No. 20-1479

In The

Supreme Court of the United States

EDDIE HOUSTON, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The Brief in Opposition only underscores the Ninth Circuit's error and the need for this Court's review. The Government does not deny that the courts of appeals are sharply divided over whether the First Step Act mandates consideration of applicable § 3553(a) factors. Nor does the Government offer a single word in defense of the Ninth Circuit's construction of the First Step Act. In fact, the Government never even suggests that the Ninth Circuit's approach is correct. To the contrary, the Government emphasizes that it urged the district court to apply the § 3553(a) factors here—a recommendation the district court rejected.

The Government says the Court should nonetheless deny review because the question presented is of limited practical importance. But Congress has already decided that the difference between permissive and mandatory consideration of the § 3553(a) factors matters—in fact, it matters greatly. Real-world First Step Act proceedings prove the point: the difference between "may" and "must" will often be dispositive for thousands of offenders sentenced under a regime Congress has roundly rejected as unfair and discriminatory.

The Government's purported vehicle problems are likewise insubstantial. The question presented is squarely implicated here; indeed, the Ninth Circuit's holding that "the district court was not required to consider the section 3553(a) factors" was the sole basis for affirmance. Pet. App. 4a. The Government's speculation that the district court would not have reduced petitioner's sentence anyway lacks force. And

that the decision below is unpublished is immaterial. When petitioner sought certiorari, there was already a 3-3 split among published decisions. Since then, the split has deepened, with three additional circuits weighing in on opposing sides of the split.

Rarely is a conflict deeper or more ripe for review. This case is an excellent and timely vehicle to bring much-needed clarity to a basic question at the heart of this remedial statute. The Court should grant certiorari and reverse.

A. There is a deep split on the question presented.

1. The Government does not dispute that the circuits are sharply divided on the question presented. As the petition explained, the Ninth Circuit's construction of the First Step Act directly conflicts with decisions from the Third, Fourth, and Sixth Circuits; in each of these circuits, the district court's failure to consider applicable § 3553(a) factors would have been reversible error. Pet. 12-14. And the First, Eighth, and Tenth Circuits have adopted the rule the Ninth Circuit followed here. Pet. 11-12. Even if that were the full depth of the conflict, certiorari would be warranted. The First Step Act—a landmark bipartisan statute—should not be disparately applied in half the Circuits.

2. Since petitioner sought certiorari, moreover, the split has only deepened, with three more circuits choosing sides in the conflict.

In *United States v. Moyhernandez*, ___ F.4th ___, 2021 WL 2963725 (2d Cir. Jul. 15, 2021), the Second Circuit held that "consideration of the § 3553(a)

factors is not required on review of a motion brought pursuant to § 404 of the First Step Act." *Id.* at *4. "Section 404 contains no explicit mandate to consider § 3553(a)," the court explained, "and we do not infer that Congress intended to imply one." *Id.* The Eleventh Circuit has likewise now concluded that the First Step Act "does not mandate consideration of the § 3553(a) sentencing factors." *United States v. Stevens*, 997 F.3d 1307, 1316 (11th Cir. 2021).

Meanwhile, the D.C. Circuit also recently clarified its view—taking the opposite position and holding that a district court adjudicating a First Step Act motion "must consider 'all relevant factors,' including … the sentencing factors outlined at 18 U.S.C. § 3553(a)." *United States v. Lawrence*, 1 F.4th 40, 43-44 (D.C. Cir. 2021). Like the Third, Fourth, and Sixth Circuits, the D.C. Circuit reasoned that "[t]he district court's discretion in adjudicating a Section 404 motion is 'broad' but not 'unfettered'"; consideration of applicable § 3553(a) factors is necessary to effectuate "Congress's intent to rectify disproportionate and racially disparate sentencing penalties." *Id.* at 44.

3. The split is clear and intractable, as the courts of appeals themselves have repeatedly acknowledged. *See, e.g.*, *Moyhernandez*, 2021 WL 2963725, at *5 ("Our sister circuits are split."); *United States v. Easter*, 975 F.3d 318, 323-27 (3d Cir. 2020) ("[O]ur sister circuits are divided.").

The Government itself has conceded the split. In *Moyhernandez*, it observed that "there is a split in the decisions of the courts of appeals … [t]he Eighth, Ninth, and Tenth Circuits have held that a district court may, but is not required to consider the Section

3553(a) factors, while the Third, Fourth, and Sixth Circuits have held that such a review is required." U.S. Br. at *12, 2020 WL 6275137 (Oct. 16, 2020).

That count, of course, is now outdated. Even beyond the decision below, nine circuits have staked out definitive positions on the question presented. This conflict calls out for this Court's resolution.

B. The question presented is central to the First Step Act.

The Government's suggestion that the question presented lacks "practical import," BIO 12, both flouts Congress's judgment about how to ensure fair sentencing and ignores the facts on the ground.

1. Congress codified the § 3553(a) factors in the Sentencing Reform Act of 1984, which "revolutionized" federal sentencing to further "Congress' goal of assuring certainty and fairness." *Burns v. United States*, 501 U.S. 129, 132-33 (1991). The Act "constrain[ed] sentencing courts' discretion in important respects," including "by specifying [the § 3553(a)] factors that courts must consider." *Pepper v. United States*, 562 U.S. 476, 489 (2011). Thus, while district courts retain broad discretion in sentencing, Congress viewed § 3553(a) as an important means to ensure consistency—important enough to *require* district courts to expressly consider the factors therein. "[F]ailing to consider the § 3553(a) factors" is a "significant procedural error" that warrants reversal. *Gall v. United States*, 552 U.S. 38, 51 (2007).

The Government's view—that as long as courts *may* consider the § 3553(a) factors in First Step Act resentencings, it makes no difference whether they

must, BIO 12-14—disregards Congress's considered judgment. Congress and this Court have already determined that mandatory consideration of the § 3553(a) factors is different from permissive consideration. And the same goal of evenhanded sentencing that animates the Sentencing Reform Act animates both the Fair Sentencing Act and First Step Act. *See* Constitutional Accountability Center Br. 6-9.

To be sure, district courts may "take into account a broad array of considerations in determining whether to reduce sentences under Section 404" and must write decisions that "allow for meaningful appellate review." BIO 12-13. And the "factual differences between cases" may drive disparate sentences. BIO 14. But all that is true in initial sentencing proceedings, too, where consideration of the § 3553(a) factors is still necessary—just as it is here. District courts may consider the § 3553(a) factors of their own volition, but hoping they do so is not enough.

Indeed, mandatory consideration of the § 3553(a) factors is particularly imperative during First Step Act resentencings. Eligible defendants have necessarily been incarcerated for more than a decade. If district courts are not required to consider the § 3553(a) factors anew, they may lean on stale justifications for the original sentence, deferring to "prior judicial musings rendered under meaningfully different circumstances." *United States v. Knight*, 2021 WL 266341, at *2 (W.D. Pa. Jan. 27, 2021). This risk is especially stark in the many cases where, as here, the original sentencing judge is unavailable; a new judge, unfamiliar with the defendant, may "be

heavily reliant on a previous explanation and record that was not created with the current statutory framework in mind." *United States v. Shaw*, 957 F.3d 734, 741 (7th Cir. 2020) (internal quotation marks omitted). Fresh consideration of the § 3553(a) factors ensures that resentencing courts avoid repeating the errors of the past.

2. The flaws in the Government's dismissive view are not simply philosophical; the facts on the ground show that considering the § 3553(a) factors in First Step Act resentencings often affects outcomes. This Court need not look for "*different* courts … reaching different results on *similar* facts," BIO 14 (emphasis added), to see that in action. In many cases, the *same* court has reached a different result on the *same* facts when revisiting a First Step Act resentencing with instructions to expressly consider the § 3553(a) factors. *See* NACDL Br. 4-16 (collecting examples).

To highlight just one such case, consider Anthony Olvis. Mr. Olvis filed a § 404 motion in 2019, seeking to reduce his 404-month sentence for crack-cocaine offenses committed when he was 22 years old. Without the benefit of the Fourth Circuit's decision in *United States v. Chambers*, 956 F.3d 667 (4th Cir. 2020)—which held that courts in the Fourth Circuit must consider applicable § 3553(a) factors—the district court denied the motion without considering the sentencing factors. *United States v. Olvis*, 828 F. App'x 181, 181-82 (4th Cir. 2020). The Fourth Circuit remanded "in light of *Chambers*." *Id.* at 182.

On remand, the district court expressly addressed the § 3553(a) factors, including Mr. Olvis's post-sentencing conduct, disciplinary record, and

unwarranted sentence disparities. *United States v. Olvis*, No. 95-38, ECF 344 at 8 (E.D. Va. Apr. 23, 2021). Ultimately, the district court concluded that the § 3553(a) factors warranted a reduction to 240 months' imprisonment—a 13-year reduction. Absent mandatory consideration of the § 3553(a) factors, Mr. Olvis would still be serving his 404-month sentence.[1]

C. This case is an excellent vehicle to resolve the conflict.

1. The Government says the "circuit conflict" is not "implicate[d]" here. BIO 9. But the district court did not merely fail to "expressly discuss[]" the § 3553(a) factors, Pet. I; it refused to consider the § 3553(a) factors at all—expressly or otherwise. And the court of appeals's holding rested on its conclusion that the district court "was not required to *consider* the section 3553(a) factors," Pet. App. 3a-4a (emphasis added)—not that it was not required to discuss its consideration of them on the record. If the rule adopted by the Third, Fourth, Sixth, and now D.C. Circuits is correct, then the judgment below must be vacated and petitioner's case remanded for resentencing.

Indeed, in his dissent from denial of rehearing, Judge Chhabria emphasized that he would "grant

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[1] Contrary to a recent suggestion, this petition does not "address[] only the application of intervening factual developments." Pet. 22-23, *Concepcion v. United States*, No. 20-1650 (May 24. 2021). Rather, this petition presents a threshold question about the basic framework for First Step Act resentencings: whether the sentencing court must consider the § 3553(a) factors, which ordinarily apply at "all sentencing proceedings." *Gall*, 552 U.S. at 51.

rehearing," "because of the possibility that we erred in *resting our ruling* on the conclusion that the district court was not required to consider the sentencing factors." Pet. App. 15a (emphasis added).

2. The Government's speculation that the district court might not have reduced petitioner's sentence even if required to consider the § 3553(a) factors, BIO 11-12, provides no reason to deny certiorari. The failure to consider applicable § 3553(a) factors, where required, is itself reversible error. *Gall*, 552 U.S. at 51. A favorable ruling in this Court would thus necessarily entitle petitioner to meaningful relief: a § 404 proceeding where the district court must consider applicable § 3553(a) factors.

At any rate, the Government would not be able to demonstrate on remand that the district court's error was harmless. The Government merely suggests that without some affirmative "indication" the district court would have reduced petitioner's sentence "were it required to more expressly consider those factors," there is no reason to think mandatory consideration would matter. BIO 12. But the Government sets an impossible standard; few courts would write an opinion representing (in pure *dicta*) they would reduce a sentence if required to consider additional information. Critically, the district court never indicated it would *not* have reduced petitioner's sentence after considering the § 3553(a) factors.

The record makes clear, moreover, that the district court's failure to consider the § 3553(a) factors mattered greatly. Petitioner presented substantial evidence that those factors weighed heavily in favor of his proposed reduction, including evidence

regarding his (i) outstanding rehabilitation record; (ii) age; (iii) realistic release plan; and (iv) abusive childhood and adolescence. Pet. 8.

The Government disputes none of this. Instead, the Government emphasizes petitioner's crack-cocaine offense, applicable penalty range, and pre-offense history. BIO 10-11. But the entire point of the § 3553(a) factors is to consider not just the penalty range and offense conduct, but also other relevant considerations that properly inform an appropriate sentence. Pet. 16; *Pepper*, 562 U.S. at 491-93. Had the district court considered petitioner's "history and characteristics," and "the need for the sentence imposed … to afford adequate deterrence," "protect the public," and provide "correctional treatment," 18 U.S.C. § 3553(a)—as four circuits require—it would likely have reached a different conclusion.[2]

3. The Government's "unpublished decision" module likewise has no purchase. In keeping its own ledger of the conflict, the Government has expressly included the Ninth Circuit in the split—citing the decision below. *See* U.S. Br. at *12-13, *Moyhernandez*, 2020 WL 6275137 (Oct. 16, 2020).

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[2] Oddly, the Government also highlights that it "urged the district court to consider the Section 3553(a) factors." BIO 11. But that only proves petitioner's point. The Government did so presumably because, in the Government's view, such consideration matters. But the court instead wholly ignored these factors—to petitioner's substantial detriment.

In any event, this Court frequently grants certiorari to review unpublished decisions.[3] That is particularly so where the decisions turn on issues "over which the courts of appeals have split." Shapiro, *supra*, § 4.11. Here, there are nine published court of appeals decisions disagreeing on the question presented. Timely resolution of the conflict is imperative; lower courts are handling these cases at a rapid pace and § 404(c) may limit successive motions. Pet. 17-18. This case is a clean vehicle to resolve this important and time-sensitive conflict over the proper interpretation of the First Step Act.

D. The decision below is wrong.

The merits are for the merits stage—but it is notable that the Government does not even try to defend the Ninth Circuit's rule. For good reason: the Ninth Circuit's decision contorts settled interpretative principles, this Court's precedent, and common sense. Petitioner already explained why the Ninth Circuit's analysis—and that of the initial circuits that adopted the same rule—is incorrect. Pet. 19-26. The more recent decisions are as flawed as those that preceded them.

In *Moyhernandez*, the Second Circuit majority emphasized the First Step Act's "as if" clause. While

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[3] *See, e.g.*, *United States v. Palomar-Santiago*, 141 S. Ct. 1615 (2021); *Torres v. Madrid*, 141 S. Ct. 989 (2021); *Borden v. United States*, 141 S. Ct. 1817 (2021); *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021); *Greer v. United States*, 141 S. Ct. 2090 (2021); *Stokeling v. United States*, 139 S. Ct. 544 (2019); Shapiro *et al.*, Supreme Court Practice § 4.11 (11th ed. 2019) (collecting cases).

a "court 'imposing' a sentence in the first instance" must consider the § 3553(a) factors, the majority believed a court authorized to "impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act … were in effect" can only "determine the impact of … the Fair Sentencing Act." 2021 WL 2963725, at *6. But the Act omits the word "only," and this Court will not "add[] words to the law to produce what is thought to be a desirable result." *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 774 (2015). Moreover, Congress enacted both the Fair Sentencing Act and the First Step Act against a post-*Booker* backdrop, "a world in which district courts were already required to consider the Section 3553(a) factors in imposing a sentence." *Moyhernandez*, 2021 WL 2963725, at *13 (Pooler, J., dissenting). A court cannot impose a sentence "as if the Fair Sentencing Act were in effect" while ignoring the § 3553(a) factors. *Id.*

The *Moyhernandez* majority also interpreted "§ 404(b)'s instruction to 'impose a *reduced* sentence'" as authorizing "only the discretionary reduction of a sentence that was already imposed." *Id.* at *6 (emphasis added). But Congress could have achieved that result by allowing courts to "reduce" a sentence. Pet. 21. Congress instead used the word "impose" twice, providing that a court "that imposed a sentence for a covered offense" may "impose a reduced sentence" consistent with the Fair Sentencing Act. "Congress specifically chose the word 'impose' to refer to both the initial sentencing," in which the court must consider the § 3553(a) factors, "and the resentencing," indicating that the same required

procedures should apply. *Moyhernandez,* 2021 WL 2963725, at *14 (Pooler, J., dissenting). Only this reading renders every word necessary, with the word "reduced" clarifying that a court cannot extend an eligible defendant's sentence.

The Eleventh Circuit's reasoning in *Stevens* is equally flawed. The court believed that "requiring consideration of § 3553(a) factors … would impermissibly hamper and cabin this wide discretion that Congress expressly afforded district courts" in the First Step Act. 997 F.3d at 1316. But Congress often mandates frameworks to structure the exercise of discretion and facilitate review. *See, e.g., Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227-28 (1980) (National Environmental Policy Act imposes "duties that are essentially procedural" while preserving agency "discretion" "as to the choice of action to be taken"). Most obviously, Congress "expressly instructed district courts to consider [§ 3553(a)] at sentencing" in the first instance, *Pepper*, 562 U.S. at 491, while "preserv[ing] the traditional discretion of sentencing courts," *id.* at 489. Structure and discretion were not mutually exclusive when a court "imposed a sentence for a covered offense," and neither are they mutually exclusive when a court elects to "impose a reduced sentence" under the First Step Act.

CONCLUSION

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

Respectfully submitted,

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