No. 23-1150

IN THE
Supreme Court of the United States

COREY DEYON DUFFEY, JARVIS DUPREE ROSS,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

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

REPLY BRIEF IN SUPPORT OF CERTIORARI

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INTRODUCTION

The government's brief reads more like a brief acquiescing to this Court's review than a brief in opposition. For example, the government opens the argument section of its "opposition" brief by noting that "the government agrees with petitioners that the decision below adopted an incorrect interpretation of Section 403." Opp. 9 (footnote omitted). The government then proceeds to explain that there is a split of authority on the question presented. In the government's words, while "[t]he Sixth Circuit * * * has adopted the position of the [Fifth Circuit] below," "[t]he Third and Ninth Circuits * * * have both correctly interpreted Section 403 to apply at a

resentencing held following the Act's enactment." *Id.* 9-10 (citation omitted).

Despite conceding the split and the Fifth Circuit's error, the government still contends that this Court should deny review. The government raises three objections to certiorari, none of which can withstand scrutiny. First, the government says that the split is "shallow and recent." *Id.* 9. But even if one takes the split as the government describes it, a 2-2 split that has persisted for three years cannot fairly be termed "shallow and recent." Second, the government argues that the question presented has only "modest prospective importance." *Id.* 11. But the Petitioners and many other similarly situated defendants will serve decades of wrongful imprisonment because of the Fifth and Sixth Circuits' failure to answer the question presented correctly. And third, the government suggests that pending legislation "obviate[s] the need for this Court's intervention." *Id.* 13. But legislation that has been pending before Congress for over a year without a hearing or a vote is unlikely to become law.

Moreover and importantly, none of the government's objections to certiorari are barriers to this Court's review. There are no vehicle problems. There are no antecedent questions. There are no procedural complications. The question presented is outcome-determinative for the Petitioners. Petitioners' arguments are fully preserved. And this case comes to this Court after full adversarial testing in the lower courts.

The government's objections don't even suggest that delaying a grant would be helpful to the Court. Mindful of the Sixth Circuit's recent rejection of the government's request for rehearing en banc, the government makes no argument that the Fifth and Sixth Circuits

are likely to reverse themselves. And the government is too honest to suggest that further percolation would aid this Court's review when the question presented has been fully ventilated in numerous decisions.

This Court should grant the petition.

ARGUMENT

I. THERE IS A CLEAR, ACKNOWLEDGED, AND ENTRENCHED SPLIT ON THE QUESTION PRESENTED.

A. The Government Concedes The Split.

The government concedes (at 9-10) that the Third and Ninth Circuits have split from the Fifth and Sixth Circuits on the question presented.

The government downplays (at 9) this split as "shallow," but a 2-2 split is far from shallow. Indeed, this Court routinely grants review even when the courts of appeals are divided 1-1. *See, e.g.*, Pet. for Cert. at 4, *Nat'l Rifle Ass'n* v. *Vullo*, No. 22-842 (cert. granted Nov. 3, 2023); Pet. for Cert. at 21, *Bittner* v. *United States*, No. 21-1195 (cert. granted June 21, 2022); *PPL Corp.* v. *Comm'r of Internal Revenue*, 569 U.S. 329, 334 (2013).

The government also characterizes (at 9) the split as "recent." But the Sixth Circuit issued *Jackson* three years ago, *see United States* v. *Jackson*, 995 F.3d 522 (6th Cir. 2021), and the Third and Ninth Circuits broke with that case two years ago, *see United States* v. *Mitchell*, 38 F.4th 382, 386 & n.22 (3d Cir. 2022); *United States* v. *Merrell*, 37 F.4th 571, 575 (9th Cir. 2022). The decisions could hardly be much older than

that given the First Step Act's enactment in 2018. *See* Pub. L. No. 115-391, 132 Stat. 5194, 5221-22.

More importantly, the government does not explain why the depth and recency of the split matters here. Ordinarily, when a respondent downplays a split as shallow and recent, those adjectives are used in service of a broader argument that the split may resolve itself. *See* Dan Himmelfarb, Kenneth S. Geller, Stephen M. Shapiro, Timothy S. Bishop & Edward A. Hartnett, *Supreme Court Practice* 243 (11th Ed. 2019) ("[E]ven where a 'true' conflict may be said to exist, certiorari will sometimes be denied where it seems likely that the conflict may be resolved as a result of future cases in the Courts of Appeals.") (quoting Justice Harlan, *Some Aspects of the Judicial Process in the Supreme Court of the United States*, 33 Austl. L. J. 108 (1959)). But the government does not make that argument here. Nor could it.

There is no reason to suspect that the circuits are in flux and this split will resolve itself. The government and defendants alike agree with the position adopted by the Third and Ninth Circuits, making those courts unlikely to switch positions. The Fifth Circuit's decision below is unanimous, and the panel carefully considered the contrary Third and Ninth Circuit decisions before picking a side in the split. *See* Pet. App. 6a-12a. The Sixth Circuit has rejected rehearing this issue en banc multiple times, even in the face of the government's change in position on the proper reading of the statute. *See* Order, *United States* v. *Jackson*, No. 22-3958 (6th Cir. Apr. 2, 2024); *United States* v.

Carpenter, 80 F.4th 790, 790 (6th Cir. 2023). These courts are entrenched in their positions.

B. The Courts Of Appeals Are More Deeply Divided Than The Government Is Willing To Admit.

The Fourth and Seventh Circuits have also addressed similar questions in similar contexts. *See* Pet. 13-15. The government tries to distinguish those cases, but at no point does the government grapple with Petitioners' fundamental point: that those decisions indicate that the Fourth and Seventh Circuits would also agree with the Third and Ninth Circuits on the question presented.

The government observes (at 10) that the Fourth Circuit's decision in *United States* v. *Bethea*, 841 F. App'x 544 (4th Cir. 2021), considered "the application of a different provision" and is "unpublished." But the government later concedes (at 12 n.3) that provision is "identically worded" to Section 403. That is why other circuits universally treat *Bethea* as the Fourth Circuit's definitive ruling on this issue. *See* Pet. 14. District courts in the Fourth Circuit have likewise recognized that "*Bethea*'s reasoning" makes clear that Section 403 applies at a pre-Act defendant's post-Act resentencing. *Broadnax* v. *United States*, No. 5:09-CR-201-FL-1, 2022 WL 56525, at *6 (E.D.N.C. Jan. 5, 2022). Although *Bethea* may be unpublished, it is treated as controlling by district courts in the Fourth Circuit. *See, e.g.*, *United States* v. *Mathis*, No. 3:14-CR-00016, 2021 WL 4504688, at *3-4 (W.D. Va. Oct. 1, 2021) (referring to *Bethea* as "persuasive and instructive"). In light of that treatment, and the government's agreement with a pro-defendant reading of the statute, the Fourth Circuit is unlikely to ever have the

opportunity to address this question in a published decision.

The government argues (at 11) that the Seventh Circuit's decision in *United States* v. *Uriarte*, 975 F.3d 596 (7th Cir. 2020) (en banc), is irrelevant because that case "'left open the question' presented here." (citation omitted). But, because *Uriarte* was decided en banc, there is no chance that a different panel might limit the reach of that decision. The Seventh Circuit as a whole has endorsed *Uriarte*'s reasoning. And that reasoning naturally extends to this situation. *See* Pet. 13-14. Both the Third and the Ninth Circuits relied on *Uriarte* when considering the question presented. *See Mitchell*, 38 F.4th at 387 & n.26-28; *Merrell*, 37 F.4th at 575-576. And the Fifth Circuit cites Justice Barrett's dissent in *Uriarte* in response to nearly every substantive argument that the Petitioners raised. *See* Pet. App. 8a-10a. The government has no argument for why the Seventh Circuit would decide any differently when it confronts this question—especially now that the government agrees with *Uriarte*.[1]

We don't need a crystal ball to figure out how the Fourth and Seventh Circuits would approach the question presented. The government's suggestion

[1] As for the Second Circuit, the government's summary (at 11) of *United States* v. *Brown*, 935 F.3d 43 (2d Cir. 2019), only confirms Judge Moore's observation that the Second Circuit "appears likely to join this side of the circuit split, if given the opportunity to decide the issue directly." *United States* v. *Jackson*, No. 22-3985, 2023 WL 8847859, at *8 (6th Cir. Dec. 21, 2023) (Moore, J., concurring in part and dissenting in part).

that these courts are undecided is wrong at best, and misleading at worst.

C. Circumstances have materially changed since the Court denied certiorari in *Carpenter*.

The government argues (at 10) that "the situation in the circuits" is the same as when "this Court declined to review the same issue in *Carpenter*." That is wrong. So much has changed.

First, at the time this Court considered *Carpenter*, the Sixth Circuit seemed poised to re-consider its position en banc, and potentially resolve the split. As the government itself argued in *Carpenter*, the Sixth Circuit's position on the issue was still unsettled when this Court considered the *Carpenter* petition. *See* Br. in Opp. at 12-14, No. 23-531 (U.S. Jan. 17 2024) (counting the number of Sixth Circuit active judges on either side of the issue and suggesting that "if other circuits' future consideration of the question confirms the Sixth Circuit's position as an outlier, that court may yet decide to revisit its determination in *Jackson*"); Letter, *Carpenter*, No. 23-531 (U.S. Jan. 26, 2024). However, since this Court's consideration of the *Carpenter* petition, the Sixth Circuit has declined to rehear the question presented en banc. *See* Order, *United States* v. *Jackson*, No. 22-3958 (6th Cir. Apr. 2, 2024).

Second, at the time this Court considered *Carpenter*, the split was lopsided, and the tilt favored criminal defendants. That is no longer true. Now, the courts of appeals are evenly divided on the proper reading of the statute, and defendants in both the Fifth and Sixth Circuits face a draconian reading of the statute. To be sure, the Fifth Circuit's decision issued 14 days

before *Carpenter* was conferenced. *See* No. 23-531 (U.S. Jan. 31, 2024) (distributing petition for February 16, 2024, conference). But that decision came too late for the parties to discuss the Fifth Circuit's decision in their briefing defining the contours of the split.

Third, and relatedly, at the time this Court considered *Carpenter*, the government was still arguing that subsequent court of appeals' decisions "could obviate the need for this Court's intervention." Br. in Opp. at 14, No. 25-531 (U.S. Jan. 17 2024). Now, however, although the government's brief in opposition here is more or less a copy-and-paste of its brief in opposition in *Carpenter*, the government does not renew the argument that the split may resolve itself. Nor could it now that both the Fifth and Sixth Circuits are entrenched in their positions. This firm 2-2 split, comprised of decisions reached by courts of appeals that have explicitly acknowledged a division of authority among the courts of appeals, *see* Pet. App. 6a, is materially different than the division this Court considered earlier this year. Unlike at that point in time, there is no reason to believe that the split will resolve absent this Court's intervention.

Fourth, at the time this Court considered *Carpenter*, the lack of other decisions on the Sixth Circuit's side of the split may have suggested to the Court that the arguments in favor of the Sixth Circuit's approach were underdeveloped. That is no longer the case. The lower courts have now analyzed this issue from every angle. *See* Pet. 22-24. Further percolation would not aid this Court's review. Moreover, the government's switch in position could stymie further percolation. *See, e.g.*, *United States* v. *Daniels*, No. 3:11-CR-8-WKW, 2023 WL 2588172, at *3 (M.D. Ala. Mar. 21,

2023) (granting a *joint* motion of the government and the defense to apply Section 403 at a pre-Act defendant's post-Act resentencing). Waiting for more circuits to weigh in would thus not only be unnecessary to aid this Court's resolution of the issue, it may be futile.

II. THE QUESTION PRESENTED IS RECURRING AND IMPORTANT.

The government states (at 12) that "[t]he Fifth and Sixth Circuits' divergence from other circuits' view of Section 403's applicability will arise and be outcome-determinative only in a discrete set of cases." It is hard to know what the government means by that vague statement. But however you read that statement, it's clearly wrong.

First, to the extent that the government suggests that the question presented is not important because very few defendants will be affected—that's wrong. Many sentences turn on this issue. The question presented arises whenever a defendant sentenced to at least two Section 924(c) sentences before December 21, 2018, secures vacatur of those sentences and faces resentencing. In light of the number of defendants imprisoned on Section 924(c) counts, *see* Pet. 23-24, and the evergreen question of whether a particular crime constitutes a crime of violence under that provision, it should be no surprise that this issue already arises with regularity. *See id.* 10-12; *United States* v. *Carpenter*, No. 22-1198, 2023 WL 3200321, at *2 (6th Cir. May 2, 2023); *United States* v. *Nix*, No. 6:14-CR-06181 EAW, 2023 WL 4457894, at *2 (W.D.N.Y. July 11, 2023) (applying Section 403 at a pre-Act defendant's post-Act resentencing); *United States* v. *Figueroa* 530 F. Supp. 3d 437, 443 & n.5 (S.D.N.Y. 2021) (same);

Daniels, 2023 WL 2588172, at *3 (granting joint motion to apply Section 403 at a pre-Act defendant's post-Act resentencing); *Broadnax*, 2022 WL 56525, at *5-6 (vacating defendant's Section 924(c) convictions and concluding that Section 403 would apply at post-Act resentencing).

Second, to the extent that the government suggests (at 12) that the question presented is not important because the number of defendants facing the issue will "diminish over time"—that's wrong, too. This issue will continue to arise for decades to come. The class of affected defendants are typically serving sentences that span decades—if not *de facto* life sentences like Petitioners. Given that these defendants will remain in prison well into the next century, the question presented will continue to recur for at least that long.

Third, to the extent that the government suggests that the question presented is not "outcome determinative" in the sense that many of the affected defendants face very long sentences anyway—that's also wrong. The question presented is enormously consequential: At stake is whether Petitioners and those in their position must die in prison serving *100+ year* sentences, rather than sentences as low as *25 years*. *See* Pet. 24.

Fourth, to the extent that the government suggests that the question presented is not important because its resolution will not contribute to lower courts' understanding of any related legal issues—that's wrong, too. The question presented also arises whenever Section 401 of the First Step Act would reduce a defendant's sentence. *See id.* 25-26. The government tucks that related provision away in a footnote, responding (at 12 n.3) that Section 401's amendments "will only

be relevant at the resentencing of defendants whose sentences were enhanced under 21 U.S.C. § 841(b)(1)(A) or (b)(1)(B)," as well as other provisions. But that's just it. Those offenses include "the most commonly prosecuted drug offenses" in the Nation. U.S. Sentencing Comm'n, *Primer: Drug Offenses* 1 (2023); *see also* NACDL Amicus Br. at 9-12, *Hewitt*, No. 23-1002 (U.S. Apr. 11, 2024). The thousands of federal prisoners convicted of offenses covered by Section 401 means that this issue will arise even more frequently in the future.

III. THERE IS NO LEGISLATIVE FIX IN THE WORKS.

The government also argues (at 13) this Court's review is "unwarranted" because a bill that would amend the First Step Act is currently pending in Congress. That is a red herring. The bill was first introduced in 2021, and it never received a floor vote. *See* First Step Implementation Act of 2021 (FSIA), S. 1014 (117th Congress). The updated version of the bill the government cites was referred to the Senate Judiciary Committee over a year ago and has since fallen dormant. *See* S. 1251 – First Step Implementation Act of 2023, *All Actions: S. 1251 — 118th Congress (2023-2024)*.[2] There is no reason to expect that Congress will ever enact this amendment into law.

Even if that bill were under serious consideration by Congress, it would not obviate the need for this Court to address the question presented. As the government agrees (at 9), Section 403 mandates that courts *must* apply the Act's reforms at post-Act resentencing

[2] *Available at* https://www.congress.gov/bill/118th-congress/senate-bill/1251/all-actions.

proceedings. The government's cited bill, however, provides only that courts "may" apply those reforms. FSIA § 101(c); *see* Opp. 13 (recognizing that the bill "would permit" a court to afford relief); *Concepcion* v. *United States*, 597 U.S. 481, 501 (2022) (interpreting the current version of this provision to mean that courts are not required to reduce any sentence). When the choice is between 105 years or 25 years' imprisonment, the difference between "must" and "may" is too consequential to leave to geography.

IV. THIS IS AN EXCELLENT VEHICLE.

The time to grant certiorari is now. The government does not contest that this is the perfect vehicle to resolve this recurring issue. *See* Pet. 26-27. The question presented is outcome-determinative. There are no antecedent questions. There are no procedural complications. This case comes to this Court after full adversarial testing in the lower courts. And in contrast to the other pending petition on this issue, Petitioners' arguments are fully preserved. *See id.* at 27 (discussing the petition in *Hewitt* v. *United States*, No. 23-1002). This Court should resolve this pressing issue, and this is the case in which to do it.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision reversed.

Respectfully submitted,

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