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

REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION

Using arguments recycled from its opposition to certiorari in *Bryant v. United States*, No. 20-1732, the government's brief [1] here mistakenly contends that the issues presented by this petition, like the issues presented by *Bryant*, will, in effect, be resolved by the Sentencing Commission. That conflation of the distinct issues raised by these cases, however, misapprehends both the authority of the Commission and the effect of the inevitable amendment to U.S.S.G. § 1B1.13, which will be enacted as soon as the Commission regains a quorum. It is true that both *Bryant* and this case present issues of statutory construction, issues the Commission cannot decide. But *Bryant* involved an issue the Commission will certainly *moot* and, for that reason, the petition in *Bryant* was properly denied. In contrast, because there is no prospect that the challenge raised here will be mooted by future Commission action, this petition should be granted.

In *Bryant*, the issue was whether, in light of the First Step Act's amendment to Section 3582(c)(1)(A)—which now permits defendants to bring compassionate release motions before the courts directly—Section 1B1.13 was an "applicable policy statement" to defendant-filed motions within the meaning of the statute. That issue will be resolved when the Commission regains a quorum, because it will almost certainly amend Section 1B1.13

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[1] The government's brief in opposition in this case relies on the brief submitted in opposition to certiorari in *Jarvis v. United States*, No. 21-568 (filed Oct. 15, 2021). The government waives any further response.

to make it applicable to all Section 3582(c)(1)(A) motions. Thus, while such an amendment to Section 1B1.13 will not *decide* the issue in *Bryant*—only courts can do that—it will *moot* the issue going forward because it will create an undisputedly applicable policy statement, irrespective of the movant.

Here, the issue is whether the 2018 amendment to the punishments mandated by Section 924(c) can be considered an "extraordinary and compelling reason" warranting a sentence reduction. Just as was the case in *Bryant*, the Commission has no authority to override circuit court determinations that it can or cannot. But, unlike in *Bryant*, the Commission also cannot moot the issue going forward. That is because, even if the amended Section 1B1.13 purports to make the revised 924(c) regime an eligible reason for a sentence reduction, the courts of appeals in three circuits have construed the *statute* to prohibit that result, and the Commission has no authority to overrule those decisions.

Finally, because the government relies entirely on its opposition in *Jarvis*, it does not even attempt to dispute that this case, unlike *Jarvis*, is an ideal vehicle for resolving the question presented. One of the key arguments made by the government against granting the petition in *Jarvis* is that "the outcome below would be the same" even if this Court reached a different result on the legal question presented. *Jarvis* BIO at 22. But here, that is demonstrably untrue. The district court in this case expressly stated that if it had the authority to do so, it would release Petitioner from prison *now*, more than thirty years before his projected release date. Pet. App. 35a (citing the district court's statement that it "would

order compassionate release if it had jurisdiction to do so," and explaining that "[i]f there were any legal authority to do so, this court—this judge—would order [Petitioner] released from prison"). In other words, if this threshold legal issue is resolved in Petitioner's favor, he will be free.

For all these reasons, this Court should grant certiorari and reverse the decision below.

A. There is a Deep and Entrenched Circuit Split on the Question Presented That Cannot be Resolved by the Sentencing Commission.

Five courts of appeals have squarely addressed the question of whether district courts have the statutory authority to consider the First Step Act's amendment to Section 924(c) in determining whether a sentence should be reduced under Section 3582(c)(1)(A)(i). Three have held they do not, and two have held the opposite. The government dismisses this clear circuit split as "a divergence of views" that "could be addressed by the Sentencing Commission." *Jarvis* BIO at 16. Specifically, it asserts that the Commission could "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." *Jarvis* BIO at 18.

This argument misapprehends the role and authority of the Sentencing Commission. The circuit split at issue in this petition is not over the construc-

tion of a guideline, policy statement, or commentary—that is, the sort of split resolved by the Commission. Instead, it relates to the scope of the *legal authority* granted to the courts by Section 3582(c)(1)(A), a federal statute. That is not something the Commission can resolve. *Stinson v. United States*, 508 U.S. 36, 38 (1993) ("We decide that commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline.").

Additionally, the government simply ignores the possibility that a repopulated Sentencing Commission could decide the opposite. In other words, it fails to contend with the possibility that the Commission's amended policy statement could continue to leave the determination of what constitutes an "extraordinary and compelling reason" to judges, as the existing policy statement does. U.S.S.G. § 1B1.13 ("The court is in a unique position to determine whether the circumstances warrant a reduction (and, if so, the amount of reduction) . . ."). Indeed, that would be aligned not only with the current commentary issued by the Commission, but also with the many dozens of district court decisions that have reduced draconian sentences like the one in this case, and the decisions by the Fourth and Tenth Circuits that have held that, as a matter of federal statutory law, Section 3582(c)(1)(A) authorizes district courts to consider the First Step Act's amendment to Section 924(c).

As with the opposite outcome, however, this also would not resolve the issue presented here, because it would remain the case that in the Third, Sixth,

and Seventh Circuits, the Commission's amended policy statement will be for naught. In those circuits, under the controlling case law challenged by this petition, the courts have held that Section 3582(c)(1)(A)(i) *prohibits* consideration of the First Step Act's amendment to Section 924(c) in deciding a motion for a sentence reduction. The government concedes 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," *Jarvis* BIO at 20, and there is no question that the Third, Sixth, and Seventh Circuits would find such a Guidelines provision foreclosed by the text of the statute.

In short, although it is certainly the Commission's task to determine the content of the Guidelines Manual, its guardrails include an obligation to ensure that its determinations do not conflict with federal statutes. In this important setting, only this Court can inform it of what those statutes permit.

Further, the government is wrong in asserting that "the practical significance of the current disagreement among the circuits is limited" because the First Step Act's amendment to Section 924(c) can be considered by a district court when deciding "whether the Section 3553(a) factors support a sentence reduction." *Jarvis* BIO at 21. The dispute here relates to a predicate determination—whether extraordinary and compelling reasons for a sentence reduction exist—not to the subsequent inquiry into whether, if it does, the reduction is consistent with Section 3553(a). They are separate inquiries, and allowing consideration of the amended penalties under Section 924(c) at the Section 3553(a) stage does not remediate the harm caused by the artificially—and

impermissibly—restrictive view of what a defendant may rely on to show that the extraordinary and compelling circumstances of his case warrant relief in the first instance. This is illustrated by the fact that, in the Third, Sixth, and Seventh Circuits, defendants like Petitioner are precluded from obtaining relief on this basis even when the district court acknowledges that the Section 3553(a) factors weigh in favor of substantially reduced sentence.

B. The Decision Below is Incorrect.

The government defends the decision below by invoking "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." *Jarvis* BIO at 13. But that interpretation of the First Step Act reads into the statute provisions found nowhere in the statute and that are inconsistent with its text.

First, there is "nothing inconsistent about Congress's paired First Step Act judgments: that 'not all defendants convicted under § 924(c) should receive new sentences,' but that the courts should be empowered to 'relieve some defendants of those sentences on a case-by-case basis.'" *United States v. McCoy*, 981 F.3d 271, 287 (4th Cir. 2020) (citation omitted); *see also United States v. Maumau*, 993 F. 3d 821, 837 (10th Cir. 2020) (affirming sentence reduction based on district court's "individualized review of all the circumstances," including "'the First Step Act's elimination of sentence-stacking under § 924(c)'") (citation omitted). Indeed, this approach is entirely consistent with Congress's decision to expand the use of sentence reductions. The same Con-

gress that elected against full retroactivity used the same statute to open a different (if narrower) window for potential relief by amending Section 3582(c)(1)(A) to afford defendants direct access to courts to seek sentence reductions based on extraordinary and compelling reasons like this change.

Second, no part of any relevant statute supports the authority of a court to place any particular factor—with the exception of "rehabilitation of the defendant *alone*," *see* 28 U.S.C. § 994(t) (emphasis added)—out of bounds. Indeed, the very fact that Congress, when it wants to make a factor off-limits to judges deciding compassionate release motions, will say so explicitly, demonstrates the flaw in the government's argument.

Third, the government's repeated attempt to characterize the First Step Act's changes to Section 924(c) as part of "'the ordinary practice' in 'federal sentencing' of 'apply[ing] new penalties to defendants not yet sentenced, while withholding that change from defendants already sentenced,'" *Jarvis* BIO at 13 (quoting *Dorsey v. United States*, 567 U.S. 260, 280 (2012)), inappropriately diminishes the importance of those monumental changes. The First Step Act's amendment to Section 924(c) is "not just any sentencing change, but an exceptionally dramatic one" because it eliminated a misuse of Section 924(c)'s recidivist enhancements that for decades produced unusually cruel sentences that were decades longer "than what Congress has now deemed an adequate punishment for comparable . . . conduct." *McCoy*, 981 F.3d at 285 (*quoting United States v. Redd*, 444 F. Supp. 3d 717, 723 (E.D. Va. 2020)). In other words, it is precisely the type of change in the

law that should weigh heavily in a judicial "second look" under Section 3582(c)(1)(A).

C. This Case Presents an Ideal Vehicle.

The government's complete reliance in this case on its Brief in Opposition filed in *Jarvis* elides the critical distinction between the two cases as vehicles for resolving this crucial issue. In this case—unlike in *Jarvis*—the district court made clear that it would grant compassionate release to Petitioner if the legal question raised here were resolved in Petitioner's favor. The district court criticized Petitioner's sentence as "an example of the Draconian nature of the sentencing law of that age, and a manifestly unreasonable sentence by today's standards." Pet. App. 35a. It went on to state that if Congress's changes to Section 924(c) could be considered an extraordinary and compelling reason, it "would order compassionate release." Pet. App. 6a; *see also* Pet. App. 35a ("If there were any legal authority to do so, this court—this judge—would order [Petitioner] released from prison."). Thus, unlike in *Jarvis* where the government argued that "the outcome below would be the same," *Jarvis* BIO at 22, there is no question that the district court would grant compassionate release in this case if the Fourth Circuit's holding in *McCoy* or the Tenth Circuit's holding in *Maumau* applied.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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