Sentencing Commission," 18 U.S.C. 3582(c)(2), when he is subject to a mandatory minimum that exceeds the otherwise-applicable guidelines range but received a lower sentence, pursuant to 18 U.S.C. 3553(e), that accounted for his substantial assistance to the government. Pet. App. 9a-11a; Koons, 850 F.3d at 977; see also Rodriguez-Soriano, 855 F.3d at 1044-1046 (holding that a defendant was ineligible for a sentence reduction under Section

3582(c)(2) because the transcript in his case made clear that his sentence was "based on" the mandatory minimum).[5]

Section 3553(e) provides:

> 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 [28 U.S.C. 994].

18 U.S.C. 3553(e). Section 3553(e) thus provides statutory authority for a court to impose a sentence below a mandatory minimum, but it expressly ties such a departure to the sentence "established by statute as a minimum sentence." Ibid.[6] Moreover, Section 3553(e) limits the extent of a departure to a reflection of the defendant's substantial assistance. Indeed, the court of appeals below and every other court of appeals to address the question has concluded that "only substantial assistance considerations" -- not any other considerations embodied in the

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[5] By contrast, when a defendant's guidelines range is above the mandatory minimum, the court must consider that guidelines range in its sentencing decision, and the defendant accordingly may be eligible for a Section 3582(c)(2) reduction if the guidelines range is subsequently lowered by the Sentencing Commission. See, e.g., United States v. Freeman, 586 Fed. Appx. 237 (7th Cir. 2014).

[6] Indeed, the district court expressly explained in petitioners' cases that the initial sentence were a downward departure from the mandatory minimum, not an upward departure from the guidelines range that would have applied in the absence of a mandatory minimum. Pet. App. 28a, 46a & n.13, 64a & n.14.

Guidelines -- "may support a downward departure below a mandatory minimum sentence" under Section 3553(e). Pet. App. 10a (quoting United States v. A.B., 529 F.3d 1275, 1281 (10th Cir.), cert. denied, 555 U.S. 962 (2008)); accord United States v. Winebarger, 664 F.3d 388, 396 (3d Cir. 2011) (collecting cases), cert. denied, 134 S. Ct. 181 (2013).

c. Petitioners' contrary contentions (Pet. 33-36) lack merit. Petitioners, like the government in the proceedings below, rely on the policy statement appearing at Section 1B1.10(c) of the Guidelines. That statement provides:

> 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 the 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).

Sentencing Guidelines App. C Supp., Amend. 780 (Nov. 1, 2014). Under that directive, a court considering a Section 3582(c)(2) sentence reduction motion by a defendant who received a substantial assistance reduction would calculate the "amended guideline range" without regard to the mandatory minimum. Ibid. In petitioner C.D.'s case, for example, the guidelines range after Amendment 782 (absent the mandatory minimum) was 100 to 125 months, Pet. App. 27a, so the Section 1B1.10(c) policy statement would set that as his "amended guideline range," ibid., irrespective of Section

5G1.1(b)'s instruction that, in an ordinary case, a superseding statutory minimum becomes the "guideline sentence," Sentencing Guidelines § 5G1.1(b).

The policy statement, however, does not eliminate or supersede the statutory requirement that a defendant's original sentence have been "based on a sentencing range that has subsequently been lowered by the Sentencing Commission" in order to qualify for a sentence reduction. 18 U.S.C. 3582(c)(2). The policy statement appears, instead, to assume -- as do petitioners, see Pet. 34-36 -- that any sentence involving a substantial assistance departure from a mandatory minimum satisfies that prerequisite. As explained above, that assumption is unwarranted. When a defendant in petitioners' position receives a substantial assistance departure, the resulting sentence is still "based on" the mandatory minimum (which is also incorporated through Sentencing Guidelines § 5G1.1(b), a provision the Commission does not purport to amend) with a departure only to "reflect a defendant's substantial assistance," 18 U.S.C. 3553(e). Therefore, as multiple courts of appeals have recognized, granting a Section 3582(c)(2) reduction to a defendant in petitioners' position effectively reads the threshold "based on" requirement in Section 3582(c)(2) "out of the statute." Rodriguez-Soriano, 855 F.3d at 1045; see Pet. App. 6a-7a. The Commission's policy statement cannot permissibly be read to have that effect. See

United States v. LaBonte, 520 U.S. 751, 757 (1997) (explaining that guidelines provision "at odds with [the] plain language" of a statute "must give way" to "the specific directives of Congress"); accord id. at 760 (rejecting Commission position that would "largely eviscerate" statutory requirement and render it "a virtual nullity").

3. As petitioners note (Pet. 27-33), a limited conflict exists between the Eighth and Tenth Circuits, which have held that defendants in petitioners' position are not eligible for sentence reductions under Section 3582(c)(2), see Pet. App. 11a; Koons, 850 F.3d at 977, and the Fourth Circuit, which has held in a divided decision that defendants in petitioners' position may receive such reductions, see Williams, 808 F.3d at 260-263; id. at 263-266 (Traxler, C.J., dissenting). The Ninth Circuit has adopted an intermediate approach, holding that defendants in petitioners' position are eligible for sentence reductions under Section 3582(c)(2) only if the sentencing transcript or other record materials in that particular case indicate that the defendant's sentence was "based on" a subsequently lowered guidelines range rather than the mandatory minimum incorporated as the guideline sentence. Rodriguez-Soriano, 855 F.3d at 1044-1046.

That limited conflict does not warrant this Court's intervention at this time. The disagreement is of recent vintage, and only one court of appeals (the Fourth Circuit in Williams) has

taken a position inconsistent with the decision below. The dissenting judge in Williams, moreover, viewed that decision to conflict with the Fourth Circuit's own prior holding in United States v. Hood, 556 F.3d 226, 233, cert. denied, 558 U.S. 921 (2009), where another panel held, before Section 1B1.10(c) was promulgated, that the sentence of a defendant in petitioners' position "was not 'based on' the sentencing range * * * that was [subsequently] lowered by" a Guidelines amendment. Id. at 236; see Williams, 808 F.3d at 264-266 (Traxler, C.J., dissenting). Particularly because Williams predated the government's reconsideration of its position, the Fourth Circuit and other courts of appeals would benefit from the opportunity to consider the government's current view. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam).

4. In any event, this case would be a poor vehicle for reviewing application (or jurisdictional characterization) of the eligibility criteria for a discretionary sentence reduction under Section 3582(c)(2), because the district court determined that such a discretionary reduction would not be appropriate in this case. The court believed that petitioners were eligible for sentence reductions under Section 3582(c)(2), but nevertheless denied the motions "after considering the factors set forth in section 3553(a)," 18 U.S.C. 3582(c)(2); see Pet. App. 20a, 37a, 55a. Accordingly, even if petitioners were correct that the court

of appeals erred in addressing their eligibility for discretionary relief and finding them ineligible, they would be unlikely ultimately to obtain such relief. The question whether a particular defendant is entitled to a Section 3582(c)(2) sentence reduction based on the factors set forth in 18 U.S.C. 3553(a) "is a query committed to the sound discretion of the district court and reviewable for an abuse of discretion." Pet. App. 6a. The district court here acted well within its discretion in giving "significant weight" both to "the seriousness of the offense" committed by petitioners and "to the need to avoid unwarranted sentence disparities" among similarly situated defendants to determine that reductions would not be appropriate here. Id. at 37a, 55a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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