No. 21-568

In the Supreme Court of the United States

JASON JARVIS, 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 18 U.S.C. 924(c) that specifically does not apply to preexisting sentences.

ADDITIONAL RELATED PROCEEDINGS

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

Jarvis v. *United States*, No. 97-cv-1125 (Sept. 30, 1997)

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

Jarvis v. *United States*, No. 97-4391 (Oct. 22, 1998)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 999 F.3d 442. The opinion of the district court (Pet. App. 23a-32a) is not published in the Federal Supplement but is available at 2020 WL 4726455.

JURISDICTION

The judgment of the court of appeals was entered on June 3, 2021. A petition for rehearing was denied on September 8, 2021 (Pet. App. 33a). The petition for a writ of certiorari was filed on October 15, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Ohio, petitioner was convicted on three counts of armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d); one count of

attempted armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d); one count of conspiring to commit armed bank robbery, in violation of 18 U.S.C. 371; and five counts of using a firearm during a crime of violence, in violation of 18 U.S.C. 924(c) (Supp. IV 1992). Judgment 1; see Superseding Indictment 3-4, 6-14. The district court sentenced petitioner to 1155 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. 81 F.3d 161, 1996 WL 109500 (Tbl.) (per curiam). After denying petitioner's motion under 28 U.S.C. 2255 to vacate his sentence, 20-3912 C.A. App. 602-606, the district court granted petitioner's motion under Federal Rule of Civil Procedure 60(b) to reopen his Section 2255 proceedings and to vacate three of his Section 924(c) convictions, D. Ct. Doc. 551, at 1-2 (May 19, 2017). On his remaining convictions, the court resentenced petitioner to 480 months of imprisonment, to be followed by five years of supervised release. *Id.* at 2-3. In 2020, petitioner filed a motion for a sentence reduction under 18 U.S.C. 3582(c)(1)(A). D. Ct. Doc. 574 (May 29, 2020). The district court denied the motion, Pet. App. 23a-32a, and the court of appeals affirmed, *id.* at 1a-22a.

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) (citation omitted). Although the initial policy statement primarily "restate[d] the statutory bases for a reduction in sentence under [Section] 3582(c)(1)(A)," *ibid.*, the Commission updated the policy statement the following year "to further effectuate the directive in [Section] 994(t)," *id.* App. C, Amend. 698 (Nov. 1, 2007). That amendment revised the commentary (or "Application Notes") to Section 1B1.13 to describe four circumstances that should be considered extraordinary and compelling reasons for a sentence reduction under Section 3582(c)(1)(A). *Ibid.*

In 2016, the Commission further amended the commentary to Section 1B1.13 to "broaden[] the Commission's guidance on what should be considered 'extraordinary and compelling reasons'" that might justify a sentence reduction. Sentencing Guidelines App. C 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" 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 Bureau of Prisons (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).

d. The First Step Act additionally amended the penalties for using a firearm during a crime of violence, in violation of 18 U.S.C. 924(c). § 403(a), 132 Stat. 5221-5222. Before the First Step Act, Section 924(c) provided for a minimum consecutive sentence of 20 years of imprisonment—later revised to 25 years, see Act of Nov. 13, 1998, Pub. L. No. 105-386, § 1(a)(1), 112 Stat. 3469—in the case of a "second or subsequent conviction" under Section 924(c), including when that second

or subsequent conviction was obtained in the same proceeding as the defendant's first conviction under Section 924(c). 18 U.S.C. 924(c)(1) (Supp. IV 1992); see *Deal* v. *United States*, 508 U.S. 129, 132-137 (1993). In the First Step Act, Congress amended Section 924(c) to provide for a minimum consecutive sentence of 25 years of imprisonment only in the case of a "violation of [Section 924(c)] that occurs after a prior conviction under [Section 924(c)] has become final." § 403(a), 132 Stat. 5222. Congress specified that the amendment "shall apply to any offense that was committed before the date of enactment of [the First Step Act], if a sentence for the offense has not been imposed as of such date of enactment." § 403(b), 132 Stat. 5222.

2. In 1993, petitioner and his co-defendants committed "a string of bank robberies." Pet. App. 2a. During the robberies—which they modeled on the robberies depicted in the movie *Point Break*—petitioner and his co-defendants wore ski masks or bandannas, brandished firearms, used threatening language, forced bystanders to lie down on the floor, demanded that tellers open their cash drawers, and placed stolen money in bags or pillow cases. See Presentence Investigation Report (PSR) ¶¶ 12-13, 18, 20-21, 126; 1996 WL 109500, at *2. They were finally arrested after a police officer, acting on a tip from a bystander who had seen one of them "suspiciously looking into the window of a bank," stopped their van as they were about to commit another armed robbery. 1996 WL 109500, at *2.

A federal grand jury in the Northern District of Ohio charged petitioner with various offenses relating to the armed bank robberies. Superseding Indictment 3-4, 6-14. Following a trial, a jury found petitioner guilty of three counts of armed bank robbery, in violation of

18 U.S.C. 2113(a) and (d); one count of attempted armed bank robbery, in violation of 18 U.S.C. 2113; one count of conspiring to commit armed bank robbery, in violation of 18 U.S.C. 371; and five counts of using a firearm during a crime of violence, in violation of 18 U.S.C. 924(c) (Supp. IV 1992). Judgment 1; see Superseding Indictment 3-4, 6-14.

In 1994, the district court sentenced petitioner to 135 months of imprisonment on each of the bank-robbery and conspiracy counts, to be served concurrently. Judgment 2. The court also sentenced petitioner to five years of imprisonment on the first Section 924(c) count and 20 years of imprisonment on each of the four other Section 924(c) counts, to be served consecutively to each other and to the sentences on the other counts. *Ibid.* The court of appeals affirmed. 1996 WL 109500.

In 1997, petitioner filed a motion under 28 U.S.C. 2255 to vacate his sentence. See D. Ct. Doc. 533-3 (May 6, 2015); D. Ct. Doc. 533-4 (May 6, 2015). The district court denied the motion and declined to issue a certificate of appealability (COA). 20-3912 C.A. App. 602-606. The court of appeals likewise denied a COA. 97-4391 C.A. Docket entry No. 17 (July 2, 1998).

In 2015, petitioner filed a motion under Federal Rule of Civil Procedure 60(b), seeking to reopen his Section 2255 proceedings. D. Ct. Doc. 533, at 1 (May 6, 2015). In that motion, petitioner argued that four of his Section 924(c) convictions should be vacated in light of this Court's intervening decision in *Rosemond* v. *United States*, 572 U.S. 65 (2013), which "clarified the proof required for the intent element of aiding-and-abetting liability under § 924(c)." Pet. App. 2a; see D. Ct. Doc. 533, at 3-18. The parties agreed that three of petitioner's Section 924(c) convictions should be vacated on

that ground and that he should be resentenced to 480 months of imprisonment. D. Ct. Doc. 547, at 1, 3 (May 17, 2017). The court accepted the parties' agreement, vacated three of petitioner's Section 924(c) convictions, and resentenced him to 480 months of imprisonment. D. Ct. Doc. 548, at 1-2 (May 17, 2017); D. Ct. Doc. 551, at 1-2. Specifically, the court resentenced petitioner to 180 months of imprisonment on each of the bank-robbery counts and 60 months on the conspiracy count, to be served concurrently. D. Ct. Doc. 551, at 2. The court further sentenced petitioner to five years of imprisonment on the first Section 924(c) count and 20 years of imprisonment on the second Section 924(c) count, to be served consecutively to each other and to the sentences on the other counts. *Ibid.*

3. In May 2020, petitioner filed a motion in the district court for a sentence reduction under 18 U.S.C. 3582(c)(1)(A). D. Ct. Doc. 574. In that motion, petitioner asserted that his "personal health condition and the circumstances surrounding COVID-19 constitute extraordinary and compelling reasons" for "compassionate release." *Id.* at 18. Petitioner also argued that if he had been sentenced after the enactment of the First Step Act, he would not have received a statutory minimum 20-year consecutive sentence on his second Section 924(c) conviction. *Id.* at 25.

The district court denied petitioner's Section 3582(c)(1)(A) motion. Pet. App. 23a-32a. The court found that the "combination" of petitioner's health condition and "the presence of COVID-19" in his correctional facility was not "enough" to constitute extraordinary and compelling reasons for a sentence reduction. *Id.* at 27a. The court also recognized that "a disparity based on a change in sentencing law cannot serve as

'extraordinary and compelling reasons' under § 3582(c)(1)(A)." *Id.* at 30a. The court explained that the "inquiry under the compassionate release statute must be highly individualized, and not based on facts or changes in the law that affect hundreds—if not thousands—of prisoners" and that "[f]acts like the First Step amendments (which impact[] hundreds of prisoners) and COVID-19 (which impacts all prisoners) are too general to satisfy this individualized analysis." *Id.* at 31a.

4. The court of appeals affirmed. Pet. App. 1a-22a. Like the district court, and relying on circuit precedent, the court of appeals recognized that the First Step Act's amendment to Section 924(c) cannot serve as an "extraordinary and compelling" reason for a sentence reduction. *Id.* at 4a (quoting *United States* v. *Tomes*, 990 F.3d 500, 505 (6th Cir. 2021), petition for cert. pending, No. 21-5104 (filed July 7, 2021)). The court explained that "the sentence-reduction statute, § 3582(c)(1)(A), does not give district courts a license to 'end run around Congress's careful effort to limit the retroactivity of the First Step Act's reforms.'" *Ibid.* (quoting *Tomes*, 990 F.3d at 505).

The court of appeals also rejected petitioner's argument that "even if the First Step Act's amendments do not amount to an extraordinary and compelling reason on their own, they meet the standard when combined with three other considerations: COVID-19, his high blood pressure, and his rehabilitative efforts." Pet. App. 5a. The court observed that petitioner's argument "assumes that the district court did not err when it reasoned that these three considerations in combination did not rise to the level of extraordinary and compelling," but "contemplates that an error nonetheless

occurred when the court failed to add the First Step Act's non-retroactive amendments to the extraordinary-and-compelling equation." *Ibid.* And the court explained that "adding a legally impermissible ground to three insufficient factual considerations does not entitle a defendant to a sentence reduction." *Ibid.* The court emphasized that the "text of these sentencing statutes does not permit [a court] to treat the First Step Act's non-retroactive amendments, whether by themselves or together with other factors, as 'extraordinary and compelling' explanations for a sentencing reduction." *Id.* at 7a-8a.

The court of appeals noted that "[a]fter the district court entered its order in this case," the court of appeals took the view that Sentencing Guidelines § 1B1.13 is not applicable to sentence-reduction motions filed by prisoners. Pet. App. 10a. The court explained, however, that the district court "correctly concluded that it lacked the authority to reduce [petitioner's] sentence[] based on a non-retroactive change in the law—not because of the Sentencing Commission's policy statement but because of the relevant statutory texts." *Ibid.*

Judge Clay dissented. Pet. App. 11a-22a. In his view, a district court should be permitted to "consider a non-retroactive First Step Act amendment that creates a sentencing disparity in combination with other factors as the basis for an extraordinary and compelling reason for compassionate release." *Id.* at 11a.

ARGUMENT

Petitioner contends (Pet. 22-27) that the First Step Act's amendment to Section 924(c), which is not applicable to preexisting sentences like petitioner's, can nevertheless serve as an "extraordinary and compelling" reason for a sentence reduction under Section

3582(c)(1)(A)(i). That contention lacks merit. And although courts of appeals have reached different conclusions on the issue, the practical importance of the disagreement is limited, and the Sentencing Commission could promulgate a new policy statement that deprives a decision by this Court of any practical significance. In any event, this case would be a poor vehicle to address the question presented, because petitioner would not be entitled to a sentence reduction even if the question were resolved in his favor. The petition for a writ of certiorari should be denied.*

1. Petitioner contends (Pet. 22-27) that Congress's decision not to extend the First Step Act's amendment to Section 924(c) to defendants like him can constitute an "extraordinary and compelling reason" for a sentence reduction under Section 3582(c)(1)(A). The court of appeals correctly rejected that contention. Pet. App. 4a-6a.

In the First Step Act, Congress amended Section 924(c) to provide for an enhanced minimum consecutive sentence for a second or subsequent Section 924(c) conviction only in the case of a "violation of [Section 924(c)] that occurs after a prior conviction under [Section 924(c)] has become final." § 403(a), 132 Stat. 5222. In Section 403(b) of the First Step Act, however, Congress made the deliberate choice not to make that amendment applicable to defendants who had been sentenced before

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* Other pending petitions for writs of certiorari raise similar issues. See, *e.g.*, *Gashe* v. *United States*, No. 20-8284 (filed Apr. 19, 2021); *Tomes* v. *United States*, No. 21-5104 (filed July 7, 2021); *Corona* v. *United States*, No. 21-5671 (filed Sept. 2, 2021); *Watford* v. *United States*, No. 21-551 (filed Oct. 12, 2021); *Sutton* v. *United States*, No. 21-6010 (filed Oct. 14, 2021); *Tingle* v. *United States*, No. 21-6068 (filed Oct. 15, 2021).

the enactment of the First Step Act, expressly specifying that the change would apply only "if a sentence for the offense has not been imposed as of such date of enactment." § 403(b), 132 Stat. 5222. In so doing, Congress adhered to "the ordinary practice" in "federal sentencing" of "apply[ing] new penalties to defendants not yet sentenced, while withholding that change from defendants already sentenced." *Dorsey* v. *United States*, 567 U.S. 260, 280 (2012); cf. 1 U.S.C. 109 (general nonretroactivity provision).

Given Congress's deliberate choice not to make the First Step Act's change to Section 924(c) applicable to defendants who had already been sentenced, "there is nothing 'extraordinary' about" the fact that petitioner's sentence for his second Section 924(c) conviction reflects the statutory penalty that existed at the time he was sentenced. *United States* v. *Thacker*, 4 F.4th 569, 574 (7th Cir. 2021). That sentence "was not only permissible but statutorily required at the time." *United States* v. *Maumau*, 993 F.3d 821, 838 (10th Cir. 2021) (Tymkovich, C.J., concurring). And when Congress enacted the First Step Act, it specifically declined to disturb petitioner's sentence for his second Section 924(c) conviction, even as it made other (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 sentence and "the sentence he would receive today" (Pet. 23) is therefore the product of deliberate congressional design—namely, Congress's decision not to make the First Step Act's change to Section 924(c) applicable to defendants who

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

When interpreting statutes, this Court generally seeks "to 'fit, if possible, all parts' into a 'harmonious whole.'" *Andrews*, 12 F.4th at 261 (quoting *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)). But nothing is harmonious about treating the ordinary operation of one provision (Section 403(b)) as an "extraordinary" circumstance under another (Section 3582(c)(1)(A))—especially when Congress addressed both in the same statute (the First Step Act) without any suggestion that the new prisoner-filed Section 3582(c)(1)(A) motions would constitute an end-around to its prospective application of Section 403's change to the sentencing scheme for Section 924(c) offenses. In addition, "[i]t is a commonplace of statutory construction that the specific governs the general." *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 566 U.S. 639, 645 (2012) (citation omitted). And treating the ordinary operation of Section 403(b) as an extraordinary circumstance under Section 3582(c)(1)(A) would allow the more general provision (Section 3582(c)(1)(A)) to "thwart" the more specific one (Section 403(b)). Pet. App. 5a. 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," *id.* at 6a, simply by allowing prisoner-filed Section 3582(c)(1)(A) motions.

Petitioner does not contest the court of appeals' determination that "the First Step Act's amendments do not amount to an extraordinary and compelling reason on their own." Pet. App. 5a. Instead, petitioner asserts (Pet. 26-27) that "[e]ven if that circumstance alone does not add up to an extraordinary and compelling factor," a court "should have discretion to weigh" that circumstance "in conjunction with other factors" in assessing whether extraordinary and compelling reasons warrant a sentence reduction. But whether considered alone or in combination with other circumstances, the possibility that a previously sentenced defendant might receive a lower sentence if he were sentenced today is still the ordinary, express, and expected result of Congress's deliberate decision not to make the First Step Act's change to Section 924(c) applicable to previously sentenced defendants. Thus, as the court of appeals correctly recognized, the prospective design of Section 403 cannot serve as an "extraordinary and compelling" reason for a Section 3582(c)(1)(A) reduction to a preexisting sentence, either by itself or as part of a package of factors. See Pet. App. 5a (explaining that the First Step Act's change to Section 924(c) is a "legally impermissible ground" for finding an "extraordinary and compelling reason," even when it is "combined with" other considerations).

Petitioner contends (Pet. 24) that if Congress had intended to exclude the First Step Act's change to Section 924(c) as a basis for finding that "extraordinary and compelling reasons" exist under Section 3582(c)(1)(A),

Congress would have amended Section 994(t) to say so specifically. But no such amendment was necessary. Section 3582(c)(1)(A) already requires that any sentence reduction be justified by "extraordinary and compelling reasons." 18 U.S.C. 3582(c)(1)(A)(i). And by expressly declining to make its change to Section 924(c) applicable to defendants who had previously been sentenced, Congress ensured that there would be nothing "extraordinary" about a defendant like petitioner continuing to serve his preexisting sentence under Section 924(c).

2. Petitioner asserts (Pet. 11-14) that the courts of appeals are divided on whether district courts may rely on Congress's decision not to make the First Step Act's amendment to Section 924(c) applicable to defendants who had already been sentenced in finding "extraordinary and compelling reasons" for a sentence reduction under Section 3582(c)(1)(A). But a divergence of views on that issue, which could be addressed by the Sentencing Commission, lacks sufficient practical significance to warrant this Court's review.

a. In accord with the decision below, the Third and Seventh Circuits have also recognized that Congress's decision not to make the First Step Act's amendment to Section 924(c) applicable to previously sentenced defendants, "whether considered alone or in connection with other facts and circumstances, cannot constitute an 'extraordinary and compelling' reason to authorize a sentencing reduction." *Thacker*, 4 F.4th at 571; see *Andrews*, 12 F.4th at 260-261. The Eleventh Circuit has likewise determined that the First Step Act's prospective amendment to Section 924(c) cannot constitute an "extraordinary and compelling" reason for a sentence reduction 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 (2021), cert. denied, No. 20-1732 (Dec. 6, 2021).

The Fourth and Tenth Circuits have taken the view that Congress's decision not to make the First Step Act's amendment to Section 924(c) applicable to previously sentenced defendants can form part of an "individualized assessment[]" of whether "extraordinary and compelling reasons" exist in a particular defendant's case. *United States* v. *McCoy*, 981 F.3d 271, 286 (4th Cir. 2020); see *Maumau*, 993 F.3d at 837. But the Sentencing Commission could promulgate a new policy statement that resolves the disagreement. Under Section 3582(c)(1)(A), any sentence reduction must be "consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. 3582(c)(1)(A). The two circuits that have upheld a district court's reliance on the First Step Act's prospective amendment to Section 924(c) in finding extraordinary and compelling reasons for a sentence reduction have both done so on the premise that the *current* version of Section 1B1.13 is inapplicable to sentence-reduction motions filed by prisoners. See *Maumau*, 993 F.3d at 836-837; *McCoy*, 981 F.3d at 283. Nobody disputes, however, that the Commission has the power—indeed, the statutory duty—to promulgate a policy statement that applies to prisoner-filed motions, or that it could resolve this particular issue.

Just as it was before the First Step Act, the Commission remains tasked with providing constraints applicable to *all* Section 3582(c)(1)(A) motions. The First Step Act did not alter or eliminate the Commission's mandate

to describe "what should be considered extraordinary and compelling reasons" for granting such a motion, 28 U.S.C. 994(t), or release district courts from their statutory obligation to adhere to that description, see 18 U.S.C. 3582(c)(1)(A). The Commission could thus promulgate a new policy statement, binding on district courts in considering prisoner-filed sentence-reduction motions, that rules out the First Step Act's prospective amendment to Section 924(c) as a possible basis for finding "extraordinary and compelling reasons" for a Section 3582(c)(1)(A) sentence reduction.

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

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

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

Given that a decision by this Court would not preclude the Commission from issuing a new policy statement, applicable to prisoner-filed motions, that forecloses reliance on prospective amendments to the law in finding "extraordinary and compelling reasons," no sound reason exists for this Court's intervention at this time. In recent years, the Commission has carefully attended to Congress's directive to "describe what should be considered extraordinary and compelling reasons for sentence reduction," 28 U.S.C. 994(t), twice making substantial revisions to Section 1B1.13. See Sentencing Guidelines App. C 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, see Pet. 23 n.11, the Commission could exercise its discretion to exclude, as a policy matter, prospective changes in the law. Moreover, the Commission could revise the applicable description of "extraordinary and compelling reasons" in such a way that would render prisoners like petitioner eligible for relief, independent of the First Step Act's change to Section 924(c). The current statutory and Guidelines scheme would not preclude petitioner from filing a second sentence-reduction motion and thus taking advantage of such a revised policy statement.

The Commission's current lack of a quorum does not support this Court's intervention. Notwithstanding the Commission's current lack of a quorum, this Court has

adhered to its usual practice of denying review of issues that the Commission may address. See, *e.g.*, *Bryant* v. *United States*, No. 20-1732 (Dec. 6, 2021); *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 solely prospective amendment of Section 924(c) as a potential "extraordinary and compelling" circumstance for a sentence reduction. In the event that the Commission were to desire to permit reductions on that basis as a policy matter, but view that course to be foreclosed as a statutory matter, it could indicate as much in a revised policy statement and thereby allow for further congressional, and possibly judicial, action.

b. In any event, even irrespective of future Commission action, the practical significance of the current disagreement among the circuits is limited. Even in those circuits that have determined that the First Step Act's amendment to Section 924(c) cannot constitute an "extraordinary and compelling" reason for a sentence reduction, that amendment is not necessarily "irrelevant to the sentence-reduction inquiry." *Andrews*, 12 F.4th at 262; see *Thacker*, 4 F.4th at 575; Pet. App. 7a-8a. For "those defendants who can show some other 'extra-

ordinary and compelling' reason for a sentencing reduction," district courts may consider prospective "sentencing law changes" in "balancing the § 3553(a) factors." Pet. App. 8a. 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 a 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.

First, even if this Court were to hold that "a court should have discretion to weigh" the First Step Act's change to Section 924(c) "in conjunction with other factors" in determining whether extraordinary and compelling reasons exist, Pet. 27, the outcome below would be the same, because petitioner would still be unable to demonstrate that such reasons exist. In finding that petitioner had not demonstrated such reasons, the district court rejected petitioner's reliance on the First Step Act's change to Section 924(c) "as a matter of law." Pet. App. 3a-4a. In doing so, however, it observed that "[f]acts like the First Step amendments (which impact[] hundreds of prisoners) and COVID-19 (which impacts all prisoners) are too general to satisfy th[e] individualized analysis" that the "inquiry under the compassionate release statute" requires. *Id.* at 31a. And nothing in petitioner's argument here—that district courts should be allowed to consider the First Step Act's amendment to Section 924(c) "as part of an individualized compassionate release analysis," Pet. 26—would require district courts to give it any significant weight. Thus, even if this Court were to adopt petitioner's view, the district court could, should, and likely would rely on

that observation to again find petitioner unable to "demonstrate[] any 'extraordinary and compelling reason' to justify compassionate release." Pet. App. 31a.

Second, even if petitioner could demonstrate "extraordinary and compelling reasons" for a sentence reduction, the outcome below would be the same, because he would be unable to show that "the factors set forth in section 3553(a)" support such a reduction. 18 U.S.C. 3582(c)(1)(A). Petitioner committed "a slew of offenses connected with a string of bank robberies." Pet. App. 2a. "As part of the conspiracy," petitioner and his co-defendants "stole a minimum of eight vehicles for use as getaway vehicles." PSR ¶ 126. And in committing the robberies, they carried firearms "and threatened to kill the victims on several occasions." *Ibid.*; see PSR ¶ 13. During one attempted robbery, petitioner aimed his gun at a security officer, who responded by firing seven shots in the presence of bystanders, including one baby, all but one of which missed petitioner. PSR ¶ 21. Petitioner's existing sentence, as reduced pursuant to Section 2255, remains an appropriate sentence for those serious crimes. Thus, regardless of this Court's resolution of the question presented, petitioner could not demonstrate that the Section 3553(a) factors support relief.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2021