No. 23-531

IN THE

Supreme Court of the United States

TIMOTHY IVORY CARPENTER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

This is a textbook case for this Court's review. The Government recognizes that the Third and Ninth Circuits have rejected the Sixth Circuit's reading of the First Step Act. BIO 12-13. The Government also agrees that the Sixth Circuit erred in holding that Section 403 of the Act does not apply to defendants, like petitioner, whose offenses were committed before the Act's effective date but whose initial sentences were vacated afterwards. *Id.* 7-12. A range of amici underscore that "the question presented is of exceptional importance to defendants facing resentencing, and to the courts that must resentence them." Br. of ACLU, Cato Institute, and the Due Process Institute 3; *see also* Br. of NACDL 2. And the Government does not dispute that this case is an ideal vehicle for resolving the increasingly deepening conflict among the circuits.

The Government nevertheless opposes this Court's review. Grasping at the thinnest of reeds, the Solicitor General asserts that (1) the square conflict, which the Sixth Circuit just cemented by denying rehearing en banc, is "shallow" and might even go away on its own; (2) the question presented, upon which decades of prison time turns in every case in which it arises, is of only "modest" importance; and (3) legislation first proposed several years ago—never voted on by either chamber of Congress, and dormant for almost three years—could "obviate the need for this Court's intervention." BIO 12, 14, 16. None of these contentions is remotely persuasive. Certiorari should be granted.

1. The circuit split here is substantial, locked-in, and continues to deepen. To begin, this Court

regularly grants review when courts of appeals are divided 2-1, or even 1-1.[1] And this case presents no ordinary 2-1 conflict: The Fourth Circuit has also weighed in (making the actual tally on the ground 3-1). Pet. 8-9; BIO 13 n.1. District courts within the Second Circuit have departed from the Sixth Circuit's reading of the Act as well, and the Government is not appealing those decisions, thus rendering them controlling within that jurisdiction. Pet. 10; BIO 14. District courts within the Fifth and Eleventh Circuits have also divided over the question presented. Pet. 10.

Against this backdrop, the only real question is whether the circuit split might truly dissolve. It will not. Petitioner and the Government both urged the Sixth Circuit to rehear this case en banc. The Government declared the issue was one "of exceptional importance" and devoted over eight pages of argumentation to explaining why the Sixth Circuit's reading of the Act is wrong. Gov't's Resp. to Pet'n for Reh'g En Banc at 2, 5-13. But the court of appeals refused to rehear this case, offering no reason apart from its contrarian view of the merits. *See* Pet. App. 7a.

The Government nonetheless speculates that the Sixth Circuit "may yet decide to revisit" its position,

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[1] For a sampling from this Term alone, see Pet. for Cert. at 11-15, *Connelly v. United* States, No. 23-146 (cert. granted Dec. 13, 2023); Pet. for Cert. at 4, *Nat'l Rifle Ass'n v. Vullo*, No. 22-842 (cert. granted Nov. 3, 2023); Pet. for Cert. at 11-14, *Cantero v. Bank of Am.*, No. 22-529 (cert. granted Oct. 13, 2023); Pet. for Cert. at 10-14, *Warner Chappell Music, Inc. v. Nealy*, No. 22-1078 (cert. granted Sept. 29, 2023); Pet. for Cert. at 9-17, *Moore v. United States*, No. 22-800 (cert. granted June 26, 2023).

citing one case in which that court granted rehearing en banc "after previously denying petitions for rehearing on the same question." BIO 14 (citing *United States v. McCall*, 56 F.4th 1048 (6th Cir. 2022) (en banc)). *McCall*, however, is completely inapposite. In that case, the Sixth Circuit "granted en banc review to resolve [an] 'intractable' '*intra-circuit* split' created by the [panel] decision." *McCall*, 56 F.4th at 1051 (emphasis added). There is no intra-circuit split here. To the contrary, the Sixth Circuit recently confirmed that an "inter-circuit split" exists over whether the Act applies in these circumstances and doubled down yet again on its position that it does not, emphasizing that it believes its position is "reasonable." *United States v. Jackson*, 2023 WL 8847859, at *4 (6th Cir. Dec. 21, 2023) (citation omitted).[2]

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[2] In a letter to this Court dated January 26, 2024, the Solicitor General notes that the Sixth Circuit has ordered the Government to respond to a petition for rehearing en banc in *Jackson*, and she says that the Government will agree rehearing is warranted. But the Government identifies no reason why, having denied en banc in this case, the Sixth Circuit would grant rehearing in that case. Nor does any such reason exist. The Government acquiesced to rehearing in this case too, and this case was (and remains) a perfect vehicle for addressing the question presented. Nor has any further legal development occurred since the Sixth Circuit denied en banc in this case.

At any rate, denying certiorari here to wait and see what happens in *Jackson* would be a terrible idea. The First Step Act question in that case is encumbered by "the law-of-the-case doctrine," making it an inferior vehicle to this one for resolving the circuit split. *Jackson*, 2023 WL 8847859, at *2-4. Waiting for *Jackson* would also threaten to foreclose petitioner from obtaining the decades of sentencing relief that even the Government itself admits he is entitled to. BIO 7-12.

Nor does the Government offer any reason to think some "future" court decision might cause the Sixth Circuit to change its position. *See* BIO 14. Three courts of appeals have thoroughly explained why they think the Sixth Circuit's position is wrong. *See* Pet. 8-9. The Government (as just mentioned) has now done so at length as well. On the other hand, then-Judge Barrett, and Judges Boggs, Kethledge, and Quattlebaum have aligned themselves with the Sixth Circuit's view. *See id.* 10-11; Pet. App. 9a-10a (Kethledge, J., concurring in the denial of rehearing en banc); *United States v. Merrell*, 37 F.4th 571, 578-79 (9th Cir. 2022) (Boggs, J., dissenting); *United States v. Bethea*, 841 Fed. Appx. 551, 556-57 (4th Cir. 2021) (Quattlebaum, J., dissenting). Does the Government really think some new argument might still emerge that persuades the Sixth Circuit to change course? It is much more likely that the Sixth Circuit has simply decided to stick with its position (shared by other distinguished jurists) unless and until this Court directs it to do otherwise. *See, e.g.*, *Helphenstine v. Lewis County*, 65 F.4th 794, 801 (6th Cir. 2023) (Readler, J., statement respecting denial of rehearing en banc) (denying en banc despite "many competing views" on the legal issue, because of the "high bar for convening en banc proceedings" and this Court's superior ability to resolve the conflict); *CIC Servs., LLC v. Internal Revenue Serv.*, 936 F.3d 501, 505 (6th Cir. 2019) (Sutton, C.J., concurring in the denial of rehearing en banc) (same where an en banc opinion would not have meaningfully "add[ed] to the mix" of other judicial opinions on the issue).

2. It is also very important that this Court resolve the conflict over whether Section 403 applies to defendants whose offenses were committed before the

Act's effective date but whose initial sentences were vacated afterwards. Indeed, the Government urged the Sixth Circuit to grant rehearing en banc on the ground that this case "presents a question of exceptional importance." Gov't's Resp. to Pet'n for Reh'g En Banc at 1-2 (citation omitted).

For starters, measured by solely the sheer number of years of incarceration at issue for petitioner and others in his situation, the question presented is enormously consequential. The Government does not dispute that petitioner's sentence, for example, is "*eighty* years longer than it would be if he had been resentenced in the seventeen states that comprise the Third, Fourth, and Ninth Circuits." Pet. App. 23a (Bloomekatz, J., dissenting from the denial of rehearing en banc); *see* BIO 7-8. These dramatic stakes alone make the question presented important enough to warrant this Court's review. All the more so because this Court and Congress have specifically decried "unwarranted sentencing disparities" based on nothing more than the happenstance of geography or other arbitrary variables. *Dorsey v. United States*, 567 U.S. 260, 277 (2012) (quoting 28 U.S.C. § 991(b)(1)(B)).

Turning a blind eye to the consequences for petitioner and others in his situation, the Government suggests that the question presented "will arise and be outcome-determinative only in a discrete set of cases." BIO 15. Of course that statement is literally true. *Every* question of federal sentencing law—indeed, virtually every question of federal law—arises only in a "discrete set of cases." The question is how often the necessary factors come together to give rise to the question. As the several cases cited in the Petition demonstrate, that happens with regularity. Pet. 8-10.

What's more, the question presented arises not just where Section 403 of the Act is implicated, but also where Section 401 would lower a defendant's sentence. *See* Pet. 8, 12. The Government breezes past this reality, stating that Section 401 is relevant only "at the resentencing of defendants whose sentence was [sic] enhanced under 21 U.S.C. 841(b)(1)(A) or (b)(1)(B)." BIO 15-16 n.2. For one thing, that statement is legally inaccurate; Section 401 also applies to defendants convicted under the Controlled Substances Import and Export Act and whose sentences were enhanced under 21 U.S.C. § 960(b). *See* FSA § 401(b). More important, the Government does not deny that thousands of defendants per year are subject to the enhancements covered by Section 401. Br. of NACDL 6-7; *see also* Br. of ACLU et al. 12-14. Indeed, the offenses affected by Section 401 have long been "'the most commonly prosecuted drug offenses' in the country," Pet. 13 (citations omitted), and drug crimes are by far the most commonly prosecuted of *all* federal offenses, Br. of NACDL 6.

That leaves the Government's contention that, because the question presented can arise only for defendants who committed offenses before December of 2018, the frequency with which the question arises will "diminish over time." BIO 15. That might be correct. But the arc of time here is *very* long, for the terms of imprisonment at issue here are typically dozens of years. Furthermore, the Government does not dispute that there are three distinct scenarios in which the question presented will continue to arise for

years—indeed decades—to come. *See* Pet. 13-14.[3] The sooner this Court resolves whether the Act applies in those resentencings, the better.

3. The existence of a bill to amend the First Step Act furnishes no reason to deny review either. That proposal was first introduced in 2021. *See* First Step Implementation Act of 2021 (FSIA), S. 1014 (117th Congress). It never received a floor vote. The current bill the Government cites has been languishing since April of 2023 without a single hearing or vote. In short, there is no reason to believe this bill, or any subsequent version of it, will ever become law.

Even if it might, this potential amendment would still not obviate the need for this Court to resolve the question presented. Petitioner maintains (and, again, the Government and other courts agree) that district courts *must* apply the Act's reforms at resentencings like this. The pending bill, however, provides only that district courts "may" apply the Act's reforms in this situation. FSIA § 101(c); *see also* BIO 16 (asserting that the bill would merely "permit" courts to apply the Act's reforms). In other words, the bill would merely give district courts the discretion to apply Section 403 in cases like this. When the better part of 100 years behind bars is at stake, the difference between must and may is too significant to leave unresolved.

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[3] The Government notes that the question whether Section 403 applies to pre-2019 offenses "arises only when a defendant has been convicted of more than one Section 924(c) offense." BIO 15. But petitioner already accounted for that factor, highlighting only those defendants "serving multiple 'stacked' Section 924(c) sentences." Pet. 13.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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