N0. 13-30133

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

TYRONE DAVIS,

Defendant-Appellant.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON AT TACOMA
(District Court No. CR 04-5350 RBL)

The Honorable Ronald B. Leighton, U.S. District Judge

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# PETITION FOR REHEARING EN BANC

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## STATEMENT PURSUANT TO FED. R. APP. P. 35

Pursuant to Federal Rule of Appellate Procedure 35(b), Tyrone Davis respectfully petitions this Court for rehearing en banc of the published panel decision in this case. The panel opinion affirmed the district court's conclusion that it lacked jurisdiction to consider Mr. Davis' request for a sentence reduction based on retroactive amendments to the crack cocaine sentencing guidelines. *United States v. Davis,* -- F.3d --, No. 13-30133 (9th Cir. Jan. 27, 2015) (Appendix A). As urged in Judge Berzon's concurring opinion in this case, en banc review is necessary to maintain uniformity of this Court's decisions, to address direct conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue, and to resolve questions of exceptional importance.

## INTRODUCTION

Tyrone Davis has served over ten years of the 18-year sentence imposed after he pled guilty to conspiracy, distribution, and possession with intent to distribute crack cocaine. Over the past decade, sweeping changes to federal drug sentencing laws and policy have led to substantial sentence reductions for prisoners serving time for crack cocaine offenses across the United States. In 2010, the United States Sentencing Commission retroactively reduced by two levels the applicable base offense levels assigned to various quantities of crack cocaine, and subsequent amendments have further lowered sentencing penalties. If Mr. Davis

were sentenced today, the current provisions of U.S.S.G. § 2D1.1(c), in conjunction with the stipulated drug quantity set forth in his plea agreement, would result in an advisory guidelines range of 78-97 months.

Individuals whose sentences are "based on" guidelines provisions that are subsequently lowered by the Sentencing Commission may move for a sentence reduction under 18 U.S.C. § 3582(c)(2). Despite significant reductions to the base offense level for crack cocaine in U.S.S.G. § 2D1.1 at the heart of his sentence, Mr. Davis was denied consideration of a motion to reduce his sentence because he entered into a Fed. R. Crim. P. 11(c)(1)(C) plea agreement. In *United States v. Austin,* 676 F.3d 924 (9th Cir. 2012), this Court interpreted the Supreme Court's plurality opinion in *Freeman v. United States,* __U.S. __, 131 S.Ct. 2685 (2011), to hold that a sentence imposed pursuant to Rule 11(c)(1)(C) is not "based on" a sentencing guideline range unless the agreement: (1) calls for the defendant to be sentenced within a particular Guidelines range; or (2) expressly uses a Guidelines sentencing range to establish the term of imprisonment. In effect, *Austin* held that Justice Sotomayor's concurring opinion in *Freeman* controls.

The Court's reasoning in *Austin*, however, conflicts with this Court's own precedent governing how to interpret fractured Supreme Court pluralities. And it conflicts directly with the D.C. Circuit's interpretation of *Freeman*. The conflicts presented by this case are complex and the implications are far reaching. Given the

resulting disparity and impact on Mr. Davis and prisoners who are similarly situated, these issues merit consideration by an en banc panel of this Court.

## STATEMENT OF THE CASE

Since his initial sentencing in 2006, Tyrone Davis has argued that the crack cocaine guidelines driving his sentence were excessive and resulted in racial disparity in federal sentencing. A decade later, these very considerations resulted in major sentencing reforms, including the retroactive reduction of drug sentences supported by the President, Attorney General, members of Congress, the Sentencing Commission, judges and numerous interest groups nationwide. Yet because of the language selected for inclusion in his plea agreement, Mr. Davis has been found ineligible for a sentence reduction.

### I. Initial Sentencing and Resentencing

Tyrone Davis was 33 years old when he was sentenced to 18 years in prison for his involvement in a drug conspiracy. Mr. Davis' plea to conspiracy to distribute cocaine base, distribution of cocaine base and possession with intent to distribute cocaine base was negotiated pursuant to Fed. R. Crim. P. 11(c)(1). ER 31-38. The agreement detailed certain drug transactions and quantities that formed the factual basis for the plea – the equivalent of approximately 170.5 grams of

crack cocaine – and stipulated to the corresponding base offense level under the guidelines:

> The parties have stipulated and agree that the total amount of cocaine base for which defendant Davis is responsible in these offenses, and which was reasonably foreseeable to him for purposes of the conspiracy charged in Count One, would yield a base offense level of 34, pursuant to USSG § 2D1.1.

ER 36. This was the base offense level applied to at least 150 but less than 500 grams of cocaine base under the November 2003 version of the United States Sentencing Guidelines. Although the plea outlined a recommended sentence of 216 months, Mr. Davis was subsequently allowed to argue for a lesser sentence. ER 27. The sentencing court incorrectly calculated his criminal history and determined that Mr. Davis' advisory guideline range was 235-293 months. The Court then imposed what it believed was a below guidelines sentence of 216 months. ER 29-30.

An earlier panel of this Court reversed and remanded for resentencing due to the district court's failure to properly calculate the advisory sentencing guidelines range. *United States v. Davis,* 312 Fed. App'x. 909 (9th Cir. 2009). On remand, the district court concluded Mr. Davis should be in criminal history category I and the corrected advisory guideline range was 188-235 months. ER 21. The Court then re-imposed its original sentence. That decision was affirmed in *United States v. Davis,* 389 Fed. App'x 616 (9th Cir. 2010).

## II. Mr. Davis' Motion for Sentence Reduction

Congress passed the Fair Sentencing Act of 2010 ("FSA") to address the growing concern over disproportionately higher sentences imposed largely on African Americans for crack cocaine offenses under 21 U.S.C. § 841. Pub.L. No. 111-220, 124 Stat. 2372 (2010). In November 2010, the U.S. Sentencing Commission exercised its authority under the FSA to permanently and retroactively reduce base offense for crack cocaine offenses penalties under U.S.S.G. § 2D1.1 app. C (2011). Subsequent amendments have further lowered the base offense level and corresponding sentencing range for the stipulated quantity of cocaine in Mr. Davis' plea agreement. *See* U.S.S.G § 2D1.1(c) (2014).

Mr. Davis filed a motion for sentence reduction in the district court in September 2012. ER 8-19. In the federal Bureau of Prisons, Mr. Davis has established himself as a model prisoner and received early transfer to a camp facility at FCI Herlong where he is scheduled to remain until March 2020. Having already served more time than the current Sentencing Guidelines would advise today, Mr. Davis' case is ripe for a potential reduction.

Both the district court and the current panel concluded that because Mr. Davis' plea was taken under Rule 11(c), his sentence was not "based on" the guidelines pursuant to *United States v. Austin,* 676 F.3d at 924. ER 7; Appendix A. Given these facts, the resulting anomaly of the legal approach that denies Mr.

Davis an opportunity for sentencing relief under the FSA warrants reconsideration by an en banc panel of this Court.

## REASONS FOR GRANTING EN BANC REVIEW

The panel's holding—that Justice Sotomayor's concurrence in *Freeman* is controlling—conflicts with the D.C. Circuit's opinion in *United States v. Epps,* 707 F.3d 337 (D.C. Cir. 2013), and is at odds with this Court's own precedent holding that a fractured Supreme Court opinion provides binding precedent only when five Justices share a common denominator of reasoning. To "secure or maintain uniformity of [this] [C]ourt's decisions," and to resolve this "question of exceptional importance," the Court should grant rehearing en banc. Fed. R. App. P. 35(a).

In *Freeman*, the Supreme Court considered whether a defendant sentenced under a Rule 11(c)(1)(C) plea is eligible for § 3582(c)(2) relief under the FSA. A four-judge plurality held that "the text and purpose of the three relevant sources—the statute, the Rule, and the governing policy statements—require the conclusion that the district court has authority to entertain § 3582(c)(2) motions when sentences are imposed in light of the Guidelines, even if the defendant enters into an 11(c)(1)(C) agreement." *Freeman*, 131 S. Ct. at 2692–93 (Kennedy, J.). "In every case the judge must exercise discretion to impose an appropriate sentence. This discretion, in turn, is framed by the Guidelines." *Id*. at 2960. "Even where

the judge varies from the recommended range . . . if the judge uses the sentencing range as the beginning point to explain the decision to deviate from it, then the Guidelines are in a real sense a basis for the sentence." *Id*. at 2692. Therefore, "§ 3582(c)(2) modification proceedings should be available to permit the district court to revisit a prior sentence to whatever extent the sentencing range in question was a relevant part of the analytic framework the judge used to determine the sentence or approve the settlement." *Id.* at 2692–93.

In so holding, the plurality rejected Justice Sotomayor's approach, which requires that the plea agreement explicitly base the sentence on a particular guidelines range:

> There is no good reason to extend the benefit of the Commission's judgment only to an arbitrary subset of defendants whose agreed sentences were accepted in light of a since-rejected Guidelines range based on whether their plea agreements refer to the Guidelines. Congress enacted § 3582(c)(2) to remedy systemic injustice, and the approach outlined in the opinion concurring in the judgment would undercut a systemic solution.

*Id*. at 2694–95.

Justice Sotomayor rejected the plurality's rationale. *See id*. at 2695 (Sotomayor, J., concurring). In Justice Sotomayor's view, "the term of imprisonment imposed by a district court pursuant to an agreement authorized by Federal Rule of Criminal Procedure 11(c)(1)(C) . . . is 'based on' the agreement itself, not on the judge's calculation of the Sentencing Guidelines." *Id*. This is so

because "[t]he term of imprisonment imposed by the sentencing judge is dictated by the terms of the agreement entered into by the parties, not the judge's Guidelines calculation." *Id*. at 2696. Thus, a district court has jurisdiction to consider a sentence reduction pursuant to § 3582(c)(2) only if the Rule 11(c)(1)(C) agreement itself either (1) explicitly "call[s] for the defendant to be sentenced within a particular Guidelines sentencing range" or (2) "make[s] clear that the basis for the specified term is a Guidelines sentencing range applicable to the offense to which the defendant pleaded guilty." *Id*. at 2697.

In *Austin*, this Court held that Justice Sotomayor's concurrence controlled pursuant to *Marks v. United States,* 430 U.S. 188, 97 S.Ct. 990 (1979). *Marks* instructs that when a fragmented decision by the Court that has no single rationale explaining the majority's result, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." 430 U.S. at 193. Without substantial analysis, the *Austin* opinion held that because Justice Sotomayor concurred in the plurality's opinion, her concurrence controlled because it concluded that a sentence imposed pursuant to Rule 11(c)(1)(C) does not preclude eligibility for § 3582(c)(2) relief "on the 'narrowest grounds.'" 676 F.3d at 927-28.

This Court's opinion in *Austin* now stands in direct conflict with the D.C. Circuit's opinion in *Epps*. In *Epps*, the D.C. Circuit assessed the application of

*Marks* to the *Freeman* decision and held that there is no controlling opinion in *Freeman*, citing the lack of common reasoning between the plurality and concurring opinions. *United States v. Epps,* 707 F.3d 337 (D.C. Cir 2013); *In re Sealed Case,* 722 F.3d 361, 365 (D.C. Cir. 2013). The Court explained that *Marks* requires "'a common denominator of the Court's reasoning'" which must "'embody a position implicitly approved by at least five Justices who support the judgment.'" *Epps*, 707 F.3d at 348 (quoting *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991)). Stated otherwise, *Marks* applies when "the concurrence posits a narrow test to which the plurality must necessarily agree as a logical consequence of its own, broader position." *Id.* (quotation marks and citation omitted).

Applying that standard, the *Epps* Court held there is no controlling opinion in *Freeman* because the plurality and Justice Sotomayor's opinions "do not share common reasoning whereby one analysis is a 'logical subset' . . . of the other." *Epps*, 707 F.3d at 350–51. Declaring itself bound only by *Freeman*'s result, the D.C. Circuit then held the plurality's rationale was more persuasive than Justice Sotomayor's concurring opinion. *Id*. at 351–52.

In concluding that Justice Sotomayor's concurring opinion reflects the Court's narrowest grounds, *Austin* did not merely lay the groundwork for a circuit split, it deviated from this Court's own application of the *Marks* test. Like the D.C. Circuit in *Epps*, this Court has repeatedly interpreted *Marks* to apply only "'where

one opinion can be meaningfully regarded as narrower than another *and* can represent a common denominator of the Court's reasoning.'" *Lair v. Bullock*, 697 F.3d 1200, 1205 (9th Cir. 2012) (quoting *United States v. Rodriguez-Preciado*, 399 F.3d 1118, 1140 (9th Cir. 2005) (emphasis in original). Indeed, this Court has expressly adopted the D.C. Circuit's interpretation of *Marks*, which requires the "narrowest opinion" to "'present a common denominator of the Court's reasoning.'" *Rodriguez-Preciado*, 399 F.3d at 1140 (quoting *King*, 950 F.2d at 781-82). By concluding that Justice Sotomayor's concurrence controls, even though the *Freeman* plurality and concurrence do *not* share common reasoning whereby one analysis is a logical subset of the other, *Austin* effectively adopted a conflicting interpretation of the *Marks* test: one that mechanically adopts the Supreme Court opinion that reaches a majority result while benefitting the fewest litigants.

That restrictive interpretation of *Marks* is particularly unjust when applied in the context presented here. As the *Freeman* plurality warned, the Supreme Court's fractured decision has now resulted in arbitrary distinctions between similar defendants, undermining the Sentencing Reform Act's purpose of reducing unwarranted disparities. 131 S.Ct. at 2694-95. The district court's narrow application of the Sotomayor concurrence to Mr. Davis' case creates such an example. *See, e.g., United States v. Dunn,* 728 F.3d 1151, 1153 (9th Cir. 2013)

(government conceded jurisdiction under 3582(c)(2) where plea with agreed sentencing recommendation involved amended guideline provision but did not set forth criminal history category). The language in Mr. Davis' plea requiring consideration of the sentencing guidelines was deemed mere "boilerplate" by the district judge, yet application of this languages was found sufficient to invoke section 3582(c)(2) jurisdiction by four justices of the Supreme Court. ER 6; *Freeman*, 131 S.Ct. at 2695.

Today, whether a defendant with an 11(c) plea qualifies for a sentence reduction depends on the arbitrary factors of location and what sentencing factors the parties opted to spell out with specificity in a plea agreement. In Mr. Davis' case this has led to the cruel reality that he faces years of continued imprisonment based on arbitrary distinctions that perpetuate unwarranted disparities in the federal sentencing of cocaine offenses – a result that frustrates the FSA's goal of bringing some measure of fairness to crack cocaine sentencing. This Court should grant en banc review on this important issue of the standard for evaluating Rule 11(c)(1)(C) defendants' eligibility for § 3582(c)(2) relief.

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## CONCLUSION

For the foregoing reasons, Appellant Tyrone Davis respectfully requests that his Petition for Rehearing En Banc be granted.

Dated this 24th day of February, 2015.

Respectfully submitted,

TOLIN LAW FIRM

*s/ Anna M. Tolin*

_____

Anna M. Tolin
Attorney for Tyrone Davis

**CERTIFICATE OF COMPLIANCE PURSUANT TO CIRCUIT RULES 35-4 AND 40-1**

I certify pursuant to Circuit Rule 35-40 or 40-1, the attached petition for rehearing with suggestion for rehearing *en banc* is proportionately spaced, has a typeface of 14 points or more and contains 2,553 words.

Dated this 24th day of February, 2015.

*s/ Anna M. Tolin*

_____

Anna M. Tolin

**CERTIFICATE OF SERVICE**

I hereby certify than on February 24, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated this 24th day of February, 2015.

*s/ Anna M. Tolin*

_____

Anna M. Tolin

No. 13-30133
[NO. CR04-5350RBL, USDC, W.D. Washington]

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**IN THE UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

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UNITED STATES OF AMERICA,

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# APPELLEE'S RESPONSE TO PETITION FOR REHEARING EN BANC

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Appeal from the United States District Court
for the Western District of Washington at Tacoma
The Honorable Ronald B. Leighton
United States District Judge

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## PRELIMINARY STATEMENT

This case involves a defendant who pleaded guilty under a plea agreement pursuant to Fed. R. Crim. P. 11(c)(1)(C)—who received a sentence untethered to and significantly below his Guidelines range—who then sought a sentencing reduction pursuant to 18 U.S.C. §3582(c)(2). In *Freeman v. United States*, 131 S. Ct. 2685 (2011), a four-justice plurality concluded that defendants sentenced under a Rule 11(c)(1)(C) plea agreement are indeed eligible for a sentencing reduction under §3582(c)(2). Justice Sotomayor provided the fifth vote to support the plurality's judgment, but her concurring opinion was based on a very different rationale. In Justice Sotomayor's view, defendants sentenced under Rule 11(c)(1)(C) plea agreements are generally ineligible for relief under §3582(c)(2), with two exceptions, one of which applied in that case. Applying the rule of *Marks v. United States*, 430 U.S. 188 (1977) to *Freeman,* this Court has previously concluded that "Justice Sotomayor's concurrence is the controlling opinion because it reached this conclusion on the 'narrowest grounds.'" *United States v. Austin*, 676 F.3d 924, 927-28 (9th Cir. 2012).

When deciding Defendant-Appellant Tyrone Davis's appeal, the Court followed *Austin* and, applying the analysis outlined in Justice Sotomayor's *Freeman* opinion, held Davis was ineligible for relief under §3582(c)(2) because his sentence was "based on" his Rule 11(c)(1)(C) plea agreement rather than his Guidelines range. *United States v. Davis*, 776 F.3d 1088, 1091 (9th Cir. 2015) (per curium). Davis now argues that rehearing en banc is warranted so the Court can reconsider its *Austin* decision and effectively adopt the reasoning of the *Freeman* plurality. RH_8-11.[1] This case does not, however, meet the criteria for rehearing en banc as it does not involve "a question of exceptional importance," Fed. R. App. P. 35(a)(2), (b)(1)(B), nor is rehearing en banc needed "to secure or maintain uniformity of the court's decisions." Fed. R. App. P. 35(a)(1), (b)(1)(A), (a)(2). Indeed, other than the outlier decision of the District of Columbia Circuit which Davis urges this Court to adopt, all nine Circuits that have considered the question have reached the same conclusion as articulated in *Austin*. Accordingly, Davis's petition for rehearing en banc should be denied.

[1] "CR_" refers to the district court's record of the case; "ER_" to Appellant's Excerpts of Record; and "RH_" to Appellant's Rehearing Petition.

## PERTINENT FACTUAL AND PROCEDURAL BACKGROUND

### I. Davis's Conviction And Direct Appeals.

Davis was indicted for five drug-trafficking crimes stemming from his high-ranking role with the Seven Deuce Mob, a gang that purchased cocaine which was then processed and sold as cocaine base. CR 1, 70, 97, 242. Given the amount of drugs at issue in three counts—50 grams or more of cocaine base—Davis faced a 10-year mandatory minimum sentence. *See* 21 U.S.C. §841(b)(1)(A)(iii) (2005). On August 31, 2005, Davis agreed to plead guilty as charged. ER_31-40.

Davis's plea agreement contained two stipulations pertinent to the Guidelines calculation. Based only on the stipulated quantity of cocaine base for which Davis was directly responsible—at least 170.5 grams—the parties agreed Davis's base offense level was 34 under USSG §2D1.1(c)(3) (Nov. 2005). ER_37-38. The government further agreed Davis would be eligible for a three-level downward adjustment under USSG §3E1.1 if he accepted responsibility. ER_38. Also, pursuant to Fed. R. Crim. P. 11(c)(1)(C), the parties stipulated the appropriate prison sentence for Davis's crimes was 18 years. ER_38.

At sentencing, held on May 12, 2006, the district court calculated Davis's total offense level to be 37 and found he fell within Criminal History Category II, resulting in a Guidelines range of 235 to 293 months.[2] ER_29. The court then accepted the Rule 11(c)(1)(C) plea agreement and imposed the stipulated 18-year (216-month) sentence. Davis appealed, and this Court remanded for recalculation of the Guidelines range. *United States v. Davis*, 312 Fed. App'x 909 (9th Cir. 2009). At resentencing, held on July 29, 2009, Davis's total offense level was found to be 36 and he was placed in Criminal History Category I, resulting in a Guidelines range of 188 to 235 months. ER_21. The court then reimposed the stipulated 18-year sentence. ER_22-23. This Court affirmed. *United States v. Davis*, 389 F. App'x 616 (9th Cir. 2010).

## II. Davis's Motion To Modify His Sentence.

### *A. Section 3582(c)(2), The Supreme Court's* Freeman *Decision, And This Court's* Austin *Decision.*

A sentencing modification is permissible under 18 U.S.C. §3582(c)(2) if two conditions are met, one being that the defendant was

[2] The court did not adopt the Guidelines range of 360 months to life as calculated in Davis's Presentence Report. CR_536 at 3-4.

"sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission." *See also United States v. Pleasant*, 704 F.3d 808, 810-12 (9th Cir. 2013). In *Freeman v. United States*, *supra,* the Supreme Court considered whether a sentence imposed pursuant to a Rule 11(c)(1)(C) plea agreement is "based on" a Guidelines sentencing range within the meaning of §3582(c)(2). Four justices concluded a "sentence imposed under a Rule 11(c)(1)(C) plea agreement is based on the agreement, not the Sentencing Guidelines," and thus is not eligible for a §3582(c)(2) modification. 131 S. Ct. at 2700 (Roberts, C.J., dissenting). Four justices took the opposite view, concluding such a sentence can be modified if a retroactively-amended Guideline provision played any role in the sentencing decision, e.g., the district court's consideration of the Guidelines range in determining whether to accept the plea agreement.[3] *Id.* at 2692-93 (plurality opinion).

[3] Since a district court is always supposed to consider the Guidelines range in deciding whether to accept a Rule 11(c)(1)(C) plea agreement, *see* USSG §6B1.2(c), the plurality's opinion would hold that defendants sentenced under such plea agreements are always eligible to seek relief under §3582(c)(2).

Justice Sotomayor concurred with the plurality's judgment, but offered a different rationale. Justice Sotomayor concluded that sentences imposed under Rule 11(c)(1)(C) plea agreements are generally ineligible for a §3582(c)(2) modification because those sentences are based on the terms of the agreement, not the sentencing court's Guidelines calculation. *Id.* at 2695-97 (Sotomayor, J., concurring). But Justice Sotomayor recognized two exceptions. First, if a Rule 11(c)(1)(C) plea agreement calls for a defendant "to be sentenced within a particular Guidelines range," the resulting sentence "is 'based on' the agreed-upon sentencing range within the meaning of § 3582(c)(2)." *Id.* at 2697. Second, if a Rule 11(c)(1)(C) plea agreement calls for the defendant to be sentenced to "a specific term of imprisonment," and "the basis for the specified term is a Guidelines sentencing range applicable to the offense to which the defendant pleaded guilty," then the sentence "is 'based on' that range" and a retroactive lowering of that Guidelines range will entitle the defendant to seek a sentence modification under §3852(c)(2). *Id.* at 2697-98. The plea agreement in *Freeman* fell within this second exception, so Justice Sotomayor concurred with the plurality that the defendant was eligible for a §3582(c)(2) sentencing reduction.

*Id.* at 2699-700. Because Justice Sotomayor concurred in the ultimate disposition "on the 'narrowest grounds,'" this Court has held that "Justice Sotomayor's concurrence is the controlling opinion" in *Freeman*. *Austin*, 676 F.3d at 927-28 (quoting *Marks*, 430 U.S. at 193).

### *B. The Retroactive Amendment To The Cocaine Base Guideline.*

As part of the Fair Sentencing Act of 2010, the Sentencing Commission was directed to amend the Guidelines to effect a reduction of the cocaine base/powder cocaine sentencing ratio from 100-to-1 to about 18-to-1. *See* Pub. L. 111-220, §§8(1), 8(2), 124 Stat. 2372, 2374 (2010). The Commission complied by enacting Amendment 748, which took effect on November 1, 2010. This was a temporary amendment that (among other things) amended USSG §2D1.1(c) to increase the quantities of cocaine base necessary to qualify for the guideline's specified base offense levels. USSG Appendix C, Amend. 748. These amendments were made permanent and retroactively-applicable on November 1, 2011, when Amendments 750 and 759 took effect. USSG Appendix C, Amends. 750, 759.

Under the version of USSG §2D1.1(c) in effect when Davis filed his §3582(c)(2) motion, the amount of cocaine base attributable to his

convictions as agreed upon in the plea agreement (at least 170.5 grams) results in a base offense level of 28. USSG §2D1.1(c)(6) (Nov. 2012). Given the district court's other Guidelines calculations at Davis's resentencing, substituting this lower base offense level yields a total offense level of 30 (down from 36), and Guidelines range of 97 to 121 months (down from 188 to 235 months).

### *C. Davis's Motion To Modify His Sentence And His Ensuing Appeal.*

In September 2012, Davis moved for a reduction of his sentence pursuant to 18 U.S.C. §3582(c)(2), relying on Amendments 750 and 759. ER_8-19. The district court denied this motion. ER_4-7. Finding "there was no relationship between the guideline calculation and the parties' 11(c)(1)(C) agreement as to the appropriate sentence," the court concluded Davis's sentence "was not based on a sentencing guidelines range" that had been retroactively lowered, but was instead a function of his Rule 11(c)(1)(C) plea agreement. ER_7.

This Court affirmed. The Court ruled that *Austin* compelled the panel to apply Justice Sotomayor's *Freeman* concurrence and that "[u]nder *Austin*, Davis's 18-year sentence was 'based on' his 11(c)(1)(C) agreement unless one of the two *Freeman* exceptions applies. They do

not." *Davis*, 776 F.3d at 1091. Judge Berzon concurred, but argued that *Austin*'s implementation of *Marks* was incorrect and should be reexamined by the Court en banc. *Id.* at 1091-92 (Berzon, J., concurring). Judge Berzon further argued that, upon revisiting *Austin*, the Court should adopt the reasoning of the *Freeman* plurality holding that defendants sentenced under Rule 11(c)(1)(C) plea agreements are not precluded from seeking relief under §3582(c)(2). *Id.* at 1092.

## ARGUMENT

### I. Because the Court's *Austin* Decision Does Not Conflict With Any Of This Court's Precedent, The Panel's Reliance On *Austin* In Deciding This Appeal Does Not Warrant Rehearing En Banc.

Davis's main argument in favor of en banc review is that the decision on which the panel relied—the Court's holding in *Austin* that Justice Sotomayor's concurrence represents the controlling opinion in *Freeman*—"conflicts with this Court's own precedents governing how to interpret fractured Supreme Court pluralities." RH_2. According to Davis, *Austin* "is at odds with this Court's own precedents holding that a fractured opinion provides binding precedent only when five Justices

share a common denominator of reasoning." RH_6. But this conflict is illusory, as *Austin* is consistent with this Court's precedents.

"When 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.'" *Marks*, 430 U.S. at 193 (citation omitted). Sometimes, however, "[t]his test is more easily stated than applied." *Nichols v. United States*, 511 U.S. 738, 745 (1994). This Court has therefore cautioned that *Marks* "should only be applied 'where one opinion can be meaningfully regarded as narrower than another *and* can represent a common denominator of the Court's reasoning,'" namely where "the narrowest opinion is actually the 'logical subset of other, broader opinions.'" *Lair v. Bullock*, 697 F.3d 1200, 1205 (9th Cir. 2012) (quoting *United States v. Rodriguez-Preciado*, 399 F.3d 1118, 1140 (9th Cir. 2005) (Berzon, J., dissenting in part)) (cited in RH_10).

However, when attempting to locate the "common denominator" in a fractured opinion, the Court "need not find a legal opinion which a majority joined, but merely 'a legal standard which, when applied, will

necessarily *produce results* with which a majority of the Court from that case would agree.'" *United States v. Williams*, 435 F.3d 1148, 1157 (9th Cir. 2006) (citation omitted) (emphasis added). Thus, the proper inquiry looks to *the results* generated by the various opinions, *viz.*, what is the narrowest rationale that produced the result with which at least five justices agreed. *See, e.g., United States v. Van Alstyne*, 584 F.3d 803, 811-14 (9th Cir. 2009); *United States v. Antelope*, 395 F.3d 1128, 1136-37 (9th Cir. 2005). If the plurality and a concurring opinion agree on the result, but the concurrence's rationale "would affect a narrower range of cases than that of the plurality," then the concurrence "represent[s] a logical subset of the plurality's" and is therefore the controlling holding. *Williams*, 435 F.3d at 1157 n.9. Put differently, "[w]here the Justices issue three or more opinions, the 'narrowest grounds' principle identifies as authoritative 'the opinion of the Justice or Justices who concurred on the narrowest grounds *necessary to secure a majority*.'" *Dickens v. Brewer*, 631 F.3d 1139, 1145 (9th Cir. 2011) (citation omitted).

So understood, the Court's *Austin* decision is consistent with this Court's *Marks* jurisprudence. *Freeman* generated three divergent

opinions: (1) a four-justice plurality concluding that a defendant sentenced under a Rule 11(c)(1)(C) plea agreement is always eligible for relief under §3582(c)(2); (2) a four-justice dissent concluding such defendants are never eligible for this relief; and (3) Justice Sotomayor's concurrence concluding that this class of defendants can sometimes be eligible for this relief. This concurring opinion is plainly a logical subset of the plurality: sometimes is a subset of always.[4] The panel in *Austin* was thus on firm ground in concluding that "Justice Sotomayor's concurrence is the controlling opinion" because it resolved the case "on the 'narrowest grounds.'" 676 F.3d at 927 (citation omitted). Indeed, with one exception, every other circuit court to consider the issue has concluded, applying a *Marks* analysis, that Justice Sotomayor's concurrence is the controlling opinion in *Freeman*.[5] *See United States v.*

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[4] Indeed, the *Freeman* plurality recognized the concurrence was "an intermediate position," 131 S. Ct. at 2694, and the dissent likewise appeared to recognize that the concurrence would be controlling going forward. *See id*. at 2700-05.

[5] Another way of applying *Marks* is "to run the facts and circumstances of the current case through the tests articulated in the Justices' various opinions in the binding case and adopt the result that a majority of the Supreme Court would have reached." *United States v. Duvall*, 740 F.3d 604, 611 (D.C. Cir. 2013) (Kavanaugh, J., concurring in denial of rehearing en banc) (collecting cases). This exercise shows

(continued . . .)

*Rivera-Martinez*, 665 F.3d 344, 347-48 (1st Cir. 2011); *United States v. White*, 429 Fed. App'x 43, 47 (2d Cir. 2011); *United States v. Thompson*, 682 F.3d 285, 289-90 (3d Cir. 2012); *United States v. Brown*, 653 F.3d 337, 340 & n.1 (4th Cir. 2011); *United States v. Smith*, 658 F.3d 608, 611 (6th Cir. 2011); *United States v. Dixon*, 687 F.3d 356, 359-60 (7th Cir. 2012); *United States v. Browne*, 698 F.3d 1042, 1045 (8th Cir. 2012); *United States v. Graham*, 704 F.3d 1275, 1278 (10th Cir. 2013); *United States v. Lawson*, 686 F.3d 1317, 1321 n.2 (11th Cir. 2012).

The lone exception is *United States v. Epps*, 707 F.3d 337 (D.C. Cir. 2013). In *Epps*, the District of Columbia Circuit concluded that, under its precedents, "'the analytically necessary portions of a Supreme Court opinion' must overlap *in rationale* in order for a controlling opinion to be discerned pursuant to *Marks*." 707 F.3d at 349

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that Justice Sotomayor's *Freeman* concurrence will always be controlling: in most cases the concurrence and the four dissenters will agree that relief under §3582(c)(2) is unavailable, while in some cases the concurrence and the four-justice plurality will agree that relief is available. This is the mode of analysis this Court employs when deriving the governing rule from a splintered en banc decision, *see Clabourne v. Ryan*, 745 F.3d 362, 375-76 (9th Cir. 2014), and it would be anomalous to apply a different rule when construing a fractured Supreme Court opinion. And, indeed, the Court has applied this type of analysis previously in that context. *See Dickens*, 631 F.3d at 1145.

(quoting *King v. Palmer*, 950 F.2d 771, 784. (D.C. Cir. 1991) (en banc)). In other words, the District of Columbia Circuit focuses exclusively on the legal reasoning underlying a splintered decision. Only if a concurring opinion's reasoning "'fit[s] entirely within a broader circle drawn by the [plurality]" will the concurrence be viewed as controlling under *Marks*. *Id.* (citation omitted). Because the rationale underlying Justice Sotomayor's *Freeman* concurrence was not "'a logical subset'" of the plurality's legal "analysis," *Epps* held "there is no controlling opinion in *Freeman*."[6] *Id.* at 350-51 (citation omitted). Rather, the *Epps* court held it was only bound by the result in *Freeman*—namely that a defendant who pleads guilty under a Rule 11(c)(1)(C) plea agreement is not categorically precluded from obtaining relief under §3582(c)(2)—and that the court was free to reach that result by adopting the plurality's analysis. *Id.* at 351-52.

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[6] In reaching this conclusion, *Epps* stated there are circumstances where a defendant would qualify for relief under Justice Sotomayor's concurrence but not under the plurality's approach. 707 F.3d at 350-51 (citing *United States v. Duvall*, 705 F.3d 479, 487-89 (D.C. Cir. 2013) (Williams, J., concurring)). This is inaccurate. As previously discussed (*see* note 2, *supra*), the plurality's reasoning ensures every defendant who pleads guilty under a Rule 11(c)(1)(C) plea agreement will be eligible for relief under §3582(c)(2). *See also Duvall*, 740 F.3d at 608 (Kavanaugh, J., concurring in denial of rehearing en banc).

By deciding it was free to adopt the plurality's analysis, *Epps* effectively held that any defendant sentenced under a Rule 11(c)(1)(C) may seek relief under §3582(c)(2). But since five justices in *Freeman* agreed this was not the case, the result in *Epps* cannot be right. *See generally United States v. Webster*, 623 F.3d 901, 906 (9th Cir. 2010) (combining concurring and dissenting opinions and concluding five justices had rejected part of a concurring opinion); *United States v. Puerta*, 982 F.2d 1297, 1303 (9th Cir. 1992) (same). Nevertheless, Davis urges that *Epps* is consistent with this Court's application of the *Marks* rule, and thus is evidence that *Austin* "deviated" from those precedents and that correction from the Court sitting en banc is warranted. RH_9. Davis is mistaken.

Unlike the District of Columbia Circuit, this Court has not generally read *Marks* as applying only when a plurality and a concurrence "share common reasoning whereby one analysis is a logical subset of the other." RH_10. *See, e.g., United States v. Bland*, 961 F.2d 123, 128-29 (9th Cir. 1992); *see also United States v. Kilbride*, 584 F.3d 1240, 1254 (9th Cir. 2009); *Van Alstyne*, 584 F.3d at 811-14; *but see Lair*, 697 F.3d at 1205. Rather, this Court has generally looked to the

result of the splintered decision, reading *Marks* as "identif[ying] as authoritative 'the opinion of the Justice or Justices who concurred on the narrowest grounds *necessary to secure a majority*.'" *Dickens*, 631 F.3d at 1145. If one opinion sets forth "'a legal standard which, when applied, will necessarily produce results with which a majority of the Court from that case would agree,'" that is the controlling opinion under *Marks*. *Williams*, 435 F.3d at 1157 (citation omitted). In other words, this Court's "logical subset" inquiry focuses on whether there is any overlap—as opposed to compete overlap—between the results generated by the concurrence and the plurality; so long as the concurrence adopts a "holding that would affect a narrower range of cases than that of the plurality," it is binding under *Marks*.[7] *Id.* at 1157 n.9; *see also Kilbride*, 584 F.3d at 1254; *Smith v. University of Washington Law School*, 233 F.3d 1188, 1199-200 (9th Cir. 2000); *Bland*, 961 F.2d at 128-29. There is no reason to revisit this *Marks* analysis now. And because Justice Sotomayor's *Freeman* concurrence

[7] Of course, if there is no overlap between the splintered opinions—if the opinions concurred in result but offered rationales so divergent that they could never guarantee any common ground among five justices in future cases—then *Mark*s does not apply. *See Lair*, 697 F.3d at 1205-06.

qualifies as the controlling holding under this test, as the Court held in *Austin,* the panel's decision relying on *Austin* should not be disturbed.

## II. Rehearing En Banc Is Not Warranted Because, Even If The Court Revisits *Austin*, It Would Be Compelled to Adopt Basically The Same Legal Rule, Rendering The Exercise Largely Academic.

In urging the Court to revisit *Austin*'s application of the *Marks* rule to *Freeman*, Davis asks the Court to follow the District of Columbia Circuit and conclude there is no controlling opinion in *Freeman*. RH_9-10. In that event, the Court would only be bound by the result in *Freeman*, namely that a defendant who pleads guilty under a Rule 11(c)(1)(C) plea agreement is not categorically ineligible for relief under §3582(c)(2). *See Lair*, 697 F.3d at 1205. Davis would then have the Court adopt the *Freeman* plurality's reasoning to support that result. RH_10-11. But this path is not currently open to the Court.

First, as has been discussed, five justices in *Freeman* specifically rejected the plurality's view that defendants sentenced under Rule 11(c)(1)(C) plea agreements are always eligible for relief under §3582(c)(2), so there is no plausible way such a holding can be adopted following *Freeman*. Moreover, prior to *Freeman*, this Court had also rejected the idea that a defendant sentenced under a Rule 11(c)(1)(C)

plea agreement could be eligible for relief under §3582(c)(2) merely because "there is some 'nexus' between the applicable Guidelines range and the actual sentence," e.g., where "the parties to a plea agreement considered the Guidelines in recommending a sentence." *United States v. Bride*, 581 F.3d 888, 891 (9th Cir. 2009). Rather, the Court in *Bride* held that "the terms of the plea agreement are key to determining whether the defendant's sentence was, in fact, based on a sentencing range that was later reduced by the Sentencing Commission." *Id.* Because the parties never "agree[d] that the recommended sentence was in any way dependent upon or connected to the applicable Guidelines sentencing range as determined by the district court," the defendant was ineligible for a sentencing reduction because his below-Guidelines sentence was "based on the agreement between the parties, rather than on a Guidelines sentencing range" *Id.* The Court, however, declined to hold that defendants sentenced under Rule 11(c)(1)(C) plea agreements are categorically disqualified from relief under §3582(c)(2). *Id.* at 891 n.5. *Bride* thus foreshadowed the intermediate approach articulated in Justice Sotomayor's *Freeman* concurrence. [8]

[8] The defendant in *Bride* was Davis's codefendant and a fellow (continued . . .)

Therefore, unless the Court is prepared to revisit *Bride* en banc (and Davis has not asked the Court to do so), were the Court to reconsider *Austin* and conclude that it is only bound by the result in *Freeman*, the Court would still be required by *Bride* to embrace a rationale for that result that largely mirrors Justice Sotomayor's concurrence. In other words, no meaningful change in the law governing §3582(c)(2) motions would result from the Court's reconsidering *Austin*'s application of *Marks* to *Freeman*. Such a pointless exercise hardly presents a question of exceptional importance meriting en banc review.

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(continued . . .)
leader of the Seven Deuce Mob. And, like Bride, Davis's Rule 11(c)(1)(C) plea agreement called for a sentence below the Guidelines range calculated by the court at sentencing, which shows Davis's sentence was based on the agreement, not the Guidelines range. *See Bride*, 581 F.3d at 891. Bride and Davis are similarly situated, and their mutual ineligibility for §3582(c)(2) relief shows there is nothing "unjust" about applying a rule like that articulated by Justice Sotomayor in *Freeman*. RH_10. Nor is *United States v. Dunn*, 728 F.3d 1151 (9th Cir. 2013) evidence of any such injustice. The defendant in *Dunn* was not sentenced pursuant to a Rule 11(c)(1)(C) plea agreement—the court actually rejected the parties' sentencing stipulation, and hence their Rule 11(c)(1)(C) plea agreement, 728 F.3d at 1154—so nothing about that opinion shows there is anything "unjust" or "arbitrary" about such a rule. RH_10-11.

## CONCLUSION

For the foregoing reasons, Davis's petition for rehearing en banc should be denied.

Dated this 24th day of April, 2015.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 40-1(a), I certify that the attached Response of the United States in Opposition to Appellee's Petition for Rehearing En Banc is proportionately spaced, has a Century Schoolbook typeface of 14 points, and contains 3,976 words, less than the 4,200 allowed.

Dated this 24th day of April, 2014.

*s/Michael S. Morgan*
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**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that on April 24, 2015, I electronically filed the foregoing Answering Brief of the United States with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED this 24th day of April, 2015.

*s/ Elisa G. Skinner*
ELISA G. SKINNER
Paralegal Specialist

**No. 13-30133**

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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**UNITED STATES OF AMERICA,**

**Plaintiff-Appellee,**

**v.**

**TYRONE DAVIS,**

**Defendant-Appellant.**

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**On Appeal from the United States District Court**
**for the Western District of Washington at Tacoma**
**CR 04-5350 RBL**

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# BRIEF OF AMICI CURIAE ACLU-WA, FEDERAL PUBLIC DEFENDER FOR THE WESTERN DISTRICT OF WASHINGTON, AND WACDL IN SUPPORT OF DEFENDANT-APPELLANT ON REHEARING EN BANC

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## DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER ENTITIES WITH A DIRECT FINANCIAL INTEREST IN LITIGATION

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amici Curiae* American Civil Liberties Union of Washington, Federal Public Defender for the Western District of Washington, and the Washington Association of Criminal Defense Lawyers, state that they do not have a parent corporation, and that no publicly held corporation owns 10 percent or more of the stock of any amici.

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## STATEMENT OF INTERESTS OF AMICI CURIAE[1]

The American Civil Liberties Union of Washington (ACLU-WA) is a nonpartisan, nonprofit organization, with over 50,000 members and supporters, dedicated to the preservation of civil liberties and the fairness and equality guaranteed by the Constitution and civil rights laws. ACLU-WA has long been devoted to dismantling laws that perpetuate racial inequality and has repeatedly called for reform of the nation's drug laws. The ACLU has grave concerns about the harms the federal crack cocaine sentencing laws have caused not only for the African-American community, but for our nation as a whole.

The Federal Public Defender Office for the Western District of Washington was established in 1975 for the purpose of ensuring the effective assistance of counsel and equal access to justice in federal court. It represents indigent defendants in federal criminal cases. It has an interest in this matter because it has represented a number of defendants whose sentences were informed by the Sentencing Guidelines, but have been, and continue to be, denied the benefit of retroactive Guideline amendments because their guilty pleas were entered pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C).

[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), no one, except for undersigned counsel, has authored this brief in whole or in part or contributed money toward the preparation of this brief. Neither party opposes the filing of this brief.

The Washington Association of Criminal Defense Lawyers (WACDL) was formed to improve the quality and administration of justice. A professional bar association founded in 1987, WACDL has over 1000 members—private criminal defense lawyers, public defenders, and related professionals committed to preserving fairness and promoting a rational and humane criminal justice system. WACDL joins this brief as a part of its mission to promote justice and protect individual rights. The interests of *amici* are also set forth in the Unopposed Motion For Leave To File Brief Of *Amici Curiae* which is filed with this brief.

## I. INTRODUCTION

If Tyrone Davis had been sentenced within the current United States Sentencing Guideline range for his offense of conspiracy to distribute crack cocaine—97 to 121 months—he likely would be free today. But Mr. Davis was sentenced after he agreed to a 216-month plea bargain entered into under the shadow of the former Guidelines. These Guidelines imposed a 100:1 crack-powder ratio for triggering sentencing ranges, meaning it took 100 times more powder than crack to subject one to the same Guideline sentence. The 100:1 ratio resulted in drastically longer sentences for crack cocaine offenses, leading to severe racial disparities that heavily impacted African-American defendants. These racial disparities had devastating consequences for individual offenders, their families and communities, and the perceptions of our justice system. These systemic injustices led Congress to pass the Fair Sentencing Act of 2010, which narrowed the gap by raising the amount of crack needed to trigger mandatory minimums.

Because Mr. Davis was sentenced before the Fair Sentencing Act, he still has nearly five more years in prison on his 18-year sentence—a sentence that surpasses his current Guideline range. He sought relief under 18 U.S.C. § 3582(c)(2), which provides relief for defendants like Mr. Davis who have been sentenced "based on" a Guideline sentencing range that the Sentencing

Commission has since reduced. But Mr. Davis's motion was denied based on this Court's precedent in *United States v. Austin*, which held that a sentence entered into under a Rule 11(c)(1)(C) plea is "based on" the plea agreement itself, not on a Guideline range. *Austin*, in turn, purported to apply binding precedent from the Supreme Court's decision in *Freeman v. United States*, a fractured 4-1-4 decision with no majority. Even though *eight* justices disagreed with the concurrence authored by Justice Sotomayor, *Austin* ruled it was binding.

The Court is now rehearing this matter *en banc* to consider whether *Austin* should be overruled. Hanging in the balance are those defendants who entered Rule 11(c)(1)(C) pleas in the shadow of the harsh and unjust 100:1 Guidelines. This Court should restore some measure of justice to these people and overrule *Austin*. Justice Sotomayor's concurrence is not binding on this Court because it does not embody a position implicitly approved by at least five justices who support the *Freeman* judgment. Indeed, no other justice—much less a majority of the Court—agreed with Justice Sotomayor's reasoning. This Court likewise should reject it. Justice Sotomayor's concurrence fails to acknowledge that the district court's sentence typically, and here, is "based on" the Guidelines, regardless of whether it is imposed following a plea agreement or a jury verdict. It fails to account for those defendants who could not have known at the time of their plea agreements that Congress would subsequently act to rectify a racially

discriminatory, unnecessarily harsh crack sentencing scheme. And it fails to effect Congress's intent in passing the Fair Sentencing Act.

Instead, this Court should adopt the plurality's approach in *Freeman*, which recognized that a sentencing judge's decision to accept a Rule 11(c)(1)(C) plea and impose the agreed-upon sentence is "based on" the Guidelines wherever the sentencing range in question was a relevant part of the analytic framework used to determine the sentence or approve the agreement. This rule best accounts for the reality of the plea process, the enormous influence of the Guidelines in plea negotiations and at sentencing, and the intent of Congress and the Sentencing Commission in discarding the discriminatory 100:1 crack-powder ratio. As the plurality in *United States v. Freeman* put it, "[t]here 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 since-rejected, excessive range[.]" *Freeman v. United States*, 131 S. Ct. 2685, 2689 (2011) (plurality opinion).

## II. ARGUMENT

### A. The 100:1 Crack-Powder Ratio Created Severe Racial Disparities, Led to Excessively Harsh Sentences, and Was Rejected By Congress in 2010 Following A Long Bipartisan Reform Movement Joined by All Branches of Government.

The unfair, racially discriminatory, and since-discarded 100:1 ratio emerged from a haphazard attempt to address a perceived drug abuse crisis. As it became clear that these disproportionately harsh sentences for crack cocaine were imposed

almost entirely on African-Americans, the Sentencing Commission called for change and was joined by the judiciary, lawmakers, and the executive branch. In 2010, Congress finally passed the Fair Sentencing Act to address the disparity. But the Act's promise cannot be fully realized so long as individuals like Mr. Davis are barred from seeking a reduction of their sentences.

### 1. The 100:1 Sentencing Law Was a Misguided Attempt to Address a Perceived Crisis of Drug Abuse.

In the fall of 1986, in the midst of a nationwide outcry over a perceived "epidemic" of drug abuse, and with the midterm congressional elections less than two months away, Congress passed the Anti-Drug Abuse Act. Pub. L. No. 99-570, 100 Stat. 3207 (1986); *see also* U.S. Sentencing Comm'n, Special Report to the Congress: Cocaine and Federal Sentencing Policy 121 (1995) (hereinafter "1995 Report"); Ben Fabens-Lassen, *A Cracked Remedy: The Anti-Drug Abuse Act of 1986 and Retroactive Application of the Fair Sentencing Act of 2010*, 87 Temp. L. Rev. 645, 649 (2015).[2] The Anti-Drug Abuse Act, a fundamental reshaping of

[2] The spread of crack cocaine was perhaps the biggest news story of 1986. "In the months leading up to the 1986 elections, more than 1,000 stories appeared on crack in the national press, including five cover stories each in Time and Newsweek. NBC news ran 400 separate reports on crack . . . . Time called crack the 'Issue of the Year' . . . . Newsweek called crack the biggest news story since Vietnam and Watergate." 1995 Report, at 122 (footnotes omitted). The media frenzy hit its peak in the summer of 1986 when Len Bias, a star basketball player at the University of Maryland, died of a drug overdose two days after being selected second overall in the 1986 NBA Draft by the NBA Champion Boston Celtics. 1995 Report, at 122-23. Although media reports suggested that Mr. Bias

U.S. drug law, was rushed through Congress in an "extraordinarily hasty and truncated legislative process." *United States v. Clary*, 846 F. Supp. 768, 784 (E.D. Mo. 1994), *rev'd on other grounds*, 34 F.3d 709 (8th Cir. 1994). There were no committee reports and few hearings; "[t]he careful deliberative practices of the Congress were set aside for the drug bill." *Id.* (quoting *Hearings Before the U.S. Sentencing Comm'n on Proposed Guideline Amendments for Public Comment* (Mar. 22, 1993) (statement of Eric E. Sterling, President of the Criminal Justice Policy Foundation)); 1995 Report, at 116-17.

The result of this truncated process was a tiered system of five- and ten-year mandatory minimum sentences tied to different quantities of drugs. 1995 Report, at 116. These minimum sentences inaugurated the 100:1 sentencing disparity between powder and crack cocaine: under the Anti-Drug Abuse Act, individuals convicted of trafficking offenses involving 500 grams of powder cocaine—between 2,500 and 5,000 doses—were required to be sentenced to at least five years in prison. 1995 Report, at 116; U.S. Sentencing Comm'n, Report to the Congress: Federal Cocaine Sentencing Policy 63 (2007) (hereinafter "2007 Report"). That same sentence was triggered by a mere 5 grams of crack cocaine—the weight of two pennies, and enough for only 10 to 50 doses. 1995 Report, at 116; 2007 Report, at 63. Similarly, the threshold triggering the ten-year mandatory

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overdosed on crack cocaine, he in fact overdosed on powder cocaine. 1995 Report, at 122-23.

minimum for powder cocaine was 5,000 grams, compared to 50 grams for crack cocaine. 1995 Report, at 116. Although the Act listed only two quantities for each form of cocaine—the threshold quantities to which the new mandatory minimum sentences attached—the Sentencing Commission adopted this 100:1 ratio in developing its Sentencing Guidelines. 1995 Report, at 1; *Kimbrough v. United States*, 552 U.S. 85, 96-97 (2007).

**2. The 100:1 Ratio Had No Sound Basis.**

This ratio had no scientific support. Congress "didn't really have an evidentiary basis" for the disparity, conceded Representative Dan Lungren (R-CA), one of the authors of the Anti-Drug Abuse Act. 156 Cong. Rec. H6196-01 (daily ed. July 28, 2010) (statement of Rep. Lungren), 2010 WL 2942883, at *H6202. Instead, Congress based the 100:1 ratio on the assumption that crack cocaine was more dangerous than powder cocaine. U.S. Sentencing Comm'n, Report to the Congress: Cocaine and Federal Sentencing Policy 90 (2002) (hereinafter "2002 Report").

That assumption proved false: "the U.S. Sentencing Commission informed Congress in four consecutive reports between 1995 and 2007 that empirical data failed to support the assumption that crack was more harmful than cocaine, whether in terms of drug trafficking related violence, prenatal effects, or use among youth." *United States v. Baptist*, 646 F.3d 1225, 1228 n. 1 (9th Cir. 2011)

(citing the Commission's reports to Congress); *see also* Dorothy K. Hatsukami & Marian W. Fischman, *Crack Cocaine and Cocaine Hydrochloride: Are the Differences Myth or Reality?*, 276 JAMA 1580 (1996) (concluding that the effects of powder and crack cocaine are similar and that the 100:1 sentencing disparity was "excessive"); *Kimbrough*, 552 U.S. at 94 (noting that crack and powder cocaine have the same active ingredient and "the same physiological and psychotropic effects, but smoking crack cocaine allows the body to absorb the drug much faster than inhaling powder cocaine, and thus produces a shorter, more intense high") (citing 1995 Report, at 15-19).

**3. The 100:1 Ratio Created Severe Racial Disparities in Drug Sentencing.**

Under the 100:1 ratio, African-American offenders were punished far more severely than similarly situated white offenders. Although the majority of crack cocaine users are not African-American, the vast majority of those convicted of crack cocaine offenses are. Richard Dvorak, *Cracking the Code: "De-Coding" Colorblind Slurs During the Congressional Crack Cocaine Debates*, 5 Mich. J. Race & L. 611, 652 n.219 (2000); 2007 Report, at 16. In 2006, when Mr. Davis was sentenced, 81.8% of federal crack cocaine offenders were African-American. 2007 Report, at 16. Amazingly, this number represented progress of a sort: six

years earlier, this figure had been 84.7%; eight years before that, it was a staggering 91.4%.[3] *Id.*

These disproportionate rates of arrest and conviction, when coupled with the 100:1 ratio, resulted in enormous sentence disparities between African-American and white offenders. In 1986, when the 100:1 ratio was created, the average federal drug sentence for African-American offenders was 11% higher than for white offenders, down from 28% two years prior. But after four years of the 100:1 ratio, the disparity skyrocketed to 49%. Barbara S. Meierhoefer, Fed. Judicial Ctr., The General Effect of Mandatory Minimum Prison Terms: A Longitudinal Study of Federal Sentences Imposed 20 (1992). Between 1994 and 2003, the average federal prison sentence for white drug offenders increased by 33%; for African-American offenders, it increased 77%. *Compare* U.S. Dep't of Justice, Bureau of Justice Statistics, Compendium of Federal Justice Statistics 85 (1994) *with* U.S. Dep't of Justice, Bureau of Justice Statistics, Compendium of Federal Justice Statistics 112 (2003). By 2003, African-Americans were spending, on average, almost as much time in prison for non-violent drug offenses (58.7 months) as white Americans were for violent offenses (61.7 months).[4] U.S. Dep't of Justice, Bureau

[3] By contrast, between 27% and 31% of federal convictions for powder cocaine involved African-American offenders. 2007 Report, at 16.

[4] And African-American offenders were spending, on average, 74.7 months in federal prison for violent offenses. U.S. Dep't of Justice, Bureau of Justice Statistics, Compendium of Federal Justice Statistics 112 (2003).

of Justice Statistics, Compendium of Federal Justice Statistics 112 (2003). Much of this disparity in sentencing can be directly traced to the 100:1 ratio.

#### 4. The 100:1 Ratio Punished Low-Level Offenders As Harshly As Drug Traffickers.

Although the Guideline ranges were intended to distinguish and punish major and serious cocaine traffickers, 1995 Report, at 117-18, the extreme disparity between crack and powder sentencing meant that minor crack offenses were punished like wholesale powder trafficking.

The story of Dorothy Gaines provides a chilling example.[5] Ms. Gaines, a self-described PTA mom from Mobile, Alabama, had her home raided by law enforcement in 1993. No drugs were found. Nonetheless, she was arrested and charged with conspiracy to deliver crack cocaine. It turned out that her boyfriend—a crack user who Ms. Gaines had previously convinced to enter treatment, but who had relapsed upon leaving—was, unbeknownst to Ms. Gaines, a low-level drug dealer. Although the state dropped all charges against Ms. Gaines, federal prosecutors charged her with participation in a crack cocaine conspiracy. In exchange for more favorable treatment, the other defendants testified against

[5] For a description of Ms. Gaines, see the Featured Story on Dorothy Gaines, The Sentencing Project, http://www.sentencingproject.org/detail/feature.cfm?feature_id=11 (last visited Aug. 26, 2015) and ACLU, Caught in the Net: The Impact of Drug Policies on Women and Children 1 (2005), *available at* https://www.aclu.org/files/images/asset_upload_file431_23513.pdf (last visited Aug. 26, 2015).

her, claiming that she had delivered small packets of cocaine to low-level street dealers. On the basis of this testimony, she was sentenced to 19 years and 7 months in federal prison, leaving her three children—ages 19, 11, and 9—parentless.[6]

The Sentencing Commission's 1995 report details another example in which two defendants had "purchased approximately 255 grams of powder cocaine from their supplier," cooked the powder into crack, and ended up with approximately 88 grams of crack. 1995 Report, at 193-94. Dissatisfied with their yield, the defendants returned to the dealer, who agreed to replace the original 255 grams of powder cocaine. *Id.* at 193. In their possession was the 88 grams of crack cocaine they had already cooked. *Id.* Before they could complete the second transaction, they were arrested. *Id.* Ironically, and absurdly, their Guideline range for possessing the crack (121 to 151 months) was far stiffer than the Guideline range their supplier faced (33 to 41 months) for selling them the very powder they had cooked down. *Id.* at 194. Absurd outcomes like this were the norm under the 100:1 ratio, and so long as the 100:1 ratio remained in effect, the injustice was borne principally by African-Americans.

[6] After serving six years in prison, Ms. Gaines's sentence was commuted by President Bill Clinton. Featured Story on Dorothy Gaines, The Sentencing Project, http://www.sentencingproject.org/detail/feature.cfm?feature_id=11. Thousands of others have not been so lucky.

**5. The Sentencing Commission Repeatedly Called Upon Congress to Undo These Racial Disparities.**

Although the Sentencing Commission originally employed the 100:1 ratio in defining base offense levels, it later recognized that the sentencing disparities between crack and powder offenses were unjustified. *See Kimbrough*, 552 U.S. at 97. For over a decade, the Commission, consistent with its mandate to ensure fair and equitable sentences, repeatedly called for sentencing reforms to remedy the inequities of the 100:1 crack-to-powder ratio.[7]

In 1995, the Commission proposed Guideline amendments that would have lowered the ratio to 1:1. *Kimbrough*, 552 U.S. at 99 (citing Amendments to the Sentencing Guidelines for the U.S. Courts, 60 Fed. Reg. 25074, 25075-77 (May 10, 1995)). In 1997, the Commission proposed a 5:1 ratio. *Id.* (citing U.S. Sentencing Comm'n, Special Report to the Congress: Cocaine and Federal Sentencing Policy 2 (1997)). In 2002, it proposed a ratio of no more than 20:1. *Id.* (citing 2002 Report, Executive Summary, at iv). None of these proposals incited Congress to act. *Id.*

In 2007, the Commission once again "unanimously and strongly" urged Congress to address the disparity resulting from the 100:1 ratio. 2007 Report, at 8.

[7] The Commission is tasked with "establishing sentencing policies and practices for the Federal criminal justice system" that, among other things, are designed to provide "fairness in meeting the purpose of sentencing" including "avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct[.]" 28 U.S.C. § 991(b)(1).

The Commission reiterated its findings from the 2002 report that the prevailing quantity-based penalties exaggerated the negative effects of crack over powder, applied most often to low-level offenders, overstated the seriousness of crack-related offenses, and impacted mostly minorities. *Id.* Due to the "urgent and compelling" problems posed by crack sentencing, the Commission promulgated an amendment assigning lower base offense levels to varying quantities of crack cocaine. *Id.* at 9. The Commission recognized that this modest measure was "only a partial remedy," and was "neither a permanent nor a complete solution to [the] problem," such as could be achieved by legislative action. *Id.* at 10. The Commission requested that Congress pass legislation providing the Commission with emergency amendment authority to enable it to quickly amend the Sentencing Guidelines. *Id.* at 9.

**6. The Judicial and Executive Branches Advocate for Changing the Unjust 100:1 Ratio.**

The judiciary and the executive branch also pushed hard for change. Federal judges across the country advocated for correcting the crack-versus-powder sentencing disparity through speeches, letters, and judicial opinions:

- "It is our strongly held-view that the current disparity between powder cocaine and crack cocaine . . . can not be justified and results in sentences that are unjust and do not serve society's interest." Letter from Judge John S. Martin, Jr. to Senator Orrin Hatch, Chairman of the Senate Judiciary Comm., and Congressman Henry Hyde, Chairman of the House Judiciary Comm. (Sept. 16, 1997) (letter signed by 27 federal judges, all of whom had

previously served as United States Attorneys), *reprinted in* 10 Fed. Sent'g Rep. 194 (1998).

- "[T]he longer the policies exist, the greater the risk that we send a message to the public that the lives of white criminals are considered by the U.S. justice system to be at least 100 times more valuable and worthy of preservation than those of black criminals." *United States v. Smith*, 73 F.3d 1414, 1422 (6th Cir. 1996) (Jones, J., concurring) (internal quotation marks and citation omitted).

- "I, for one, do not understand how it came to be that the courts of this nation, which stood for centuries as the defenders of the rights of minorities against abuse at the hands of the majority, have so far abdicated their function that this defendant must serve a ten year sentence. . . . In upholding mandatory minimum sentences, the courts have instituted racial disparity in sentencing." *United States v. Patillo*, 817 F. Supp. 839, 843 & n.6 (C.D. Cal. 1993).

*See also, e.g.*, *United States v. Williams*, 982 F.2d 1209, 1214 (8th Cir. 1992) (Bright, J., concurring) ("I write separately to note the racial injustice flowing from this policy."); *United States v. Then*, 56 F.3d 464, 467 (2d Cir. 1995) (Calabresi, J., concurring) ("The unfavorable and disproportionate impact that the 100-to-1 crack/cocaine sentencing ratio has on members of minority groups is deeply troubling."); *Baptist*, 646 F.3d at 1229 (agreeing with district judge who expressed that the pre-FSA sentence he was required to impose "made his 'stomach hurt[]' because it was 'disproportionate [with respect to] African Americans' and 'wrong from a moral sense'").

Following the Commission's 2007 Report, these voices became all the more urgent. Appearing before the Senate Judiciary Committee on behalf of the Judicial

Conference, Judge Reggie Walton of the D.C. District explained that reducing the sentencing disparity was of particular concern to federal judges, who saw first-hand the ill effects that racially disparate sentences promoted:

> [B]ecause crack offenses carry longer sentences than equivalent powder cocaine offenses, African-American defendants sentenced for cocaine offenses wind up serving prison terms that are greater than those served by other cocaine defendants. . . . When large segments of the African-American population believe that our criminal justice system is in any way influenced by racial considerations, our [courts] are presented with serious practical problems. People come to doubt the legitimacy of the law—not just the law associated with crack—but *all* laws. People come to view the courts with suspicion, as institutions that mete out unequal justice, and the moral authority of not only the federal courts, but all courts, is diminished.

*Restoring Fairness to Federal Sentencing: Addressing the Crack-Powder Disparity: Hearing Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary*, 111th Cong. 7-8 (2009) (statement of Hon. Reggie B. Walton, U.S. District Judge for the District of Columbia, on behalf of Judicial Conference of the U.S.).

In April 2009, the Department of Justice acknowledged that "the current cocaine sentencing disparity is difficult to justify based on the facts and science" and that the racially disparate sentences "fueled the belief across the country that federal cocaine laws are unjust." *Restoring Fairness to Federal Sentencing: Addressing the Crack-Powder Disparity: Hearing Before the Subcomm. on Crime*

*and Drugs of the S. Comm. on the Judiciary*, 111th Cong. 8-9 (2009) (statement of Lanny A. Breuer, Assistant Att'y Gen. of the U.S.).

Around the same time, Attorney General Eric Holder forcefully made the case for reform on behalf of the Obama administration:

> It is the view of this Administration that the 100-to-1 crack-powder sentencing ratio is simply wrong. . . . It is unjust to have a sentencing disparity that disproportionately and illogically affects some racial groups. I know the American people can see this. And that perception of unfairness undermines governmental authority in the criminal justice process and breeds disrespect for the system.

Eric H. Holder, Att'y Gen. of the U.S (remarks as prepared for delivery at the D.C. Court of Appeals Judicial Conference) (June 19, 2009), *available at* http://www.justice.gov/opa/speech/attorney-general-eric-holder-dc-court-appeals-judicial-conference.

As these calls to reform were emerging from the other branches of government, broad, bipartisan momentum continued to build within Congress.

**7. Congress Sought to Eliminate the 100:1 Disparity.**

As criticism of the 100:1 ratio mounted, Congress was finally spurred to act. The movement toward reform culminated in 2010 with proposed legislation to level the disparity. The sense of urgency was captured by Senator Richard Durbin: "[e]very day that passes without taking action to solve this problem is another day that people are being sentenced under a law that virtually everyone agrees is unjust." 156 Cong. Rec. S1690-02 (daily ed. Mar. 17, 2010) (statement of Sen.

Durbin), 2010 WL 956335, at *S1681. The Fair Sentencing Act was introduced in October 2009, easily passed the Senate and House, and was signed into law by President Obama on August 3, 2010. *See* S. 1789, Bill Summary & Status, Major Congressional Actions, 111th Cong., *available at* http://thomas.loc.gov/cgi-bin/bdquery/z?d111:SN01789:@@CC@R.

The Fair Sentencing Act addressed the vast, racially unfair crack cocaine sentencing discrepancies. 156 Cong. Rec. S1690-02 (daily ed. Mar. 17, 2010) (statement of Sen. Leahy) ( "[T]his bill . . . helps to ensure that our system will no longer affect many minority and urban communities more harshly than offenders who use drugs in the suburbs and corporate offices"), 2010 WL 956335, at *S1682. The Act increased the amounts necessary to trigger mandatory minimums, reducing the crack-powder ratio to 18:1. *See Dorsey v. United States*, 132 S. Ct. 2321, 2329 (2012). The Act further directed the Commission to "make such conforming amendments to the Federal sentencing guidelines" as necessary "to achieve consistency with other guideline provisions and applicable law" and to do so "as soon as practicable." Pub. L. 111-220, § 8, 124 Stat. 2372, 2374 (2010).

The Commission rapidly promulgated amended guideline ranges adopting the 18:1 ratio to match the new mandatory minimums. U.S. Sentencing Guidelines Manual, supp. to app. C, amend. 748 (Supp. 2010) (effective Nov. 1, 2010). The Commission also made the amended ranges permanent and retroactive. U.S.

Sentencing Comm'n, Final Crack Retroactivity Data Report: Fair Sentencing Act 1-2 (2014) (explaining amendments) (hereinafter "Retroactivity Report").

### B. This Court Should Permit Sentence Reductions When a Sentence Is "Based On" the Unjust Former Guidelines.

The reduced penalties of the Fair Sentencing Act do not reach those who were sentenced *before* its effective date. *E.g.*, *Baptist*, 646 F.3d at 1229. But 18 U.S.C. § 3582(c)(2) provides for potential sentence reductions when the Sentencing Commission subsequently lowers the Guideline range.

Across the country, thousands of inmates sentenced for crack offenses have moved for reductions under § 3582(c)(2). Retroactivity Report, Table 1. As of October 31, 2014, over 7,700 such motions had been granted and over 6,000 denied. *Id.* Of these denied motions, the sentencing court cited the existence of a binding plea as the basis for the denial in only 71 cases. *Id.* at Table 9.

Tyrone Davis is one of these 71 inmates who sought a reduction of his sentence under § 3582(c)(2) and was denied relief. Despite Congress's clear intent to eliminate the disparities wrought by the old 100:1 ratio, both the district court and a panel of this Court rejected Mr. Davis' request because he was sentenced pursuant to a plea agreement under Federal Rule of Criminal Procedure 11(c)(1)(C) ("(C) agreement").[8] Because Mr. Davis's plea agreement does not

[8] A "(C) agreement" refers to a binding plea under Rule 11(c)(1)(C). That rule provides, in part:

make clear that the basis for the 216-month term is a Guidelines sentencing range, the district court and panel ruled he does not qualify for relief under this Court's precedent in *Austin*. *See United States v. Austin*, 676 F.3d 924 (9th Cir. 2012).

But *Austin* was wrongly decided. *Austin* held that Justice Sotomayor's concurrence in *Freeman v. United States*, 131 S. Ct. 2685 (2011), was controlling law—even though every other justice specifically rejected its reasoning. *See United States v. Davis*, 776 F.3d 1088, 1092 (9th Cir. 2015) (Berzon, J., concurring) (explaining that Justice Sotomayor's concurrence does not represent the Supreme Court's holding because her reasoning "is totally contrary to that of the plurality opinion, and her opinion would result in sentencing reductions in cases in which the plurality opinion would not"), *vacated, reh'g en banc granted*, __F.3d__, 2015 WL 4663640 (9th Cir. Aug. 6, 2015). Among *Freeman*'s fractured, 4-1-4 opinions, no single rationale commanded the necessary majority. The *Austin* result is not mandated, or even consistent, with this Court's

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> 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).

interpretation of *Marks*. *Marks v. United States*, 430 U.S. 188, 193 (1977). Rather, under *Marks*, a plurality opinion is "narrower," and thus controls, only where it is the "logical subset" of other, broader opinions, such that it embodies a position implicitly approved by at least five Justices who support the judgment. *Lair v. Bullock*, 697 F.3d 1200, 1205 (9th Cir. 2012). Thus, there is no rule that courts must apply moving forward. This Court should therefore overrule *Austin*, and instead adopt the reasoning of the *Freeman* plurality.

### 1. This Court Should Overrule *Austin* Because Justice Sotomayor's Concurrence Is Not Controlling.

In *Freeman*, the Court considered whether sentences imposed under (C) agreements were "based on" the Sentencing Guidelines within the meaning of § 3582(c)(2). 18 U.S.C. § 3582(c)(2) (permitting reductions only if the original sentence was "based on a sentencing range that has subsequently been lowered by the Sentencing Commission"). The four-justice plurality recognized that most sentences, including sentences imposed after the defendant enters a (C) agreement, are "based on" the Guidelines because the sentencing court ultimately retains discretion, framed by the Guidelines, to impose appropriate sentences. *Freeman*, 131 S. Ct. at 2692 (plurality opinion). The plurality held that a sentence was subject to § 3582(c)(2) relief, "to whatever extent the sentencing range in question was a relevant part of the analytic framework the judge used to determine the sentence or to approve the agreement." *Id.* at 2692-93 (plurality opinion).

Justice Sotomayor issued a concurrence, joined by no one, agreeing with the dissent that sentences entered as a result of (C) agreements are "based on" the agreement, not on the Guidelines. However, she would recognize two narrow exceptions: (1) when the plea agreement "call[s] for the defendant to be sentenced within a particular Guidelines sentencing range" or (2) when the plea agreement "expressly uses a Guidelines sentencing range to establish the term of imprisonment," and that range is later lowered by the Commission. *Id.* at 2697-98 (Sotomayor, J., concurring).

In determining whether a sentence following a plea agreement is "based on" the Guidelines, the plurality and concurrence use entirely different frameworks. The plurality considers whether the *sentencing judge* relied on the Guidelines. By contrast, the concurrence considers only whether the *parties* expressed reliance on the Guidelines in their plea agreement. Thus the four-justice plurality's reasoning is completely at odds with Justice Sotomayor's concurrence. As Chief Justice Roberts noted in dissent, "[t]he plurality and the opinion concurring in the judgment agree on very little except the judgment." *Id.* at 2700 (Roberts, C.J., dissenting).[9] Consequently, there is no "narrowest ground" constituting a binding

[9] Aside from the disposition specific to Mr. Freeman, the only point on which the plurality and concurrence can be said to agree is that they both reject a *per se* rule barring § 3582(c)(2) relief to those who enter (C) agreements. As discussed, though, their reasoning for rejecting the rule is fundamentally different.

holding because there is *no* logical ground on which both the plurality and concurrence stand. *See Marks*, 430 U.S. at 193; *Lair*, 697 F.3d at 1205.

**2. The Holding of the *Freeman* Plurality Best Effectuates Congress's Intent to Rectify the Systemic Injustices Wrought by the 100:1 Crack-Powder Sentencing Disparity.**

Faced with a lack of binding precedent, this Court is free to write with a clean slate. In light of the unfairness of the 100:1 old crack cocaine sentencing regime, this Court should adopt the *Freeman* plurality.

The plurality's approach best remedies the effects of the unjust and rejected Guidelines. Under the plurality rule, an inmate would be eligible for sentencing relief whenever the discarded Guideline played a meaningful role in sentencing. *Freeman*, 131 S. Ct. at 2692-93 (plurality opinion). This rule is consistent with § 3582(c)(2)'s purpose of enabling inmates to "to reduce unwarranted sentencing disparities, such as the crack-cocaine range." *United States v. Epps*, 707 F.3d 337, 351 (D.C. Cir. 2013) (citing *Freeman*, 131 S. Ct. at 2695) (plurality opinion); *see also Freeman*, 131 S. Ct. at 2694 (plurality opinion) ("The crack-cocaine range here is a prime example of an unwarranted disparity that § 3582(c)(2) is designed to cure.").

Moreover, the plurality rule upholds the intent of Congress and the Sentencing Commission to undo racially discriminatory sentencing disparities "that virtually everyone agrees [are] unjust." 156 Cong. Rec. S1690-02 (daily ed.

Mar. 17, 2010) (statement of Sen. Durbin), 2010 WL 956335, at *S1681. Indeed, the *Freeman* plurality underscored that § 3582(c)(2)'s role is to remedy precisely the type of injustice wrought by the 100:1 Guidelines:

> There is no good reason to extend the benefit of the Commission's judgment only to an arbitrary subset of defendants whose agreed sentences were accepted in light of a since-rejected Guidelines range based on whether their plea agreements refer to the Guidelines. Congress enacted § 3582(c)(2) to remedy systemic injustice, and the approach outlined in the opinion concurring in the judgment would undercut a systemic solution.

*Freeman*, 131 S. Ct. at 2694-95 (plurality opinion). The plurality's approach enables a "systemic solution" consistent with Congress's intent to eliminate entirely the disastrous, discriminatory effects of the 100:1 ratio.

By contrast, the approach taken by Justice Sotomayor's concurrence would narrow this relief by arbitrarily singling out a very narrow set of plea agreements for potential § 3582(c)(2) resentencing. By her reasoning, a plea agreement must specifically reference the Sentencing Guidelines before an inmate would be eligible to seek § 3582(c)(2) relief. Whether an inmate is eligible for potential resentencing would hinge on the happenstance of whether the plea agreement explicitly referenced the Guidelines. "By allowing modification only when the terms of the agreement contemplate it, the proposed rule would permit the very disparities the Sentencing Reform Act seeks to eliminate." *Freeman*, 131 S. Ct. at 2694 (plurality opinion).

And the concurrence's underlying premise that sentences following guilty pleas under (C) agreements are "based on" the agreement, and not the Guidelines, misses the mark. It ignores the fact that plea agreements are necessarily influenced by the Guidelines. In a plea negotiation, each side tries to maximize its outcome in light of the risk of being sentenced by the court following a guilty verdict at trial. H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 Cath. U. L. Rev. 63, 72-73 (2011). No competent attorney, representing either party in a plea negotiation, would enter into a plea negotiation unaware of the defendant's potential Guideline sentence range. Given the high significance of even non-binding Guidelines in determining a defendant's likely sentence, and how rare departures from Guideline ranges are, a defendant's potential Guideline range sentence looms large in calculating the relative benefits of plea deals. As the *Freeman* plurality points out, "plea bargaining necessarily occurs in the shadow of the sentencing scheme to which the defendant would otherwise be subject." *Freeman*, 131 S. Ct. at 2697 (2011) (plurality opinion); *see also* Russell D. Covey, *Signaling and Plea Bargaining's Innocence Problem*, 66 Wash. & Lee L. Rev. 73, 77 (2009).

Given the strong influence the Guidelines exert over plea negotiations, any agreed-on sentence is likely "based on" the Guidelines. Justice Sotomayor's approach would provide relief only to that small sliver of defendants whose plea

agreements explicitly memorialize their reliance on the Guidelines. There is no meaningful basis for this distinction. To avoid perpetuating the unjust, racially-discriminatory disparities of the discarded, discriminatory 100:1 Sentencing Guidelines, this Court should reject the *Freeman* concurrence and embrace the plurality's approach.

## III. CONCLUSION

As this Court has noted, "the 100–to–1 crack-powder sentencing disparity [is] . . . , 'now recognized by virtually everyone, including Congress, to have imposed unnecessarily and unfairly severe mandatory sentences.'" *Baptist*, 646 F.3d at 1226 (quoting *United States v. Acoff*, 634 F.3d 200, 205 (2nd Cir. 2011) (Lynch, J., concurring)). Many inmates were sentenced "under a law that Congress appears to have concluded was groundless and racially discriminatory." *Id.* To deny relief to such inmates would perpetuate a racial injustice that Congress sought to remedy. And to bar them from relief because they entered into (C) agreements but lacked the foresight to explicitly incorporate a Guideline range by reference would "subvert[] justice and erode[] the legitimacy of the criminal justice system." *Id.* Such a rule is also out of step with the realities of plea negotiations, in which the Guidelines—whether referenced in the plea agreement or not—exert an enormous influence over the bargaining process. In light of these realities, and consistent with principles of justice, this Court should recognize that sentences like

Mr. Davis's are "based on" the Guidelines and are therefore eligible for reduction under § 3582(c)(2).

DATED this 27th day of August, 2015.

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## CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because this brief contains 5,803 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 28, 2015.

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