No. 24-820

IN THE
Supreme Court of the United States

DANIEL RUTHERFORD,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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The government agrees that the question presented "warrants this Court's review." U.S. *Rutherford* Br. 10. The courts of appeals are deeply divided over whether a district court may consider disparities created by the First Step Act's prospective changes in sentencing law when deciding if "extraordinary and compelling reasons" warrant a sentence reduction under 18 U.S.C. § 3582(c)(1)(A)(i). That issue is important and recurring, and this Court should resolve it. U.S. *Rutherford* Br. 10.

But the government is incorrect to suggest that the Court grant the later-filed petition in *Carter v. United States*, No. 24-860 (U.S. Feb. 11, 2025), over this petition. *See* U.S. *Rutherford* Br. 10-11. This case is a better vehicle than *Carter*, which presents an antecedent jurisdictional issue that could stand in the way of reaching the question presented. Carter requested an expedited summary affirmance against his own interests, an action a Fifth Circuit panel recently found to destroy adversity and Article III jurisdiction.

The Court thus should grant Rutherford's petition and hold Carter's. In the alternative, it should grant both petitions and consolidate the cases. The two petitions ask different questions: *Rutherford* focuses on a concrete question of statutory interpretation, while *Carter* seeks a broader ruling on the outer bounds of the U.S. Sentencing Commission's delegated authority. *Carter* thus raises potentially knotty issues of administrative law and deference that, in Rutherford's view, the Court need not answer to resolve the present split. Granting both petitions will ensure the Court receives adequate briefing from both perspectives.

ARGUMENT

1. Rutherford's case is an excellent vehicle to resolve the question presented. *See Rutherford* Pet. 32-33. It was the lead appeal in the Third Circuit, and it generated the 44-page precedential decision the government asks this Court to review. The Third Circuit found no obstacle to reaching the "purely legal" question Rutherford's case presents. *Rutherford* App. 23a-24a. The court affirmed the denial of Rutherford's motion solely on the ground that "the First Step Act's change to § 924(c) cannot be considered in the analysis of whether extraordinary and compelling circumstances make a prisoner eligible for compassionate release." *Id.* at 36a.

In recommending that the Court grant only *Carter*, the government observes only that the Commission's policy statement, (b)(6), took effect while Rutherford's case was on appeal, whereas *Carter* "does not present that complication." U.S. *Carter* Br. 19-20. This half-hearted vehicle argument fails for three reasons.

First, the timing of (b)(6)'s issuance is irrelevant. The question Rutherford presents turns on the meaning of two statutes: the compassionate-release statute and the First Step Act. The text of those statutes has not changed since (b)(6) was issued. So the fact that (b)(6) became effective while Rutherford's appeal was pending does not alter this Court's task of construing the text of two statutes.

Below, (b)(6)'s timing was relevant only to a separate question: whether the Third Circuit panel could revisit the validity of its previous precedent, *United States v. Andrews*, 12 F.4th 255 (3d Cir. 2021), which construed the relevant statutes before (b)(6) existed. That is not a threshold question here because this Court has no previous decision to revisit.

Second, any argument about (b)(6)'s timing has been waived. The Third Circuit agreed with Rutherford that it could consider (b)(6) in his case. *Rutherford* App. 24a. That decision was correct: an appellate court "must apply the law in effect at the time it renders its decision." *Henderson v. United States*, 568 U.S. 266, 271 (2013); *see United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801). And the government's brief does not challenge that decision. It therefore has waived any such challenge. *See* Sup. Ct. R. 15.2; *Granite Rock Co. v. International Bhd. of Teamsters*, 561 U.S. 287, 306 (2010) (argument not raised in brief in opposition was "properly 'deemed waived'"); *Baldwin v. Reese*, 541 U.S. 27, 34 (2004) (same). The timing of (b)(6) thus has no effect on the propriety of Rutherford's case as a vehicle.

Third, the government's vehicle argument is undeveloped and inaccurate—and thus should receive no weight. The government fails to explain why (b)(6)'s timing would prevent this Court from reaching the question presented in Rutherford's case. And the government makes a basic factual error when it states that *Carter* is a "suitable vehicle" that "cleanly presents the issue" because the "district court denied [Carter's compassionate release] motion based on the court of appeals' prior decision in *Rutherford*." U.S. *Carter* Br. 19. In fact, the district court in *Carter* denied Carter's motion 10 months *before* the Third Circuit rendered its decision in *Rutherford*. *Compare Carter* App. 3a (district court decision in January 2024) *with Rutherford* App. 1a (Third Circuit decision in November 2024). The government's mistaken rendering of the chronology in *Carter* deprives its undeveloped vehicle argument of any force.

2. This case is a better vehicle than *Carter*, which may require the Court to resolve a threshold jurisdictional issue before reaching the question presented.

According to a recent Fifth Circuit panel, "where the defendant-appellant has moved for summary affirmance against his own interest," the Court "must dismiss for lack of jurisdiction" because adversity has been destroyed. *United States v. Aguilar-Torres*, 116 F.4th 341, 342 (5th Cir. 2024) (per curiam), *vacated and reh'g en banc granted*, 130 F.4th 450 (5th Cir. 2024) (en banc) (per curiam); *see id.* at 342 n.1 ("Article III does not permit us to grant a fast pass to the Supreme Court where true adversity no longer exists."); *see also Acheson Hotels, LLC v. Laufer*, 601 U.S. 1, 5 (2023) (expressing "concern about litigants manipulating the jurisdiction of this Court").

That is the course Carter took. The Third Circuit stayed Carter's appeal pending the issuance of the mandate in Rutherford's appeal. Once the Third Circuit ruled in Rutherford's case, Carter sought an expedited ruling against himself to fast-track his case for this Court's review: he conceded that *Rutherford* was "dispositive as to" his appeal and moved for "a summary order and summary mandate affirming the District Court's decision" denying his request for compassionate release. Appellant's Mot. for an Expedited Decision, *United States v. Carter*, No. 24-1115 (3d Cir. Nov. 14, 2024), ECF No. 33-1. By requesting the same relief as his opponent, Carter may have removed his case from the "adversary context," *Flast v. Cohen*, 392 U.S. 83, 95 (1968), which must "be extant at all stages of review," *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 160 (2016).

The jurisdictional issue lurking in *Carter*'s case is a recurring one, but not one that is ready for this Court

to resolve. As Judge Willett noted in *Aguilar-Torres*, the issue is "more complicated than we probably appreciate." 116 F.4th at 344 (Willett, J., dissenting). That need for deeper inquiry led the Fifth Circuit to grant rehearing en banc, appoint Adam Mortara to argue the jurisdictional issues, and ultimately return the case to the panel on other grounds. *United States v. Aguilar-Torres*, 128 F.4th 1298 (5th Cir. 2025) (en banc) (per curiam) (permitting appellant to "withdraw his Motion for Summary Affirmance" to "[p]retermit[]" the "jurisdictional issues presented by amicus").

Other circuits, too, have yet to weigh in on this "complicated" issue. *Aguilar-Torres*, 116 F.4th at 344 (Willett, J., dissenting). They may find a difference between acknowledging adverse precedent (while maintaining a request for relief to preserve adversity) and what Carter did here to seek expedited issuance of an adverse ruling. And they may, like the panel majority in *Aguilar-Torres*, view Carter's actions as an effort to secure "a fast pass to the Supreme Court where true adversity no longer exists," *id.* at 342 n.1 (majority), or as an effort to manufacture this Court's jurisdiction. Or they may disagree with *Aguilar-Torres* and find no jurisdictional flaw.

But because this Court "has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,'" *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998) (citation omitted), it would have to resolve this still-percolating jurisdictional question before reaching the merits in *Carter*. And if this Court were to agree with *Aguilar-Torres* that an appellant destroys adversity when requesting a summary affirmance against his own interests in the manner advanced by Carter, then the Court may ultimately decide to

dismiss Carter's petition as improvidently granted. So in *Carter*, where a "mare's nest" of issues "stand[s] in the way of" reaching the question presented, one approach would be to hold the petition pending the Court's decision on the merits in this case, which presents no similar antecedent jurisdictional issue. *Arizona v. City & Cnty. of San Francisco*, 596 U.S. 763, 766 (2022) (Roberts, C.J., concurring) (concurring in the Court's dismissal of the writ of certiorari as improvidently granted); *see also Dart Cherokee Basin Operating Co. v. Owens*, 574 U.S. 81, 97 (2014) (Scalia, J., dissenting) (same for jurisdictional issues).

3. If the Court does not grant only Rutherford's petition and hold Carter's tag-along petition, it should grant both petitions and consolidate the cases.

The government incorrectly contends that "[t]he question presented" here "is the same as the question presented" in *Carter*. U.S. *Rutherford* Br. 10. Rutherford's petition asks whether courts may consider the First Step Act's prospective amendments to § 924(c) at the "extraordinary and compelling" stage of the compassionate-release analysis. *Rutherford* Pet. i. That is the concrete question of statutory interpretation the government itself asks. *See* U.S. *Rutherford* Br. I; U.S. *Carter* Br. I.

Carter, by contrast, asks a broader question: whether the Sentencing Commission "acted within its expressly delegated authority" when it allowed courts to consider *any* "nonretroactive change in law." *Carter* Pet. i. Carter's framing thus sweeps more broadly: It appears to seek a ruling on the validity of (b)(6) in every circumstance, including judicial decisions that make new sentencing law and statutory changes other

than the First Step Act's change to § 924(c).[1] And it raises issues of delegation and deference, urging the Court to address questions about the Commission's power that may be unnecessary to reach. *See Carter* Pet. 21-22, 27.

Rutherford's petition asks a question suited to a straightforward statutory answer. If Rutherford is right in his reading of the compassionate-release statute, there would be no need to explore the Commission's broader authority, its ability to out-interpret an Article III court, or whether, as Carter contends, a deferential standard of review applies to "[t]he Commission's resolution of [statutory] ambiguity." *Carter* Pet. 21-22, 27.

Carter may not agree that Rutherford's approach is the right one. Granting both petitions thus would ensure that the Court receives adequate briefing from both perspectives. This course also would ensure that the Court will reach the merits, with the benefit of both approaches, notwithstanding Carter's potential jurisdictional flaw.

The Court often grants multiple petitions raising similar issues and it should do so here as well. *See*, *e.g.*, 144 S. Ct. 2713 (2024) (granting *Hewitt v. United States* (No. 23-1002), and *Duffey v. United States* (No. 23-1150), two First Step Act petitions, and consolidating cases); 143 S. Ct. 2457 & 2458 (2023) (granting and consolidating *Brown v. United States* (No. 22-6389), and *Jackson v. United States* (No. 22-6640)); *Kelly v.*

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[1] Cases involving judicial interpretations as changes in law may require a distinct analysis. *See*, *e.g.*, *United States v. Jean*, 108 F.4th 275, 281-82 (5th Cir. 2024) (decisional-law-change case); *United States v. Austin*, 125 F.4th 688, 693 (5th Cir. 2025) (finding decisional changes "distinguishable" from statutory changes).

United States, 140 S. Ct. 661 (2019) (granting motion for divided argument in consolidated case); *Turner v. United States*, 580 U.S. 1193 (2017) (same).

4. Finally, any suggestion that Carter has a better case for discretionary relief under the compassionate-release statute is not just irrelevant in this Court, but incorrect. *See Carter* Pet. 28-29. Rutherford has served more than 19 years of a 42.5-year sentence the Third Circuit described as "unthinkable" for his underlying facts. *Rutherford* Pet. 9, 32-33. He has made admirable efforts to better himself—generating an impressively clean disciplinary record for the last decade and taking more than 50 educational courses while serving his sentence. *Id.* at 9-10. Both Rutherford and Carter deserve a chance for relief.

In any event, this Court is not the factfinder. *See Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("we are a court of review, not of first view"); *contra Carter* Pet. 28 (suggesting that this Court "will actually determine whether [Carter's] sentence will be reduced" and "resolve th[is] litigation").[2] Once this Court clarifies the standard that applies when district courts consider motions for compassionate release, the appropriate course will be to remand for further proceedings. *See*, *e.g.*, *Holland v. Florida*, 560 U.S. 631, 653-54 (2010) (remanding to allow lower courts

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[2] The district court in Carter's case left several questions open that would have to be addressed on remand. For example, the court agreed that one § 3553(a) factor—the need to avoid unwarranted disparities—would favor a shorter sentence. It nonetheless added that the "same factor weighs against Carter's request" for "release immediately," because "such a modification would result in a sentence below the 21-year mandatory minimum that would be imposed on similarly situated defendants today." *Carter* App. 33a n.6; *compare Carter* Pet. 10 (Carter has "served over 16 years").

to apply correct legal standard in the first instance); *Florida v. Bostick*, 501 U.S. 429, 437 (1991) (same).

CONCLUSION

The Court should grant Rutherford's petition and hold Carter's petition (No. 24-860). Alternatively, it should grant both petitions and consolidate the cases for purposes of argument.

Respectfully submitted,

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