No. 17-155

IN THE

Supreme Court of the United States

ERIK LINDSEY HUGHES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF PETITIONER

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QUESTIONS PRESENTED

This Court explained in *Marks v. United States*, 430 U.S. 188, 193 (1977), that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" In *Freeman v. United States*, 564 U.S. 522 (2011), the Court issued a fractured 4-1-4 decision concluding that a defendant who enters into a plea agreement under Fed. R. Crim. P. 11(c)(1)(C) may be eligible for a reduction in his sentence if the Sentencing Commission subsequently issues a retroactive amendment to the Sentencing Guidelines. But the four-Justice plurality and Justice Sotomayor's concurrence shared no common rationale.

The questions presented are:

1. Whether this Court's decision in *Marks* means that the concurring opinion in a 4-1-4 decision represents the holding of the Court where neither the plurality's reasoning nor the concurrence's reasoning is a logical subset of the other.

2. Whether, under *Marks*, the lower courts are bound by the four-Justice plurality opinion in *Freeman*, or, instead, by Justice Sotomayor's separate concurring opinion with which all eight other Justices disagreed.

3. Whether, as the four-Justice plurality in *Freeman* concluded, a defendant who enters into a Fed. R. Crim. P. 11(c)(1)(C) plea agreement is generally eligible for a sentence reduction if there is a later, retroactive amendment to the relevant Sentencing Guidelines range.

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JURISDICTION

The court of appeals entered judgment on February 27, 2017. Pet. App. 1a. On May 22, 2017, Justice Thomas extended the time for filing a petition for certiorari to July 27, 2017. The certiorari petition was filed on July 27, 2017, and granted on December 8, 2017. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

18 U.S.C. § 3582(c)(2) provides:

> The court may not modify a term of imprisonment once it has been imposed except that … in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994(o), … 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.

Federal Rule of Criminal Procedure 11(c)(1)(C) provides:

> (c) Plea Agreement Procedure.
>
> > (1) In General. An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will:
> >
> > …
> >
> > > (C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

STATEMENT OF THE CASE

Congress Authorizes Sentences To Be Retroactively Reduced Based On Subsequently Amended Guidelines.

In the Sentencing Reform Act of 1984, 18 U.S.C. § 3551 et seq., Congress overhauled federal sentencing law to "avoid unwarranted sentence disparities

among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6); *see* S. Rep. No. 98-225, at 51-52 (1983). Congress established the U.S. Sentencing Commission and tasked it with creating Sentencing Guidelines that establish an "appropriate kind and range of sentence for a given category of offense committed by a given category of offender." S. Rep. No. 98-225, at 51; *see* 28 U.S.C. § 994(a). Although the Guidelines no longer are mandatory, *United States v. Booker*, 543 U.S. 220, 264-65 (2005), courts still must consider the Guidelines "in determining the particular sentence to be imposed." 18 U.S.C. § 3553(a)(4); *see Peugh v. United States*, 569 U.S. 530, 536 (2013). Accordingly, the Guidelines remain "the starting point and the initial benchmark" for "all sentencing proceedings." *Gall v. United States*, 552 U.S. 38, 49 (2007).

The Guidelines are not static. Congress directed the Commission to "periodically … review and revise" them. 28 U.S.C. § 994(o). In so doing, the Commission sometimes reduces the Guidelines range associated with a particular offense. Usually it does so to avoid unwarranted disparities—for example, among those convicted of crimes involving similar types of drugs—or to avoid sentences longer than necessary to achieve penological purposes. *E.g.*, U.S.S.G. app. C, amend. 706 (2013) (2007 amendment reducing base offense level for most crack cocaine offenses by two levels); *id.*

amend. 505 (1994 amendment eliminating top two levels in drug quantity table).[1]

The Commission has the power to make these reductions retroactive. 28 U.S.C. § 994(u); *see Freeman v. United States*, 564 U.S. 522, 525 (2011) (plurality opinion) ("The Act allows retroactive amendments to the Guidelines for cases where the Guidelines become a cause of inequality, not a bulwark against it."). And, when an amendment has been given retroactive effect, a defendant may move to have his sentence reduced. Thus, a district court may (but is not required to) 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 Commission, … if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

18 U.S.C. § 3582(c)(2). These sentence reductions are intended to "remedy systemic injustice"; the statute prevents inequitable disparities between similarly situated defendants who happen to have been sentenced before and after the Commission decided to change a Guideline. *Freeman*, 564 U.S. at 533-34 (plurality).

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[1] Unless otherwise indicated, citations are to the 2013 version of the Guidelines, which was in effect at the time Mr. Hughes was sentenced. There are no relevant differences between the 2013 version and the currently effective version.

The Court Divides 4-1-4 Over When Reductions Are Available To Defendants Who Enter Into Plea Agreements Under Rule 11(c)(1)(C).

In *Freeman*, the Court addressed whether § 3582(c)(2) relief is available to defendants who enter plea agreements under Rule 11(c)(1)(C). Under these "C-type" agreements, the government and the defendant agree on "a specific sentence or sentencing range." Fed. R. Crim. P. 11(c)(1)(C). That "recommendation or request binds the court"—but only "once the court accepts the plea agreement." *Id.* Five Justices agreed that defendants who enter C-type agreements are *sometimes* eligible for a reduction under § 3582(c)(2). But the Court split 4-1-4 over the rationale for such relief and the circumstances under which defendants are eligible for it. The disagreement centered on the meaning of the statutory term "based on":

- A four-Justice plurality concluded that a defendant is sentenced "based on" the sentencing judge's approval of the sentence. Accordingly, a defendant is "sentenced … based on a sentencing range" if that range "was a relevant part of the analytic framework the judge used to determine the sentence or approve the agreement." 564 U.S. at 529-30.

- Justice Sotomayor concurred separately in the judgment only, reasoning that a sentence pursuant to a C-type agreement is "based on" the agreement. *Id.* at 535-36. A sentence therefore is "based on" a Guidelines range when the agreement "expressly

uses a Guidelines sentencing range applicable to the charged offense to establish the term of imprisonment," or "provide[s] for a specific term of imprisonment—such as a number of months" and it "is evident from the agreement" that the term is based on the Guidelines. *Id*. at 534, 539.

- Four Justices dissented. They agreed with the plurality that "the inquiry properly looks to what the *judge*" decides. *Id.* at 547 (Roberts, C.J., dissenting). But they reasoned that a judge at sentencing "need[s] to consult one thing and one thing only—the plea agreement." *Id.* at 545. Accordingly, a sentence imposed after a C-type agreement is "based on" the agreement, not the Guidelines, and is never eligible for reduction. *Id*. at 544-45.

In the wake of *Freeman*, two courts of appeals recognized that no single rationale had captured a majority of the Court. Accordingly, they explained, the Court's fractured opinions produced a judgment but announced no binding rule of decision.[2] Multiple other courts—including the Eleventh Circuit in the decision below—concluded that the concurrence provided the "narrowest" rationale, *see Marks v. United States*, 430 U.S. 188, 193 (1977), and therefore was binding.

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[2] *United States v. Davis*, 825 F.3d 1014, 1023-26 (9th Cir. 2016) (en banc); *United States v. Epps*, 707 F.3d 337, 350-51 (D.C. Cir. 2013).

Mr. Hughes Enters Into A Plea Agreement Under Rule 11(c)(1)(C) And Is Sentenced To 180 Months In Prison.

In 2013, a federal grand jury indicted Erik Hughes—a father whose drug "addiction has controlled him for a large part of his adult life," Pet. App. 41a-42a—on drug and firearm offenses, including under 21 U.S.C. §§ 841(a)(1), (b)(1)(A)(viii), and 846. Pet. App. 3a, 16a-17a. Mr. Hughes entered into a plea agreement under Rule 11(c)(1)(C). Pet. App. 50a-70a. He pleaded guilty to conspiracy to possess with intent to distribute at least 500 grams of a mixture or substance containing methamphetamine, and to being a felon in possession of a firearm. Pet. App. 16a-17a.

The agreement provided "that the Court should impose a sentence of 180 months of imprisonment." Pet. App. 54a. The record makes plain that this sentence was negotiated "in the shadow of" the Guidelines. *Freeman*, 564 U.S. at 538 (concurrence). For instance, during plea negotiations, "it was discussed that [Mr. Hughes's Sentencing] Guideline range was 188-235 months." Pet. App. 74a. The plea agreement made clear that, "before imposing sentence in this case, the Court will be required to consider, among other factors, the provisions of the United States Sentencing Guidelines." Pet. App. 54a. But, notwithstanding this and other references to the Guidelines, *infra* 36, the agreement did not say *in haec verba* that the sentence was based on the Guidelines. Pet. App. 54a.

At the sentencing hearing, the court calculated Mr. Hughes's base offense level and his criminal history category under the Guidelines. Pet. App. 33a-36a. After a colloquy with the parties and the probation officer about a three-point reduction to Mr. Hughes's total offense level for acceptance of responsibility—and a correction to the court's initial computation of the Guidelines range—the court and parties agreed that the Guidelines range was 188-235 months. *Id.* The court considered the "plea agreement" and the sentence proposed therein; found no "unreasonable disparity between the sentence" in this and similar cases; and concluded that the recommended sentence "complie[d] … with the spirit of the advisory … Guidelines." Pet. App. 32a-33a; *see also* Pet. App. 47a (recommended sentence is "compatible with the advisory United States Sentencing Guidelines"). The court accepted the plea agreement and sentenced Mr. Hughes to 180 months in prison. Pet. App. 44a.

The Sentencing Commission Retroactively Reduces The Relevant Guidelines Range, But Mr. Hughes Is Denied The Opportunity To Seek A Reduction.

1. Less than two months after Mr. Hughes was sentenced, the Sentencing Commission adopted Amendment 782 to the Guidelines.

This amendment reduced the relevant offense level by two levels. *See* U.S.S.G. supp. app. C, amend. 782 (2016) (amendment effective Nov. 1, 2014). The Commission did so based on research, hearing testimony, and public comment demonstrating that longer

sentences were unnecessary to encourage defendants to plead guilty, and that reducing the overcrowded prison population through prospective and retroactive sentence reductions would enhance public safety by freeing up resources for crime prevention. *See id.* at 71-73 (amend. 782, Reason for Amendment).

The Commission subsequently determined to apply Amendment 782 retroactively to defendants sentenced before its adoption. *Id.*, amend. 788 (effective Nov. 1, 2014). The amendment therefore would reduce both the top and bottom of Mr. Hughes's sentencing range by more than three years. *Compare* Pet. App. 36a (range of 188-235 months), *with* Pet. App. 4a *and* Dkt. 94-2, Case No. 4:13-CR-043-HLM-WEJ-01 (N.D. Ga. Oct. 14, 2015) (revised range of 151-188 months).

2. Mr. Hughes filed a motion to reduce his sentence pursuant to 18 U.S.C. § 3582(c)(2). The district court denied the motion on the theory that his sentence was not "based on" a subsequently reduced sentencing range as required by § 3582(c)(2). Pet. App. 18a. The court gave controlling weight to the *Freeman* concurrence, and concluded that the concurrence's test hadn't been satisfied. Pet. App. 21a-25a. It reasoned that Mr. Hughes's "sentence was not linked or tied to the Sentencing Guidelines" because the plea agreement "does not mention an otherwise applicable Sentencing Guidelines range or Defendant's criminal history, and Defendant's criminal history category is not evident from the Agreement itself." Pet. App. 28a.

3. The Eleventh Circuit similarly found itself bound by the concurrence. It concluded that even

though no other Justice embraced the concurrence's rationale, that opinion still controlled because it "provides a legal standard that produces *results* with which a majority of the Court in *Freeman* would agree." Pet. App. 12a (emphasis added). Under that rule, it concluded, Mr. Hughes "is not eligible for a sentence reduction": The plea agreement "does not make any recommendation about a specific application of the Sentencing Guidelines, [it] does not calculate [Mr.] Hughes's range or discuss factors that must be used to determine that range, such as [Mr.] Hughes's criminal history[, n]or does it set the agreed-upon sentence within the applicable guideline range." Pet. App. 14a-15a.

SUMMARY OF THE ARGUMENT

I. With the issue unresolved by *Freeman* cleanly presented again, the Court can take a fresh look at when a defendant who pleads guilty under a C-type agreement is eligible for a sentence reduction under § 3582(c)(2).

A. Such a reduction is available when the sentence was "based on" the Guidelines. A "basis" is a "foundation" for, or "reasoning behind," a result. *New Oxford American Dictionary* 137 (3d ed. 2010); *Black's Law Dictionary* 180 (10th ed. 2014). That is language of causation. And under standard principles of causation, a Guidelines range is a basis for the sentence when it bears a reasonably close connection to the imposition of the sentence.

To assess the basis for the sentence, the first place to look is the rationale of the judge who imposed the

sentence. It is, after all, the judge who sentences. And, before accepting a C-type plea agreement, the judge must "evaluat[e] the recommended sentence in light of the defendant's applicable sentencing range." *Freeman*, 564 U.S. at 529 (plurality).

But the judge's rationale is not the only place to look. In this context, as in others, a result—the sentence—can have more than one cause. And the plea agreement also is a "foundation for the term of imprisonment to which the defendant is sentenced." *Id.* at 535 (concurrence). If the agreement specifies "that the basis for the specified term is a Guidelines sentencing range applicable to the offense to which the defendant pleaded guilty," *id.* at 539, then the Guidelines range is a basis for the sentence unless the district judge declines to rely on the Guidelines and imposes the sentence for non-Guidelines reasons.

B. A contrary rule would undermine the statute's goal of avoiding unwarranted sentencing disparities. It would severely limit, or indeed exclude, defendants with C-type agreements from seeking relief that similarly situated defendants may obtain. If such relief were ever available, it would only be because of the fortuity of language in a plea agreement over which defendants typically have little control. A rule like the Eleventh Circuit's thereby ignores the realities of plea bargaining and sentencing in the plea context, including the central role the Guidelines play in both processes.

C. Applying these principles, Mr. Hughes's sentence plainly was "based on" the Guidelines. The judge expressly relied on the Guidelines in approving

the plea agreement and imposing its recommended sentence.

II. A. If the Court does not garner a majority on that first question, it still should vacate the decision below. That is because the Eleventh Circuit erroneously treated the *Freeman* concurrence as binding precedent. A less-than-majority opinion only reflects the holding of the Court when it is the "narrowest grounds" on which a majority of Justices agree. *Marks*, 430 U.S. at 193. But that is only the case when, unlike here, a concurring opinion forms a logical subset of the plurality's rationale—i.e., when it "represent[s] a common denominator of the Court's *reasoning*." *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc) (emphasis added).

B. Any other approach would be hopelessly indeterminate and would risk bestowing binding precedential force on decisions supported by a minority of the Court. Here, indeed, the Eleventh Circuit gave controlling force to a rationale that eight Justices rejected.

C. No opinion in *Freeman* can be said to provide a *Marks* "narrowest ground[]." Most fundamentally, the plurality and concurring opinions disagreed about the basic test for assessing when § 3582(c)(2) relief is available. In addition, not every defendant eligible for relief under the concurrence's approach would qualify under the plurality's rule. Thus, there is no logical subset, and the Eleventh Circuit erred in treating the concurrence as binding precedent.

D. Alternatively, the Court may ultimately conclude that the *Marks* "narrowest grounds" test has proven unworkable. This would mean returning to the rule that governed for well over a century: that no opinion establishes precedent unless it carries majority assent. Under that rule too, the decision below must be vacated because of the court's erroneous premise that it was bound to follow the *Freeman* concurrence.

ARGUMENT

I. Mr. Hughes Is Eligible For § 3582(c)(2) Relief Because His Sentence Was "Based On" A Sentencing Guidelines Range That Subsequently Was Lowered.

Mr. Hughes's sentence was based on a Guidelines range that subsequently was reduced. He therefore is eligible to apply for a sentence reduction, and the decision below should be reversed.

A. A defendant who enters into a C-type agreement is sentenced "based on" a Guidelines range when the Guidelines bear a reasonably close connection to the sentence.

1. The term "based on" invokes standard principles of causation.

To be eligible for a sentencing reduction under § 3582(c)(2), a defendant must have been "sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered." The key

term "based on" is not defined, and so carries "its ordinary meaning." *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012). The ordinary meaning of "based on" is rooted in principles of causation. Those principles, however, may have been given short shrift in the *Freeman* briefing; the petitioner said little about it, and the government offered only a flawed "legally binding" test that no Justice endorsed.

In plain terms, a result is "based on" conditions that underlie and support it. To "base" means "[t]o use (something) as the thing from which something else is developed," *Black's Law Dictionary* (2014), *supra*, at 180, i.e., "to make, form, or serve as a base for," *Merriam-Webster's Collegiate Dictionary* 101 (11th ed. 2014). A "base" or "basis," in turn, is "[a] fundamental principle; … a foundation or starting point." *Black's Law Dictionary* (2014), *supra*, at 180 (basis). This can be "[a] basic or underlying element," or "[a] supporting part or layer." *American Heritage Dictionary* 148 (5th ed. 2016) (base). In short, it is "a main ingredient." *Merriam-Webster's Collegiate Dictionary*, *supra*, at 101 (base). In conceptual terms, a base is "[t]he fact, observation, or premise from which a reasoning process is begun." *American Heritage Dictionary* (2016), *supra*, at 148; *see New Oxford American Dictionary*, *supra*, at 136-37 (base is "conceptual structure"; basis is "the justification for or reasoning behind something").[3]

[3] Contemporaneous dictionaries are to similar effect. *See, e.g.*, *Oxford American Dictionary* 50 (1980) ("basis" is "a foundation or support, a main principle"); *Black's Law Dictionary* 138

These definitions invoke common principles of causation. A "foundation" or "supporting part" is a necessary condition—in tort language, a but-for cause. *See generally* Dan B. Dobbs et al., *Dobbs' Law of Torts* § 186 (2d ed. 2017). That's how the Court understood the term in *Safeco Insurance Co. v. Burr*, which interpreted provisions of the Fair Credit Reporting Act. 551 U.S. 47, 52 (2007). The Court observed that, "[i]n common talk, the phrase 'based on' indicates a but-for causal relationship and thus a necessary logical condition." *Id.* at 63.

Elsewhere the Court has understood "based on" to denote necessary elements with a close connection to the result. *Saudi Arabia v. Nelson* interpreted the term "based upon" in the Foreign Sovereign Immunities Act (FSIA). 507 U.S. 349 (1993). Invoking dictionaries that define "base" as a "basis" or "foundation," the Court explained that an FSIA claim is "based on" those elements that entitle a plaintiff to relief, *id.* at 356-57—in other words, the "essentials" of the suit, *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 395-97 (2015).

This language sounds in proximate cause. In the tort context, a cause bearing a "close connection" to the result is a "proximate" or legal cause. *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1306 (2017).

(5th ed. 1979) ("basis" is a "[f]undamental principle"); *American Heritage Dictionary* 110 (1969) ("base" is "[t]he fact, observation, or premise from which a measurement or reasoning process is begun"); *Webster's Third New Int'l Dictionary* 180 (1966 ed.) ("base" is "foundation"; "main ingredient"; "basic principle").

As Prosser puts it, this is a cause that has a "reasonably close connection with" the result. W. Page Keeton et al., *Prosser and Keeton on Torts* 300 (5th ed. 1984) (*Prosser*); *accord* Restatement (Second) of Torts § 431 (1965) ("substantial factor in bringing about" the result). That concept mirrors definitions of "base" as an "important" or "main … ingredient." *New Oxford American Dictionary*, *supra*, at 136; *Merriam-Webster's Collegiate Dictionary*, *supra*, at 101.

Important in this context, where the plea agreement and the judge's sentencing decision both are necessary to the sentence, an effect can be "based on" multiple causes. "The law of joint tortfeasors rests very largely upon recognition of the fact that each of two or more causes may be charged with a single result." *Prosser*, *supra*, at 268. "[A] given proximate cause need not be, and frequently is not, the exclusive proximate cause of harm." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 704 (2004); *see Staub v. Proctor Hosp.*, 562 U.S. 411, 420 (2011) (it is "common for injuries to have multiple proximate causes"). So long as a cause is not "too remote, purely contingent, or indirect," it is a proximate cause. *Staub*, 562 U.S. at 419; *see Prosser*, *supra*, at 268 ("If the defendant's conduct was a substantial factor in causing the plaintiff's injury, it follows that he will not be absolved from liability merely because other causes have contributed to the result ….").

The ordinary meaning of "based on" applies here. "Courts in applying criminal laws generally must follow the plain and unambiguous meaning of the statutory language." *United States v. Albertini*, 472 U.S. 675, 680 (1985). A sentence, therefore, is "based on"

those factors—those "principle[s]" or dat[a]," *Black's Law Dictionary* (2014), *supra*, at 180 (base)—that bear a "reasonably close connection" to the imposition of the sentence. *Prosser*, *supra*, at 300.

2. The sentencing judge's rationale and the parties' agreement each can show that the Guidelines bore a reasonably close connection to the sentence.

a. To identify the bases for a sentence, we begin with sentencing basics. Sentencing, of course, is performed by the judge. 18 U.S.C. § 3553(a) ("The court shall impose a sentence ...."). That is equally true when a judge sentences a defendant following a C-type plea agreement. *Freeman*, 564 U.S. at 535 (concurrence) ("No term of imprisonment—whether derived from a (C) agreement or otherwise—has legal effect until the court enters judgment imposing it.").

C-type agreements work as follows. As part of the plea agreement, the parties "recommend[]" a sentence to the judge. Fed. R. Crim. P. 11(c)(1)(C). That agreement "binds the court," but not until "the court accepts the plea agreement." *Id.*; *see Freeman*, 564 U.S. at 529-30 (plurality). The judge must separately determine both whether to accept the guilty plea and whether to accept the plea agreement (including the recommended sentence). *See United States v. Hyde*, 520 U.S. 670, 674 (1997) (faulting court of appeals for

"equat[ing] acceptance of the guilty plea with acceptance of the plea agreement").[4]

A plea hearing comes first. Accepting a plea entails placing the defendant under oath, determining that he understands his rights and how the plea procedure works, and ensuring that the plea is voluntary. Fed. R. Crim. P. 11(b). At that hearing, the judge may also accept the plea agreement. "[O]ften," however, the judge will accept only the guilty plea but defer a decision on the agreement (and thus the recommended sentence) until the sentencing hearing, by which time the court will have reviewed the presentence report. *Hyde*, 520 U.S. at 678; Fed. R. Crim. P. 11(c)(3)(A). When acceptance of the plea agreement is deferred, the court considers the agreement at sentencing alongside the Guidelines calculations set out in the report. That is what happened in *Hyde*, *Freeman*, and here. Pet. App. 32a-33a.

Regardless of when this decision occurs, the judge cannot accept the plea agreement without first finding that the agreed-upon sentence complies with the Guidelines, or explaining why the sentence is acceptable nonetheless:

> [T]he court may accept the agreement if the court is satisfied either that (1) the agreed sentence is within the applicable guideline

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[4] The Rules themselves recognize that accepting the plea and accepting the agreement are different; a defendant may withdraw a guilty plea "after the court accepts the plea, but before it imposes sentence … if the court rejects [the] plea *agreement*." Fed. R. Crim. P. 11(d)(2)(A) (emphasis added).

> range; or (2)(A) the agreed sentence is outside the applicable guideline range for justifiable reasons; and (B) those reasons are set forth with specificity in the statement of reasons form.

U.S.S.G. § 6B1.2(c); *see also* 18 U.S.C. § 3553(a)(4) (requiring court to consider the Guidelines range before imposing sentence). The court is required to provide these reasons in open court "*at the time of sentencing*." 18 U.S.C. § 3553(c) (emphasis added).

These sentencing basics indicate that there are two places to look for evidence of the basis for the sentence: the judge's rationale for imposing the sentence, and the parties' reasons for entering into the underlying agreement. We discuss each in turn.

b. The judge imposes the sentence. Accordingly, the judge's reasons for doing so necessarily reveal at least *a* basis—a proximate cause—of the sentence. Thus, to identify the causes of the sentence, one must look at "the analytic framework the judge used to determine the sentence or to approve the agreement." *Freeman*, 564 U.S. at 530 (plurality).

This approach is consistent with the plain meaning of "based on." *Supra* 14-16. A "basis" is the "justification for or reasoning behind something." *New Oxford American Dictionary*, *supra*, at 137; *see also Black's Law Dictionary* (2014), *supra*, at 180 ("[a] point, part, line, or quantity from which a reckoning or conclusion proceeds") (base); *American Heritage Dictionary* (2016), *supra*, at 148 ("fact, observation, or premise from which a reasoning process is begun")

(base). A court confronted with a § 3582(c)(2) motion should consult documents such as the statement of reasons and the sentencing transcript to understand the judge's rationale and determine whether the Guidelines bore a reasonably close connection to the recommended sentence. *See Freeman*, 564 U.S. at 529-31 (plurality).

So, for instance, the Guidelines will be a basis for a sentence when the district court "calculated" and "considered" the Guidelines sentencing range, then "expressed its independent judgment that the sentence was appropriate in light of the applicable Guidelines range." *Id.* at 530-31. The same will be true when a court approves the sentence after "finding it 'fair and reasonable' under the Guidelines." *United States v. Davis*, 825 F.3d 1014, 1017, 1023 (9th Cir. 2016) (en banc). In another example, the D.C. Circuit correctly concluded that a C-type sentence of 188 months (which fell below the Guidelines range of 210-260 months) was "based on" the Guidelines because the court calculated the Guidelines range, then explained that it "considered the sentence imposed 'sufficient' 'in view of the fact that the crack cocaine guidelines are what they are.'" *United States v. Epps*, 707 F.3d 337, 352 (D.C. Cir. 2013) (emphasis omitted). An even easier case is presented if the judge accepts the parties' agreed-upon sentence because it "is within the applicable guideline range." U.S.S.G. § 6B1.2(c)(1).

c. The Guidelines can be a basis for the sentence in another way too: when the parties' *agreement* is based on the Guidelines. Where C-type plea agreements are concerned, a sentence often will be "based

on" the agreement, because the agreement is a foundation for the sentence under the plain terms of Rule 11(c)(1)(C). *Freeman*, 564 U.S. at 535 (concurrence). If, therefore, the parties in their agreement "call for the defendant to be sentenced within a particular Guidelines sentencing range," *id.* at 538, or "make clear that the basis for the specified term is a Guidelines sentencing range," *id.* at 539, then the Guidelines range will be a basis for the sentence—absent a decision by the court to reject the parties' reliance on the Guidelines and to base the sentence on non-Guidelines reasons, *infra* 27-28. Similarly, statements in the plea agreement establishing that the parties derived the term of imprisonment from the Guidelines range can be evidence that the court, in approving the sentence, based its approval on the same calculations. Courts applying the approach of the *Freeman* plurality have looked to the agreement for this purpose. *Davis*, 825 F.3d at 1027-28; *Epps*, 707 F.3d at 352.

Considering the parties' agreement ensures that, when the parties have tied their recommended sentence to a Guidelines range that subsequently is lowered, a corresponding reduction is available so as to "enforce[] the agreement's terms." *Freeman*, 564 U.S. at 540 (concurrence). The agreement can serve the important function of filling gaps when the sentencing transcript is opaque (or lost), thereby ensuring that the defendant does not lose the ability to seek a sentence reduction merely because the record is less than clear. Take, for instance, a case where the judge approves an out-of-Guidelines sentence. If the judge is silent about whether he is looking to the Guidelines themselves to justify the sentence, or rejecting their

use altogether, the agreement may clarify matters. This does not call for a "free-ranging search through the parties' negotiating history." *Id.* at 538. But, when the terms of the parties' agreement show that the sentencing recommendation was tied to the Guidelines, and the judge has not rejected the parties' rationale before imposing the sentence, the resulting sentence is fairly said to be "based on" the Guidelines range.

The agreement, however, cannot be the end of the analysis. The *Freeman* dissent thought that it was, reasoning that although the judge is "the one who imposes the sentence," *id.* at 547, "the sentence … is based on the agreement, not the Sentencing Guidelines," *id.* at 544. It focused on the fact that, "*[a]t the moment of sentencing*, the court simply implements the terms of the agreement it has already accepted." *Id.* at 545 (emphasis added) (quoting *id.* at 535-36 (concurrence)). But a proximate cause need not be the *last* cause; there can be multiple legal causes at different points in time. *See Staub*, 562 U.S. at 419-20; Restatement (Second) of Torts § 430 cmt. d. And, for the reasons described above (at 18-19), it is artificial to focus on the moment of sentencing to the exclusion of the judge's approval of the sentence. Those steps often occur in tandem, as they did here. The district court therefore "considered the allegations of the presentence report, … the plea agreement, [and] the sentencing guidelines" before accepting that agreement, Pet. App. 32a-33a—then, just moments later, reviewed Guidelines calculations with the parties and again referenced Guidelines considerations before imposing a sentence it deemed "compatible with the advisory United States Sentencing Guidelines." Pet. App. 47a. The judge was not thinking exclusively

about the agreement, rather than the Guidelines, when he imposed that sentence. Were that so, it would suggest that the lengthy analysis he undertook—that he was *required* to undertake, *see* 18 U.S.C. § 3553(a)(4); U.S.S.G. § 6B1.2(c)—was an empty gesture.

Indeed, if the moment of sentencing were all that mattered, it would mean that a sentence imposed pursuant to a C-type agreement *never* is "based on" the Guidelines. That conclusion would be at odds with the Sentencing Act itself. The statute puts limits on the parties' ability to appeal a sentence imposed pursuant to a C-type agreement. But it *preserves* the parties' ability to appeal such a sentence on the ground that it "was imposed as a result of an incorrect application of the sentencing guidelines." 18 U.S.C. § 3742(a)(2), (b)(2), (c)(1)-(2); *see*, *e.g.*, *United States v. Smith*, 918 F.2d 664, 668-69 (6th Cir. 1990) (permitting a defendant to appeal his C-type sentence as involving an "incorrect application of the sentencing guidelines"). If the Guidelines weren't being applied, there would be no incorrect application of the Guidelines to appeal.

3. The Guidelines often but not always will bear a reasonably close connection to the sentence of a C-type defendant.

a. For the reasons just set forth, C-type sentences often—but not always—will be "based on" the Guidelines.

This should not be surprising. The Guidelines are "the starting point and the initial benchmark" of all

federal sentencing. *Gall v. United States*, 552 U.S. 38, 49 (2007); *see Freeman*, 564 U.S. at 529 (plurality). Accordingly, the parties bargain against the backdrop of the applicable Guidelines range. The Principles of Federal Prosecution instruct federal prosecutors to use the Guidelines "as a touchstone," and to "seek sentences that reflect an appropriate balance of the factors set forth in § 3553"—which, "[i]n the typical case," will be "reflected by the applicable guideline range." U.S. Dep't of Justice, *U.S. Attorneys' Manual* § 9-27.730(C)(1) (2017). This is true in both litigated and pleaded cases. The U.S. Attorneys' Manual divides plea agreements (including C-type agreements) into two groups: agreed-upon sentences within the Guidelines range, and sentences that "seek to depart from the guidelines." *Id.* § 9-27.400. Either way, the Guidelines are the starting point. And when a prosecutor wants to depart from the Guidelines range in a plea agreement, that departure is supposed to "be accomplished through appropriate Sentencing Guideline provisions." *Id.* § 9-16.300. The fact of bargaining in the shadow of the Guidelines may not be dispositive. *Freeman*, 564 U.S. at 537-38 (concurrence). But it underscores the important role the Guidelines play even in pleaded cases.

Indeed, Congress deliberately preserved that role, in ways that the *Freeman* briefing may not have made clear. When Congress was considering the Sentencing Reform Act, "critics expressed the concern" that prosecutors could "circumvent the guidelines recommendation" through plea bargaining. S. Rep. No. 98-225, at 63. Congress responded by ensuring that sentences arising out of plea agreements—like other sen-

tences—would be grounded in the Guidelines. It directed the Sentencing Commission to issue "policy statements for consideration by Federal judges in deciding whether to accept a plea agreement." *Id.*; *see* 28 U.S.C. § 994(a)(2)(E) (authorizing these policy statements). "This guidance," Congress believed, would "assure that judges can examine plea agreements to make certain that prosecutors have not used plea bargaining to undermine the sentencing guidelines." S. Rep. No. 98-225, at 63; *see also* 18 U.S.C. § 3553(a)(4). The Sentencing Commission responded by promulgating U.S.S.G. § 6B1.2, discussed above (at 18-19). That provision demonstrates that the court at sentencing does not "simply implement[] the terms of the agreement it has already accepted." *Freeman*, 564 U.S. at 535-36 (concurrence). The Guidelines are very much in the mind of the court at the moment of sentencing.

Similarly, the Federal Rules make clear that the judge has an "*obligation* to calculate the applicable sentencing-guideline range and to consider that range [and] possible departures under the Sentencing Guidelines." Fed. R. Crim. P. 11(b)(1)(M) (emphasis added). And this "obligation" is so critical that the judge must explain it to the defendant before accepting a guilty plea. *Id.*

Accordingly, the judge often will issue a sentence that depends upon and bears a "reasonably close connection" to the Guidelines. *Prosser*, *supra*, at 300. That is precisely how the Guidelines are intended to operate—as an "anchor" for the sentencing analysis. *Peugh*, 569 U.S. at 541 ("The post-*Booker* federal sen-

tencing scheme aims to achieve uniformity by ensuring that sentencing decisions are anchored by the Guidelines and that they remain a meaningful benchmark through the process of appellate review."); *see generally* Mark W. Bennett, *Confronting Cognitive 'Anchoring Effect' and 'Blind Spot' Biases in Federal Sentencing: A Modest Solution For Reforming a Fundamental Flaw*, 104 J. Crim. L. & Criminology 489, 523-29 (2014).

b. "Even where the judge varies from the recommended range," *Freeman*, 564 U.S. at 529 (plurality), the sentence often will be "based on" the Guidelines. That is, "if the judge uses the sentencing range as the beginning point to explain the decision to deviate from it, then the Guidelines are in a real sense a basis for the sentence." *Id.* Whether a sentence is inside or outside of the applicable Guidelines range, it is "based on" that range if the judge used the Guidelines range to justify the sentence. Under those circumstances, the Guidelines range is a "necessary logical condition," *Safeco*, 551 U.S. at 63, for the sentence.

The Guidelines themselves indicate that an outside-the-Guidelines sentence may be "based on" the Guidelines. If sentences outside the Guidelines range were never based on the Guidelines, then relief for such sentences never would be available under § 3582(c)(2). But the Guidelines are clear that a defendant whose sentence falls outside the recommended Guidelines range *is* eligible for a reduced sentence under § 3582(c)(2) subject to certain limitations. U.S.S.G. § 1B1.10(b)(2) & n.3.

c. A C-type sentence will not, however, *always* be based on the Guidelines. *See Freeman*, 564 U.S. at 534 (plurality). The post-*Booker* scheme allows a judge to impose a sentence for non-Guidelines reasons. *Peugh*, 569 U.S. at 541-42; *see, e.g.*, *Gall*, 552 U.S. at 43-44, 58-59 (approving district court's decision to impose below-Guidelines sentence for non-Guidelines reasons, including the defendant's post-offense rehabilitation). Thus, although judges "must *begin* their analysis with the Guidelines," they may impose a non-Guidelines sentence based on non-Guidelines factors, so long as "the justification is sufficiently compelling to support the degree of the variance." *Id.* at 50 & n.6 (quoting 18 U.S.C. § 3553(a)(1)) (emphasis added). This means that there will be situations when the sentence is not based on the Guidelines.

That will be the case, for instance, when the judge merely consults the Guidelines, but then goes on to impose the sentence for wholly non-Guidelines reasons. Having imposed the sentence *despite* the Guidelines, they are not a basis for the sentence. *See Davis*, 825 F.3d at 1023; *see also Safeco*, 551 U.S. at 63-64. The same will be true when the *agreement* calls for a Guidelines-based sentence, but the judge justifies and then imposes the sentence on non-Guidelines grounds. Under those circumstances, the parties' Guidelines-based rationale did not cause the sentence that the judge ultimately imposed. Whether this is thought of as a lack of sufficient legal cause, *see supra* 15-16, or akin to "an intervening cause breaking the chain of causation," *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 659 (2008), the basis for the sentence is the judge's reasons and rationale, not the Guidelines.

In *United States v. Garrett*, for example, the judge noted his disagreement with the Guidelines range for a crack cocaine offense. 758 F.3d 749, 751 (6th Cir. 2014). He nevertheless accepted the recommended within-Guidelines sentence based on his independent view that such a sentence was appropriate "for purposes of deterrence." *Id.* at 752. That sentence is not "based on" the applicable Guidelines range: As the court of appeals observed, "If we take the district court at its word, the court does not appear to have based Garrett's sentence on the crack-cocaine guidelines." *Id.* at 755.[5] For similar reasons, if the judge and parties disagree on the proper calculation of the Guidelines range, the sentence is "based on" the range calculated by the judge, not the parties. *E.g.*, *United States v. Leonard*, 844 F.3d 102, 110 (2d Cir. 2016); *see United States v. Duvall*, 705 F.3d 479, 487-88 (D.C. Cir. 2013) (Williams, J., concurring in judgment).

B. Foreclosing or severely limiting C-type plea recipients' eligibility for relief under § 3582(c)(2) is inconsistent with the Sentencing Act and likely to lead to significant inequities.

1. "There is no reason to deny § 3582(c)(2) relief to defendants who linger in prison pursuant to sentences that would not have been imposed but for a

[5] The court of appeals believed itself bound by the *Freeman* concurrence, however, and therefore concluded (incorrectly) that the sentence *was* based on the Guidelines due to the language of the agreement, notwithstanding the judge's rejection of that rationale. 758 F.3d at 754-55.

since-rejected, excessive range." *Freeman*, 564 U.S. at 526 (plurality). And there is no statutory basis for distinguishing between defendants who enter C-type agreements and those who do not. C-type plea deals were well established when Congress enacted § 3582(c)(2). *Id.* at 537 (concurrence). If Congress had wanted to exclude defendants who enter C-type plea deals from the benefits of § 3582, it could have done so. And there is strong textual evidence that Congress did not intend to do so. Congress knew how to exclude C-type deals from other categories of statutory relief. It barred defendants whose C-type agreements provide a specific sentence from appealing their sentences except in limited circumstances. *See* 18 U.S.C. § 3742(c); *supra* 23. But Congress has not similarly excluded C-type agreements from relief under § 3582(c)(2). Thus, "Congress knew how to draft [an] … exemption in [the statute] when it wanted to," *City of Chicago v. Envtl. Def. Fund*, 511 U.S. 328, 338 (1994) (internal quotation marks omitted), and its decision not to do so here is telling.

2. There is good reason that Congress did not exclude C-type plea recipients from relief under § 3582(c)(2); doing so would have undermined the statute's purpose. Section 3582(c)(2) is a "safety valve" intended to "assure the availability of specific review and reduction of a term of imprisonment … to respond to changes in the guidelines." S. Rep. No. 98-225, at 121. It is another way in which the Sentencing Reform Act effectuates one of its most basic purposes—to ensure that "those who commit crimes of similar severity under similar conditions receive similar sentences." *Freeman*, 564 U.S. at 533 (plurality);

see 18 U.S.C. § 3553(a)(6). Eliminating or significantly limiting its application to an entire category of plea agreements would arbitrarily distinguish between similarly situated defendants—thereby causing the very disparities the statute was designed to alleviate.

Imagine three equally culpable co-defendants charged with the same offense. Their offense levels, criminal history categories, and sentencing ranges under the Guidelines are the same. One goes to trial and is convicted. The second enters a nonbinding plea agreement under Rule 11(c)(1)(B), which recommends a sentence at the low end of the Guidelines range without explicitly invoking the Guidelines. The third enters a C-type agreement that does likewise. The judge gives each defendant the same sentence, indicating her satisfaction that the sentences conform to the Guidelines. If the Commission determines that a change should be applied retroactively to the relevant Guideline, there is no equitable basis to treat these defendants differently in their eligibility for a sentence reduction. They are "defendants with similar records who have been found guilty of similar conduct," and should therefore serve similar terms of imprisonment. 18 U.S.C. § 3553(a)(6).

A contrary rule also would create unwarranted disparities between defendants who enter into C-type agreements before and after a retroactive Guidelines amendment. "[R]emov[ing] Rule 11 pleas from the reach of § 3582 … would leave defendants who pled guilty before the effective date of the amendment with higher sentences than those who pled guilty after-

ward because the post-amendment pleas and plea negotiations are based on the lower, modified sentencing ranges." *United States v. Cobb*, 584 F.3d 979, 985 (10th Cir. 2009). That is precisely the sort of disparity that a retroactive change is meant to avoid. *Supra* 3-4.

3. The *Freeman* concurrence would limit this inequity by leaving the door open to relief under certain circumstances: when the agreement (1) "call[s] for the defendant to be sentenced within a particular Guidelines sentencing range," or (2) "provide[s] for a specific term of imprisonment—such as a number of months" and "make[s] clear" that the foundation for the agreed-upon sentence was the Guidelines. 564 U.S. at 538-39. The effect of this rule, however, is to "treat the Guidelines differently in similar proceedings," thereby leading "to unfair results and considerable administrative challenges." *Dillon v. United States*, 560 U.S. 817, 829-30 (2010).

As a practical matter, such a rule systematically disadvantages defendants whose plea agreements are not reduced to writing. *E.g.*, *United States v. Graham*, 704 F.3d 1275, 1278 n.5 (10th Cir. 2013); *see* Defender Services Office, *Status of Plea Agreements 2010-2016*, https://tinyurl.com/pleastatistics (last visited Jan. 20, 2018). That fact alone will arbitrarily disqualify deserving applicants from relief because the Guidelines basis for their sentence will not be "evident from the agreement itself." *Freeman*, 564 U.S. at 539 (concurrence).

Worse still, this rule would make a defendant's eligibility for § 3582(c)(2) relief "depend in large part

upon the fortuity of whether a particular United States Attorney's Office includes" language making an explicit reference to the Guidelines "in plea agreements as a matter of course." *United States v. Hamdi*, 432 F.3d 115, 126 (2d Cir. 2005). Individual U.S. Attorney's Offices—and even individual prosecutors—often present defendants with form agreements on a take-it-or-leave-it basis. And at least some offices have modified those forms to preclude the possibility of any relief under the *Freeman* concurrence's rule. Elevating that form over the substance of what actually drove a particular defendant's sentencing would create the kind of "arbitrary disparity," *id.*, that should be unacceptable in criminal sentencing.

And the results under this test have been incongruous, denying § 3582(c)(2) relief to defendants whose sentences plainly were imposed because of the Guidelines. In *United States v. Dixon*, for example, the district court denied relief because the written agreement did not "expressly link" the Guidelines range to the recommended sentence. 687 F.3d 356, 360 (7th Cir. 2012). The court of appeals candidly acknowledged that the recommended sentence was, in fact, based on the Guidelines range. The prosecutor had stated at the sentencing hearing that the parties arrived at their recommended range by calculating "a one-third to one-half discount from the bottom of the applicable Guideline range." *Id.* at 361. As the court of appeals noted, "[i]t is hard to believe that these assurances were not relevant, perhaps even decisive, in the judge's decision to accept the binding plea agreement." *Id.* Nevertheless, the court denied relief. It felt compelled to follow the *Freeman* concurrence under which, it reasoned, anything "beyond the scope of the

written agreement" must be disregarded. *Id.*; *cf. United States v. Rivera-Martinez*, 665 F.3d 344, 349 (1st Cir. 2011) (insufficient that the agreement identified "some guideline components (including a total offense level) as well as a specified drug quantity").

4. It is no answer to say that a defendant can control his fate by insisting on an explicit Guidelines invocation in his plea deal. Br. in Opp. 14. That argument is cold comfort to the many defendants who already have been sentenced following C-type agreements. Section 3582(c)(2) is, by its very nature, intended to protect the interests of those already serving prison terms. Nor is this of any benefit to defendants who do not have written plea agreements. *Supra* 31.

Moreover, it blinks reality to suggest that defendants simply can insist on explicit Guidelines references in their plea agreements. Under the sentencing Guidelines and mandatory minimum laws, prosecutors wield tremendous power: A prosecutor can control a defendant's probable sentence through charging decisions. *See* Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 Stan. L. Rev. 869, 877, 886 (2009). Defendants often feel compelled to accept pleas on the government's terms, particularly given the possible alternative: the threat of more serious charges if they elect to go to trial. *See id.* at 886-87. And few will go to the mat, even if they could, to insist on a term that grants them a mere shot at a lower sentence on the off chance the Sentencing Commission lowers their Guidelines range.

5. Affording the benefits of § 3582(c)(2) to defendants subject to C-type agreements does not deprive the government of the benefit of any bargain. *Contra Freeman*, 564 U.S. at 551 (dissent). When a Guidelines range that drove the agreement (and the judge's acceptance of it) is subsequently reduced, this indicates that, in the Commission's current judgment, the government was bargaining with a chip it should not have had.

Likewise, permitting such a defendant to seek relief under § 3582 does not enable a judge to "rewrite" the parties' agreement. *Id.* at 536 (concurrence); *id.* at 545 (dissent). Plea agreements are written against the backdrop of § 3582(c)(2); it is implicit that the agreed-upon sentence might later be reduced in the ways the statute contemplates. Accordingly, § 3582(c)(2) does not allow the court to rewrite the plea agreement any more than it impinges on finality, which it does only modestly. Congress provided "a limited adjustment" available "to a limited class of prisoners." *Dillon*, 560 U.S. at 825-26; *see* U.S.S.G. § 1B1.10(a)(3), (b)(1). It has not authorized retroactive revisions of plea agreements, but rather "permit[ted] the district court to revisit a prior sentence to whatever extent the sentencing range in question was a relevant part of the analytic framework the judge used … to approve the agreement." *Freeman*, 564 U.S. at 530 (plurality). And eligibility does not equal a reduction; a judge has discretion to deny relief based on the § 3553(a) factors and Commission policy statements. *Id.* at 531-32; *id.* at 541 (concurrence).

Absent an explicit waiver of § 3582(c)(2) relief in the agreement, it makes little sense to deprive C-type

plea defendants (but not others) of the benefit of a retroactive change in that sentencing range. Here, for example, nothing in Mr. Hughes's fully integrated agreement indicated that he intended to waive eligibility for a retroactive reduction for which he otherwise would have been eligible. *See* Pet. App. 66a ("[t]here are no other agreements, promises, representations or understandings between" the parties); *compare* Pet. App. 51a-52a, 63a (waiving appellate rights). It is inappropriate to presume that a defendant bargained away his eligibility for a future sentence reduction. Sub silentio waivers generally won't be read into even *ordinary* contracts. 11 *Williston on Contracts* § 31:4 (4th ed.). And a plea agreement, of course, is no ordinary contract; indeed, it "necessarily implicates the integrity of the criminal justice system." *United States v. Cvijanovich*, 556 F.3d 857, 862 (8th Cir. 2009). A waiver of the right to appeal, for example, must be express and acknowledged by the defendant on the record. Fed. R. Crim. P. 11(b)(1)(N). Courts should be similarly wary of reading into an agreement a silent waiver of § 3582(c)(2) relief.

C. Mr. Hughes is eligible for relief under § 3582(c)(2).

Under these principles, Mr. Hughes's sentence was "based on" the Guidelines. The Guidelines were considered throughout Mr. Hughes's plea bargaining and sentencing process. And every indication is that the applicable Guidelines range was closely connected to the sentence Mr. Hughes received.

The plea agreement signaled that the judge would evaluate the stipulated sentence in light of the Guidelines range. It expressly indicated that the judge would consider the Sentencing Guidelines before imposing the sentence. Pet. App. 54a. The parties further contemplated that the sentence would involve an "application of the Sentencing Guidelines." Pet. App. 56a ("[T]he government also reserves the right to make recommendations regarding application of the Sentencing Guidelines."); *see also* Pet. App. 58a ("Pursuant to § 1B1.8 of the Sentencing Guidelines, the Government agrees that any self-incriminating information that was previously unknown to the Government … will not be used in determining the applicable sentencing guideline range ….").

The district court then accepted the plea agreement and sentenced Mr. Hughes to the parties' recommended sentence. In so doing, the judge expressly "considered … the sentencing guidelines" and determined that the agreement "complie[d]" with their "spirit." Pet. App. 32a-33a. He indicated that he had read and considered the presentence report, which included a calculation of the applicable Guidelines range as required by Rule 32(d)(1). Pet. App. 33a. He also considered the parties' agreement. *Id.* The judge then undertook the calculations that the Guidelines require. He calculated a total offense level of 31 and a criminal history category of VI. Pet. App. 33a-36a. Attorneys for Mr. Hughes and the government weighed in on these calculations, as did the probation officer. *Id.* On that basis, the court computed a sentencing range under the Sentencing Guidelines—188 to 235 months. Pet. App. 36a.

In imposing sentence, the court referred back expressly to the same considerations that motivated its approval of the plea agreement. Pet. App. 47a. And in so doing, the court "conclude[d] and f[ound] that it ha[d] imposed a reasonable sentence in this case compatible with the advisory United States Sentencing Guidelines but in accordance with the mandatory matters the Court is required to consider in ultimately determining a sentence." *Id.* It gave no indication that 180 months was the sentence it would have arrived at irrespective of the Guidelines range, or that factors other than the Guidelines range justified the result. *See Freeman*, 564 U.S. at 530-31 (plurality) (sentence was "based on" the Guidelines range where the court "expressed its independent judgment that the sentence was appropriate in light of the applicable Guidelines range"); *Epps*, 707 F.3d at 352 (sentence was "based on" the guidelines where the judge imposed a sentence "in view of the fact that the crack cocaine guidelines are what they are" (emphasis omitted)). Accordingly, the Eleventh Circuit erred in foreclosing Mr. Hughes from seeking relief under § 3582(c)(2).

II. The Court Of Appeals Erred By Treating The Single-Justice Concurrence In *Freeman* As Binding Precedent.

The simplest resolution of this case is to reach a majority on the question left unresolved by *Freeman*. But if the Court does not do so, the decision below still must be vacated because the Eleventh Circuit erroneously believed that it was bound by the *Freeman* concurrence. When no single opinion captures a majority,

the decision has binding effect only if, among the "position[s] taken by those Members who concurred in the judgment[]," there is a "narrowest ground[]" supporting the judgment with which a majority of the Court agrees. *Marks*, 430 U.S. at 193 (internal quotation marks omitted). An opinion embodies a "narrowest ground[]" only when it is a "logical subset" of enough opinions to form a majority. *King*, 950 F.2d at 780-81. The *Freeman* concurrence, however, is not a logical subset of the plurality; the opinions rest on different theories and share no rationale.

The Eleventh Circuit's alternative approach invites confusion. It would require a court to imagine the *results* dictated by each separate opinion in a variety of hypothetical cases. Predicting how *future* cases might come out stands the judicial role on its head, and is certain to generate disagreement and dissent. But even if that approach were correct, the decision below still was wrong; it mistakenly concluded that "whenever Justice Sotomayor's opinion would permit a sentence reduction, the plurality opinion would as well." Pet. App. 12a-13a. For these reasons too, the decision below must be vacated.

A. An opinion constitutes the "narrowest grounds" under *Marks* when it represents a logical subset of reasoning embraced by a majority of the Court.

1. *Marks* wasn't always the rule. That relatively recent decision represented a limited departure from how the Court historically has established precedent: by issuing opinions joined by a majority of Justices.

Early in the Court's history, each Justice issued a separate opinion, even when they all agreed on the proper disposition of a case. Those seriatim opinions often "varied so greatly in their reasoning and conclusions that it was difficult to see who had 'won' and 'why.'" Melvin I. Urofsky, *Dissent and the Supreme Court: Its Role in the Court's History and the Nation's Constitutional Dialogue* 6 (2015). Chief Justice Marshall eventually "institutionalized" the practice of offering a precedential "opinion of the Court," *id.* at 6, and "[f]or the first time, the Court as a judicial unit had been committed to an opinion—a ratio decidendi—in support of its judgments." Karl M. ZoBell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 Cornell L.Q. 186, 193 (1959).

Thus, historically the rule has been that if no "opinion[] was accepted by a majority of the court," then "statements therein are not binding." *Alaska v. Troy*, 258 U.S. 101, 111 (1922); *cf. United States v. Pink*, 315 U.S. 203, 216 (1942) (in an earlier affirmance by an equally divided Court, "the lack of an agreement by a majority of the Court on the principles of law involved prevents [a judgment] from being an authoritative determination for other cases"). "Many pre-*Marks* authorities and cases doubted the precedential value of opinions without a majority rationale or majority agreement on a rule of decision." Richard M. Re, *Beyond The* Marks *Rule* 5 n.21 (Jan. 5, 2018), https://tinyurl.com/y8wwqnnn (last visited Jan. 20, 2018); *see* Eugene Wambaugh, *The Study of Cases* § 48 (2d ed. 1894) (discussing practices at common law; "Even when all of the judges concur in the result,

the value of the case as an authority may be diminished and almost wholly destroyed by the fact that the reasons given by the several judges differ materially."); Henry C. Black, *Handbook on the Law of Judicial Precedents* 135-37 (1912). In short, the general rule was that without a majority opinion, there was no precedent binding on lower courts.[6]

2. In the 1970s, the waters were muddied. In *Marks*, the Court addressed how to proceed "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices." 430 U.S. at 193. Under those circumstances, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment[] on the narrowest grounds." *Id.* (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)).

Marks refined the historical norm, and its circumstances make clear that the refinement was modest. It assessed the precedential effect of a prior, fragmented decision in which opinions sufficient to form a majority fit together like Russian dolls; the rationale of one opinion nested entirely within the broader rationale of another. Specifically, *Marks* considered whether a plurality opinion in *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), "authoritatively stated the law in effect." *Marks*, 430 U.S. at 191. At

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[6] *This* Court, of course, is not bound by *Marks*: It "is free to reconsider or refine or tweak its own precedents—including splintered precedents." *United States v. Duvall*, 740 F.3d 604, 611 n.2 (D.C. Cir. 2013) (Kavanaugh, J., concurring in the denial of rehearing en banc).

issue in *Memoirs* was the extent to which sexually explicit material is constitutionally protected. 383 U.S. at 415. A majority of Justices voted to reverse a declaration that the book in question was obscene. Two Justices concluded that "the First Amendment provides an *absolute* shield against governmental action aimed at suppressing obscenity," and a plurality of three Justices wrote that obscenity cases could proceed only as to material "utterly without redeeming social value." *Marks*, 430 U.S. at 193-94 (emphasis added).[7]

Among the opinions supporting the judgment, the three-Justice plurality authored by Justice Brennan represented the "narrowest grounds" on which a majority of the Court concurred. *Id.* at 193. That is because the plurality's reasoning was fully encompassed within two other Justices' absolutist positions: "Because Justices Black and Douglas had to agree, as a logical consequence of their own position, with the plurality's view that anything with redeeming social value is not obscene, the plurality of three in effect spoke for five Justices …." *King*, 950 F.2d at 781; Ryan C. Williams, *Questioning* Marks*: Plurality Decisions and Precedential Constraint*, 69 Stan. L. Rev. 795, 840 (2017) ("[T]reating Justice Brennan's opinion [in *Memoirs*] as 'controlling' was fully consistent with requiring a majority consensus among the concurring Justices for binding precedential force to attach."). The same was true in *Gregg*, from which *Marks* drew its "narrowest grounds" formulation. There, similar to

[7] Justice Stewart provided a sixth vote for the judgment "based on his view that only 'hardcore pornography' may be suppressed." 430 U.S. at 193 (quoting *Memoirs*, 383 U.S. at 421).

Marks, the Court was interpreting an underlying decision in which some Justices held a law to be facially unconstitutional and others thought it constitutional in certain applications. 428 U.S. at 169 n.15; *see King*, 950 F.2d at 781 (describing splintered opinions in *Furman v. Georgia*, 408 U.S. 238 (1972), that the Court addressed in *Gregg*).

3. Thus, both *Marks* and *Gregg* addressed underlying decisions in which one opinion was a logical subset of another. That is no accident. "*Marks* is workable—one opinion can be meaningfully regarded as 'narrower' than another—only when one opinion is a logical subset of other, broader opinions." *King*, 950 F.2d at 781. That is because when "one opinion supporting the judgment does not fit entirely within a broader circle drawn by the others," a contrary rule would "turn a single opinion that lacks majority support into national law." *Id.* at 782. "[I]t surely cannot be proper to endow that approach with controlling force …." *Id.*; *see Davis*, 825 F.3d at 1014; *United States v. Carrizales-Toledo*, 454 F.3d 1142, 1151 (10th Cir. 2006).

Under the logical subset test, "the narrowest opinion must represent a common denominator of the Court's reasoning; it must embody a position implicitly approved by at least five Justices who support the judgment." *King*, 950 F.2d at 781. For instance, in a case with two opinions supporting the judgment (embodying Rule A and Rule B), the inquiry is simply whether Rule B calls for relief only "where Rule A does," and "calls for relief in no other cases." *Duvall*, 740 F.3d at 620 (Williams, J.). In such a case, "Rule B is clearly 'narrower' than Rule A" and falls within the

ambit of *Marks*. *Id.* If, however, the rules only "partially overlap[]," then no opinion of the Court controls. *Id.* at 618-19. Instead, a lower court is bound only by the "specific result," and must "consider which of the rationales set forth in the varying opinions is most persuasive" and apply that reasoning. *Davis*, 825 F.3d at 1022, 1026.

Determining when one opinion is a logical subset of another can be straightforward. Take, for example, *Caldwell v. Mississippi*, 472 U.S. 320 (1985). There, a prosecutor had made comments to the jury about the role of appellate review in capital sentencing. The plurality concluded that the comments rendered the sentence unconstitutional for two reasons: The comments inaccurately described the appellate process in a way that diminished the jury's sense of responsibility, and any reference to appellate review was "wholly irrelevant" to sentencing. *Id.* at 336 (plurality opinion). In a separate opinion that the Court later deemed controlling under *Marks*, *see Romano v. Oklahoma*, 512 U.S. 1, 9 (1994), Justice O'Connor concurred because she agreed with one of those two reasons—she thought the comments "were inaccurate and misleading." *Caldwell*, 472 U.S. at 322. She disagreed, however, that the comments were "irrelevant," and believed that providing the jury with accurate information about appellate procedures was constitutionally permissible. *Id.* at 336. Because the concurrence fully embraced one of the plurality's two stated rationales, Justice O'Connor's opinion was a logical subset.

In short, the logical subset approach provides a viable method for identifying the "narrowest grounds"

of a fractured decision. It is sufficiently certain in application; a lower court need only ask whether the rationale of one opinion is fully subsumed by that of another. If so, the narrower opinion controls; if not, there is no controlling precedent. This test also properly accounts for common situations that reflect reasoning shared by a majority of the Court, such as where overlapping opinions would invalidate a statute on facial and as-applied grounds, or (as in *Caldwell*) a narrower opinion would afford relief for some (but not all) rationales embraced by the plurality. *See United States v. Johnson*, 467 F.3d 56, 64 (1st Cir. 2006) ("when two opinions reach the same result in a given case, but one opinion reaches that result for less sweeping reasons than the other," it "makes … sense" to afford precedential weight to the less sweeping opinion). And this approach is faithful to the Court's command that "[w]hen an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result" that have binding effect. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996). It properly recognizes that this Court's holdings arise from the intersection of the judgment in a case and the rationale that supports it.

B. The test adopted by the decision below is unworkable, and would transform theories rejected by the majority of the Court into binding precedent.

Any other approach to identifying a majority rationale where this Court has not stated one "is inherently confusing and in fact indeterminate," requiring

"guesswork as to the distribution of situations governed" by competing rules. *Duvall*, 740 F.3d at 618 (Williams, J.). That is plain from the decision below.

The Eleventh Circuit rejected the logical subset test. Pet. App. 10a. It refused to consider whether the opinions supporting the judgment share common reasoning. *Id.* (concluding that a "narrow focus on the *rationale* of the opinions in *Freeman* is misplaced" (emphasis added)). Instead, the Eleventh Circuit asked whether the concurrence "produces *results* with which a majority of the Court … would agree." Pet. App. 12a (emphasis added). Under this approach, such bare results—bereft of any common rationale—wouldn't even have to be endorsed by a majority of Justices in the underlying case. Rather, for an opinion to be "narrowest," it would need only "consistently produce results" with which a majority would agree. Pet. App. 7a. The court's premise was that "it is the ultimate 'vote' of five Justices"—not a shared rationale—"that is important in determining the binding effect of a splintered Supreme Court opinion." Pet. App. 12a (internal quotation marks omitted).

That approach ignores the fundamental precept that precedent is established by marrying up a common rationale and a common result. *Seminole Tribe*, 517 U.S. at 67; *see also Cty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part) ("As a general rule, the principle of stare decisis directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law."). When "the principles of law involved" in a case have not "been agreed upon by

a majority of the court," that disagreement "prevents the case from becoming an authority for the determination of other cases, either in this or in inferior courts." *Hertz v. Woodman*, 218 U.S. 205, 213-14 (1910).

Moreover, giving binding effect to an opinion whose reasoning lacks majority support does violence to the distinction between *ratio decidendi* and *obiter dictum*. The *ratio decidendi* is the rationale that "is considered to have been necessary to the decision of the actual issue between the litigants." C.K. Allen, *Law in the Making* 148 (1927). Only the *ratio decidendi* represents the holding of the Court. *See United States ex rel. Bernardin v. Duell*, 172 U.S. 576, 586 (1899); *Smith v. City of Jackson*, 544 U.S. 228, 262 (2005) (O'Connor, J., concurring in the judgment); *cf. The Rock Island Bridge*, 73 U.S. 213, 216 (1867) ("mere dictum … not being necessary for the decision of the case cannot be taken as authority"). The Eleventh Circuit ignored this essential distinction when it concluded that the "concurring opinion is the holding of *Freeman*," Pet. App. 9a, without assessing whether the *reasoning* of that opinion was shared by a majority of the Court.

It is no answer to say that the concurrence was necessary to provide a fifth vote for the judgment. After all, the concurring opinion was no more "necessary" than the plurality. "[W]hen the Supreme Court opinions yielding a result are on different wavelengths …, characterizing one as narrower than the other is just a kind of judicial *force majeure*." *Duvall*, 740 F.3d at 620 (Williams, J.). Only the logical subset approach avoids this problem: When the rationale of

one opinion is completely subsumed by another, the narrower opinion represents the *ratio decidendi* because its reasoning enjoys majority support.

There is something seriously wrong with an approach that would give controlling effect to reasoning with which eight Justices disagreed—but that is exactly what the Eleventh Circuit did here. As the government explained previously in another case involving *Marks*, "[n]either precedent nor logic supports the court of appeals' conclusion that [a concurring Justice's standard] must be treated as the controlling rule of law even when it yields an outcome inconsistent with a controlling legal principle endorsed by eight Members of this Court." U.S. Petition for Writ of Certiorari, *United States v. McWane, Inc.*, No. 08-223, 2008 WL 3884295, at *23 (U.S. Aug. 21, 2008). That confounding result is precisely what the Eleventh Circuit's rule accomplished, as other courts have candidly acknowledged: "Even though eight Justices disagreed with Justice Sotomayor's approach and believed it would produce arbitrary and unworkable results, her reasoning provided the narrowest, most case-specific basis for deciding *Freeman*." *Dixon*, 687 F.3d at 359 (citations omitted).

That backwards result is not unique to this case. When lower courts fail to seek a common rationale, they often unthinkingly apply the label "narrowest" to a single-Justice opinion and then give it binding effect—even when no other Justice agreed with that opinion. *See, e.g.*, *J & B Entm't, Inc. v. City of Jackson*, 152 F.3d 362, 370 (5th Cir. 1998) (following Justice Souter's concurrence in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), because other lower courts had

"generally adopted [it] as the narrowest opinion"); *Blum v. Witco Chem. Corp.*, 888 F.2d 975, 981 (3d Cir. 1989) (applying Justice O'Connor's concurrence in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987) on the view it was "determinative," despite "awkwardness in attributing precedential value to an opinion of one Supreme Court justice to which no other justice adhered"). The Court should reject any approach that produces "the anomaly of the views of one justice, with whom no one concurs, being the law of the land." *Dague v. City of Burlington*, 935 F.2d 1343, 1360 (2d Cir. 1991), *rev'd on other grounds*, 505 U.S. 557, 571 (1992).

The Eleventh Circuit's approach is a recipe for chaos. Under the logical subset approach, at least, the inquiry is confined; a lower court need only review the separate opinions supporting the judgment and identify shared reasoning. *Supra* 42-43. But the analysis proposed by the decision below would bring a high degree of difficulty to an inquiry that already has caused confusion and dissent.[8] According to the Eleventh Circuit, a court would have to find "the narrowest grounds … that, *when applied to other cases*, would

[8] *E.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (recognizing "divergent opinions of the lower courts" on whether Justice Powell's plurality in *Bakke* controlled under *Marks*); *Nichols v. United States*, 511 U.S. 738, 745 (1994) (describing the "degree of confusion" in the lower courts following the "splintered decision" in *Baldasar v. Illinois*, 446 U.S. 222 (1980)); *see* U.S. Petition for Writ of Certiorari, *McWane*, *supra*, at *16-19 (describing "the difficulty that courts have encountered in identifying the legal principles established by *Rapanos*" *v. United States*, 547 U.S. 715, 767 (2006)); Re, *supra*, at 13 (identifying circuit splits); Williams, *supra*, at 807 n.50 (same).

consistently produce results that a majority of the Justices supporting the result in the governing precedent would have reached." Pet. App. 7a (quoting Bryan A. Garner et al., *The Law of Judicial Precedent* 200 (2016)) (emphases added). In short, in order to decide which opinion to follow, a lower court would have to hypothesize future cases; imagine how each of the authoring Justices would resolve them; and then select the opinion that would "consistently produce results" that garner a majority.

That's a tall order. However challenging it ordinarily may be to apply established law to new settings, it will be many times more difficult for lower courts to "run the facts and circumstances of the current case through [each of] the tests articulated in the Justices' various opinions." *Duvall*, 740 F.3d at 611 (Kavanaugh, J.)—especially in circumstances complicated enough that the Court itself could not converge around any unifying rationale. And asking a lower court to plug hypothetical facts into multiple conflicting opinions in order to pick one that would "consistently" produce majorities is a project fit for oracles.

This very case proves the point. Judges have disagreed starkly about whether hypothetical defendants would be eligible for relief under the *Freeman* concurrence's approach but not the plurality's. *Compare, e.g.*, Pet. App. 12a-13a ("whenever Justice Sotomayor's opinion would permit a sentence reduction, the plurality opinion would as well"), *Duvall*, 740 F.3d at 612 (Kavanaugh, J.), *and Davis*, 825 F.3d at 1036-37 (Bea, J., dissenting), *with Epps*, 707 F.3d at 351 ("[T]he set of cases where the defendant prevails under the concurrence is not always nestled within the

set of cases where the defendant prevails under the plurality …."), *and Davis*, 825 F.3d at 1022-23 (majority opinion).

Compounding that indeterminacy, even courts that share those predictions may disagree about how "consistently" a separate opinion must produce results with which a hypothetical majority of Justices would agree for it to be "narrowest." Take *Rapanos*. There, in interpreting the phrase "waters of the United States" in a jurisdictional statute, a four-Justice plurality proposed one test, Justice Kennedy concurred in the judgment, and four Justices dissented. Several lower courts have agreed that Justice Kennedy would find jurisdiction in most instances where the plurality would—but they disagree about what this means. One court believed that, because divergences between the plurality and the concurrence would be "rare," "as a practical matter the Kennedy concurrence is the least common denominator" and controls under *Marks*. *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 725 (7th Cir. 2006). But another court could not accept the "bizarre outcome" of treating the concurrence as controlling even though eight Justices might well disagree with it in particular applications. *Johnson*, 467 F.3d at 64.

The promise that it is "easy" to predict the results generated by each separate opinion, *Duvall*, 740 F.3d at 611 (Kavanaugh, J.), is at odds with this experience. *Marks* should not be "an invitation from [this] Court to read its fragmented opinions like tea leaves, attempting to divine what the Justices 'would have' held." *Hopwood v. Texas*, 236 F.3d 256, 275 n.66 (5th

Cir. 2000). "[N]ose-counting" of that sort "is an exercise for litigators, not jurists." *People v. Lopez*, 286 P.3d 469, 485 (Cal. 2012) (Liu, J., dissenting). Lower courts shouldn't spend their time guessing about majority opinions that don't exist, any more than they should predict when the Court might overturn its past precedents. *Cf. Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). It is this Court's prerogative to announce binding rules, just like it is the Court's prerogative to *re*nounce them. The proper rule is the simpler one: Shared results without shared rationales generate only judgments.

C. The single-Justice concurrence in *Freeman* is not binding precedent.

Under no theory was the *Freeman* concurrence a "narrowest ground[]" with which a majority of the Court agreed.

1. *Freeman* plainly does not satisfy the logical subset test. The plurality and the concurrence disagreed about the meaning of the key statutory text and diverged on the basis for the judgment. *Supra* 5-6. The plurality interpreted "based on" to refer to "*the judge's decision* to accept the plea and impose the recommended sentence." 564 U.S. at 534 (emphasis added). The concurring opinion agreed as to the judgment, but "differ[ed] as to the reason why." *Id.* at 534. According to the concurrence, following a C-type agreement, "it is the binding plea agreement" upon which the sentence is based. *Id.* at 535; *contra id.* at 533 (plurality) (responding that "[t]he statute … calls for an inquiry into the reasons for a judge's sentence,

not the reasons that motivated or informed the parties").[9]

In short, there was "no explicit majority agreement on all the analytically necessary portions of [the] Supreme Court['s] opinion." *King*, 950 F.2d at 784. Rather, their underlying rationales simply differed. Accordingly, the concurrence is not "narrower" than the plurality.[10]

2. The Eleventh Circuit's results test also is not satisfied here. The court of appeals was wrong that whenever relief is available under the *Freeman* concurrence's approach, it also is available under the plurality's. Pet. App. 8a. There are scenarios under which a defendant would be entitled to a sentence reduction under the plurality's rule but not the concurrence's, and scenarios in which the converse is true. *See Davis*, 825 F.3d at 1023; *Epps*, 707 F.3d at 350 & n.8. No one

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[9] The concurrence also "necessarily reject[ed] the categorical rule … endorsed by the dissent." *Freeman*, 564 U.S. at 539. The dissent's approach "would have courts ignore the [plea] agreement's express terms, which the court 'applie[s]' when imposing the term of imprisonment." *Id.* at 540 n.4 (second alteration in original).

[10] *See Glossip v. Gross*, 135 S. Ct. 2726, 2793 (2015) (Sotomayor, J., dissenting) (when a concurring opinion "is unrelated to, and thus not any broader or narrower than," the plurality's approach, the plurality should not control under *Marks*); U.S. Brief in Opposition, *Olive v. United States*, No. 15-1166, 2016 WL 2937081, at *12 (U.S. May 18, 2016) (discussing splintered opinions in *United States v. Santos*, 553 U.S. 507 (2008), and asserting that "neither opinion is a logical subset of the other or provides a common denominator because the opinions rest on logically inconsistent premises").

disagrees that "'sometimes' is a middle ground between 'always' and 'never,'" Pet. App. 13a (quoting *Duvall*, 740 F.3d at 612 (Kavanaugh, J.)), but the Eleventh Circuit was wrong that the *Freeman* plurality is an "'always'" rule. And while this incomplete overlap in the Venn diagrams is not *necessary* to show that *Marks* does not apply here, *see supra* 42-44 (discussing the need for common rationales); *Duvall*, 740 F.3d at 618-20 (Williams, J.), it certainly is sufficient.

On the one hand, there plainly are situations in which the plurality would find a defendant eligible under § 3582 but the concurrence would not—for instance, when a judge made clear she was relying on the Guidelines to accept the plea, but the agreement did not expressly invoke the Guidelines. *Supra* 5-6. In addition, there are multiple scenarios in which the defendant could prevail under the concurrence's rationale but not the plurality's.

First, even when the parties present a plea agreement that incorporates the Guidelines and settles on a Guidelines range, a "sentencing court … might consider and reject the guideline range used by the parties … because, having considered the applicable guidelines range, the court rejects it as a matter of policy and selects its sentence without regard to it." *Davis*, 825 F.3d at 1023 (quoting *Epps*, 707 F.3d at 350 n.8) (some alterations in original). District courts have "authority to vary from the … Guidelines based on *policy* disagreement with them." *Spears v. United States*, 555 U.S. 261, 264 (2009) (per curiam). And they have done so, for instance, upon concluding that some Guidelines yield excessive sentences for certain types of offenses. *E.g.*, *id.* at 262-63; *United States v.*

Lewis, 623 F. Supp. 2d 42, 45 (D.D.C. 2009); *United States v. R.V.*, 157 F. Supp. 3d 207, 258-60 (E.D.N.Y. 2016).

But the court might nonetheless "decide[] for reasons unrelated to the guidelines range to impose the sentence the parties agreed upon," for instance because of similarity to sentences for like offenders in recent cases, or based on other relevant § 3553(a) factors. *Epps*, 707 F.3d at 350 n.8. If the applicable Guidelines range later were lowered, a lower-court judge reasonably would predict that the concurrence would permit a retroactive reduction (because the plea agreement was based on the Guidelines) while the plurality would not (because the Guidelines were not the basis for the district court's sentencing decision). This is exactly what happened in *Garrett*, 758 F.3d at 755, as discussed above (at 28).

There are still further situations in which the same sort of disconnect between the plurality and concurrence likely would arise. *See Davis*, 825 F.3d at 1023; *Epps*, 707 F.3d at 350 n.8. Take, for instance, a C-type agreement that invokes the Guidelines and recommends a sentence at the bottom of a specified range. The concurrence likely would find the sentence to be based on the Guidelines for that reason alone. But what if the district court concludes that the parties settled on the *wrong* Guidelines range—perhaps because they erred in assessing career offender status? *See* U.S.S.G. § 4B1.1. The district court might nonetheless accept the plea because it finds the recommended range acceptable for reasons unrelated to the Guidelines—for instance, a defendant's upbringing or his post-crime repentance. Given the district

court's reasons for imposing the sentence, the plurality—unlike the concurrence—likely would conclude that the sentence was *not* based on the Guidelines. *See Davis*, 825 F.3d at 1023; *Epps*, 707 F.3d at 350 n.8.

Accordingly, the Eleventh Circuit was wrong that, whenever the *Freeman* concurrence "would grant relief to a defendant sentenced according to a binding plea agreement, the plurality opinion would agree with the result because, under the logic of the plurality opinion, a defendant should always receive relief." Pet. App. 8a; *see also Duvall*, 740 F.3d at 608 (Kavanaugh, J.). Each approach would afford relief in scenarios where the other would not. *See Duvall*, 740 F.3d at 619 (Williams, J.). The Russian dolls simply don't fit; one may be generally smaller, but they bulge and taper in different places. So even if it were permissible to focus exclusively on potential *results*—and ignore disagreement in the opinions' *rationales*, *but cf. supra* 44-51—*Freeman* still provides no binding holding under *Marks*.

D. Alternatively, the Court may wish to revisit *Marks*'s treatment of divided opinions and hold that only opinions joined by a majority of Justices merit precedential status.

As the foregoing discussion should make clear, *Marks* is subject to great uncertainty. The Court has expressed concerns about its viability. *E.g.*, *Nichols*, 511 U.S. at 745-46 (*Marks* can be "more easily stated than applied"; "it [is] not useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so

obviously baffled and divided the lower courts"). It has been a repeated source of disagreement. *See, e.g.*, *Santos*, 553 U.S. at 523-24 (plurality opinion); *id.* at 528 & n.7 (Stevens, J., concurring in the judgment). And "[i]n recent years, fragmented Supreme Court decisions have continued to bedevil both state and federal courts." Re, *supra*, at 3.

Accordingly, the Court may conclude that the *Marks* enterprise has failed, and return to a rule that only an opinion joined by a majority of Justices establishes binding precedent. This approach would produce greater certainty for lower courts and litigants; focus them on substantive legal questions rather than meta-jurisprudential Russian dolls; and encourage courts to coalesce around majority opinions with circumscribed rationales. If the Court so concludes, then the decision below must be vacated for erroneously treating the *Freeman* concurrence as controlling precedent.

"Far from having an ancient pedigree, the *Marks* rule is an invention of the last forty years." Re, *supra*, at 5. Any rule in this context should serve a pragmatic purpose—to provide guidance to lower courts. Measured against that standard, however, *Marks* has created more cost than benefit. While *Marks* was "designed to clarify the precedential significance of [plurality] decisions," it "has instead exacerbated the confusion." Williams, *supra*, at 864. That confusion is rampant. The lower courts have been "baffled and divided" when attempting to apply *Marks*. *Nichols*, 511 U.S. at 746; *see supra* n.8 (identifying circuit splits generated by *Marks*). If the purpose of *Marks* is to promote uniformity by identifying a controlling opinion

where there otherwise might be none, this disarray indicates that the game may not be worth the candle.

These difficulties applying *Marks* suggest the sort of "inherent confusion created by an unworkable decision" that justifies a departure from stare decisis. *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989). "Revisiting precedent is particularly appropriate where, as here … the precedent consists of a judge-made rule that was recently adopted to improve the operation of the courts, and experience has pointed [out] the precedent's shortcomings." *Pearson v. Callahan*, 555 U.S. 223, 233 (2009). And unlike when "'property and contract rights'" are at stake, reevaluating this "'procedural … rule[]'" would not "upset settled expectations on anyone's part." *Id.* (quoting *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)).

Nor is a rule like *Marks* a necessity, as certain state courts have concluded.[11] To be sure, there may be marginal cases in which some version of *Marks* might resolve an issue where confusion otherwise would persist. But *Marks* generates immense confusion of its own, very likely more than it resolves. And it is a distraction; it forces lower courts to spend their time counting noses and "reading the tea leaves." *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129, 134 (6th

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[11] *Rowland v. Washtenaw Cty. Rd. Comm'n*, 731 N.W.2d 41, 47 n.7 (Mich. 2007) ("decisions in which no majority of the justices participating agree with regard to the reasoning are not an authoritative interpretation under the doctrine of stare decisis"); *cf. State v. Kikuta*, 253 P.3d 639, 658 n.14 (Haw. 2011), *as corrected* (Aug. 11, 2011).

Cir. 1994). When the Court cannot reach a majority decision on a "frontier legal problem[]," the lower courts should focus their attention on the substantive merits of the question, so that the "diverse opinions from[] state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court." *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting). With the benefit of this percolation, the Court may eventually reach a majority, either because of changed composition or because a Justice, with time and upon reflection, casts a different vote. *Cf. Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519 (2013) (arriving at a 6-3 decision after splitting 4-4 on the same issue in *Costco Wholesale Corp. v. Omega, S.A.*, 562 U.S. 40 (2010) three years earlier).

In addition, a return to the historical norm—that only majority opinions have precedential force—is likely to generate greater certainty by encouraging divergent views on the Court to merge together into opinions that are both narrower and binding. "[W]hen it comes to identifying majority agreement on the Court, the most efficient actor … is the Court itself, at the time of its decision." Re, *supra*, at 20. And abrogating *Marks* could produce incentives to tamp down the "unsettling … proliferation of separate opinions with no single opinion commanding a clear majority." Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 Wash. L. Rev. 133, 148 (1990); *see also* Re, *supra*, at 21-23. The events of the past two years demonstrate that incentives toward narrowness and

consensus may have a powerful effect.[12] As the Chief Justice has remarked, although "[d]ivision should not be artificially suppressed, … the rule of law benefits from a broader agreement." Hope Yen, *Roberts Seeks Greater Consensus On Court*, Wash. Post, May 21, 2006. "The broader the agreement among the justices, the more likely it is a decision on the narrowest possible grounds." *Id.*

Accordingly, if the Court concludes that *Marks* is unworkable or unsound, it should return to the pre-*Marks* framework under which only a majority opinion establishes binding precedent. And whether the Court concludes that *Marks* should be abandoned entirely, or merely that *Marks* does not convert the *Freeman* concurrence into a holding, the judgment below cannot stand. The court of appeals erroneously relied on the concurrence because it felt bound to do so, and at a minimum, its decision must be vacated for the court to consider the issue anew.

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[12] *See Justice Sotomayor Laments Perception of Judges as Political*, L.A. Times, Mar. 9, 2017 ("We are talking more …. We are trying to reach consensus more."); Patrick Marley, *Justice Elena Kagan Says Court Had To Reach More Consensus After Antonin Scalia's Death*, Milwaukee J. Sentinel, Sept. 8, 2017 ("[W]e all made a very serious effort to try to find common ground even where we thought we couldn't.").

CONCLUSION

For the foregoing reasons, the judgment below should be reversed or vacated.

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