No. 20-1650

In the Supreme Court of the United States

CARLOS CONCEPCION,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FIRST CIRCUIT

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

I. The Decision Below Deepened a Clear Circuit Split 3
II. This Case Is An Ideal Vehicle for Review 8
III. The Decision Below Is Wrong 9
CONCLUSION 12

TABLE OF AUTHORITIES

Page

Cases:

Alabama v. Bozeman, 533 U.S. 146 (2001) 4
Dillon v. United States, 560 U.S. 817 (2010) 10
Molina-Martinez v. United States, 136 S. Ct. 1338 (2016) 6
United States v. Brown, 974 F.3d 1137 (10th Cir. 2020) 4, 11
United States v. Chambers, 956 F.3d 667 (2020) 7, 10, 11
United States v. Collington, 995 F.3d 347 (4th Cir. 2021) 4
United States v. Concepcion, 991 F.3d 279 (1st Cir. 2021) 2
United States v. Denson, 963 F.3d 1080 (11th Cir. 2020) 5
United States v. Easter, 975 F.3d 318 (3d Cir. 2020) 11
United States v. Fowowe, 1 F.4th 522 (7th Cir. 2021) 3, 5
United States v. Kelley, 962 F.3d 470 (9th Cir. 2020) 5
United States v. Kizzee, 847 F. App'x 242 (5th Cir. 2021) 5
United States v. Lancaster, 997 F.3d 171 (4th Cir. 2021) 1, 2, 4, 5
United States v. Lawrence, 1 F.4th 40 (D.C. Cir. 2021) 4
United States v. Moyhernandez, 5 F.4th 195 (2d Cir. 2021) 3
United States v. Murphy, 998 F.3d 549 (3d Cir. 2021), *as amended* (Aug. 4, 2021) 2, 3, 5

Page

Cases—continued:

United States v. Naranjo,
No. 20-50257, 2021 WL 2657108
(5th Cir. June 25, 2021) 5
United States v. Outlaw,
No. 20-13127, 2021 WL 3052550
(11th Cir. July 20, 2021) 5
United States v. Robinson,
980 F.3d 454 (5th Cir. 2020) 5
United States v. Wirsing,
943 F.3d 175 (4th Cir. 2019) 10

Statutes:

18 U.S.C. § 3553(a) 4, 8, 9, 11
§ 3582(a) 9
§ 3582(c)(1)(B) 10
§ 3582(c)(2) 10
§ 3661 9
Fair Sentencing Act of 2010,
Pub. L. No. 111-220, 124 Stat. 2372
§ 2 ..... 5, 8, 9, 10
§ 3 ..... 5, 8, 9, 10
First Step Act,
Pub. L. No. 115-391, 132 Stat. 5194 ..... 9, 10, 11
§ 404 ..... 1, 3, 5, 7
§ 404(b) 8, 9, 10, 11

Miscellaneous:

U.S. Sent'g Comm'n, *First Step Act of 2018 Resentencing Provisions Retroactivity Data Rep.* (May 2021) 7

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The scope of district courts' authority under section 404 of the First Step Act is a paradigmatic issue for this Court's review. The question presented involves a core criminal justice function—sentencing—and has intractably divided the courts of appeal into at least three camps. Only this Court can resolve the lower courts' "fractured views" on this "serious" issue. *United States v. Lancaster*, 997 F.3d 171, 177 (4th Cir. 2021) (Wilkinson, J., concurring).

The government concedes (at 11, 22, 25) that the "circuits' approaches . . . are not uniform," but dismisses (at 22-25) the "practical effect" of the disagreement. The government seemingly sees no difference between *requiring* a district court to consider certain law and facts and *permitting* or *forbidding* such consideration. That position is

untenable. Multiple judges in multiple circuits have produced dissenting or concurring opinions precisely because even minor variations in approaches to sentencing under the First Step Act can be the difference between years of freedom or years of confinement. *See, e.g.*, *United States v. Murphy*, 998 F.3d 549, 562 (3d Cir. 2021), *as amended* (Aug. 4, 2021) (Bibas, J., dissenting) ("[The majority's approach] puts us on the wrong side of a three-way circuit split."); *Lancaster*, 997 F.3d at 177 (Wilkinson, J., concurring) ("[T]o say that [the Fourth Circuit's] holdings exacerbate a circuit split greatly understates the matter"); *United States v. Concepcion*, 991 F.3d 279, 313 (1st Cir. 2021) (Barron, J., dissenting) ("[I]n cases involving intervening factual developments, I would think the legal difference might be especially significant.").

Here, the variations between the correct approach and the approach applied below are anything but minor: if petitioner had been in the Third, Fourth, Tenth, or D.C. Circuits, he would have been entitled to have his Guidelines range *updated* to reflect that he should no longer be considered a career offender. How that difference could be of no moment to the government is hard to comprehend; but the difference to criminal defendants and the administration of justice should be clear enough.

The government's invented vehicle problems underscore the weakness of the case against certiorari. The government incorrectly claims that the First Circuit below did not consider whether petitioner was entitled to consideration of updated law *and* updated facts. In fact, it considered and rejected both arguments. And the government's attempt to argue that petitioner would not receive a lower sentence on remand is both premature and beside the point. The critical question at the certiorari stage is whether the outcome in petitioner's case *could* be different, and the answer is obviously yes.

The government spends most of its brief attempting to defend the decision below on the merits. But those arguments are no reason to deny review in the face of an undeniable—and undeniably important—split. The government's atextual reading of the First Step Act fails in any event.

I. The Decision Below Deepened a Clear Circuit Split

1. The government concedes that "the circuits' approaches to intervening legal developments in section 404 proceedings are not uniform." Opp. 11. That is a massive understatement. Nearly three years after the First Step Act became law, every circuit with jurisdiction over sentencing issues has weighed in and there is judicially-recognized chaos and confusion about the proper considerations on a motion for sentencing under section 404. Most circuits explicitly note the variance among the courts. Judge Bibas recently commented that "[a]ll eleven other circuits have taken sides in a three-way conflict." *Murphy*, 998 F.3d at 561 (Bibas, J., dissenting). The Seventh Circuit agrees: "Our sister circuits have mixed views." *United States v. Fowowe*, 1 F.4th 522, 530 (7th Cir. 2021). So does the Second Circuit: "Our sister circuits are split." *United States v. Moyhernandez*, 5 F.4th 195 (2d Cir. 2021).

The First Camp. There can be no reasonable dispute that the Fourth, Third, and D.C. Circuits have held that consideration of updated law and facts and recalculation of the applicable Guidelines range is *mandatory*. *See* Pet. 13-15. The government argues these circuits are internally inconsistent, alluding (at 23-24) to what it considers "permissive" language in a handful of decisions. But the government's cherry-picked examples cannot create ambiguity and intra-circuit conflicts where none exist. For example, the government notes (at 23) that the Fourth

Circuit in *Lancaster* stated that a district court "can" look at post-sentencing conduct. *Lancaster*, 997 F.3d at 175. But *Lancaster* vacated the district court's opinion precisely because it "did not review the § 3553(a) factors to determine whether its balancing of the factors was still appropriate in light of intervening circumstances." *Id.* at 176. *Lancaster* thus is consistent with precedents "requir[ing] courts to consider a defendant's arguments." *United States v. Collington*, 995 F.3d 347, 360 (4th Cir. 2021).

The government's efforts (at 23-24) to muddy the waters in the Tenth and D.C. Circuits similarly fall flat. Notwithstanding any language the government characterizes as "permissive," *United States v. Brown*, 974 F.3d 1137, 1139-40 (10th Cir. 2020), remanded with instructions that the district court "*shall* consider [defendant's] challenge to his career offender status." *Id.* at 1146 (emphasis added). "Shall" means must, not may. *See Alabama v. Bozeman*, 533 U.S. 146, 153 (2001). The D.C. Circuit's bottom line is equally clear: district courts "*must* consider 'all relevant factors." *United States v. Lawrence*, 1 F.4th 40, 43-44 (D.C. Cir. 2021).

The Second Camp. The government admits (at 19-20) that the First, Second, Sixth, Seventh, and Eighth Circuits hold that district courts need not consider intervening legal developments or updated Guidelines and facts when resentencing under the First Step Act.

The Third Camp. For their part, the Fifth, Ninth, and Eleventh Circuits *forbid* district courts from considering intervening caselaw or updated Guidelines. *See* Pet. at 16-18. The government downplays these courts' divergence from the rest, contending that they actually permit discretionary consideration of those legal updates. But other courts have recognized that "the Fifth, Ninth, and

Eleventh Circuits have imposed limits on a district court's [First Step Act] discretion." *Fowowe*, 1 F.4th at 531; *see also Murphy*, 998 F.3d at 561 (Bibas, J., dissenting); *Lancaster*, 997 F.3d at 178 (Wilkinson, J., concurring).

Those observations are backed by holdings from these circuits. The Eleventh Circuit just confirmed that under its precedents "*the court is not free to recalculate [defendant's] Guidelines range based on other changes in the law since his original sentencing*." *United States v. Outlaw*, No. 20-13127, 2021 WL 3052550, at *2 (11th Cir. July 20, 2021) (emphasis added) (citing *United States v. Denson*, 963 F.3d 1080, 1089 (11th Cir. 2020)). In *United States v. Kelley*, 962 F.3d 470, 476 (9th Cir. 2020), *cert. denied*, No. 20-7474, 2021 WL 2637994 (U.S. June 28, 2021), the Ninth Circuit squarely held that a district court had "no authority" to consider any "changes in law other than sections 2 and 3 of the Fair Sentencing Act." Tellingly, the government cites no district (or any other) court construing these precedents differently.

As to the Fifth Circuit, the government's argument relies on dicta in *United States v. Robinson*, 980 F.3d 454, 465 (5th Cir. 2020). But *Robinson* affirmed a district court opinion that refused to consider a change in career-offender status. Regardless, later Fifth Circuit opinions remove any doubt that district courts cannot consider updated law. *See, e.g.*, *United States v. Kizzee*, 847 F. App'x 242, 243 (5th Cir. 2021) (district court "could not consider" post-sentencing caselaw); *United States v. Naranjo*, No. 20-50257, 2021 WL 2657108, at *2 (5th Cir. June 25, 2021) (Fifth Circuit precedent "foreclosed" claim that court should have reconsidered his career-offender designation).

2. The government argues (at 25) that "different approaches" to a section 404 proceeding "may not have a

substantial practical effect" because sentence reductions are ultimately discretionary. All that matters at this stage, however, is that the lower courts' varying approaches *could* determine the outcome of criminal sentences. This Court has recognized that applying the wrong Guidelines range "in most instances will suffice to show an effect on the defendant's substantial rights." *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1347 (2016). And when the stakes are measured in decades of potential incarceration, there is no room for guesswork about the effect of non-uniform criminal sentencing rules.

Indeed, when the shoe has been on the other foot, the government has forcefully argued that if there is "a state of confusion about the manner in which federal sentences are to be determined," "resolution of those questions cannot be delayed." Petition for Certiorari, *United States v. Fanfan*, 542 U.S. 956 (2004) (No. 04-105), 2004 WL 1638205, at *6 (cert. granted). The same principles should govern both sides of the "v."

3. Finally, the government points to this Court's denial, within the past three years, of five other First Step Act petitions.

As revealed in the briefs in opposition,[1] those petitions presented reasons for denial that are absent here. When the petition in *Hegwood v. United States*, No. 19-5743, was filed, the circuit split was not yet established. Since then courts' efforts to call out the split have become deafening. *Supra* 2-3.

Other petitions presented narrower questions presented that did not implicate the full extent of the split. In

[1] The government waived its right to file a response in *Hegwood v. United States*, No. 19-5743.

Bates v. United States, No. 20-535, the government conceded that "some tension exist[ed] in the circuits regarding the precise manner in which a Section 404 sentence reduction may be informed by legal developments since the original sentencing," but the question presented was limited to whether an intervening, retroactive Guidelines amendment must be considered.

In both *Harris v. United States*, No. 20-6832, and *Deruise v. United States*, No. 20-6953, the question presented was also limited to consideration of factors impacting the Guidelines calculation. In addition, the *Deruise* petition failed to cite the Fourth Circuit's decision in *United States v. Chambers*, 956 F.3d 667 (2020), and the petitioner in *Harris* had threatened to kill his attorney and had nine disciplinary actions in prison since his original sentencing. And in *Kelley v. United States*, No. 20-7474, the question presented was not only narrow, but the petitioner had already been released from prison.

Here, the question presented is broad, squarely raised, and could determine the length of incarceration for petitioner and thousands of others. Real-world evidence shows that the difference between a mandatory and a permissive consideration makes an enormous difference in sentencing outcomes. For example, courts in the Fourth Circuit (where consideration of intervening legal and factual developments is required) have granted approximately *seven times* more motions for sentence reductions under the First Step Act than courts in the Ninth Circuit (where consideration of intervening case law is prohibited and consideration of updated facts is not required). *See* U.S. Sent'g Comm'n, *First Step Act of 2018 Resentencing Provisions Retroactivity Data Rep.* at Tbl. 3 (May 2021). These inequities cannot continue. Immediate resolution of the question presented is warranted.

II. This Case Is An Ideal Vehicle for Review

The government calls this case "an unsuitable vehicle," Opp. 11, but fails to substantiate any barrier to this Court's review.

The government attempts to cast doubt that the mandatory consideration of both legal and factual developments is squarely implicated here. Opp. 25. The government is wrong. On appeal, Mr. Concepcion argued that the district court erred in failing to consider (1) the Guidelines as they were in effect at the time of resentencing, and (2) the section 3553(a) factors using present-day information about his factual circumstances. Br. 10. The First Circuit addressed those issues clearly: "At the time of resentencing, a district court must place itself back at the date of the offense, altering the legal landscape *only* by resort to sections 2 and 3 of the Fair Sentencing Act." Pet.App.17a (emphasis added). It later reiterated the point: "there is no principled way that we can find reassessment of the section 3553(a) factors mandatory." Pet.App.18a.

The government finally hypothesizes (at 25-27) that the district court *might* not reduce petitioner's sentence if it were required (rather than permitted) to consider current facts and law. Judge Barron addressed the same argument in his dissenting opinion, explaining that he could not make the assumption petitioner's sentence would be the same "when the District Court was misinformed about what § 404(b) itself permitted it to do." Pet.App.65a. Petitioner's case thus illustrates how the different legal standards applied by the courts of appeals "might very well matter in some instances." Pet.App.66a.

In any event, the possibility of the same result on remand is no reason to deny review. The same could be said when the government seeks review in sentencing cases;

sentencing courts on remand might always impose the same sentence based on a different rationale. The question here is whether petitioner should have the opportunity to present, and have the district court consider, all of the relevant evidence supporting a sentence reduction. As to that issue, the question presented is outcome determinative.

III. The Decision Below Is Wrong

1. The government contends that "Section 404(b) limits the scope of relief available, authorizing a *reduction only* 'as if sections 2 and 3 of the Fair Sentencing Act * * * were in effect at the time the covered offense was committed.'" Opp. 15-16 (emphasis added) (quoting First Step Act § 404(b), Pub. L. No. 115-391, 132 Stat. 5194, 5222). The government thereby impermissibly amends the text of the Act by (1) excising Congress' direction that a district court "impose" a sentence, and (2) adding the word "only," which does not appear in section 404(b).

The government's substitution of the word "reduction" for the word "impose" radically alters section 404(b). The Act authorizes district courts to "*impose* a reduced sentence," First Step Act § 404(b), Pub. L. No. 115-391, 132 Stat. 5194, 5222 (emphasis added), not to grant "a reduction," Opp. 15. Congress uses the word "impose" throughout the federal sentencing statutes when it wants to empower district courts "to consider any thing relevant to what is an appropriate sentence." Pet. 24; *see* 18 U.S.C. § 3553(a); 18 U.S.C. § 3582(a); 18 U.S.C. § 3661.

The government's addition of the word "only" to section 404(b) fundamentally alters Congress' language as well. The Act authorizes district courts to "impose a reduced sentence *as if* section 2 and 3 of the Fair Sentencing Act of 2010 . . . were in effect at the time the covered offense was committed." First Step Act § 404(b), Pub. L.

No. 115-391, 132 Stat. 5194, 5222 (emphasis added). This plain language tells the district court which statutory-sentencing range to apply, effectively "mak[ing] those sections of the Fair Sentencing Act retroactive." *Chambers*, 956 F.3d at 672. The government, however, proposes to limit district courts to imposing sentences "*only* 'as if'" those provisions were previously in effect. Opp. 15 (emphasis added). This extra-textual limitation transforms section 404(b) into a time-traveling thought experiment that, as the First Circuit put it, "place[s]" a district court "back at the date of the offense, altering the legal landscape only by resort to sections 2 and 3 of the Fair Sentencing Act." Pet.App.17a. That is not what Congress wrote.

2. The government further errs in relying on *Dillon v. United States*, 560 U.S. 817 (2010). *Dillon* held that 18 U.S.C. § 3582(c)(2) "'authorize[s] only a limited adjustment to an otherwise final sentence'" because that law gave authority "only to 'reduce' sentences." Opp. 15 (quoting *Dillon*, 560 U.S. at 825-26). The government claims that the First Step Act is analogous and thus provides only the same narrow authority to adjust a sentence. Opp. 15-16, 18. But *Dillon* and section 3582(c)(2) have nothing to do with the First Step Act.

First Step Act motions are brought under section 3582(c)(1)(B), which provides a vehicle to "modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute," *not* under section 3582(c)(2). *See Chambers*, 956 F.3d at 673 (citing *United States v. Wirsing*, 943 F.3d 175, 183-85 (4th Cir. 2019)) ("[T]he strictures of § 3582(c)(2) are irrelevant to § 3582(c)(1)(B), under which First Step Act motions are brought."). And *Dillon* explained that under section 3582(c)(2), a district court "does not impose a new sentence in the usual sense." 560 U.S. at 827. By contrast,

Congress expressly authorized a district court to "impose a reduced sentence" under the First Step Act. First Step Act § 404(b), Pub. L. No. 115-391, 132 Stat. 5194, 5222.

3. The government complains that petitioner seeks plenary resentencing. Opp. 16-18. But a host of options exist between an adjustment of sentence and plenary resentencing, as shown by the circuits that require consideration of present-day law and facts. *See United States v. Easter*, 975 F.3d 318, 326 (3d Cir. 2020); *Brown*, 974 F.3d at 1139, 1145; *Chambers*, 956 F.3d at 673 n.3. In those circuits, a First Step Act defendant could not re-litigate preexisting facts regarding "the nature and circumstances of the offense and the history and characteristics of the defendant," "the need for the sentence imposed," or "the need to avoid unwarranted sentence disparities." 18 U.S.C. § 3553(a). Nor can a First Step Act defendant reopen previously decided legal arguments from the initial sentencing about the application of a particular Sentencing Guideline cross-reference or enhancement.

In any event, all of the government's merits arguments are exactly that: arguments to be fleshed out on the merits. The question presented is recurring, important, dividing the circuits, and is outcome determinative in the sentencing approach for this and hundreds or thousands of other cases. It is time to grant certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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