No. 21-551

In the Supreme Court of the United States

JOHN J. WATFORD,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

BRIEF FOR THE AMERICAN CONSERVATIVE UNION FOUNDATION NOLAN CENTER FOR JUSTICE AND THE CATO INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

John S. Moran
Counsel of Record
Clare E. Reardon
James A. Compton
Emily E. Kelley
MCGUIREWOODS LLP
888 16th Street N.W.
Washington, DC 20006
(202) 828-2817
jmoran@mcguirewoods.com

Additional counsel listed on signature page

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QUESTION PRESENTED

Whether a district court may consider the 2018 amendment to the sentences mandated by 18 U.S.C. § 924(c) in determining whether a defendant has shown "extraordinary and compelling reasons" warranting a sentence reduction under 18 U.S.C. § 3582(c)(1)(A)(i).

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INTERESTS OF *AMICI CURIAE*[1]

The American Conservative Union Foundation Nolan Center for Justice is a nonprofit organization dedicated to improving the criminal-justice system in ways that improve public safety, increase government accountability, and protect human dignity. The Center raises public awareness of proposed criminal-justice reforms through opinion pieces, media interviews, briefing papers, the testimony of expert witnesses at government hearings, and the judicial process. On occasion, it works with policymakers to advance conservative solutions to address matters of societal concern. The First Step Act was one such occasion, where the Nolan Center worked closely with the White House and conservatives in Congress to craft and enact meaningful federal criminal justice reform legislation.

The Cato Institute is a nonpartisan public-policy research foundation established in 1977 that is dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice, founded in 1999, focuses on the scope of criminal liability, the proper role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal-justice system, and accountability of law

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[1] No party's counsel authored any part of this brief. No person or entity, other than *amicus curiae* and its counsel, paid for the preparation or submission of this brief. All parties received notice and have consented to the filing of this brief.

enforcement. Cato published articles endorsing the First Step Act.

INTRODUCTION & SUMMARY OF ARGUMENT

This case presents another important opportunity for the Court to resolve a clear circuit split on implementation of the First Step Act, Pub. L. No. 115-391, 132 Stat. 5194 (2018), and to ensure that Congress's ground-breaking criminal reforms are not thwarted through interpretive retrenchment. The Court recently granted certiorari in *Concepcion* v. *United States*, No. 20-1650, to resolve a circuit split over what factual and legal developments a court may consider when imposing a reduced sentence under Section 404(b) of the First Step Act.[2] This case involves a distinct circuit split over what factors a court may consider in modifying a sentence under 18 U.S.C. § 3582, as amended by Section 603 of the First Step Act—that is, in granting compassionate release. The Court's grant in *Concepcion* highlights the importance of resolving these types of issues. And since this petition presents a distinct split on a distinct legal issue involving a distinct sentencing procedure, the appropriate course is to grant the petition and address both cases on the merits.

The First Step Act is "the most significant criminal justice reform bill in a generation." 164 Cong. Rec. S7649 (daily ed. Dec. 17, 2018) (statement of Sen. Grassley). The legislation addressed inequities that plagued the criminal justice system and sapped it of public legitimacy. Among other things, the Act transformed the process for reducing the sentences of

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[2] The Court appears to be holding the petition in *Maxwell* v. *United States*, No. 20-1653, which presents that same issue.

some prisoners by amending 18 U.S.C. § 3582(c), known as the compassionate release provision. Under that provision, a district court can reduce a defendant's sentence if it determines that "extraordinary and compelling reasons warrant such a reduction." 18 U.S.C. § 3582(c)(1)(A)(i).

Congress also used the First Step Act to "clarify" that, for possession of a firearm in furtherance of a crime of violence or drug trafficking, the enhanced 25-year sentence in 18 U.S.C. § 924(c)(1)(C) applies only if the offense occurred after a prior § 924(c) conviction became final. *See* First Step Act of 2018, § 403(a), Pub. L. No. 115-391, *codified at* 21 U.S.C. § 841 note. Congress directed that this change should 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." *Id.* § 403(b). The question presented here, on which the Courts of Appeals are squarely divided, is whether courts may consider this "clarification" in assessing whether "extraordinary and compelling reasons" justify compassionate release.

Compassionate release is not a new concept. Before the passage of the First Step Act, a federal court could reduce a sentence under Section 3582(c) if the Director of the Bureau of Prisons (BOP) filed an initial motion seeking a reduction. But BOP was notoriously reluctant to support pleas for early release, no matter how warranted. As a result, defendants who did not belong in prison languished there and added needless costs to BOP and the

taxpayers. To address this problem, the First Step Act amended Section 3582(c) to strip BOP of its gatekeeping role. Defendants now can file their own compassionate release motions, and courts now are authorized to consider for themselves whether sentence reductions are warranted. The Congress that enacted the First Step Act on an overwhelming bipartisan basis emphasized that the Act would confer substantially greater discretion on judges to determine case-by-case whether circumstances warrant compassionate release for any given defendant.

Notwithstanding Congress's clear intent and based on nothing written in the text of the First Step Act, the Seventh Circuit has joined the Third Circuit and the Sixth Circuit in holding that district courts are categorically prohibited from considering the clarification of § 924(c)—even in combination with other factors specific to the defendant—in adjudicating a motion for compassionate release. Meanwhile, in the Fourth Circuit and the Tenth Circuit, district courts are permitted to consider the First Step Act's clarification of § 924(c)—under which defendants like Mr. Watford would have received much shorter sentences—among the "reasons" favoring modification of their sentences.

Certiorari should be granted to ensure that justice does not turn on geography, and that courts can give full consideration to a prisoner's circumstances as Congress intended.

ARGUMENT

I. Congress Amended Section 3582(c) to Ensure That Judges Had Discretion to Mitigate Criminal Justice Inequities.

Leading up to the passage of the First Step Act, there was broad bipartisan agreement that serious inequities plagued the criminal justice system. Draconian mandatory minimums kept nonviolent offenders in prison long past any reasonable point; the costs of incarceration were skyrocketing; and the penalty imposed on defendants for forcing the government to meet its burden at trial rather than taking a plea generated indefensible sentencing disparities. Congress originally enacted the compassionate release "safety valve" to allow BOP to mitigate these problems on a case-by-case basis where "extraordinary and compelling reasons" warranted. *See* S. Rep. No. 98-225, at 121 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3304. But BOP notoriously failed to exercise that authority.

Congress designed the First Step Act to remedy these problems by giving judges more agency to address inequities. Against the common-law backdrop of judges' broad sentencing discretion, *see Setser* v. *United States*, 566 U.S. 231, 235–36 (2012), Congress expressly granted district judges independent discretion to fix sentencing inequities case-by-case when they arise.

A. *Recognized inequities plague the criminal justice system.*

1. At the time of the First Step Act's passage, a bipartisan consensus had emerged that significant problems and inequities plagued the criminal justice system. First and foremost, the prison population far exceeded what it was a few decades prior. The federal inmate population was only 56,821 in 1990. *See* James Stephan, Bureau of Justice Statistics, *Census of State and Federal Correctional Facilities, 1990*, at 3 (May 1992), https://bjs.ojp.gov/redirect-legacy/content/pub/pdf/csfcf90.pdf. But by 2017—the year before the First Step Act was enacted—it had ballooned to 183,058. *See* Jennifer Bronson & E. Ann Carson, Bureau of Justice Statistics, *Prisoners in 2017*, at 3 (Apr. 2019), https://bjs.ojp.gov/redirectlegacy/content/pub/pdf/p17.pdf.

Mandatory minimums fueled this incarceration explosion and were widely regarded as unjust in their own right. They were part of a decades-old response to the nation's drug epidemic that had achieved "just the opposite of what [Congress was then] trying to achieve." 164 Cong. Rec. S7644 (daily ed. Dec. 17, 2018) (statement of Sen. Durbin). Instead of winning the drug war, "[t]he availability of heroin, cocaine, and methamphetamine increased," and the prison system was flooded with drug offenders serving lengthy mandatory minimum sentences for "*nonviolent*" crimes. *Ibid.* (emphasis added); Bronson & Carson, *supra*, at 1 ("Nearly half of federal prisoners were serving a sentence for a drug-trafficking offense at

fiscal year-end 2017."). Mandatory minimums were also viewed as pernicious because they prevented sentencing judges from exercising discretion to distinguish between those defendants who truly deserved enhanced punishment and those who did not. 164 Cong. Rec. at S7644 (statement of Sen. Durbin) (noting the unjust reality that mandatory minimums "don't allow judges to distinguish between drug kingpins * * * and lower level offenders"); *see also* Megan Keller, *Mike Lee: Mandatory sentencing forces you to ask "does this punishment fit the crime?*", The Hill (Nov. 27, 2018), https://thehill.com/homenews/senate/418413-mike-lee-mandatory-sentencing-forces-you-to-ask-does-this-punishment-fit-the (quoting Senator Mike Lee: "when we get into a situation where we're routinely imposing[] 15, 20, 25, sometimes 55-year mandatory minimum sentences, you have to ask yourself the question, does the punishment fit the crime?").

Meanwhile, mandatory minimums and the elimination of parole exacerbated the "trial penalty," which undermines the integrity of the criminal justice system itself by punishing defendants with higher sentences if they decided to go to trial. This Court has repeatedly recognized that the right to trial by jury is fundamental to the legitimacy of the criminal justice system. *See Apprendi* v. *New Jersey*, 530 U.S. 466, 477 (2000) (recognizing that "unanimous suffrage of twelve of [defendant's] equals and neighbours" guards against "oppression and tyranny" (citations omitted)); *United States* v. *Booker*, 543 U.S. 220, 238–39 (2005) ("The Framers of the Constitution understood the threat of 'judicial despotism' that could arise from

'arbitrary punishments upon arbitrary convictions' without the benefit of a jury in criminal cases."). Yet the coercive pressure of longer sentences often compels defendants to forgo that right, *sometimes even by pleading to a crime they did not commit*. *See, e.g.*, Innocence Project, DNA Exonerations in the United States, https://innocenceproject.org/dna-exonerations-in-the-united-states/ (last visited July 13, 2021) (identifying that DNA evidence has exonerated 44 persons who pled guilty to crimes they did not commit). "The decision to go to trial is a gamble: the payoff can be acquittal and complete freedom, but often the more likely outcome is conviction and a longer sentence" than if the defendant had pled. Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 Harv. L. Rev. 2463, 2507 (2004). The growing gulf in sentencing between those who exercised their right to trial by jury and those who forfeited that right for leniency has had a toxic effect on the public's perception of the fairness of the entire criminal justice system. *See, e.g.*, Clark Neily, *A Distant Mirror: American-Style Plea Bargaining Through the Eyes of a Foreign Tribunal*, 27 GEO. MASON L. REV. 719, 730–32 (2020) (describing the "routine feature of the US plea bargaining process" in which prosecutors "threaten defendants with massively disproportionate sentences should they refuse to plead guilty and insist upon exercising their right to trial"); Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. Rev. of Books (Nov. 20, 2014); see also Nat'l Association of Criminal Defense Lawyers, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It* (2018), https://www.nacdl.org/getattachment/

95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixthamendment-right-to-trial-on-the-verge-of-extinctionand-how-to-save-it.pdf.

And all of this occurred against a backdrop of rapidly escalating incarceration costs. In 1990, the yearly cost to house a federal inmate was $14,456. See Stephan, *supra*, at 2. But by 2017, it was $36,299.25. Annual Determination of Average Cost of Incarceration, 83 Fed. Reg. 18,863, 18,863 (Apr. 30, 2018). At the time of the First Step Act, these costs were approaching a tipping point: As the House Report put it, the "stark" choice emerging was to either "control federal prison spending or see significant reductions in the resources available for all non-prison criminal justice areas." H.R. Rep. No. 115-699, at 23 (2018), 2018 WL 2348593. If Congress failed to control prison costs, the budgeting consequences would mean "fewer prosecutors to bring charges, fewer agents to investigate federal crimes, less support to state and local criminal justice partners, less support to treatment, prevention and intervention programs, and cuts along a range of other criminal justice priorities." *Id.* at 23–24.

2. For a long time, the power to mitigate these inequities on a case-by-case basis rested with the Bureau of Prisons. The original version of the compassionate release provision at issue here authorized district courts to reduce a sentence upon a motion by BOP when "extraordinary and compelling reasons warrant[ed] such a reduction." 18 U.S.C. § 3582(c)(1)(A)(i) (Supp. II vol. 2 1984). Congress described the provision as providing a "safety valve[]"

where the circumstances no longer warranted imprisonment. *See* S. Rep. No. 98-225, at 55-56, 121, *as reprinted in* 1984 U.S.C.C.A.N. at 3238-39, 3304.

BOP, however, notoriously shirked its role. An Inspector General (IG) report in 2013 found that an average of only 24 inmates were released per year through BOP's administration of the compassionate release program. *See* Office of the Inspector General, Dep't of Justice, *The Federal Bureau of Prisons' Compassionate Release Program*, at 1 (Apr. 2013), https://oig.justice.gov/press/2013/2013_05_01.pdf (OIG Report). BOP's compassionate release program was so dysfunctional that it even denied compassionate release to an inmate who suffered a stroke and was in a vegetative condition. *Id.* at 24. "For years, the [BOP] approved only prisoners who were near death or completely debilitated. While nonmedical releases were permitted, an inspector general report found in 2013, not a single one was approved over a six-year period." Christie Thompson, *Old, Sick and Dying in Shackles*, Marshall Project (Mar. 7, 2018), https://www.themarshallproject.org/2018/03/07/oldsick-and-dying-in-shackles. This was particularly galling because, as the IG recognized, "an effectively managed compassionate release program would result in cost savings for the BOP," OIG Report at i, and very few prisoners awarded compassionate release recidivate, *id.* at 49–50 (recidivism rate of 3.5% under compassionate release, versus 41% general rate for federal offenders). Ultimately, the IG concluded that BOP had "not properly manage[d] the compassionate release program, resulting in inmates

who may be eligible candidates for release not being considered." *Id*. at 11.

Congress took notice. A few years after the IG's report, a bipartisan group of senators wrote DOJ to express "deep[] concern that BOP is not fulfilling its role in the compassionate release process." Letter from 12 U.S. Senators to J. Rod Rosenstein, Deputy Attorney General, & Dr. Thomas R. Kane, Acting Bureau of Prisons Director, at 3 (Aug. 3, 2017), https://famm.org/wpcontent/uploads/2017.08.03-Letter-to-BOP-and-DAG-re.-Compassionate-Release.pdf (Senators Letter). The senators explained that BOP's task of filing motions was merely "administrative," and that it was the "appropriate purview of the sentencing court to [then] determine if a defendant's circumstances warrant a sentence reduction under compassionate release." *Id.* at 2–3. And they expressed frustration that BOP was rarely exercising this authority, even as prison costs were increasing.

B. *Congress enacted the First Step Act to address these problems.*

The First Step Act resulted from a strong bipartisan determination to remedy recognized inequities in our federal criminal justice system. *See* 164 Cong. Rec. S7645 (daily ed. Dec. 17, 2018) (statement of Sen. Durbin) (noting "extraordinary political coalition" for criminal justice reform); 164 Cong. Rec. S7749 (daily ed. Dec. 18, 2018) (statement of Sen. Leahy) (stating support for First Step Act was "not just bipartisan; it [was] nearly nonpartisan"); 164 Cong. Rec. S7778 (daily ed. Dec. 18, 2018) (statement

of Sen. Grassley) (observing that he did not know "whether we have had legislation like this before * * * whereby we have put together such diverse groups of people and organizations that support the bill").

Certain aspects of the Act directly addressed the problems outlined above. For example, the Act reduced mandatory minimums for certain non-violent offenses, Pub. L. No. 115-391, § 401, 132 Stat. at 5220–21, and as relevant here, clarified that a prior final conviction was necessary to trigger the 25-year mandatory minimum sentence under § 924(c). Other parts of the Act addressed these problems indirectly. For example, sentencing judges were given greater discretion to sentence low-level, nonviolent drug offenders to terms below the applicable mandatory minimum, and authority to retroactively apply the Fair Sentencing Act of 2010, which had itself reduced the application of certain mandatory minimums. *Id.* §§ 402, 404, 132 Stat. at 5221–22. Congress expected these and other provisions to bear cost-saving fruit: "[I]mproving the effectiveness and efficiency of the federal prison system" was core to its entire design. H.R. Rep. No. 115-699, at 22.

The First Step Act also fundamentally altered the process for seeking and granting compassionate release by empowering judges on a case-by-case basis to mitigate those inequities Congress had not addressed systemically. Whereas previously only BOP could move for a sentence reduction, the First Step Act permits prisoners to move for their own compassionate release and allows courts to resolve for themselves whether "extraordinary and compelling

reasons" justify that relief. *See* Pub. L. No. 115-391, § 603(b), 132 Stat. at 5238. With the BOP bottleneck cleared, Congress expected sentencing judges to exercise substantial new discretion. *See* 164 Cong. Rec. S7774 (daily ed. Dec. 18, 2018) (statement of Sen. Cardin) (the First Step Act "expands compassionate release"); *see generally* 164 Cong. Rec. S7764 (daily ed. Dec. 18, 2018) (statement of Sen. Booker) (the First Step Act "includes critical sentencing reforms that will * * * give judges discretion back—not legislators but judges who sit and see the totality of the facts"); 164 Cong. Rec. S7748 (daily ed. Dec. 18, 2018) (statement of Sen. Klobuchar) ("By giving * * * judges this discretion, we will give them the tools to better see that justice is done."); 164 Cong. Rec. S7649 (daily ed. Dec. 17, 2018) (statement of Sen. Grassley) ("[T]he bill provides for more judicial discretion * * * ."); 164 Cong. Rec. S7739 (daily ed. Dec. 18, 2018) (statement of Sen. Schumer) ("T]he legislation will give judges more discretion * * * ."); *see also* Senators Letter at 2 ("[T]he sentencing court, rather than the BOP, is best suited to decide if the prisoner deserves compassionate release.").

II. The Court Should Grant Certiorari to Resolve a Clear Circuit Split and to Prevent Substantial Frustration of Congress's Purpose.

As shown above, Congress intended to give district judges substantial discretion to consider motions for compassionate release. And that is precisely what it did through its amendment to 18 U.S.C. § 3582. Moreover, this Court has recognized

that courts inherently possess broad sentencing discretion as a matter of common law, and that Congress is presumed to legislate against this backdrop. *See Setser* v. *United States*, 566 U.S. 231, 235–36 (2012). The decision by the Third, Sixth, and Seventh Circuits to limit that discretion when it comes to the clarification of § 924(c) is wholly atextual and perpetuates the sentencing inequities and wasteful spending that Congress passed the First Step Act to address.

A. *Under the plain meaning of 18 U.S.C. § 3582, the First Step Act's clarification to § 924(c) is a "reason" the court may consider, and nothing forecloses that approach.*

Courts must interpret statutes according to the ordinary meaning of the text at the time of enactment. *See, e.g.*, *New Prime Inc.* v. *Oliveira*, 139 S. Ct. 532, 539 (2019). The relevant portion of 18 U.S.C. § 3582, as amended, provides:

> "the court, * * * upon motion of the defendant * * * 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." *Id.* § 3582(c)(1)(A) (emphasis added).

Nothing there remotely suggests that changes in sentencing law—like the clarification of § 924(c) in

§ 403 of the First Step Act—are categorically excluded from the types of "reasons" that the defendant may raise and the court may consider. But Congress knows how to exclude potential "reasons" categorically and has done so elsewhere. *See* 28 U.S.C. § 994(t) ("Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason."). Under the interpretive maxim *expression unius est exclusion alterius*, Congress's enumeration of this categorical exclusion implies that it did not intend other categorical exclusions. *See Setser*, 566 U.S. at 238–39. And where it is clear that Congress "knows how to impose such [an exclusion] when it wishes to do so," the courts should not lightly infer an atextual exclusion. *Whitfield* v. *United States*, 543 U.S. 209, 216 (2005).

Of course, defendants must ultimately show that the reasons offered are "extraordinary and compelling." But that is necessarily a case-by-case inquiry, and one that is guided by a district judge's consideration of the familiar § 3553(a) factors. *See* 18 U.S.C. § 3582(c)(1)(A) (providing that a court may modify a term of imprisonment "after considering the factors set forth in section 3553(a) to the extent that they are applicable"). Among those factors, the district judge is directed to consider "the kinds of sentences available" and "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." *Id.* § 3553(a)(3), (6). Given the regime that Congress enacted, a categorical prohibition on district judges' considering the clarification to § 924(c)

frustrates congressional purpose rather than fulfilling it.

The rationale adopted by the Third, Sixth, and Seventh Circuits—that Congress impliedly limited judicial considerations under § 3582(c)(1)(A) by making its clarifications only partially retroactive through § 403(b) of the First Step Act—is both atextual and inconsistent with sound interpretive principles. Section 403(b) provides:

> "This section, and the amendments made by this section, 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 of 2018, § 403(b), Pub. L. No. 115-391, *codified at* 21 U.S.C. § 841 note.

On its face, this subsection instructs only that the amendments "shall apply" to a specific set of cases. As the Fourth Circuit has noted, it is not inconsistent to limit the cases in which defendants are entitled to automatic re-sentencing but also to leave flexibility for seeking modification based on judicial discretion. *See United States* v. *McCoy*, 981 F.3d 271, 286–87 (CA4 2020). In applying the § 924(c) clarification only to certain re-sentencing apples, Congress said nothing about applying it to compassionate-release oranges.

The negative inference on which the decision below rests is also inconsistent with this Court's admonition that congressional pronouncements on sentencing must be read against a backdrop of broad

common-law discretion. *See Setser*, 566 U.S. at 235–36. Given the background rule that district judges traditionally enjoy broad discretion in sentencing, the courts should not lightly infer that Congress has cabined that discretion—especially where, as here, the statutory text itself contemplates broad discretion, and the purported basis for the limitation is far from clear.

Besides being profoundly unsound as a matter of statutory interpretation, the position of the Third, Sixth, and Seventh Circuits will, if left in place, frustrate rather than advance the purpose Congress meant to achieve. Courts must favor the "textually permissible interpretation that furthers rather than obstructs" a statute's purpose. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, at 63 (2012); *Kasten* v. *Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 7 (2011) ("[C]onsidering the provision in conjunction with the purpose and context leads us to conclude that only one interpretation is permissible."). By authorizing defendants to file their own motions under the First Step Act, Congress intended to remove compassionate-release determinations from BOP's gatekeeping role and to vest in district courts the independent authority to consider all possible grounds for compassionate release. Recognizing that BOP had fallen down on the job of properly administering the program, *see* Senators Letter at 3, Congress "deliberately broadened [the] availability" of compassionate release. *Long*, 997 F.3d at 359; *see also* 164 Cong. Rec. at S7774 (statement of Sen. Cardin)

(same), and conferred broad discretion on sentencing judges.

B. *If not reversed, the decisions of the Third, Sixth, and Seventh Circuits will exacerbate sentencing inequities and needlessly inflate taxpayer costs.*

As noted, in enacting the First Step Act, Congress meant to address BOP's record of intransigence and the waste of incarcerating prisoners long past the realization of any reasonable rehabilitative, retributive, or preventative goals. Compassionate release plays an important part in this, as DOJ's Inspector General recognized. The annual cost of incarcerating a single federal prisoner is now more than $37,000. *See* Annual Determination of Average Cost of Incarceration Fee (COIF), 84 Fed. Reg. 63,891, 63,891–92 (Nov. 19, 2019). And the cost of keeping a federal prisoner in a BOP medical center is approximately *double* the general incarceration cost. *See* OIG Report at 45. In 2020, the district courts granted 2,587 motions for compassionate release—resulting in well over $100 million in savings to BOP. *See* U.S. Sentencing Commission, Compassionate Release Data Report: Calendar Year 2020, at Table 3 (June 2021), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/20210609-Compassionate-Release.pdf (Compassionate Release Data Report). Under the decision below, however, district court power to grant compassionate release will be sharply circumscribed, and these savings will be limited significantly going forward.

Unless reversed, this atextual limitation on compassionate release will erode systemic improvements that have already been realized. Defendant-filed motions for compassionate release have been even more important during the COVID-19 pandemic. *See, e.g.*, *United States* v. *Russell*, No. 3:05-CR-00257, 2021 WL 1597927, at *6–7 (N.D. Ala. Apr. 23, 2021) (granting compassionate release to prisoner with type-2 diabetes, obesity, and hypertension who also would have "face[d] a much lighter sentence if he were sentenced today"); *United States* v. *Hewlett*, No. 5:93-CR-00137, 2020 WL 7343951, at *5–6 (N.D. Ala. Dec. 14, 2020) (similar for asthmatic prisoner). Indeed, sometimes DOJ does not even oppose compassionate release. *See United States* v. *Poulnott*, No. 1:89-cr-00001, 2020 WL 7974295 (N.D. Ga. Dec. 30, 2020) (government did not oppose release where 58-year-old prisoner had served 32 years of lengthy mandatory minimums, had serious health issues, and had worked his way up to and held the highest attainable position at prison work facility over a period of decades). As these cases illustrate, district judges can weigh changes to sentencing law together with each defendant's individual circumstances to determine whether there are "extraordinary and compelling reasons" to modify a term of imprisonment.

Congress intended for them to do so, and the statutory regime it enacted allows them to do so.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

David H. Safavian
General Counsel
THE AMERICAN CONSERVATIVE UNION FOUNDATION
1199 N. Fairfax St.
Suite 500
Alexandria, VA 22307
(202) 347-9399
dsafavian@conservative.org

Clark M. Neily III
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 218-4631
cneily@cato.org

John S. Moran
Counsel of Record
Clare E. Reardon
James A. Compton
Emily E. Kelley
MCGUIREWOODS LLP
888 16th Street N.W.
Washington, DC 20006
(202) 828-2817
jmoran@mcguirewoods.com

Counsel for Amici Curiae

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