No. 16-9672

IN THE
Supreme Court of the United States

C.D,
E.F., and
G.H.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals For The Tenth Circuit

Reply Brief for Petitioners

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REPLY BRIEF FOR PETITIONERS

1. This Case Is An Ideal Vehicle For Deciding Whether 18 U.S.C. § 3582 Is A Jurisdictional Statute.

The petitioners have asked this Court to decide whether 18 U.S.C. § 3582 is a jurisdictional statute. The government opposes certiorari. But the government does not argue that 18 U.S.C. § 3582 *is* a jurisdictional statute. Nor does it deny the extent or entrenchment of the circuit courts' disagreement about whether and to what extent the statute is jurisdictional. Nor does it dispute that jurisdictional questions like the one presented here are of "considerable practical importance for judges and litigants," *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434 (2011)—particularly for those district courts that rely heavily on party concessions during the high volume of litigation that retroactive guideline amendments generate.

The government argues only that this case is not the right vehicle for reviewing the question presented. According to the government, if this Court declares § 3582 nonjurisdictional, the Tenth Circuit will simply, as a matter of discretion, reach the same eligibility conclusion on remand. BIO 11-12. This is an unsound reason to deny this petition, and it is incorrect as a matter of fact and law.

A. The government's speculation that the result below will be the same regardless of what this Court does is no reason to deny this petition.

The government argues that this case is "not a suitable vehicle" for deciding whether § 3582 is a jurisdictional statute, because correction of the Tenth Circuit's jurisdictional mislabeling "would have little practical effect on the disposition of this case." BIO 11-12. This is nothing more than an argument that the Tenth Circuit's labeling error was harmless. But this Court routinely rejects harmless-error

arguments as a basis for denying otherwise-worthy certiorari petitions. Instead, it is this Court's "usual practice" to decide those cases, and "leave that [harmless error] dispute for resolution on remand." *Maslenjak v. United States*, 137 S.Ct. 1918, 1931 (2017) (vacating judgment below after granting certiorari despite government's urging in its Brief in Opposition that "this case is a poor vehicle" because any error below was harmless, *Maslenjak v. United States*, No. 16-309 (BIO 18-19)). Indeed, this Court recently granted certiorari and heard arguments in another case challenging a jurisdictional label, despite the respondent's invocation of the very same vehicle argument the government makes in this case. *Hamer v. Neighborhood Housing Services of Chicago*, S.Ct. No. 16-658 (BIO 11). This Court should follow its usual practice here and reject the government's vehicle argument as a reason to deny this petition.

B. The Tenth Circuit's own opinion rebuts the government's vehicle argument.

The Tenth Circuit's own opinion rebuts the government's assumption that the Tenth Circuit will simply regurgitate its eligibility ruling as a matter of discretion if this Court declares § 3582 nonjurisdictional. In that opinion, the Tenth Circuit carefully set out the government's express eligibility concessions in both the district court and on appeal. Pet. App. 6a-7a. The Tenth Circuit then proceeded sua sponte to find the petitioners ineligible for § 3582(c)(2) relief, but only after observing that "the Government cannot concede a court's criminal jurisdiction where it does not exist," and citing circuit precedent for the proposition that subject-matter jurisdiction "cannot be conferred or waived by consent." *Id*. at 7 (citing *United States v.*

McGaughy, 670 F.3d 1149, 1155 (10th Cir. 2012)). The Tenth Circuit explained that it believed itself bound by circuit precedent to consider § 3582 a jurisdictional statute, "[u]ntil an intervening Supreme Court decision, en banc review, or Congressional action tells us otherwise." *Id* at 5 n.2 (citing *United States v. White*, 765 F.3d 1240 (10th Cir. 2014)). The Tenth Circuit therefore "beg[an] and end[ed]" its analysis with eligibility. *Id*. By emphasizing the jurisdictional nature (as the Tenth Circuit saw it) of the eligibility question, the Tenth Circuit clearly signaled that the jurisdictional label is what drove that court's sua sponte eligibility examination notwithstanding the government's concessions.[1] The government's argument that the eligibility result will be the same below whatever this Court does ignores this clear signal.

A final note: In arguing that the Tenth Circuit would declare the petitioners ineligible for § 3582(c)(2) relief with or without the jurisdictional label, the government assumes that the Tenth Circuit was right about eligibility, a point that is disputed and the subject of our second question presented. The Tenth Circuit would of course not find the petitioners ineligible on remand if this Court were to grant this petition and rule in our favor on both questions.

C. The government's vehicle argument is inconsistent with precedent from both the Tenth Circuit and this Court.

The government is wrong as a matter of law when it argues that a court may sua sponte find a § 3582(c)(2) movant ineligible for relief over a government eligibility

[1] The Ninth Circuit has likewise relied on the jurisdictional label to override a government concession. *See, e.g., United States v. Thornton*, ___ Fed. Appx. ___, 2017 WL 2445058 at *1 (9th Cir. 2017) ("Although the government concedes that it did not raise this argument before the district court, we have held that eligibility for a sentencing reduction under 18 U.S.C. § 3582(c)(2) is a jurisdictional question. . . . We are therefore required to consider the question regardless of whether the parties raised it below.") (citation omitted).

concession. To be clear: The government did not merely *forfeit* any eligibility challenge in this case; it knowingly *waived* that challenge by expressly conceding eligibility both in the district court and in the Tenth Circuit. *See* Pet. App. 15a, 31a, 49a, (district court orders in each petitioner's case noting that "[t]he parties agree that defendant is eligible for relief"); Pet. App. 6a-7a (Tenth Circuit opinion noting government's continued concession on appeal). As this Court has recognized, "[a] waived claim or defense is one that a party has knowingly and intelligently relinquished; a forfeited plea is one that a party has merely failed to preserve." *Wood v. Milyard*, 566 US. 463, 470 (2012). When a party waives a nonjurisdictional claim or defense—that is, "deliberately steer[s]" a court "away from the question and towards the merits"—a court abuses its discretion if it disposes of the case on the waived ground. *Id*. at 474; *cf. Arbaugh v. Y & H Corp*., 546 U.S. 500 (2006) (civil defendant's pretrial stipulations and failure to invoke statutory eligibility requirement for Title VII relief until after trial "would preclude vacation" of verdict if eligibility were nonjurisdictional); *Eberhart v. United States*, 546 U.S. 12, 19 (2005) (where government failed to raise nonjurisdictional claim that new-trial motion was untimely until after district court reached merits, "it forfeited that defense" and "[t]he Court of Appeals should therefore have proceeded to the merits").

Consistent with these authorities, the Tenth Circuit declines to entertain waived claims and defenses. *City of Albuquerque v. Soto Enterprises, Inc.*, 864 F.3d 1089, 1093 (10th Cir. 2017) ("unlike jurisdictional defects (which cannot be waived and can be raised *sua sponte* by the court), courts lack authority to remand *sua sponte* for

procedural defects, and the parties can waive such defects by failing to raise them in a timely manner"); *Hale v. Fox*, 829 F.3d 1162, 1167 n.3 (10th Cir. 2016) (where government "waived or at least forfeited" timeliness issue in habeas action, "we do not address this issue"; citing *Wood*); *McCormick v. Parker*, 821 F.3d 1240, 1245-46 (10th Cir. 2016) (declining to consider procedural defense in habeas action in light of state's "textbook example of waiver"); *Teamsters Local Union v. NLRB*, 765 F.3d 1198, 1201 (10th Cir. 2014) (Gorsuch, J.) ("We don't often raise arguments to help litigants who decline to help themselves, especially when the litigants have consciously waived the arguments by steering us away from them and toward the merits instead.").

The Tenth Circuit's approach to waivers when it comes to jurisdictional versus nonjurisdictional claims and defenses is perhaps best illustrated by *United States v. Mulay*, 805 F.3d 1263 (10th Cir. 2015). There the government and the defendant jointly sought sentencing relief for the defendant under 28 U.S.C. § 2255. The government "waived any procedural hurdles that might apply to § 2255 relief." 805 F.3d at 1264. The district court denied relief on the merits. On appeal, the government repudiated its waiver in part and argued that the defendant's claim involved non-constitutional sentencing error and was therefore not cognizable. *Id*. Noting the jurisdictional nature of cognizability on appeal, the Tenth Circuit considered that issue notwithstanding the government's earlier waiver. *Id*. at 1265. But the Tenth Circuit enforced the government's waiver when it came to the nonjurisdictional question of timeliness: "The joint motion stated that the

government waived any procedural hurdles that might apply to § 2255 relief, so we have no occasion to consider the issue of time bar." *Id*. at 1264.

In arguing that the Tenth Circuit need not be bound by the government's eligibility waiver, the government claims that "petitioners identify no decision in which a court of appeals has viewed itself bound by the government's concession that a defendant is eligible for such a reduction." BIO 12. But we did identify such a decision: *United States v. Johnson*, 732 F.3d 109 (2d Cir. 2013). In *Johnson*, the defendant appealed from a sentence reduction, arguing that the district court insufficiently reduced his sentence. The Second Circuit denied relief, finding the defendant ineligible for any reduction. But the Second Circuit let the reduction stand as far as it went, viewing itself bound by the fact that the government had conceded eligibility below and not cross-appealed on that ground. 732 F.3d at 116-17. Had the Second Circuit deemed § 3582 jurisdictional (which it expressly did not, *id.* at 116 n.11), it would have been bound instead to vacate the reduction as exceeding the district court's jurisdiction. The fact that other circuit courts don't view themselves bound by government eligibility concessions is precisely because they continue to deem § 3582 jurisdictional. Those circuit courts, like the Tenth Circuit, would have no discretion to ignore eligibility concessions were this Court to hold that the statute is not jurisdictional.

In its effort to avoid this conclusion, the government cites a hodgepodge of cases for the general proposition that legal concessions are "not binding" on a court. BIO 10-11. These cases have nothing to do with whether a court may override a party

waiver of nonjurisdictional threshold requirements, and are inapposite. *See Grove City Coll. v. Bell*, 465 U.S. 555, 562 n.10 (1984) (respondent's concession that circuit court erred, made at merits stage after certiorari granted, did not foreclose this Court's review); *NASA v. Nelson*, 562 U.S. 134, 147 n.10 & 163 n.* (2011) (declining to rule on underlying constitutional question not raised by petitioner and not briefed by the parties; Scalia, J., concurring, would have ruled on question, but majority disagreed); *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 561 U.S. 89, 104 & 120 n.4 (2010) (expressing approval of party's "necessary concession" of law at oral argument; Sotomayor, J., dissenting, would have held to the contrary on the legal point); *Garcia v. United States*, 469 U.S. 70, 79 (1984) (noting earlier case in which Court "vacated and remanded in light of the Solicitor General's concession" that criminal statute at issue did not reach defendant's conduct; concession did not control subsequent, separate case).

D. This case is perfectly situated for deciding whether § 3582 is a jurisdictional statute.

This case is in exactly the posture one would expect for a challenge to a jurisdictional label: A lower court deprived the petitioners of an asserted right after labeling a purportedly unmet procedural hurdle jurisdictional. This is exactly the posture in which similar cases challenging jurisdictional labels have arrived at this Court. *See, e.g., Hamer v. Neighborhood Housing Services of Chicago*, S.Ct. No. 16-658 (circuit court blocked petitioner's Title VII appeal after labeling overextended limit on time to appeal jurisdictional); *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428 (2011) (appellate court blocked petitioner's veteran's-benefits appeal after

labeling missed notice-of-appeal deadline jurisdictional); *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010) (circuit court vacated petitioners' civil settlement after labeling unfulfilled claim precondition jurisdictional); *Bowles v. Russell*, 551 U.S. 205 (2007) (circuit court blocked petitioner's habeas appeal after labeling limits on expansion of time to file late notice of appeal jurisdictional); *Arbaugh v. Y & H Corp.,* 546 U.S. 500 (2006) (circuit court affirmed dismissal of petitioner's Title VII claim after labeling unmet claim-eligibility prerequisite jurisdictional); *Eberhart v. United States*, 546 U.S. 12 (2005) (circuit court reversed grant of new criminal trial after labeling unmet time limit for motion jurisdictional).

In the end, the government's argument is no more than a plea to simply let this jurisdictional mislabeling lie. This case is perfectly situated for deciding whether § 3582 is a jurisdictional statute; the question is one that needs to be decided, and the government's vehicle argument is unconvincing.

2. This Case Is A Suitable Vehicle For Deciding The Eligibility Question, And The Time Is Ripe To Correct The Tenth Circuit's Flawed Decision.

The petitioners have also asked this Court to decide whether a substantial-assistance departure from a statutory mandatory minimum sentence that is higher than the defendant's guideline range categorically renders that defendant ineligible for a § 3582(c)(2) sentence reduction. The government opposes certiorari on this question for several reasons. The government first argues on the merits that defendants in the petitioners' posture are not eligible for § 3582(c)(2) relief—taking the opposite position from the one it took in the district court and in the Tenth Circuit (as well as in the Eighth and Ninth Circuits). The government further argues that

this Court should wait until more cooperating defendants are denied relief before deciding this question, and that this case is a poor vehicle in any event. The government's brief in opposition only confirms the need for review.

A. The Tenth Circuit wrongly decided that these petitioners are ineligible for § 3582(c)(2) relief.

The government argues that the Tenth Circuit was right to conclude that cooperators in the petitioners' posture are not eligible for § 3582(c)(2) relief. BIO 13-18. But the government does little more than repeatedly insist that the petitioners' sentences were "based on" the statutory minimum rather than on the sentencing guidelines. *Id.* The government quotes 18 U.S.C. § 3553(e), BIO 15, but then ignores key language in the statute requiring district courts to base substantial-assistance departures not on the statutory minimum, but on the sentencing guidelines ("Such sentence *shall* be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission . . . ."") (emphasis added). The government further ignores our discussion of how § 3553(e) works in tandem with the guidelines. Pet. 34. The government's "based on" incantations do little to advance its argument, do not meaningfully engage with our detailed eligibility analysis, Pet. 33-36, and are no reason to deny this petition.

B. The disagreement about cooperator eligibility for § 3582(c)(2) relief—among the circuit courts, the Sentencing Commission, and even government attorneys—is sufficiently developed to warrant this Court's attention.

The circuit courts remain split three to two on the eligibility question, with three circuits (including the Tenth Circuit) disagreeing with the Sentencing Commission's

own interpretation of § 3582(c)(2). Pet. 27-30. This is a sufficiently developed divide to warrant this Court's attention.

The government urges this Court not to take up this question until the circuit courts have had more time to contemplate denying more cooperating defendants sentencing relief—especially now that the government has changed its mind about which of those defendants are eligible for relief. BIO 19. This is not likely to happen until the next round of retroactive guideline amendments makes its way through the district courts. The litigation of these amendments comes in waves, flowing steadily for a couple of years after each amendment, and then ebbing until the next amendment. To accept the government's invitation would be to subject the entire next wave of cooperating defendants in the Eighth, Ninth, and Tenth Circuits to sentence-reduction denials in the district courts and on direct appeal (assuming the defendants persist in litigating the issue in the face of published circuit opinions against them) before one of their cases makes its way to this Court. In the meantime, those defendants will continue to serve their sentences while defendants in the same posture in other jurisdictions will win relief. The government's change of heart about whether these defendants are eligible for relief is no reason to delay a final decision on the matter. Indeed, the fact that government attorneys in multiple jurisdictions conceded eligibility in multiple cases before the Solicitor General's office stepped in and changed course, BIO 9 ("[a]lthough the government initially agreed that petitioners were eligible . . . . the government has reconsidered its view"), is further reason to grant this petition now—if even the government's own attorneys can't agree

on eligibility, that's a sure sign this Court's guidance is needed, and should be offered at this first opportunity.

C. This case is a fine vehicle for deciding the eligibility question.

The government argues that this case is a poor vehicle for deciding the eligibility question because the district court denied the requested sentence reductions not on eligibility grounds, but on the merits. BIO 19-20. But the petitioners argued on appeal in the Tenth Circuit that those merits denials were erroneous on multiple grounds. Pet. 10. The Tenth Circuit never addressed those arguments because of its jurisdictional ruling. Pet. App. 7a. A decision for the petitioners at this level would entitle the petitioners to a decision by the Tenth Circuit on the arguments they raised in that court. That is sufficient relief to warrant consideration by this Court.

CONCLUSION

As stated in our original petition as well as for the above reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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