No. 22-7783

IN THE

Supreme Court of the United States

PINKNEY CLOWERS, III,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

This case satisfies all of the traditional criteria for certiorari: It presents a square and acknowledged circuit split on an important question of federal law; the decision below is wrong (now, concededly so); and this is the ideal vehicle for resolving the split.

First and foremost, the government now "agrees with petitioner" that the decision below violates this Court's precedent. Opp. 1. The rule in the Eleventh Circuit is that prior judicial drug-quantity findings made in violation of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), have binding effect in First Step Act proceedings. *See United States v. Jones*, 962 F.3d 1290, 1301-02 (11th Cir. 2020). It was the government that previously urged that erroneous rule on the Eleventh Circuit,[1] and the government has not sought to correct that outlier rule, despite its devastating effect on defendants like Mr. Clowers. Now, however, the government agrees with Mr. Clowers—and with every other court of appeals to consider the question—that this rule is wrong, and that district courts are not bound by pre-*Apprendi* drug findings.

Mr. Clowers's case is an exceptional vehicle and it vividly illustrates the importance of the question presented. All agree that Mr. Clowers has been a model prisoner during his decades in prison, and the district court expressly stated that it would

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[1] Br. of United States at 24-26, *Jones*, 962 F.3d 1290 (No. 19-11505), 2019 WL 3003722, at *24-26.

grant Mr. Clowers relief if the law allowed it. So for Mr. Clowers, the erroneous Eleventh Circuit rule is the only thing that stands between life in prison and release in a matter of months. Presumably for that same reason, the government makes no argument that any vehicle issue stands in the way of this Court's review, despite having pressed numerous such arguments in its other briefs in opposition.

Ultimately, the government's only counterargument is that the question is of limited importance. But there currently are *six* petitions presenting this same issue (and counting), which make up just a fraction of the cases presenting this question within the Eleventh Circuit's jurisdiction—a number that, tellingly, the government downplays but does not quantify. The government also does not deny the surpassing importance of the question for the individuals affected—individuals to whom Congress offered life-changing relief that the Eleventh Circuit nevertheless denies.

For all of these reasons, the Court should grant the Petition.

I. The Government Concedes That The Decision Below Is On The Wrong Side Of A Circuit Conflict.

As the Petition explains (at 19-31), the Eleventh Circuit held that Mr. Clowers was categorically ineligible for discretionary relief under the First Step Act—despite the undisputed facts that he was sentenced for a "covered offense" under the Fair Sentencing Act and the only possible drug quantity finding was made in violation of *Apprendi*. Had Mr. Clowers's case arisen in any other circuit that has confronted the

issue, he would have been eligible for relief—relief that the district court definitively stated it would grant, *infra* 8.

The government now agrees that the "Eleventh Circuit erred." Br. in Opp. 9, *Harper v. United States*, No. 23-27 (filed Nov. 9, 2023) ("*Harper* Opp."), incorporated by reference at Opp. 1-2. The government further recognizes that the Eleventh Circuit has split from multiple other circuits in so holding. *Harper* Opp. 12; *see also United States v. Jackson*, 995 F.3d 1308, 1314-15 (11th Cir. 2021) (Martin, J., dissenting from denial of rehearing en banc) ("*Jones* cannot be reconciled with" the law of the "vast majority of circuits to consider the question"). In short: The government, Mr. Clowers, at least five other petitioners, two Eleventh Circuit judges, and every other circuit to address the question agree on the bottom line: The Eleventh Circuit's precedent violates this Court's law, at the cost of a lifetime in prison for defendants like Mr. Clowers.

A. The decision below conflicts with *Concepcion* and circuit consensus.

As the Petition explains, the decision below squarely conflicts with *Concepcion v. United States*, 597 U.S. 481 (2022). Pet. 28-31. *Concepcion* held that "[n]othing in the text and structure of the First Step Act expressly, or even implicitly," imposed any limits on "the scope of information that a district court can consider." 597 U.S. at

495, 497 n.5. Yet the Eleventh Circuit prevents courts from exercising their discretion in a manner consistent with *Apprendi*. Pet. 30; Opp. 1-2.

The government acknowledges that the Eleventh Circuit's rule is both wrong and the subject of a mature and persistent split. Opp. 1-2; *Harper* Opp. 9-12. That rule, the government now admits, erroneously "fails to take proper account of Congress having legislated against existing constitutional sentencing requirements" (namely, *Apprendi*). *Harper* Opp. 11. It also concededly misreads *Concepcion*. *Id.* at 11-12 (Eleventh Circuit's reading of *Concepcion* footnote 6 "simply begs the question of how Congress understood 'retroactive application of the Fair Sentencing Act' … to operate").[2]

Every other circuit to address the question has held that a First Step Act court may consider changes in law since the time of sentencing, including *Apprendi*'s holding that defendants are entitled to a jury finding on any fact that increases their

[2] The Eleventh Circuit deems findings made in violation of *Apprendi* to be binding, on the logic that "*Apprendi* does not apply retroactively." *United States v. Jackson*, 58 F.4th 1331, 1338 (11th Cir. 2023), *cert. pet'n filed* (No. 22-7728). The government does not defend this rule, and properly so, for the reasons that Judges Martin and Rosenbaum explained when dissenting from denial of rehearing en banc in *Jackson*. *See* 995 F.3d at 1316 n.6. "[R]etroactivity jurisprudence is concerned with whether, as a categorical matter, a new rule is available on direct review as a potential ground for relief." *Davis v. United States*, 564 U.S. 229, 243 (2011) (emphasis omitted). Mr. Clowers is not seeking review based on *Apprendi*; he seeks relief under First Step Act, which *does* "make retroactive the changes in the Fair Sentencing Act," *Concepcion*, 597 U.S. at 497.

imprisonment range. *See* Pet. 30-31 (citing cases); *Harper* Opp. 12 (additionally citing *United States v. Robinson*, 9 F.4th 954, 959 (8th Cir. 2021); *United States v. White*, 984 F.3d 76, 87-88 (D.C. Cir. 2020)); *see also United States v. Mason*, 855 F. App'x 298, 299 (7th Cir. 2021).

Strangely, the government argues that the "lopsided" nature of the split, Opp. 2, counsels *against* rather than *in favor* of review. On the government's logic, the more wrong a court of appeals is, the less reason this Court has to correct it. On the contrary, this Court repeatedly brings outlier circuits into line with an otherwise national consensus. *See, e.g., United States v. Tinklenberg*, 563 U.S. 647, 656 (2011) ("[E]very Court of Appeals has considered the question before us now, and … rejected the interpretation that the Sixth Circuit adopted in this case."). The fact that the Eleventh Circuit has persisted in its error after multiple courts have taken the contrary position is more rather than less reason for this Court to intervene.

B. The decision below also conflicts with *Terry* and a further consensus among the circuits.

In fact, the division of authority is even more "lopsided," Opp. 2, than the government admits. As the Petition explains, the decision below also conflicts with *Terry v. United States*, 141 S. Ct. 1858, 1862-63 (2021), which held that an "offense" is "covered"—and the defendant thus eligible for relief—based on the "elements" of the offense rather than the specific facts used to satisfy those elements. Pet. 21-27. For that

reason, the decision below also departs from the holdings of at least six more courts of appeals—in addition to the "only three" that the government acknowledges. *Harper* Opp. 12; *see* Pet. 25-27; Br. for National Association of Federal Defenders as Amicus Curiae Supporting Petitioner ("NAFD Br.") at 14-16 & nn.13, 15, *Perez v. United States*, No. 22-7794 (S. Ct. June 30, 2023).

In a passing footnote, the government suggests that the Eleventh Circuit's rule is consistent with *Terry* because, it says, the Eleventh Circuit properly holds that the "covered-offense determination turns on 'the offense for which the district court imposed a sentence,' without 'considering the specific quantity of crack cocaine involved in the movant's violation.'" *Harper* Opp. 12 n.2 (quoting *Jones*, 962 F.3d at 1300-01). To be sure, the Eleventh Circuit recognizes that eligibility requires an assessment of the statutory elements of the offense. But it runs afoul of *Terry* by expanding the criteria for eligibility beyond those elements to the factual quantities that could have been found by the sentencing court—an approach starkly at odds with what every other court of appeals has done or will permit.

Mr. Clowers's case proves the point: The Eleventh Circuit turned to specific quantity findings to assess whether he was eligible for discretionary resentencing.

After agreeing that Mr. Clowers "has a covered offense,"[3] Pet. App. 7, the Eleventh Circuit said the district court still could not consider a reduced sentence because "the sentencing court's finding that Clowers's offense involved *more than 15 kilograms* of crack cocaine would easily *satisfy the quantity element*." Pet. App. 8 (emphasis added); *see also Jackson*, 58 F.4th at 1336 ("This finding"—i.e., "determining how much of a drug the defendant possessed"—"must occur before the district court can define the substantive offense."). Compounding the error, while the district court "acknowledge[d] that the record does not reveal that [the sentencing judge] made a gram-specific finding of the drug amount" at all, Dist. Ct. Doc. No. 1053 at 7 (Order Denying Motion To Reduce Sentence), the Eleventh Circuit reiterated that "district courts considering First Step Act motions [must] honor any drug-quantity finding that '*could have been used* … at the time of sentencing,'" Pet. App. 10 (emphasis added)—here, a conclusion in the Presentence Report. That goes well beyond the legal "elements" of the "'covered offense.'" *Terry*, 141 S. Ct. at 1862.

[3] Mr. Clowers was convicted of violating the continuing criminal enterprise provision in 21 U.S.C. § 848(b)(2)(A). All agree that this is a "covered offense" under § 404(a) of the First Step Act. Pet. App. 8; Br. of United States at 16-17, *United States v. Clowers*, 62 F.4th 1377 (2023) (No. 20-13074); *see also* Pet. 22 n.2 (collecting cases so holding).

II. This Case Is An Unusually Good Vehicle For Considering The Question Presented.

Tellingly, the government does not contest that this case is an ideal vehicle for this Court to consider the question presented. Nor could it, given the district court's unambiguous statement that it would have granted Mr. Clowers relief were it not foreclosed from doing so by Eleventh Circuit precedent.

As the district court found, although Mr. Clowers has spent "more than half of his life in federal prison," he has been a "model inmate." Dist. Ct. Doc. No. 1053 at 3. Over the past three decades, he has received his GED, completed "more than 900 hours of [Bureau of Prisons] programming," and accumulated four-plus years of good time credit that, under the Eleventh Circuit's rule in *Jones*, he is not eligible to use. *Id*. As the Eleventh Circuit put it, "by all accounts" Mr. Clowers has "behav[ed] as a model prisoner." Pet. App. 5. Making matters worse, all of Mr. Clowers's co-defendants "have long been released from prison." Dist. Ct. Doc. No. 1053 at 3. Thus, the district court stated in unmistakable terms that it would grant Mr. Clowers relief if it could. *Id*. at 8 ("It should be crystal clear that the answer I reached above is … not the answer I [would] prefer."); Pet. 17.

Were it not for the now-concededly erroneous decision of the Eleventh Circuit, Mr. Clowers would be months away from freedom.[4] Indeed, had the correct rule been in place when Mr. Clowers sought relief from the district court in 2020, he would be free today. Instead, he continues to labor under a life sentence.

Unsurprisingly, therefore, the government does not deny that this case presents a compelling vehicle for review. In opposing the other petitions presenting this question, the government has raised the usual litany of vehicle problems, from mootness to harmless error.[5] But whatever the merit of those arguments, even the government does not believe that this case suffers from any such problem. The government does not contest that a ruling from this Court that the Eleventh Circuit misconstrued the First Step Act would result in certain and substantial relief for Mr. Clowers—who, at 52 years of age, would benefit immensely from a favorable ruling. This is an uncommonly good case for resolving the question presented.

III. The Question Presented Is Important.

A bipartisan Congress enacted and President Trump signed the First Step Act out of a recognition that, despite various sentencing reforms, many federal drug

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[4] Mr. Clowers is serving an outstanding 60-month sentence, Pet. 14-15. By January 2024, Mr. Clowers is predicted to have earned 54 months of good time credit, meaning he would be released within months of a favorable decision. *See* 18 U.S.C. § 3624(b)(1).

[5] *See Harper* Opp. 14-15; Br. in Opp. 2-3, *Williams v. United States*, No. 23-5014; Br. in Opp. 2-3, *Jackson*, No. 22-7728; Br. in Opp. 2-3, *Perez*, No. 22-7794.

sentences remain grossly excessive. *See generally* Remarks By President Trump at Signing Ceremony For S. 756, The "First Step Act of 2018," 2018 WL 6715859, at *2-3 (Dec. 21, 2018). Specifically, numerous people remained incarcerated for crack cocaine offenses that were imposed before 2010 under the "strongly criticized" 100-to-1 crack-to-cocaine ratio. *Dorsey v. United States*, 567 U.S. 260, 268 (2012). As the district court recognized, Congress passed this law for the precise purpose of permitting deserving individuals like Mr. Clowers to "reestablish themselves as productive members of society." 164 Cong. Rec. S2580-81 (daily ed. May 9, 2018) (introductory statement of Sen. John Cornyn); Dist. Ct. Doc. No. 1053 at 8. Yet the Eleventh Circuit's rule "drastically curtails the reach of the First Step Act." *Jackson*, 995 F.3d at 1312 (Martin, J., dissenting from denial of rehearing en banc). Worse, the Eleventh Circuit makes relief impossible for those who need it most: individuals sentenced before *Apprendi*, who have been in prison the longest and who received the fewest constitutional protections at sentencing. Pet. 32; NAFD Br. 3.

The government responds that the "practical significance" of this question is "minimal" because, even if the affected individuals are eligible for relief, district courts might not exercise discretion to resentence them. *Harper* Opp. 12-13. But we know the practical significance of the rule is profound for individuals like Mr. Clowers—who was told he would receive such relief, and who, without it, remains subject to life in prison. Given the nature of the offenses subject to the First Step Act, it is no

coincidence that all but one of the petitioners now before the Court currently are serving a life sentence, and all of them would be entitled to immediate or near-immediate release if awarded relief.[6] Whether to grant such relief is a question best resolved by district courts under the correct legal rule. And it is clear that, when district courts do have discretion to act under the First Step Act, they often exercise it: In the year after the Act's passage, fully 41% of *all* sentence modifications in the Eleventh Circuit were driven by district courts' application of the Act.[7]

The government also argues that the question is of "declining prospective importance" because it applies only to the "diminishing set of defendants" who remain incarcerated for pre-2010 crack cocaine offenses in the Eleventh Circuit. *Harper* Opp. 13. This argument is belied by the fact that there already are a dozen cases raising this issue, with six petitions currently before the Court and more in the pipeline. *See*

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[6] With the exception of Mr. Jackson, each of the six petitioners before the Court is serving a life sentence. *Perez* Pet. 12; *Williams* Pet. 4-5; *Ingram v. United States*, No. 23-341 (filed July 7, 2023), Pet. App. 6a-7a; *Harper* Pet. App. 7a; *Clowers* Pet. 14. Mr. Perez, Mr. Williams, and Mr. Harper could receive immediate release. *Perez* Pet. App. 12-13; *Williams* Pet. App. 1-2; *Harper* Reply at 6-7, 9. Mr. Ingram could be released shortly. *See Ingram* Pet. 12-13.

[7] U.S. Sent'g Comm'n, *2019 Annual Report and Sourcebook of Federal Sentencing Statistics*, at 195 tbl.R (2019), https://tinyurl.com/2a74eyrh. The average length of sentence reduction granted was also significant, at 26%. U.S. Sent'g Comm'n, *The First Step Act of 2018: One Year of Implementation*, at 43 (2020), https://tinyurl.com/4t855yrs.

Pet. 24 n.3; *Harper* Opp. 9 n.1.[8] As the National Association of Federal Defenders explains, there are "many more" defendants who will be able to seek relief in the district court if the Eleventh Circuit's rule is brought into alignment with every other circuit. NAFD Br. 3 n.5.[9] This is particularly likely to be true in the Eleventh Circuit, which houses the third-largest population of federal offenders in the country.[10] And, most fundamentally, the government's argument ignores the life-changing consequences of the question to the individuals affected, as Congress recognized when it enacted the First Step Act.

CONCLUSION

Even as circuit after circuit has weighed in on the right side of the law, the Eleventh Circuit remains committed to its rule—and defendants in its jurisdiction

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[8] *Cf. Ford v. United States*, No. 23A458 (S. Ct.) (forthcoming petition for certiorari concerning application of *Concepcion*, *Jones*, *Jackson*, and *Clowers*); *see* Jackson Reply 5-6 (identifying additional cases pending in the Eleventh Circuit and in district courts, and cases where defendants have withdrawn their claims in light of *Jones*).

[9] Indeed, even defendants whose First Step Act petitions already have been denied may be able to obtain relief. *Contra Harper* Opp. 13. Depending on the case, defendants may be able to avoid the § 404(c) bar because they did not receive a "complete review of the motion on the merits," *see* § 404(c); seek reconsideration in the district court, *see United States v. Russell*, 994 F.3d 1230, 1235 (11th Cir. 2021) (appeal from motion for reconsideration after First Step Act denial); or obtain the government's waiver of the § 404(c) bar, *see United States v. Deruise*, No. 22-12983, 2023 WL 3668929, at *2 (11th Cir. May 26, 2023) (government may waive § 404(c) bar).

[10] *See* U.S. Sent'g Comm'n, *2022 Annual Report and Sourcebook of Federal Sentencing Statistics* at 36, tbl.1 (2022), https://tinyurl.com/2p9un6jx.

remain subject to massive sentences they would not serve elsewhere. Accordingly, plenary review is appropriate.

Alternatively, the Court may wish to consider summary reversal in light of the government's concession, a disposition that the government conspicuously fails to address even after its concession brings it into stark relief. *See, e.g.*, *CNH Indus. N.V. v. Reese*, 583 U.S. 133, 139-40 (2018) (summarily reversing where decision below failed to comply with recent Supreme Court precedent and "no other Court of Appeals" agreed); *Am. Tradition P'ship, Inc. v. Bullock*, 567 U.S. 516, 516-17 (2012) (summarily reversing where decision below conflicted with recent Supreme Court precedent, even in the absence of a conflict).

Either way, the Court's intervention is appropriate now and in this case.

Respectfully submitted,

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