No. 20-8284

IN THE SUPREME COURT OF THE UNITED STATES

HAROLD GASHE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record

KENNETH A. POLITE, JR.
Assistant Attorney General

ANDREW C. NOLL
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 preexisting sentence under 18 U.S.C. 3582(c)(1)(A), where his motion was premised on statutory sentencing amendments to 18 U.S.C. 924(c) that Congress made clear do not apply to preexisting sentences.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (N.D. Iowa):

United States v. Gashe, No. 07-cr-4033 (June 2, 2008)

Gashe v. United States, No. 17-cv-4029 (May 8, 2017)

Gashe v. United States, No. 20-cv-4006 (July 2, 2021)

United States Court of Appeals (8th Cir.):

Gashe v. United States, No. 14-2306 (July 23, 2014)

Gashe v. United States, No. 16-3066 (Apr. 21, 2017)

Gashe v. United States, No. 17-3023 (Feb. 5, 2018)

United States v. Gashe, No. 18-2570 (Aug. 7, 2018)

Gashe v. United States, No. 18-3359 (Mar. 8, 2019)

Gashe v. United States, No. 18-3612 (Mar. 8, 2019)

United States v. Gashe, No. 20-3466 (Jan. 19, 2021)

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OPINIONS BELOW

The judgment of the court of appeals (Pet. App. A1) is not published in the Federal Reporter but is available at 2021 WL 2450585. The opinion of the district court (Pet. App. B1-B6) is not published in the Federal Supplement but is available at 2020 WL 6276140.

JURISDICTION

The judgment of the court of appeals was entered on January 19, 2021. The petition for a writ of certiorari was filed on April 19, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Iowa, petitioner was convicted on one count of conspiring to distribute 50 grams or more of methamphetamine, in violation of 21 U.S.C. 841(a)(1), 841(b)(1)(B), and 846; two counts of possessing a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c); and one count of possessing a firearm following a conviction for a misdemeanor crime of domestic violence, in violation of 18 U.S.C. 922(g)(9). Judgment 1. The district court sentenced petitioner to 570 months of imprisonment, to be followed by eight years of supervised release. Judgment 2-3. Petitioner did not appeal. The court later reduced petitioner's term of imprisonment to 528 months under 18 U.S.C. 3582(c)(2). D. Ct. Doc. 116, at 4 (Mar. 12, 2015). In 2020, petitioner filed a motion for a sentence reduction under 18 U.S.C. 3582(c)(1)(A). D. Ct. Doc. 135 (Aug. 24, 2020). The district court denied the motion, Pet. App. B1-B6, and the court of appeals affirmed, id. at A1.

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. App. C, 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." Id. § 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 review of

compassionate release applications, which can delay or deny release, even in cases where the applicant appears to meet the criteria for eligibility." Id. App. C, Amend. 799.

c. In the First Step Act of 2018, Pub. L. No. 115-391, Tit. VI, § 603(b), 132 Stat. 5239, Congress amended Section 3582(c)(1)(A) to allow defendants, as well as the BOP itself, to file motions for a reduced sentence. As modified, 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)(1), 112 Stat. 3469 -- in the case of a "second or subsequent conviction" under Section 924(c), including 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) (1994); see 18 U.S.C. 924(c)(1)(C) (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. From 2003 to 2007, petitioner participated in a conspiracy to distribute methamphetamine. Presentence Investigation Report (PSR) ¶ 30. In the course of the conspiracy, petitioner obtained methamphetamine in Nebraska and sold it from his home in Iowa. PSR ¶¶ 30, 36-38. Petitioner also possessed several firearms, which he stored in the same bedroom in which he weighed, packaged, and sold methamphetamine. PSR ¶¶ 25-29.

A federal grand jury in the Northern District of Iowa returned a 17-count indictment charging petitioner with various drug-trafficking and firearms offenses. Indictment 1-8. The government subsequently filed an information charging petitioner with one count of conspiring to distribute 50 grams or more of methamphetamine, in violation of 21 U.S.C. 841(a)(1), 841(b)(1)(B), and 846; two counts of possessing a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c); and one count of possessing a firearm following a conviction for a misdemeanor crime of domestic violence, in violation of 18 U.S.C. 922(g)(9). Information 1-3. Petitioner pleaded guilty to all four counts in the information. D. Ct. Doc. 91, at 1-3 (Mar. 20, 2008).

In 2008, the district court sentenced petitioner to 210 months of imprisonment on the conspiracy count and 120 months on the

Section 922(g)(9) count, to be served concurrently. Judgment 2. The court sentenced petitioner to 60 months on the first Section 924(c) count and 300 months on the second Section 924(c) count, to be served consecutively to each other and to the sentences on the other counts. Ibid. Petitioner did not appeal.

In 2014, 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. 115 (Nov. 4, 2014). The district court granted the motion, reducing petitioner's sentence on the conspiracy count to 168 months of imprisonment, thereby lowering his total sentence by 42 months. D. Ct. Doc. 116, at 4.

3. a. In August 2020, petitioner filed a pro se motion in the district court for a sentence reduction under Section 3582(c)(1)(A). D. Ct. Doc. 135 (Aug. 24, 2020). In that motion, petitioner relied on the First Step Act's change to Section 924(c) to assert that "extraordinary and compelling reasons" warranted a sentence reduction. Id. at 7-12. In particular, petitioner stated that if he had been sentenced after the enactment of the First Step Act, he would not have received a statutory minimum 25-year consecutive sentence on his second Section 924(c) conviction. Id. at 12. Petitioner further asserted that, in light of his "post-sentencing rehabilitation," the factors set forth in 18 U.S.C. 3553(a) supported a sentence reduction. Id. at 14; see id. at 13-17.

The district court denied petitioner's Section 3582(c)(1)(A) motion. Pet. App. B1-B6. The court took the view that Sentencing Guidelines § 1B1.13 -- which would foreclose a sentence reduction on the grounds asserted by petitioner -- is not applicable to Section 3583(c)(1)(A) motions brought by prisoners, and that it was therefore "not bound by § 1B1.13 in deciding whether extraordinary and compelling reasons exist" in petitioner's case. Pet. App. B4; see id. at B5 n.1. But the court nevertheless determined that "the changes the [First Step Act] made to § 924(c), either alone or in combination with [petitioner's] rehabilitation, do not constitute an extraordinary and compelling reason justifying compassionate release." Id. at B3.

The district court emphasized that, "in enacting the [First Step Act], Congress was cognizant of the difference between making statutory changes retroactive or prospective" and chose not to make its amendment to Section 924(c) applicable to defendants like petitioner, who were sentenced before the enactment of the First Step Act. Pet. App. B3. The court explained that, "[h]ad Congress intended the entire [First Step Act] to apply retroactively, or had Congress intended [First Step Act] changes to constitute extraordinary and compelling reasons under the compassionate release statute, it could have said so." Ibid. The court found "no indication" that Congress intended to "render the word 'extraordinary' meaningless" by "mak[ing] virtually every defendant sentenced before the [First Step Act] became law eligible

for a reduced sentence." Ibid. And the court noted that, although not binding, Section 1B1.13 "provides helpful guidance on what constitutes extraordinary and compelling reasons," ibid., and that "[n]othing in that section suggests that non-retroactive changes to sentencing law constitute extraordinary and compelling reasons," id. at B4. The court then determined that petitioner's only other stated reason for a sentence reduction -- his alleged post-sentencing rehabilitation -- "alone cannot be an extraordinary and compelling reason," in light of the limitation in 18 U.S.C. 994(t). Pet. App. B4.

b. Petitioner sought reconsideration of the denial of his Section 3582(c)(1)(A) motion, citing the COVID-19 pandemic and alleged medical conditions. D. Ct. Doc. 138, at 1-2 (Nov. 16, 2020). Based on the allegations in that motion, the district court appointed counsel to represent petitioner and ordered the filing of an amended Section 3582(c)(1)(A) motion addressing both "whether extraordinary and compelling circumstances are present in this case" and "the 18 U.S.C. § 3553(a) factors." D. Ct. Doc. 139, at 3 (Nov. 19, 2020). After filing a notice of appeal of the court's denial of his original Section 3582(c)(1)(A) motion, D. Ct. Doc. 141 (Nov. 23, 2020), petitioner filed an amended Section 3582(c)(1)(A) motion, D. Ct. Doc. 144-1 (Dec. 3, 2020). In his amended motion, petitioner asserted that his medical conditions, including obesity, type II diabetes, and high blood pressure, made him especially vulnerable to COVID-19 and

constituted "extraordinary and compelling" reasons for a sentence reduction. Id. at 6-10.

The district court denied both petitioner's motion to reconsider and his amended Section 3582(c)(1)(A) motion. D. Ct. Doc. 148, at 1-14 (Jan. 11, 2021); see id. at 14 n.10 (noting that Federal Rule of Criminal Procedure 37(a) permitted denial of those motions while an appeal of the original Section 3582(c)(1)(A) motion was pending). The court determined that "even if [petitioner] has shown extraordinary and compelling reasons, the 18 U.S.C. § 3553(a) factors weigh against early release." Id. at 10. The court took the view that although "non-retroactive sentencing changes do not constitute extraordinary and compelling reasons," such changes could be considered in weighing the Section 3553(a) factors. Id. at 13. But while the court accepted the assertion that petitioner's "sentence under current law would likely be much shorter" as "favor[able], to some extent," it found, after "consider[ing] all of the § 3553(a) factors," that a sentence reduction was nevertheless unwarranted. Ibid. The court emphasized that petitioner "committed serious felony drug and firearm offenses and has a lengthy criminal history"; that he "has not served even close to half of his already-reduced sentence"; and that "[n]either his age nor his health conditions are so advanced as to prevent him from committing additional crimes if released." Ibid.

The district court's order denying petitioner's motion to reconsider and amended Section 3582(c)(1)(A) motion was transmitted as a supplemental record to the court of appeals. See 07-cr-4033 D. Ct. Docket entry (Jan. 11, 2021); 20-3466 C.A. Docket entry (Jan. 11, 2021).

4. In an unpublished order, the court of appeals affirmed "the order of the district court denying compassionate release," explaining that it had "reviewed the original file" of the district court. Pet. App. A1.

ARGUMENT

Petitioner contends (Pet. 4-7) that the First Step Act's amendment to Section 924(c), which is not applicable to preexisting sentences like petitioner's, can nevertheless serve as an "extraordinary and compelling" reason for a sentence reduction under Section 3582(c)(1)(A)(i). That contention lacks merit. And although courts of appeals have reached different conclusions on the issue, the practical importance of the disagreement is limited, and the Sentencing Commission could promulgate a new policy statement that would deprive a decision by this Court of any practical significance. In any event, this case would be a poor vehicle to address the question presented, because petitioner would not be entitled to a sentence reduction even if the question

were resolved in his favor. The petition for a writ of certiorari should be denied.*

1. Petitioner contends (Pet. 7) that Congress's decision not to extend the First Step Act's amendment to Section 924(c) to defendants like him can constitute an "extraordinary and compelling reason" for a sentence reduction under Section 3582(c)(1)(A). The district court correctly rejected that contention. Pet. App. B2-B4.

In the First Step Act, Congress amended Section 924(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. In Section 403(b) of the First Step Act, however, Congress made the deliberate choice not to make that amendment applicable to defendants who had been sentenced before the enactment of the First Step Act, expressly specifying that the change would apply only "if a sentence for the offense has not been imposed as of such date of enactment." § 403(b), 132 Stat. 5222. In so doing, Congress adhered to "the ordinary practice" in "federal sentencing" of "apply[ing] new penalties to defendants not yet sentenced, while withholding that

* Other pending petitions for writs of certiorari raise similar issues. See, e.g., Tomes v. United States, No. 21-5104 (filed July 7, 2021); Corona v. United States, No. 21-5671 (filed Sept. 2, 2021); Watford v. United States, No. 21-551 (filed Oct. 12, 2021); Sutton v. United States, No. 21-6010 (filed Oct. 14, 2021); Jarvis v. United States, No. 21-568 (filed Oct. 15, 2021); Tingle v. United States, No. 21-6068 (filed Oct. 15, 2021).

change from defendants already sentenced." Dorsey v. United States, 567 U.S. 260, 280 (2012); cf. 1 U.S.C. 109 (general nonretroactivity provision).

Given Congress's deliberate choice not to make the First Step Act's change to Section 924(c) applicable to defendants who had already been sentenced, "there is nothing 'extraordinary' about" the fact that petitioner's sentence for his second Section 924(c) conviction reflects the statutory penalty that existed at the time he was sentenced. United States v. Thacker, 4 F.4th 569, 574 (7th Cir. 2021). That sentence "was not only permissible but statutorily required at the time." United States v. Maumau, 993 F.3d 821, 838 (10th Cir. 2021) (Tymkovich, C.J., concurring). And when Congress enacted the First Step Act, it specifically declined to disturb petitioner's sentence for his second Section 924(c) conviction, even as it made other (previous) statutory changes applicable to defendants previously sentenced. See § 404(b), 132 Stat. 5222 (adopting a specific mechanism for retroactively applying certain changes in the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372).

Any disparity between petitioner's sentence "and the sentence a defendant would receive today" (Pet. 7) is therefore the product of deliberate congressional design -- namely, its decision not to make the First Step Act's change to Section 924(c) applicable to defendants who had already been sentenced. As this Court has recognized, such "disparities, reflecting a line-drawing effort,

will exist whenever Congress enacts a new law changing sentences (unless Congress intends reopening sentencing proceedings concluded prior to a new law's effective date)." Dorsey, 567 U.S. at 280. And treating Congress's express adherence to "ordinary practice" in federal sentencing, ibid., "as simultaneously creating an extraordinary and compelling reason for early release" would contravene various canons of construction, United States v. Andrews, 12 F.4th 255, 261 (3d Cir. 2021).

When interpreting statutes, this Court generally seeks "to 'fit, if possible, all parts' into a 'harmonious whole.'" Andrews, 12 F.4th at 261 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000)). But nothing is harmonious about treating the ordinary operation of one provision (Section 403(b)) as an "extraordinary" circumstance under another (Section 3582(c)(1)(A)) -- especially when Congress addressed both in the same statute (the First Step Act) without any suggestion that the new prisoner-filed Section 3528(c)(1)(A) motions would constitute an end-around to its prospective application of Section 403's change to the sentencing scheme for Section 924(c) offenses. In addition, "[i]t is a commonplace of statutory construction that the specific governs the general." RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639, 645 (2012) (citation omitted). And treating the ordinary operation of Section 403(b) as an extraordinary circumstance under Section 3582(c)(1)(A) would allow the more general provision (Section 3582(c)(1)(A)) to "thwart" the

more specific one (Section 403(b)). United States v. Jarvis, 999 F.3d 442, 444 (6th Cir. 2021), petition for cert. pending, No. 21-568 (filed Oct. 15, 2021). Nothing suggests that "the same Congress that specifically decided to make these sentencing reductions non-retroactive in 2018 somehow mean[t] to use a general sentencing statute from 1984 to unscramble that approach," ibid., simply by allowing prisoner-filed Section 3582(c)(1)(A) motions.

Section 403's prospective amendment accordingly cannot serve as an "extraordinary and compelling" reason for reducing a preexisting sentence under Section 3582(c)(1)(A), either by itself or as part of a package of factors. Whether considered alone or in combination with other circumstances, the possibility that a previously sentenced defendant might receive a lower sentence if he were sentenced today is still the ordinary, express, and expected result of Congress's deliberate decision not to make the First Step Act's change to Section 924(c) applicable to previously sentenced defendants. See Jarvis, 999 F.3d at 444 (explaining that the First Step Act's change to Section 924(c) is a "legally impermissible ground" for finding an "extraordinary and compelling reason," even when it is "combined with" other considerations).

2. Petitioner asserts (Pet. 4-5) that the courts of appeals are divided on whether district courts may rely on Congress's decision not to make the First Step Act's amendment to Section 924(c) applicable to defendants who had already been sentenced in finding "extraordinary and compelling reasons" for a sentence

reduction under Section 3582(c)(1)(A). But a divergence of views on that issue, which could be addressed by the Sentencing Commission, lacks sufficient practical significance to warrant this Court's review.

a. In accord with the decision below, the Third, Sixth, and Seventh Circuits have determined that Congress's decision not to make the First Step Act's amendment to Section 924(c) applicable to previously sentenced defendants, "whether considered alone or in connection with other facts and circumstances, cannot constitute an 'extraordinary and compelling' reason to authorize a sentencing reduction." Thacker, 4 F.4th at 571; see Andrews, 12 F.4th at 260-261; Jarvis, 999 F.3d at 445. The Eleventh Circuit has likewise determined that the First Step Act's prospective amendment to Section 924(c) cannot constitute an "extraordinary and compelling" reason, reasoning that Section 1B1.13's description of what should be considered "extraordinary and compelling reasons" is applicable to prisoner-filed Section 3582(c)(1)(A) motions and does not encompass such prospective changes in the law. See United States v. Bryant, 996 F.3d 1243, 1257 (11th Cir. 2021), petition for cert. pending, No. 20-1732 (filed June 10, 2021).

The Fourth and Tenth Circuits have determined that Congress's decision not to make the First Step Act's amendment to Section 924(c) applicable to previously sentenced defendants can form part of an "individualized assessment[]" of whether "'extraordinary and

compelling reasons'" exist in a particular defendant's case. United States v. McCoy, 981 F.3d 271, 286 (4th Cir. 2020); see Maumau, 993 F.3d at 837. But the Sentencing Commission could promulgate a new policy statement that resolves the disagreement. Under Section 3582(c)(1)(A), any sentence reduction must be "consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. 3582(c)(1)(A). The two circuits that have upheld a district court's reliance on the First Step Act's prospective amendment to Section 924(c) in finding extraordinary and compelling reasons for a sentence reduction have both done so on the premise that the current version of Section 1B1.13 is inapplicable to sentence-reduction motions filed by prisoners. See Maumau, 993 F.3d at 836-837; McCoy, 981 F.3d at 283. Nobody disputes, however, that the Commission has the power -- indeed, the statutory duty -- to promulgate a policy statement that applies to prisoner-filed motions, or that it could resolve this particular issue.

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). The Commission could thus promulgate a new policy

statement, binding on district courts in considering prisoner-filed sentence-reduction motions, that rules out the First Step Act's prospective amendment to Section 924(c) as a possible basis for finding "extraordinary and compelling reasons" for a Section 3582(c)(1)(A) sentence reduction.

Such a policy statement -- which would account for observed practices and could incorporate input from various stakeholders, 28 U.S.C. 994(o) -- could take various forms. For instance, the Commission could revise the policy statement in Section 1B1.13 to clarify that Application Note 1's current description of what should be considered extraordinary and compelling reasons, which does not encompass prospective changes in the law, 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 that likewise exclude prospective changes in the law. Or the Commission could identify specific circumstances that should not be considered extraordinary and compelling and include prospective amendments to sentencing law among them.

Indeed, in any of those ways, the Commission could not only resolve circuit disagreement, but also deprive a decision by this Court that adopted petitioner's view of any practical significance. Even if the Court were to issue such a decision, the Commission would "continue to collect and study appellate court

decisionmaking" with respect to prisoner-filed sentence-reduction motions following the enactment of the First Step Act. United States v. Booker, 543 U.S. 220, 263 (2005). And the Commission would continue to have both the duty and the power to "modify" its description of what should be considered extraordinary and compelling reasons "in light of what it learns" and thereby "encourag[e] what it finds to be better sentencing practices." Ibid.; see Braxton v. United States, 500 U.S. 344, 348 (1991) (citing 28 U.S.C. 994(o)). The Commission could thus determine, as an exercise of its policy discretion, to exclude prospective amendments to sentencing law as a basis for finding that "extraordinary and compelling reasons" exist under Section 3582(c)(1)(A), even if this Court were to decide that the statute did not compel such exclusion.

Given that a decision by this Court would not preclude the Commission from issuing a new policy statement, applicable to prisoner-filed motions, that forecloses reliance on prospective amendments to the law in finding "extraordinary and compelling reasons," no sound reason exists for this Court's intervention at this time. 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. App. C, 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. App. C, Amend. 799. Particularly given that the Commission is statutorily required to describe "what should be considered extraordinary and compelling reasons" for all sentence-reduction motions, 28 U.S.C. 994(t), and that the Commission may wish to clarify whether the existing policy statement in Section 1B1.13 is applicable to such motions filed by prisoners, the Commission is likely to take up the issue again.

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 to urge judicial intervention at this juncture particularly unsound. Although the Commission could not describe "extraordinary and compelling reasons" to include consideration of a factor that, as a statutory matter, may not constitute such a reason, the Commission could exercise its discretion to exclude, as a policy matter, prospective changes in the law. Moreover, the Commission could revise the applicable description of "extraordinary and compelling reasons" in such a way that would render prisoners like petitioner eligible for

relief, independent of the First Step Act's change to Section 924(c). The current statutory and Guidelines scheme would not preclude petitioner from filing a second sentence-reduction motion and thus taking advantage of such a revised policy statement.

The Commission's current lack of a quorum does not support this Court's intervention. Notwithstanding the Commission's current lack of a quorum, this Court has adhered to its usual practice of denying review of issues that the Commission may address. 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). Intervention is likewise unwarranted solely to advise the Commission as to whether it would be precluded, as a statutory matter, from including the solely prospective amendment of Section 924(c) as a potential "extraordinary and compelling" circumstance for a sentence reduction. In the event that the Commission were to desire to permit reductions on that basis as a policy matter, but view that course to be foreclosed as a statutory matter, it could indicate

as much in a revised policy statement and thereby allow for further congressional, and possibly judicial, action.

b. In any event, even irrespective of future Commission action, the practical significance of the current disagreement among the circuits is limited. Even in those circuits that have determined that the First Step Act's amendment to Section 924(c) cannot constitute an "extraordinary and compelling" reason for a sentence reduction, that amendment is not necessarily "irrelevant to the sentence-reduction inquiry." Andrews, 12 F.4th at 262; see Thacker, 4 F.4th at 575; Jarvis, 999 F.3d at 445; Pet. App. B6 n.3. For "those defendants who can show some other 'extraordinary and compelling' reason for a sentencing reduction," district courts may consider prospective "sentencing law changes" in "balancing the § 3553(a) factors." Jarvis, 999 F.3d at 445. No court of appeals has precluded district courts from considering such changes in determining whether the Section 3553(a) factors support a sentence reduction or "in determining the length of the warranted reduction." Thacker, 4 F.4th at 575.

3. Even if the question presented otherwise warranted review, this case would be a poor vehicle in which to address it. After "review[ing] the original file" of the district court, the court of appeals "summarily affirmed" the denial of "compassionate release" in a brief, unpublished order. Pet. App. A1. The court of appeals' order does not specify whether it affirmed on the ground relied on by the district court or whether it affirmed on

an alternative ground. Moreover, the alternative grounds for the district court's own disposition make clear that this Court's review would not be outcome-determinative.

Under Section 3582(c)(1)(A), any sentence reduction must be supported not only by "extraordinary and compelling reasons," but also by "the factors set forth in section 3553(a) to the extent that they are applicable." 18 U.S.C. 3582(c)(1)(A). Here, after filing a notice of appeal of the district court's denial of his original Section 3582(c)(1)(A) motion, petitioner filed an amended motion with the assistance of appointed counsel. D. Ct. Doc. 144-1. In denying that motion, the district court assumed, without deciding, that petitioner had "shown extraordinary and compelling reasons" for a sentence reduction. D. Ct. Doc. 148, at 10. But after considering all of the relevant circumstances under Section 3553(a) -- including the First Step Act's amendment to Section 924(c) -- the court nevertheless determined that a sentence reduction was not warranted. Id. at 10-13. As the court explained, the seriousness of petitioner's "felony drug and firearm offenses," his "lengthy criminal history," the length of his remaining sentence, and the fact that "[n]either his age nor his health conditions are so advanced as to prevent him from committing additional crimes if released" all "weigh[ed] strongly against early release." Id. at 13. Thus, regardless of this Court's resolution of the question presented, the outcome below would be the same because -- as the district court has already

made clear -- the Section 3553(a) factors weigh strongly against relief.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

KENNETH A. POLITE, JR.
Assistant Attorney General

ANDREW C. NOLL
Attorney

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