No. 21-568

IN THE

Supreme Court of the United States

JASON JARVIS,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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The government concedes a deep and intractable circuit split on the question presented: whether a court considering compassionate release may consider the lesser sentence that a defendant would receive today in finding "extraordinary and compelling" reasons for reducing a harsh sentence under now-repudiated sentencing laws. BIO 12, 16-17. And the government barely disputes the importance of the issue to multitudes of federal prisoners seeking compassionate release—prisoners who are invoking a procedure that the First Step Act provided to them after decades of failures of the Bureau of Prisons (BOP) and the Sentencing Commission to fulfill Congress's objectives.

Nevertheless, the government contends that the Court should leave the conflict unresolved.

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

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

The government cannot deny that the courts of appeals have expressly disagreed on whether non-retroactive changes in federal law may support finding "extraordinary and compelling reasons" justifying compassionate release of prisoners who were sentenced under an older, harsher regime. BIO 16-17. The Fourth and Tenth Circuits unequivocally hold that they can, while the Third, Sixth, and Seventh Circuits say they cannot. *Compare United States v. McCoy*, 981 F.3d 271, 286 (4th Cir. 2020);

United States v. McGee, 992 F.3d 1035, 1045-48 (10th Cir. 2021), *with United States v. Andrews*, 12 F.4th 255, 261-62 (3d Cir. 2021); *United States v. Thacker*, 4 F.4th 569, 574-75 (7th Cir. 2021); Pet. App. 1a-10a; *see also* Pet. 11-14 (describing split).[1]

Faced with this deep circuit conflict, the government leads its opposition by defending the decision below. BIO 12-16. That defense provides no reason to deny review. The government will have an opportunity to make a merits defense if this Court grants certiorari, and the government's restatement of one side of the conflict is no reason to leave the split unresolved.

1. A district court "may reduce the term of imprisonment . . . after considering the factors set forth in section 3553(a) to the extent that they are applicable," if it determines, first, that "extraordinary and compelling reasons warrant such a reduction" (or certain other conditions are met), and second, "that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(1)(A).

When it enacted Section 3582, Congress simultaneously required the Sentencing Commission

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[1] The government suggests that *United States v. Bryant*, 996 F.3d 1243 (11th Cir. 2021), *cert. denied*, No. 20-1732 (Dec. 6, 2021), supports its position. BIO 16-17. But *Bryant* resolved an entirely different question: whether Sentencing Guidelines § 1B1.13—which speaks only to compassionate-release motions filed by the Bureau of Prisons—is an "applicable" policy statement that binds a district court considering defendant-filed motions for compassionate release. *Bryant* did not address the statutory question presented here.

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

The government's position also conflicts with ordinary understandings of what constitutes "extraordinary and compelling reasons" warranting compassionate release. The sentences under the previous regime could be "unjust, cruel, and even irrational." *United States v. Angelos*, 345 F. Supp. 2d 1227, 1230 (D. Utah 2004), *aff'd*, 433 F.3d 738 (10th Cir. 2006). And the "exceptionally dramatic" reductions to these sentences that Congress has prospectively enacted, *McCoy*, 981 F.3d at 285, can logically support finding "extraordinary and

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

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

First, the government argues that the First Step Act's changes to federal sentencing laws cannot be an "extraordinary" reason to grant compassionate release because the "ordinary" rule is that changes to federal sentencing statutes do not apply retroactively. BIO 12-13. This argument erroneously equates general retroactivity with individualized discretionary relief. Congress's decision not to require resentencing of all individuals sentenced under the prior regime—the retroactivity question—says nothing about whether some individuals, as part

of an "individualized assessment[]," BIO 17 (quoting *McCoy*, 981 F.3d at 286), may receive compassionate release in part because of the extraordinary sentencing disparities between the current and former regimes. And the idea that prison sentences running to hundreds of years (longer than the punishment for many murders, rapes or kidnappings) are not "extraordinary" defies ordinary meaning.[2]

Second, in a retreat from plain language, the government says that petitioner's view of the law violates the general principle that statutes must be interpreted as a "harmonious whole." BIO 14 (citation omitted). But this canon of construction applies when one reading of ambiguous statutory text would render it incompatible with another statutory provision. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000). As explained, the class-wide non-retroactivity of the First Step Act reforms to 18 U.S.C. § 924(c) is entirely compatible with individualized consideration of the impact of prior law—and its now-rejected policy—in evaluating particular compassionate-release petitions under the separate authority of 18 U.S.C. § 3582.

Third, arguing that "the specific governs the general," the government suggests that the compassionate-release statute cannot be construed to

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

"thwart" Congress's decision to make the First Step Act's reforms to Section 924(c) non-retroactive. BIO 14 (citations omitted). This principle, however, applies where two statutes touch "upon the same subject" and are not "capable of co-existence." *Morton v. Mancari*, 417 U.S. 535, 551 (1974) (citation omitted). It has no application here: withholding automatic resentencing is a distinct subject from allowing individualized resentencing and the two can easily co-exist. And to the extent that the "specific governs the general" canon applies at all, it supports petitioner. Section 3582 is a specific grant of authority to reduce the sentences of a narrow class of defendants; non-retroactivity is general and applies to all Section 924(c) offenders.

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

The government's primary non-merits argument is that the Court should let the Sentencing Commission resolve the circuit conflict. BIO 16-22. The government invokes (BIO 19) *Braxton v. United States*, 500 U.S. 344 (1991), to avoid review, but that decision does not apply here. *Braxton* indicates that when courts fall into conflict over the meaning of a Sentencing Guideline or policy statement, the Court should ordinarily leave resolution of that issue to the Commission. *Id.* at 348. But the rule is otherwise where, as here, courts disagree about the meaning of a statute, as *Braxton* itself recognized. *Id.* at 347-48. In that situation, "it is this Court's responsibility to say what a statute means." *Nitro-Lift Techs., LLC v. Howard*, 568 U.S. 17, 21 (2012) (per curiam) (citation omitted).

The question presented here—whether non-retroactive changes in federal law are categorically unavailable as "extraordinary and compelling reasons" under 18 U.S.C. § 3582(c)(1)(A)—is a matter of statutory interpretation for this Court, not the Commission. The government admits that "the Commission could not describe 'extraordinary and compelling reasons' to include consideration of a factor that, as a statutory matter, may not constitute such a reason." BIO 20 (emphasis added). That leaves the government in the position of arguing that the Commission could seek to "resolve" the split only by issuing a policy statement adopting the government's position. Were the Commission instead to agree with defendants that non-retroactive changes in the law can serve as extraordinary and compelling reasons, the circuits that have held—as a matter of statutory construction—that they cannot do so would hold that policy statement contrary to law and invalid.

But the government's suggestion that the Commission can resolve the split through a policy statement that places non-retroactive changes off limits is wrong. Nothing in the text of Section 3582 or 28 U.S.C. § 994(t) gives the Commission power to *preclude* consideration of something as an "extraordinary and compelling" reason. Section 994(t) charges the Commission with "describ[ing] what *should* be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied." 28 U.S.C. § 994(t) (emphasis added). And Section 3582 obligates courts "only [to] ensure that reductions are 'consistent with' the Commission's applicable policy statements."

FAMM *et al.* Amici Br. 15 (quoting 18 U.S.C. § 3582(c)(1)(A)). Neither statute empowers the Commission to say categorically what factors should *not* be considered extraordinary and compelling.

Nor does either statute make the Commission the exclusive arbiter of what counts as extraordinary and compelling. The Commission's own policy statement supports that conclusion by recognizing that the BOP may identify "[o]ther [r]easons" supporting release. U.S.S.G. § 1B1.13 cmt. n.1. And the Tenth Circuit has rejected the argument that the Commission has "exclusive authority to define the phrase 'extraordinary and compelling reasons.'" *McGee*, 992 F.3d at 1043-45. Instead, that court has recognized that district courts exercise "independent" discretion to "determine the existence of 'extraordinary and compelling reasons'" before consulting with applicable policy statements. *Id.* at 1044 (noting that the independent discretion of courts is "circumscribed" by the requirement that a sentence reduction be "consistent with applicable policy statements"). This reflects a congressional design that district courts and the Commission play complementary roles, and it further underscores that the Commission is not the ultimate authority on the on the meaning of "extraordinary and compelling reasons." As a result, if the Commission tried to resolve the statutory-construction question presented here against petitioner's position, it might find courts that have embraced petitioner's view—like the Tenth Circuit—in disagreement with the Commission's rejection of that position. Accordingly, the Commission may receive an adverse judicial

reception no matter what it said in a new policy statement.

Rather than leave the Commission in the predicament that the circuit conflict causes, the Court should grant review, clarify the meaning of Section 3582(c)(1)(A), and leave the Commission with clear guidance. Such a ruling would not, as the government suggests, be deprived of "practical significance" by any future Commission policy statement. BIO 18. Once this Court has "determined a statute's meaning," the Sentencing Commission cannot subsequently promulgate a conflicting interpretation. *Neal v. United States*, 516 U.S. 284, 295 (1996) (citing *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536-37 (1992); *Maislin Indus., U.S. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990)).

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

1. At least 2,412 federal prisoners were sentenced under the now-repudiated stacking provision of Section 924(c).[3] Many of them could potentially seek sentence reductions based, in part, on their stacked sentences. Consequently, the question presented implicates tens of thousands of years of incarceration for these individuals, who are serving an average sentence of 418 months each.[4]

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

[4] *Id.*

The severity and racially disparate impact of these sentences magnifies the case for review. *See* FAMM *et al.* Amici Br. 10-11.

The government nevertheless suggests that "the practical significance of the current disagreement among the circuits is limited" because district courts may still consider sentencing disparities when "balancing the § 3553(a) factors" in imposing a sentence. BIO 21-22 (citation omitted); *see also* 18 U.S.C. § 3553(a)(6). But a court reaches the Section 3553(a) factors only after it has already found extraordinary and compelling circumstances justifying compassionate release. The rule in the Third, Sixth, and Seventh Circuits cuts off that inquiry before it begins.

Without this Court's intervention, the conflict will persist. In 2021 alone, district courts have adjudicated hundreds of motions for reduced sentences based in part on stacked Section 924(c) sentences.[5] The government provides no reason to think that defendants will stop filing such motions or seeking individualized relief based on non-retroactive changes in the law. And the government provides no good reason for the Court to ignore the conflict and allow whether a defendant wins compassionate release to turn on geographical happenstance.

2. This case is the right vehicle for resolution of the conflict. The government does not dispute that

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

the Sixth Circuit and the district court fully considered and clearly decided the question presented. *See* Pet. App. 4a-10a, 30a-31a. Nor does it suggest that any jurisdictional or other serious vehicle issue would prevent this Court from reaching and fully resolving the question presented. Rather, it contends that the question presented is not outcome-determinative for two unpersuasive reasons.

First, the government argues that even if the district court were allowed to consider the First Step Act amendments on remand, it "could, should, and likely would . . . again find petitioner unable to" demonstrate extraordinary and compelling reasons. BIO 22-23. This inverts the district court's reasoning. The district court stated that "[f]acts like the First Step amendments (which impact[] hundreds of prisoners) . . . are too general to satisfy th[e] individualized" compassionate-release analysis. BIO 22. That was not an alternative case-specific rationale, but reasoning in support of the court's *legal* conclusion that "changes in law that affect hundreds—if not thousands—of prisoners" cannot be considered because they are insufficiently individualized. Pet. App. 31a. That is the precise issue presented in this petition. And petitioner presented many case-specific grounds for compassionate release; he was 19 at the time of his offense, has demonstrated complete rehabilitation during his 26 years in prison, has been deemed to be an unlikely recidivist by the BOP, and is vulnerable to COVID-19 due to his hypertension and bronchitis. *See* Dkt. No. 574.

Second, the government argues that petitioner's compassionate-release motion would fail under the

Section 3553(a) factors. BIO 23. But this is no more than speculation based on the government's own analysis. The courts below never considered that issue in light of their dispositive conclusion that petitioner failed to demonstrate "extraordinary and compelling reasons." *See* Pet. App. 3a-4a, 30a-31a.

The possibility that lower courts could reach the same result on remand on alternative grounds is not a reason to deny review. *See, e.g.*, *Brownback v. King*, 141 S. Ct. 740, 746-47 (2021). Where the courts below have applied an incorrect legal rule, the Court's "usual practice" is to leave harmless-error review for remand. *Maslenjak v. United States*, 137 S. Ct. 1918, 1931 (2017). That usual practice is especially appropriate here because the courts below have not addressed the alternative grounds that the government raises in opposing certiorari.

CONCLUSION

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

Respectfully submitted,

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December 22, 2021