No. 21-5348

IN THE

Supreme Court of the United States

JAMES H. BATES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF OF PETITIONER

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The government does not dispute that the Courts of Appeals are divided over whether judges *must* consider the § 3553(a) factors in First Step Act proceedings. *See* Opp. Br. at 14. Nor does it dispute that the district court denied Mr. Bates's motion using generic language recycled from previous Section 404 denials—categorically denying relief to an entire class of eligible defendants without any substantive analysis of their individualized circumstances. Pet. at 8. Nevertheless, the government opposes certiorari in this case because, in its view, (1) the questions presented are not important enough to merit this Court's review, and (2) the identified circuit conflicts are not actually implicated in this case. Opp. Br. at 10–18. The government is incorrect on both points. For the reasons discussed in Mr. Bates's petition and below, this Court should grant certiorari in his case or, alternatively, hold his petition pending disposition of similar cases before this Court.

I. The district court's ruling shows that it failed to conduct a full, renewed consideration of the § 3553(a) factors.[1]

As the government recognizes, there is a clear split in authority over whether courts must (or may) consider the § 3553(a) factors in deciding whether to reduce a sentence under Section 404 of the First Step Act. Pet. at 11–13. That split has deepened since the filing of Mr. Bates's petition a few months ago, with the current balance of published authority divided at 6-4.

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[1] The district court's decision was inadvertently omitted from the appendix to Mr. Bates's petition for writ of certiorari. Accordingly, a copy is attached as the Appendix to this Reply.

Six courts—the First, Second, Seventh, Eighth, Tenth, and Eleventh Circuits—now have explicitly held in published decisions that consideration of the factors is merely permissive, not required. *See United States v. Concepcion*, 991 F.3d 279, 290 (1st Cir. 2021), *cert. granted*, __ S. Ct. __, 2021 WL 4464217 (U.S. Sept. 30, 2021) (No. 20-1650); *United States v. Moyhernandez*, 5 F.4th 195, 198 (2d Cir. 2021), *petition for cert. filed* (U.S. Oct. 19, 2021) (No. 21-6009); *United States v. Fowowe*, 1 F.4th 522, 524 (7th Cir. 2021); *United States v. Moore*, 963 F.3d 725, 727 (8th Cir. 2020); *United States v. Mannie*, 971 F.3d 1145, 1158 n.18 (10th Cir. 2020); *United States v. Stevens*, 997 F.3d 1307, 1316 (11th Cir. 2021). Four others—the Third, Fourth, Sixth, and D.C. Circuits—have disagreed, holding in published decisions that renewed consideration of the § 3553(a) factors is required in Section 404 proceedings. *See United States v. Easter*, 975 F.3d 318, 326 (3d Cir. 2020); *United States v. Chambers*, 956 F.3d 667, 674 (4th Cir. 2020); *United States v. Smith*, 959 F.3d 701, 703 (6th Cir. 2020); *United States v. Lawrence*, 1 F.4th 40, 43–44 (D.C. Cir. 2021).

The government primarily argues that Supreme Court review of this divisive § 3553(a) question is unwarranted because no Court of Appeals has *forbidden* district courts from considering them, and many district courts consider them even when they are not required. *See* Gov't Br. in Opp., at 12–14, *Houston v. United States*, No. 20-1479 (U.S. July 21, 2021); *see also* Opp. Br. at 14 (referring to its opposition arguments in *Houston*). That argument disregards the central importance of § 3553(a) in ensuring fairness, consistency, and uniformity in the federal system. Indeed, this Court has recognized that the Sentencing Reform Act was intended to

"constrain sentencing courts' discretion in important respects," including by "specifying various factors that courts *must* consider in exercising their discretion." *Pepper v. United States*, 562 U.S. 476, 489 (2011) (emphasis added). It also has held that the failure to fully consider those factors constitutes a "significant procedural error" and abuse of discretion mandating reversal. *Gall v. United States*, 552 U.S. 38, 51 (2007). Allowing disparate enforcement of that requirement in Section 404 proceedings undermines the statute's purpose, especially considering that every Section 404 applicant has at least a decade of new information relevant to the § 3553(a) analysis.

The government separately argues that the § 3553(a) split is "not actually implicated" in Mr. Bates's case, claiming that the district court "expressly considered the Section 3553(a) factors" and "the totality of the facts" in reaching its decision. *See* Opp. Br. at 12, 15. But that is a misreading of the district court's ruling. The Fifth Circuit has held that, in Section 404 proceedings, "[t]he district court decides on a new sentence by *placing itself in the time frame of the original sentencing*, altering the relevant legal landscape only by the changes mandated by the 2010 Fair Sentencing Act." *United States v. Hegwood*, 934 F.3d 414, 418 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 285 (2019) (emphasis added). The district court quoted that holding and "appl[ied] that reasoning" when it concluded that a sentence reduction was not "in order based on the totality of the facts." App. at 5. In other words, the court relied on the "totality of the facts" as they existed at Mr. Bates's original sentencing to deny him relief. Indeed, the district court only addressed a few, select § 3553(a) factors that

were "before the Court at the time of Bates's original sentencing" to find that his case was not "suitable" for resentencing. App. at 5–6. And, as discussed below, the court's only reference to Mr. Bates's "current characteristics" was a single paragraph at the end of its decision, in which the court stated that it "need not consider" post-conviction conduct before dismissing his arguments without any individualized analysis or consideration. App. at 6–7.

Finally, the government argues that this Court should deny certiorari because the Fifth Circuit has not explicitly weighed in on this question. Opp. Br. at 15–16. That should not bar relief in this case. The district court made clear that it did not believe it had to consider all of the § 3553(a) factors, much less conduct a renewed analysis of them, and Mr. Bates should not be penalized for the Fifth Circuit's failure to meaningfully review that decision or reach the central legal questions. If that were true, Courts of Appeals could avoid scrutiny from this Court by routinely issuing barebones decisions like the one in this case.

Accordingly, this Court should grant certiorari on the first question presented in Mr. Bates's petition. Alternatively, if the Court does not believe that Mr. Bates's case presents the best vehicle for addressing this circuit split, it should grant certiorari in *Houston* and hold Mr. Bates's petition pending resolution of that case.

II. The district court provided no individualized explanation for its rejection of Mr. Bates's mitigating arguments.

The government's opposition ignores the fact that the district court used identical, generic statements recycled from other Section 404 denials to reject Mr. Bates's mitigating arguments. *See* Pet. 8, 13–16. The court did not provide any

analysis or individualized explanation for why his post-sentencing conduct "does not warrant a sentence reduction." App. at 7. Instead, it summarily dismissed his arguments using language that was copied from denial orders in other cases—specifically, other cases in which the eligible defendant was a career offender whose Guidelines range remained unchanged. *See* Pet. at 8. And while the government repeatedly refers to the district court's "seven-page written decision," Opp. Br. at 10, 13, 16, it fails to acknowledge that only two full pages of the order discuss its reasoning, and only a single paragraph at the end addresses Mr. Bates's "current characteristics" and arguments. *See* App. at 5–7. That final paragraph simply notes that the court "need not consider" post-conviction conduct before concluding that it does not warrant a reduction. App. at 8.

The government suggests that Mr. Bates is demanding something more than an individualized evaluation of his motion, but that is not the case. For example, the government claims that Mr. Bates is "criticizing the court for using similar language in other orders." Opp. Br. at 13. But the language is not similar—it is substantively identical, copied directly from previous denial orders and modified only to substitute Mr. Bates's specific mitigation. Pet. at 8. The government also argues that the court is not "required to pen a lengthy exegesis or to mechanically recite and reject each argument put forward by a defendant." Opp. Br. at 14. That is a far cry from the relief that Mr. Bates has actually requested: an individualized ruling on his motion that is distinguishable from other Section 404 denials. The district court's explanation was plainly inadequate under this Court's precedent, *see* Pet.at 16–19, and the Fifth

Circuit's affirmance conflicts with the approaches taken by other circuits. *See* Pet. at 13–16. This Court should thus intervene to clarify the degree of explanation required of district courts in these proceedings.

III. This Court should alternatively hold Mr. Bates's petition pending resolution of *Concepcion v. United States.*

As the government noted in its response, this Court granted certiorari in *Concepcion v. United States*, No. 20-1650, after Mr. Bates filed his petition for writ of certiorari. While the government asserts that this petition should not be held pending resolution of that case, Opp. Br. at 18–19, Mr. Bates respectfully disagrees. It is true that there have been no intervening legal developments that would have impacted Mr. Bates's Section 404 proceedings. However, this Court's ruling on whether intervening *factual* developments must or may be considered could impact Mr. Bates case.

In *Hegwood*, the Fifth Circuit announced the "mechanics" for Section 404 proceedings, stating that the court "plac[es] itself in the time frame of the original sentencing, altering the relevant legal landscape only by the changes mandated by the 2010 Fair Sentencing Act." 934 F.3d at 418. The Fifth Circuit later held that district courts are not "obliged to consider [a defendant's] post-sentencing conduct." *United States v. Jackson*, 945 F.3d 315, 321 (5th Cir. 2019). Relying on *Hegwood*, the *Jackson* panel explained that it would "make little sense to mandate . . . that the court consider a defendant's *post-sentencing* conduct, which would be to peer outside 'the time frame of the original sentencing.'" *Id.* at 321–22 (emphasis in original). Thus, as the petition in *Concepcion* noted, the Fifth Circuit has held that district

courts "are not required to consider updated facts" in Section 404 proceedings. Pet. for Writ of Certiorari, at 4, *Concepcion*, No. 20-1650 (May 24, 2021).

In response to Mr. Bates's post-conviction conduct arguments, the district court cited *Jackson* and asserted that it "need not consider" post-conviction conduct in deciding whether to resentence him. App. at 6. It then summarily dismissed his arguments using conclusory language from other Section 404 denials, stating:

> In any event, these characteristics would need to be weighed against the other circumstances of defendant and his offense conduct. Considering that here, Bates's conduct does not warrant a sentencing reduction.

App. at 7; *see also* Pet. at 7. Notably, the court did not address Mr. Bates's current age or medical conditions at all in denying relief. *See* Pet. at 5–6, 8.

The district court's order thus shows that it did not meaningfully consider Mr. Bates's post-sentencing conduct in denying his motion, believing that such consideration was not required. Instead, it relied on *Jackson* to avoid delving into the merits of Mr. Bates's mitigation evidence and arguments. Mr. Bates's arguments on appeal and in his petition do not reflect mere "dissatisfaction with the court's weighing" of the sentencing factors, as the government suggests at 13, and the district court's use of the word "weighed" in its decision does not remedy its barebones denial. To the contrary, the record shows that Mr. Bates was deprived of fair consideration and reasoned judgment in his Section 404 proceeding. Accordingly, this Court's ruling on whether district courts must consider intervening factual developments in deciding whether to reduce a sentence under Section 404 of the First Step Act may impact the proper disposition of Mr. Bates's case, and this Court should therefore

hold his petition pending resolution of *Concepcion* if it does not grant certiorari on either question presented in Mr. Bates's petition.

CONCLUSION

For the reasons discussed in the petition for writ of certiorari and above, this Court should grant certiorari on the questions presented or, alternatively, hold this petition pending resolution of *Concepcion* and (if granted certiorari) *Houston*.

Respectfully submitted,

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