No. 20-1732

In the Supreme Court of the United States

THOMAS BRYANT, JR., PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

BRIAN H. FLETCHER
Acting Solicitor General
Counsel of Record
KENNETH A. POLITE, JR.
Assistant Attorney General
DANIEL N. LERMAN
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the district court abused its discretion in finding that "extraordinary and compelling reasons" did not support reducing petitioner's sentence under 18 U.S.C. 3582(c)(1)(A), where his motion was substantially premised on statutory sentencing amendments that specifically do not apply to defendants with pre-existing sentences.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D. Ga.):

Bryant v. *United States*, No. 01-cv-112 (Oct. 3, 2019)

Bryant v. *United States*, No. 05-cv-97 (Nov. 1, 2015)

United States Court of Appeals (11th Cir.):

United States v. *Bryant*, No. 98-8168 (Mar. 27, 2000)

Bryant v. *United States*, No. 01-15051 (Nov. 22, 2002)

United States v. *Bryant*, No. 04-14096 (Sept. 14, 2004)

Supreme Court of the United States:

Bryant v. *United States*, No. 99-10043 (Oct. 2, 2000)

Bryant v. *United States*, No. 02-9652 (Apr. 21, 2003)

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 11
Conclusion 19

TABLE OF AUTHORITIES

Cases:

Braxton v. *United States*, 500 U.S. 344 (1991) 12, 13, 16
Deal v. *United States*, 508 U.S. 129 (1993) 6
Dillon v. *United States*, 560 U.S. 817 (2010) 2
Hughes v. *United States*, 138 S. Ct. 1765 (2018) 2
Longoria v. *United States*, 141 S. Ct. 978 (2021) 15
Tabb v. *United States*, 141 S Ct. 2793 (2021) 15
Tapia v. *United States*, 564 U.S. 319 (2011) 2
United States v. *Andrews*, 12 F.4th 255 (3d Cir. 2021) 11, 17
United States v. *Aruda*, 993 F.3d 797 (9th Cir. 2021) 11, 17
United States v. *Booker*, 543 U.S. 220 (2005) 14
United States v. *Brooker*, 976 F.3d 228 (2d Cir. 2020) 11
United States v. *Cook*, 998 F.3d 1180 (11th Cir. 2021) 18
United States v. *Gunn*, 980 F.3d 1178 (7th Cir. 2020) 11, 17
United States v. *Hope*, No. 13-cr-16, 2020 WL 4207107 (S.D. Ga. July 22, 2020) 18
United States v. *Jones*, 980 F.3d 1098 (6th Cir. 2020) 11
United States v. *Long*, 997 F.3d 342 (D.C. Cir. 2021) 11
United States v. *McCoy*, 981 F.3d 271 (4th Cir. 2020) 11, 17

Cases—Continued: Page

United States v. *McGee*, 992 F.3d 1035 (10th Cir. 2021) 11
United States v. *Potts*, No. 06-cr-80070, 2020 WL 5540126 (S.D. Fla. Sept. 14, 2020) 18
United States v. *Shkambi*, 993 F.3d 388 (5th Cir. 2021) 11
United States v. *Tomes*, 990 F.3d 500 (6th Cir. 2021) 17

Statutes, guidelines, and rule:

Act of Nov. 13, 1998, Pub. L. No. 105-386, § 1(a), 112 Stat. 3469 6
First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 5
§ 403(a), 132 Stat. 5221-5222 ..... 6, 7
§ 403(b), 132 Stat. 5222 7
Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, ch. II, 98 Stat. 1987 (18 U.S.C. 3551 *et seq.*) 2
§ 212(a)(2), 98 Stat. 1998-1999 3
§ 217(a), 98 Stat. 2023 3
18 U.S.C. 3582(c) 2
18 U.S.C. 3582(c)(1)(A) ..... *passim*
18 U.S.C. 3582(c)(2) 2, 8
18 U.S.C. 3582(d) 6
18 U.S.C. 3582(d)(1) 2
18 U.S.C. 3582(d)(2)(A) 6
18 U.S.C. 3582(d)(2)(A)(i) 6
18 U.S.C. 3582(d)(2)(A)(iii) 6
18 U.S.C. 3582(d)(2)(B) 6
18 U.S.C. 3582(d)(2)(B)(i) 6
18 U.S.C. 3582(d)(2)(B)(iii) 6
18 U.S.C. 3582(d)(2)(C) 6

Statutes, guidelines, and rule—Continued: Page

18 U.S.C. 922(d)(1) 2, 7
18 U.S.C. 922(j) 2, 7, 8
18 U.S.C. 924(c) 2, 6, 7, 8, 9
18 U.S.C. 924(c)(1)(C) 6
18 U.S.C. 924(c)(1)(C)(i) (1994) 6
18 U.S.C. 924(c)(1)(D)(ii) (2012) 6
21 U.S.C. 841(a)(1) 1, 7
21 U.S.C. 846 ..... 1, 7
28 U.S.C. 991 2
28 U.S.C. 994(a) 2
28 U.S.C. 994(a)(2)(C) 3
28 U.S.C. 994(*o*) 12, 13
28 U.S.C. 994(p) 16
28 U.S.C. 994(t) 3, 13, 14, 16
U.S. Sentencing Guidelines:
§ 1B1.13, p.s. ..... *passim*
comment. (n.1) 9
comment. (n.1(A)(ii)(I)) 17
comment. (n.1(A)-(D)) 4
comment. (n.1(D)) 4, 8, 10
comment. (n.4) 5
App. C:
Amend. 683 (Nov. 1, 2006) 4
Amend. 698 (Nov. 1, 2007) 14
Amend. 799 (Nov. 1, 2016) 3, 4, 5, 16
U.S. Sentencing Comm'n Rules of Practice & Procedure (2016):
R. 4.1 16

In the Supreme Court of the United States

No. 20-1732

THOMAS BRYANT, JR., PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-57a) is reported at 996 F.3d 1243. The order of the district court (Pet. App. 58a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 7, 2021. The petition for a writ of certiorari was filed on June 10, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Georgia, petitioner was convicted of conspiring to aid and abet the distribution of cocaine, in violation of 21 U.S.C. 846; attempting to aid and abet the distribution of cocaine, in violation of 21 U.S.C. 846; distributing cocaine, in violation of 21 U.S.C. 841(a)(1); selling a stolen firearm, in violation

of 18 U.S.C. 922(j); providing a firearm to a convicted felon, in violation of 18 U.S.C. 922(d)(1); and carrying a firearm during and in relation to a drug-trafficking crime, in violation of 18 U.S.C. 924(c). Judgment 1. The district court sentenced petitioner to life plus 300 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed, 196 F.3d 1262 (Tbl.), and this Court denied a petition for a writ of certiorari, 531 U.S. 857. The district court later reduced petitioner's term of imprisonment to 592 months under 18 U.S.C. 3582(c)(2). D. Ct. Doc. 249 (Sept. 8, 2015). In 2019, petitioner filed a motion for a sentence reduction under 18 U.S.C. 3582(c)(1)(A). D. Ct. Doc. 259 (Sept. 11, 2019). The district court denied the motion, Pet. App. 58a, and the court of appeals affirmed, *id.* at 1a-57a.

1. a. The Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, ch. II, 98 Stat. 1987 (18 U.S.C. 3551 *et seq.*), "overhaul[ed] federal sentencing practices." *Tapia* v. *United States*, 564 U.S. 319, 325 (2011). To make prison terms more determinate, Congress "established the Sentencing Commission and authorized it to promulgate Sentencing Guidelines and to issue policy statements." *Dillon* v. *United States*, 560 U.S. 817, 820 (2010); see 28 U.S.C. 991 and 994(a).

Congress also abolished the practice of federal parole, specifying that a "court may not modify a term of imprisonment once it has been imposed" except in certain enumerated circumstances. 18 U.S.C. 3582(c); see *Tapia*, 564 U.S. at 325. One such circumstance is when the Sentencing Commission has made a retroactive amendment to the sentencing range on which the defendant's term of imprisonment was based. 18 U.S.C. 3582(c)(2); see *Hughes* v. *United States*, 138 S. Ct. 1765,

1772-1773 (2018). Another such circumstance is when "extraordinary and compelling reasons" warrant the defendant's "compassionate release" from prison. Sentencing Guidelines App. C, Amend. 799 (Nov. 1, 2016); see 18 U.S.C. 3582(c)(1)(A).

As originally enacted in the Sentencing Reform Act, Section 3582(c)(1)(A) stated:

> the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment, after considering the factors set forth in [18 U.S.C.] 3553(a) to the extent that they are applicable, if it finds that extraordinary and compelling reasons warrant such a reduction and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

Sentencing Reform Act § 212(a)(2), 98 Stat. 1998-1999. Congress made clear that "[r]ehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason." 28 U.S.C. 994(t); see Sentencing Reform Act § 217(a), 98 Stat. 2023.

Congress also directed the Sentencing Commission to promulgate "general policy statements regarding * * * the appropriate use of * * * the sentence modification provisions set forth in [Section] 3582(c)." 28 U.S.C. 994(a)(2)(C); see Sentencing Reform Act § 217(a), 98 Stat. 2019. Congress instructed "[t]he Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, [to] describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples." 28 U.S.C. 994(t); see Sentencing Reform Act § 217(a), 98 Stat. 2023.

b. In 2006, the Sentencing Commission promulgated a new policy statement—Sentencing Guidelines § 1B1.13, p.s.—as a "first step toward implementing the directive in 28 U.S.C. § 994(t)" that required the Commission to "'describe what should be considered extraordinary and compelling reasons for sentence reduction.'" Sentencing Guidelines App. C, Amend. 683 (Nov. 1, 2006) (citation omitted). Although the initial policy statement primarily "restate[d] the statutory bases for a reduction in sentence under [Section] 3582(c)(1)(A)," *ibid.*, the Commission updated the policy statement the following year "to further effectuate the directive in [Section] 994(t)," *id.* Amend. 698 (Nov. 1, 2007). That amendment revised the commentary (or "Application Notes") to Section 1B1.13 to describe four circumstances that should be considered extraordinary and compelling reasons for a sentence reduction under Section 3582(c)(1)(A). *Ibid.*

In 2016, the Commission further amended the commentary to Section 1B1.13 to "broaden[] the Commission's guidance on what should be considered 'extraordinary and compelling reasons'" that might justify a sentence reduction. Sentencing Guidelines App. C, Amend. 799. Today, Application Note 1 to Section 1B1.13 describes four categories of reasons that should be considered extraordinary and compelling: "Medical Condition of the Defendant," "Age of the Defendant," "Family Circumstances," and "Other Reasons." Sentencing Guidelines § 1B1.13, comment. (n.1(A)-(D)). Application Note 1(D) explains that the fourth category—"Other Reasons"—encompasses any reason "determined by the Director of the Bureau of Prisons" (BOP) to be "extraordinary and compelling" "other than, or in combination with," the reasons described in the other three categories. *Id.* § 1B1.13, comment. (n.1(D)).

In its 2016 amendment to Section 1B1.13, the Commission also added a new Application Note "encourag[ing] the Director of the Bureau of Prisons" to file a motion under Section 3582(c)(1)(A) whenever "the defendant meets any of the circumstances set forth in Application Note 1." Sentencing Guidelines § 1B1.13, comment. (n.4). The Commission explained that it had "heard testimony and received public comment concerning the inefficiencies that exist within the Bureau of Prisons' administrative release applications, which can delay or deny release, even in cases where the applicant appears to meet the criteria for eligibility." Sentencing Guidelines App. C, Amend. 799.

c. In the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, Congress amended Section 3582(c)(1)(A) to allow defendants, as well as the BOP itself, to file motions for a reduced sentence. As amended, Section 3582(c)(1)(A) now states:

> the court, upon motion of the Director of the Bureau of Prisons, *or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier*, may reduce the term of imprisonment * * * , after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that * * * extraordinary and compelling reasons warrant such a reduction * * * and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

18 U.S.C. 3582(c)(1)(A) (emphasis added).

The First Step Act also added a new Section 3582(d), which imposes additional obligations on the BOP with respect to motions for a Section 3582(c)(1)(A) sentence reduction. Sections 3582(d)(2)(A) and (B) require the BOP, when a defendant is "diagnosed with a terminal illness" or "is physically or mentally unable to submit a request for a sentence reduction pursuant to subsection (c)(1)(A)," to notify the defendant's attorney, partner, and family members that they may prepare and submit a request for a sentence reduction on the defendant's behalf, and to assist in the preparation of such requests. 18 U.S.C. 3582(d)(2)(A)(i), (iii), (B)(i) and (iii). Section 3582(d)(2)(C) requires the BOP to provide notice to all defendants of their ability to request a sentence reduction, the procedures for doing so, and their "right to appeal a denial of a request * * * after all administrative rights to appeal within the Bureau of Prisons have been exhausted." 18 U.S.C. 3582(d)(2)(C).

In addition, the First Step Act amended the penalties for violations of 18 U.S.C. 924(c). § 403(a), 132 Stat. 5221-5222. Before the First Step Act, Section 924(c)(1)(C) provided for a minimum consecutive sentence of 20 years of imprisonment—later revised to 25 years, see Act of Nov. 13, 1998, Pub. L. No. 105-386, § 1(a), 112 Stat. 3469—in the case of a "second or subsequent conviction" under Section 924(c), even when that second or subsequent conviction was obtained in the same proceeding as the defendant's first conviction under Section 924(c). 18 U.S.C. 924(c)(1)(C)(i) (1994); see 18 U.S.C. 924(c)(1)(D)(ii) (2012); *Deal* v. *United States*, 508 U.S. 129, 132-137 (1993). In the First Step Act, Congress amended Section 924(c)(1)(C) to provide for a minimum consecutive sentence of 25 years of imprisonment only in the case of a "violation of [Section 924(c)] that occurs after a prior conviction

under [Section 924(c)] has become final." § 403(a), 132 Stat. 5221-5222. Congress specified that the amendment "shall apply to any offense that was committed before the date of enactment of [the First Step Act], if a sentence for the offense has not been imposed as of such date of enactment." § 403(b), 132 Stat. 5222.

2. Petitioner was a police officer in Savannah, Georgia. Presentence Investigation Report (PSR) ¶ 4. In 1993, the Federal Bureau of Investigation (FBI) began receiving complaints about corrupt Savannah police officers, including petitioner. *Ibid.* The FBI subsequently initiated an undercover operation involving a cooperating witness. *Ibid.* In 1995, the cooperating witness approached petitioner to ask whether he would be willing to provide security and escort services to couriers transporting cocaine to and from Savannah. *Ibid.* Petitioner agreed to be a drug escort and recruited the help of other police officers. *Ibid.* "Armed and in uniform—often in police vehicles—they acted as the cocaine couriers' personal security detail." Pet. App. 4a. Petitioner "also sold cocaine and stolen guns himself" and "passed along confidential police information." *Ibid.*

A federal grand jury in the United States District Court for the Southern District of Georgia returned an eight-count indictment charging petitioner with one count of conspiring to aid and abet the distribution of cocaine, in violation of 21 U.S.C. 846; two counts of attempting to aid and abet the distribution of cocaine, in violation of 21 U.S.C. 846; one count of distributing cocaine, in violation of 21 U.S.C. 841(a)(1); one count of selling a stolen firearm, in violation of 18 U.S.C. 922(j); one count of providing a firearm to a convicted felon, in violation of 18 U.S.C. 922(d)(1); and two counts of carrying a firearm during and in relation to a drug-trafficking

crime, in violation of 18 U.S.C. 924(c). Judgment 1. A jury found petitioner guilty on all counts. *Ibid.*; see D. Ct. Docket entry No. 83 (Nov. 19, 1997).

In 1998, the district court sentenced petitioner to life imprisonment on the cocaine-conspiracy count, 480 months of imprisonment on the attempted aiding-and-abetting counts, 240 months on the cocaine-distribution count, 120 months on the Section 922(j) count, and 120 months on the firearm-provision count, all to be served concurrently. Judgment 2. The court further sentenced petitioner to 60 months on the first Section 924(c) count and 240 months on the second Section 924(c) count, to be served consecutively to each other and to the sentences on the other counts. *Ibid.* The court of appeals affirmed, 196 F.3d 1262 (Tbl.), and this Court denied a petition for a writ of certiorari, 531 U.S. 857.

In 2015, petitioner moved for a sentence reduction under Section 3582(c)(2) based on a retroactive amendment to the Sentencing Guidelines that had lowered base offense levels for drug-trafficking offenses. D. Ct. Doc. 246, at 1, 3-4 (Jan. 13, 2015). The district court granted the motion, reducing petitioner's sentence on each of the first three counts to concurrent sentences of 292 months of imprisonment. D. Ct. Doc. 249, at 1.

3. In August 2019, petitioner submitted a request to the warden of his correctional facility, asking the BOP to file a motion on his behalf for a sentence reduction under Section 3582(c)(1)(A). D. Ct. Doc. 259-1, at 2-8 (Sept. 11, 2019). In his request, petitioner noted that, under Application Note 1(D) to Sentencing Guidelines § 1B1.13, the BOP may rely on extraordinary and compelling reasons other than the defendant's medical condition, age, or family circumstances in moving for a sentence reduction. D. Ct. Doc. 259-1, at 8. Petitioner

asserted that his case presented such "Other Reasons." *Id.* at 4 (emphasis omitted). In particular, he stated that if he had been sentenced after the enactment of the First Step Act, he would not have received a statutory minimum 20-year consecutive sentence on his second Section 924(c) conviction. *Id.* at 6-7. He also claimed that his prison record showed rehabilitation. *Id.* at 7.

When the BOP did not respond to petitioner's request within 30 days, petitioner filed his own Section 3582(c)(1)(A) motion in the district court. D. Ct. Doc. 259, at 11. In that motion, petitioner again asserted that "extraordinary and compelling reasons" warranted a sentence reduction, relying on the First Step Act's changes to Section 924(c) (which Congress had not made retroactively applicable to defendants like him) and his "record of rehabilitation." *Id.* at 12. He also argued that his original sentence reflected a penalty for exercising his right to a jury trial. *Ibid.* Petitioner asked the court to reduce his term of imprisonment to time served. *Id.* at 15.

The government opposed petitioner's motion. D. Ct. Doc. 260 (Sept. 23, 2019). The government maintained that any sentence reduction under Section 3582(c)(1)(A) must be consistent with the policy statement in Sentencing Guidelines § 1B1.13 and that none of the reasons for a sentence reduction that petitioner had identified qualified as an "extraordinary and compelling" reason under Application Note 1 to Section 1B1.13. D. Ct. Doc. 260 at 4, 7-9. The district court denied petitioner's Section 3582(c)(1)(A) motion "for the reasons stated in the Government's response in opposition." Pet. App. 58a.

4. The court of appeals affirmed. Pet. App. 1a-57a.

The court of appeals rejected petitioner's argument that Section 1B1.13 applies to only BOP-filed Section

3582(c)(1)(A) motions and is not "an applicable policy statement for defendant-filed Section 3582(c)(1)(A) motions." Pet. App. 12a. The court reasoned that although the First Step Act amended Section 3582(c)(1)(A) "to allow defendants to file motions in addition to the BOP," that "procedural change does not affect the statute's or 1B1.13's substantive standards, specifically the definition of 'extraordinary and compelling reasons.'" *Id.* at 2a-3a. The court stated that those "standards are still capable of being applied and relevant to all Section 3582(c)(1)(A) motions, whether filed by the BOP or a defendant." *Id.* at 3a. And the court found "nothing in the statute, policy statement, or common sense [to] suggest[] that 'what should be considered extraordinary and compelling reasons for [a] sentence reduction,' might vary depending on whether a defendant files a reduction motion for himself or whether the BOP files a motion on his behalf." *Id.* at 24a-25a (citation omitted; third set of brackets in original).

The court of appeals also rejected petitioner's argument that Application Note 1(D) to Section 1B1.13 should be read to "grant discretion to courts to develop 'other reasons' that might justify a reduction in a defendant's sentence." Pet. App. 3a-4a. The court observed that Application Note 1(D) "conditions the 'other reasons' that can be extraordinary and compelling on a BOP determination." *Id.* at 33a. The court found "no inherent incompatibility between a defendant filing a Section 3582(c)(1)(A) motion and the BOP determining which reasons outside of those explicitly delineated by the Commission are extraordinary and compelling." *Id.* at 37a-38a. "Indeed," the court emphasized, "Congress required that defendants first submit their requests to the BOP and allow it the initial opportunity to file the

Section 3582(c)(1)(A) motion." *Id.* at 37a. And the court reasoned that "[b]ecause [petitioner's] motion does not fall within any of the reasons that 1B1.13 identifies as 'extraordinary and compelling,' the district court correctly denied his motion for a reduction of his sentence." *Id.* at 38a.

Judge Martin dissented. Pet. App. 39a-57a. In her view, Section 1B1.13 "applies only to motions brought by the Director of the BOP" and thus is "not 'applicable' to" petitioner's Section 3582(c)(1)(A) motion. *Id.* at 46a-47a.

ARGUMENT

Petitioner contends (Pet. 14-16) that the court of appeals erred in determining that Section 1B1.13's description of what should be considered extraordinary and compelling reasons for a sentence reduction is applicable to Section 3582(c)(1)(A) motions filed by defendants. Although other courts of appeals have reached a different conclusion,* petitioner overstates the practical importance of the disagreement, and this Court typically does not review issues involving application of the Sentencing Guidelines, which can be addressed instead by the Sentencing Commission. The petition for a writ of certiorari should be denied.

1. For nearly three decades, this Court has recognized that the Sentencing Commission should have

---

* See *United States* v. *Brooker*, 976 F.3d 228, 235 (2d Cir. 2020); *United States* v. *Andrews*, 12 F.4th 255, 259 (3d Cir. 2021); *United States* v. *McCoy*, 981 F.3d 271, 282 (4th Cir. 2020); *United States* v. *Shkambi*, 993 F.3d 388, 392-393 (5th Cir. 2021); *United States* v. *Jones*, 980 F.3d 1098, 1109-1111 (6th Cir. 2020); *United States* v. *Gunn*, 980 F.3d 1178, 1180-1181 (7th Cir. 2020); *United States* v. *Aruda*, 993 F.3d 797, 802 (9th Cir. 2021) (per curiam); *United States* v. *McGee*, 992 F.3d 1035, 1050 (10th Cir. 2021); *United States* v. *Long*, 997 F.3d 342, 355 (D.C. Cir. 2021).

primary responsibility for reviewing and resolving circuit conflicts over the interpretation of the Guidelines. Congress has specifically directed the Commission to "periodically review and revise" the Guidelines. 18 U.S.C. 994(*o*). In so doing, "Congress necessarily contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." *Braxton* v. *United States*, 500 U.S. 344, 348 (1991). The Commission thus has both the "duty" and the "power" to revise the Guidelines, as well as specialized expertise and wider latitude to craft a solution to any problem that may exist. *Ibid.* (emphasis omitted). And given the Commission's congressionally assigned role, this Court has concluded that it should be "restrained and circumspect" in using its certiorari power to address conflicts over the proper interpretation of the Guidelines. *Ibid.*

This case is not meaningfully different from the many other Sentencing Guidelines cases that this Court regularly declines to review. The only issue in this case is whether the current wording of the policy statement in Sentencing Guidelines § 1B1.13 limits the definition of "extraordinary and compelling reasons" that might support a sentence reduction under Section 3582(c)(1)(A) for both BOP-filed motions *and* prisoner-filed motions. Nobody disputes that the Sentencing Commission has the power—indeed, the statutory duty—to promulgate a statement that applies to both types of motions. Just as it was before the First Step Act, the Commission remains tasked with providing constraints applicable to *all* Section 3582(c)(1)(A) motions. The First Step Act did not alter or eliminate the Commission's mandate to describe "what should be considered extraordinary and

compelling reasons" for granting such a motion, 28 U.S.C. 994(t), or release district courts from their statutory obligation to adhere to that description, see 18 U.S.C. 3582(c)(1)(A) (requiring "consisten[cy] with applicable policy statements"). Petitioner therefore acknowledges (Pet. 15) that the Commission can resolve the circuit conflict by simply "promulgat[ing] a new policy statement."

The Commission's solution, which would account for observed practices and could incorporate input from various stakeholders, 28 U.S.C. 994(*o*), could take a variety of approaches. For instance, the Commission could revise the policy statement in Section 1B1.13 to clarify that Application Note 1's description of what should be considered extraordinary and compelling reasons is applicable to prisoner-filed and BOP-filed motions alike. Or the Commission could revise the policy statement in Section 1B1.13 to clarify that the same categories of extraordinary and compelling reasons apply to both types of motions, while adding new categories of reasons or expanding the existing ones. Or the Commission could "use [its] authority to limit a court's discretion in ruling on defendant-filed motions" (Pet. 15) in some other way—such as by identifying specific grounds that should *not* be considered extraordinary and compelling.

A decision by this Court in this case would therefore likely just be a temporary measure. Regardless of this Court's answer to the question presented, the Commission would have a continuing statutory duty to "periodically review the work of the courts" and make "whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." *Braxton*, 500 U.S. at 348 (citing 28 U.S.C. 994(*o*)). By "collect[ing] and study[ing] appellate court decisionmaking" with respect to prisoner-

filed sentence-reduction motions following the First Step Act, the Commission—unlike a court—is able to "modify its Guidelines in light of what it learns" and thereby "encourag[e] what it finds to be better sentencing practices," *United States* v. *Booker*, 543 U.S. 220, 263 (2005), in ways that a decision on the narrow and time-limited question presented in this case would not.

Given that this Court is unlikely to have the last word, no sound reason exists for its intervention. In recent years, the Commission has carefully attended to Congress's directive to "describe what should be considered extraordinary and compelling reasons for sentence reduction," 28 U.S.C. 994(t), twice making substantial revisions to Section 1B1.13. See Sentencing Guidelines App. C, Amend. 799; *id.* Amend. 698. In 2016, for example, the Commission "broaden[ed] [its] guidance on what should be considered 'extraordinary and compelling reasons' for compassionate release" after conducting an "in-depth review of th[e] topic" involving consideration of "Bureau of Prisons data," "two reports issued by the Department of Justice Office of the Inspector General," and testimony from various "witnesses and experts." *Id.* Amend. 799.

The particularized and express congressional preference for Commission-based decisionmaking on the specific issue of what should be considered extraordinary and compelling reasons, together with the Commission's recent attention to the issue, make petitioner's efforts (Pet. 19-22) to urge judicial intervention at this juncture particularly unsound. Recognizing that this Court does not normally review Guidelines issues, petitioner attempts (Pet. 19) to distinguish this case on the ground that "the question presented here deals with the interpretation of a statute." But petitioner's disagreement

with the decision below turns primarily on the interpretation of the Commission's policy statement, not the statute. See Pet. 14-15 (asserting that the decision below is contrary to "the plain language of the policy statement"). And to the extent the question presented turns on the interpretation of the statute, it is limited to the statutory scheme's interaction with the *current* version of the policy statement; it is undisputed that the Commission could promulgate a differently worded policy statement that would put any doubts to rest.

Petitioner also asserts (Pet. 19) that, "for both political and practical reasons, the Court should not wait for the Commission to promulgate a new policy statement." But none of the "political and practical reasons" that petitioner identifies (*ibid.*) is unique to the question presented in this case; each would apply to any Guidelines issue presented to this Court. Petitioner observes (*ibid.*), for example, that the Commission currently lacks a quorum, and he speculates (Pet. 20) that "it will likely remain without a quorum for the considerable future." Notwithstanding the Commission's current lack of a quorum, however, this Court has adhered to its usual practice of denying review of Guidelines issues. See, *e.g.*, *Wiggins* v. *United States*, No. 20-8020 (Oct. 4, 2021); *Warren* v. *United States*, No. 20-7742 (Oct. 4, 2021); *Ward* v. *United States*, 141 S. Ct. 2864 (2021) (No. 20-7327); *Tabb* v. *United States*, 141 S. Ct. 2793 (2021) (No. 20-579); *Longoria* v. *United States*, 141 S. Ct. 978, 979 (2021) (Sotomayor, J., respecting the denial of the petition for a writ of certiorari) (observing, with respect to another Guidelines dispute, that the "Commission should have the opportunity to address [the] issue in the first instance, once it regains a quorum of voting members") (citing *Braxton*, 500 U.S. at 348).

Petitioner also contends (Pet. 21) that when the Commission addresses the question presented here, it will be "at least two years before a new policy statement takes effect" because "any amendment" will need to be "sent to Congress." But only "amendments to the *guidelines*" are required to be "submit[ted] to Congress." U.S. Sentencing Comm'n Rules of Practice & Procedure R. 4.1 (2016) (emphasis added). "Amendments to policy statements and commentary," in contrast, "may be promulgated and put into effect at any time." *Ibid.* In any event, even if the Commission chose to submit any new policy statement to Congress, the time that it would take to promulgate that new policy statement would not be any longer than the time that it would take to promulgate any other amendment. See 28 U.S.C. 994(p). And given that the Commission is statutorily required to describe "what should be considered extraordinary and compelling reasons for [a Section 3582(c)(1)(A)] sentence reduction," 28 U.S.C. 994(t), and conducted an "in-depth review" of the subject just recently, Sentencing Guidelines App. C, Amend. 799, the Commission is unlikely to delay in taking up the issue again.

Finally, judicial intervention on the Guidelines-interpretation question presented is especially unwarranted in this case because petitioner would likely be able to take advantage of any Commission amendment that would permit a reduction for prisoners like him. The current statutory and Guidelines scheme would not preclude petitioner from filing a second sentence-reduction motion, which the district court could then evaluate in light of the Commission's considered views. Given that petitioner would be unlikely to secure immediate release even if the case were remanded following

a decision in his favor from this Court, cf. p. 17, *infra*, he is unlikely to be prejudiced by following that procedure. Furthermore, if the Commission were to make clear that his circumstances do *not* qualify as extraordinary and compelling, any release before then would be out of step with the Commission's considered approach.

2. In any event, petitioner overstates (Pet. 17-19) the practical importance of the disagreement in the courts of appeals. Even in those circuits that have held that Section 1B1.13's description of extraordinary and compelling reasons is not binding when a Section 3582(c)(1)(A) motion is filed by a defendant, Section 1B1.13 continues to guide district courts in determining whether the defendant has established such reasons. See Pet. App. 15a & n.4; *United States* v. *Andrews*, 12 F.4th 255, 260 (3d Cir. 2021) (stating that Section 1B1.13 "still sheds light on the meaning of extraordinary and compelling reasons"); *United States* v. *McCoy*, 981 F.3d 271, 282 n.7 (4th Cir. 2020) (stating that Section 1B1.13 "remains helpful guidance even when motions are filed by defendants"); *United States* v. *Tomes*, 990 F.3d 500, 503 n.1 (6th Cir. 2021) (stating that district courts may still "look to § 1B1.13 as relevant, even if no longer binding"); *United States* v. *Gunn*, 980 F.3d 1178, 1180 (7th Cir. 2020) (stating that "the Commission's analysis can guide discretion without being conclusive"); *United States* v. *Aruda*, 993 F.3d 797, 802 (9th Cir. 2021) (per curiam) (stating that Section 1B1.13 may still "inform a district court's discretion for § 3582(c)(1)(A) motions filed by a defendant"). Indeed, no court of appeals has *precluded* district courts from consulting Section 1B1.13 in cases involving prisoner-filed motions.

Petitioner errs in asserting (Pet. 18) that the decision below "prohibits courts from granting relief in a

substantial number of cases related to the COVID-19 pandemic." The government has taken the position that, during the pandemic, a defendant who has not been offered a COVID-19 vaccine, "who presents one of the increased risk factors identified by the Centers for Disease Control," and "who is not expected to recover from that condition[] presents an extraordinary and compelling reason for compassionate release" under Application Note 1(A)(ii)(I) to Section 1B1.13, "even if that condition in ordinary times would not allow compassionate release." Gov't Br. at 22, *United States* v. *Bueno-Sierra*, 847 Fed. Appx. 749 (11th Cir. 2021) (No. 20-12017) (per curiam); see *United States* v. *Cook*, 998 F.3d 1180, 1185 (11th Cir. 2021) (noting the government's acknowledgment that the defendant's "obesity 'presents an extraordinary and compelling reason for compassionate release in light of the COVID-19 pandemic'").

Accordingly, district courts within the Eleventh Circuit have granted compassionate release for COVID-related reasons. See, *e.g.*, *United States* v. *Potts*, No. 06-cr-80070, 2020 WL 5540126, *3-*5 (S.D. Fla. Sept. 14, 2020) (determining that the defendant's medical conditions, which put him at "increased risk of severe illness from COVID-19," presented an extraordinary and compelling reason for a sentence reduction under Application Note I(A)(ii)(I)) (citation omitted); *United States* v. *Hope*, No. 13-cr-16, 2020 WL 4207107, at *3-*4 (S.D. Ga. July 22, 2020) (similar). Nor are adverse decisions preclusive of later relief in another motion that might follow a revised Commission policy statement on this subject.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

BRIAN H. FLETCHER
Acting Solicitor General
KENNETH A. POLITE, JR.
Assistant Attorney General
DANIEL N. LERMAN
Attorney

OCTOBER 2021