No. 21-5104

IN THE SUPREME COURT OF THE UNITED STATES

JOHN G. TOMES, JR., PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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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 centered on a statutory sentencing amendment to 21 U.S.C. 841(b)(1)(A) that Congress made clear does not apply to preexisting sentences.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (W.D. Ky.):

United States v. Tomes, No. 16-cr-113 (Aug. 31, 2020)

United States Court of Appeals (6th Cir.):

United States v. Tomes, No. 20-6056 (Apr. 8, 2021)

Tomes v. United States, No. 21-5325 (Nov. 16, 2021)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 11-17) is reported at 990 F.3d 500. The order of the district court (Pet. App. 9-10) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 2021. A petition for rehearing was denied on April 8, 2021 (Pet. App. 18). The petition for a writ of certiorari was filed on July 7, 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 Western District of Kentucky, petitioner was convicted on one count of conspiring to distribute 500 grams or more of methamphetamine and one kilogram or more of heroin, in violation of 21 U.S.C. 841(a)(1), 841(b)(1)(A), and 846 (2012); one count of possessing 500 grams or more of methamphetamine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A) (2012); one count of possessing heroin with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C) (2012); one count of possessing a firearm and ammunition as a felon, in violation of 18 U.S.C. 922(g); one count of conspiring to commit money laundering, in violation of 18 U.S.C. 1956; and three counts of engaging in monetary transactions in property derived from unlawful activities, in violation of 18 U.S.C. 1957. Pet. App. 1-2; Superseding Indictment 1-2, 6-9. The district court sentenced petitioner to 240 months of imprisonment, to be followed by ten years of supervised release. Pet. App. 3-4. Petitioner did not appeal. In 2020, petitioner filed a motion for a sentence reduction under 18 U.S.C. 3582(c)(1)(A). D. Ct. Doc. 244 (May 26, 2020). The district court denied the motion, Pet. App. 9-10, and the court of appeals affirmed, id. at 11-17.

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, 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 Supp., 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 sec. 212(a)(2), § 3582(c)(1)(A), 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 sec. 217(a), § 994(s), 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 sec. 217(a), § 994(a)(2)(C), 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 sec. 217(a), § 994(s), 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). 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 Supp., 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)) (emphases omitted). 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 Supp., Amend. 799.

c. In the First Step Act of 2018, Pub. L. No. 115-391, Tit. VI, § 603(b)(1), 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. Section 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 certain drug offenses. § 401, 132 Stat. 5220-5221. Before the First Step Act, 21 U.S.C. 841(b)(1)(A) (2012) prescribed a minimum sentence of 20 years of imprisonment for a violation of Section 841(a) and (b)(1)(A) committed "after a prior conviction for a felony drug offense has become final." Section 401(a) of the First Step Act amended the statute to prescribe a minimum sentence of 15 years for a violation of Section 841(a) and (b)(1)(A) committed "after a prior conviction for a serious drug felony or serious violent felony has become final." § 401(a)(2)(A)(i), 132 Stat. 5220; see § 401(a)(1), 132 Stat. 5220 (21 U.S.C. 802(57)) (defining "serious drug felony"). Congress specified that the amendment "shall apply to any offense that was committed before the date of

enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment." First Step Act § 401(c), 132 Stat. 5221.

2. From 2015 to 2016, petitioner and his co-conspirators ran a drug ring in Louisville, Kentucky. Plea Agreement 2. Together, they trafficked in illegal drugs, including methamphetamine and heroin, and laundered drug money. Id. at 2-4. Petitioner maintained a stash house where he stored the drugs as well as a firearm and ammunition. Id. at 2-3.

A federal grand jury in the Western District of Kentucky returned a superseding indictment charging petitioner with one count of conspiring to distribute 500 grams or more of methamphetamine and one kilogram or more of heroin, in violation of 21 U.S.C. 841(a)(1), 841(b)(1)(A), and 846 (2012); one count of possessing 500 grams or more of methamphetamine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A) (2012); one count of possessing heroin with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C) (2012); one count of possessing a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c); one count of possessing a firearm and ammunition as a felon, in violation of 18 U.S.C. 922(g); one count of conspiring to commit money laundering, in violation of 18 U.S.C. 1956; and three counts of engaging in monetary transactions in property derived from unlawful activities, in violation of 18 U.S.C. 1957. Superseding Indictment 1-2, 6-9.

The government gave notice of its intent to seek enhanced penalties on the Section 841 counts based on petitioner's prior convictions for felony drug offenses. D. Ct. Doc. 114, at 1-2 (Sept. 19, 2017); see 21 U.S.C. 851(a).

Petitioner and the government entered into a plea agreement pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C). Plea Agreement 1, 8-9. The government agreed to dismiss the Section 924(c) count (which would have required a mandatory consecutive sentence), and petitioner agreed to plead guilty to the remaining counts. Id. at 2-4, 7. The government also agreed to rely on only one prior conviction for a felony drug offense in seeking enhanced penalties on the Section 841 counts, resulting in a statutory minimum sentence of 20 years of imprisonment (as opposed to life imprisonment for two or more such prior convictions, see 21 U.S.C. 841(b)(1)(A) (2012)) on the distribution-conspiracy and methamphetamine-possession counts. Plea Agreement 4, 6. Petitioner and the government further stipulated to a total sentence of 240 months of imprisonment. Id. at 6.

The district court accepted petitioner's guilty plea and imposed the stipulated sentence required by the plea agreement. D. Ct. Doc. 177, at 1 (Mar. 20, 2018). Specifically, in June 2018 -- before the enactment of the First Step Act, Pet. App. 17 -- the court sentenced petitioner to 240 months of imprisonment on each of the Section 841 counts and the Section 1956 count, and 120 months on the Section 922(g) count and each of the Section 1957

counts, all to be served concurrently. Sent. Tr. 4; Pet. App. 3. Petitioner did not appeal. Pet. 3.

3. In May 2020, petitioner filed a motion in the district court for a sentence reduction under Section 3582(c)(1)(A). D. Ct. Doc. 244. In that motion, petitioner stated that if he had been sentenced after the enactment of the First Step Act, none of his prior convictions would qualify as a "serious drug felony," id. at 18 (citation and emphasis omitted); he "would not be subject to an increased statutory minimum penalty under § 841(b)(1)(A)," ibid.; and the court would have had "discretion to impose a sentence of less than 20 years [of] imprisonment," id. at 2-3. Petitioner also asserted that he had "experienced substantial post-offense rehabilitation" and that his "respiratory conditions such as chronic asthma" made him "particularly susceptible to COVID-19." Id. at 2. Petitioner argued that those "factors combine[d] to present extraordinary and compelling reasons to modify [his] sentence." Id. at 3. He further argued that the factors set forth in 18 U.S.C. 3553(a) supported a sentence reduction. D. Ct. Doc. 244, at 24-28.

The district court denied petitioner's motion. Pet. App. 9-10. The court took the view that Sentencing Guidelines § 1B1.13 "limits the 'extraordinary and compelling reasons' for compassionate release to four categories: (1) the inmate's medical condition; (2) the inmate's age; (3) the inmate's family circumstances; and (4) other reasons 'as determined by the Director

of the Bureau of Prisons.'" Pet. App. 9 (brackets omitted). The court then determined that petitioner's "asserted reasons for release" -- including "his argument that his sentence should be or would be lower today than when it was imposed" -- "are not 'extraordinary and compelling reasons' for compassionate release." Id. at 9-10. The court emphasized that a "compassionate-release motion under § 3582(c)(1)(A)(i) is not the proper legal mechanism for arguments about whether the sentencing court should have imposed -- or would impose today -- a shorter sentence." Id. at 10. The court further determined that the Section 3553(a) factors did not support a sentence reduction, explaining that "[c]ompassionate release here would not reflect the seriousness of the crime, deter criminal activity, or protect the public." Ibid.

4. The court of appeals affirmed. Pet. App. 11-17.

The court of appeals observed that under circuit precedent, Sentencing Guidelines § 1B1.13 "is not an applicable policy statement for compassionate-release motions brought directly by inmates." Pet. App. 14 (quoting United States v. Elias, 984 F.3d 516, 519 (6th Cir. 2021)). The court explained, however, that "even if a district court wrongly constrains itself to § 1B1.13 to define extraordinary and compelling reasons for release, [the court of appeals] can still affirm if the [district] court uses § 3553(a) as an independent reason to deny relief." Id. at 15. The court of appeals then affirmed the district court's "denial of

[petitioner's] compassionate release motion based on the court's consideration of the § 3553(a) factors alone." Ibid.

The court of appeals found "no abuse of discretion" in the district court's "weighing of the § 3553(a) factors." Pet. App. 16. The court of appeals emphasized that petitioner "and his associates dealt in large quantities of various drugs, including methamphetamine, heroin, cocaine, and marijuana"; that he "did so while armed, despite his status as a felon"; and that he "laundered tens of thousands of dollars, fruits of his illegal trade." Ibid. The court thus found that "releasing [petitioner] after he served just a few years of a twenty-year sentence would not 'reflect the seriousness of the offense.'" Ibid. (quoting 18 U.S.C. 3553(a)(2)(A)). And the court determined that "it was not an abuse of discretion for the [district] court to find that an armed felon involved in a complex drug distribution scheme might still pose a danger to the public" or "to note that [petitioner's] release would not deter criminal activity." Ibid.

The court of appeals also rejected petitioner's argument that "he should receive compassionate release because if he were sentenced today for the same crime, he would not have gotten the sentence he did." Pet. App. 17. The court explained that the First Step Act's amendment to Section 841(b)(1)(A) is "inapplicable" to petitioner because the First Step Act "explicitly says" that the amendment applies only where "a sentence for the offense has not been imposed as of [the] date of [the

Act's] enactment." Ibid. (citation omitted; brackets in original). And the court declined to "render [that provision] useless by using § 3582(c)(1)(A) as an end run around Congress's careful effort to limit the retroactivity of the First Step Act's reforms." Ibid.

ARGUMENT

Petitioner contends (Pet. 7-18) that the First Step Act's amendment to 21 U.S.C. 841(b)(1)(A), 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). 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]

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[1] Other pending petitions for writs of certiorari raise similar issues. See, e.g., Gashe v. United States, No. 20-8284 (filed Apr. 19, 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).

1. Petitioner contends (Pet. 13) that Congress's decision not to extend the First Step Act's amendment to Section 841(b)(1)(A) to defendants like him can constitute an "extraordinary and compelling" reason for a sentence reduction under Section 3582(c)(1)(A). The court of appeals correctly rejected that contention. Pet. App. 17.

In the First Step Act, Congress amended Section 841(b)(1)(A) by changing the minimum penalty for recidivists and the types of prior convictions that render a defendant eligible for that minimum penalty. § 401(a)(2)(A), 132 Stat. 5220; see pp. 7-8, supra. In Section 401(c) 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." § 401(c), 132 Stat. 5221. 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 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 841(b)(1)(A) applicable to defendants who had already been sentenced, "there is nothing 'extraordinary' about" the fact that petitioner's sentences for violating Section

841(a) and (b)(1)(A) reflect the statutory penalty that existed at the time he was sentenced. United States v. Thacker, 4 F.4th 569, 574 (7th Cir. 2021).[2] Those sentences were "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 sentences for violating Section 841(a) and (b)(1)(A), even as it made other (prior) 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 sentences and the sentences a defendant would receive today (Pet. 14) is therefore the product of deliberate congressional design -- namely, Congress's decision not to make the First Step Act's change to Section 841(b)(1)(A) 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

[2] Thacker and some of the other decisions cited in this brief involved Section 3582(c)(1)(A) motions premised on the First Step Act's sentencing amendment to 18 U.S.C. 924(c). § 403(a), 132 Stat. 5221-5222. Because Congress employed identical language to make clear that its amendment to Section 924(c) likewise does not apply to preexisting sentences, § 403(b), 132 Stat. 5222, the reasoning of those decisions is applicable here.

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 401(a)) 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 3582(c)(1)(A) motions would constitute an end-around to its prospective application of Section 401(a)'s change to the sentencing scheme for certain drug offenses. Pet. App. 17. 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 401(a) 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 401(a)). 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 401(a)'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 841(b)(1)(A) applicable to previously sentenced defendants. See Jarvis, 999 F.3d at 444 (explaining that the First Step Act's prospective change to sentencing law is a "legally impermissible ground" for finding an "extraordinary and compelling reason," even when it is "combined with" other considerations).

2. Petitioner asserts (Pet. 14-18) that the courts of appeals are divided on whether district courts may rely on Congress's decision not to make sentencing amendments in the First Step Act 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 and Seventh Circuits have determined that Congress's decision not to make a sentencing amendment in the First Step Act 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. The Eleventh Circuit has likewise determined that a prospective amendment to sentencing law under the First Step Act cannot constitute an "extraordinary and compelling" reason under Section 3582(c)(1)(A), 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 a sentencing amendment in the First Step Act 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 United States v. McGee, 992 F.3d 1035, 1045-1048 (10th Cir. 2021).[3] 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 a prospective amendment to sentencing law in the First Step Act to find an extraordinary and compelling reason 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 McGee, 992 F.3d at 1050; McCoy, 981 F.3d at 283. Nobody disputes, however, that the Commission has the power -- indeed, the statutory duty --

[3] Contrary to petitioner's contention (Pet. 8, 15-16), the Second, Fifth, Seventh, and Ninth Circuits' decisions in United States v. Brooker, 976 F.3d 228 (2d Cir. 2020); United States v. Shkambi, 993 F.3d 388 (5th Cir. 2021); United States v. Wrice, 834 Fed. Appx. 267 (7th Cir. 2021); and United States v. Aruda, 993 F.3d 797 (9th Cir. 2021) (per curiam), do not show that those circuits are aligned with the minority view on this issue. Those decisions did not address whether the First Step Act's prospective changes to the law can serve as "extraordinary and compelling reasons" for a sentence reduction under Section 3582(c)(1)(A). Rather, those decisions took the view that district courts are not bound by Sentencing Guidelines § 1B1.13's description of "extraordinary and compelling reasons" in deciding Section 3582(c)(1)(A) motions filed by prisoners, without deciding the more specific question here. See Brooker, 976 F.3d at 234-237; Shkambi, 993 F.3d at 393; Wrice, 834 Fed. Appx. at 267-268; Aruda, 993 F.3d at 802.

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 amendments to the law 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 Supp., 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 Supp., 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 841(b)(1)(A). 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 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 First Step Act's prospective amendments to sentencing law 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 prospective amendments to sentencing law cannot constitute an "extraordinary and compelling" reason for a sentence reduction, such amendments are 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. As the court of appeals here explained in a subsequent

case, "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. 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). And here, the court of appeals upheld the district court's denial of petitioner's Section 3582(c)(1)(A) motion on the "independent" ground that the Section 3553(a) factors do not support a sentence reduction. Pet. App. 15.

As the court of appeals recognized, the district court did not abuse its discretion in determining that "releasing [petitioner] after he served just a few years of a twenty-year sentence would not 'reflect the seriousness of the offense,'" "deter criminal activity," or protect "the public." Pet. App. 16 (quoting 18 U.S.C. 3553(a)(2)(A)); see id. at 10. Those reasons for denying the motion are independent of the question presented

here. And petitioner does not challenge the court of appeals' decision to "affirm [the] denial of [petitioner's] compassionate release motion based on the [district] court's consideration of the § 3553(a) factors alone." Id. at 15. Thus, regardless of this Court's resolution of the question presented, the outcome below would be the same.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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