No. 20-291

IN THE
Supreme Court of the United States

JAMELL BIRT,
Petitioner,
v.
UNITED STATES,
Respondent.

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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

HEIDI R. FREESE
FREDERICK W. ULRICH
TAMMY L. TAYLOR
FEDERAL PUBLIC DEFENDER
MIDDLE DISTRICT OF
PENNSYLVANIA
100 Chestnut St.
Suite 306
Harrisburg, PA 17101
(717) 782-2237

ZACHARY C. SCHAUF
Counsel of Record
ELIZABETH B. DEUTSCH
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
zschauf@jenner.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

The government concedes at least a 5-2 split, yet its principal argument against review is the cursory claim that the split is "shallow[] and of diminishing practical importance." BIO 22. That claim rebels against reality. Seven circuits have decided the question presented, eight more circuit cases are pending, and the issue will remain relevant until *2040*.

Meanwhile, the government cannot seriously contest the importance of immediate review. As Congress expected, the First Step Act has real-world consequences: When individuals get merits review, they often receive lower sentences. *Thousands* have already received new sentences, averaging a reduction of 71 months (or 26%). Many receive time served. It is urgent that this Court resolve the acknowledged split concerning whether individuals sentenced for low-level crack offenses pursuant to § 841(b)(1)(C) ("Subparagraph C") are eligible to seek relief from a draconian sentencing regime Congress has disavowed.

The government spends most of its brief arguing the merits—but that is for the merits stage. Anyway, the government is wrong. As Judge Rushing explained, the Fair Sentencing Act "modified" Subparagraph C by altering the crack-cocaine quantities to which its penalty applies. And as Judge Kayatta explained, the "term 'modified,' given its ordinary meaning, includes any change, however slight"—which readily encompasses the Fair Sentencing Act's changes to "the thresholds for crack-cocaine offenses." The government's faulty invocations of purpose and its silly slippery-slope argument only reinforce the Third Circuit's error and

the need for this Court's review.

I. THE GOVERNMENT CONCEDES THE SPLIT.

The government concedes that the "the First, Third, and Fourth Circuits have squarely confronted the question presented in published decisions." BIO 25. It admits, too, that the Fifth, Sixth, Tenth, and Eleventh Circuits have squarely addressed the question in unpublished decisions (agreeing with the government). *Id.* at 22-23. The split is thus at least 5-2.

Even this understates the depth of disagreement. The Eleventh Circuit regards *United States v. Jones*, 962 F.3d 1290 (11th Cir. 2020), as having answered the question presented. Although *Jones* did not involve individuals sentenced pursuant to Subparagraph C, *Jones* was express: A "court must determine whether the movant's offense triggered … section 841(b)(1)(A)(iii) or (B)(iii)," and "[i]f so, the movant committed a covered offense." *Id.* at 1301. This proposition's flip side—that individuals sentenced under Subparagraph *C do not* have "covered offenses"—was necessary to *Jones*. *Jones* rejected the argument that, under *Apprendi*, "courts may not, in making the 'covered offense' determination, consider a previous drug-quantity finding that was necessary to trigger [a] statutory penalty" under Subparagraphs A or B "if [that finding] was made by a judge." *Id.* at 1302. That position, the Eleventh Circuit explained, would mean that courts would have to regard individuals as "punish[ed] [under] section 841(b)(1)(C)," even if they were sentenced under Subparagraphs A or B. And that approach was intolerable, the Eleventh Circuit said,

because it "would mean that a movant convicted before *Apprendi* is ineligible for relief … because the Fair Sentencing Act did not modify the statutory penalties for offenses involving only a detectable amount of crack." *Id.* The absurdity *Jones* identified follows only if Subparagraph C is not a "covered offense."

Myriad Eleventh Circuit decisions now hold that Subparagraph C is not a "covered offense." They are unpublished because they read *Jones* as dispositive. *United States v. Foley*, 798 F. App'x 534, 536 n.3 (11th Cir. 2020); *United States v. Cunningham*, 824 F. App'x 835, 837 (11th Cir. 2020); *United States v. Dixon*, No. 19-14708, __ F. App'x __, 2020 WL 5569511, at *3 (11th Cir. Sept. 17, 2020); *United States v. Terry*, No. 20-10482, __ F. App'x __, 2020 WL 5640801, at *2 (11th Cir. Sept. 22, 2020).

United States v. Hudson, 967 F.3d 605 (7th Cir. 2020), adds another circuit to the split. The government acknowledges that *Hudson* "stated … that … a conviction for 'possession with intent to distribute less than 5 grams of crack cocaine'" is a "'covered offense[].'" BIO 24 (quoting 967 F.3d at 607). While the government dismisses this statement as a "passing" remark, *id.*, *Hudson*'s position is clear.

II. THE GOVERNMENT FAILS WITH ITS ARGUMENTS THAT THE CONCEDED 5-2 SPLIT DOES NOT WARRANT REVIEW.

Whatever the precise circuit count, the question presented merits review. The Third Circuit acknowledged that the disagreement has "significant implications for many federal prisoners." Pet. App. 2a.

The American Civil Liberties Union, R Street Institute, and Rutherford Institute agree. ACLU Br. 2. The National Association of Criminal Defense Lawyers does, too. NACDL Br. 3-4. The government's arguments that the issue "does not warrant … review at this time," BIO 25, are makeweights.

First, the government says the split is "recent." BIO 25. That is because the *First Step Act* is recent. That this issue has generated so many circuit decisions, in just two years since the Act's passage, underscores why review is warranted.

Second, the government says the split is "shallow." But the seven circuits (on the government's count) that have weighed in constitute more *half* the circuits hearing criminal cases. Even as to "published decisions," BIO 25, the split is no less than 2-2 (given *Jones*). Even were the split 2-1, the Court routinely reviews such splits—and here, the many unpublished decisions heighten the need for review. *E.g.*, *Rotkiske v. Klemm*, 139 S. Ct. 1259 (2019) (2-1 split); *Citgo Asphalt Refining Co. v. Frescati Shipping Co., Ltd.*, 139 S. Ct. 1599 (2019) (2-1 split); *Retirement Plans Comm. of IBM v. Jander*, 139 S. Ct. 2667 (2019) (2-1 split); *Intel Corp. Inv. Pol'y Comm. v. Sulyma*, 139 S. Ct. 2692 (2019) (1-1 split).

Absent review, disagreement is certain to persist. The government notes that no court has gone en banc. BIO 25. But that is largely because the government did not seek review of its First and Fourth Circuit losses. The government also avers that those "decisions were rendered without the benefit of the Third Circuit's analysis." *Id.* The First and Fourth Circuits, however,

considered and rejected exactly the *arguments* the Third Circuit accepted. *United States v. Smith*, 954 F.3d 446, 449 (1st Cir. 2020); *United States v. Woodson*, 962 F.3d 812, 817 (4th Cir. 2020).[1]

There is no chance the First Circuit—with five active judges—will depart from Judge Kayatta's unanimous panel opinion. There is also no chance the Fourth Circuit will jettison Judge Rushing's unanimous panel decision. And there is no chance *all five* circuits rejecting Birt's position will reverse themselves. *Cf. United States v. Aller*, No. 00-CR-977, 2020 WL 5494622, at *14 (S.D.N.Y. Sept. 11, 2020) (following *Smith* post-*Birt*).

Third, the government avers that the issue is "of limited and diminishing practical importance." BIO 25. None of its arguments, however, withstands scrutiny.

Principally, the government urges that the question presented affects only individuals who committed offenses "'before August 3, 2010.'" *Id.* The government posits that, "presumably," that number will be limited because individuals sentenced under Subparagraph C "never faced a statutory minimum" or have received relief under "retroactive Guidelines amendments." *Id.*

The government's speculation, however, ignores what is *actually happening*. The parties have cited eight circuit decisions squarely addressing the question

---

[1] The government, oddly, emphasizes that *Smith* "declined to decide whether its interpretation of 'covered offense' had implications for offenses not involving crack." BIO 25. That reservation is irrelevant: This case—like *Smith*—is about crack.

presented, which is pending in at least eight more circuit cases.[2] The Petition cited nine district court decisions (there are many more). Pet. 22-24. While the government avers that this "may well represent the high-water mark," BIO 26, certiorari will rarely be more warranted than when (as the government concedes) lower courts are both flooded and split. Indeed, the deluge will continue. Subparagraph C carries a maximum of at least 20 years, which a prior "felony drug offense" boosts to 30 years. 21 U.S.C. § 841(b)(1)(C). So, this issue will remain live until 2040.

The government claims that individuals who have litigated *and lost* on eligibility cannot apply again because Section 404(c) precludes successive motions if a motion was "denied after a complete review … on the merits." BIO 26. But to begin, that argument ignores the many cases still pending. Anyway, the government's view is wrong. Individuals who lose on threshold eligibility grounds have not received a "*complete* review … *on the merits*." Moreover, were the government right, that would only make review more urgent—because any defendant who loses on "covered offense" grounds could never reapply, even if this Court ultimately agreed with the First and Fourth Circuits.

---

[2] *United States v. Jennings*, No. 20-2677 (2d Cir.); *United States v. Wilson*, No. 20-3327 (6th Cir.); *United States v. Brown*, No. 20-5312 (6th Cir.); *United States v. Russell*, No. 20-5458 (6th Cir.) (argument set for Jan. 12, 2021); *United States v. Hogsett*, No. 19-3465 (7th Cir.) (argument held Oct. 2, 2020); *United States v. March*, No. 20-2240 (8th Cir.) (argument notice dated Nov. 2, 2020); *United States v. Simmons*, No. 19-13386 (11th Cir.); *United States v. Copeland*, No. 20-12106 (11th Cir.).

The government's alternative argument—that "the question presented concerns only the antecedent issue of eligibility," BIO 26—is more makeweight. This Court routinely reviews threshold questions of eligibility for discretionary relief. *E.g.*, *Niz-Chavez v. Barr*, No. 19-863, 2020 WL 3038288 (U.S. June 8, 2020) (cancellation of removal); *Barton v. Barr*, 140 S. Ct. 1442, 1445 (2020) (same); *Pereira v. Sessions*, 138 S. Ct. 2105, 2109 (2018) (same). Such threshold legal questions are precisely what this Court *should* review.

The government speculates that few Subparagraph C offenders will "actually receive sentence reductions." BIO 26. Again, reality intervenes. Within one year of the First Step Act, courts "granted 2,387 reductions" under Section 404. U.S. Sentencing Comm'n, *The First Step Act of 2018: One Year of Implementation* 43 (2020). The average was 71 months, or 26%. *Id.* Individuals sentenced under Subparagraph C can expect similar success—indeed, more, because their offenses were lesser. The *Smith* movant received time served. Amended Judgment, *United States v. Smith*, No. 1:05-cr-00259-SM1 (D.N.H. Apr. 10, 2020), Dkt. 85.

III. THE OPPOSITION CONFIRMS THIS CASE IS A SUITABLE VEHICLE.

The government's only "vehicle" argument is not a genuine vehicle issue. BIO 26. The government predicts that, if Birt wins, on remand he will not "actually receive [a] sentence reduction." *Id.* But that has nothing to do with the question presented, which concerns eligibility. This Court routinely hears and rejects similar arguments. *E.g.*, BIO at 17-19, *Niz-Chavez*, No. 19-863,

2020 WL 1972213; BIO at 19-20, *Pereira v. Sessions*, 138 S. Ct. 735 (2018) (No. 17-459), 2017 WL 6399165.

Regardless, Birt can expect meaningful relief. The best evidence is that, when Birt sought relief based on the retroactive Guidelines amendments, the court "lowered [his] sentence to the bottom of the revised applicable guideline range" (210 months)—which "was as much as the statute and the guidelines permitted." *United States v. Birt*, 479 F. App'x 445, 446 (3d Cir. 2012); *see* Pet. 13. Because Birt received his original sentence when the Guidelines were mandatory, no court has *ever* had discretion to give him a below-Guidelines sentence. Pet. 13; BIO 3-4.

Birt is well-positioned to seek a further reduction. The government stresses that Birt committed "three … crack cocaine" offenses. BIO 26-27. But none was violent, and his offense of conviction occurred 20 years ago. Meanwhile, Birt has rehabilitated himself—and the government has conceded that the district court could "consider post-offense conduct, including … rehabilitative efforts." M.D. Pa. Dkt. No. 120 at 10; Pet. 14. Birt has completed many rehabilitative programs, including a selective "Victim Impact" program requiring acceptance of responsibility. M.D. Pa. Dkt. 113 at 7. He has held steady jobs. *Id.* And he married Tamika Birt, who describes him as "a changed man" thanks to the "wisdom and knowledge" gained in prison. M.D. Pa. Dkt. 121 at 4.

This case is an especially strong vehicle because Birt, unlike some movants, remains years away from his

scheduled release—in 2024. M.D. Pa. Dkt. 117 at 2. He has an overriding personal stake in prevailing.[3]

IV. THE GOVERNMENT'S MERITS ARGUMENTS FAIL.

The government's lengthy merits argument, BIO 11-22, is premature and unpersuasive. Crack-cocaine defendants sentenced under Subparagraph C have "covered offenses" because the Fair Sentencing Act "modified" the "statutory penalties" applicable to their "violation of a Federal criminal statute." The Fair Sentencing Act modified *all* the statutory penalties for crack-cocaine offenses—some directly, others by cross-reference—with effects across the board. Pet. 28-34. The government's contrary arguments fail.

Principally, the government argues that the Fair Sentencing Act did not "amend the text of" Subparagraph C. BIO 5. But that ignores the cross-reference to Subparagraphs A and B, which changed Subparagraph C's range for crack cocaine from 0-to-5 grams to 0-to-28 grams. Pet. 30-31. As Judge Rushing explained, the Fair Sentencing Act thus "'modified'

---

[3] A petition has been filed from the Eleventh Circuit in *Terry v. United States*, No. 20-5904 (U.S. Oct. 5, 2020). Birt's petition, however, is a superior vehicle. The *Terry* petitioner is due to be released on September 22, 2021, *see* Federal Bureau of Prisons, Find an Inmate, https://www.bop.gov/inmateloc/, and received the statutory minimum 6 years' supervised release. *Terry* Pet. App. 5a. If the Court grants certiorari and rules in the *Terry* petitioner's favor, any resentencing could not occur until (at earliest) shortly before his anticipated release, leaving him little personal stake. The Court should grant this petition and hold *Terry*.

[Subparagraph C] by altering the crack cocaine quantities to which its penalty applies." *Woodson*, 962 F.3d at 816.[4]

The government's claim that only direct textual amendments can "modify," BIO 5, also cannot be squared with *Nielsen v. Preap*, 139 S. Ct. 954 (2019). *Preap* read the mandatory detention provision of 8 U.S.C. § 1226(c) "as modifying its counterpart"—the discretionary detention and release provision of § 1226(a)—based on a similar cross-reference. 139 S. Ct. at 966; *see* ACLU Br. 9-10; *accord Woodson*, 962 F.3d at 815-16. Likewise here, the Fair Sentencing Act—in its plain text and practical effect—modified the "statutory penalties" for all quantities of crack and changed the entire framework for crack sentencing. Pet. 6-7, 32. That is why, in response, the Sentencing Commission changed the Guidelines at every level. *Id.*

The government pivots to "purpose"—but gets nowhere. It says Congress enacted Section 404 to "provide[] a mechanism for defendants for whom the retroactive Guidelines amendments provided incomplete relief to seek a sentence reduction"; avers that only defendants with "statutory minimum sentences" faced such limits; and proclaims that allowing individuals like Birt to invoke Section 404 would yield a "windfall" because Birt was "never subject to" a

---

[4] Contra the government, "the facts of petitioner's case" do not "demonstrate that [Subparagraph C] has no 'upper bound.'" BIO 20. Birt faced more serious charges and pled guilty to *no* "specifi[ed]" amount. Pet. App. 3a. This does not show Subparagraph C lacks an "upper bound."

minimum. BIO 12, 14. The government ignores, however, that the retroactive Guidelines amendments also "provided incomplete relief" to people *like Birt*. When the Commission retroactively amended the Guidelines, Birt could not seek a below-Guidelines sentence—indeed, Birt has never had a sentencing hearing where the court was free to sentence below the Guidelines. *Supra* 8. In creating a remedy for resentencing individuals "as if" the Fair Sentencing Act had been in effect, Congress defined "covered offense" broadly to allow relief for all those who might have received a different sentence after the Act than they received when sentenced.

Relatedly, the government stresses that individuals sentenced for less than 5 grams, or unspecified amounts, "were already subject to" the same 0-to-20-year penalty range. BIO 19. But the government begrudgingly admits that the same is true for individuals "whose offenses involved 280 grams or more" and sentenced under Subparagraph A. BIO 15. While the government avers that it would be "reasonable" to construe "covered offense" to exclude such individuals, the government offers nothing to back that *ipse dixit*: It does not offer any interpretation of "covered offense" that could effect that result, *id.*; admits that courts of appeals have universally held that such individuals are eligible for relief, *id.* (citing *United States v. Davis*, 961 F.3d 181, 187 (2d Cir. 2020) (collecting cases)); and elsewhere affirms that Subparagraph A defendants are "generally eligible … under Section 404," BIO 12. In reality, Congress included those individuals for the same reason it included individuals sentenced under Subparagraph C:

That is the only way to ensure equal treatment of individuals sentenced before and after the Fair Sentencing Act.

Nor will a ruling for Birt usher "serious and unintended consequences." BIO 19. The government is wrong that defendants convicted of offenses involving "*all* controlled substances" could suddenly receive resentencing. BIO 20. For one thing, "Section 2 or 3 of the Fair Sentencing Act" altered penalties only for *crack cocaine*, and Subparagraph C's range changed (via the cross-reference to Subparagraphs A and B) only for crack. The government cannot cite a single case yielding the consequences it warns about. *E.g.*, *United States v. Gray*, No. 4:12-CR-54, 2020 WL 1943476, at *1-2 (E.D.N.C. Apr. 22, 2020) (heroin distribution not a "covered offense").[5]

The First and Fourth Circuits have explained that, for multiple independent reasons, the position of the government and Third Circuit are wrong. This Court should grant certiorari to restore a uniform and correct interpretation to the phrase "covered offense" under the First Step Act. Unless the Court does so—and does so now—many individuals sentenced for low-level crack offenses will languish in prison when, had they been sentenced after the Fair Sentencing Act, they would have received shorter sentences.

---

[5] The "as if" clause yields the same result. The government manufactures a distinction between "eligibility" and "procedures," BIO 18, without attempting to explain how the "as if" clause could permit relief for an individual convicted of a non-crack offense.

CONCLUSION

The petition should be granted.

Respectfully submitted,

HEIDI R. FREESE
FREDERICK W. ULRICH
TAMMY L. TAYLOR
FEDERAL PUBLIC DEFENDER
MIDDLE DISTRICT OF
PENNSYLVANIA
100 Chestnut St.
Suite 306
Harrisburg, PA 17101
(717) 782-2237

ZACHARY C. SCHAUF
Counsel of Record
ELIZABETH B. DEUTSCH
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
zschauf@jenner.com