No. 23-1002

In the Supreme Court of the United States

TONY R. HEWITT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITIONER'S REPLY

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PETITIONER'S REPLY

All parties agree that the decision below was wrongly decided. All also agree that it deepens at least a 2-2 circuit split—one that cannot and will not resolve itself. That leaves no doubt that the Court should grant the petition and reverse, restoring uniformity on the question presented and ensuring that the First Step Act is applied according to its plain terms.

Notwithstanding the Fifth Circuit's admitted error and the Solicitor General's acknowledgment of a division of authority among the courts of appeals, the government strangely resists this Court's intervention. As the government sees it, review is unnecessary because (1) the issue has limited prospective importance and (2) there is a long-stalled bill pending before Congress which, if enacted, would amend the First Step Act.

Neither assertion is remotely persuasive. If the decision below is left to stand, untold numbers of individuals will continue to be denied often decades-long sentence reductions to which they are entitled by law. And as the government begrudgingly admits, the question presented is certain to recur as changes in the law continue to crop up. The Court should not delay resolution of the issue any longer.

1. The government agrees that the decision below deepens a circuit split: Whereas "[t]he Third and Ninth Circuits * * * have both correctly interpreted Section 403 to apply at a resentencing held following the Act's enactment," the Fifth and Sixth Circuits have reached the opposite conclusion. See BIO 9-10.

In an attempt to trivialize this point, the government asserts (at 9) that "the disagreement in the courts of appeals is shallow and recent." But that is plainly wrong.

The split is two years old, and it emerged almost immediately after the FSA was enacted. That the statute spawned a circuit split nearly from the start is a reason to grant review, not the other way around. In all events, a 2-2 division of authority that is widely recognized and firmly entrenched is plainly worthy of the Court's attention.

That is especially so here, given that two dozen federal appellate judges sitting on four circuit courts have issued ten fully considered opinions—majorities, concurrences, dissents, and opinions respecting rehearing—that have openly approved or criticized the conflicting views of their colleagues all across the country. And that is to say nothing of the unpublished decisions of the Second and Fourth Circuits and the on-point opinion of the *en banc* Seventh Circuit.[1] Given the extensive treatment that the question presented already has received, there is nothing to be gained from further percolation.

The now-entrenched nature of the circuit split also explains the irrelevance of the denial of review in *Carpenter* v. *United States*, No. 23-531. See BIO 9. As we noted in the petition (at 1, 6-7), the government there stated that it would attempt to resolve the circuit split by acquiescing

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[1] See Pet. App. 1a-16a; *United States* v. *Carpenter*, 80 F.4th 790 (6th Cir. 2023) (Kethledge, J., concurring in denial of rehearing en banc); *id.* at 793-795 (Griffin, J., dissenting from denial of rehearing en banc); *id.* at 795-797 (Bloomekatz, J., dissenting from denial of rehearing en banc); *United States* v. *Mitchell*, 38 F.4th 382 (3d Cir. 2022); *id.* at 392-393 (Bibas, J., concurring in the judgment); *United States* v. *Merrell*, 37 F.4th 571 (9th Cir. 2022); *id.* at 578-579 (Boggs, J., dissenting); *United States* v. *Jackson*, 995 F.3d 522 (6th Cir. 2021); *id.* at 526-528 (Moore, J., dissenting) *United States* v. *Uriarte*, 975 F.3d 596 (7th Cir. 2020) (en banc); *United States* v. *Bethea*, 841 F. App'x 544 (4th Cir. 2021); *United States* v. *Walker*, 830 F. App'x 12 (2d Cir. 2020).

in *en banc* rehearing in the Sixth Circuit. But the Sixth Circuit rebuffed the government, and the Fifth Circuit has since solidified the conflict beyond any one circuit's ability to resolve. This Court is thus the only tribunal that can end the dispute among the lower courts.

2. The question presented is exceptionally important. To begin, the sentencing disparities at issue here are huge. Whether the First Step Act applies to a criminal defendant often makes a difference of decades or centuries of incarceration. The Court and Congress both have called out the injustice of "unwarranted sentencing disparities" like this. *Dorsey* v. *United States*, 567 U.S. 260, 277 (2012). For many individuals, the question presented is the difference between liberty and detention; for them, it is of utmost importance.

Moreover, the question arises with great frequency, not only under Section 403 of the Act, but also in cases implicating Section 401. See BIO 12 n.3. Many thousands of defendants every year have been subject to the sentencing enhancements implicated by Sections 401 and 403. See NACDL Br. 7-8; ACLU Br. 12-14.

Although it is true that the question presented can arise only for defendants who committed offenses before December 2018, the government is wrong to imply (at 12) that the range of cases in which the question presented arises will meaningfully "diminish" any time soon. The whole point is that the terms of imprisonment at issue here are many decades, sometimes centuries, long. Thus, for decades to come, the question presented will arise every time there is a change in law that can be raised on collateral review in cases involving convictions that fall within the reach of Section 401 or 403—which is most federal convictions. NACDL Br. 7-8.

Given these facts, it is perhaps unsurprising that, just a few months ago, the government argued to the Sixth Circuit that "restoring uniformity among the circuits" on the question presented is a matter "of exceptional importance." See U.S. Rehearing Br. 1-2, *Carpenter* v. *United States*, No. 22-1198 (6th Cir. Aug. 7, 2023). It was correct then, and it is wrong to suggest otherwise now.

3. The government makes a final pitch for denial, noting in passing (at 9, 13) that a bill has been introduced that would amend the First Step Act so that it applies retroactively. The bill that the government references, the First Step Implementation Act, was first introduced in 2021 but died without receiving a floor vote. It was reintroduced in the Senate more than one year ago, in April 2023. In the time since, it has not received so much as a committee hearing, let alone has it been voted out of committee, debated on the chamber floor, voted upon by the full Senate, or moved to the House.

Given the approaching end to the 118th Congress, there is no realistic possibility that the bill will be enacted before it dies again at the end of the year. And it would be manifestly unjust to allow continued misapplication of a law that *has* been enacted out of speculative concern for a bill that never will be.

In circumstances like these, the Court often grants review notwithstanding a respondent's assertion that Congress is currently considering legislation that, if adopted, would affect the question presented.[2] That is the approp-

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[2] See, *e.g.*, BIO 13, *Kelly* v. *Preap*, No. 16-1363 ("Review is premature because Congress is currently considering bills that would modify the statutory language in question") (cert. granted March 19, 2018); BIO 15, *United States v. Microsoft Corp.*, No. 17-2 ("Congress is currently considering several proposals" that would provide a

riate course here. In the Fifth and Sixth Circuits, countless individuals are being held incarcerated for decades too long, in contravention of the plain text and clear purpose of the First Step Act. If their cases had arisen in the Third or Ninth Circuits, their sentences would be far shorter, and many likely would be free. Such variability in the administration of the federal criminal justice system is intolerable. The Court should grant the petition and restore uniformity on the question presented.

Respectfully submitted.

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"nuanced solution" to the question presented) (cert. granted Oct. 16, 2017); BIO 1, *Mayorkas* v. *Cuellar de Osorio*, No. 12-930 ("Congress is currently considering a comprehensive immigration reform bill that would moot the question presented entirely.") (cert. granted June 24, 2013); BIO 20, *Octane Fitness, LLC* v. *Icon Health & Fitness, Inc.*, No. 12-1184 ("currently, Congress is considering revision of the statutes" at issue) (cert. granted Oct. 1, 2013); BIO 13, *Henderson* v. *Shinseki*, No. 09-1036 ("Congress is currently considering whether to enact" a legislative fix to the question presented) (cert. granted June 28, 2010).