No. 24-860

In the Supreme Court of the United States

JOHNNIE MARKEL CARTER,

Petitioner,

v.

UNITED STATES,

Respondent.

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

REPLY BRIEF FOR PETITIONER

STEVEN TEGRAR
JAMES STRAMM
NED TERRACE
SARAH BRODY-BIZAR
LAURA HALLAS
DEBEVOISE & PLIMPTON LLP
66 Hudson Blvd.
New York, NY 10001

DAVID A. O'NEIL
Counsel of Record
SUZANNE ZAKARIA
DEBEVOISE & PLIMPTON LLP
801 Pennsylvania Ave. N.W.
Washington, D.C. 20004
daoneil@debevoise.com
(202) 383-8000

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The United States agrees that the Court should grant certiorari in this case because the "courts of appeals have arrived at irreconcilable legal positions" on the question presented. U.S. *Carter* Br. 10–11. As the Government correctly explains, "circuit disagreement will . . . persist until this Court addresses" that "frequently recurring" question. *Id.* at 18. The Government is also correct that this case is the "suitable vehicle" because it "cleanly presents" the dispositive issue. *Id.* at 11, 19. This Court should grant the Petition.

1. Recent developments reinforce the Government's agreement that certiorari is necessary now.

First, the conflict and confusion among the courts of appeals are only growing. Just weeks ago, the Sixth Circuit sided with the Government on the merits, holding that Section (b)(6) conflicted with existing precedent. *United States* v. *Bricker*, No. 24-3286, 2025 WL 1166016, at *5–10 (6th Cir. Apr. 22, 2025). The Government nevertheless asked the Sixth Circuit to rehear the case because the decision was "overbroad" in its limitation of district courts' discretion to reduce sentences under 18 U.S.C. § 3582(c)(1)(A)(i). Gov. Mot. Amend or Pet. Panel Reh'g at 2, *United States v. Bricker*, No. 24-3286, ECF No. 58 (Apr. 25, 2025). The Sixth Circuit denied the motion, leaving in place an opinion that both parties believe is flawed. *See Bricker*, No. 24-3286 (May 1, 2025), ECF No. 59.

Meanwhile, the Fifth Circuit has produced dueling decisions on the question presented. *Compare United States v. Jean*, 108 F.4th 275, 290–91 (5th Cir. 2024) (upholding Section (b)(6) on the ground that the

Sentencing Commission "resolved the [circuit] split with a reasoned, middle-ground approach"), *with* *United States v. Austin*, 125 F.4th 688, 692–93 (5th Cir. 2025) (invalidating Section (b)(6) and holding that *Jean* "was wrongly decided"). Despite this inconsistency, the Fifth Circuit denied the Government's petition for rehearing en banc in *Jean*, *United States v. Jean*, No. 23-40463 (5th Cir. 2024), ECF No. 108-2, and issued mandates in both cases, leaving district courts at sea in determining whether they have the authority to grant Section (b)(6) motions.

Second, with each passing day, finite judicial resources are consumed by an issue that both the parties and the courts of appeals recognize this Court must address. The courts of appeals have exhaustively aired the competing positions, repeatedly noting that the issue is destined for this Court. *United States v. Black*, 131 F.4th 542, 548 (7th Cir. 2025) ("Perhaps the Supreme Court will eventually resolve the split."); *United States v. Williams*, 65 F.4th 343, 349 (7th Cir. 2023) (noting "the issue is teed up" for the Supreme Court); Oral Arg. at 59:09–59:18, *United States v. Bricker*, No. 24-3286 (6th Cir. Oct. 31, 2024) (Readler, J.) ("I assume this issue is eventually going to go to the Supreme Court."). The Seventh Circuit last week suspended the Government's appeal in a case presenting the issue pending resolution of this Petition. *United States v. Bailey*, No. 24-2045, (7th Cir. May 9, 2025), ECF No. 16. ("[P]roceedings will remain SUSPENDED in this appeal pending the Supreme Court's resolution of the petition for writ of certiorari in *United States v. Carter*, no. 24-860.").

2. The Government is correct that this case is the appropriate vehicle to resolve the question presented.

U.S. Carter Br. 19–20. The Court should grant this Petition and hold others pending its resolution.

a. As the Government observes, this case "cleanly presents" the central question whether non-retroactive changes in the law "can support the existence of an extraordinary and compelling reason for a sentence reduction, including whether the Sentencing Commission may permissibly treat it as such a reason." U.S. *Carter* Br. 19. Petitioner sought relief under Section (b)(6), and the district court indicated that it would grant a sentence reduction under that provision if legally permitted to do so. The Third Circuit then affirmed based on circuit precedent that precluded such relief in Petitioner's case and held Section (b)(6) invalid. This Court has an unobstructed path to the merits, and its decision would be dispositive.

b. The Government is also correct that the petition in *Rutherford* is not a suitable vehicle.

Rutherford's *pro se* motion in the district court was filed before Section (b)(6) took effect and rested instead on "the broad authority granted this Court by Section 603 of the First Step Act." *United States v. Rutherford*, No. 2:05-cr-00126-JMY (E.D. Pa. 2021), ECF No. 153. The district court did not address Section (b)(6) at all, and the Government argued on appeal—as it has consistently and successfully in similar cases across the country—that Section (b)(6) does not apply to a motion filed before the amendment became effective. U.S. Br. 12, *United States v. Rutherford*, No. 23-1904 (3d Cir. 2024), ECF No. 36. Rutherford disagreed, and that threshold dispute about the applicability of Section (b)(6) consumed a substantial portion of the parties' briefing. To resolve the issue, the Third Circuit addressed at length the permissibility of retroactive application of "'clarifying" versus "substantive" guidelines amendments and whether that distinction controls in the sentence modification context or only at initial sentencing. *United States v. Rutherford*, 120 F.4th 360, 371–74 (3d Cir. 2024). While the Third Circuit concluded it could consider Section (b)(6), the court recognized that it was "part[ing] ways" with two other courts of appeals that had reached the opposite conclusion. *Id.* at 372 n.15; *see also United States v. Harper*, No. 22-1291, 2023 WL 10677931, at *3 (6th Cir. Dec. 12, 2023) (affirming denial of sentence reduction and accepting government's argument that defendant could not rely on Section (b)(6) "[b]ecause this policy statement was not in effect at the time the district court issued its order").

As the Government notes, the same threshold issue would block or obscure this Court's path in *Rutherford* to reaching the question presented, rendering that case a poor vehicle for addressing the merits.

Recognizing the vehicle flaw, Rutherford attempts to argue that the Government has waived the argument that Section (b)(6) does not apply. That is obviously incorrect. The Government filed simultaneous briefs in response to the petitions explaining why the Court should grant plenary review in this case and not in *Rutherford*. In the *Carter* filing, which it cross-referenced in *Rutherford*, the Government explained that *Rutherford* was a flawed vehicle "because Section 1B1.13(b)(6) took effect after the defendant in *Rutherford* filed his sentence-reduction motion, as well as after the district court decided his motion, and the court of appeals in that case had to consider whether the validity of Section 1B1.13(b)(6) was even properly before it on appeal." U.S. *Carter* Br. 19–20. On that basis, the Government urged the Court to grant review in *Carter* instead because it "does not present that complication." The Government then opposed plenary review in *Rutherford* "for the reasons explained in" the *Carter* response. U.S. *Rutherford* Br. 10. Nothing more was required for the Government to preserve the position it argued below in *Rutherford*, has maintained throughout in the courts of appeals, and would continue to advance in this Court.[1]

c. Rutherford next ventures an equally baseless attempt to manufacture a defect in this case notwithstanding the Solicitor General's acquiescence. He contends that there "may" have been a lack of adversity below because the Third Circuit's decision resulted from the grant of a motion for summary affirmance. Reply *Rutherford* Br., at 4. It is conceivable, Rutherford speculates, that for unspecified reasons this "potential" issue could arise later in this case even though the Government has agreed that jurisdiction is proper and has urged the Court to grant the Petition. *See id.* at 7. That contention, too, is plainly meritless.

There is no jurisdictional issue, and this Court's review on certiorari of a summary affirmance is neither unusual nor problematic. Just two Terms ago, this Court granted certiorari in exactly the same circumstances. In *Jack Daniel's Props., Inc. v. VIP Prods. LLC*, petitioner-appellant moved for summary affirmance in the Ninth Circuit because the issues it "intend[ed] to raise on appeal [were] controlled by a

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[1] In another attempt to will away his vehicle problem, Rutherford contends that a single typo in the Government's brief means that its arguments "should receive no weight." Reply *Rutherford*, at 3. That Rutherford must resort to seizing on the Government's reference to "the court of appeals' prior decision in *Rutherford*," instead of that court's prior decision in *United States v. Andrews*, 12 F.4th 255 (3d Cir. 2021), speaks for itself.

prior panel's decision," and summary affirmance would allow petitioner-appellant to efficiently seek "Supreme Court review of those prior rulings—without needlessly wasting judicial and party resources." Appellant Mot. for Summ. Affirmance at 4, *VIP Prods., LLC, v. Jack Daniel's Props., Inc.*, No. 21-16969 (9th Cir. 2021), ECF No. 14-1. This Court granted the petition and resolved the case on the merits. *Jack Daniel's Props., Inc. v. VIP Prods. LLC*, 599 U.S. 140 (2023). There was no jurisdictional flaw in that case, and there is none here.

Summary affirmance was particularly appropriate in the circumstances below. The controlling circuit precedent specifically addressed and effectively resolved Petitioner's appeal. Because the district court in *Rutherford* had not addressed Section (b)(6), the Third Circuit instead focused its analysis on the district court decision in *Carter*. *See Rutherford*, 120 F.4th at 374 & n.18 (noting that "[w]e do have the benefit of a well-reasoned district court decision now [in] *United States v. Carter*, 711 F.Supp.3d 428 (E.D. Pa. 2024)," discussing the facts and reasoning of *Carter*, and recognizing that *Carter*'s appeal would be resolved by the *Rutherford* decision). The decision in *Rutherford* was the functional equivalent of a decision in *Carter* as well.

Petitioner therefore appropriately moved for, and the Third Circuit granted, summary affirmance pursuant to rules specifically intended for this context, providing that either "party may move for summary action affirming . . . a judgment, decree or order, alleging that no substantial question is presented or that subsequent precedent or a change in circumstances warrants such action." 3d Cir. L.A.R. 27.4 (2011); *see* 3d Cir. I.O.P. 10.6 (2018); *see also Barnes* *v. United States*, 678 F.2d 10, 12 (3d Cir. 1982) ("There can be no dispute about our power to act summarily."). Any other course would have been a breach of Petitioner's duty not to assert frivolous arguments. Fed. R. Civ. P. 11 (requiring attorneys to present arguments that "are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law"). Courts uniformly agree that summary affirmance is appropriate when one party is "clearly correct as a matter of law." *Joshua v. United States*, 17 F.3d 378, 380 (Fed. Cir. 1994) (collecting cases); *see also Abney v. United States*, 431 U.S. 651, 662 n.8 (1977) (approving of "rules or policies giving [certain] appeals expedited treatment," which are "well within the supervisory powers of the courts of appeals to establish summary procedures and calendars").

There is no "jurisdictional" significance when, as here, the parties responsibly recognize that an appeal is squarely foreclosed by binding case law and therefore request summary affirmance in order to preserve the opportunity for further review, just as there is no jurisdictional issue in this Court when, as here, a litigant acquiesces to certiorari even though that litigant is thereby "requesting the same relief as his opponent." Reply *Rutherford* Br., at 4; *see also*; U.S. *Carter* Br. 20 ("The Petition for a writ of certiorari should be granted.").

Not surprisingly, there is not a single valid federal decision that supports Rutherford's effort to invent this complication. His sole asserted basis is a now-vacated, one-page per curiam opinion (over a dissent) from a different circuit—an order that no other court has even referenced, much less adopted, and that the circuit court promptly voided in a subsequent one-page per curiam order. Rutherford's attempt to cast the theory in the vacated order as "recurring" and "percolating" is an obvious mischaracterization. In fact, other than the subsequent vacatur, no decision has so much as cited, acknowledged, or referenced—much less agreed with—the order that alone underlies Rutherford's effort to conjure an issue where none exists.

3. If this Court agrees with the Government's request to grant this case, there is no reason also to grant *Rutherford* and consolidate.

Rutherford would not add any question worthy of this Court's review that is not also presented in this case. The essential difference between *Rutherford* and this case is that *Rutherford* would require resolution of the threshold question that detained the Third Circuit of whether Section (b)(6) applies to petitions filed before it became effective. But for reasons explained above, that is a flaw, not a feature. Because prisoners can refile motions for sentence reduction without prejudice, any petitioner with a pending pre-Section (b)(6) petition (including Rutherford) can simply file a new petition if this Court upholds Section (b)(6) in this case. The threshold applicability question therefore does not independently warrant attention, and that is presumably why Rutherford has not sought certiorari on it.

In a further bid for consolidation, Rutherford suggests that his petition rests on a pure "reading of the compassionate-release statute" and not on "questions about the Commission's power" to construe that statute. Reply *Rutherford* Br., at 7. But Rutherford has always insisted that his pre-Section (b)(6) petition is controlled by that provision. The first line of argument in his Third Circuit brief was: "The Policy

Statement Applies to Mr. Rutherford's Appeal." Br. for Appellant at 20, *United States v. Rutheford*, No. 23-1904 (3d Cir. 2024), ECF No. 39. If Rutherford were to succeed in persuading this Court that Section (b)(6) applies, then his case would implicate the same merits questions as this one. And if he is now contending for the first time in this litigation that Section (b)(6) does not apply to his case, then his petition would be an even poorer one, because it would remove from consideration how the Commission's adoption of that guidance impacts the analysis.[2]

4. While the Government correctly urges this Court both to grant this Petition and "hold the petition in *Rutherford* pending the disposition of" this case, the Government is incorrect on the merits. U.S. *Carter* Br. 20. Petitioner looks forward to addressing the merits arguments at that stage.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[2] Rutherford further suggests that this Petition encompasses the "broader question" of whether the Sentencing Commission validly allowed courts "to consider *any* 'nonretroactive change in law.'" Reply *Rutherford* Br., at 6–7. In fact, both cases concern requests to reduce grossly excessive sentences specifically resulting from stacked 18 U.S.C. § 924(c) offenses. But to the extent this Petition provides an opportunity to provide broader guidance on the validity of Section (b)(6) and the permissibility of considering changes in law as an "extraordinary and compelling" reason for a sentence reduction, that is further support for granting it. The growing and irreconcilable confusion among the courts of appeals warrants such guidance.

DAVID A. O'NEIL
Counsel of Record
SUZANNE ZAKARIA
DEBEVOISE & PLIMPTON LLP
801 Pennsylvania Ave. N.W.
Washington, D.C. 20004
daoneil@debevoise.com
(202) 383-8000

STEVEN TEGRAR
JAMES STRAMM
NED TERRACE
SARAH BRODY-BIZAR
LAURA HALLAS
DEBEVOISE & PLIMPTON LLP
66 Hudson Blvd
New York, NY 10001

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