No. 22-1239

In the
Supreme Court of the United States

MICHAEL JEROME FILES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

REPLY BRIEF OF PETITIONER

John C. Neiman, Jr.
Caleb C. Wolanek
Counsel of Record
MAYNARD NEXSEN PC
1901 Sixth Avenue North
Suite 1700
Birmingham, AL 35203
(205) 254-1000
cwolanek@maynardnexsen.com

October 2023

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Briefs

Other Authorities

REPLY BRIEF OF PETITIONER

The Brief in Opposition never defends the Eleventh Circuit's construction of § 404 of the First Step Act.[1] Even though § 404(b) authorizes courts to "impose a reduced sentence" for defendants like Petitioner, the Eleventh Circuit and other courts have invented a rule that § 404 can never permit relief on a so-called "non-covered" offense—even if punishment for that offense was inflated by being part of the same sentencing package as a "covered" crack-cocaine offense. In the BIO, the United States rejects that rule once again, broadly agreeing with Petitioner—and the Seventh Circuit—that "Section 404 authorizes a district court to reduce a sentence for a noncovered offense" in at least some cases. BIO 11.

The United States, though, opposes certiorari by trying to minimize the importance of the question presented and arguing this case is a poor vehicle to resolve the entrenched circuit split. Neither contention has merit.

The scope of available relief under § 404 is, in fact, "important." Pet. App. 24a (Newsom, J., concurring). The question presented matters for countless defendants, as lower courts continue to grapple with the issue. And the facts here illustrate the stakes. Over two years ago, the District Court commended Petitioner's "laudable record of rehabilitation" and observed that "every single one of his co-conspirators … has already been released from prison." Pet. App. 44a. So under § 404, the District Court imposed a reduced sentence

---

[1] *See* First Step Act of 2018, Pub. L. No. 115-391, § 404, 132 Stat. 5194, 5222 (codified at 21 U.S.C. § 841 note).

of "time served" for eleven crack-cocaine offenses. Pet. App. 45a. Petitioner's remaining powder-cocaine offenses are all related to those crack-cocaine offenses. Yet both lower courts wrongly held that the District Court lacked authority to grant any relief on those interconnected offenses. Without that error, Petitioner likely would have been released from prison years ago.

To be sure, one aspect of Petitioner's sentence—his term of imprisonment—is scheduled to end soon. But the United States is wrong to argue that Petitioner's release from prison will moot this case or create a vehicle problem. For years to come, Petitioner will still have to serve other parts of his sentence, and his over-incarceration will still have consequences. Petitioner has a concrete interest in obtaining relief, and there is a real possibility that the District Court could grant effectual relief. The government's attempt to run out the clock is no obstacle. This Court should therefore grant review.

A. There is an acknowledged circuit split on the question presented.

The government does not dispute that lower courts are divided on the question presented. Nor could it, as lower courts have flagged an entrenched circuit split. *See, e.g.*, *United States v. Gladney*, 44 F.4th 1253, 1262 n.5 (10th Cir. 2022), *petition for cert. pending*, No. 23-5556 (July 18, 2023); *see also* Pet. 16–19.

If Petitioner were in the Seventh Circuit, for instance, then he could have received a reduced sentence for his covered crack-cocaine offenses and his related powder-cocaine offenses. As that Circuit held in *United States v. Hudson*, so long as a defendant has a covered offense, "a court may consider a defendant's

request for a reduced sentence, *including for non-covered offenses* that are grouped with the covered offenses to produce the aggregate sentence." 967 F.3d 605, 611 (7th Cir. 2020) (emphasis added). Courts in other circuits apply § 404 the same way. *See, e.g.*, *United States v. DesAnges*, No. 95-cr-70046, 2023 WL 3309876, at *10 (W.D. Va. May 8, 2023) ("[T]he court will apply the sentencing package doctrine to [the defendant's] sentence and examine his entire sentence although only the crack cocaine conviction was a 'covered offense.'"); Pet. 18–19.[2]

Yet the Eleventh Circuit holds that under § 404, a court "'is permitted to reduce a defendant's sentence … only on a "covered offense."'" Pet. App. 23a (quoting *United States v. Denson*, 963 F.3d 1080, 1089 (11th Cir. 2020)). Similarly, the Tenth Circuit held that "the First Step Act prohibits a district court from reducing the sentence on a non-covered offense." *Gladney*, 44 F.4th at 1262. And the Second Circuit, too, construed § 404 to mean that a defendant is "ineligible" for relief on a non-covered offense. *United States v. Young*, 998 F.3d 43, 49 (2d Cir. 2021).

The United States tries to downplay this circuit split as mere "tension," BIO 10, 13, but the divide is sharp and shows no signs of resolving on its own. If Petitioner were in a different circuit, then he likely would have been released from prison years ago. But because Petitioner is in the Eleventh Circuit, the District Court's decision to impose a reduced sentence of

---

[2] *See also United States v. Watkins*, No. 19-7899, 2023 WL 6491998, at *1–2 (4th Cir. Oct. 5, 2023) (per curiam) (vacating denial of § 404 relief after the United States agreed the district court could revisit the sentence for a non-covered offense).

"time served" for crack-cocaine offenses had no real effect on Petitioner's total time in prison. Whether defendants are eligible for meaningful relief under § 404 should not turn on geography; all defendants should instead have an equal chance at the relief Congress extended. Only this Court can provide that essential uniformity.

B. The question presented is important.

Despite the acknowledged circuit split, the United States contends the question presented has "declining prospective importance" because defendants could complete their sentences before obtaining relief. BIO 15. But that argument quickly falls apart.

This Court previously recognized that the scope of § 404 relief is important. *Terry v. United States*, 141 S. Ct. 1858 (2021), and *Concepcion v. United States*, 142 S. Ct. 2389 (2022), were both about § 404's scope. *Terry* focused on the definition of "covered" offenses, 141 S. Ct. at 1862, and *Concepcion* focused on how courts could exercise discretion, 142 S. Ct. at 2396. In opposing certiorari in *Terry*, the United States argued that § 404's scope had "diminishing practical importance" because some defendants may have completed their original sentences without obtaining relief. Br. in Opp. 27, *Terry v. United States*, 141 S. Ct. 1858 (2021) (No. 20-5904). Yet this Court rejected that argument and granted review in both *Terry* and *Concepcion*.[3]

[3] The United States notes that relief is discretionary, BIO 15, but that was no obstacle to review in *Terry* or *Concepcion*, either. *See also, e.g.*, *Hughes v. United States*, 138 S. Ct. 1765 (2018) (reviewing eligibility for discretionary sentencing relief).

The Court should do the same here. Section 404's "very purpose is to reopen final judgments," *Concepcion*, 142 S. Ct. at 2398 n.3, and Congress enacted that statute "to rectify disproportionate and racially disparate sentencing penalties," *United States v. White*, 984 F.3d 76, 90 (D.C. Cir. 2020). So as Judge Newsom —joined by Judge Tjoflat—wrote below, the First Step Act's proper scope is "important" and "has practical, real-world significance." Pet. App. 24a (Newsom, J., concurring).

Petitioner is far from the only person who has been (or will be) wrongly denied relief under § 404. Courts nationwide are still deciding whether—and to what extent—defendants with packaged crack-cocaine and other offenses are eligible for relief. *See, e.g.*, *Watkins*, 2023 WL 6491998.[4] This Court's prompt review is needed to ensure such defendants do not serve unfair sentences and are not denied meaningful relief under a misinterpretation of the law. That is especially true because once § 404 relief is "denied after a complete review of the motion on the merits," the First Step Act dictates that a district court cannot even "entertain" a successive motion. First Step Act § 404(c).

It is also no surprise that many defendants are still eligible for relief. Section 404 applies to defendants who committed offenses as recently as 2010. *See* First Step Act § 404(a). Given the interconnected nature of

---

[4] *See also, e.g.*, *United States v. Thompson*, No. 05-cr-141, 2023 WL 6216624 (D. Colo. Sept. 25, 2023), *appeal docketed*, No. 23-1319 (10th Cir. Oct. 12, 2023); *DesAnges*, 2023 WL 3309876; *United States v. Degout*, No. 94-cr-8, 2023 WL 3903277 (W.D. Va. June 8, 2023), *appeal docketed*, No. 23-6600 (4th Cir. June 21, 2023); *United States v. Watkins*, No. 08-cr-231, 2023 WL 2811658 (W.D. Pa. Apr. 6, 2023).

federal sentencing, *see* Pet. 26–28, countless such defendants received sentencing packages for related covered and non-covered offenses. And because 21 U.S.C. § 841(b)(1)(A) and (b)(1)(B) impose harsh penalties, many eligible defendants are no doubt still in prison. *See also* U.S. SENT'G COMM'N, FIRST STEP ACT OF 2018 RESENTENCING PROVISIONS RETROACTIVITY DATA REPORT, at tbl. 6 (Aug. 2022) (reporting that the average defendant resentenced under § 404 was serving 282 months), https://tinyurl.com/59pwtyx8. Some, of course, have already been released. But the United States does not even suggest that § 404 proceedings have ended for all defendants. And even when some defendants could seek relief for crack-cocaine offenses, many courts would not consider the merits of relief for related non-covered offenses—even when a crack-cocaine offense ratcheted up the total punishment. Correcting that error about the scope of available relief—and ensuring defendants do not spend any more time than necessary in prison—is important. By contrast, denying certiorari would let the government run out the clock while defendants are denied a chance the relief Congress chose to extend.

C. This case is a good vehicle.

The United States' main attempt to avoid review is to raise the specter of "vehicle" problems. This case, however, is a good vehicle for resolving the question presented.

To recap the facts, Petitioner has been in custody since 1997 and has diligently sought relief under § 404 since 2019. *See* Pet. 7, 11; Pet. App. 5a. Until, in 2021, the District Court imposed a reduced sentence of "time served" for crack-cocaine offenses, Pet. App. 45a, Petitioner's crack-cocaine offenses were packaged

with his powder-cocaine offenses. Petitioner was first sentenced to the maximum prison term for each offense, and in 2017—after amendments to the Sentencing Guidelines—the District Court uniformly lowered the longest prison terms to 30 years, regardless of the controlled substance involved. *See* Pet. 9–10.

The United States is right that, with "good time" credit, the prison term for Petitioner's remaining offenses is scheduled to end on November 8, 2023. After obtaining two extensions of time to file the BIO, the United States tries to use that release date to support a mootness argument. But "mere release of [a] prisoner does not mechanically foreclose consideration of the merits by this Court," *Sibron v. New York*, 392 U.S. 40, 51 (1968), and for two reasons, the United States cannot meet its "'heavy burden'" of showing this case is moot, *Michigan v. Long*, 463 U.S. 1032, 1042 n.8 (1983) (citation omitted).

First, even after Petitioner's term of imprisonment ends, his *sentence* will not be over: His sentence also includes concurrent terms of supervised release (ranging from two to five years) and a $100,000 fine. D.C. Dkt. No. 2395 at 37–38; *see also* 18 U.S.C. §§ 3551(b), 3583(a); *Mont v. United States*, 139 S. Ct. 1826, 1834 (2019) (explaining that imprisonment and supervised release are "part of the same sentence").

A case is moot "'only when it is impossible for a court to grant any effectual relief whatever to the prevailing party.'" *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (citation omitted). Section 404, however, is not limited to reducing terms of imprisonment; it authorizes courts to reduce a "sentence" as a whole. First Step Act § 404(b). And even when a term of imprison-

ment has been served, "a case is not moot" when another part of the sentence "is ongoing." *United States v. Ketter*, 908 F.3d 61, 66 (4th Cir. 2018); *see also, e.g.*, *United States v. Stevens*, 997 F.3d 1307, 1310 n.1 (11th Cir. 2021) (deciding the merits of a released defendant's § 404 appeal because he was on supervised release); *Young*, 998 F.3d at 51 (same); *United States v. Sutton*, 962 F.3d 979, 982–83 (7th Cir. 2020) (same).

Given the full extent of Petitioner's ongoing sentence, this case will not be moot anytime soon. The District Court observed that Petitioner sought "any sentencing relief" that the District Court "may be inclined to grant," Pet. App. 43a, and Petitioner has a concrete interest in relief.[5] And if Petitioner prevails, there is a real possibility the District Court could grant that relief—perhaps even on its own motion. *See* First Step Act § 404(b). Of course, the United States will be free to oppose relief on the merits. But whether, for example, the District Court can or should impose a shorter term of supervised release does not implicate mootness. Those types of questions about "the legal availability of a certain kind of relief" instead "confuse[] mootness with the merits." *Chafin*, 568 U.S. at 174; *see also Decker v. Nw. Env't Def. Ctr.*, 568 U.S. 597, 610 (2013).

Second, Petitioner's over-incarceration for his powder-cocaine offenses will continue to have adverse consequences because it delayed the start of supervised release. A ruling that the District Court erred will,

---

[5] The government cites *United States v. Juvenile Male*, but the defendant there "was no longer subject to" the conditions he challenged. 564 U.S. 932, 937 (2011) (per curiam). Petitioner, by contrast, is serving "an ongoing sentence." *United States v. Prophet*, 989 F.3d 231, 235 n.3 (3d Cir. 2021).

however, "necessarily inform" the evaluation of a motion under 18 U.S.C. § 3583(e)(1) or (e)(2) to terminate or reduce Petitioner's supervised release. *United States v. Epps*, 707 F.3d 337, 345 (D.C. Cir. 2013). That keeps this case from being moot. *See, e.g.*, *ibid.*; *Sutton*, 962 F.3d at 982–83; *United States v. Reyes-Barreto*, 24 F.4th 82, 86 (1st Cir. 2022); *United States v. D.M.*, 869 F.3d 1133, 1137–38 (9th Cir. 2017); *Johnson v. Pettiford*, 442 F.3d 917, 918 (5th Cir. 2006) (per curiam).[6]

Apart from mootness, the BIO mentions a pending petition in *Gladney v. United States* (No. 23-5556). If the United States means to suggest this Court should grant certiorari in *Gladney*, it never explains why that case is a better vehicle. The United States has instead argued that a threshold issue in *Gladney* is "waived." U.S. Resp. to Pet. for Reh'g En Banc 7, *United States v. Gladney*, 44 F.4th 1253 (10th Cir. Nov. 28, 2022) (No. 21-1159). Similarly, *Contrera v. United States* did "not squarely present" the "sentencing-package issue" because the sentencing court there "did not package" the relevant offenses. Br. in Opp. 15, 23, *Contrera v. United States*, 143 S. Ct. 511 (2022) (No. 21-8111). Here, by contrast, the District Court *did* package each of Petitioner's offenses, *see* Pet. 7–10, and whether § 404 permits relief for those related offenses "is

[6] For this reason, courts reject mootness arguments even when, for instance, the out-of-prison defendant had sought relief from a "term of imprisonment" under 18 U.S.C. § 3582(c)(2), *see D.M.*, 869 F.3d at 1137, or the government argues that supervised release is mandatory, *see Pope v. Perdue*, 889 F.3d 410, 414 (7th Cir. 2018). *See also, e.g.*, *In re Sealed Case*, 809 F.3d 672, 674 (D.C. Cir. 2016) (rejecting a mootness argument even when the substantive challenge was to the prison term).

squarely presented," Pet. App. 24a (Newsom, J., concurring). There is no reason to think any other case will present a better vehicle.

In sum, this case will not be moot anytime soon, and it is a good vehicle in which to answer an important and recurring question.

D. The government agrees that the Eleventh Circuit wrongly constricts the scope of relief under the First Step Act.

Finally, it bears repeating that the United States never defends the Eleventh Circuit's view that under § 404, courts are "'permitted to reduce a defendant's sentence … only on a "covered offense."'" Pet. App. 23a (citation omitted). The United States instead takes a contrary view: "Section 404 authorizes a district court to reduce a sentence for a noncovered offense" in at least some cases. BIO 11. In other words, "the Department of Justice supports the broader theory of eligibility that the Seventh Circuit has adopted." U.S. Br. 25, *United States v. Dale*, No. 23-1050 (6th Cir. July 21, 2023) (citing *Hudson*, 967 F.3d at 610); *see also Contrera* Br. in Opp. 11; Pet. 20–22.[7]

Relief for Petitioner's powder-cocaine offenses is, to use the government's phrasing, "consistent with the text and purpose of Section 404." BIO 11; *see* Pet. 22–29. Whether a defendant has a covered crack-cocaine offense is a threshold requirement for eligibility. *Hudson*, 967 F.3d at 610–11. But § 404(b) then provides that if a defendant is eligible for relief, the district court "may … impose a reduced sentence as if sections

[7] If this Court grants review, it may consider appointing an *amicus curiae* in support of the judgment below.

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) (citation omitted). "In sentencing-package cases" like this one, "the court in essence imposes a single 'sentence'" for related offenses. BIO 11 (citation omitted). Section 404(b) thus allows the District Court to grant relief on Petitioner's interconnected crack-cocaine and powder-cocaine offenses.

By contrast, the Eleventh Circuit's construction requires adding words to § 404(b), "such that the provision reads, in effect, … 'impose a reduced sentence for a covered offense.'" Pet. App. 24a (Newsom, J., concurring) (emphasis in original). That is wrong. Courts cannot add to what Congress wrote, and as this Court explained in *Concepcion*, Congress did not "hide any limitations on district courts' discretion outside of § 404(c)." 142 S. Ct. at 2402. Nothing in § 404(c) bars the District Court from imposing a reduced total sentence here, *see* Pet. 22–23, and thus the lower courts erred in holding Petitioner is ineligible for any relief on his powder-cocaine offenses. This Court should correct that error.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

John C. Neiman, Jr.
Caleb C. Wolanek
Counsel of Record
MAYNARD NEXSEN PC
1901 Sixth Avenue North
Suite 1700
Birmingham, AL 35203
(205) 254-1000
cwolanek@maynardnexsen.com

Counsel for Petitioner

October 2023