No. _____

IN THE
Supreme Court of the United States

ROBERT D. SUTTON,

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under 18 U.S.C. § 3582(c)(1)(A), a defendant may seek a sentence reduction based, in part, on "extraordinary and compelling reasons." In 2018, Congress amended 18 U.S.C. § 924(c) to limit when the mandatory minimum penalties apply to multiple § 924(c) convictions. But that amendment is not retroactive. Can a district court consider a defendant's disproportionately long sentence under the earlier version of § 924(c) to find "extraordinary and compelling reasons" exist under § 3582(c)(1)(A)?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Robert D. Sutton. Respondent is the United States of America. No party is a corporation.

STATEMENT OF RELATED PROCEEDINGS

Pursuant to Supreme Court Rule 14.1(b)(iii), Petitioner submits that the following proceedings are directly related to this case, because they arise from the same trial court case as the case in this Court. The two proceedings in bold pertain specifically to the question presented in this petition:

- *United States of America v. Robert D. Sutton*, No. 3:01-cr-00032, U.S. District Court for the Western District of Wisconsin. Judgment and Commitment Order entered on March 15, 2002.

- *United States of America v. Robert D. Sutton*, Consol. Nos. 02-1679, 02-1687, 02-1739, U.S. Court of Appeals for the Seventh Circuit. Judgment entered on July 23, 2003. Decision reported at 337 F.3d 792 (7th Cir. 2003).

- *Robert D. Sutton v. United States of America*, No. 03-614, Supreme Court of the United States. Petition for writ of certiorari denied on December 1, 2003. Decision reported at 540 U.S. 1050 (2003) (mem.).

- *United States of America v. Robert D. Sutton*, No. 3:01-cr-00032, U.S. District Court for the Western District of Wisconsin. Motion to vacate conviction pursuant to 28 U.S.C. § 2255 denied on April 27, 2005, and motion for reconsideration denied on May 31, 2005. Certificate of appealability denied on August 9, 2005.

- *United States of America v. Robert D. Sutton*, No. 05-3313, U.S. Court of Appeals for the Seventh Circuit. Certificate of appealability denied on January 10, 2006.

- *Robert D. Sutton v. United States of America*, No. 05-10359, Supreme Court of the United States. Petition for writ of certiorari denied on May 15, 2006. Decision reported at 547 U.S. 1142 (2006) (mem.).

- *United States of America v. Robert D. Sutton*, No. 3:01-cr-00032, U.S. District Court for the Western District of Wisconsin. Motion to modify restitution order denied on December 15, 2005, and motion for reconsideration denied on February 14, 2006. Motion for evidentiary hearing (construed as motion for post-conviction relief under 28 U.S.C. § 2255) and certificate of appealability denied on March 11, 2013 (docketed March 12, 2013).

- *United States of America v. Robert D. Sutton*, No. 13-1705, U.S. Court of Appeals for the Seventh Circuit. Certificate of appealability denied on October 3, 2013.

- *Robert D. Sutton v. United States of America*, No. 3:14-cv-00460, U.S. District Court for the Western District of Wisconsin. Motion to vacate sentence per 28 U.S.C. § 2255 dismissed on July 2, 2014.

- *Robert D. Sutton v. United States of America*, No. 15-1529, U.S. Court of Appeals for the Seventh Circuit. Authorization to file successive motion to vacate under 28 U.S.C. § 2255 denied and application dismissed on March 19, 2015.

- *Robert D. Sutton v. United States of America*, No. 16-2459, U.S. Court of Appeals for the Seventh Circuit. Authorization to file successive motion to vacate under 28 U.S.C. § 2255 denied and application dismissed on July 13, 2016.

- *Robert D. Sutton v. United States of America*, No. 17-2310, U.S. Court of Appeals for the Seventh Circuit. Authorization to file successive motion to vacate under 28 U.S.C. § 2255 denied and application dismissed on July 11, 2017.

- *Robert D. Sutton v. United States of America*, No. 19-1752, U.S. Court of Appeals for the Seventh Circuit. Authorization to file successive motion to vacate under 28 U.S.C. § 2255 denied and application dismissed on May 10, 2019.

- *Robert D. Sutton v. United States of America*, No. 20-2114, U.S. Court of Appeals for the Seventh Circuit. Authorization to file successive motion to vacate under 28 U.S.C. § 2255 denied and application dismissed on July 27, 2020.

- ***United States of America v. Robert D. Sutton*, No. 3:01-cr-00032, U.S. District Court for the Western District of Wisconsin**. Order denying motion for compassionate release pursuant to 18 U.S.C. § 3582(c)(1)(A) entered on September 21, 2020.

- ***United States of America v. Robert D. Sutton*, No. 20-2876, U.S. Court of Appeals for the Seventh Circuit**. Judgment entered on July 16, 2021, affirming district court's order denying motion for compassionate release.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Robert Sutton, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS AND RULINGS BELOW

The opinion of the Seventh Circuit is an unpublished decision available at 854 F. App'x 59 (7th Cir. 2021) (mem.). *See* App. 1a–4a. The district court's ruling on Petitioner's motion under 18 U.S.C. § 3582(c)(1)(A) is not reported. *See* App. 5a–13a.

JURISDICTION

The Seventh Circuit entered judgment on July 16, 2021. Pursuant to Supreme Court Rule 13.1, as extended by the Court's COVID-19 order, a petition for a writ of certiorari is due to this Court within 150 days of that judgment, which is on or before December 13, 2021. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 3582 of Title 18 is the statutory provision involved in this petition. In light of its length, Petitioner has included a copy of that statute in the Appendix to this petition. *See* App. 33a–35a; Sup. Ct. Rule 14.1(f).

STATEMENT OF THE CASE

I. Petitioner, who has served nearly 20 years' incarceration, brought a motion for compassionate release after Congress amended § 924(c).

In 2002, Petitioner was convicted of three counts of Hobbs Act robbery (18 U.S.C. § 1951), one count of bank robbery by intimidation (18 U.S.C. § 2113(a)), and three counts of using a firearm in connection with a crime of violence (18 U.S.C. § 924(c)). App. 2a, 6a, 14a. Bound by the draconian penalties of § 924(c), as the statute then read, the district court sentenced him to 52 years and 3 months' imprisonment—a *de facto* life sentence. App. 2a, 6a, 14a–15a.

The arithmetic went like this: After concluding that concurrent 87-month terms of imprisonment were appropriate for all the Hobbs Act and bank robbery counts, the court then added a 45-year statutory minimum term *consecutive* to that 87-month term for all three § 924(c) offenses. This was because, at the time, Congress punished multiple § 924(c) convictions severely by "stacking" the penalties, even when the convictions were all part of the same proceeding. As such, Petitioner's first § 924(c) count triggered a 5-year mandatory minimum term, to run consecutive to the 87-month sentence, and each of the remaining § 924(c) counts tacked on an additional 20-year term, also to run consecutive to one another. App. 6a, 15a. As a result, at 34 years old, Petitioner was slated to die in prison.

Sixteen years later, Congress amended the very penalty provision that made Petitioner's sentence so harsh. The First Step Act of 2018 clarified that the mandatory minimum term for a "second or subsequent" § 924(c) conviction could be triggered *only* for those defendants with a prior § 924(c) conviction arising from a

separate case that already had become final; those sentenced for multiple § 924(c) convictions as part of the same proceeding (like Petitioner) would not receive it. *See* First Step Act of 2018, Pub. L. No. 115-391, § 403(a), 132 Stat. 5194, 5221–5222 (2018). But there was a catch. Congress made the statutory amendment prospective-only, providing no categorical relief to those individuals (like Petitioner) sentenced under § 924(c) before the date of enactment. *See id.* § 403(b).

But Congress also amended 18 U.S.C. § 3582(c)(1)(A) in 2018. That amendment made it possible for a defendant to file a motion for a sentence modification (commonly known as "compassionate release") on his own behalf, rather than rely on the Bureau of Prisons (BOP) to do so. *See* First Step Act § 603(b). Though seemingly slight, this procedural change was meaningful. Reliance on the BOP had proven a dead-end road. *See, e.g.*, *United States v. Long*, 997 F.3d 342, 348 (D.C. Cir. 2021) ("For more than three decades, . . . [t]he Bureau used [its] power [under § 3582(c)(1)(A)] so sparingly that, as of 2013, on average only 24 defendants were being released annually" (internal quotation marks omitted)); *United States v. Jones*, 980 F.3d 1098, 1104 (6th Cir. 2020) (Congress amended § 3582(c)(1)(A) in response to BOP inaction). Now, a defendant can put before the sentencing court new information and arguments in favor of finding that there exist "extraordinary and compelling reasons" warranting a sentence reduction as to him; that the balance of 18 U.S.C. § 3553(a) factors, considered today, tilt in favor of such a reduction; "and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission" (if any exist). *See* 18 U.S.C. § 3582(c)(1)(A). "By creating an avenue for

defendants to seek relief directly from the courts, Congress . . . expand[ed] the discretion of the courts to consider leniency." *United States v. McCoy*, 981 F.3d 271, 276 (4th Cir. 2020).

Petitioner filed a motion for compassionate release under § 3582(c)(1)(A) in the middle of the COVID-19 pandemic. He explained, in relevant part, that "extraordinary and compelling reasons" existed as to him for two independent reasons. First, were he to be sentenced for the same conduct today under the newly amended § 924(c), his § 924(c) convictions would carry an aggregate mandatory minimum term of 15 years, not 45 years. *See* Mot. for Compassionate Release, *United States v. Sutton*, No. 3:01-cr-00032 (W.D. Wis. Aug. 25, 2020), ECF No. 353 (hereinafter, "D. Ct. Mot."), at 8–10; *see also* App. 2a, 9a. Second, he argued that his continued incarceration during the pandemic was "extraordinary and compelling" because his underlying medical conditions—hypertension, hyperlipidemia, and Type II diabetes—placed him in a high-risk category for harm from COVID-19, which already was present at USP Allenwood. D. Ct. Mot. at 13–19; *see also* App. 2a, 9a.

II. The district court denied relief.

The district court, which had jurisdiction under 28 U.S.C. § 3231, disagreed that either reason qualified as "extraordinary and compelling." In assessing each, the court treated the Sentencing Commission's policy statement, USSG § 1B1.13, as "applicable" to Petitioner's motion and used it as the lens through which any

sentencing reduction had to be deemed consistent. It did so even though § 1B1.13, on its face, applied only to a motion filed by the BOP.[1]

The district court concluded that Petitioner had not identified any "extraordinary and compelling reasons." First, the court determined that Petitioner's health conditions did not qualify as "extraordinary and compelling." App. 9a.[2] Second—and the focal point of this petition—the court found that Petitioner could not rely on the amendment to § 924(c) to establish an "extraordinary and compelling reason." *Id.* at 10a. As to the latter point, because Petitioner was sentenced before that amendment took effect, the district court found he was "not entitled to the benefit of the 2018 changes in the statute." *Id.* "Although a good case can be made for the proposition that unduly punitive sentences do not serve the ends of justice," the court concluded its hands were tied: "[o]nly Congress has the authority to change the meaning and the scope of a statute, either on its own or acting through the Sentencing Commission." *Id.* at 12a.

III. The Seventh Circuit affirmed.

Petitioner timely appealed to the Seventh Circuit, which had jurisdiction to review the denial of his motion for compassionate release under 28 U.S.C. § 1291. Two months after the district court issued its decision, and one day after Petitioner filed his opening brief, the court of appeals held that § 1B1.13 did not apply to

[1] The policy statement has not been amended since Congress passed the First Step Act of 2018.

[2] The court explained that this was so because USP Allenwood had few cases of COVID-19 and Petitioner's 18-year-old offense conduct precluded finding that he "would pose no danger to the community if released," which § 1B1.13 (but not § 3582(c)(1)(A)) made part of the analysis. App. 9a–10a.

defendant-filed motions (like Petitioner's). *United States v. Gunn*, 980 F.3d 1178, 1180 (7th Cir. 2020).

Petitioner's case was argued close in time to that of appellant Ross Thacker, who also had asserted that "extraordinary and compelling reasons" existed based on the First Step Act's amendment to § 924(c) and underlying health conditions that put him at increased risk of harm from COVID-19. *See* App. 21a. The Seventh Circuit decided *Thacker* first, which set precedent that then controlled the result in this case.

In *Thacker*, the court of appeals held that the amendment to § 924(c) could not support a finding of "extraordinary and compelling reasons" under § 3582(c)(1)(A). The court reasoned that, because Congress made the "deliberate" choice to have its amendment apply only to those sentenced *after* its date of enactment, it "would unwind and disregard Congress's clear direction" and work an "end-run around Congress's decision" to allow defendants sentenced before the amendment to benefit from it. *United States v. Thacker*, 4 F.4th 569, 573 (7th Cir. 2021) (App. 25a). Further, any other result would cause separation of powers concerns, because district courts might start reducing mandatory minimum sentences that were legally imposed at the time pursuant to a law that "Congress enacted[] and the President signed." *Id.* at 574 (App. 27a). And, any other result would create tension with federal habeas law, which fixes a strict path for collateral review and post-conviction relief; allowing § 3582(c)(1)(A) to address changes to mandatory minimums would impermissibly work around the limitations placed on successive § 2255 motions. *See id.* (App. 28a).

The next day, the court of appeals issued its decision in this case, affirming the denial of Petitioner's motion. The court of appeals acknowledged that the district court's entire analysis was premised on the mistaken understanding that § 1B1.13 applied. App. 3a. But, the court concluded, that foundational error was "inconsequential" because the district court had "exercised its discretion independent of the policy statement's instructions" when determining whether the changes to § 924(c) could qualify as "extraordinary and compelling." *See id.* And "[t]he district court got it exactly right when it concluded the change to § 924(c)" could not qualify—just as the court of appeals had the day before, in *Thacker*. *Id.* at 4a. In closing, the court of appeals also held that the district court had not abused its discretion in denying Petitioner relief based on his health concerns. *See id.*[3]

Petitioner then timely filed this petition for a writ of certiorari.

[3] The court of appeals mistook the district court's statement that Petitioner continued to pose a danger to the community as representing a § 3553(a) analysis. *See* App. 4a. The district court had not cited § 3553(a) in that section of its opinion. Instead, the district court considered whether Petitioner was a "danger to the safety of any other person or to the community" as part of its analysis under § 1B1.13, which uses that language. *See* App. 9a–10a; *see also* USSG § 1B1.13(2); note 2, *supra*.

REASONS FOR GRANTING THE PETITION

I. This Court should grant review to resolve a recurring, important question of law that has split the courts of appeals and which affects hundreds of individuals serving disproportionately long sentences.

A. The decision below sits at the center of a Circuit split.

The courts of appeals are divided over whether the fact that a defendant's sentence for § 924(c) offenses would be dramatically shorter today may serve in whole or in part as an "extraordinary and compelling reason." The decision below (tagging alongside *Thacker*) dragged the Seventh Circuit into that fray. The Seventh Circuit's approach aligns with that of the Third and Sixth Circuits and fundamentally deviates from the approach that the Fourth and Tenth Circuits have taken.

1. Starting with the latter: In the Fourth and Tenth Circuits, defendants may argue that their now-disproportionately long sentence for "stacked" § 924(c) offenses, when considered against the 2018 amended version, can support finding "extraordinary and compelling reasons." *McCoy*, 981 F.3d at 285–86; *United States v. Maumau*, 993 F.3d 821, 837 (10th Cir. 2021).

These courts reason that the First Step Act's amendment created an extraordinary situation, because it "resulted in not just any sentencing change, but an exceptionally dramatic one." *McCoy*, 981 F.3d at 285. Further, the fact that Congress did not make the amendment "categorically retroactive" does not affect whether courts may "consider that legislative change in conducting their *individualized* reviews of motions for compassionate release under § 3582(c)(1)(A)(i)." *Id.* at 286 (emphasis added). Indeed, as the Tenth Circuit noted: "Congress chose not to afford relief to *all* defendants who, prior to the First Step Act, were sentenced to

mandatory [terms of imprisonment under the prior version of the statute]," but there is no indication "that Congress intended to prohibit district courts, on an individualized, case-by-case basis, from granting sentence reductions under § 3582(c)(1)(A)(i) to *some* of those defendants." *United States v. McGee*, 992 F.3d 1035, 1047 (10th Cir. 2021) (extending *McCoy*'s reasoning to allow non-retroactive amendment to 21 U.S.C. § 841(b)(1)(A) to contribute to finding "extraordinary and compelling reasons").

2. In contrast, defendants in the Third, Sixth, and Seventh Circuits cannot rely on the amendment to § 924(c) and the extreme length of their sentences under the prior version of § 924(c) to argue that "extraordinary and compelling reasons" exist. *See United States v. Andrews*, 12 F.4th 255 (3d Cir. 2021); *United States v. Jarvis*, 999 F.3d 442 (6th Cir. 2021); *Thacker*, 4 F.4th 569 (App. 20a–32a).[4]

As described above, these courts reason that allowing the non-retroactive amendment to § 924(c) to serve as an "extraordinary and compelling reason" would raise separation-of-powers concerns. Under this line of thinking, to allow "the length of a statutorily mandated sentence [to serve] as a reason for modifying a sentence would infringe on Congress's authority to set penalties." *Andrews*, 12 F.4th at 261. And to give the amendment retroactive effect would work an "end-run" around Congress's intent that the statute apply only prospectively. *Thacker*, 4 F.4th at 573 (App. 25a); *accord Jarvis*, 999 F.3d at 444. Plus, given that non-retroactive

[4] In *United States v. Loggins*, the Eighth Circuit indicated that it would join the position taken by the Third, Sixth, and Seventh Circuits but did not squarely address the issue. *See* 966 F.3d 891, 893 (8th Cir. 2020) (district court "did not misstate the law" when finding that "a non-retroactive change in law did not support a finding of extraordinary or compelling reasons for release").

application of new amendments is "the ordinary practice," it "cannot also be an extraordinary and compelling reason to deviate from that practice." *Andrews*, 12 F.4th at 261 (internal quotation marks omitted); *see also Thacker*, 4 F.4th at 574 (App. 26a) ("[T]here is nothing 'extraordinary' about leaving untouched the exact penalties that Congress prescribed and that a district court imposed for particular violations of a statute."). Instead, in these jurisdictions, "the current sentencing landscape" may come into the analysis only as part of the § 3553(a) analysis, after an *independent* "extraordinary and compelling reason" has been identified. *Andrews*, 12 F.4th at 262; *accord Thacker*, 4 F.4th at 576 (App. 31a); *Jarvis*, 999 F.3d at 445.

3. The conflict could not be clearer. Congress did not define "extraordinary and compelling reasons" in § 3582(c)(1)(A), except to say that rehabilitation alone cannot meet that standard. *See* 28 U.S.C. § 994(t). And it left it to district courts to make those findings. The Fourth and Tenth Circuits take Congress at its word by affirming that district courts may determine that the length of a defendant's sentence under § 924(c) may contribute to a finding of "extraordinary and compelling reasons." Meanwhile, the Third and Sixth Circuits view retroactivity as a demarcation line for what reasons may qualify and embroider a non-retroactivity requirement onto the "extraordinary and compelling" standard. In *Thacker* and Petitioner's case, the Seventh Circuit joined those courts in their error and deepened the divide between the courts of appeals.

B. The decision below was wrongly decided.

The decision in *Thacker* rests on shaky ground. That instability was imported into the decision below, which depended entirely on the day-old reasoning in *Thacker*. *See* App. 2a. 4a. The Seventh Circuit's analysis and rulings in both cases founder for at least three reasons. *See also* Pet. for Writ of Certiorari at 22–26, *John Watford v. United States*, No. _____ (U.S. Oct. 12, 2021) (identifying additional reasons).

1. As a preliminary matter, *Thacker*'s analysis assigned substantive meaning to Congressional silence. It assumed that when Congress "deliberate[ly]" wrote the First Step Act's amendment to § 924(c) to apply prospectively, Congress also implicitly *prohibited* that amendment from playing a role in any individualized, case-by-case determination of "extraordinary and compelling reasons" under § 3582(c)(1)(A)—an entirely different statute. *See Thacker*, 4 F.4th at 573 (App. 25a); *accord* App. 3a–4a. Of course, that's not what Congress said, and "[i]t is at best treacherous to find in Congressional silence alone the adoption of a controlling rule of law." *See Girouard v. United States*, 328 U.S. 61, 69 (1946); *see also, e.g.*, *Touche Ross & Co. v. Redington*, 442 U.S. 560, 571 (1979) (declining to interpret § 17(a) of the Securities Exchange Act of 1934 to contain cause of action because "implying a private right of action on the basis of congressional silence is a hazardous enterprise, at best"); Hon. Amy Coney Barrett, *Assorted Canards of Contemporary Legal Analysis: Redux*, 70 CASE W. RES. L. REV. 855, 867 (2020) ("[T]here is no way to reliably count on congressional silence as a source of information."). Plus, Congress certainly knows how to carve-out a category of reasons from qualifying as

"extraordinary and compelling" if it so chooses. It did just that when it precluded rehabilitation alone from serving as an "extraordinary and compelling reason." 28 U.S.C. § 994(t).

2. Principles of finality and statutory interpretation do not dictate otherwise. We all agree that Congress has circumscribed the timeline and mechanisms through which a federal defendant may pursue collateral attacks on his sentence. *See* 28 U.S.C. § 2255(f). But, at the same time, Congress has provided and expanded access to § 3582(c)(1)(A) as a mechanism through which district courts can, in their discretion, engage in "acts of lenity" based on a defendant's changed circumstances. *United States v. Jones*, 482 F. Supp. 3d 969, 981 (N.D. Cal. 2020) (quoting *United States v. Padilla-Diaz*, 862 F.3d 856, 861 (9th Cir. 2017)). After all, prescience as to the perfect sentence is impossible and, not infrequently, the sentence imposed proves inappropriate later. *See, e.g.*, *United States v. Brooker*, 976 F.3d 228, 238 (2d Cir. 2020).[5] On that provision, Congress placed no statute of limitations and no prohibition on successive motions. It "represents Congress's judgment that the generic interest in finality must give way in certain individual cases and authorizes judges to implement that judgment." *McCoy*, 981 F.3d at 288 (citation and internal quotation marks omitted).

Considered through this lens, it is easy to read §§ 2255 and 3582(c)(1)(A) in harmony. Congress plainly intended to limit the number of attacks that a defendant

[5] *See also, e.g.*, Hon. Stefan R. Underhill, Op., *Did the Man I Sentenced to 18 Years Deserve It?*, N.Y. TIMES, Jan. 23, 2016, https://tinyurl.com/ztmyh6vy; Hon. Richard G. Kopf, *Shon Hopwood and Kopf's terrible sentencing instincts*, HERCULES AND THE UMPIRE. (Aug. 8, 2013), https://tinyurl.com/vys8kvn8.

could make on the validity of his sentence, but not to foreclose the possibility of equitable relief altogether, should the sentence prove unjust over time. Put another way, § 3582(c)(1)(A) isn't at odds with § 2255 because it doesn't *entitle* the defendant to relief based on a prior legal error. *Cf. Andrews*, 12 F.4th at 259 ("[A] grant of compassionate release is a purely discretionary decision."). Yet it still allows the court to consider that error when deciding whether to exercise its discretion to grant relief. It is entirely appropriate, then, to allow a defendant sentenced before the amendment to § 924(c) to make an equity-based argument that his now-grossly disproportionate sentence supports finding "extraordinary and compelling reasons" exist.

3. Finally, on closer inspection, the citation to separation-of-powers principles simply is a pretext for floodgates concerns. The court of appeals feared granting relief would leave "nothing [to] prevent[] the next inmate serving a mandatory minimum sentence under some other federal statute from requesting a sentencing reduction in the name of compassionate release on the basis that the prescribed sentence is too long, rests on a misguided view of the purposes of sentencing, reflects an outdated legislative choice by Congress, and the like." *Thacker*, 4 F.4th at 574 (App. 27a). But, of course, that is precisely what Congress envisioned—that district courts presented with the appropriate "changed circumstances" could reduce a defendant's "unusually long sentence." S. Rep. No. 98-225, at 55 (1983). In a purported attempt to adhere to Congress's will and keep the branches balanced, the court of appeals offended those very principles by artificially limiting the discretion that Congress gave district courts.

Plus, as a pragmatic matter, those floodgates concerns are unwarranted. As the Fourth Circuit explained, "there is a significant difference between automatic vacatur and resentencing of an entire class of sentences—with its avalanche of applications and inevitable resentencings—and allowing for the provision of individual relief in the most grievous cases." *McCoy*, 981 F.3d at 286–87 (citation and internal quotation marks omitted). And if docket overload really is a concern, then that is an issue for Congress to address—not for the court of appeals to skirt through statutory interpretation.

C. The issue is important and recurring.

1. To put it simply, this Court's answer to the question presented could have far reaching consequences for those sentenced for multiple § 924(c) convictions before 2018. In just the five years preceding the First Step Act (2014–2018), more than 700 individuals were convicted of multiple counts of § 924(c).[6] Today, however, only those individuals in the Fourth and Tenth Circuits are able to argue that this substantial change in federal law supports compassionate release, while those in the Third, Sixth, and Seventh cannot. This uneven application of the law sticks in equity's craw—a defendant's ability to find relief should not turn on geography. And, given both the volume of people affected and the proliferation of compassionate release motions since

[6] *See* Sent. Comm., *Quick Facts: Section 924(c) Firearms Offenses (Fiscal Year 2018)*, https://tinyurl.com/7rt8tn5v (136 individuals (5.3% of 2,564 cases) convicted of multiple counts of § 924(c)); Sent. Comm., *Quick Facts: Section 924(c) Firearms Offenses (Fiscal Year 2017)*, https://tinyurl.com/msypt7cz (124 individuals); *See* Sent. Comm., *Quick Facts: Section 924(c) Firearms Offenses (Fiscal Year 2016)*, https://tinyurl.com/fubjdu65 (153 individuals); Sent. Comm., *Quick Facts: Section 924(c) Firearms Offenses (Fiscal Year 2015)*, https://tinyurl.com/cjnke8fe (119 individuals); Sent. Comm., *Quick Facts: Section 924(c) Firearms Offenses (Fiscal Year 2014)*, https://tinyurl.com/dvh5d5sw (178 individuals).

the First Step Act was passed, it is critically important that this Court step in to iron out the jurisprudential wrinkle.

2. This Court's answer to the question presented also affects the scope of district courts' discretion under § 3582(c)(1)(A), beyond the context of § 924(c). Closely related issues already are percolating. For example, just a few weeks ago, the Sixth Circuit concluded that a defendant could not rely on the fact that he was sentenced before this Court decided *United States v. Booker*, 543 U.S. 220 (2005), to support a finding of "extraordinary and compelling reasons." *See United States v. Hunter*, 12 F.4th 555 (6th Cir. 2021). In so holding, the court of appeals relied substantially on the concept that a non-retroactive law cannot supply an "extraordinary and compelling reason," consistent with *Thacker*, and then went even further by extending that principle to non-retroactive *constitutional* rulings, rather than simply statutory amendments. *Id.* at 568–69. Thus, a decision from this Court as to whether the non-retroactive amendment to § 924(c) can supply an "extraordinary and compelling reason" under § 3582(c)(1)(A) may avoid a needless jurisprudential fissure on other grounds.

D. This case presents an ideal vehicle for deciding this question.

The question presented here was preserved and litigated in the lower court. The district court considered only whether Petitioner had established "extraordinary and compelling reasons" and, finding he had not, did not proceed to the second part of the analysis under 18 U.S.C. § 3553(a). *See* App. 9a–12a; *see also* note 2, *supra*. As such, there was no alternate ground on which to affirm. Therefore, if this Court

concludes that the amendment to § 924(c) may support finding "extraordinary and compelling reasons" exist as to a defendant who was sentenced *before* that amendment took effect, then it will clearly establish that the Seventh Circuit's decision was in error.

II. Alternatively, this Court could hold this petition in abeyance because other petitions are pending that, if granted, may affect the judgment under review.

As just discussed, the decision in this case exacerbates a Circuit split over what reasons qualify as "extraordinary and compelling" under § 3582(c)(1)(A). That inquiry has two parts, and questions involving each already are pending before this Court in separately filed petitions. First, the decision below implicates the question presented in the petition for a writ of certiorari in *Thomas Bryant v. United* States, No. 20-1732 (U.S. June 10, 2021): whether the Sentencing Commission's policy statement, USSG § 1B1.13, binds a district court's review of a defendant-filed motion under § 3582(c)(1)(A). Second, the decision below is identical to the question presented in the petition for a writ of certiorari just filed in *John Watford v. United States*, No. _____ (U.S. Oct. 12, 2021): whether the amendment to § 924(c) may support finding "extraordinary and compelling reasons" under § 3582(c)(1)(A). In light of the overlap between this case and those other cases, in the interests in efficiency and judicial economy, the Court could hold this petition pending the Court's disposition of those petitions.

A. The decision below could be affected by two issues presented in petitions for writs of certiorari now pending before this Court.

1. Whether § 1B1.13 sets forth an exclusive list of the reasons that qualify as "extraordinary and compelling" under § 3582(c)(1)(A) is the implicit threshold question in this case. In ruling on Petitioner's appeal, the Seventh Circuit repeated its position that §1B1.13 *does not* apply to defendant-filed motions for compassionate release. *See* App. 3a (explaining that *Gunn*, 980 F.3d 1178, "concluded that the policy statement applies only to motions brought by the Bureau of Prisons"). And, the court commended the district court on going beyond § 1B1.13 to "exercise[] its discretion independent of the policy statement's instructions" to determine whether "extraordinary and compelling reasons" existed based on the amendment to § 924(c). *Id.* The Second, Third, Fourth, Fifth, Sixth, Ninth, Tenth, and D.C. Circuits all agree with the Seventh Circuit that § 1B1.13 does not bind a district court's review of a defendant-filed motion under § 3582(c)(1)(A). *See Brooker*, 976 F.3d at 234; *Andrews*, 12 F.4th at 259; *McCoy*, 981 F.3d at 284; *United States v. Shkambi*, 993 F.3d 388, 392–93 (5th Cir. 2021); *Jones*, 980 F.3d at 1109; *United States v. Aruda*, 993 F.3d 797, 802 (9th Cir. 2021); *Maumau*, 993 F.3d at 834–37; *Long*, 997 F.3d at 355.

The Eleventh Circuit stands alone in holding to the contrary. That court of appeals has taken the position that "extraordinary and compelling reasons" are limited to those set out in § 1B1.13 or otherwise articulated by the BOP. *See United States v. Bryant*, 996 F.3d 1243, 1262–65 (11th Cir. 2021). On the facts presented there, because the policy statement does not reference the amendment to § 924(c) as

an "extraordinary and compelling reason," the Eleventh Circuit held that it could not qualify. *See id.* at 1265.

Whether the Commission's policy statement binds a district court's review of a defendant-filed motion under § 3582(c)(1)(A) is now pending before this Court in *Thomas Bryant v. United States*, No. 21-1732 (U.S. June 10, 2021). If this Court were to grant a writ of certiorari in that case and conclude that § 1B1.13 remains an applicable policy statement that restricts a district court's analysis under § 3582(c)(1)(A), then that ruling would affect the analysis in Petitioner's case.

2. This case presents the identical issue as the petition for a writ of certiorari filed in *John Watford v. United States*, No. ____ (U.S. Oct. 12, 2021). As discussed above, even the courts that agree that § 1B1.13 does not apply to defendant-filed motions under § 3582(c)(1)(A) are split over whether the 2018 amendment to § 924(c) can support finding "extraordinary and compelling reasons." The Fourth and Tenth Circuits have held that it can, while the Third, Sixth, and (now) Seventh have held it cannot. *See* Part I.A, *supra*. If this Court were to grant a writ of certiorari in *Watford* and conclude that the amendment to § 924(c) may contribute to a finding of "extraordinary and compelling reasons," then that holding would control the result in Petitioner's case and warrant vacatur of the judgment and remand for further proceedings consistent with the Court's opinion.

B. The interests in efficiency and judicial economy support holding this petition in abeyance until this Court has decided whether to grant the petitions in *Bryant* and *Watford*.

This Court has the power to manage its own docket to conserve judicial resources and avoid duplicative litigation. *See, e.g.*, *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936) ("[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants."). As just described, the questions presented in *Bryant* and *Watford* bear on this case.

1. Most directly, the question presented in *Watford* is identical to the question presented in this case and already is before the Court. If this Court grants the petition in *Watford*, then this Court should grant the petition in this case, as well. The Court could then vacate the judgment and remand for further proceedings consistent with the Court's final decision on the merits in *Watford*.

2. Independently, because the question presented in *Bryant* bears on the result reached in this case, judicial economy may be best served by holding this petition in abeyance pending the Court's decision whether to grant a petition for a writ of certiorari in *Bryant*. If the Court grants the petition in *Bryant* and holds on the merits that § 1B1.13 sets forth the exclusive list of "extraordinary and compelling reasons," then Petitioner will voluntarily dismiss this petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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