

No. 20-7474

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IN THE  
**Supreme Court of the United States**

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EZRALEE J. KELLEY,  
*Petitioner,*

v.

UNITED STATES OF AMERICA,  
*Respondent.*

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

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**SUPPLEMENTAL BRIEF OF PETITIONER**

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**SUPPLEMENTAL BRIEF OF PETITIONER**

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Last week, after Petitioner submitted her reply brief in support of certiorari, the Seventh Circuit issued a published opinion taking a position on the circuit split that is the subject of this petition. In *United States v. Fowowe*, \_\_ F.3d \_\_, 2021 WL 2450405 (7th Cir. June 16, 2021), the Seventh Circuit aligned itself with the First, Fifth, and Sixth Circuits, holding that “the First Step Act authorizes but does not require a district court to apply intervening judicial decisions” when deciding whether to impose a reduced sentence. *Id.* at \*7.

Importantly, the court recognized that the Ninth and Eleventh Circuits have adopted a more restrictive approach by imposing “limits on a district court’s § 404(b) discretion” by requiring courts to disregard legal changes that were not “mandated by the 2010

Fair Sentencing Act.” *Id.* (internal quotation marks omitted). The Seventh Circuit acknowledged the “tension” between its approach and that of these “sister circuits,” but was not “dissuade[d]” from adopting a contrary approach. *Id.* at \*9.<sup>1</sup>

If anything, the Seventh Circuit understated the extent of the disagreement among the circuits. Although the court recognized that the Fourth Circuit took a third approach—by “requir[ing] a district court to apply an intervening judicial decision in recalculating a defendant’s sentencing range,” *id.* at \*6—it apparently did not locate decisions in the Tenth and Third Circuits reaching the same conclusion. See *United States v. Murphy*, \_\_ F.3d \_\_, 2021 WL 2150201, at \*7 (3d Cir. May 27, 2021); *United States v. Dymond Brown*, 974 F.3d 1137, 1146 (10th Cir. 2020); *United States v. Crooks*, 997 F.3d 1273, 1278-79 (10th Cir. 2021).

Under the approach followed by the First, Fifth, Sixth, and now Seventh Circuits—or the approach followed by the Fourth, Third, and Tenth Circuits—the District Court’s order in this case would have been reversed. *Cf.* Pet’r Reply Br. 5.

This split is getting worse—on a near-weekly basis. Further delay in resolving the conflict serves no purpose. As the steady flow of opinions addressing this issue demonstrates, lower courts are handling these

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<sup>1</sup> Further underscoring the conflict in the legal landscape, the Seventh Circuit mistakenly included the Fifth Circuit in this camp, having not accounted for the latter court’s suggestion in *United States v. Robinson*, 980 F.3d 454 (2020), that intervening judicial decisions might be considered as part of the Section 3553(a) analysis. See *id.* at 462-465.

cases at a rapid clip. Those courts require timely and authoritative guidance from this Court.

**CONCLUSION**

The petition should be granted.

Respectfully submitted,

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