No. 20-8284

IN THE SUPREME COURT OF THE UNITED STATES

Harold Gashe,

Petitioner,

v.

United States of America,

The government.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The government concedes a deep and intractable circuit split on the question presented: whether a court considering compassionate release may consider the lesser sentence that a defendant would receive today in finding "extraordinary and compelling" reasons for reducing a harsh sentence under now-repudiated sentencing laws. BIO 13, 17-19. And the government barely disputes the importance of the issue to multitudes of federal prisoners seeking compassionate release—prisoners who are invoking a procedure that the First Step Act provided to them after decades of failures of the Bureau of Prisons (BOP) and the Sentencing Commission to fulfill Congress's

objectives. Nevertheless, the government contends that the Court should leave the conflict unresolved. None of its reasons withstands scrutiny. The government's defense of its merits position is wrong, but more important, it is irrelevant to whether this Court should grant certiorari to resolve the conflict in the circuits. And its primary submission—that the Court should leave the issue to the Commission—rests on a fundamental error. The Commission cannot resolve the statutory-construction question that has split the circuits. And because the Commission cannot require the consideration of factors precluded by statute, the Commission could try to "resolve" the split only by conforming to the most restrictive circuits' decisions—even if they are wrong. Accordingly, *Braxton v. United States*, 500 U.S. 344 (1991), does not support leaving the resolution of this conflict to the Commission. Rather, this is precisely the type of case that *Braxton* describes as implicating "[a] principal purpose" of the Court's "certiorari jurisdiction": "to resolve conflicts" among the courts appeals "concerning the meaning of provisions of federal law." *Id.* at 347. Because that task is "initially and primarily" for this Court, *id.* at 348, and because this case cleanly presents the issue, the Court should grant certiorari.

A. The Courts Of Appeals Are In Stark Conflict On The Question Presented

The government cannot deny that the courts of appeals have expressly disagreed on whether non-retroactive changes in federal law may support finding "extraordinary and compelling reasons" justifying compassionate release of prisoners who were sentenced under an older, harsher regime. BIO 17-18. The Fourth and Tenth Circuits unequivocally hold that they can, while the Third, Sixth, Seventh, and

Eighth Circuits categorically say they cannot. *Compare United States v. McCoy*, 981 F.3d 271, 286 (4th Cir. 2020); *United States v. McGee*, 992 F.3d 1035, 1045-48 (10th Cir. 2021), *with United States v. Andrews*, 12 F.4th 255, 261-62 (3d Cir. 2021); *United States v. Jarvis*, 999 F.3d 442, 443-44 (6th Cir. 2021), *petition for cert. pending*, No. 21-568 (filed Oct. 15, 2021); *United States v. Thacker*, 4 F.4th 569, 574-75 (7th Cir. 2021); Pet. App. A; *see also* Pet. 11-14, *Jarvis v. United States*, No. 21-568 (Oct. 15, 2021) (describing split).[1]

Faced with this deep circuit conflict, the government leads its opposition by defending the decision below. BIO 14-17. That defense provides no reason to deny review. The time for a merits defense is on the merits, and the government's restatement of one side of the conflict is no reason to leave the split unresolved.

1. A district court "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 determines, first, that "extraordinary and compelling reasons warrant such a reduction" (or certain other conditions are met), and second, "that such a reduction is

[1] The government suggests that *United States v. Bryant*, 996 F.3d 1243 (11th Cir. 2021), *petition for cert. pending*, No. 20-1732 (filed June 10, 2021), supports its position. BIO 18. But *Bryant* resolved a different question: whether Sentencing Guidelines § 1B1.13—which speaks only to compassionate-release motions filed by the Bureau of Prisons—is an "applicable" policy statement that binds a district court considering defendant-filed motions for compassionate release. The Eleventh Circuit said yes; seven other circuits have said no. Because of its aberrant resolution of that issue, the Eleventh Circuit did not address the issue in this case. *See* BIO 11-18, *Bryant*, *supra* (No. 20-1732) (opposing certiorari without addressing the issue here or defending the Eleventh Circuit's holding).

consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(1)(A).

When it enacted Section 3582, Congress simultaneously required the Sentencing Commission to "promulgat[e] general policy statements regarding" Section 3582(c)(1)(A) in which it "shall describe what should be considered extraordinary and compelling reasons for sentence reduction." 28 U.S.C. § 994(t). Congress precluded only one factor from constituting an extraordinary and compelling reason: "[r]ehabilitation of the defendant." *Id.*; *see also* U.S.S.G. § 1B1.13 (same). And even for rehabilitation, Congress made it an impermissible factor only when considered "alone," 28 U.S.C. § 994(t); district courts remain free to consider it in combination with other factors. Reading an additional exception into the district court's discretion contradicts that statutory text, as "[t]he expression of one thing implies the exclusion of others (*expressio unius est exclusio alterius*)." *Jennings v. Rodriguez*, 138 S. Ct. 830, 844 (2018) (citation omitted). Where, as in Section 994(t), Congress has "direct[ed] sentencing practices in express terms," courts cannot rewrite those terms by adding additional provisions. *Dean v. United States*, 137 S. Ct. 1170, 1177 (2017) (quoting *Kimbrough v. United States*, 552 U.S. 85, 103 (2007)).

The government's position also conflicts with ordinary understandings of what constitutes "extraordinary and compelling reasons" warranting compassionate release. The sentences under the previous regime could be "unjust, cruel, and even irrational." *United States v. Angelos*, 345 F. Supp. 2d 1227, 1230 (D. Utah 2004), *aff'd*, 433 F.3d 738 (10th Cir. 2006). And the "exceptionally dramatic" reductions to these

sentences that Congress has prospectively enacted, *McCoy*, 981 F.3d at 285, can logically support finding "extraordinary and compelling" reasons for a discretionary reduction. Before the First Step Act, the law subjected individuals with multiple Section 924(c) convictions to prison terms that could easily amount to a life sentence. For example, in *United States v. Ezell*, 518 F. Supp. 3d 851 (E.D. Pa. 2021), the court imposed a 132-year mandatory minimum sentence under prior law; today, it would be 30 years. *Id.* at 854, 857. "[O]ne cannot treat such" differences "as if they were minor ones"; they are instead "radical[.]" *Dorsey v. United States*, 567 U.S. 260, 277 (2012) (discussing Fair Sentencing Act's similar reforms). A compassionate-release court is not required to turn a blind eye to the extreme harshness of old-law sentences—and their later repudiation—in deciding in a particular case, based on all the facts and circumstances, whether extraordinary and compelling reasons support a reduced sentence.

2. The government offers three arguments why compassionate-release courts must ignore non-retroactive changes in federal law, no matter how extreme the sentence or how obsolete the sentencing policy that produced it. None has merit.

First, the government argues that the First Step Act's changes to federal sentencing laws cannot be an "extraordinary" reason to grant compassionate release because the "ordinary" rule is that changes to federal sentencing statutes do not apply retroactively. BIO 14-15. This argument erroneously equates general retroactivity with individualized discretionary relief. Congress's decision not to require resentencing of *all* individuals sentenced under the prior regime—the retroactivity

question—says nothing about whether *some* individuals, as part of an "individualized assessment[]," BIO 18 (quoting *McCoy*, 981 F.3d at 286), may receive compassionate release in part because of the extraordinary sentencing disparities between the current and former regimes. And the idea that prison sentences running to hundreds of years (longer than the punishment for many murders, rapes or kidnappings) are not "extraordinary" defies ordinary meaning.[2]

Second, in a retreat from plain language, the government says that petitioner's view of the law violates the general principle that statutes must be interpreted as a "harmonious whole." BIO 16 (citation omitted). But this canon of construction applies when one reading of ambiguous statutory text would render it incompatible with another statutory provision. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000). As explained, the *class-wide* non-retroactivity of the First Step Act reforms to 18 U.S.C. § 924(c) is entirely compatible with *individualized* consideration of the impact of prior law—and its now-rejected policy—in evaluating particular compassionate-release petitions under the separate authority of 18 U.S.C. § 3582.

Third, arguing that "the specific governs the general," the government suggests that the compassionate-release statute cannot be construed to "thwart" Congress's decision to make the First Step Act's reforms to Section 924(c) non-

[2] *See* U.S. Sentencing Comm'n, *Life Sentences in the Federal System* 1 (2015) ("Life imprisonment sentences are rare in the federal criminal justice system."), https://perma.cc/96WL-BP7N; Fed. Bureau of Prisons, *Sentencing Imposed* (updated Nov. 27, 2021) (2.7% of federal inmates are serving a life sentence), https://perma.cc/7YK9-2MD4.

retroactive. BIO 16 (citations omitted). This principle, however, applies where two statutes touch "upon the same subject" and are not "capable of co-existence." *Morton v. Mancari*, 417 U.S. 535, 551 (1974) (citation omitted). It has no application here: withholding *automatic* resentencing is a distinct subject from allowing *individualized* resentencing and the two can easily co-exist. And to the extent that the "specific governs the general" canon applies at all, it supports petitioner. Section 3582 is a *specific* grant of authority to reduce the sentences of a narrow class of defendants; non-retroactivity is *general* and applies to all Section 924(c) offenders.

B. The Sentencing Commission Cannot Resolve The Disagreement That Has Divided The Circuits

The government's primary non-merits argument is that the Court should let the Sentencing Commission resolve the circuit conflict. BIO 18-24. The government invokes (BIO 21) *Braxton v. United States*, 500 U.S. 344 (1991), to avoid review, but that decision does not apply here. *Braxton* indicates that when courts fall into conflict over the meaning of a Sentencing Guideline or policy statement, the Court should ordinarily leave resolution of that issue to the Commission. *Id.* at 348. But the rule is otherwise where, as here, courts disagree about the meaning of a statute, as *Braxton* itself recognized. *Id.* at 347-48. In that situation, "it is this Court's responsibility to say what a statute means." *Nitro-Lift Techs., LLC v. Howard*, 568 U.S. 17, 21 (2012) (per curiam) (citation omitted).

The question presented here—whether non-retroactive sentence reductions are categorically unavailable as "extraordinary and compelling reasons" under 18 U.S.C. § 3582(c)(1)(A)—is a matter of statutory interpretation for this Court, not the

Commission. The government admits that "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." BIO 22 (emphasis added). That leaves the government in the position of arguing that the Commission could seek to "resolve" the split only by issuing a policy statement *adopting the government's position*. Were the Commission instead to agree with defendants that non-retroactive changes in the law *can* serve as extraordinary and compelling reasons, the circuits that have held—as a matter of statutory construction—that they cannot do so would hold that policy statement contrary to law and invalid. And if the Commission agreed with the government's interpretation, it might find itself at odds with one of the circuits on the other side of the split. The Tenth Circuit has rejected the view that "the Sentencing Commission possesse[s] the exclusive authority to define, through its general policy statements, the statutory phrase 'extraordinary and compelling reasons,'" and has determined that "Congress intended" district courts "to independently determine the existence of 'extraordinary and compelling reasons,'" although it went on to say that district courts would then be "circumscribed" by applicable Commission policy statements. *See United States v. McGee*, 992 F.3d 1035, 1043-44 (10th Cir. 2021). As a result, if the Commission tried to resolve the statutory-construction question presented here, it might find courts in disagreement with its position no matter what it did.

The government's citation of 28 U.S.C. § 994(t) as "express[ing a] congressional preference for Commission-based decisionmaking" on the question presented is thus

inapt. BIO 22. Section 994(t) charges the Commission with "describ[ing] what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied." 28 U.S.C. § 994(t). But, as the government concedes, the Commission has no authority to adopt a definition of "extraordinary and compelling reasons" that conflicts with the statutory text. BIO 22. The conflict over the meaning of the statute thus creates a dilemma that only this Court can resolve.[3]

Rather than leave the Commission in the predicament that the circuit conflict causes, the Court should grant review, clarify the meaning of Section 3582(c)(1)(A), and leave the Commission with clear guidance. Such a ruling would not, as the government suggests, be deprived of "practical significance" by any future Commission policy statement. BIO 20. Once this Court has "determined a statute's meaning," the Sentencing Commission cannot subsequently promulgate a conflicting interpretation. *Neal v. United States*, 516 U.S. 284, 295 (1996) (citing *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536-37 (1992); *Maislin Indus., U.S. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990)).

[3] And speculation about future Commission action is, in any event, no answer for prisoners who have a compelling argument for compassionate release today. The Commission lacks a quorum, *see* BIO 23, and with only one of seven seats filled, no likelihood exists that one will soon materialize, *see* Nate Raymond, *U.S. Sentencing Panel's Last Member Breyer Urges Biden to Revive Commission*, Reuters (Nov. 11, 2021).

C. The Decision Below Has Significant Consequences For Criminal Defendants And Merits Review In This Case

1. At least 2,412 federal prisoners were sentenced under the now-repudiated stacking provision of Section 924(c).[4] Many of them could potentially seek sentence reductions based, in part, on their stacked sentences. Consequently, the question presented implicates tens of thousands of years of incarceration for these individuals, who are serving an average sentence of 418 months each.[5]

The government nevertheless suggests that "the practical significance of the current disagreement among the circuits is limited" because district courts may still consider sentencing disparities when "balancing the § 3553(a) factors" in imposing a sentence. BIO 24 (citation omitted); *see also* 18 U.S.C. § 3553(a)(6). But a court reaches the Section 3553(a) factors only *after* it has already found extraordinary and compelling circumstances justifying compassionate release. The rule in the Third, Sixth, Seventh, and Eighth Circuits cuts off that inquiry before it begins.

Without this Court's intervention, the conflict will persist. In 2021 alone, district courts have adjudicated hundreds of motions for reduced sentences based in part on stacked Section 924(c) sentences.[6] The government provides no reason to think that defendants will stop filing such motions or seeking individualized relief

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[4] U.S. Sentencing Comm'n, *Estimate of the Impact of Selected Sections of S. 1014, The First Step Act Implementation Act of 2021*, at 1 (2021), https://perma.cc/6VGM-Q4DC.

[5] *Id.*

[6] This figure is based on a Westlaw survey of district court decisions that issued in 2021 and addressed stacked Section 924(c) convictions in the context of motions for sentence reductions under Section 3582.

based on non-retroactive changes in the law. And the government provides no good reason for the Court to ignore the conflict and allow whether a defendant wins compassionate relief to turn on geographical happenstance.

2. This case is the right vehicle for resolution of the conflict. The district court fully considered and clearly decided the question presented, *see* Pet. App. B2-B4, and the Eighth Circuit summarily affirmed that decision, *see* Pet. App. A. This Court regularly reviews cases arising from summary affirmances. *See, e.g.*, *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1372 (2018); *Shapiro v. McManus*, 577 U.S. 39, 42 (2015); *Christeson v. Roper*, 574 U.S. 373, 373-74 (2015) (per curiam); *Clark v. Martinez*, 543 U.S. 371, 376-77 (2005); *United States v. Flores-Montano*, 541 U.S. 149, 151 (2004).

The government does not suggest that any jurisdictional or other serious vehicle issue would prevent this Court from reaching and fully resolving the question presented. Rather, it contends that the question presented is not outcome-determinative because petitioner's compassionate-release motion would fail under the Section 3553(a) factors. BIO 25-26. It points to the district court's denial of reconsideration of petitioner's compassionate-release motion, which reasoned that, even if petitioner were correct on the question presented, he would not be entitled to relief under the Section 3553(a) factors. *See id.* at 24-26. But the Eighth Circuit never considered that issue. Petitioner did not file a notice of appeal from the denial of reconsideration, and the Eighth Circuit affirmed after reviewing only the district

court's "original" denial. *Id.* at 13. The district court's original memorandum opinion did not conduct a Section 3553(a) analysis at all. *See* Pet. App. B1-B6.

This Court routinely grants review when a district court has ruled in the alternative on grounds not reviewed by the court of appeals. *See, e.g.*, *Brownback v. King*, 141 S. Ct. 740, 746-47 (2021); *Harris v. Reed*, 489 U.S. 255, 258-60 (1988). And that makes particular sense when the alternative holding could be affected by the resolution of the question presented. Here, if this Court grants certiorari and reverses, the court of appeals could decide in the first instance whether the district court should reconsider petitioner's motion for compassionate release. On remand, the district court could then take into account the changes worked by the non-retroactive provisions of the First Step Act—not just hypothetically, but knowing that they may count as contributing to "extraordinary and compelling reasons." For that reason, whether any mistaken belief by the district court was harmless should be left for the court of appeals to address in the first instance. *Cf. United States v. Garcia*, 655 F.3d 426, 433 (5th Cir. 2011) ("A district court's mistaken belief regarding its authority under the guidelines is not harmless even where it states that the modified sentence is appropriate in light of other factors and that even if it had discretion to analyze the supposedly impermissible factor, that factor would not affect the sentence."). The district court's unreviewed alternative decision is therefore no reason for this Court to forgo review.

CONCLUSION

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

Respectfully submitted,

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December 2, 2021